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THE SUPREME COURT OF TASMANIA

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THE JUDGES

OF THE

SUPREME COURT OF TASMANIA

DURING THE PERIOD COMPRISED IN THIS VOLUME

The Hon WILLIAM JOHN ELLIS COX, AC, RFD, ED
Chief Justice

The Hon PETER GEORGE UNDERWOOD

The Hon CHRISTOPHER REGINALD WRIGHT

The Hon EWAN CHARLES CRAWFORD

The Hon PIERRE WILLIAM SLICER

The Hon PETER ETHRINGTON EVANS

The Hon ALAN MICHAEL BLOW, QC, OAM

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MEMORANDA

On Tuesday 7 March 2000 at a special sitting of the Full Court before the Full Bench to mark the retirement of the Honourable Mr Justice C R Wright, Cox CJ said:

"We are sitting today to acknowledge the contribution to the Court made by the Honourable Mr Justice Wright, to bid him farewell as he retires from the Bench and the full time service of the law. Mr Justice Slicer is on leave and cannot join us, but he sends warm greetings from Antarctica or Patagonia, where he is presently sojourning.

Mr Justice Wright has seniority over all of us on the Bench, having been admitted to the Bar in early 1959. Throughout the 1960's he gained a great depth of experience in all aspects of litigation, particularly in civil actions under the tutelage of his esteemed father, Sir Reginald Wright who was the senior partner of his Honour's firm of Crisp, Wright and Brown.

Progressing from the art of juggling his father's cases at the weekly call-over of the list to accommodate the latter's parliamentary commitments with those of a forensic nature, through acting as junior counsel to Sir Reginald in many important cases he conducted, his Honour graduated to undertaking cases of that nature on his own and built up a reputation as a leading barrister.

Between 1972 and 1977 he served as a magistrate in the southern division. His fulfilment of that role demonstrating his objectivity, fairness and temperamental suitability to the judicial office.

He left the magisterial bench shortly after I joined it, whether coincidentally or not, I have never enquired. Nevertheless, leave it he did. And he returned to private practice at the separate bar, a somewhat unusual and potentially hazardous undertaking at that time. However, he was remarkably successful, immediately regained the standing he had previously enjoyed and was soon in demand in respect of complex advice and litigation.

In 1984 when the office of Solicitor-General fell vacant, his Honour was the obvious choice and he was appointed to that office and took silk. He fulfilled the role of Solicitor-General with great distinction and when in 1986 a further vacancy occurred on the bench of this Court, as the result of the premature resignation due to illness of Mr Justice Tim Brettingham-Moore, his Honour was appointed to replace him.

We have had the benefit of almost fourteen years of service by him as a judge of this Court. He has been a valued colleague and we have all admired the depth of his scholarship, his willingness in sharing the workload of the court, and the felicity of the literary style of his judgments. In respect of the latter, I have to plead guilty to having

persuaded him, with a view to not embarrassing counsel, to delete a passage which was well worthy of inclusion in the Law Reports. In dismissing an appeal to the Full Court in respect of amendments to a particularly torturously expressed statement of claim, his Honour threatened to observe in the draft judgment he circulated, that this was not the first time the Full Court had been asked by the counsel in question to 'unscramble the egg which learned counsel had not only broken in the first place, but later built into a soufflé.' However, there are plenty of other *bons mots* perhaps of a less culinary flavour which Mr Justice Wright has bequeathed to us in his judicial career.

I thank him for his contribution to the life of this Court and to the administration of justice in Tasmania, for the warmth of his friendship and his co-operation as a colleague. I wish him and Mrs Wright a long and fruitful retirement. I share Robert Browning's confidence that 'the best is yet to be'.

CHIEF JUSTICE: Mr Attorney?

MR ATTORNEY: May it please the Court. On behalf of the government and people of Tasmania, it is my honour today to convey a sincere thank you for your long and distinguished service to the Tasmanian community. It might be said that service commenced upon your admission to the bar in March 1959 and continued thereafter, but I particularly wish to mention the public offices you have occupied on behalf of both Federal and State governments.

