

The wearing of masks during the Spanish Flu

By Dominic Villa SC



Credit: State Library of NSW

It is no understatement to say that there was something of an obsession with the issue of the wearing of masks during the influenza pandemic of 1919.

3 February 1919 was officially declared Mask Day in Sydney when all residents were expected to wear masks in public.¹ Hundreds of police were placed on mask duty throughout the city and country towns. The newspapers enthusiastically reported upon the mask as a fashion item, the *Daily Telegraph* declaring:²

Never before has the charm of a woman's eyes been so marked. The Egyptian lady has too long had a monopoly of this beauty aid. Miss Sydney is experimenting with the yashmak effect; and the style threatens to survive long after the influenza is beaten from our city. Every eye above a yashmak is a glad eye. And the Sydney girl has just the alluring sort of eye that is set off by a mask. Last night was one of 'The Arabian Nights'.

And it was reported that because of the enthusiasm with which masks were taken



up, 'the market for freckle-extermimating lotions completely slumped.'³ The visage of the courtroom, however, was somewhat less fashionably described by one wag in the following terms:⁴

I wandered into a court last week and enjoyed the spectacle of the muffled old gentleman who was presiding. On his head he wore the usual horsehair tea cosy. On his nose he had gold spectacles. And over the top of his nose and his

mouth was his mask. His forehead and ears were the only parts of him showing. If, during hot legal argument, he had tipped his wig over his eyes and barked like a dog, a dull case would have been greatly enlivened and no man seriously scandalised.

The judicial attitude to mask-wearing caused something of a scandal. Reporting on the opening of the Law Term in February 1919 the *Sydney Morning Herald* reported:⁵

One unusual feature of the opening of the first Supreme Court term of the year was the appearance of the Judges on the Full Court bench without State robes and without the ceremonial full-bottomed wigs. This departure from custom was, no doubt, suggested by the extremely oppressive heat of the morning. The Court room, as is customary, was thronged with barristers and solicitors. All were closely masked, and looked anything but comfortable in the close confines of the Banco Court. Expectancy and surprise were, therefore, natural when the Chief

Justice, Sir Wm Cullen, Mr Justice Pring, and Mr Justice Sly appeared in Court without masks. The Chief Justice lost no time in explaining matters:

'With regard to the regulations requiring the wearing of masks,' said Sir William Cullen, 'the Court is not disposed to do anything that would suggest any laxity in the observance of the regulations, and I have been in communication with the proper department in regard to the conduct of proceedings before the Full Court, and am expecting a message at any moment conveying the result of their consideration of the matter. In the meantime, it is understood that we are not regarded as transgressing the regulation by appearing without masks this morning, but we are expected to see that every possible precaution is taken in Court against any laxity on the part of those attending the Court, and I think it is right that we should ask the members of the profession and the public not to come to the Court unless necessity brings them here. In the case of counsel, who have the duty of addressing the Court, if they are so disposed, I understand, they will not be held guilty of any breach of the regulation if they do not wear the mask while addressing the Court. It is expected that in every possible way those attending the Court will take every care not to run any risk of conveying or receiving infection, and that those whose duties do not require them for the time being to address the Court shall observe the regulation as far as it is practicable to so. I mention that because it may be thought that as we came in this morning without masks we regarded the regulations as something that could be lightly set aside. We do not. It is because, after consideration of the matter, it seems that we are justified in dispensing to some extent with the strictness of the regulation.'

The 'No-Masks Incident' led to lurid headlines across the country describing how judges had been 'Rebuked.'⁶ Thereafter, the newspapers of the day remained fixated upon judicial compliance (or non-compliance) with the mask regulations. The *Sydney Morning Herald* of 8 April 1919 was moved to report:⁷

During the brief sitting of the High Court yesterday Mr Justice Barton and Mr Justice Rich wore masks. The Sheriff, Mr Walsh, was also masked, and so were the Court officials and the barristers in the appeal cases. Mr Blacket KC, Mr Alec Thompson, and

Mr Jaques did not remove their masks while addressing the Court, which was adjourned till Friday next.

In the Central Criminal Court the Jurymen wore masks. The Chief Justice, Sir William Cullen, was not masked, nor was the Crown Prosecutor, Mr Herbert Harris.

Apart from the Jurymen, very few masks were worn before Judge Scholes at the Court of Quarter Sessions.

Harold Jaques personified the cost of the Great War in that he had lost his leg and a finger in battle. No mention is made of Justice Griffith, who also sat on the case referred to in the High Court,⁸ suggesting he did not wear a mask. The following day, however, the judiciary appear to have been more compliant:⁹

At the Quarter Sessions yesterday, everyone in court, including Judge Scholes, the Crown Prosecutor, and the members of the legal profession, wore masks. Masks were not removed during the examination and cross-examination of witnesses.

