50 years of the New South Wales Court of Appeal

On Monday 8 February 2016 the New South Wales Court of Appeal held a special ceremonial sitting to mark the 50th anniversary of its inaugural sitting. The president of the Court of Appeal, the Hon Justice Margaret Beazley AO spoke at the sitting. *Bar News* is pleased to publish her remarks.

Photo: Supreme Court of NSW

14 February 1966 ushered in a dramatic change in the coinage of our nation from pounds, shillings and pence to decimal currency. On the Monday before that, that well-known jingle, 14 February 1966 (I will not sing it, but you will all remember it), jangled across the airwaves for the last time, a similarly fundamental but less heralded change was made to the coinage of the New South Wales judicial system.

On 8 February 1966, seven judges: Justice Herron, the then chief justice, and Justices Wallace, Sugerman, McLelland, Walsh, Jacobs, Asprey and Holmes, filed onto the bench of the Banco Court in the old Supreme Court building in King Street, and in about 500 words, the chief justice announced the day as one of special significance, 'for it marks the first sitting of a new division of the Supreme Court, called the Court of Appeal.'

The chief justice announced that Justice Wallace was the President and that the assembled judges had been duly appointed by commission to be judges of appeal. The chief justice continued:

> We set about our new statutory tasks with enthusiasm and with determination, so far as practical, to dispose of the list with dispatch, with economy to the litigants and with a minimum of delay, keeping steadily in mind the importance of the matters entrusted to us.

The chief justice concluded by calling for the cooperation of the profession and he then declared the first term of 1966 open. The then chief justice having taken control of that ceremony, I acknowledge the graciousness of the present chief justice, The Honourable T F Bathurst AC in providing me with the opportunity to speak for the court on this occasion.

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Something else not shared by that historic occasion with today's ceremony is the presence of the profession. By happenchance, a young solicitor had a little time to spare in the week prior to his admission to the bar and wandered into the open courtroom, almost the sole observer of that momentous occasion. The Honourable John Bryson QC, judge of the Court of Appeal from 2004 to 2007, and a judge of the Equity Division from 1988, recalls that there was scarcely room for all judges on the

The Hon Justice Beazley AO, 'Fifty years of the New South Wales Court of Appeal'

The president of the Court of Appeal, the Hon Justice Margaret Beazley AO speaking at the ceremonial sitting. Photo: Supreme Court of NSW

bench of the Banco Court, in the then Supreme Court building in King Street, as they sat uncomfortably crowded together in long wigs and full ceremonial robes. He counts that poorly attended, slightly embarrassing occasion as part of his personal legal history. It is fitting that he is here today, this time sitting on the bench as a former judge of the Court of Appeal.

Following the chief justice's declaration of the opening of the law term, the court was reconstituted. The president and Justices Jacobs and Asprey proceeded to hear the court's first case, *Chirray v Christoforidis*, a damages claim arising from a motor vehicle. The Honourable Peter Young QC, then a junior of two years' standing, appeared for the respondent plaintiff, and Longsworth QC and Waddy for the appellant insurer. Whilst the young Mr Young had been stunningly successful before the jury, Longsworth QC prevailed before the new appellate court in a judgment delivered *ex tempore*. The jury verdict of 7,324 pounds and five shillings was reduced to 4,342 pounds and that ubiquitous five shillings. The court papers for both the trial at first instance and the Court of Appeal are here with us on the bench today [a slim folder comprising half a dozen pages]. I commend them to your reading [laughter].

Whether that experience prompted Mr Young to focus on the law of equity, where he pursued his illustrious career as a barrister, a judge of the Equity Division, chief judge in Equity and as a judge of appeal, is a story to be left to his telling.

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The bound judgments for 1966 which we have on the bench this morning are as tactile as they are insightful, the cast of the typewriter clearly felt on every page, and only a rare overtyping of a spelling error to be found. In the 401 judgments delivered that year, there was a proliferation of *ex tempore* judgments and, in a computerless age, fewer words were used in the administration of appellate justice in New South Wales than has occurred in later eras of the court. There are, however, indications that the wheel is turning full circle.

Since the appointment of the first six judges of appeal, there have been 51 further appointments to the court, including a further eight presidents: Bernard Sugerman, Kenneth Jacobs,

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whose wig I wear, Athol Moffitt, Michael Kirby, Dennis Mahoney, Keith Mason, James Allsop and myself. Four of us are on the bench this morning and another, Chief Justice Allsop, has just slipped in to the body of the court, having been detained by official duties. In that time, five Justices have followed Sir Leslie Herron, Sir John Kerr, Sir Laurence Street, Murray Gleeson, James Spigelman, who sits with us today, and our present chief justice.

