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Judges and art

On 28 March 2006 the Hon Justice Michael Kirby AC CMG delivered an address at the Art Gallery of New South Wales, titled 'Hanging judges and the Archibald Prize'. The following is an extract from that address.

Most judges – indeed most lawyers – have no particular skills for deciding what is art and what is not. Yet art, and specifically portraiture, occasionally present legal problems. In a rule of law society, such problems have to be resolved, ultimately, by judges. We may like it or lump it. But cases do not go away because judges, or others, doubt the judicial suitability to decide such cases. Rightly or wrongly, in a society such as ours, contests of a legal character have to be decided by people like me.

Occasionally, the issues arise in the absurd context of customs and excise law. In October 1926, sculptures were sent from France to be exhibited in the Brummer Gallery in New York. They included large works by Constantin Brancusi. One of them 'Bird in Space', was an object four feet tall. It was made of shiny and heavy yellow bronze. As a work of art, it was exempt from customs duty. But the United States customs officials were unimpressed. They applied an enormous tariff applicable to manufactured objects of base metal.[1] The gallery objected. The case went to the United States Customs Court. The judges pressed the gallery owner with questions based on their rustic experience:

Judge:	Simply because he called it a bird does that make it a bird to you?
Owner:	Yes your Honor.
Judge:	If you would see it on the street you would never think of calling it a bird would you?
Owner:	... (A contemptuous silence).
Other judge:	If you saw it in the forest, you would not take a shot at it?
Owner:	No your Honor.

Despite the ignorance manifested in these questions, the judges ultimately ruled in favour of the artist. They held that the work was 'beautiful and symmetrical in outline'. It was thus entitled to free entry to the United States. Heaven knows what would have happened if the judges had found the work ugly. Perhaps they would have felt the need to protect their fellow citizens from it.

Obscenity is another area where judges and artists have come together. To overcome accusations of obscenity, artists have often resorted to contending that their work has literary, artistic, political or scientific value. In *Pope v Illinois*[2], a judge in Chicago had had enough. He instructed the jury that the work in question was without 'value'. The Supreme Court of the United States held that the jury needed to be told that a work, allegedly obscene, did not need to enjoy civic approval to merit protection from the criminal law. The proper inquiry was not whether an ordinary member of the community would find the work of serious value, although allegedly obscene, but whether a *reasonable* person would find value in the work, taken as a whole. This was a liberal decision of the Supreme Court. Whether it would still represent the law in the United States in these conservative judicial times must be a matter of doubt.

Josonia Palaitis and Kirby J: artist and subject.

Another field of law that frequently involves judges evaluating works of art is the law of copyright. Typically, that law protects the creator's interest in works of artistic craftsmanship. Questions have often arisen as to whether a particular work falls within such a classification and is therefore worthy of copyright protection.[3]

Connected with this question are countless disputes over taxation law. In Australia, the former law of sales tax exempted works of art from its burdens. Many a time, judges have struggled over disputed questions as to whether a particular work is deserving of the description of artistic craftsmanship. In *Commissioner of Taxation v Murray*[4], the Federal Court of Australia concluded that the proper test for determining whether a work was a 'work of art' was primarily an objective one. If the objective test left room for doubt, the doubt could be resolved by reference to the subjective impressions of the judge as to whether the work in question is 'utilitarian and artistically pleasing'. Lawyers tend to dress such issues up in words (the paint and oils and crayons with which lawyers work), to give them the appearance of objectivity, certainty and incontestability. However, often little more is involved than the aesthetic sense of the decision-maker who, ultimately, in a court, must be a lawyer sitting as a judge.

In the Federal Court, Justice Sheppard quoted Sir Zelman Cowen's description of the libel action brought by Whistler against Ruskin in 1878.[5] Ruskin had written of a painting by Whistler:

> I have seen and heard much of Cockney impudence before now, but never expected to hear a cockscomb ask two hundred guineas for flinging a pot of paint in the public's face.

