



20th Anniversary of the Court of Appeal

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In August 1951 in an address to a distinguished gathering at the University of Melbourne, the then Master of the Rolls, Sir Raymond Evershed, advanced cogent reasons for the establishment of permanent intermediate appellate courts. He emphasised the different functions and skills involved in appellate work, the likely improvement in the quality of judicial performance, that the principled development of the law is more likely to be ensured, that a court of rotating judges of equal membership does not have the necessary primacy it needs as the court of final resort in most cases and that only by separation from the trial court could the reality and appearance of complete independence be secured. Those reasons, as valid today as they were two generations ago, provided the genesis for the creation of this Court.

Nine judges appointed to the Victorian Court of Appeal commenced sitting in June 1995. President Winneke almost immediately introduced practices which resulted in swifter dispositions and produced a marked increase in the number of appeals. The benefits of constant interaction between a small group of judges of the highest quality resulted in consistency and soundly principled decisions. The court quickly became respected for its hard work and intellectual rigour. Although intermediate appellate decisions generally have a relatively short shelf life, much of the jurisprudence of the Winneke Court has proved invaluable and is likely to endure well into the future. By the end of the first decade the primacy of the Court was assured.

The unremitting nature of appellate work with its high turnover of cases and challenging issues took its toll however on the original members of the Court. Save for the appointment of Justice Hayne to the High Court and Justice Kenny to the Federal

Court very early in the Court's life, almost all of those initially appointed had resigned or retired by 2006. Continuity of experience of the Court was ensured by the appointment of eight further justices of appeal during its first decade, six of whom continued to serve well into the second decade of the Court. Justice Buchanan's exceptionally long tenure spanned a large portion of both decades and the court benefitted greatly from his invaluable contribution and experience. By 2014 the number of permanent members of the Court had increased to 12 and in addition there are a number of reserve judges that the Chief Justice is able to call upon from time to time.

During its second decade the Court continued to provide an efficient means of appellate review. This was a period of profound and rapid legislative and technological change yet only a very small proportion of cases reached the ultimate court of the nation. To those who look to the number of successful appeals to the High Court as a measure of an appellate court's success, only a relatively small number of appeals have been allowed over the lifetime of this Court, varying generally between 10 and 20 per cent of the total applications for special leave each year.

The burdens upon appellate judges throughout the Court's short history have remained unalleviated. There is a voluminous amount of reading required to meet the expectation that judges will have read all of the relevant material before hearing the appeal. Then there is the analysis of the parties' submissions, which over time have become more complex with elaborate reference to authority. Finally there is the onerous task of writing the judgment which must address at least the primary submissions of the parties to demonstrate that they have been heard. The provisions of reasons, to enable accountability through the appellate process to the High Court or through public criticism, must be sufficient, clear and persuasive. In addition to hearing appeals, all of the judges undertake a substantial amount of extra curial work in a wide range of areas. Every member of the Court provides assistance to the Judicial College of Victoria in the discharge of its responsibilities.

The annual reports of this Court demonstrate the continuing growth of the workload of the Court during its lifetime and its changing and complex nature. This has had the potential to affect hearing times for oral argument, the number of appeals suitable for ex tempore judgment and delays in the delivery of judgments. Despite these challenges, the reforms to which I shall refer have made a dramatic change to the speed with which appeals in this Court are heard and determined.

To reduce the burden of the constant workload, in the second decade of the Court, different sitting schedules were employed that altered the tradition of the judges sitting on a number of consecutive days. A strong collegiate spirit evolved amongst the members of the Court. That environment has enabled the Court's preference for joint judgments. That preference accords with the view expressed by Sir Raymond Evershed that to achieve the real purpose of the court there must be a 'combined judicial operation' where the members of the court 'work truly together'. The process of consultation and refinement required for a joint judgment has generally enhanced the quality of the reasons without risk that principles would be compromised or divergent views abandoned. When speaking with one voice the Court has been able to provide intelligible guidance to the bench and the profession and promote greater certainty and consistency in the application of legal principles.

Early in the Court's life, judges from the Trial Division commenced to sit as acting justices of appeal on three-monthly rotations. That is a practice which has endured. It gives trial judges an exposure to appellate work and the principled development of the law. The appellate judges benefit from the presence of trial judges who bring their continuing experience of the trial process to the resolution of appellate issues. There remains the practical problem that trial judges often depart the appeal court with reserved judgments but there remains a strong view that the benefits of the practice warrant its continuance.

