



Robert Stephen Toner 1951 – 2018

Jim Poulos QC

Judge Bob Toner QC died on 3rd February 2018 from lung cancer which had only been diagnosed in late 2017. He was 66 years of age. A child of Fred and Helen Toner, he was brought up in Chatswood and was later educated at St Ignatius College Riverview, where he excelled in what he called 'Latin in Society' giving him a collection of stock phrases which he applied more or less correctly in the practice of law in later years. As a young man he was slim, bearded, loud and radical. He lost one of those descriptors in later years.

From the age of 15 he participated wholeheartedly in the causes of the day; such as the Vietnam War, anti-Apartheid, the push against development of Victoria Street, Kings Cross and in the pleasures and excesses of that time.

For a time, he was employed by the New South Wales Department of Government Transport as a bus conductor operating out of Willoughby Depot. In due course he came under notice as a staunch champion of workers' rights. However, an earnest discussion and the return of a shower of coins to a pompous passenger was his undoing – apparently the passenger really did know Minister Morton.

A stint as a process server created more opportunity for excitement and a realisation that it was time to progress to a higher plane.

He became a counter clerk in the frantically busy default registry of the District Court of the Metropolitan District. There he developed skills in dealing with a cross-section of those who peopled the lower reaches of the world of finance – those who owed and those who were owed. His affections were somewhat in favour of the former.

His studies in law were initially carried out through the Barrister's Admission Board until he was accepted into the University of New South Wales Law School.

As his work instilled deep knowledge of the law relating to common money courts, he came to be employed by John Chippendale, solicitor, in a large insolvency practice: a firm which Toner described as 'H N Chip-

pendale & Co, threats made and received'.

At the Law School he impressed as a force to be reckoned with in the controversies of the day, whether political, social or legal in nature. The demos of the day were bread and butter to him. Among his mentors at that time were Terry Budden, the late Jim Staples and the late Merv Rutherford.

His interest in the plight of the indigenous community can be traced to this time. In later years he came to apply his experience in an effort to administer a fairer brand of justice to that community. In particular, his admiration for the late Bob Bellar DCJ was deep and he learnt much from him which he later applied in his judicial career.

Part of his political experience involved being secretary to the East Sydney Branch of the Labor Party, where he learned the workings of the political machine from the viewpoint of the left of the party.

In 1973 following a series of Machiavellian manoeuvres in the Chatswood Branch of the party, Toner was selected to run against the then attorney general, Kenneth McCaw in the electorate of Lane Cove. The final (losing) vote was a healthy one for Toner. He said, however, that the high point of the campaign was that his T-shirts were screen-printed by a rather dissolute looking individual who, observing that Toner's efforts were somewhat amateurish, took over the task. He often mused on what an original Brett Whiteley screen-printed T-shirt would now be worth.

In 1981, Bob was admitted as a barrister, his pupil master was Rod Madgwick (later of the District and Federal Court). He was fortunate to commence his career with the Grays Point Bush Fire Inquiry, which was to last almost three hundred hearing days.

Tom Kelly, his instructing solicitor, pointed out that the trees destroyed in the fire had largely regrown before the Inquiry findings were published.

Bob and Chris Birch (now Dr Chris Birch SC) were accepted as readers on 16 Wardell; where they were greeted by the floor leader, T E F Hughes QC who, on returning from court silently disrobed to the bare essentials before donning his street clothes and speaking words of welcome to them. Birch thinks this was the last time Hughes spoke to them during their readership.

In 1982 he met his life partner, Helen McCarthy, a forensic psychologist in the Corrective Services system. Her knowledge and insights were valuable and assisted Bob in the practice of criminal law. Helen shared Bob's political and social beliefs which they jointly promoted. They were married in 1985. Bob became father to Helen's children, Claudia and Joshua McCarthy, who he nurtured as his own, as he did their children, Isobel, Claudia's daughter and Amelia, the daughter of Joshua and Mai Mai.

Helen and Bob provided their family and

friends with the fabled hospitality of their house in Darling Street, Balmain.

Toner progressed to 8th Floor Garfield Barwick in 1983 where eventually he became the leader of the Floor, developing a traditional common law practice in crime and personal injury litigation; there he came to work with his beloved clerk, Sarojini Ramsay, and his long-term secretary (later court associate) Elaine Prochaska. Elaine was with him for 30 years.