Whistler won. But he only recovered nominal damage of a farthing. His costs must have been huge. Sir Zelman Cowen concluded, in words that ring down the years for the Archibald Prize:

> Whistler, though subjected to ridicule and attack in his own day, has now achieved well-merited recognition. The scorn poured upon the impressionists has now turned to praise. Those facts should serve as a warning to those who laugh to scorn contemporary art.[6]

Perhaps Whistler's mistake was bothering to sue Ruskin in a court of law, knowing, as he must, that this would necessitate relying on the opinion of judges or jurors who might sometimes hold 'barbarian' views, reflecting, in a sense, the diverse opinions of their fellow citizens.

On the Archibald Prize for *portraiture*, little is left to be said since the publication of the illustrated history of the prize, *Let's Face It*.[7] As Edmund Capon says, in his foreword to that book:

> The Archibald Prize is indelibly etched into the history and psyche of twentieth century Australian art. Indeed, the Archibald is far more than an art award: it is the most improbable circus which, like so many imponderables, succeeds mightily against all odds.[8]

So far, there have been three great law cases about the Archibald Prize. Yet outside the courtroom, legal opinions have often been taken as to what J F Archibald's will requires. The first such enquiry concerned what was meant by 'resident in Australasia'. In 1921, Mr Langer Owen KC expressed the view that the precondition of residence meant that the artist must have a place or country which is the artist's home. This advice expelled, at first, the works of some famous artists, like Lambert and Longstaff. They worked in England, although they were undoubtedly regarded as Australians.[9] Notwithstanding this advice on the 'residency' question, Longstaff was awarded the prize in 1925 for his portrait of the actor Maurice Moscovitch. The trustees must have put art above Mr Owen's opinion. The point was not challenged in court.

Despite Barwick's brilliance, the team for the trustees led by Frank Kitto KC won the day. Kitto was subsequently to become the father-in-law of Kevin Connor, whose portrait of Kitto won the Archibald Prize. Kevin Connor's visage is present again in the 2006 exhibition.

Other disputes have arisen over what J F Archibald meant by saying that the prize should 'preferably' commemorate a person 'distinguished in arts, letters, science of politics'. What did 'preferably' require? What did 'distinguished' mean? Again, these points have not come to judgment. So far.

The greatest battle was joined when the Archibald Prize was awarded in 1943 to William Dobell for his portrait of his fellow artist Joshua Smith.[10] This time a challenge was brought in the Supreme Court of New South Wales. It contested the opinion that the work was a 'portrait' at all. Mr Garfield Barwick KC assumed the burden of showing that it was not a portrait but a caricature. He propounded the thesis that these two concepts were completely contradictory.

John Olsen, then an art student who like all of his colleagues was 'wildly pro-Dobell, of course', remembers singing boisterously at parties of the time, to the tune of *Champagne Charlie*[11]:

> William Dobell is my name,
> Painting portraits is my game,
> At distortion I'm just whizz, whizz, whizz
> I'll twist every face there is, is, is.

The challengers considered that Dobell's portrait of Smith went a twist too far. The case was heard by a noble and sensitive Supreme Court judge, Justice David Roper. Despite Barwick's brilliance, the team for the trustees led by Frank Kitto KC won the day. Kitto was subsequently to become the father-in-law of Kevin Connor, whose portrait of Kitto won the Archibald Prize. Kevin Connor's visage is present again in the 2006 exhibition.

The decision of Justice Roper is reported in the law reports.[12] It is a clear decision, easy to read and to understand. It is as if the judge decided to drop as much legalese as possible and to speak directly so that the public and artists would comprehend his reasoning. He pointed out that the word 'portrait' had been used in Mr Archibald's will in a context that was addressed to the trustees 'eight persons, all highly qualified to express an opinion on the meaning of the word, as it is understood by artists'.[13] The judge was satisfied that, amongst artists, the word 'portrait' did not have a technical meaning, different from the ordinary meaning amongst the laity. He concluded:

> The picture in question is characterised by some startling exaggeration and distortion, clearly intended by the artist, his technique being too brilliant to admit of any other conclusion. It bears, nonetheless, a strong degree of likeness to the subject and is I think undoubtedly a pictorial representation of him. I find as a fact that it is a portrait within the meaning of the word in this will ...Finally, I think that it is necessary to state my opinion of the claim that the portrait cannot be included ... because it is proper to classify it in another realm of art or work - as caricature ... or as fantasy ... It is, I think, unnecessary to consider whether the picture could properly be classed as a caricature or a fantasy. If it could be so classed that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it is in any event properly classified as a portrait.