In the Federal sphere you were the chairman of the Social Security Appeals Tribunal between 1978 and 1983. In the State sphere you served as a magistrate and coroner between 1972 and 1977, as Solicitor-General between 1984 and 1986 and you were also chairman of the Retirement Benefits Fund Investment Trust, and as a judge of this Court since 29 April 1986. In total, you have thus served in a variety of important public offices for over twenty-five years.

On occasions such as this it is worth remembering that judges of this Court sit in both original and appellate jurisdictions dealing with the full gamut of litigation in which citizens are involved, criminal, civil, ecclesiastical and admiralty, a situation which no longer prevails in some other jurisdictions.

In undertaking this wide range of work, your Honour has met the challenge with great distinction, being noted for patience, diligence, intellectual rigour, fairness in dealing with counsel, parties and witnesses that come before the Court and above all, for your integrity.

In your dealings with government you have been forthright. You spearheaded the judges' submission to be provided with cars. When a departmental officer queried why the application should be successful the only reply was that the judges had right on their side.

We hope that the interest in travel and music which you share with Mrs Wright will be a continued source of enjoyment for many years to come and that your interests in boating and fishing and your retirement will be long and fulfilling. If it please the Court.

CHIEF JUSTICE: Mrs Bartlett?

MRS BARTLETT: May it please the Court and especially your Honour, Justice Wright. I have the honour and pleasure to address the Court as President of the Law Society in Tasmania which represents all the legal practitioners practising in this State. This is a day of regret as we mark your Honour's retirement after many years of service to the legal profession, to the magistracy, as Queen's Counsel, as Solicitor-General and as a judge of this honourable Court since 1986.

Your Honour will be deeply missed from the Bench by all practitioners. There are many reasons for this. Included in these reasons are your Honour's patience and courtesy to members of the public and to members of the profession, both experienced and inexperienced. Your Honour was always prepared to listen to submissions without interrupting and then to ask the well-thought out question.

In addition, there is a clarity and a thoughtfulness in your Honour's judgments which reflect the often difficult circumstances of the litigant, whilst recognising human failings and the need for both justice and compassion.

In return, your Honour, you have earned the deserved respect and loyalty of all those who have appeared before you. It is a measure of the respect in which your Honour is held that this court is filled to capacity today.

Your Honour will no doubt leave the bench with mixed feelings. May I thank you for the services you have so willingly and faithfully rendered to the law, to the legal profession and to the citizens of Tasmania during your fourteen years as a judge of this Court. May I also express the hope that in your retirement your Honour will enjoy good health, and have the opportunity to be involved in personal pleasures which have been limited by judicial office.

I note your Honour had cause in a recent Full Court case to determine whether fish had been taken from the wild in Tasmanian waters. Your Honour illustrated the point with an example about flathead fish. In view of your Honour's love of fishing, I hope you have time to put your example to the test.

Your Honour, on behalf of every practitioner in this State, I thank you and wish you and Mrs Wright good health and a personally satisfying time. If it please the Court.

CHIEF JUSTICE: Thank you Mrs Bartlett. Mr Brown?

MR BROWN: If it please the Court. I have the great pleasure of addressing the Court on behalf of the Tasmanian Bar Association. Nevertheless, despite that pleasure, I am mindful that this is for all of us a melancholy occasion. As we have heard, your Honour has been coming to these courts in one capacity or another, since you were admitted almost exactly forty-one years ago today. That length of time in practice, let alone also on the bench, of itself bespeaks of an uncommon devotion to your calling, patience and not a little stamina. However, for your Honour that entire period has also been marked by constant adherence to the higher standards of learning, of courtesy and the unfailing application of intellectual effort and thoroughness to every matter in which you have appeared, given advice on, or had before you as a judge.