At the end of the first decade, there was a justifiable grievance amongst judges that the Court's independence had been eroded by government restriction, particularly financial. A number of judges of this Court, on retirement, commented upon the perception that the Court was being treated as a unit or functionary within the Department of Justice. This challenged the 'institutional autonomy', described by Sir Anthony Mason as an extended sense of judicial independence.¹

This occasion presents an opportunity to recognise that there has been an important shift in the conversation between this Court and other arms of government. With the support of the Court, the Chief Justice and President Maxwell have been able to cultivate a harmonious and constructive dialogue with the executive whilst maintaining the Court's independence. The conversation has produced significant benefits for the

¹ Sir Anthony Mason, 'Judicial Independence and the Separation of Powers – Some Problems Old and New' (1990) 13 *UNSW Law Journal* 173,174.

administration of justice without affecting the Court's freedom from influence in the performance of its judicial functions. The new dialogue has enabled the future of the entire Supreme Court to be better secured by the establishment of Court Services Victoria, an independent body now responsible for the financial administration of this and other courts. The initiative, driven by the Chief Justice, will undoubtedly benefit this Court.

Access to justice has been a prime consideration for the Court. Early in its history the Court ensured that upon leave being granted, an applicant in a criminal appeal would receive legal aid. The Court has introduced a self-represented litigant coordinator and with recourse to the Bar pro bono scheme the Court is better placed to deal with the increasing number of unrepresented litigants. They often raise challenging questions for the Court. By way of illustration, recently a litigant in person, charged with offences forty years old, advanced an elaborate submission before the trial judge and again on appeal that all State and Federal legislation was invalid as the Queen or her representative had no authority to assent to legislation as Australia had ceased to be a colony from the time Australia joined the League of Nations and that judges, amongst others, had committed treason by their oath of allegiance. When we asked the applicant how we would have jurisdiction to grant him relief if his argument was correct, he responded that he would make an exception in our case.

By 2006 a civil practice statement was introduced setting out a pilot programme of front end and intensive case management of civil appeals which refined the appellate process and which produced further reductions in delay times from initiation to judgment. Appellate level mediation was introduced which has proved successful in further reducing pending appeals. The number of civil applications heard by two judges for leave to appeal, stays of judgments pending appeal, and applications for security for costs remained constant throughout the two decades. The Court now also seeks to treat the application for leave as the appeal wherever possible.

Another common theme amongst appellate judges on retirement at the end of the Court's first decade was the constant threat of new legislation to an understanding of the law. The replacement of the *Companies Act* by the *Corporations Act 2001* (Cth) was singled out for particular mention. The second decade has seen further and very substantial increases in the legislation that has impacted upon the administration of justice in this State. New legislation affects many areas of the common law. The *Transport Accident Act 1986* (Vic) which restricts common law actions for damages by a

criterion of ‘serious injury’ has occupied much court attention. The continued amendment of the *Accident Compensation Act 1985* (Vic) for work-related injuries has meant that during its 20 year existence, the Court has had to consider four quite distinct phases of the Victorian workers’ compensation scheme. Under the present phase, common law claims were subject first to s 134AB of the *Accident Compensation Act* and now corresponding provisions in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). Section 134AB comprised no fewer than 42 sub-sections calling for resolution of important and difficult questions. The Court’s decisions continue to provide guidance in relation to this difficult legislation, which is notorious for its studied obscurity.

Other common law claims for personal injury and tortious claims, were the subject of the Ipp-inspired amendments in 2003 to the *Wrongs Act 1958* (Vic). The 2003 amendments introduced ‘significant injury’ gateways for personal injuries damages. The Court has had to grapple with issues concerning the existence, content and breach of a duty of care, and causation. Defamation is now subject to the *Defamation Act 2005* (Vic). It is said by some that the Supreme Court of Victoria is the leading common law court in Australia for the trial of defamation proceedings. This Court has decided a number of leading defamation cases which have stood the test of time.

In 2006 the *Charter of Human Rights and Responsibilities* became law. Although the expected flood of litigation has not eventuated, the Charter has raised complex and time consuming questions as to the compatibility of statutory provisions with the Charter in a wide range of legislation.

The *Evidence Act 2008* (Vic), not unexpectedly, even to those who supported its introduction, has generated considerable challenges for trial judges and for the Court of Appeal. Our Court has drawn heavily upon the jurisprudence of the New South Wales Court of Appeal which has dealt with the Act since 1995. In rare cases we have departed from the NSW Court’s construction. A number of these evidentiary reforms have added considerably to the burden of trial judges and the Court of Appeal, one of which deserves particular mention. The repeal of s 398A of the *Crimes Act*, which regulated the admission of propensity evidence through the ‘just to admit’ test, and its replacement with the concepts of tendency and coincidence evidence under the *Evidence Act 2008*, has provided fertile ground for interlocutory appeals and appellate review following conviction. This culminated in the recent decision of the Court in

Velkoski v The Queen,² which sought to identify the common principles which underlie the numerous decisions of the Victorian and NSW Courts of Appeal.