To the end of his life, Sir Garfield Barwick was still bristling over this notable failure. He put it down to his own 'poor advocacy'.[14] He thought that he had good material to establish that the work was not a 'portrait' as required by the will. He concluded that he had tripped up the experts for the trustees. Alas, many advocates, perhaps a few artists, fall in love with their own brilliance and blame others when they do not win.

We now know that the prize of 1943 had a sad aftermath. Dobell hid the portrait in his flat. It was partly eaten away by silverfish. Eventually, it was sold to an owner in whose possession it was burnt, almost to destruction. When it was restored, only five per cent of Dobell remained.[15] Meantime, Joshua Smith felt cursed by the affair. He resented what he saw as Dobell's presentation of him as an ugly cartoon. Even forty years later, he still choked up and shed heavy tears when he spoke of the portrait.

Nor did the traditional artists who challenged Dobell come off lightly. Donald Friend, a close confidant of Dobell, loved to tell the story of Mary Edwards, one of the challengers. According to Friend, she wore 'voluminous dresses and braided hair coiled like two telephone receivers'. One day she discovered an artificial penis in the garden of her home. A sculptor resident had hurled it out of a window instead of a bone, seeking to exercise his dog. Ever one to be easily alarmed, Mary Edwards called the police. She said there had been a murder and that she had the evidence.[16] But on this occasion, in 1943, the unconventional won the day in court.

In September 1983, Justice Michael Helsham[17], in the second case, concluded that a painting by John Bloomfield of Tim Burstall did not qualify because the artist had never met the subject. In Justice Helsham's view, the reference in J F Archibald's will to a 'portrait' meant a work that was painted from life. In fact, the portrait in question had been painted from a photograph. Whilst acknowledging that the judge had assembled some compelling reasons for saying that painting from life was a requirement of Mr Archibald's will, a distinguished legal commentator, in the *Australian Law Journal*, concluded that, there being no express requirement to that effect, 'an equally compelling case can be made to support a conclusion that the [Bloomfield] portrait should not have been disqualified'.[18] He remarked:

> If a live sitting were the primary criterion, there would be difficulty in accepting as portraits the self-portraits of Rembrandt and Rubens in, respectively, the Victorian National Gallery and the Australian National Gallery at Canberra. These must have been painted on the basis of images in a mirror; is there any distinction of significance between a photographic image and a mirror image? A self-portrait cannot possibly be done from a live sitting.

The decision in the Bloomfield case was condemned in the legal journal as 'being in conflict with the inherent factors of artistic creation'.

On 9 July 1985 Justice Philip Powell, in the third case, ruled that the Archibald Prize should be retained in perpetuity by the Art Gallery of New South Wales.[19] In response to a challenge after the death of Gladys Archibald, the last surviving beneficiary of J F Archibald, the judge decided that the prize could continue as 'a good and charitable bequest'. This meant that the capital of the bequest would be transferred to the trustees of this gallery rather than to the Australian Journalists' Association, whom Archibald (one-time editor of the *Bulletin*) had named as the residuary beneficiary. Justice Powell declared that the object of the bequest was 'the continuing production and exhibition to the public of portraits of high quality, painted by artists resident in Australia'.[20] He rejected the journalists' submission that the Archibald Prize had become so irrelevant that it 'was like giving a prize for cave painting'.[21] Justice Powell ruled that 'those who came but to stand and stare must learn something'.

There is another, fourth, case involving a claim that has followed the award of the 2004 prize to Craig Ruddy. As that case is pending in the Supreme Court of New South Wales, I will say no more about it. It concerns whether the winning portrait of David Gulpilil was a 'painting'.[22] According to reports it is listed for hearing mid-March 2006. So watch this space.

The contribution of the Archibald Prize to the popularity of art in Australia in general, and to portraiture in particular, cannot be denied. Even the controversies that have surrounded the prize winners, and the other portraits chosen for exhibition, are generally a good thing. The great liberal justice of the High Court, Lionel Murphy, famously defended agitators and trouble-makers. He declared in a case brought against the Aboriginal activist, Percy Neal, that 'Mr Neal is entitled to be an agitator'.[23] In the realm of art, the lesson of most of the Australian cases on painting and law is that judges have normally held that artists may also be agitators. They may be creative. They may push the envelope. They may do strange and challenging artist things. They may be odd and unconventional. They may be, dare I say it, queer.

