

Malcolm Duncan (1956–2011)

The following is an edited version of the eulogy delivered by John Ralston on Friday, 4 February 2011.



I confess that the prospect of speaking about Malcolm is a daunting one.

First, there are so many facets to his life and he was known to so many people in differing circumstances that we will have a different story about Malcolm, and everyone here will have a slightly or even wildly different perception and opinion of him.

Accordingly, all I can do is speak of him, as I knew him.

Secondly, there is the public and media portrayal of him as the combative, rabble-rousing, archconservative, eccentric barrister. This is exemplified by the comment of Bob Carr in parliament when

he looked up and he saw Malcolm staring down at him from the public gallery.

‘There he is’ said Carr, ‘the Rumpole of the lower traffic courts’.

This media and public presentation, while it has some elements of accuracy and was not discouraged by Malcolm, is at odds with the Malcolm Duncan that I and his other friends knew and which I hope to capture shortly.

Thirdly, Malcolm himself was such a formidable speaker - dare I say orator - that, if he were here, he would be doing a much better job of this than me.

However, first some disclaimers.

I have known Malcolm for in excess of 20 years so there are some things that I am not in the position to talk about; I cannot talk of his life growing up in Potts Point as the only child of Bruce and Joy Duncan. I cannot talk of his school days at the Scots College in Bellevue Hill - though you can go to his website and find a splendid photograph of him from those times looking like a slightly malevolent Bonnie Prince Charlie in full Scottish regalia. I cannot speak about his life in the Army Psychology Unit or his life as a student at Sydney University, though I do have it on good authority that he was an enthusiastic participant in the Law School revue, and memorably portrayed Russ Hinze in a vicious skit. The remarkable thing about

that portrayal is that even Malcolm had to be padded up to attain the corpulence of the late Mr Hinze.

However, I can speak with some authority about Malcolm as a barrister.

I instructed Malcolm in a few cases. All of them were extremely difficult. All of them had features which were common to many of Malcolm’s cases. The factual issues were complex and technical. The client was always a battler, being a small business owner, a tenant or a farmer, fighting against banks or government but generally against the big end of town.

Quite often the client came from an ethnic background, did not have the advantages of extensive education and sometimes had language difficulties.

There was very little monetary reward in the case for Malcolm. In this regard I suspect that Malcolm, more than any other barrister in Sydney, acted pro bono, or on spec or on a very reduced-fee basis. Nevertheless, he cared for his clients as if they were millionaires paying full freight.

This absence of remuneration from the cases he took on usually also applied to his instructing solicitors which made the range of firms prepared to brief him somewhat limited.

Finally, as with most of Malcolm’s cases, the chances of success were no good.

Malcolm had an eye for technical detail whether it was in the construction of commercial documentation, the rules of court or legislation and regulation. He also loved devising legal strategies and technical arguments.

This was just as well, as in many of his cases cunning strategies and technical arguments were the best that the client had going for him.

Malcolm also liked cross-examination and was a formidable cross-examiner. However, true to his Scottish heritage, he preferred to wield a claymore or broad-sword, rather than a stiletto.

While this robust approach gave him immense pleasure and bruised witnesses, his enthusiasm for cross-examinations sometimes had to be restrained as he had a slight tendency to go a bridge too far. With the restraining hand of a strong and determined instructing solicitor, Malcolm could be a very effective cross-examiner. Unfortunately, very few solicitors, including myself, had the strength or the stamina to stand up to him when he had the bit between the teeth.

The other thing about Malcolm as a barrister was that he was completely fearless. He was not intimidated by either the bench or his opponents. This is not to say that he did not show appropriate respect and courtesies. He was in fact, extremely polite (most of the time) as he liked the formal aspects of court—the wigs, the gowns

and the procedure - the bows and flourishes both verbal and physical.

But if it was necessary to put an unattractive argument to the most ferocious and difficult judge you can think of, Malcolm would do it.

From time to time Malcolm was also a litigant person, the most famous being his stoushes with Clover Moore over electoral advertising. The stoushes are duly reported and appear prominently on Malcolm's webpage, even though he was unsuccessful.

Curiously, one of the cases that Malcolm is most remembered for does not appear on his web page.

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That case was the Kings Cross Chamber of Commerce v the Uniting Church of Australia Property Trust, the Director General of the Department of Health and the Commissioner of Police.

This is the format title for the great Injecting Room Case, in relation to premises in Darlinghurst Road, Kings Cross.

I forget Malcolm's official title in the Kings Cross Chambers of Commerce but he was effectively the guiding force, mouthpiece and personal embodiment of the organisation. Although I should

add, behind him there was a very active governing body.

The Injecting Room was a classic Malcolm Duncan case.

Firstly, it involved the people of Kings Cross, and in particular a variety of small businesses along both sides of the strip in Darlinghurst Road.

Secondly, he had as his enemy, organised religion (which he was not a great fan of) in the form of the Uniting Church, and the New South Wales Government (which he was happy to torment) in the form of the Commissioner of Police and the Director General of Health.

The debate about whether to have an injecting room and then where it was to be situated, involved a huge public debate, some of it quite toxic and bruising. Malcolm was very active in that debate both in the press, in public meetings and on television.

Malcolm strongarmed his old university friend and colleague from Garfield Barwick Chambers, Dr Chris Birch SC, to take on the case as counsel.

