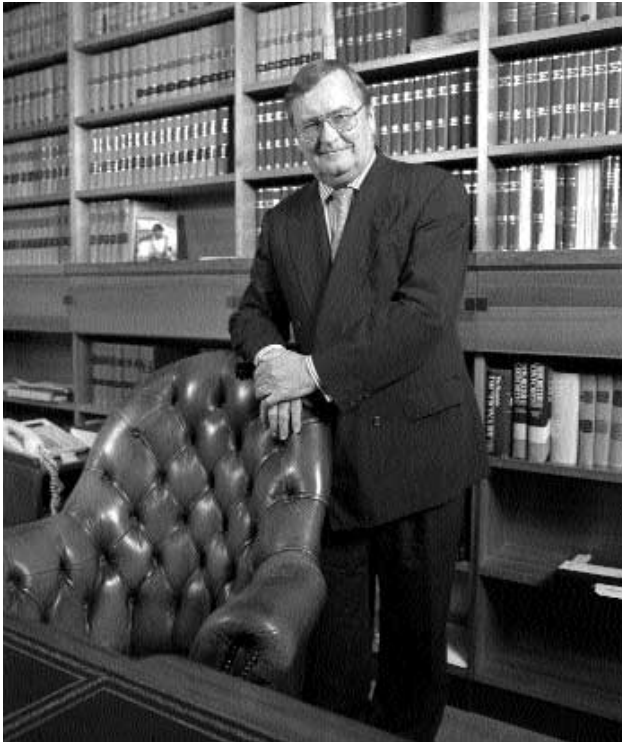


The Hon Justice Peter Hely (1944 - 2005)



Amongst commercial barristers and other lawyers, the late Justice Peter Hely had a universal reputation as an outstanding advocate and an excellent judge. Justices Gummow and Heydon of the High Court of Australia read with him, as did a number of other judges and leading counsel. His funeral service at St James' Church, King Street, on 14 October, overflowed with his friends, colleagues and many admirers. Two of the eulogies were delivered by Justices Heydon and Jacobson. They are reproduced below. Justin Gleeson SC, as one of the members of the Bar who had the privilege frequently to appear as his junior, has also penned an appreciation of Peter Hely, focussing on his forensic powers and unrivalled skill as an advocate in commercial causes

Eulogy by the Hon Justice J D Heydon AC

We know that the Bar is a career open to talent. Peter Hely certainly showed that. He came to the Bar at the age of 25 with no advantages of birth or wealth or connections. He did come with some solid assets – his own admirable mental and moral equipment, a sound secondary and university education, and, by a stroke of good fortune, the experience of having been articulated to Mr W J Sinclair.

Within a few years of his call in 1969, before he was 30, he had achieved a great reputation as a highly capable junior. By 1981, aged 37, he had taken silk. At once he moved to the centre of the equity/commercial bar.

What brought this speedy success? He worked hard, long and fast, both on weekdays and at weekends. On weekdays he

habitually came to chambers very early each morning. Usually each day began with a conference or two unrelated to the case being heard later in the day. After the hearing was over two or three more conferences would be held before an evening's work on that day's case began. He often made himself available at short notice for these conferences. The atmosphere in them could be very tense: the clients were usually desperate men in immense difficulties, some near ruin. Each conference tended to involve murky facts and complex bodies of law. Each was conducted under the stresses caused by the case of the day and the need for constant changes of mental gear. Yet he was always punctual, always prepared, always able to remember the detail of what he had been told and had advised at earlier conferences. He resisted all temptations or urgings to hold out false cheer or flattery. His stock in trade was precise and crisp realism. Written opinions were delivered quickly and expressed trenchantly.

While in court he was aided by an excellent general knowledge of every field of law he practised in, but before each case he would again examine the law carefully. He would write down a list of all the legal propositions likely to come up, favourable or not. Each of the favourable ones would be supported by one compelling authority – not so that it could be thrust on the court, but in case the court asked for it. Each unfavourable proposition would be assigned an authority persuasively explaining its limitations. He also wrote down a list of facts which would have to be proved if the favourable legal propositions were to be triggered or the unfavourable ones deflected. He noted how these facts were to be proved from his own witnesses and documents. He thus worked out what he would have to establish by cross-examination of the other side's witnesses. He would also assemble and master a small bundle of key documents from the mass usually dumped onto his desk. By these simple methods he created a blueprint for the case. In court he only took notes when some significant piece of evidence was given. Later the transcript reference to that evidence would be fitted into the blueprint or the blueprint modified to accommodate the evidence. His skill was usually vindicated by events: few authorities or documents or evidence references were needed beyond those he assembled in these ways.

