

TRIBUTE TO SIR OWEN WOODHOUSE

I have already been introduced in passing by Geoff McLay when he was quite critical of the fine distinctions drawn by the Court of Appeal in a decision relating to nervous shock. Let me plead my defence: I was not a member of the Court; alternatively, if I was a member of the Court, I delivered a dissenting judgment; alternatively, if I was a member of that Court and I did not deliver a dissenting judgment - then, I was unwell on the day.

I also thought that Sir Geoffrey may have been getting pertinently personal when he referred to the application of ACC to a "one-legged judge". Now, I have never been described as a one-legged judge, but often, perhaps too often, or perhaps not often enough, I have been called a one-eyed judge. We would all accept that one-eyed judges are beyond rehabilitation. But should Sir Geoffrey in his reforming zeal choose to ensure that compensation is paid to one-eyed judges, I will be pleased to live out the rest of my days in relative affluence.

So, as a retired one-eyed judge, it is a great privilege to be asked to conclude today's Symposium with a tribute to Sir Owen Woodhouse.

Of course, it is difficult not to duplicate what speakers have already said. But I will try and avoid that by being largely irrelevant. Apart from the explicit and generous acknowledgements made by the various speakers today, the fact that they have prepared and presented such carefully researched and learned papers is itself a tribute to Sir Owen.

I know that Sir Owen would not wish me to pay him a tribute without acknowledging the assistance he had from the other members of the Commission he chaired; Mr H L Bockett and Mr G A Parsons. They undoubtedly provided Sir Owen with real support.

Not more than a day or so ago, my preparation of this tribute to Sir Owen was interrupted by the Symposium's organizer, Associate Professor Rosemary Tobin, with a firm instruction sternly delivered. I was not, repeat not, to "go over the top".

With a speed of thought that escaped me during my professional lifetime, I at once deduced that Sir Owen had been in touch with Associate Professor Tobin. But this was to be expected. Even though his achievements are anything but modest, Sir Owen is essentially a modest and self-effacing man. I know that any tribute, over the top or not, will cause him embarrassment.

So I will do what lawyers often do in such circumstances and retreat behind a quotation. The extract comes from a speech written in 1969 when the Woodhouse Report was being widely debated.

This beautifully crafted Report is the work of a man with a deep-rooted social conscience fully aware of the needs and aspirations of the common man and woman. His Report reflects his vision of a more humane, harmonious and responsible society. As such, it represents the most far-reaching exhortation to the community to engage significantly with those who are less fortunate since the enactment of the Social Security Act in 1938. The comprehensive and unified scheme which he advances to replace a fragmented and capricious response to the problem of personal injury is conveyed with a clarity, cogency and cohesiveness that few, if any, authors could emulate. And it reveals the author's love of language being couched in such disarmingly straightforward and precise writing that it cannot but fail to persuade. Indeed, the sheer strength, power and eloquence of his expression, it is to be predicted, will defuse and mute much of the criticism which would otherwise develop in opposition to a system that will dislocate so many vested interests and will, in the fullness of time, lead to the introduction of the appropriate legislation in this country.

Undoubtedly there are those who would say that this quotation is over the top. Yet others would say that the extract is a succinct, realistic and balanced appraisal of the Report. I am of the latter view - but then I would be. After all, I wrote it.

Having regard to the fact that this is the 40th anniversary of the Accident Compensation scheme it is right that I should focus on the Woodhouse Report.

But I do not want to let the occasion pass without acknowledging Sir Owens's other achievements. He has had a number of successful careers; in the military, in the law, and as the first President of the Law Commission.

In unilaterally enlarging my instructions in this way I am doing no more than Sir Owen did with the terms of reference for the Royal Commission he headed in 1966. Those terms, you will remember, were limited to "claims for compensation or damages in respect of persons incapacitated or killed in employment". My tribute, like the Report, is not to be limited by something so insignificant as jurisdiction.

But I will touch on only one other aspect of this multi-talented man, and that briefly. It is his work as an appellate judge.

Sir Owen's appointment to the Court of Appeal and then to the Presidency from 1981 to 1986 completed a stellar judicial career. His contribution is extolled in Professor Peter Spiller's outstanding history of the Court of Appeal.

Professor Spiller does not, I think, "go over the top" in noting that Woodhouse J blended his considerable experience in the law with a social conscience and a generosity of spirit. Nor does he do so in observing that the Judge strove to interpret the law and legislation in a way which was fair, bearing in mind the interests of the average man and woman. He constantly used as a reference point the reasonable and informed person in the street. He

sought to arrive at decisions which he considered accorded with reality and common sense.

