# LEO CUSSEN LECTURE

## "LESSONS FROM THE REAR-VIEW MIRROR"

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It was inevitable that, during the years 2000 and 2001, a lot of time would be spent looking at what had happened over the previous 100 years. That examination was useful in many ways. It reminded us all of what has changed and it gave us a chance to think about whether particular changes were good or bad and about whether they had gone too far or not far enough. But, unless we seek to apply the results of what we saw when we were gazing in that rear-view mirror to what we are to do now and in the future, the exercise has been little more than a wallow in the warm bath of nostalgia. The challenge that now must be faced is what are the lessons to draw from the past for the future development of the legal system.

The last 100 years produced many changes affecting the legal system in Australia. Most fundamental of all was federation under the Constitution which, with very little amendment, remains our basic law. The importance of that change was profound. Recently we have had to consider whether some changes should be made to our constitutional arrangements and, no doubt, those issues will have to be examined again. But I do not wish to spend time, now, on those questions of constitutional change, important as they are. There are other changes that have happened during the last century to which I want to draw attention. First, there have been changes in the way in which norms of behaviour are defined. Second, the way in which both criminal and civil litigation is conducted has changed radically. Third, there have been great changes to the way in which the profession goes about its work. Last, there are two phenomena that we must all grapple with, sooner rather than later, the law as panacea and change itself.

### Norms of behaviour

Once was the time when identifying legal norms of behaviour, which is to say the rights and duties of members of society, was relatively straight forward. Much more often than not the content of these norms was to be found in, or could readily be traced to foundations in, judge-made law. And behind that judge-made law there lay moral precepts founded in a set of beliefs which, according to one's point of view could be seen as generally held by a largely homogeneous society or generally held by that part of the society in which power resided. The law of homicide, the law of theft, the law of contract could all be traced to such roots. Whatever may have been the difficulties at the edges (and there were many) the core of the relevant law was reasonably straightforward. Thus, the rights and duties of persons, both natural and juridical, were generally capable of relatively simple expression.

Over the century just passed, two things happened that I think it is important to observe and understand. First, society either became, or was seen to be, more complex. Some of that complexity came about because of technological development and change. But probably more importantly than that, society was no longer seen as monochromatically homogeneous. Difference was recognised, accepted, celebrated. The accommodation of difference thus became an important social issue which found its reflection in the law. Much more consideration was given to the position of indigenous Australians. Reference need to be made only to *Mabo v Queensland [No 2]* [1] and to other cases about native title to make that point. Equal opportunity and anti-discrimination legislation became commonplace. Even such areas of the common law as the law relating to provocation in homicide came to acknowledge that the subjective qualities of an accused, including age, sex and ethnicity, had a part to play in the proper application of principle [2].

Secondly, much more attention came to be directed to the relationship between the individual and government. Government did more, and more was expected of government. What government did, or did not do, had direct and immediate consequences for many citizens. The regulation of the relationship between individual and government took on far greater significance to the way in which individuals lived their lives. It became more important to examine the decisions that were taken in government and that affected individuals, and to consider how and why they were made.

The consequence of the two changes I have mentioned that was most obvious to lawyers was the growth of the statute book. Legislatures, both federal and State, passed more and more statutes. In 1901, in the first year of the new federal Parliament, it passed 17 Acts occupying 228 pages. In the same year, the Victorian Parliament passed 59 Acts occupying 546 pages. The comparable figures for 2000 were Federal Parliament: 174 Acts, 5,382 pages; Victorian Parliament: 101 Acts, 3,787 pages. There is no reason to think that this trend will abate. The legal system must recognise this fact and consider carefully what follows from it.

Some, but by no means all, of the issues that are presented concern the way in which statutes are prepared. Criticism is often levelled at those who draft legislation. Usually, the critic complains that the drafting is obscure. Often, however, criticism of that kind may be unfair. In truth, the criticism should be directed at the instructions given to the person who drafted the particular legislation.

Plain English drafting is now the norm. For my own part, I applaud that fact but I regret that it has brought with it a seemingly irrepressible desire to define every word used in an Act. Wary of allowing the language to speak for itself, the drafter imposes on words meanings which are either blindingly obvious or are remarkably far removed from the ordinary meaning of the word being "defined". The inevitable consequence of succumbing to the desire to define is that the reader must hunt through the Act pursuing an apparently endless chain of definitions which one day will, no doubt, include a statement that "the indefinite article includes the definite article and (were it not an impermissible Latinism) vice versa". In the end, that is by the by.