That your Honour would attain and maintain that standard is, of course, hardly surprising, bearing in mind your Honour's legal pedigree. I am sure that if your late father were here today, he would be immensely proud of all you have done. Your career has been one of constant achievement and one characterised by rendering valuable service to your clients, to your profession, to the law and to this State. You have been variously a magistrate, solicitor, highly respected and versatile barrister, leader of the bar, Solicitor-General, and finally a judge. In short it has been an outstanding career and one for which this State is all the richer.

For the profession at the bar, your years on the bench will be fondly remembered for many reasons. Amongst those was your fearless pursuit of the law as you saw it, your compassion for those who came before this court seeking recompense for the wrongs done to them and for the victims of criminal conduct. Your career has, of course, always been marked by unfailing courtesy and kindness to other lawyers. Appearing before your Honour was always a pleasure. You were never too busy to thank counsel, to offer a word or two of encouragement in a ruling or judgment, or to give credit to counsel for a submission you accepted or adopted. To practitioners young and old, those seemingly little things meant a lot. You will always have a place in our hearts as a result, although it must be said you were perhaps fractionally less likely to show such munificence in passing sentence.

In preparing these words, I had cause to look back at just a few of your Honour's judgments. In those, of course, all the characteristics I have mentioned and much more, are all apparent. What is plain in your judgments is the quality, candour and readability of the law and the reasoning behind it that you gave us. Your Honour's judgments were a model of erudition and clarity. They illustrate that your Honour was always conscious that the law should be the servant not just of justice,

but also of good sense. I might add they also showed style and not a little pith and humour, all of which were always nicely judged and apposite.

I hear that warmer climes - and I suspect warmer waters - beckon you and Mrs Wright and I trust that we might see you from time to time in years to come. Your Honour, on behalf of the Association of which you are one of our most esteemed past presidents, thank you for all you have done for us. I wish you a long, contented and fulfilling retirement.

CHIEF JUSTICE: Thank you Mr Brown. I invite Mr Justice Wright to respond.

WRIGHT J: Your Honour the Chief Justice, Mr Attorney, Mrs Bartlett, Mr Brown — thank you very much for your kind and generous — indeed over-generous — comments this morning. I am greatly moved by what you have said. As already mentioned by the speakers this morning, I was admitted to the Bar about forty-one years ago, and since then it is true I have worked as a legal practitioner in this State in several different capacities. During that forty-one years, the substance of the law and the nature of legal practice have both changed radically since my days as a law student, and I must say that to attempt a useful commentary on either on an occasion such as this, would in my opinion be both presumptuous and tedious.

However, there is one important element of our criminal justice system which has exercised my mind over the years and about which I feel that it is appropriate to say something today. Many people, including leading jurists, take the firm — indeed the passionate view — that the jury system is one of the great safeguards of the rights of the individual, against the potential tyranny of an oppressive government, but it seems to me that whilst this perception was plainly valid a century ago it is of little, if any, practical relevance in the western democratic system in which we now live. I think a much more important factor in assuring fair and just treatment in our modern society is the independence and impartiality of judicial officers. I have no doubt whatsoever that nearly all jurors act conscientiously and indeed with considerable anxiety to discharge their important functions, but nonetheless, I am fully convinced that juries return what I would regard as a wrong verdict in about twenty five percent of all cases. By a wrong verdict, I mean a verdict which flies in the face of the evidence of palpably honest witnesses or unimpeachable documentary material.

The question which troubles me is whether, as a society, we can afford both in an economic and also a cultural sense, to persevere with the trial system, which is both inefficient and very costly. It has been suggested that the juries system is of value because it is democratic, but in my opinion that view can't be sustained.