There has been a political imperative by consecutive State governments to be seen to be addressing the increasing rate of imprisonment in Victoria which has almost doubled since 1995. Hence an ever-changing legislative criminal law landscape, particularly in the last decade. These changes have had a profound impact on criminal appeals which occupy well over 60 per cent of the Court's work. Legislative impact has had its greatest effect in sentencing appeals. They generate the majority of the Court's criminal law work. To deal with the workload, the Court now regularly sits with two judges on straightforward sentencing appeals.

The *Sentencing Act 1991* (Vic) is highly prescriptive. It has been the subject of frequent amendment as successive governments have added layers of obligation in the sentencing process. Some 119 Acts have been introduced between 1995 and 2015 amending it. The Act imposes specific obligations where the offender is a serious offender (as defined) or is on bail or on parole at the time of the offence. No less than five Acts were introduced over time varying the circumstances in which suspended sentences may be imposed until they were phased out as a sentencing disposition and a new Community Correction Order was introduced. This Court in *Boulton v The Queen*³ last year, in its first guideline judgment, addressed all aspects of this new and valuable sentencing option. That decision has reportedly ushered in a significant change in approach by sentencing courts at all levels.

Presumptive non-parole periods for offences involving serious personal injury in circumstances of gross violence, and statutory minimum sentences for adults convicted of manslaughter committed by a single punch or in circumstances of gross violence have been introduced posing an unusual challenge for courts at first instance and on appeal. These sentencing obligations involve tasks very unfamiliar to the judiciary of this State and which substantially confine the parameters of the sentencing discretion. The implications of such reforms are yet to become clear. The question of construction of baseline sentencing for a range of offences is presently before the Court. The task of construction must of course be approached with fidelity to the judicial responsibility to

² [2014] VSCA 121.

³ [2014] VSCA 342.

give effect to such legislative intent as can properly be discerned from these unusual provisions.

No area of the substantive law has become more complicated than that relating to sexual offences which occupy the majority of the time of the County Court and criminal appeals in this Court. Between 1991 and 2015 there have been six separate Acts amending the law of sexual offences. Numerous changes have been made to the definition of rape and its elements including further changes made this year which are not free from difficulty. Other ancillary legislation has created secondary consequences for sexual offence convictions such as serious sex offender monitoring and sex offender registration. The creation of powers to detain or supervise offenders after they have completed their sentences has significantly extended the boundaries of the judicial role to what were previously regarded as being administrative tasks performed by the executive, with substantial appellate court time occupied in reviewing orders for continuing detention or supervision. Major reviews of offenders detained under the *Crimes (Mental Impairment)* provisions have doubled in the last five years.

Amongst the plethora of legislation is important legislation that has been solicited and welcomed by the Court. The present complexities in the criminal law, particularly governing the trial of sexual offences, was thought in *Wilson v The Queen*⁴ to be so extraordinarily complex as to throw into doubt the expectations on which the system of trial by jury is founded: the ability of trial judges to explain the relevant law to the jury without falling into error and the ability of a jury to comprehend the law as so explained and apply it to the evidence. *Wilson* provided a salutary reminder of the urgent need for legislative simplification of jury directions. Parliament responded to these concerns. Following strong expressions of concern by Justices Vincent and Eames, the President set up an ad hoc working group and one of its progenitors, Justice Eames subsequently reported on its recommendations. Further work was then undertaken by the Jury Directions Advisory Group involving a number of other senior members of the Court. Following a final report by Justice Weinberg, the *Jury Directions Act 2013* (Vic) was introduced. Its purpose was to simplify the directions in criminal trials without detracting from the quality of criminal justice in this State. It has been followed by the *Jury Directions Act 2015* (Vic) which re-enacted the same provisions and added some further provisions. This legislative response may in large measure be attributed to the

⁴ [2011] VSCA 328.

collaborative relationship between executive and judiciary but it was truly a judge-led reform.

The parties to a criminal trial now bear primary responsibility for the identification of the matters in issue in the trial with respect to the elements of the offence, defences, alternative offences and alternative modes of complicity. Importantly, the parties are obliged to inform the judge as to any specific directions that they require beyond the ineluctable directions. These reforms reduce the risk of trial by ambush, simplify the task for the trial judge in charging the jury and reduce the prospect that convictions will be overturned on appeal. Anecdotal reports from trial judges suggests that the length of jury charges have been significantly reduced. Part 6 now deals with post-offence incriminating conduct and was intended to avoid the difficulties arising from consciousness of guilt reasoning which had so beset the common law.