He planned the tactics to be employed in the courtroom with great care. The plans of barristers, of course, tend not to survive contact with the opponent and the judge any more than the plans of generals survive contact with the enemy. But his plans usually needed little modification, no matter what forensic vicissitudes took place. He had an unsurpassed capacity to elicit evidence in chief clearly and without surplusage, and to extract evidence from the most unpromising witnesses by shrewd cross-examination. With him there were no wasted words, no false starts, no rejected questions. His addresses of all kinds were concise but forceful. He became involved in long cases, but their excessive length was not his doing. He worked very closely with his juniors. He was courteous and loyal and

grateful to them – as to his staff. But, whether or not he actually needed help from juniors, he expected it, and was disappointed if it was not given.

Under the intense pressures of this existence, he rarely cracked. In court he was calm, imperturbable, impassive, dignified, unflurried. He never blustered or exaggerated. The closest he would come to passion would be when an unsatisfactory witness stirred him to an urbane ferocity, or when a professional opponent, slow or shifty about making a just concession, suddenly received a sharp and aggressive bite.

His genius for the solution of legal problems lay in identifying and simplifying the issues, marshalling the relevant factual and legal materials, and analysing those materials imaginatively, lucidly and precisely. In him those qualities were as fully developed as they were in the late John Lehane. To say that is high praise, but not false praise.

He had immense style. That style did not lie in flamboyant flourishes or glittering phrases or suave insinuations or melodramatic oratory. He was never blatant or triumphalist. Although in private he was witty, and although he responded to comedy in court while trying to suppress mirth, he himself rarely strove for epigrammatic or humorous effect. His style was classical, in the sense that everything he did was precisely and economically adjusted to the necessities of the occasion. He never struck a false note. He achieved an effect of sinewy elegance, of supple grace, of serene clarity, of simple beauty. Yeats would have said of him that he had:

... a mind

That nobleness made simple as a fire,
With beauty like a tightened bow, a kind
That is not natural in an age like this,
Being high and solitary and most stern ...

By these means, in the decade between the late 1980s and his appointment to the bench in the late 1990s he became the leading equity/commercial practitioner in Australia. Indeed he had high claims to being considered the leading Australian barrister of his generation.

When he laid down the mantle of an advocate and donned the robe of a judge, only one thing changed. Zeal for a client went; impartiality as between the litigants replaced it. He was old fashioned in approach. Evidentiary objections were ruled on at once; no argument was invited, no reasons were given. He treated the most incoherent and vulnerable of unrepresented claimants for refugee status as carefully and fairly as he treated well-represented litigants of great wealth or power. If he reserved, he reserved only briefly. Losers who appealed from his orders were almost always sent empty away. He quickly came to occupy a position among the judiciary approaching that which he had achieved at the Bar.

What, then, were the keys to Peter Hely? Conscience. Rectitude. Sincerity. Honour. He lent himself to nothing

shabby or shoddy or meretricious or conformist or selfish. There was a reckless magnificence in the way he sacrificed his interests to the claims of professional duty and then judicial duty. He never skimmed a job.

To many lawyers, he was as a craftsman and as a man, an exemplar of high virtue – to be pondered, to be admired, if possible to be emulated. Over the last melancholy fortnight, they could have applied to him the words Walter Scott wrote on the death of Pitt the Younger:

Now is the stately column broke,
The beacon-light is quenched in smoke,
The trumpet's silver sound is still,
The warder silent on the hill.

If lawyers can be great, he was great. He was a giant – a mighty man, a man of renown.

His departure is a national tragedy – for the early loss of a great judge is a terrible national loss. Much greater is the personal loss – to all his friends, but most grievously to his beloved family. To them goes our deepest sympathy.

Eulogy by the Hon Justice Jacobson

In a case called *Lockwood v Doric*, the High Court described Peter Hely's judgment at the trial in words to the effect of 'sculptured, economical and speedily delivered'.

That I think is an apt description of his work both on the Bench and in his former incarnation as a leading member of the New South Wales Bar.

He was a master craftsman in the practice and application of the law. But he was much more than that. He was an unsurpassed intellect with an extraordinary warmth of personality.

He had a mischievous sense of humour which bubbled to the surface through his large body in almost every situation. He was a source of immeasurable intellectual and personal support to all of his colleagues and friends.

And, of course, he conferred unstinted love and affection on Jane, Ben and Katherine. He was especially proud of Ben's achievements in the law and of Katherine, as a fine young woman.

