

2006

THE

FEDERAL COURT

REPORTS

THE AUTHORISED REPORTS OF DECISIONS OF
THE FEDERAL COURT OF AUSTRALIA

EDITOR
VICTOR KLINE
Barrister-at-Law

CONSULTING EDITOR
DAVID CATTERNS QC

VOLUME 152

LAWBOOK CO.

2006

REPORTERS

DAVID ASH
OREN BIGOS
TAMARA BOONE
RUTH HAMNETT
MARION ISOBEL
VICTOR KLINE
RODEN PRITCHARD
SARAH SOMERSET
CATHERINE SYMONS
DAVID FC THOMAS
ALEXIS WALLACE

PRODUCTION EDITORS

LINDA PEARSON

Published in Sydney by
Lawbook Co.
100 Harris Street, Pyrmont, NSW

ISSN 0813-7803

THOMSON

LAWBOOK CO.

© Thomson Legal & Regulatory Limited ABN 64 058 914 668 trading as Lawbook Co.

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW

FEDERAL COURT OF AUSTRALIA

CHIEF JUSTICE

THE HONOURABLE MICHAEL ERIC JOHN BLACK, AC

JUDGES

THE HONOURABLE MURRAY RUTLEDGE WILCOX (resigned,
1 October 2006)

THE HONOURABLE JEFFREY ERNEST JOHN SPENDER

THE HONOURABLE PETER ROSS AWDRY GRAY

THE HONOURABLE DONNELL MICHAEL RYAN

THE HONOURABLE ROBERT SHENTON FRENCH

THE HONOURABLE MALCOLM CAMERON LEE (resigned,
1 May 2006)

THE HONOURABLE TERENCE JOHN HIGGINS

THE HONOURABLE PETER CADDEN HEEREY

THE HONOURABLE ANTONY PHILIP WHITLAM (resigned,
1 May 2005)

THE HONOURABLE MICHAEL FRANCIS MOORE

THE HONOURABLE CATHERINE MARGARET BRANSON

THE HONOURABLE KEVIN EDMUND LINDGREN

THE HONOURABLE BRIAN JOHN MICHAEL TAMBERLIN

THE HONOURABLE RONALD SACKVILLE

THE HONOURABLE SUSAN MARY KIEFEL

THE HONOURABLE ROBERT DAVID NICHOLSON, AO

THE HONOURABLE PAUL DESMOND FINN

THE HONOURABLE ROSS ALAN SUNDBERG

THE HONOURABLE SHANE RAYMOND MARSHALL

THE HONOURABLE ANTHONY MAX NORTH

THE HONOURABLE RODNEY NEVILLE MADGWICK

THE HONOURABLE RONALD MERKEL (resigned, 15 May
2006)

THE HONOURABLE JOHN RONALD MANSFIELD

THE HONOURABLE ALAN HENRY GOLDBERG, AO

THE HONOURABLE ARTHUR ROBERT EMMETT
THE HONOURABLE RAYMOND ANTONY FINKELSTEIN
THE HONOURABLE GEOFFREY MICHAEL GIUDICE
THE HONOURABLE MARK SAMUEL WEINBERG
THE HONOURABLE JOHN ALFRED DOWSETT
THE HONOURABLE PETER GRAHAM HELY (died, 1 October
2005)
THE HONOURABLE SUSAN CORALIE KENNY
THE HONOURABLE ROGER VINCENT GYLES, AO
THE HONOURABLE RICHARD ALAN CONTI
THE HONOURABLE MARGARET ACKARY STONE
THE HONOURABLE JAMES LESLIE BAIN ALLSOP
THE HONOURABLE GARRY KEITH DOWNES, AM
THE HONOURABLE PETER MICHAEL JACOBSON
THE HONOURABLE ANNABELLE CLAIRE BENNETT, AO
THE HONOURABLE BRUCE THOMAS LANDER
THE HONOURABLE SUSAN MAREE CRENNAN
(resigned, 1 November 2005)
THE HONOURABLE ANTHONY NICHOLAS SIOPIIS
THE HONOURABLE RICHARD FRANCIS EDMONDS
THE HONOURABLE PETER ROSS GRAHAM
THE HONOURABLE ANDREW PETER GREENWOOD
THE HONOURABLE NEIL JOHN YOUNG
THE HONOURABLE STEVEN DAVID RARES
THE HONOURABLE BERNA COLLIER
THE HONOURABLE DENNIS ANTILL COWDROY, OAM
THE HONOURABLE ANTHONY JAMES BESANKO
THE HONOURABLE CHRISTOPHER NEIL JESSUP
THE HONOURABLE RICHARD ROSS SINCLAIR TRACEY,
RFD
THE HONOURABLE JOHN ERIC MIDDLETON
THE HONOURABLE ROBERT JOHN BUCHANAN

Address for
THE HONOURABLE JUSTICE PETER GRAHAM HELY
Given by
THE HONOURABLE JUSTICE DYSON HEYDON
at St James Church
King Street, Sydney
Friday, 14 October 2005

We know that the Bar is a career open to talent. Peter Hely certainly showed that. He came to the Bar at the age of 25 with no advantages of birth or wealth or connections. He did come with some solid assets - his own admirable mental and moral equipment, a sound secondary and university education, and, by a stroke of good fortune, the experience of having been articled to Mr WJ Sinclair.

Within a few years of his call in 1969, before he was 30, he had achieved a great reputation as a highly capable junior. By 1981, aged 37, he had taken silk. At once he moved to the centre of the equity/commercial bar.