Characteristically, says Professor Spiller, Woodhouse J's contentious interpretation of the Contractual Mistakes Act of 1977 was shaped by his opening statement that Mrs Ozolins was "an elderly widow who made a mistake". It is true that Woodhouse J's interpretation began with the statute and disregarded the common law which the statute displaced.

The fact that Sir Owen and I are, as I understand it, the only ones in the whole of the legal profession who believe that Sir Owen got it right, means no more than that there is a scarcity of lawyers in the profession who have an empathy for elderly widows who make mistakes. For reasons we cannot understand, vindication is clearly being delayed beyond our lifetime.

In the mould of Lord Denning, Sir Owen accepted that judges have a creative role and an obligation to closely examine rules and principles to determine their relevance in terms of justice and logic. Precedent, he said, should not be allowed to produce a situation where legal principle is left "hanging on a gradually withering vine".

Before returning to the Woodhouse Report, I want to shortly recount some personal reflections which point to the manner and character of the man we honour. They may add a dimension to the person you know, respect, or even revere as the author of the Woodhouse Report.

I first came to know Sir Owen when he was appointed to the Supreme Court, now the High Court, in Auckland when I was still a young, wet behind the ears lawyer. I appeared before him from time to time and found him to be courteous, humane and wise.

I met Sir Owen at a social gathering of lawyers. As a young, wet behind the ears lawyer I spoke to him with great deference and much reverence, and politely asked him how he was finding life on the Bench.

Sir Owen replied that it was often boring. You come into Court at 10 o'clock to start a three to five day case, he said, and by 11.30 when counsel for the plaintiff has finished his opening address, you know what it is all about. I was appalled at this lack of judicial correctness. I was even more appalled many years later when on the High Court to find that I was the same kind of judge.

Then, in 1969, two years after its publication, the then highly controversial Woodhouse Report was the subject of a panel discussion at the New Zealand Law Society's Law Conference in Rotorua. I had the privilege, along with the late Sir John White, of being asked to speak in favour of the Report. The Report was opposed by two barristers, the identity of whom does not matter now if, indeed, it mattered then.

At Sir Owen's request, the Chairman of the session announced that Sir Owen would be absent from the hall so as not to inhibit discussion.

After the session was over, I came across Sir Owen. He had been advised of my sterling defence of the Report. Sir Owen thanked me, and then remarked; "You must be a very intelligent young man".

I adopted this comment as a sobriquet, and for some time utilized it as a sort of rudimentary IQ test for the legal profession: if you were in favour of the Woodhouse Report you were intelligent, if you were not in favour, then, you were not intelligent.

It was a rudimentary IQ test that, over the years, I came to apply to any number of issues confronting the legal profession, such as concurrent liability in contract and tort, an independent principle of good faith in contractual dealings, a basket of remedies

approach to remedies, and so on, and so on. It may come as no surprise to you to learn that the bulk of the profession remain determinedly unintelligent.

Sir Owen also had the habit of asking disconcerting questions from the Bench.

I was appearing before him when he was President of the Court of Appeal on a question of statutory interpretation. I had marshalled and advanced all the canons of construction that favoured the meaning for which I sought acceptance, and then marshalled and destroyed all the inevitable canons of construction that were contrary to that meaning. At the conclusion of my long and compelling argument, Sir Owen looked down at me and simply said, "But what is the sense of the section?"

Momentarily unable to grapple with this enormously non-formalistic question, I bent over my papers, including the section in issue. And then to my utter consternation, the sense of the section jumped out at me - and I stared defeat in the face.

I don't know that I ever advanced a technical argument on a question of statutory interpretation again. And I was pleased, in my own time on the Court of Appeal, to be able to record the phrase, "the sense of the section", in more than one judgment.

Then there was the occasion when I advanced a watertight argument on behalf of one of this country's largest corporations. I finished with a fine peroration. Sir Owen leaned forward and mused; "Yes, Mr Thomas, but what would that do for the little man?"

To say that I was disconcerted would be an understatement. My client was a large public company; the two respondents were large public companies; what on earth did the little man, whoever he might be, have to do with the case?

But as I pondered the relevance of this seemingly irrelevant question, it struck me that, if my proposition were to be accepted, the law would unfairly advance the cause of the commercially strong and powerful at the expense of the weak and vulnerable.

And who is to say that the seeds of my theory of ameliorative justice, which I included in my 2005 book on the judicial process, were not sown on that day.

The benefit was not all one way. I must confess to a touch of duplicity and manipulation.

Many of my cases before the Court of Appeal were rightly or wrongly described by others as being at the "cutting edge of the law". There was the rub: how to achieve success with such cases? The answer was to ensure that it was Sir Owen who presided over the Court.