As an advocate he possessed some assets which should be emphasised. First, his appearance: there is no doubt he projected gravitas through his bulk, black beard and a direct gaze. Second, was his voice – a *basso profundo* rumble which could quickly swell to an alarming volume (see 'shouting not contempt' below). Third was a tactical sense honed by that great teacher 'copper cross examinations 101'. Fourth was a highly developed sense of humour coupled with a quick eye for the absurd in life and the law.

In 1989, he won his first murder trial instructed by Bob Thompson, solicitor in Grafton. That victory was to be the first of many; in fact, he had no losses in murder cases until the sensational *Serratore* case in 2001.

In civil cases he was a forthright advocate. In 1992 this quality led to a case which literally made his name: *In Re Toner ex parte* – a name known to all who seek to discover the boundaries beyond which a trial advocate should not go. Toner, then a junior counsel, was misheard by the late Lloyd-Jones DCJ; an argument ensued. The upshot was that Toner was convicted instant for shouting being 'a contempt'. The Court of Appeal (President Kirby, Clarke and Hope JJA) upheld the appeal against conviction. The president, Kirby, delivered a somewhat tendentious homily about politeness before refusing an order for costs in favour of the successful team for the appellant, Poulos QC, Birch and L. McCallum.

In 1996 Toner took silk; by this time, he had amassed a phalanx of loyal attorneys. His transition from junior to senior was seamless and successful.

In his leisure hours a tight-knit guard of professional lunchers attended a series of restaurants most of which did not survive the abolition of entertainment as a tax deduction and the introduction of random breath testing. For most, the golden years were no more; a pall descended over the city but Toner and his troops fought on. A list of those now closed restaurants includes: Rum-poles, Edna's Table, the Atrium and Banc, known to Toner as the 'Rope and Bucket' (it was on the ground floor of Garfield Barwick).

His chambers were one of those outposts where its members kept the old traditions alive. But in addition to receiving his hospitality his floor gained much from Toner's mentoring in the practice of advocacy. In particular he was sought after

as a pupil master and as a support of the newly admitted.

He paid particular attention to the need to support the careers of women at the Bar, not only those who were members of his chambers. He believed strongly that the Bar Association should be proactive in the support of women.

Toner was proud of his achievements in the criminal law. With Ian Barker QC, instructed by the redoubtable Sam Macedone, he achieved much success. In later years he rued their loss in the case of John Serratore, who was ultimately convicted of murder following two trials, two appeals to the Court of Criminal Appeal and a refused special leave application. Toner was convinced Serratore was innocent.

In the civil field he led in the seminal tort cases *Makita v Sprowles* (2001, NSWCA), *Earthline (State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (1999, HCA) and *Brodie v Singleton Shire Council* (2001 HCA).

Earthline was run before Barry O'Keefe, chief judge in the Commercial List. It had been the intention of Toner and his team to use the civil case brought by the SRA to get material for the defence of criminal proceedings which were in the offing against their client. Much to their surprise, after a destructive cross-examination by Toner of the plaintiff's chief witness they won. They won again in the Court of Appeal; however, the High Court gave them short shrift, ruling that the trial judge's advantages in seeing and hearing a witness could not trump a mountain of forged invoices. Ironically the Crown mislaid those invoices and the criminal proceedings never eventuated.

Makita gave no joy to him, although it has produced a wealth of material for the digestion of academics, students and judges alike. After the first instance win there followed a series of impassioned pleas to the plaintiff to settle her case for the large amount she had been offered lest she lose on appeal – she did. The unfortunate result for Mrs Sprowles' legal team was that they had to pay back the fees they had been paid, with interest.

In *Brodie* Toner and his team set out in 1996 to attack the centuries-old distinction between 'misfeasance' and 'non feasance' which had protected road authorities from liability. Years of work with a not inconsiderable risk of failure in a speculative enterprise culminated in a narrow 4/3 victory in the High Court of Australia. This was a result which caused much angst among insurers, councils and shires everywhere in Australia. The states all intervened and opposed the appeal.

In the High Court Toner and John Berwick were led by Jackson QC. Toner had nothing but praise for Jackson's appellate advocacy – he did say, however, that his own greatest achievement in *Brodie* was to convince his leader to accept the brief on a

no win-no pay basis.