The central problem that is presented by the statutory deluge is logically anterior to the problem of drafting. It is to identify what is to be the overall legislative scheme and where the particular legislation is to fit into the fabric of the law as a whole. Unless the drafter knows what is the intended shape of the whole scheme to which the legislation is to give effect, it is inevitable that there will be doubts and difficulties about how it all fits together. In turn, as the volume of legislation in force increases, those who direct and effect its preparation must know where in that general legislative scheme the particular proposals will fit and equally must know where it will fit in the entire legal system. If that is not done, there will inevitably be considerable difficulty in understanding what the legislation means and how it is to operate. The consequences of that are obvious — doubt, uncertainty, litigation, cost, time, trouble.

Those who work with legislation, however, cannot attribute responsibility for all difficulties to those who prepare or instruct the preparation of legislation. It should go without saying that careful attention must be directed first and last to what it is that the statute says. All too often, however, it is apparent that those who use legislation have not done so. It cannot be emphasised too strongly that it is a fundamental failure for a lawyer who is confronted with a problem to which a statute is relevant not to read the relevant Act and apply it. And necessarily that involves, these days, being certain that the form of the legislation that is being considered is the form relevant at the time which is in question. All too often, even in the High Court, it emerges that attention has not been given to identifying the relevant form of the Act and that insufficient time has been spent reading and understanding what is written in it.

To return more directly to my principal inquiry about what challenges for the future emerge from the lessons of the past, two other features emerge from consideration of the change in the way in which norms of behaviour are identified. The imperial march of negligence continues. Whether that is good or bad is not to the point that I now seek to make. It has meant that lawyers now tend to see all forms of damage as potentially compensable and compensable only through an action for negligence. This has led, in some jurisdictions, to the modification or abolition of common law rights to make certain kinds of claims or to make claims in certain circumstances. Such changes are often criticised but the criticisms made may not always reveal a sound basis for criticism. So mesmerised have we become with the action in negligence, and the right to bring such an action, that not only are actions which should properly be founded in some other tort wrongly forced into the negligence mould, insufficient attention is given to whether there are discernible foundations for the action of negligence that lie beneath Lord Atkin's biblical allusion. Lawyers must give attention to understanding and articulating the foundations of and underlying purposes of the cause of action which is propounded so often.

If the purpose which underpins the tort of negligence is to compensate the injured, why is the cause of action fault based? Why is it only the careless who must compensate? If the purpose is to deter careless behaviour, what role does a duty of care play? Why is the remedy not available in any and every case in which a person suffers damage as a result of another's failure to take reasonable care? If the purpose is to foster better loss distribution, why do we shut our eyes to whether parties are insured? I am not to be taken as saying that there are no answers to these questions. I think that there are, but much of the debate that has taken place in recent years would suggest that there may be no common agreement about what those answers are. If that is so, the debate should be brought to the surface and argued out. Only then can the law of negligence develop in a principled way.

Some of these issues are now matters of lively debate in the United States of America in connection with the preparation of the Restatement Third on Torts. An early draft of that revision of the Restatement discarded reference to duty of care in formulating the rules about negligence. The American Law Institute rejected the draft and returned it for revision. There is, therefore, a rich source of material directing attention to issues which all too often in this country appear to have passed without explicit consideration in debates about the place that actions for negligence have in the legal system. It is time that they became matters for debate here.

The last feature of developments in connection with identification of norms of conduct to which I want to draw attention concerns the way in which norms of conduct now find expression. It is convenient to do that by reference to statute, but examples in judge-made law can readily be found. In pursuit of what Gleeson CJ some years ago referred to as the Holy Grail of "individualised justice" [3] we find increasing use in statutes of provisions which confer discretions upon decision-makers. There are many examples. Income taxation legislation contains many provisions in which the Commissioner is required to make discretionary judgments. The *Evidence Act* 1995 (Cth) gives many discretions to trial judges about the admission or rejection of evidence. These examples could be multiplied. The problems presented by this form of legislative provision are not widely understood. So, it is said, all too often, that a judge asked to exercise a discretion under the *Evidence Act* must do so "judicially" as if that provided complete guidance to the judge and parties about how to go about the task. It does not. It tells the judge absolutely nothing about how to make the decision. If the inquiry stops at that point, it suggests only that the judge is to act like Plato's philosopher king and that the judge can safely

be guided by his or her own intuitive sense of justice. That is not a sufficient criterion to ensure justice according to law. More definite criteria must be identified in and from the legislation, and, I hasten to add, they can be.