Malcolm then strongarmed me into being the solicitor for the Kings Cross Chambers of Commerce.

Both of us were also strongarmed into taking the case on a very much reduced-fees basis.

Against us were formidable legal luminaries. Ian Harrison, now Justice Harrison of the Supreme Court, appeared for the Uniting Church and Stephen Gageler, now the Commonwealth Solicitor General, appeared for the Director General of Health and the Commissioner of Police.

Malcolm himself alternated between being de facto junior counsel in conferences with Chris Birch and myself, the client giving instructions and a solicitor or paralegal helping me with the paperwork. When he was not doing all of that, he was holding press conferences, issuing media releases and keeping the people of Kings Cross informed.

Notwithstanding his very active role in the matter, Malcolm was frustrated that he was not counsel appearing, or even junior counsel, sitting at the bar table.

Instead, he sat where clients sit, that is, behind me as the solicitor. However, from this position he peppered me with endless post-it notes containing ideas, instructions, directions, questions and quite often, insults about me, Chris Birch, our opponents and occasionally, the judge.

My task was then to filter these notes and where appropriate to

pass them on to Chris Birch, who then, as far as possible, did his best to ignore them. This of course, only added to Malcolm's frustration but contributed to the amusement of our opponents and perhaps provided a distraction from the case.

At the end of the first day, things were looking pretty good. Malcolm was convinced we had won. Chris and I were cautiously optimistic. However, for some reason, day two brought about a change of mood, both from the bench and in the plaintiff's camp.

Ultimately, we lost.

To this day, I still think we should not have lost. The decision to impose the injecting room on the site where it now stands, was in my view, a seriously defective piece of administrative decision-making, or perhaps non-decision making.

However, it is all in the past, and we had the opportunity to appeal but decided not to do so.

Two things were clear to me after this case.

Firstly, Malcolm passionately believed in the cause, and was able to motivate considerable numbers of other people to believe in it as well. Like the other Malcolm, or TOM as he liked to refer to Malcolm Turnbull, when motivated to act on an issue involving this community in Kings Cross, Malcolm was a force of nature.

Secondly, it was clear that Malcolm was much admired and revered by the citizens of Kings Cross. Some of them came down to watch the case, and many of them of course, stood out from the drab, fustian appearance of the lawyers normally populating the court.

Malcolm famously stood many times for parliament and was always unsuccessful. His last attempt was as an independent candidate in Wentworth in August last year.

I think most of us were amazed at Malcolm's ability to keep standing for elections when he must have known that every time he did, he had a difficult, if not almost impossible task.

Malcolm's long history of unsuccessful attempts to be elected to parliament and his inability to keep humour out of his campaign policies (although he was deadly serious about most of his policies) more than anything branded him in the eyes of the press as an eccentric - almost the political equivalent of a vexatious litigant.

However, the press got it wrong, and those who believe the press also got it wrong.

Not so long ago I attended an exclusive dinner of sleek, preening corporate executives and professionals. The dinner speaker and draw card was a very senior New South Wales Labor Party politician. He was quite

revealing. He acknowledged that most politicians were reviled in the community, because they increasingly came from political dynasties and party machines and many were out of touch, or incompetent, or both.

However, he said that the blame for this should fall on the likes of those who were at the dinner. It was us he said, who had the educational qualifications, the business and managerial and professional skills, and above all, the money to take time away from the business of accumulating wealth to participate in the political process.

Malcolm was the embodiment of all that he was talking about - save for the fact, that he hardly had any money to fund his campaigns, which is why they were often so threadbare and relied on friends and his own feverish hard work.

Malcolm may have failed to get elected, but unlike the rest of us (although I have noticed a couple of exceptions here today) he did not fail to use his ability, skills, or passions in the democratic process in providing an alternative voice and alternative potential representation for his community.

It is the Malcolm Duncans who have kept the flame of true grass roots participatory democracy alive in Sydney and our city is diminished politically (as well as in many other

things) by his death.

Away from the law and politics, and away from community issues and the press, Malcolm was a different character.

Not completely different, mind you. He was no Jekyll and Hyde and as a friend you could have spectacular arguments with him and on occasions he could be quite infuriating. However, as a friend, he was enormously good fun and the arguments were just arguments there was no rancour and they never damaged the friendship.

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Malcolm was also a soft touch to anyone who needed help, whether it be to raise money for children with cancer, to help a prostitute find a way out of the cycle of abuse and dependency that most of her kind were subjected to, to help a client or to coach the local school in debating.

Sometimes his assistance to others in the Kings Cross community put him in risk of physical danger. Malcolm did not talk much about these things, but I was aware of them obliquely from snatches of conversation or comments.

Finally, his friends also knew that, the most important thing in Malcolm's life was his family; Bruce, Joy, Suzanne and Anthony. They were the rock of his life and it would not be appropriate for me to do more than just simply make that observation.

Malcolm should not have died when he did. Apart from being far too young, there is an election coming on 26 March and he was once again going to be a candidate.

Since Malcolm's death, letters have been published in the press and

on blogs. Some are funny, some are trenchant, some are nostalgic. All of the however express sadness at the passing of someone quite unique.

Damn it Malcolm, a lot of people are going to miss you.