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GREAT AUSTRALIAN DISSENT

BY GIDEON HAIGH

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The Hon. Michael Kirby

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Dr H.V. Evatt was a ‘brilliant boy’. He was captain and dux of Fort Street High School in Sydney, *alma mater* since 1849, of many talented pupils. He was also a brilliant graduate of the University of Sydney, with triple First Class Honours; double university medals and only the third recipient of the rare degree of Doctor of Laws by thesis.

These accolades were accumulated in Evatt’s early life, before his career as a barrister, State politician, the youngest appointee to the High Court of Australia, member of the House of Representatives, Federal Minister in wartime, President of the Third Session of the United Nations’ General Assembly, and, in his decline, Chief Justice of New South Wales. Only the highest elected office in Australia eluded Evatt. He was never Prime Minister, despite coming very close in 1954. Still, he regarded his successes in persuading the High Court of Australia to invalidate the *Communist Party Dissolution Act* 1950 (Cth) and thereafter persuading the Australian electors

to reject a referendum designed to overturn that court decision, as more important than winning elections. As he put it at the time, the anti-communist measures would have left a permanent stain on the *Australian Constitution*.

A number of books have been written about Evatt's life.¹ In the light of his achievements, this is hardly surprising. However, the author of this new book, Gideon Haigh, concludes that Evatt is basically a "forgotten Australian". Some would contest this assessment. For those who live and work in the law, his rank as one of the more influential and persuasive of the judges of the nation's highest court, means that his judicial opinions are still regularly cited and used today. This is so, although it is now nearly a century since Evatt was appointed to that court in 1930. He is also still famous at his old school. In the halls of the United Nations, he is remembered for the leading part he played in the negotiations that led to the compromises reached at Dumbarton Oaks, near Washington DC, in hammering out the UN *Charter* in 1945. Furthermore, Evatt became a powerful supporter and ally of Eleanor Roosevelt and her committee in securing the near unanimous vote to adopt the *Universal Declaration of Human Rights* (UDHR). He was presiding in the UN General Assembly when the UDHR was adopted in December 1948. He declared that it would become a "magna carta" for all humanity: men, women and children. Certainly, Evatt stamped on the United Nations, however imperfectly, aspirations and universal values that had been missing from the League of Nations. So it is hard on Evatt to say that he is

¹ Kylie Tennant, *Evatt-Politics & Justice*, Angus & Robertson, London, Sydney 1970; Ken Buckley, Barbara Dale and Wayne Reynolds, *Doc Evatt*, Longman Cheshire, Melbourne, 1996; John Murphy, *Evatt - a life*, New South Publishing, Sydney 2016.

“forgotten”. Nevertheless, time moves on and different heroes have taken the place of Evatt in the Australian public’s imagination.

Still, the fresh reflection on Evatt’s life in this new biography suggests that he left a substantial mark on Australian public life, larger by far than those left by many of the officeholders who made it to the top job. This book reaches back to Evatt’s youth and his time on the High Court to suggest the well-springs of his early brilliance. Gideon Haigh has done Evatt’s memory a service by writing this book on aspects of Evatt’s life that have not been the main focus of the earlier biographies. Instead of addressing his high national and international offices, Haigh has chosen a different lens for this study of Evatt. He opens and closes the book with a reflection on another, and completely different “brilliant boy”, and the way his life story intersected with Evatt’s when his case in the High Court called on Evatt’s commitment to open mindedness and reform of the law.

Haigh describes how Evatt’s judicial approach to a difficult and novel legal case in 1939 reflected humanitarian values that Evatt took to underlie the Australian common law and its capacity to grow and adapt to face new problems and to reflect distinctive Australian values. For Evatt, such values were sometimes different from the British roots of the law of Australia, dominant up to that time. The other “brilliant boy” of this book, Max Chester, appears only briefly as the tragic actor in the facts of a case decided by the High Court in 1939 towards the end of Evatt’s service as a Justice in *Chester v Waverly Municipal Council*.²

² (1939) 62 *Commonwealth Law Reports* 1 (HCA).