The example I give may, perhaps, appear to be trivial, but it is an example which I hope serves to illustrate the existence of a much deeper problem with which the law must grapple. Inevitably, there is tension between prescription of a single all-embracing rule and the achievement of what may be thought to be a "just result" in an individual case. Human behaviour, and human circumstances, are so infinitely various that the prescription of a single rule may not, in every case, produce what would generally be seen to be a just result. That problem is not solved by deferring it. Thus it is not solved by saying to a decision-maker, do whatever you think is just. In the field of negligence, it is not solved by saying that a duty of care is to be imposed whenever it is "just and reasonable" to do so [4]. That does no more than restate the problem in other words. It does not solve it. If a discretionary rule is adopted and no proper attention is paid to giving the decision-maker sufficient guidance about what is meant by "just" in the circumstances, all that has been done is to defer the problem. The inevitable consequence of deferring a decision in this way is to provoke litigation designed to articulate the principles that the decision-maker should bring to bear upon the problem. The inefficiency of that approach is self-evident.

Nor is the problem solved by removing discretion from the process of judgment. It is not so long ago that there was little or no discretion to be exercised in fixing sentence for a criminal offence. The sentence was prescribed by law and sentencing was more a ritual than an exercise of judgment. Now, of course, sentencing legislation provides for the exercise of discretion by judges according to principles that are stated in the legislation [5] and are well developed in the case law. Those principles start from the premise that a sentence should be fixed by reference to more than a broad description of the offence (as "theft" or "assault") and whether the offender has committed other offences. The legislatively determined premise is that sentencing must take many more factors into account. The way in which that is to be done is far from easy, but there is a great deal of discussion and development of the relevant principles to be found in the decided cases. Now we see in the United States, and elsewhere, the emerging of a view that individual circumstances of the offender or the offending do not matter in fixing a sentence. All that needs to be taken into account can be identified in a two dimensional graph or chart, one axis of which represents the nature of the offence and the other the criminal history of the offender. Whether that is a desirable path to pursue is a choice for legislators, not judges. It is important to recognise, however, that it is a choice which represents a fundamental departure in the field of criminal law from the general trend of the law towards the very particular and individualised treatment of cases.

## Litigation

No review of the law in the past century was complete without reference to "access to justice" and "the cost of litigation". I have no doubt that it is well recognised, both in the legal community and in other circles, that these are two of the most pressing challenges for the legal system. I do not propose to enter upon the details of the debates that swirl around these subjects. Rather, I want to invite attention to what I think are a few of the more immediately pressing issues that are presented in this area.

Technology is seen as offering the means of solving at least some of the problems of cost of and access to justice that we now face. That may very well prove to be right but technology is no panacea. There is one fundamental danger to which far too little attention is being given. Developments in technology enable the assembly and ordering of large amounts of information. An unsophisticated user of the equipment can readily gain rapid access to individual pieces of the information that is stored and, with a little more skill, can assemble sets and subsets of the data according to chosen organising principles. What technology will not do, or at least will not do yet, is order information according to its forensic significance. Technology may tell you *every* document that contains a reference to a particular subject matter but it will not rank those documents according to their legal or forensic significance. The consequence is that lawyers, all too readily, agree to the creation of a massive database concerning a particular issue but fail to apply any discrimination to its creation or use until long after it has been assembled. For the barrister, this process first began with ready access to photocopying equipment. Soon, solicitors were sending all the available documents to counsel for their consideration rather than, as had previously been the case, reading the documents for themselves and identifying those few which were central to the dispute between the parties. Now, instead of photocopied documents, we have entered the era of the CD Rom with images of every document. But still no discrimination occurs until far too late in the piece. Often enough, it occurs at the point of final address and then only at the insistence of the judge.

Litigation is expensive and time-consuming. It is expensive because lawyers are skilled professionals. The amount of time consumed should, however, reflect the amount of thought that goes into deciding the real point of contention between the parties, not the amount of time that is consumed by identifying what that point is, or considering peripheral points.

The identification of the real point of difference between parties must take place out of court. All too often it now occurs in court. Whether it is to be done orally or in writing, it is plain that the statement of issues between parties in a civil matter will have to be reduced to writing. If pleadings are thought not to achieve that result then let us do so in some other way but it simply must be done and done out of court. Although the oral tradition of the common law court is one which I consider to be of inestimable benefit, and therefore to be preserved, more and more litigation will depend upon written

work for the use of the parties out of court and written work for use by the judge in or out of court. No doubt, the skills of Australian lawyers in this area must be improved. Whether, as one author suggests [6], the issue in a case can always be captured in 75 words or less, it is an aim to which all should aspire. The writing of all lawyers at all levels of the system must be examined. Does it do the job it must? Does it communicate the point quickly and accurately? If it does not, what are we to do about that?

