Dinner Address
The Law: Past and Present Tense

Hon Justice Ian Callinan, AC

I do not want to revisit the topic of judicial activism, a matter much debated in previous proceedings of this Society. But it is impossible to speak about the law as it was, as it is now, and as it may be in the future, without at least touching upon a number of matters: precedent, judicial activism, and whether and how a final court should inform itself, or be informed about shifts in social ways and expectations.

To develop my theme I have created a piece of fiction. The law, as you all know, is no stranger to fictions.

It is not the year 2003, it is not even the year 1997 when the High Court decided *Lange v. Australian Broadcasting Corporation.*[1] It is the year 1937. Merely five years later Justice Learned Hand in the United States would observe:

> "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country".

Only seventeen years earlier the High Court had decided the landmark *Engineers' Case.*[2] This, you may recall, was the case in which the Court held that if a power has been conferred on the Commonwealth by the Constitution, no implication of a prohibition against the exercise of that power can arise, nor can a possible abuse of the power narrow its limits. This was a revolutionary decision. It denied what had been thought to be settled constitutional jurisprudence, that the Commonwealth Parliament could not bind the Executive of a State in the absence of express words in s.51 of the Constitution to that effect. Not only did the case put an end to the doctrine of the implied immunity of the States, but it also made clear that there could be found in the Constitution very few implications, and only of the most necessary kind.

I return to the year 1937. Publishers are having a hard time. The Depression has greatly reduced advertising. Many people have, however, managed to save up to buy wirelesses. Radio broadcasts provide a highly desirable form of cheap entertainment and compete with the print media. Entry to grand deco picture theatres can be had for a few pence. Technicolour and pure sound are also seducing the masses. Already it has been demonstrated in the United Kingdom that television as a medium of mass communication is feasible and inevitable.

The hitherto powerful proprietors of the print media see three solutions to these menacing competitors. The first is obvious enough. It is to embark upon an early form of convergence: to buy up and take a position, preferably a majority position, in the owners of the electronic media and the film studios.

The second solution is a little less obvious although its end is clear enough, to treat the news as itself a form of entertainment. The third is the old stand-by, to reduce costs. There are risks in pursuing all of these. Infotainment, as it has come to be called, requires a degree of sensationalism, that is to say, exaggeration and colour. Contrarianism and polemicism are to become the order of the day. The theory is that they will arouse strong emotions and stimulate sales. The best way to reduce costs is to reduce staff. Fewer journalists, using less time to check and counter check, will save money.[3]

The greatest risk associated with these is of a liability for defamation. But the proprietors are resourceful, and there are some issues, particularly issues of profit, which are so important that they require the making of a common cause. The Media Association well knows who is the best defamation

silk in the country, Fox, KC. The office bearers of the Association and its solicitor wait upon Fox. Is there any systemic way in which, they ask him, the risk of defamation may be reduced? Fox conceives a bold plan. Somewhere, he says, in the interstices of the Constitution there will be, and I will find, a constitutional implication of free speech.

The solicitor is disbelieving. What about, he asks, the *Engineers' Case*? Did that not effectively abolish constitutional implications? Fox replies, only unnecessary ones. Free speech, Fox ringingly states, is a necessary implication.

The solicitor remains sceptical. Our Constitution contains nothing like the First Amendment to the United States Constitution. The authors of our Constitution knew all about the First Amendment and yet included nothing about free speech in it. Besides, no-one in the last 36 years has ever suggested that any implication of it could be found in our Constitution.

Fox, KC is undeterred. That sounds like a piece of mere originalism to me, he says. The times have changed. No-one is going to be interested these days in what the founders – those old waistcoated and whiskered men – thought. This is a time to be bold and creative.

The office bearers of the Association like Fox's style. They search for a test case. They find one in which a politician is suing one of their members for a vast sum of money for defamation.

