
Review by David Ash.

Murray Gleeson is not the sexiest man I ever met. However, he is the dominant counsel and judge of our age, and Michael Pelly’s account should be read for this alone.

In a foreword to Graham Fricke’s 1986 Judges of the High Court, Sir Harry Gibbs said:

The writer of the biography of a member of the High Court who has not engaged in politics has no easy task. The life of such a judge has not usually been an adventurous one, except in the field of the intellect, and a scholarly analysis of judgments on legal topics, and an examination of the development of legal topics, and an examination of the development of legal principles, does not make exciting reading for the layman. It seems too that nowadays judges rarely keep diaries or write memoirs which might reveal the characters and abilities of their colleagues, and perhaps themselves, more fully and intimately than public statements are likely to do.

Like Judge Fricke, Pelly has overcome these difficulties. He gives a lively account of Gleeson’s career. Reading it, one wonders whether giving a diary to Gleeson would have been like giving one to Sisyphus as a tease, only to have it returned to read a life more fully lived than one’s own.
Like the other David Copperfield, Pelly starts at the beginning. On page one, Gleeson’s maternal grandfather is asking the three-year-old what he wants to be. “I’m going to be the Pope.” Better off being Bill Dovey, the Free Presbyterian retorts. And so we have one topic and one theme which have run on through Gleeson’s life.

As to the topic, in the same year of this discussion, Dovey’s daughter would marry Gough Whitlam (or, for Gough, “my finest appointment”); thirty-three years later, Gleeson would advise on the legality of dismissing Gough; a further five years on, a member of Ian Sinclair’s jury would maintain the rage for seven hours before agreeing to a verdict which had Gleeson “just flop[ping] forwards on the bar table as the tension drained away”. Son Tony Whitlam has provided Pelly good insights into junioring Gleeson; and Robyn, Gleeson’s wife, was schooled under the stimulating and controversial headmistress-ship of Gough’s sister Freda, later moderator of the NSW synod of the Uniting Church. In a rare display of imprecision, Gleeson failed to be delivered on Gough’s birthdate, but Lionel Murphy (b 30 August 1922) filled the breach.

As to the theme, that of the Catholic Church, more later.

Fred Murray was only half-right: Dovey was a fearless KC, but became an ill-tuned judge. Yet Dovey knew his horseflesh and it may be more than serendipitous that upon his return from World War I, he took up an
associateship with Sir Adrian Knox, who had resigned his chairmanship of the
AJC upon his own elevation.

Prior to Gleeson’s appointment, Australia had only two chief justices who
were facile princeps as advocates, Sir Garfield Barwick and Knox. Whether
Gleeson was the supreme advocate of his own time is a matter for his peers
and the judges before whom they appeared. Knox went straight from the bar,
Barwick after a few frustrating but largely successful years inhabiting
Chapters I & II, and Gleeson after a decade warming the chair of Sir Frederick
(He of a Few Well-Frozen Words) Jordan.

Gleeson has his fame. And Barwick’s lingers, along with his notoriety, a half
century since his appointment. Knox is almost entirely forgotten. Perhaps the
barb of Sir Owen Dixon – that Knox “was of a type that you do not often meet:
a highly intellectual man without any intellectual interests” – worked its poison.

Knox lived a full life, and the fact that the life was occupied by far more than
merely intellectual interests is not necessarily a cause for criticism. The
observation by Gleeson’s NSW successor comes to mind: “To some degree
Dixon’s depth came at the expense of breadth”.

This said, any life worth living is founded upon self-discipline and curiosity.
Gleeson has self-discipline in self-deprecating abundance. One goes no
further than the title – or the cover photo! – to find the proposition’s self-
evidence. Pelly subtly puts and declines to answer the next question, has Gleeson left in his life a room for curiosity?

If black-letter law is self-discipline and jurisprudence is curiosity, then the answer is “No”. Gleeson clearly preferred Professor Morison to Professor Stone. Yet Pelly posits three Cs as counters.