Hitherto I have said virtually nothing about the criminal law. In that area there are some deep-seated issues of principle which I would suggest the experience of the last 100 years does not call into question. An accusatorial system leading, in the more serious crimes, to trial by jury, is not without its difficulties but for my own part I see no reason yet to challenge those premises of the criminal law system. Rather, the pressing challenge for lawyers and judges is to make the accusatorial system of trial by jury work better than it does now. Trials have become too complex. Directions to the jury have become too complex. Too often, driven by the fear of the exceptional case, directions to juries are made longer and more complex than once was the case. It was, after all, Sir Leo Cussen to whom reference was made in the joint judgment of the High Court in *Alford v Magee* [7] when it was said that the function of the trial judge is to instruct the jury on so much of the law as they need to know to guide them to a decision on the real issue or issues in the case. Juries do not require a general disquisition on the criminal law. Yet often enough that is what is given to them.

The Profession

The way in which the legal profession has gone about its work has changed markedly since I was admitted to practise. In 1969, when I was admitted, the practising profession was very largely male but, even then, was no longer of uniform ethnic origin. The bar that I joined in 1971 was, still, almost entirely male and of Anglo-Celtic background. Its civil work was based in motor vehicle accident work in the same way as, some years earlier, it had been largely based in landlord and tenant work. Taking silk was a very perilous step for it brought with it an obligation not to appear without a junior who would receive a fee fixed at two-thirds of the silk's fee. Self-promotion of any kind, either at the bar or among solicitors, was not only frowned upon, it was regarded as a serious ethical offence. Solicitors firms had, at their head, senior partners in their very late 50's or 60's. All practices at the bar and on the solicitors' side were almost always based entirely within the State. Interstate admission was very rare and then was usually a relic of some long past move by the practitioner concerned.

Much has changed over the last 30 or so years. Of those changes I single out only some. I choose those I do because they may serve to identify some challenges not all of which may be as well recognised as they should be. The most obvious is that the face of the profession has changed and it is continuing to change. No longer are graduates from the law schools predominantly male and of Anglo-Celtic origin. How we deal with that fact not only will reveal much about the profession, it will shape the way in which the profession is organised and does its work. Are we doing enough to recognise these changes and deal with them appropriately? The challenge is one that confronts society as a whole, but what are lawyers doing about it in the law?

More specific to the legal profession are the challenges that have come from a change in the balance between pursuit of the law as a profession and the conducting of a business. Both elements have always been present in the practise of the law – the self-abnegating pursuit of some higher ideal and the pursuit of commercial success. We cannot for a moment delude ourselves into thinking that the commercial element of practising law has emerged only recently. It has always been there. But the balance appears to have changed. Glossy promotional brochures, time costing, the apparently ruthless disposal of partners above about age 55, the panel system and competitive tendering for work from clients, the pyramidal work structure of one partner plus two associates plus four solicitors plus twelve articled clerks and paralegals are all signs or symptoms of what has changed. What we need to do, however, is not simply to observe the changes or even, if this is thought appropriate, complain about them. What we must do is understand whether these changes present difficulties or opportunities, changes or advantages and we must deal at once with the difficulties and dangers. Of those, there are, I think, two that require consideration.

The graduates emerging from our law schools are the best and brightest we have seen. Or at least the difficulties of obtaining law school admission suggest that they should be. Yet all too often we find that many of this generation are turning away from the law in the years immediately after admission to practise. Why? Is this telling us anything about the way in which the law is being practised today? Do we have a proper balance between the professional ideal and the commercial desire or, as some would have it, commercial imperative? Are our young graduates being used in the practise of the law or are they being used as highly paid clerks? Are principals and associates (to whom the young graduate looks as role model or awful example of what lies ahead) practising law or are they administering large commercial enterprises in which legal decision-making is relegated to others to generate the draft which they will sign? Sir James Gobbo considered these issues in last year's Leo Cussen Lecture and I need do little more than refer to what is said there about the topic.

The second of the difficulties and dangers is closely related. No client likes being told "no". No client likes being told "you will lose". Very often, however, lawyers should give the client such bleak but steely-eyed advice. Are we seeing the commercial urge to placate the client, lest the client go elsewhere, dull that resolve? Does the client shop around until congenial advice is given, presumably in the hope, Micawber-like, that something will turn up? If that is happening, why is

it happening? Is the law just another commodity to be bought by the metre or the tonne, or do its practitioners owe obligations beyond themselves and their clients?

I would hope that you would find, on careful analysis, that the difficulties and dangers I mention do not exist. But I fear we all must ask the questions. If we do not, we risk serious damage.