History is made. The media have a great triumph in the High Court. The judgment uses language to this effect. Since 1901, the common law of Australia has had to be developed in response to changing conditions. The franchise has expanded, more people are literate, the political structures have changed, as have the means of mass communication, especially the electronic media. All of these require that a different balance be struck between freedom of speech about political matters and the protection of personal reputation. The Court is bound to examine these changed circumstances. Sections 7, 24, 64, and 128, together with some other related sections, require careful consideration. From all of these the Court infers an implied right of freedom of communication between the people of the nation concerning political or government matters to enable them to exercise a free and informed choice as electors.

Of course this was not the actual language of the High Court in any real case in 1937. It is however the substance of the language of the Court 60 years later when it decided *Lange v. Australian Broadcasting Corporation*.[4] But it could well have been the language of the Court in 1937. To the perceptive it was already clear that the message would be the medium, and the medium would be electronic.

May I come forward in time to the present? Mr Jones is a longstanding and popular president of the Union of Tinkers and Matchmakers. He wishes to crown his career as a unionist by election to Parliament. He is, in all respects, an ethical, honourable and principled person. But like all people who have participated in public life, he has his enemies. Indeed, he has enemies whom he has not even met, and of whom he has never even heard.

One of his enemies telephones a journalist on *The Daily Clarion* whom she knows. She tells the journalist that Jones is unfit for public office. Of her own knowledge, ten years before he had covered up a defalcation by a committee man of the Union of $70,000.

Jones had gained nothing from the events in question. And as with any story of the past, there are both elements of truth and falsity in its recounting. The truth was that Jones became aware of the defalcation a few days after it occurred, at the same time as he learnt that the perpetrator had taken the money to pay for medical treatment for his daughter which was obtainable only in the United States. He formed the view, rightly or wrongly, that his friend must have been temporarily deranged. Mr Jones is not without important friends. He arranges for a credit union to lend his friend $70,000 on a mortgage over his house at a low interest rate, to enable him to make good the loss. The money is restored. The committee man holds his office, and no-one speaks of what has happened for ten years.

The journalist makes a few enquiries. Not surprisingly, she learns little. She does not try to contact the credit union that lent the money. Indeed, she does not even ask the *Clarion*'s solicitor to

search the Register of Titles, to see whether a mortgage to secure a loan by the credit union was registered about the time of the alleged defalcation. She tries, but fails, to contact the committee man, who has moved to a different address. She writes her story. It is a strong story. It is highly accusatory. She uses the words "scandalous", "dishonest", "fraudulent", "disgraceful", "cover-up", and concludes with the question, "How could you let this man Jones loose near the public purse?".

When the story is written, and only ten hours before the printing presses will begin to turn, she telephones Mr Jones's number. It is a Friday evening. She cannot reach him because he is at the ballet. She adds only one sentence to the article, "*The Daily Clarion* attempted to speak to Jones, but he was unavailable for comment".

The sub-editor likes the story. He makes a few minor changes, and one embellishment by way of headline of which he is particularly proud: "Gotcha. Candidate caught out in fraud?"

He selects from the paper's morgue a photograph taken at the Union's picnic fifteen years earlier. In it Mr Jones has a schooner of beer to his lips.

The story is printed and causes a sensation. *The Sydney Repeater*, *The Melbourne Echo*, and *The Canberra Responder* take it up. After all, the *Clarion* would not have printed it had it not been true. By the end of the following week, no radio station, no television channel, and not even one provincial newspaper has failed to repeat, enlarge upon, and more devastatingly, comment on Mr Jones, his morals, and his unfitness for public office.

But just as powerful friends had come to his aid in the past, they will do so on this occasion. They are prepared to fund, no matter what it costs, a defamation action against the *Clarion*.

Fox, KC, after elevation to the Bench, has passed on. He has been succeeded by the equally creative Wolf, QC. Mr Jones's solicitor gets to him before the *Clarion*, which had failed to renew his retainer, can. A conference is arranged. Jones's solicitor is an old campaigner, and bears the scars of many Quixotic causes. He has two particular concerns. The journalist seems to have made some enquiries, although possibly not enough for the purposes of the constitutional defence. There is no doubt that Mr Jones was engaged at the relevant time in political affairs. His solicitor fears that the *Clarion* will succeed on a defence of freedom of political communication.