The first is Conversableness. As much as any place and more, the NSW bar is home to men – and it is largely men – who think a smartly worded cruelty amounts to wit. Pelly’s Gleeson is largely able to engage other people with politeness and a willingness to be informed about what interests them.

One cannot take this too far. While Gleeson’s professional interest in the just may find a parallel personal interest in the relaxed, the quick and the cheap must be held safe from replacement by the warm or the fuzzy. Were there a roomful of barristers where one were to unload an FE Smith “witticism”, most would laugh, some would wonder who Smith was, but Gleeson would be a certainty to ask the speaker with an archly wry politeness whether Smith’s words had advanced his client’s case.

The second counter is Gleeson’s Catholicism. In 1964, US writer Harry Kemelman published the first of a mystery series whose hero was a conservative Jewish rabbi named David Small. Small’s closest friend is Hugh Lanigan, the Catholic local police chief. A theme of their conversations is Small’s insistence that Lanigan’s is a creed of faith while his own is a system
of belief. I am not sure that Small’s thesis would have survived Gleeson’s analysis.

These days, our experience of religious turmoil is distant and dramatic. When Gleeson was born and for decades afterwards, the sectarianism of NSW was immediate and invidious. Fred Murray would have been unlikely to propose a Catholic silk as alternative to the Pope.

Here Pelly’s experience as a journalist shows. He doesn’t labour the Catholicism, but does ensure that it pops up in its place, which is often. When an old friend recommends that the AJC retain Gleeson, the friend is met with “a good-natured jibe”, “One of your Catholic mates?” Gleeson himself was heartened by the lack of comment about his religion upon his first appointment; as Gough Whitlam had told him, “until recently, nobody with your name could have been appointed to the job”.

The word “liberal” is as difficult today as it has ever been. In a chapter headed “Liberal in disguise”, Pelly – via Michael Kirby – touches on Gleeson CJ’s observation in Roach: “It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation.”

The question becomes more arch in a context of competing ideologies, each of which might – according to its detractors – be regarded as an acme of illiberalism. Pelly quoting Gleeson:
My father could never understand how a Catholic could conscientiously support that socialisation provision in the Labor Party platform. He saw the big struggle as between the Church and Communism.

*Dred Scott* was dismal lawmaking and failed to achieve whatever goal it was aiming for. The *Australian Communist Party Case* was not dismal lawmaking, yet if its goal was to apply liberalism as a salve for fracture, it was a failure for the short term. What of its relevance today? Pelly sets out the most heartfelt element of Justice Kirby’s dissent in *Thomas v Mowbray*:

In the past, lawyers and citizens in Australia have looked back with appreciation and gratitude to this Court's enlightened majority decision in the *Communist Party Case*. Truly, it was a judicial outcome worthy of a "free and confident society" which does not bow the head at every law that diminishes liberty beyond the constitutional design.

I did not expect that, during my service, I would see the *Communist Party Case* sidelined (Gummow and Crennan), minimised, doubted and even criticised and denigrated (Callinan) in this Court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the Dissolution Act of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present Court to demands for more and more governmental powers, federal and State, that exceed or offend the constitutional text and its abiding values. It is another instance of the constitutional era of laissez faire through which the Court is presently passing.
Whether the defence power is something which justifies war on a noun, I have always been rather fond of Sir George Rich’s letter to Sir John Latham:

I have not seen the bill but I have always felt doubtful and have stated my anxiety. I hate the Commos… but I’ll fight for liberty and justice and the old principle of innocence of the accused. Tomorrow one of us may be in the dock and you must prove your innocence and so on.

Sir George is also a foil for the last demurrer to a claim that Gleeson is incurious, his awe of the common law. Both Gleeson and Dyson Heydon have lamented the loss of the short judgment. Yet the uninformed must be careful about what is meant by “short”.

Rich’s reasons were often short. Critics put this down to sloth and, increasingly, senescence. To this, I think, must be added a terminal inability to overcome debilitating grief at the loss of a favoured son in the first war and, more relevantly, an incompatibility with the forum in which Rich found himself.