He served on the Bar Council between 1990 and 2007. For much of that time, he was a member of the Executive, first as secretary and then as treasurer.

These years were marked by serial conflicts with government, some arising out of the need to press for reform in the criminal law and at the same time to resist populist attacks on entrenched common law and statutory rights.

Barker QC and Toner represented the Bar in dealing with various humanitarian issues especially those which arose following the attacks on the World Trade Towers. The cases of David Hicks and Mamdou Habib were examples of how the rule of law had not been extended to protect individuals said to be complicit in terrorist-related activities. They conducted a campaign in the press in an effort to have Hicks freed and to draw attention to the use of torture.

Toner was, as always, a forceful person in debate on a number of issues. In dealing with politicians of various persuasion it was apparent that he was in his element. Sometimes he was more forceful than others, especially if he detected any falsehood in debate.

His counsel was often relied upon by presidents of the association; they included Barker QC, O'Keefe QC, Handley QC, Katzman SC, Harrison SC, Slattery SC, as they then were. Ruth McColl JA, a former president, spoke movingly at his memorial service.

He enjoyed the Bar's annual dinners and also those held annually between the Bar Councillors and members of the High Court Bench. He considered hearing Gaudron J singing 'I dreamt I saw Joe Hill last night' to be one of the highlights of the year.

In 2007 he turned away from the heavy pressures of life as a leader and as a representative of the Bar. He accepted a District Court appointment offered by the then Attorney General Bob Debus. He was appointed on 16 April 2007.

In his personal life Toner was much saddened by the long illness and eventual death on 14 September 2007 of his stepson, Joshua McCarthy. The effect on his normally ebullient personality was clearly evident.

On his appointment, some were concerned that he might carry his robust advocate persona onto the Bench. This did not occur, although from time to time he reacted to correct imprudent counsel or witnesses.

He naturally gravitated toward criminal cases where he quickly gained a reputation as a good and fair judge. His technical expertise in the law of evidence and procedure was of a high level.

The time he was happiest was when he went to his country circuits. There he was able to do justice, as they say, to all manner of men.

The Taree and Port Macquarie circuits saw him living at Bonny Hills where he and Helen had a coastal retreat half way between the two towns.

In Taree and 'Port' he quickly became respected by all players in both the civil and criminal milieu. He was recognised as having a deep understanding of the problems of the local communities. He introduced the smoking ceremony to the first day of sittings, sitting with elders from the area on the bench and inviting locals to perform a ceremonial dance of welcome in the courtroom.

He strove to avoid jail sentences wherever possible, using a 'talking remedy' and liberal usage of suspended sentences. However, he was as strict as any judge when it came to what he recognised as serious offences. For example, in April 2017 he sentenced an 83-year-old former school teacher to at least six years in prison for child sex offences. He was similarly firm with violent offenders.

His judgments and sentences were rarely criticised by the press. This was somewhat ironic as in his time on the Bar Council Toner had been critical of the poor standard of legal reporting in New South Wales.

Several cases were of public interest. One, which perhaps sums up Toner's skills and insights was that of *R v Jones* where the Police Memorial in the Domain had been vandalised. The sentence was one, his Honour said, of 'exquisite difficulty' as the act was condemned by all elements of the community. The accused was mentally impaired. In releasing Jones on a bond with stringent conditions, Judge Toner quoted from Winston Churchill's famous speech about the mark of a 'civilised society' being how it treated its weakest members.

In his private life Toner was a devotee of the game of golf, playing for the 'Amanza Mug' in the annual Bench and Bar competition with Sam Macedone. In later years, he came to love Australian Rules football. He had a keen interest in military history and could quote the dialogue in many a classic World War II movie.

He loved his garden and he could go on at length about the science of mulching and compost. For a time, his gardener at Darling Street was Kimmy McPherson a paroled transgender double murderer who had been the subject of several acrimonious hearings before the Serious Offenders Review Board before her release from Silverwater.

He will particularly be missed by his friends and acquaintances who laughed with him and who listened to his thunderous sallies against whoever he had selected as being representative of the force of darkness on any particular day.

He is survived by Helen, stepdaughter Claudia, granddaughters Isobel and Amelia and his sisters Carolyn, Barbara and Grette.