But like his predecessor, Fox, KC, Wolf, QC thinks conceptually and can rise above petty concerns. The times have changed, he says, and, because Wolf likes the language of the market place and mixes his metaphors, he points out that the media have become a monolithic critical mass answerable to no-one, and are bent upon inflicting mortal damage to every public reputation that puts its head above the parapet.

That's as may be, the solicitor cautiously remarks. But even if it is true, how would you convince the Court that it was? All that you have to do, Wolf replies, is look around you. That is what the Court did when it found the implication of freedom of political communication. There was no evidence called on the point. I will argue that the times require the dismantlement of the defence found in 1937. But I have a fall back plan, in any event. Cryptically he adds, I will tender a lecture to the Court, if they let me, that is.

The great legal adventure begins in one of the Supreme Courts of the States. Wolf's attempts to introduce evidence of what he says can be seen by anyone with eyes to see, of the power and pervasiveness of the media, and their deterrence of political involvement by the less than lion-hearted, fail. If what he claimed was self-evident, the Court responds, it is not a matter for evidence, certainly not expert evidence. Furthermore, the so-called facts on which he relies are legislative, and not adjudicative facts, and on that ground also not admissible in evidence.

The *Clarion* of course relies upon the constitutional defence. All of the courts below the High Court are bound by its 1937 decision recognising it. *Jones v. The Daily Clarion* inexorably makes its way to the High Court.

There, Wolf, QC is allowed to read, on a provisional basis only, subject to a later ruling as to its admissibility in evidence, its relevance, or acceptability as a submission adopting it, that which he wished to introduce in the courts below. It is this:

> "Today information is abundant, but it's often mixed with misinformation and a little spice of disinformation. It can be hard to check and test what we read and hear. There are easy cases: we can check weather forecasts for their accuracy by waiting for tomorrow; we can rumble supermarkets that don't sell goods at advertised prices. But there are hard cases: how can parents judge whether to have a child vaccinated or to refuse a vaccination? How can we tell whether a product or a service will live up to its billing? Yet for daily and practical purposes we need to place our trust in some strangers and some institutions, and to refuse it to others. How can we do this well?
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> "Meanwhile, some powerful institutions and professions have managed to avoid not only the excessive but the sensible aspects of the revolutions in accountability and transparency. Most evidently, the media, in particular the print media – while deeply preoccupied with others' untrustworthiness – have escaped demands for accountability (that is, apart from the financial disciplines set by company law and accounting practices) .....
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> "Newspaper editors and journalists are not held accountable ..... Outstanding reporting and accurate writing mingle with editing and reporting that smears, sneers and jeers, names, shames and blames. Some reporting 'covers' (or should I say 'uncovers'?) dementing amounts of trivia, some misrepresents, some denigrates, some teeters on the brink of defamation. In this curious world, commitments to trustworthy reporting are erratic: there is no shame in writing on matters beyond a reporter's competence, in coining misleading headlines, in omitting matters of public interest or importance, or in recirculating others' speculations as supposed 'news'. Above all there is no requirement to make evidence accessible to readers.
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> "We may use twenty-first century communication technologies, but we still cherish nineteenth century views of freedom of the press, above all those of John Stuart Mill. The wonderful image of a free press speaking truth to power and that of investigative journalists as tribunes of the people belong to those more dangerous and heroic times. In democracies the image is obsolescent: journalists face little danger (except on overseas assignments) and the press do not risk being closed down. On the contrary, the press has acquired unaccountable power that others cannot match. Rather to my surprise and I think ultimately my comfort, the classic arguments for press freedom do not endorse, let alone require, a press with unaccountable power. A free press can be and should be an accountable press.
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> "Accountability does not mean censorship: it precludes censorship. Nobody should dictate what may be published, beyond narrowly drawn requirements to protect public safety, decency and perhaps personal privacy. But freedom of the press does not also require a licence to deceive. Like Mill we want the press to be free to seek truth and to challenge accepted views. But writing that seeks truth, or (more modestly) tries not to mislead needs internal disciplines and standards to make it assessable and criticisable by its readers.
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> "There is no case for a licence to spread confusion or obscure the truth, to overwhelm the public with 'information overload', or an even more dispiriting 'misinformation overload', let alone to peddle and rehearse disinformation".