Rich’s judgments betray all the best qualities of an experienced equity judge: an ability to distil an issue from the clamour of competing interests; a deep appreciation of the law which founds a consideration of the issue; and a confidence to apply discretion with a paradoxical firmness of mind. In all, he was well able to provide those before him with an informed finality of view.
But and while a nation’s supreme court is required, like any other court, to give finality, it must also, albeit with some sleight of hand, allow itself a flexibility to continue wrestling with issues which of their very nature do not admit a final view.

For Gleeson and Heydon, the good judgment is not short without more; rather, it is a statement of reasons which is not overly long.

Pelly raises – and I have parroted – the possibility of a schism in Gleeson’s law school between black-letter law and jurisprudence. It is hardly a novel proposition, not at least in the University of Sydney, where many schools of scholarship – English, Philosophy and Economics – have since enjoyed splits in the sun.

Yet the more one reads Gleeson’s decisions, the more it seems that Gleeson himself has come to regard the dichotomy as a false one. It is a trite criticism of the common law that it is diverted from an inquiry into truth because it is fossilised by its insistence on objectivity. A younger Gleeson might have argued against the proposition head on. The older Gleeson seems more able to digest his system’s imperfections, but, like Churchill and democracy, is yet to be convinced that a revolution is going to provide a better result.

At least two of Gleeson’s colleagues were hailed (or derided) as capital-C conservatives. Whether it is Gleeson’s competitive streak or something else which makes him a capital-B conservative, a Burkean he clearly is, finding
more than merely forensic truth in the maxim that society is a contract between the past, the present and those yet unborn. Pelly notes that in Gleeson’s 2007 speech to the Singapore Academy of Law, he described the ginger beer case as “a triumph of common law jurisprudence”. Yet that speech contains a Burkean warning:

The dissenting judgments may now be of historical interest only, but part of that interest lies in the fact that they foresaw difficulties some of which remain unresolved.

Whatever one’s own view of Gleeson’s ideology, it is hard to be too critical of a judge who assesses the dissents in *Donoghue v Stevenson* upon a criterion of foreseeability. The leader was Lord Buckmaster. In history’s finest balance between penalty and genuine assessment, Lord Dunedin is reported to have given the following answer to “Whom do you regard as the greatest colleague you have ever had?”

You will be surprised when I tell you – Buckmaster; I have not and I have never had any sympathy with Buckmaster’s political ideas and performances and I think him to be a sentimentalist – unless he is sitting on his arse on the bench; there he is one of the most learned, one of the most acute, and the fairest judge I ever sat with; and he will leave much in the books.

Even in an Antipodes left undescribed by former Prime Minister Keating, it is sufficient to observe that no-one holds Gleeson a sentimentalist.
Pelly is largely sympathetic to his subject. But the book is not a hagiography and does not provide the ersatz warts and all of the authorised biography. A good example is Pelly’s treatment of the prickly relationship between Gleeson and Mary Gaudron. At the first meeting of “the board”, Gleeson advised that he had decided to accept a minor administrative recommendation. Gaudron replied “Only if we agree. You’re no longer in NSW. We all decide. It’s not first among equals. We are all equal.” Pelly’s account of the ComCars affair underlines a sense of boundaries from this meeting: Gleeson’s ideal of institutional integrity and Gaudron’s of instinctive collegiality. Which was correct, Pelly leaves to each reader’s prejudice, informed by hindsight. Whichever was correct, the Court can be confident that it came out far better than either of the other Chapterhouses of our Constitution.

The torts law upheaval of recent years is with us still, and we cannot yet say whether Gleeson’s court has made the road less travelled risk-equivalent with the other. Nor does Pelly determine for the reader which road Gleeson has chosen. Perhaps Gleeson has made no choice, destiny and predestination each being non-justiciable. Instead, Pelly uses his legal knowledge and his journalist’s experience to give us an expert’s report readily admissible but for a justifiable want of conclusion. The only certainty is that all bets are off until we know whether the hare has the Smiler on retainer.