The plaintiff in the case was Dora Chester. She was the mother of the 7-year-old, Max. He had fallen into a large, deep and inadequately protected telephone trench, filled with water, in a suburban street of Bondi Junction in Sydney. Dora Chester was one of a family of Jewish refugees from Czechoslovakia who had sought safety in Australia. She was not herself, directly involved in, or physically injured by, the trench that claimed Max's life. However, she immediately rushed to the trench where a pole, prodding the muddy waters, struck an object that was quickly identified as the lifeless body of her son Max. She suffered a breakdown.

These facts gave rise to an acute legal controversy. Was the mother entitled to recover damages for negligence to compensate her for the 'nervous shock' she claimed to have suffered? Was the fact that her injuries were mental or psychological such as to disentitle her where a direct physical injury would probably have been compensable? Was the fact that her condition of 'nervous shock' was a natural and predictable consequence of a mother learning about such a loss enough to impose legal liability on the local council for the negligence it had shown in creating the trench? Or was the harm she suffered such that a person of "normal fortitude" would have been able to cope with it, get over it and get on with life without troubling the courts of law for damages as Mrs Chester did?

In 1939 in Australia, more than today, the law governing recovery of damages was basically developed in Australia's courts, case by case, not by statute. Australian judges generally applied the principles laid down by the English courts. Up to 1986, in matters of the common law, the last word for

Australian courts was basically written by the Judicial Committee of the Privy Council, sitting in London. Under the influence of such decisions, Australian courts had long shown a reluctance to allow damages to people who had suffered psychiatric, as distinct from physical, injury. Such hesitancy seemed “based in fears that exaggerated or false claims will be allowed: that judges or juries will be unable to discern error in diagnosing psychiatric injury or to distinguish between the injured and the malingerer”.³

This book on Evatt’s life points out that similar attitudes to shock and psychological breakdown had confronted the Evatt family when, in the midst of the First World War, they learned that two of Evatt’s brothers, Frank and Raymond, had been killed whilst each was serving with the ANZACs on the Western Front in France. Evatt’s mother and family were assured of the nobility and valour of these young victims of the Great War. That assurance was supposed to be sufficient solace for the grieving families, obliged to pick up the threads and bear their suffering without undue complaint. A number of the High Court Judges had suffered family losses of this kind. Yet, in *Chester’s* case, Evatt was moved to question the approach to “nervous shock” as suggested in the earlier judicial decisions.

One consideration that prompted Evatt’s doubts about the old law was the revolution that had then lately occurred in the general law of negligence as expounded in the highest English court in *Donoghue v Stephenson*.⁴ This revolution had been a consequence of reasoning by another Australian judge, Lord Atkin, only 7 years before *Chester’s* case. He was an

³ *Tame v New South Wales* (2002) 211 CLR 317 at 399 [243] per Hayne J. See also at 385 [200]-[201].

⁴ [1932] AC 562 at 580.

international colleague known to, and admired by, Evatt. Atkin cut through the forest of cases and re-expressed the law of negligence in a compelling way. As Evatt saw things, Atkin's fresh approach justified a new approach to legal liability for nervous shock. A second consideration that weighed with Evatt was his special open-mindedness to scientific developments. Science questioned the rigid differentiation between mental and physical injuries. This suggested the need for an approach that was at once more conceptual and convincing. So Evatt embraced it. The third consideration was Evatt's humanitarian values that were later to play a part, on the grand stage at the United Nations, in fashioning the post-war global human rights revolution that is still continuing today. Evatt saw the humble case about the death of a immigrant boy in Sydney in the wider context of his humanitarian empathy. So he gave effect to this approach although it involved pushing forward the boundaries of Australian negligence law. Perhaps, Evatt could understand the reported 'jagged wail' of Dora Chester's response when she learned of the loss of Max. Perhaps, as the author speculates, Dora's loss reminded Evatt of his own mother's suffering in consequence of her grief, still fresh in his mind.

No one will ever know whether Max Chester was indeed a 'brilliant boy' or would have gone on to become a brilliant man. Perhaps the description, attributed to him following his death, was no more than a despairing attempt by his mother to clutch a glimmer of pride in the circumstances of her inconsolable loss. However, in his dissenting reasons in the *Chester* case, Evatt deployed his own brilliance to telling effect. Decades later it was to influence the re-expression of the Australian common law in the High Court.