In the Central Criminal Court masks were worn by the Jury and the Jurors In waiting.

It was not just members of the judiciary who were non-compliant. Two days after Mask Day, 50 people were arrested for riding on the trams with their masks hanging around their necks or in their pockets. Almost all were smokers.¹⁰ The newspapers thereafter provided daily updates on prosecutions for failing to wear a mask.

The requirement to wear masks raised high constitutional questions about federal/state jurisdiction over quarantine. Clarence Brown, who was charged with failing to wear a mask on a ferry boat, challenged the validity of the law by arguing that upon the making of the Commonwealth Proclamation declaring NSW a quarantine zone, the State government had no residual quarantine power. Understandably, that argument was rejected by the magistrate who is reported to have remarked that he was not satisfied that the Federal Quarantine Act repealed the State Quarantine Act, and it would be 'impertinence on his part to put his mind against the Government', and that while his 'private opinion was that the hotels on Peace Day should not have been closed in such cities as Grafton ... if a person was brought before him to-day for drinking in one of those hotels on Saturday last he would have to fine him.'¹¹

The aversion to wearing masks was not simply because of impracticability or discomfort. One combative medical practitioner considered them to be positively counter-productive. Dr George Fox was a Member of the Royal College of Surgeons in London, Licentiate of the Royal College of Physicians in Edinburgh, and served with the Royal Army Medical Corps during the Great War. He was charged with neglecting to wear a mask. In court, he said that he was treating a great number of people and saw the bad consequences of wearing masks. He claimed that the proclamation was illegal, and that he refused to wear a mask because of his deep sympathy with the workers and toilers of for whom it was impossible to wear a mask. Dr Fox was committed for trial, and refused to find bail, whereupon he was removed to Long Bay Gaol.¹²

Dr Fox had a victory, of sorts. There was a deficiency in the regulations relating to the prosecution of such offences, and in April 1919 the attorney-general decided not to find a bill.¹³ Subsequently, following the decision of the High Court in *R v Young* which held that the NSW *Quarantine Act 1897* only authorised laws with respect to quarantine connected to the arrival of persons or things by vessels, Dr Fox sued the unfortunate magistrate before whom he had been taken for committal, Mr Frederick Adrian SM, for damages for wrongful imprisonment. He was represented by H V 'Doc' Evatt at a trial presided over by Justice Sly (whom, it may be recalled, sat without a mask at the opening of the Law Term days before Dr Fox's arrest), and was awarded £150.¹⁴ **BN**

ENDNOTES

- ¹ 'The Day of Masks: Gauze versus the microbe', *Sydney Morning Herald* (Sydney, 4 February 1919) 6.
- ² 'Masked City: Beauty does her duty. The Unmasked Bolshevik', *Daily Telegraph* (Sydney, 4 February 1919) 4.
- ³ 'The Day of Masks: Gauze versus the microbe', *Sydney Morning Herald* (Sydney, 4 February 1919) 6.
- ⁴ 'On the Verandah', *Labor News* (Sydney, 10 May 1919) 3.
- ⁵ 'Judges Without Masks. The Chief Justice Explains', *Sydney Morning Herald* (Sydney, 18 February 1919) 5.
- ⁶ 'Judges Rebuked: The No-Masks Incident' *Evening News* 18 February 1919, p5.
- ⁷ 'Masks in Courts', *Sydney Morning Herald* (Sydney, 8 April 1919) 8.
- ⁸ The case was *Trivett v McDonald* (1919) 27 CLR 156.
- ⁹ 'Masks in Court', *Sydney Morning Herald* (Sydney, 9 April 1919) 12.
- ¹⁰ 'Compulsory Masks: 50 Persons Arrested - Police on Trams and Trains', *Sydney Morning Herald* (Sydney, 5 February 1919) 8.
- ¹¹ 'Grafton 'Flu Prosecutions', *Richmond River Express and Casino Kyojole Advertiser*, 25 July 1919, p8. I am grateful to Tony Cunneen for bringing this article to my attention.
- ¹² 'Wearing of Masks. Sydney doctor Rebels. Committal for Trial', *The Argus* (Melbourne, 8 February 1919) 18.
- ¹³ 'Masking: Prosecutions withdrawn', *Sydney Morning Herald* (Sydney, 4 April 1919) 7.
- ¹⁴ 'Doctor sues Magistrate', *Sydney Morning Herald* (Sydney, 18 December 1919) 5.