I interrupt my parable, for that is what it is, to make it clear that the last six paragraphs are not my words or an expression of any opinion of mine. They are the actual words of the English philosopher, Baroness O'Neill, in the fifth and last of her Reith Lectures for the BBC this year.

After reading these passages, Wolf, QC makes the submission that the Court should develop the law in response to changing conditions. The common convenience and welfare of society to which the

High Court had frequently referred on previous occasions, including in 1937, now require the inference of a different implication, one that would compel a higher level of accountability upon the media, and one which would have the practical effect that well meaning and able people, such as Mr Jones, and others in public life, would not be deterred from seeking election to Parliament, or of holding other high office by the threat of extravagant and vicious reporting, and the magnification of long past errors of judgment.

I regret to have to say that I cannot tell you whether Mr Jones succeeded. Let us just say that the decision is reserved.

Why have I made up this rather long, and I fear, somewhat discursive story? I have done it to demonstrate the dilemmas that courts must face in dealing with assertions about changing circumstances. To what extent can a court know, or should it seek to find out, that circumstances have changed? Is one judge's judicial notice another's blind spot?

I must say I found it difficult to believe, as I read in the recently published biography of Sir Owen Dixon, that that most eminent judge, unlike practically any other sentient being of his era, could be totally unaware of the existence of Ginger Megs.

One of the difficulties about the doctrine of precedent is that although all common law judges subscribe to it, few invariably, rigidly apply it. At one extreme, Lord Denning of Whitchurch said of the doctrine that it did nothing to broaden the bases of freedom, rather it narrowed them. He called in aid the poem *Aylmer's Field*, by Tennyson:

"That codeless, myriad of precedent,
That wilderness of single instances".[5]

Why do judges not universally apply the doctrine of precedent, or of *stare decisis*? I will try to answer that with a practical example. In 1969 the High Court decided in *Beaudesert Shire Council v. Smith*[6] that a local authority was liable for an intentional positive act forbidden by law and inevitably causing damage to another. That does not sound like an unreasonable proposition by any means. There was some old authority to support it.[7]

The decision was criticized from time to time.[8] Barristers were loath to rely on it. By 1995 no one could cite a case in which it had been applied.

In that year in *Northern Territory v. Mengel*[9] the High Court concluded that *Smith* should be overruled. This was so, the Court said, because of difficulties associated with notions of "unlawful act" and "inevitable consequences".[10]

The criteria[11] for an overruling were said to have been satisfied: in particular, that the principle for which *Smith* stood had not been worked out in a significant succession of cases. Some would say, indeed many in the profession have, that on the application of that criterion, a number of other cases may be looking decidedly shaky.

The question whether a precedent should be overruled, whether it is to be regarded as little more than of curiosity to legal historians, conceals another question: whose precedent, formulated when, and in what circumstances, are we talking about? I have said this elsewhere[12] and I would, if I am not bound to do otherwise, wish to adhere to it:

> "Should this Court take the view, for example, that a decision reached by a majority of three to two should command the same weight and respect as a decision reached by a majority of all the Justices of the Court? Another question which may arise is whether the decision of a bench which itself may have overturned what had for a long time been regarded as settled legal orthodoxy should have a monopoly on the thinking on the topic in question for all time? If the answer to this last question is an affirmative one it would mean that those who support change of this kind would be able to entrench their changes by capitalizing on the caution of those who favour an incrementalist approach. … In *Astley v. Austrust Ltd*,[13] I referred to the disadvantage to people, particularly litigants, who have acted on a perceived, settled state of the law, when the law is restated in a quite