Peter's life was too short, but like his judgments and his opinions he compressed everything to its very essence. He achieved and did more in 61 years than most of us will see in 120.

He was born in Cronulla on 26 March 1944 and he attended Sydney Boys' High School. He was a year ahead of me, but I did not know him then. Someone mentioned that he may have been in the Sydney High Cadet Corp. If he was, it must have been as a punishment for having been caught smoking at the GPS Head of the River.

He was fortunate to serve his articles of clerkship with Sinclair & Leahy where he came under the tutelage of Mr William



L to R: Michael Henry, Georgina Henry and Peter Hely

James Sinclair who was his master solicitor. Bill gave Peter a first class grounding in the essential attributes for the practice of law.

On the occasion of his swearing-in on 2 October 1998, mention was made of the loyalty, admiration and unbounded respect for Peter of all those who had worked closely with him, whether as barristers, solicitors or clients. And of the complete trust reposed in him by judges. He was indeed a towering junior and a dominant silk at the Sydney equity commercial Bar, and elsewhere. He practiced nationally and internationally.

I had the good fortune to read with him over 25 years ago. I remember in my early days at the Bar I went to his chambers shortly after 6pm to discuss a brief. I made the egregious error of describing it as a lay down misere.

Son, he said, rolling his eyes back, slinking down in his chair and pouring himself a drop of whiskey, there are three rules of litigation. First, there is no case that can't be lost. Second, anything worth saying can be written down on a page and a half of paper. The third is, don't you mess it up. Those were not his exact words. But they were to that effect.

He displayed the first of his rules of litigation in an advice in the Cambridge Credit auditors' negligence proceedings. Hely was briefed as second silk with RJ Bainton for the auditors. Bainton had written an opinion in his inimitable style, stating that the auditors could not possibly lose. Hely added a PS: 'If we are wrong, the damages will be enormous.'

They had to put the advice in writing because no one could hear them in conference where the advice was delivered in whispered tones over the incessant whir of an ancient air conditioner.

That advice, and many others, was delivered to the cream of Sydney's solicitors. They dealt with the hardest of cases. Solicitors waited for him to return from court at 4:15pm. Conferences might finish at 7pm. If they were going to win, Peter told them clearly and succinctly why. If they were going to lose, they were satisfied that every issue had been more than fully dealt with. Then he would return to the day's case.

Promising juniors vied for the opportunity to read or appear with him. Sometimes I may have been more hindrance than help. But two of his readers now sit on the High Court of Australia.

It was the sheer captivating force of his advocacy that made him great. He cast a hypnotic spell over witnesses and judges alike. Innate ability and total mastery of the case enabled him to do it.

In one case, he was not the leader, having been briefed as second silk. The witness was an elusive company director. Peter's leader, no slouch in the art of cross-examination, was having difficulty obtaining the witness's assent to a proposition. Hely wrote out a question in his distinctive hand on a post-it note. His leader asked it: 'Do you usually vote in favour of a resolution the practical effect of which you are unaware?'

There was grace and style in the question but it conveyed an implied threat. You have two choices, acceptance or annihilation.

I appeared as his junior in a series of cases in the 1980s, *North Sydney Brick & Tile v Darvall*. The company was engaged in what TEF Hughes would call an ocean of litigation. Peter wanted to refer to the background in opening one of the cases. Most barristers would have described the details of the many proceedings that were on foot. Peter merely said: 'The defendant, which formerly carried on business part time as a brickmaker, is now engaged full time in the business of litigation.'

His practice was not confined to the commercial division or the warm cocoon of equity. He appeared in a wide variety of fields and jurisdictions from administrative law to white collar criminal trials.

On the Bench, he heard cases, both at first instance and on appeal, in practically every area of the Federal Court's jurisdiction. He wrote authoritative judgments in many fields including corporations, tax, trade practices, administrative law, admiralty and patents. He was truly a leader of the Federal Court. When a hearing finished, he sat in his chambers writing his judgment. He barely got up from his chair until the judgment was completed.

Peter enjoyed reading and he found time to read some good books, to travel, to spend a little time at Wagstaff and to enjoy

a meal with family and friends. One of the few occasions on which he would raise his voice was in a restaurant when the food or wine was not to his liking. Even more so if there was a delay in producing it.

I recall on one occasion ordering the wine and tasting it. I rejected it as not cold enough but only after my glass had been filled and before the others were poured. He was not pleased. But there was laughter.

In the late 1980s, I was sitting with Peter and Jane and my wife on McMaster's Beach. I was wearing an oversized tee-shirt which Marlene had bought for me. It had an illustration of some Sumo wrestlers on it. A M Gleeson, who was then chief justice of New South Wales, saw us on the beach and came over to say hello. He took one look at me and said: 'Are you wearing Hely's t-shirt?'