As we have heard today and as is well chronicled, the relations between the new court and the trial judges of the Supreme Court were severely affected by the judicial supersession that invariably occurs with the creation of a new appellate court. Our sister court in New Zealand, now presided over by President Justice Ellen France, also present today (as are presidents McMurdo and Maxwell from Queensland and Victoria), experienced the same birthing pains nearly a decade earlier, when it established its Court of Appeal. The deeply felt wounds in that court are revealed in correspondence between Justice North, one of the appointed judges, and Justice Adams, who was not accorded the honour.

As Justice Adams wrote to Justice North, in sentiments which I think would have been reflected in this court, he said:

> I regard it as an insult that a junior judge and an outsider should have been appointed without even inquiring whether I was prepared to act. And this is the thing that hurts, not one of my brethren took the trouble to inquire what my wishes or desires might be.

Despite those sad words, the correspondence between those judges was nonetheless polite and even gentle. Not so in New South Wales, a robust jurisdiction at any time. It is said, for example, of Justice Else-Mitchell, and I quote, 'That he resented the court's creation and opposed it with vigour'.

Although Chief Justice Herron pronounced the court to be a division of the Supreme Court, later commentators, by reference to s 38 of the Supreme Court Act, have described the Court of Appeal as 'A court within a court'. That interpretation invokes for me an image of the cathedral which sits inside the mosque building in Cordoba in Spain. The analogy is totally visual, not an accurate representation of the history of those amazing structures, but nonetheless I think it says it well.

Whatever be the proper construction of s 38, the reality is that through successful chief justices the Supreme Court as a whole has developed as a cohesive, collegiate body, with all judges committed to the mutual goal of administering justice according to law in accordance with our judicial oaths.

Bar Association President Noel Hutley SC speaking on behalf of the NSW Bar. Photo: Supreme Court of NSW

It is a truism that changes in legislation can have an impact upon the workload of the court, as can the exigencies occurring in jurisdictions from which appeals lie to the court. Recent changes in motor accident legislation are the classic example.

Likewise changes in dispute resolution processes have had their impact. The result, either appropriately or contrarily, depending upon one's point of view, is that the work of the court has become increasingly complex and the workload consequentially more onerous, albeit of huge interest and often of great public importance. The challenges to planning approvals for major infrastructure works, the proper construction of the preference provisions of the Corporations Act, and the meaning of the many important contracts that fall to be construed by the court are a miniscule sampling of the court's daily fare.

The constant theme throughout the history of the court has been the reduction of delays and the need for efficiency and economy, not only on the part of the court but on the part of the profession as well. The court throughout its history has striven to ensure that matters are heard and determined as

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L to R: The Hon Keith Mason AC QC, the Hon Dennis Mahoney AO QC, The Hon James Allsop AO, the Hon Justice Margaret Beazley AO. Photo: Supreme Court of NSW

L to R: the Hon Michael McHugh AC QC, the Hon Anthony Whealy QC, the Hon Joseph Campbell QC, the Hon Reginald Barrett, the Hon Michael Kirby AC CMG, the Hon Terrence Cole AO QC, the Hon Dennis Mahoney AO, the Hon Kenneth Handley AO QC, the Hon Paul Stein AM QC, the Hon Keith Mason AC QC, the Hon John Bryson QC. Photo: Supreme Court of NSW

L to R: the Hon Tom Bathurst AC, the Hon Justice Anthony Meagher, the Hon Keith Mason AC QC, the Hon Justice Fabian Gleeson, the Hon Kenneth Handley AO QC, the Hon Justice Julie Ward, the Hon J Allsop, the Hon Justice Arthur Emmett, the Hon Justice Robert Macfarlan, the Hon Justice Carolyn Simpson, the Hon Dennis Mahoney AO QC, the Hon Peter Young AO, the Hon Murray Tobias AM QC, the Hon Margaret Beazley, the Hon Reginald Barrett, the Hon Justice Patricia Bergin, the Hon Justice V Bell AC, the Hon Joseph Campbell QC, the Hon John Bryson QC, the Hon Justice Leeming, the Hon J Spigelman QC,the Hon Justice John Basten, Sir Anthony Mason, the Hon Anthony Whealy QC, the Hon Terrence Cole AO QC, the Hon L J Priestley QC, the Hon Justice Peter McClellan, the Hon AM Gleeson AC QC. Photo: Supreme Court of NSW

expeditiously as possible. We are greatly assisted in our work by the registrar of the court and our small registry, today represented by Harry Jones, Karla Worboys and Jane Yesma, and by legally qualified research staff. They deserve recognition and praise for the work they do.

The words of Chief Justice Herron on 8 February 1966, and the sentiments therein expressed at that first ceremonial sitting of the court, were not only historically significant but were prophetic. The judges of the court for the past 50 years have been, and are, as enthusiastic and as determined as the first judges of appeal, which has given this court its reputation as a highly accomplished intermediate Court of Appeal. Likewise, the cooperation of the profession is as essential and integral today to the efficiency of the court as it was then. As to the future, there are some who predict that our judgments will be written by robots. All that can be said if that should occur, is we wish them the best of luck [much laughter].