But how could this be done? It could be done, and was done, by the simple expedient of sending the President, Sir Owen, a memorandum some time before the case was set down for hearing. Of course, it would have been quite improper to say outright; "Your Honour, I really want you on this case". One required a pretense, or needed to fabricate a pretense, for the memorandum. It did not matter what the pretense was.

The key was in the first sentence: "This appeal involves an exceptionally interesting point of law". The point could then be spelt out, strained perhaps, in the most evocative of terms. Never was I disappointed, on rising to announce my appearance, to see that Sir Owen was presiding over the Court, beaming, no doubt, in anticipation of an exceptionally interesting point of law.

These seemingly aimless personal reflections are not, when analysed, without value in assessing the measure of the man we honour today. They reveal that Sir Owen was -

- a judge with a deep-rooted understanding of the dynamic of the common law;

- a lawyer who resisted the stilted and stifling approach of his formalistic colleagues;

- a person with a strong empathy for the weak and vulnerable, the disadvantaged, and the less-privileged; and

- a person with a forthright commitment to the role of law in its social context.

And all those attributes were brought to the task of the Royal Commission for Personal Injury in New Zealand.

The thrust of the Report does not need to be recounted to this audience. Suffice it to say, that the concept of community responsibility was at the heart of the Report. Sir Owen perceived personal injury as an inevitable incident of social progress and ordained that society as a whole should accept responsibility for the certain flood of casualties. He believed that "the statistically necessary but random victims were entitled to receive a coordinated response from the nation as a whole". All would contribute to the scheme and all would share pursuant to the concept of comprehensive entitlement.

Over the intervening years the basic principles of the Woodhouse Report have been closely studied and, with the odd exception of right wing ideologues, have been extolled both here and abroad. I know from my own experience in Canberra in 2003 that covetous eyes were cast across the Tasman when the medical insurance behind the common law system collapsed and had to be rescued by the Government.

But we all know that the fate of the ACC scheme has not been as favourable as its progenitor would have wished. Legislatures have been persuaded to depart from the basic principles of the Report and substitute for the single, coherent scheme originally enacted a system that accommodates private enterprise. The fundamental concept of community responsibility has been diluted by a market-based insurance approach.

Most of these points have been covered in the course of the day and I will take my litany of the respects in which there has been a departure from the basic principles of the Woodhouse Report as read.

But on an occasion such as this, and in a tribute to Sir Owen, how profound need be our disappointment that the purity of the principles may have been impinged? Indeed, it need not be at all intense.

In the first place, we should bear in mind that we still have a system which provides universal coverage for personal injury around the clock and one which preserves the no fault principle for the payment of compensation. Whatever erosion the original scheme has endured, it is still infinitely preferable and less costly than the fragmented and capricious system it replaced.

Once seen as a revolutionary experiment, it now represents a demonstrably successful piece of enlightened social legislation. Not only the hundreds who have suffered a loss or a personal injury, often serious, have benefited, but people generally can take heart from fact that they belong to a society that is, at least in this respect, both mature and responsible.

In the second place, and I will close on this note, nothing that has transpired can diminish the brilliance of the Report itself and the profound impact it has had on social, political, legal and economic thinking. Its enactment by a Government subjected to hostile pressures from vested interests has not been replicated anywhere in the common law world. Elsewhere, self-interested pressure groups have proved too strong and too vocal.

The Report recognises that the persistent creed of libertarian individualism is neither equitable, nor realistic, nor sustainable. It provides a benchmark for the realisation of a higher aspiration; that the community is collectively responsible for the cost of the random misfortunes and mishaps that befall good people living and working in an interdependent economy and an increasingly complex society.

To the Friedmanite apostles of creative destruction and the omniscience of the free market, the Woodhouse Report and the resulting scheme must pose a galling and monumental reminder that the human spirit is capable of an ideal that surpasses the constricting realities of self-interest, greed and wealth.

And therein lies the core of my tribute to Sir Owen Woodhouse. His Report, and the spirit which pervades its pages, vest human endeavour with a compassion, an empathy and a generosity of spirit which the dignity and worth of ordinary people fully deserve.

Perhaps, after all, notwithstanding his vast intellect, his extensive learning and his capacity to write beautiful prose, Sir Owen is an ordinary man. I suspect that he would not wish it otherwise.

But it is otherwise. Although not in my script, I will conclude by adopting and expanding the phrase used by Ross Wilson this morning, to which Sir Owen so audibly demurred.

Put simply: today we do not honour just an ordinary man; today we honour a truly great man.