The provisions of the *Crimes (Criminal Trials) Act 1999* (Vic) have been replaced by the *Criminal Procedure Act 2009* (Vic) which consolidated and modernised criminal procedure laws. This Act unlike its predecessors has received strong judicial support. The Act made a requirement of leave universal and also altered the test for leave to appeal in sentencing appeals, adopting the minority view from *R v Raad*⁵ that leave may be refused if there is no reasonable prospect that a less severe sentence would be imposed. The new leave process has operated as an effective filter on sentencing appeals, with over 40 per cent of leave applications being refused at first instance since the introduction of the new test.

Again at the Court's instigation the *Criminal Procedure Act* introduced interlocutory appeals, a regime which has permitted early intervention by the appeal court on important contested rulings pre-trial or during the course of the trial. It enabled the detection and avoidance of errors, usually early in the trial process, that would have caused the trial to miscarry had it proceeded to conviction. It also gave the Crown a right to contest rulings adverse to it which would have significantly weakened its case. Once the jurisprudence of the Court for these appeals was established in 2010–11 there has been a significant decline in the number of such appeals, so that the number is relatively small and manageable.

⁵ [2006] VSCA 67.

There have been numerous Crown appeals against the inadequacy of sentences during the two decades which required the formulation of principles governing the Court's ability to increase sentence. The *Criminal Procedure Act* abrogated the principle of double jeopardy in Director's appeals. In 2014, the High Court ruled in *Barbaro v The Queen*⁶ that the prosecution should not make a submission to sentencing judges regarding the appropriate range of sentences. Perhaps not surprisingly, there has since then been a pronounced increase in the number of appeals against sentence by the Director of Public Prosecutions. They now occupy in excess of 10 per cent of sentencing appeals.

President Maxwell came to the Court keen to explore further possibilities of providing efficient and expeditious justice. In February 2011, Justice Ashley travelled to England (given the current political climate in other places I hasten to add with the Court's blessing) and at the Chief Justice's request, consulted with Registrar Venne of the English Court of Appeal. The registrar viewed the Victorian approach to sentencing as 'Rolls Royce treatment on a Morris Minor budget'. With some modification, many of the features of the English model were adopted and the Ashley/Venne criminal appeal reforms embraced by the Court, Victoria Legal Aid, the Office of Public Prosecutions and practitioners. They had an immediate impact and in the longer term a remarkable effect. In the five years since their implementation, the median time for finalisation of criminal appeals has been reduced from approximately 12 months to six months and the number of pending appeals has been reduced by more than 85 per cent. The reforms required and received financial support from government. The Chief Justice and President were able to secure seed funding from the Attorney-General which enabled the appointment of a senior qualified criminal practitioner as the Registrar and case workers. The seed funding also provided support to Victoria Legal Aid, the Office of Public Prosecutions and the transcription service to assist in the implementation of the reforms. The Attorney-General secured recurrent funding for this reform in 2012. In a paper delivered last year, Justice Tate noted that it was the Court's strong commitment to institutional autonomy that influenced the process of reform.⁷

⁶ (2014) 253 CLR 58.

⁷ Justice Pamela Tate, 'Judicial Independence as Institutional Autonomy: Court-led Reforms', Speech delivered at the Supreme Court of Western Australia Annual Conference, 29–30 August 2014.

The delays in the hearing and determination of appeals, particularly in the area of commercial law have long proved a disincentive for parties to appeal. The anecdotal evidence has been that parties' preference in commercial litigation has often been to abide by a first instance decision, even one they regarded as wrong, rather than continue in a state of commercial uncertainty whilst awaiting completion of the appeal process. In order to further reduce delays in the hearing and completion of appeals the Court has now introduced civil appeal reforms modelled upon the success of the criminal appeal reforms. They were drafted largely by Justice Nettle shortly before his appointment to the High Court. The *Supreme Court Act* was amended to require leave to appeal in all civil matters. The reforms require the appellant to furnish a written case within 28 days of judgment. In the ten months since the reforms have been in place there has been a significant decline in the filing of applications and a pronounced decline in those appeals that have not been finalised. The time from filing to completion has already been reduced from 10.4 months to 7.9 months.

The success of both civil and criminal reforms owes much to the work of the Registrar, Mark Pedley, and his officers, all capable and dedicated lawyers, who provide the profession and the court with invaluable assistance. The Court's ability to deal promptly with very urgent matters was well illustrated in the appeal in the Australian Grand Prix case,⁸ which was heard and determined within 24 hours of the decision of the primary judge. The Registry attracted high praise from the common law bar for its work.

Statistics published during the life of this Court demonstrate the remarkable reductions in delays in the appeal process which this Court has achieved. These reforms have not attenuated the court's ever constant principal objective: the delivery of just outcomes by a just process. Within its relatively short life, this Court, in the face of the burgeoning workload of increasingly complex litigation and the profound changes to the legal landscape, has delivered the highest quality of justice to the people of Victoria. The aspirations held for this Court twenty years ago have been fully realised.

⁸*Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37.