different way. Lord Browne-Wilkinson in *Kleinwort Benson Ltd v. Lincoln City Council*[14] also recently pointed to the anomalous position of a party who had acted on the basis that the law precluded reliance on mistake of law to ground a claim, when the House of Lords decided to change the law to make such a claim then, and in those proceedings maintainable. Legislators can, and usually do enact transitional provisions when they change the law. The courts have so far found and provided no like means of cushioning the impact of decisions which effect significant changes. It may ultimately turn out to be an inescapable concomitant of any role that a final court may arrogate to itself to change the common law markedly, that it do so only in a way which is sensitive to the affairs and expectations of those who have acted upon the basis of what they reasonably took to be the legal *status quo*. If the proposition that judges do not change the law is to be acknowledged as a fiction, then something may have to be done to displace the effect of the other legal fiction, that the law as found by the Court has always been so, and those who may have acted upon a different understanding in the past are nonetheless bound by the Court's most recent exposition of the law. Merely to state the problems is to expose the difference between the legislative and curial roles. Certainty, predictability, the desirability of a gradual and incremental development of the common law only, and respect for the knowledge, wisdom and experience of those who made the earlier decision are very important considerations. The last of these matters will always however invite the question whether those who made the decision under challenge themselves paid due deference to those who in the past held a different opinion".[15]

More succinctly and colourfully, Justice Roberts of the United States Supreme Court, said in 1944 – I paraphrase – a decision is not an excursion railway ticket, good for the day only.[16]

The pursuit and identification of public opinion by judges for the purpose of deciding cases are exercises fraught with danger. Ask any experienced politician how hard it is to gauge even majority opinion. Not a few Prime Ministers have miscalculated to their detriment public sentiment. If politicians find it difficult, how, it may be asked, can courts expect to do it with confidence? The truth almost certainly is that at any one time there is no single public opinion but a multiplicity of them. Public sentiment, to the extent that it may be singular just like fashion, is in any event liable to change overnight. It is as elusive as a spark from a furnace. It is not the business of the Court to decide cases on the basis of any judge's perception of it.

That, ladies and gentlemen, really sums up all that I would wish to say to you this evening on the law, past and present tense.

Endnotes:

1. (1997) 189 CLR 520.

2. (1920) 28 CLR 129.

3. As recently as today I read (in *The Australian Financial Review* of today) Christopher Hitchens's review of Bob Woodward's latest book on the Presidency of the United States, *Bush at War*, in which the reviewer referred to the *Washington Post's* requirement that journalists check their sources as "pedantic".

4. (1997) 189 CLR 520, especially at 565-567.

5. Tennyson, *The Romanes Lecture* (1959), at 1.

6. (1966) 120 CLR 145.

7. Summarized in (1966) 120 CLR 145 at 154-156.

8. For example, *Elston v. Dore* (1982) 149 CLR 480 at 491; *Takaro Properties Ltd v. Rowling* [1978] 2 NZLR 314 at 339; *Van Camp Chocolates Ltd v. Aulsebrooks Ltd* [1984] 1 NZLR 354 at 359; *Lonrho Ltd v. Shell Petroleum Co Ltd* [No 2] [1982] AC 173 at 188; *Copyright Agency Ltd v. Haines* [1982] 1 NSWLR 182 at 199; Fleming, *The Law of Torts*, 8th edn (1992) at 702; and Balkin and Davis, *Law of Torts* (1991), at 687.

9. (1995) 185 CLR 307.

10. *Ibid.*, at 344.

11. In *John v. Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439, the criteria for the Court to review and depart from an earlier decision were set out by Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ. These are: 1. The earlier decision does not rest upon a principle carefully worked out in a significant succession of cases. 2. There is a difference between the reasons of the majority judges in the earlier decision. 3. The earlier decision has achieved no useful result, but has rather led to considerable inconvenience. 4. The earlier decision has not been acted on in a manner militating against its reconsideration.

    See also *Queensland v. The Commonwealth* (the *Second Territories Representation Case*) (1977) 139 CLR 585.

12. *Esso Australia Resources Ltd v. Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49, overruling *Grant v. Downs* (1976) 135 CLR 674, particularly at 101-107.

13. (1999) 197 CLR 1 at 56-57.

14. [1999] 2 AC 349 at 358-359.

15. *Esso Australia Resources Ltd v. Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 104-105 per Callinan J.

16. *Smith v. Allbright* (1944) 32 1 US 649 at 669.