I honour the artists in our midst. They come from the world of the spirit. It is a wonderful experience, for which I will always be grateful to J F Archibald and his prize, that I have come to know a number of them. As a citizen I cherish them and their works. I acknowledge my debt to this gallery, its trustees, the director and the workers and volunteers for presenting us annually with this circus, this provocation, this stimulation and this controversy. Such controversies should always be present in the world of the spirit. The Archibald Prize is no exception.

1 S Giry, 'An odd bird', *Legal Affairs* (September/October 2002).

2 481 US 497 (1986).

3 See e.g. *George Henscher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64. See also P H Karlen, 'What is art? A sketch for a legal definition' (1978) 94 *Law Quarterly Review* 383 at 399.

4 (1990) 21 *Federal Court Reports* 435.

5 In Z Cowen, 'An artist in the courts of law' (1945) 19 *Australian Law Journal* 112 at 112.

6 Ibid., p.113.

7 P Ross, Let's Face It: *The History of the Archibald Prize* (Art Gallery of NSW, 1999).

8 Ibid., p.7.

9 N Borlase, *Quadrant* (March 1982) 51 at 53.

10 The story is told in Z Owen, 'An artist in the courts of law' (1945) 11 *Australian Law Journal* 112.

11 In J Hawley, 'A portrait of pain', *Good Weekend*, 18 August 1990, 19 at 22.

12 *Attorney-General v Trustees of National Art Gallery of NSW (1945)* 62 WN (NSW), 212.

13 ibid., p.215.

14 G E Barwick, *A Radical Tory* (1995), pp.48-50.

15 J Hawley, 'A portrait in pain', *Good Weekend*, 18 August 1990, 19-28; cf D Bagnall, *The Bulletin*, 4 May 2005.

16 Hawley, above n 11, 22.

17 *Bloomfield v Art Gallery of New South Wales*, Supreme Court of NSW, unreported, 23 September 1983 per Helsham CJ in Eq; cf R Coleman, 'Why courts are being asked to chart the Archibald Prize's future', *Sydney Morning Herald*, 8 March 1982, p.7.

18 J G Starke, 'Literary and artistic competitions' (1984) 58 *Australian Law Journal* 52 at 53.

19 Ross, above n 6, 148.

20 ibid., p.86.

21 *Johansen v Art Gallery of New South Wales Trust* (NSW Supreme Court, Case No 2867/04). See *Sydney Morning Herald* 23 July 2004.

22 ibid.

23 *Neal v The Queen* (1982) 149 CLR 305 at 317.

Court in the act

Keith Chapple SC reviews the latest photographic exhibition by Mark Tedeschi QC.

What do barristers do when they are not being barristers? Some sail, others golf, some look after the family. I suppose one or two may even do all of the above. And I know there are a few literary novices who write articles for magazines.

When he is away from life at the Bar, Mark Tedeschi QC takes photographs and he does this very well indeed. Over many years at the Bar, Mark has been involved in many high profile criminal trials and holds the office of senior crown prosecutor for NSW.

Since 1988 he has pursued what he describes as a passion for photography. There have been numerous solo and joint exhibitions of his photographs and they now form part of the collections in the NSW Art Gallery, the National Library in Canberra and the NSW State Library. His images have appeared in many books, including Lucy Turnbull's Sydney: A Biography and the authority on Australian photography *Eye for Photography* by Alan Davies.

His work covers many themes and he often uses a group of photographs to explore the subject matter from a number of angles.

The topics are diverse: the people and buildings on *The Block* in Redfern, abstract landscapes from the Blue Mountains, portraits of Australian Holocaust survivors and the people who saved them and recently many images from a trip to Italy exploring his heritage.

'Court in the Act' was an exhibition of photographs of court scenes and legal identities on display at the Justice and Police Museum at Circular Quay earlier this year. Mark had been allowed virtually unrestricted access to photograph court interiors and court staff in Sydney and colleagues in the legal profession. The result was an extraordinary range of scenes inside and outside court.