The law as panacea

The variety of issues that come before the courts is now greater than ever before. There are many reasons why that is so but in many cases it will be found that the rights that are claimed are said to be based either in particular statutory provisions or in some over-arching statement of individual rights. I am not concerned to say whether the making of such claims is good or bad any more than I am concerned to say whether the time of the courts is well spent dealing with such claims. Those are matters for others to consider. What I do want to draw to attention, however, is a pressing need for us all to consider whether the law can or should be regarded as a universal solvent for an individual citizen's hurts or all of society's problems.

The legal system is a human system administered by fallible individuals. While it is to be hoped that those who participate in its activities will act justly and wisely, wisdom, fairness and experience are not the exclusive province of the legal system. Not every social problem, not every hurt suffered by an individual, requires or even admits of a legal solution and it would be quite wrong to think that they did.

Sometimes, however, it seems that a contrary view may inform what is suggested that the law can do. Because some legal principles can be stated at a high level of abstraction and some statements of individual rights are phrased in aspirational rather than normative terms, it is suggested that judges have an ability to decide some cases according to no principle other than an intuitive and individual sense of what is fair, just or reasonable. Furthermore, for like reasons it is suggested that judges may, in the name of "policy" decide cases in a way that will further some end seen by the speaker as socially desirable. Thus resort to law is seen as a panacea. "Sue, that will provide a solution."

Fairness, justice and reason should all be terms that can be applied to particular legal principles. In the High Court there will often be cases in which difficult choices must be made and those choices must be informed by considerations subsumed in the rubric "policy". But judges are not free to roam as they please in search of what seems to the individual to be a good or desirable outcome. Judges are bound to do justice according to law, not as if each were a philosopher king in whom all knowledge and wisdom resides. That is why the law cannot be seen as a panacea. Society must deal with its various difficulties in various ways. The law cannot solve them all and no one, least of all those who are in the legal system, should think it can.

Change

Finally, there is the phenomenon of change itself. It is rightly said that the law is a conservative force in society. Litigation almost always concerns events that are past, to which, with very few exceptions, the law that is applied is the law that was in force at the time of the events. Courts and litigation lawyers are, therefore, generally looking backwards. Even those who prepare agreements designed to govern the future relations of parties or give advice about how future conduct should be ordered, do so with their eyes in the rear view mirror of what has been found in the past to be the applicable law.

The rate of change in society now appears greater than once it was. Whether history will identify the changes of the late 20th and early 21st century as being as dramatic as, for example, the changes brought about by the industrial revolution, may not matter. What does matter is that business, community and social relations are changing. The legal system must be able to consider whether those changes require it to change. And it must undertake that task much more often than once was thought necessary.

In order to do that, it is essential to identify the elements of the system that are properly regarded as fundamental. It is, therefore, necessary to have a clearly developed understanding of what is meant by the rule of law, of what is meant by judicial independence, of why judicial independence is important. Especially is that so when debate on even the most complex issues is all too often conducted through the medium of seven second sound bites. If the principles I have mentioned are important, and I think they are fundamental to the way in which our society is organised, all participants in the legal system must understand what they mean and why they are important. Only then can the debate be conducted on a sound basis.

Just as it is important to identify and understand fundamental principles, it is equally important to understand what is *not* important and what is *not* fundamental. No doubt that is why what used to be a sharp distinction between civil law inquisitorial systems and common law adversarial systems of litigation can be seen to be becoming blurred. The civil law systems are increasingly taking on aspects of the common law adversarial system. Common law adversarial systems are learning from the civilian traditions.

If we are right to think that the pace of change in society will continue unabated, or even increase, the legal system must be prepared to deal with change. It is not enough to say that what has been done in the past is best unless we know why that is so and can articulate those reasons. That, we can do, only if we have examined the fundamental underpinnings of our legal system.

Of all the lessons that we may learn from looking in the rear view mirror, it is that which stands out. Unless we know not only *what* we do but *why* we do it, we will learn nothing from what has passed. And I need hardly remind you that unless we learn from it, we will be condemned to repeat it.

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[1]. (1992) 175 CLR 1.

[2]. *Masciantonio v The Queen* (1995) 183 CLR 58 at 67.

[3]. Gleeson CJ, "Individualised Justice — The Holy Grail", (1995) 69 *Australian Law Journal* 421.

[4]. *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich. See now *Sullivan v Moody; Thompson v Connon* [2001] HCA 59.

[5]. See, for example, *Sentencing Act* 1991 (Vict), s 5.

[6]. Bryan A Garner, *A Dictionary of Modern Legal Usage*, 2nd ed (1995), "Issue-Framing".

[7]. (1952) 85 CLR 437 at 466.