The jury is not elected, it is chosen by lot. It is responsible to no one. Its procedures are not open to disclosure or review and on the contrary, each juror is sworn to silence about the discussions in the jury room. Reasons for a jury verdict are neither required nor given. The jury is not truly representative of the adult population. Many citizens are excluded from jury service by reason of their occupation and it is an indisputable fact that members of the jury panel of conservative appearance are almost routinely challenged out of the box by defence counsel — no doubt on the assumption which is probably false, that such persons are more likely to convict than acquit. The people who comprise a jury come from different walks of like, from different age groups and from different economic circumstances. This is seen by some as one of the strengths of the jury system but I think this notion is open to question. When a diverse group of men and women are metamorphosed into a jury they are introduced to a courtroom atmosphere which is both foreign and bewildering to them. Some of them appear bemused when they come into court and a few remain so throughout the duration of the trial. Many of them are not involved in the discussion of complex issues in their daily lives and they are ill equipped to consider such matters rationally or to discuss them with eleven complete strangers. A dominant individual can, and I believe often does, have a disproportionate influence upon his or her fellow jurors. If, as is usually the case, the jury is asked to retire to consider a verdict, as soon as the summing up is complete, they have no opportunity as individuals to retire to a quiet place for private reflection. No matter how conscientious, they are essentially amateurs in the task they are allocated and when it is remembered that they are expected to recall possibly complicated evidence extending over several days, to rationally evaluate the seductive arguments of competing counsel and then to absorb the trial judge's directions on possibly complex legal issues. It is probably remarkable that they get it right as often as they do. It is obvious to me from some of the questions which I have been asked by juries from time to time that even after the most careful and painstaking summing up they continue to have fundamental misconceptions of key legal issues. This particular problem is often compounded by the multiplicity of directions and warnings which High Court decisions have made it necessary for a trial judge to incorporate in his summation.

To run a criminal trial, it is usual to summon a panel of eighty or more adult members of the community to the court. They are required to present themselves several times throughout the sittings for jury selection. This of itself is costly enough — however there are also incidental costs, not the least of which arises from the fact that a jury trial takes very much longer than would a trial before a judge alone.

Furthermore, some jurors suffer significant financial loss, particularly if the case lasts for several days.

It has been suggested that juries are appropriate and desirable in cases where a custodial sentence is likely, or in cases where serious moral turpitude is in issue, but this argument holds little, if any water, when it is remembered that magistrates deal with serious cases of dishonesty and violence on a daily basis and they have jurisdiction to sentence an offender, in some cases, to imprisonment for a number of years. They are also empowered to impose quite astronomical fines and penalties in some cases. Rarely does a Supreme Court judge impose a custodial sentence which would exceed the upper limit of a magistrate's jurisdiction for serious crime.

I am not aware of any public outcry against the activities of magistrates or any suggestion that they do not efficiently and appropriately deal with the cases which come before them. There are relatively few successful appeals against their decisions and I believe that in general their work is held in very high regard.

In some States of the Commonwealth, provided the accused consents, judges are empowered to try criminal cases sitting alone without a jury. Not surprisingly perhaps, such trials are few and far between. There is a perception in the legal profession, well justified I think, that the odds of acquittal with a jury are better than with a judge or magistrate sitting alone.

We are not, however, engaged in some kind of sporting contest. A criminal trial is not a game. The outcome of a criminal trial is important to the victim and the public in general as well as to the accused. It is sometimes said that judges or magistrates become 'case hardened' — whatever that may mean. If it implies that judicial officers develop a capacity to see through the hyperbole of counsel and the mendacity of witnesses, I regard the complaint not as a criticism but rather a tribute.

What feasible alternatives exist to a jury trial? I have already mentioned the possibility of trial by judge alone. Such a process is commonplace in some Canadian provinces. Alternatively, so as to avoid the unlikely chance of bias by one individual judge, a bench of three judges could be engaged. Unlike a jury, judges are required to give reasons for their decisions. A judge's decision either to acquit or convict based upon erroneous reasons would present a just case for appeal. At the present time, if the trial judge has summed up in accordance with the law and has not admitted inadmissible evidence, jury verdicts are practically unassailable unless on the trial of an indictment containing several counts, it can be demonstrated that the various verdicts are manifestly inconsistent, or for some other reason the outcome is unsafe and unsatisfactory.