Peter was strong and forceful. But he was also a loveable teddy bear. I am privileged to have been a friend. We are all privileged to have been associated with him, whether closely or less so.

I used to ask him to vet my speeches and I would ask two questions: 'Have I gone too far – and have I forgotten anyone?' As to the first, if I have, I apologise. As to the second, I'm sorry Bertie.



'Bertie'



Hely with friends from Seven Selborne, including Oslington QC, Smith SC and Whitford SC

In memory of Peter Hely

by Justin Gleeson SC

In my early years at the Bar I (like many others) was fortunate to have the rich experience of appearing with Peter Hely QC and writing joint opinions with him.

All that has been said about his concision is true. A nervous junior could bring to him a much worked over draft opinion, only to see him briefly read it and raise a questioning eyebrow. He would then hunch over his pad and, after interrogating the junior, write out in short numbered propositions the essential facts, questions and opinion to be delivered. A commercial case listed for weeks could be reduced to a few short issues on a single page. After one trial which ran for months, he, as an exception, permitted his junior a written submission extending to 50 pages.

Peter worked hard, probably too hard, at the Bar. He would regularly hold several conferences before and after court, as well as conducting a major trial during the day and carrying out preparation into the early evening. Sundays were often spent in intense preparation for a trial. His chronologies, usually written out by hand, condensed a vast morass of material into logical order which was then the foundation for skilful cross-examination.

By the time I appeared with him, his voice was already strained. By report, this made his cross-examination only more terrifying than before. His questions commanded assent from witnesses and few dared dispute them. He cross-examined largely for admissions. It was not a formalistic closing of the gates but rather the putting of a logical series of propositions, moving from the general to particular, each of which seemed inescapable to the witness.

Peter was very good to juniors, introducing them to solicitors and quality work. He corrected the work of juniors without harshness or superiority. Speaking roles were often extended to

the junior in court and, in a manner Gyles QC would have considered excessively generous, he would even give a short period of advance notice. He would always interrupt what he was doing to give a young barrister advice on ethical issues, advice which was invariably sound. He believed in the camaraderie of the Bar and would willingly offer a whisky in the evening to his junior, or his opponent, or both at the same time.

In the 1990s Hely returned to the Bar Council, not through desire for advancement but to answer a request from Coombs QC. He expressed his views with wisdom and authority and, like Bathurst QC does now, lent great strength to the Bar Council. He rose to be junior vice president. As chair of PCC3, he ensured all reports were of a very high quality and delivered quickly to minimise the anxiety of both the barrister and the customer about resolution of the complaint. But for the manoeuvrings of some, he should have been president of the Bar Association.

Some wondered whether Peter should have been appointed to the Equity Division or Commercial List of the Supreme Court, rather than the Federal Court. Had he been given a full companies list, he would have delivered a larger corpus of corporate law judgments to match that of Sir Laurence Street sitting at first instance. His love of a hard and difficult commercial trial may have been better met in the commercial list. Nevertheless his impeccable judgment of fact and law was well demonstrated across the range of federal matters he decided, and on the Australian Competition Tribunal.

Shortly after he was appointed I called into the back of his court to see a nervous young barrister presenting a migration case. The barrister sought to distinguish a recently delivered judgment of Hely J. The barrister acknowledged the force of the judgment, describing it as the leading statement in the field. Hely looked bemused to think he had now become the leading authority on an Act which several weeks before he had never read. He heard out the barrister politely then followed his previous decision.

He did enjoy sitting on the Competition Tribunal, together with economists and business persons. He explained to me how it gave a different perception on the role of the Bar. His fellow decision makers warned him that he had to be pretty careful about arguments coming from these barristers. In one case, I was having difficulty obtaining a short and direct answer to my question from an expert witness. I attempted to bring the witness to heel in my best imitation of what Hely had always done with such ease at the Bar. Hely immediately intervened and admonished me. He said with barely a smile that the tribunal was much assisted by explanations being given by the economists and barristers would do well not to interrupt them. He could be mischievous indeed.

We all miss you Peter.



The New South Wales Bar Association

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The New South Wales Bar Association announces:

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The awards apply to work published, broadcast or televised between 1 March 2005 and 28 February 2006.

Journalists may enter themselves or be nominated by a member of the judging panel or by a third party.

An entry / nomination form is available from the Bar Association web site at www.nswbar.asn.au under 'Media resources'.

The closing date for entries is 5.00pm on Wednesday, 1 March 2006.