What brought this speedy success? He worked hard, long and fast both on weekdays and at weekends. On weekdays he habitually came to chambers very early each morning. Usually each day began with a conference or two unrelated to the case being heard later in the day. After the hearing was over two or three more conferences would be held before an evening's work on that day's case began. He often made himself available at short notice for these conferences. The atmosphere in them could be very tense: the clients were usually desperate men in immense difficulties, some near ruin. Each conference tended to involve murky facts and complex bodies of law. Each was conducted under the stresses caused by the case of the day and the need for constant changes of mental gear. Yet he was always punctual, always prepared, always able to remember the detail of what he had been told and had advised at earlier conferences. He resisted all temptations or urgings to hold out false cheer or flattery. His stock in trade was precise and crisp realism. Written opinions were delivered quickly and expressed trenchantly.

While in court he was aided by an excellent general knowledge of every field of law he practised in, but before each case he would again examine the law carefully. He would write down a list of all the legal propositions likely to come up, favourable or not. Each of the favourable ones would be supported by one compelling authority - not so that it could be thrust on the court, but in case the court asked for it. Each unfavourable proposition would be assigned an authority persuasively explaining its limitations. He also wrote down a list of facts which would have to be proved if the favourable legal propositions were to be triggered or the unfavourable ones deflected. He noted how these facts were to be proved from his own witnesses and documents. He thus worked out what he would have to establish by cross-examination of the other side's witnesses. He would also assemble and master a small bundle of key documents from the mass usually dumped onto his desk. By these simple methods he created a blueprint for the case. In court he only took notes when some significant piece of evidence was given. Later the transcript reference to that evidence would be fitted into the blueprint or the blueprint modified to accommodate the evidence. His skill was usually vindicated by events: few authorities or documents or evidence references were needed beyond those he assembled in these ways.

He planned the tactics to be employed in the courtroom with great care. The plans of barristers, of course, tend not to survive contact with the opponent and the judge any more than the plans of generals survive contact with the enemy. But his plans usually needed little modification, no matter what forensic vicissitudes took place. He had an unsurpassed capacity to elicit evidence in chief clearly and without surplusage, and to extract evidence from the most unpromising witnesses by shrewd cross-examination. With him there were no wasted words, no false

starts. no rejected questions. His addresses of all kinds were concise but forceful. He became involved in long cases, but their excessive length was not his doing. He worked very closely with his juniors. He was courteous and loyal and grateful to them - as to his staff. But, whether or not he actually needed help from juniors, he expected it, and was disappointed if it was not given.

Under the intense pressures of this existence, he rarely cracked. In court he was calm, imperturbable, impassive, dignified, unflurried. He never blustered or exaggerated. The closest he would come to passion would be when an unsatisfactory witness stirred him to an urbane ferocity, or when a professional opponent, slow or shifty about making a just concession, suddenly received a sharp and aggressive bite.

His genius for the solution of legal problems lay in identifying and simplifying the issues, marshalling the relevant factual and legal materials, and analysing those materials imaginatively, lucidly and precisely. In him those qualities were as fully developed as they were in the late John Lehane. To say that is high praise, but not false praise.

He had immense style. That style did not lie in flamboyant flourishes or glittering phrases or suave insinuations or melodramatic oratory. He was never blatant or triumphalist. Although in private he was witty, and although he responded to comedy in court while trying to suppress mirth, he himself rarely strove for epigrammatic or humorous effect. His style was classical, in the sense that everything he did was precisely and economically adjusted to the necessities of the occasion. He never struck a false note. He achieved an effect of sinewy elegance, of supple grace, of serene clarity, of simple beauty. Yeats would have said of him that he had:

... a mind
That nobleness made simple as a fire,
With beauty like a tightened bow, a kind
That is not natural in an age like this,
Being high and solitary and most stern ...

By these means, in the decade between the late 1980s and his appointment to the bench in the late 1990s he became the leading equity/commercial practitioner in Australia. Indeed he had high claims to being considered the leading Australian barrister of his generation.

When he laid down the mantle of an advocate and donned the robe of a judge, only one thing changed. Zeal for a client went; impartiality as between the litigants replaced it. He was old fashioned in approach. Evidentiary objections were ruled on at once; no argument was invited, no reasons were given. He treated the most incoherent and vulnerable of unrepresented claimants for refugee status as carefully and fairly as he treated well represented litigants of great wealth or power. If he reserved, he reserved only briefly. Losers who appealed from his orders were almost always sent empty away. He quickly came to occupy a position among the judiciary approaching that which he had achieved at the Bar.

What, then, were the keys to Peter Hely? Conscience. Rectitude. Sincerity. Honour. He lent himself to nothing shabby or shoddy or meretricious or conformist or selfish. There was a reckless magnificence in the way he sacrificed his interests to the claims of professional duty and then judicial duty. He never skimmed a job.

To many lawyers, he was as a craftsman and as a man, an exemplar of high virtue - to be pondered, to be admired, if possible to be emulated. Over the last

melancholy fortnight, they could have applied to him the words Walter Scott wrote on the death of Pitt the Younger:

Now is the stately column broke,
The beacon-light is quenched in smoke,
The trumpet's silver sound is still,
The warder silent on the hill.

If lawyers can be great, he was great. He was a giant - a mighty man, a man of renown.

His departure is a national tragedy - for the early loss of a great judge is a terrible national loss. Much greater is the personal loss - to all his friends, but most grievously to his beloved family. To them goes our deepest sympathy.