Inconsistent jury verdicts are really a difficult problem and they are by no means uncommon. I am quite sure that juries sometimes make compromises in order to bring a trial to a conclusion or for some other inappropriate reason, particularly it seems, in cases of serious sexual assault. If such a compromise is manifested by plainly inconsistent verdicts and there is an appeal, the end result is almost inevitable. The accused person will be acquitted on all counts — there will be no re-trial. The logic behind this is that if he were again found guilty of the disputed offences on a re-trial, such verdicts would still be inconsistent with the acquittal or acquittals he secured at the first trial. For those who are loath to allow the conduct of a trial to be in the hands of qualified lawyers alone, a trial court composed of a judge and a small number of lay men or women may be an acceptable alternative. In such a system it is envisaged that the judge would be involved in the actual decision-making process of the court. Such models have been successfully used in Scandinavia. Studies suggest that none of the alternative modes of trial which I have been talking about today would necessarily be more expensive than jury trials and the probability I think is that they would be much cheaper.

There may well be other solutions. I do not intend to be dogmatic or to pre-emptively dismiss opposing views. I believe, however, that the question of criminal trials by jury should not have the sacred cow status that it has developed over the years and it should be opened up for further debate. I think that the time for doing so is well overdue.

I hope I have not wearied you unduly by discussing this subject. If I have provided some food for thought I will be well pleased.

Now, to less contentious matter. I have had the great good fortune to be a member of a congenial and harmonious group of judges from the very first day of my appointment. There has always been a strong collegiate spirit in Chambers and despite vigorous debate on occasions I cannot recall any time when there has not been mutual respect, cordiality and good humour. I express my gratitude to my fellow judges, both past and present for their friendship and intellectual stimulation over the years. I am proud and privileged to have been a member of such an institution.

When I was at the bar I was fortunate to appear before judges and magistrates who were almost invariably erudite, courteous and helpful. If any of these qualities have rubbed off on me in some small way, it is wholly attributable to the fine example of my predecessors.

I should also thank the members of the Bar and the Tasmanian legal profession, both past and present, for their unfailing assistance and professionalism. The development of a separate bar in recent years has

been a major step forward in delivering quality legal service to Tasmanian litigants. The high standard of representation given by members of the separate bar has always provided me with valuable assistance in reaching a conclusion on the issues before me.

I also wish to thank my personal staff for their unstinting loyalty and service over the last fourteen years. I mention in particular my secretary Mrs Christine Parker, whose willing assistance and capacity to read my often illegible scrawl has never ceased to amaze me. I should also mention my first associate Don Bridgen who was with me for twelve years. His mellifluous voice often imparted a quality of almost Shakespearean proportions to the proceedings. Nigel Kemp, who was my associate and occasional fishing companion over the least two years was always of considerable assistance and his skills at the keyboard enabled me to conceal my computer illiteracy for longer than I should have. Cedric MacKey has been my attendant for almost as long as I can remember. He has always been willing and eager to help in whatever way he can. He has also been assiduous in keeping me up to date with the latest cricket scores and similar vital information.

The law is a very demanding profession. Long hours at night and during the weekend are necessary to prepare and analyse cases when one is at the bar. When elevated to the Bench the pattern changes little. Long hours are still required to read and consider the evidence and to prepare judgments or jury directions. For over forty years my wife has tolerated these unavoidable intrusions into our family life and I hope that the sudden shock of having me present for up to twenty-four hours a day will not prove to be too traumatic to her. I thank her sincerely for her encouragement and loyal and steadfast support.

I thank again those who have spoken this morning. And I thank you, ladies and gentlemen, one and all, for doing me the considerable honour of attending on this occasion. I thank also those who have sent me messages of good will, but who are unable to be present today.

It remains for me to announce, with the leave of his Honour the Chief Justice, that the Court will now adjourn *sine die*."

THE COURT ADJOURNED

On 13 June 2000 Alan Michael Blow QC OAM was appointed as a judge of the Supreme Court in the place of the Honourable Christopher Reginald Wright.