Focusing on Evatt's less well remembered service in the High Court in one of his many decisions – including dissenting opinions - for which he is known to lawyers as an innovative judge, Gideon Haigh has set out to answer questions as to his motivations. In doing so, he has raised many more queries as to why Evatt felt justified and motivated to turn Dora Chester's case into an occasion to re-express the law of negligence as it concerned a case of nervous shock. By pursuing these features of Evatt's judicial life, and disclosing them, the author seeks to illustrate how Evatt's judicial mind worked. It was unusual for its time.

During Evatt's decade of service on the High Court of Australia in the 1930s, he mostly dressed and acted exactly in the manner expected of his high office in the Australian judiciary. The striped trousers and morning suit. The lilac-coloured waist coat. The wing collar. The horsehair wig in court. Yet, in his passionate dissenting judgment in *Chester's* case (and elsewhere) Evatt demonstrated that formality in legal reasoning was sometimes insufficient so far as he was concerned. To the contrary, in *Chester* and many other cases, by his dissenting and powerful reasoning, Evatt disclosed how judges had choices. Brilliant minds could reach differing, even opposite conclusions. In an ultimate court, at least, the judges could share their new approaches with great British, American and other judges of similar inclination. He demonstrated the "leeways of judicial choice" that his friend of later years, Professor Julius Stone, would describe as open, and even obligatory, for the apex judges of the land. Others, whose judicial values matched more closely the winged collars and horsehair wigs would disdain Evatt's concept of judicial choice. They would condemn Evatt's reasoning as an unacceptable disturbance of the law's predictability. Yet for Evatt, he

was simply searching for more rational outcomes, as the great judges of old had done, in creating the building blocks of the common law for new times.

In his judicial life, as Haigh describes, Evatt struck out on the path of dissent many times. He did it in his powerful joint reasons with Justice Owen Dixon in *Ex parte Lowenstein*,⁵ a case on the constitutional right to jury trial. He did it with his ringing dissent upholding a right to personal privacy in *Victoria Park v Taylor*.⁶ He did it powerfully in *Chester's* case.⁷ By the range and power of his reasoning (and his citation of new and different sources of comparative law) Evatt demonstrated the inescapable choices that judges have, especially on a final national court. Evatt also illustrated the duty of lawyers constantly to re-examine and reform the law, whether by processes of judicial reasoning or by supporting legislative amendments. The one posture that was unforgivable for Evatt's humanitarian, reformist values was to do nothing. Or to affirm plainly irrational or unjust conclusions. Evatt's approach in *Chester's* case flew in the teeth of the 'fairy tale' that every legal problem had but one correct outcome. Instead, Evatt laid the ground for a golden era of common law and legal renewal during the Mason High Court, forty years later. That era produced *Mabo*,⁸ and many other long overdue judicial reforms. The judges eventually despaired of waiting for parliamentary reform. They returned, as Evatt did in *Chester*, to the ultimate judicial responsibility to search for rationality that would occasionally embrace new foundations for new concepts of the law.

⁵ (1938) 59 CLR 556.

⁶ (1937) 58 CLR 479.

⁷ (1939) 62 CLR 1.

⁸ (1992) 175 CLR 1.

To many reading Haigh's book, aware of the continuing broader legacy of H.V. Evatt after 1940, any focus on individual brilliance may seem prideful and out of keeping with Evatt's basically modest personal demeanour. The focus in this new biography on the negligence case of *Chester* may even sometimes seem mawkish and occasionally over emotional. It may do so when *Chester's* case is contrasted to Evatt's normal constitutional reasoning, which was more clinical and orthodox.⁹ Yet the value of the story told in this book is that it lifts the veil still further on the relatively short period that Evatt served as a High Court Justice. It reveals the personally difficult years that Evatt experienced during that judicial service. It also reveals Evatt's already internationalist and humanitarian instincts that were soon to prove so important, far beyond Australia and during a time of global existential danger. Then, in the halls of power far from Australia's courts, Evatt was called upon to contribute significantly to the formation of the United Nations and the creation of global human rights. That legacy is enduring. On the world's stage, the achievement is mightier by far than the tragic case of Max and Dora Chester. Yet achieving justice in an individual case must be understood in the context of a duty to create justice everywhere. Those who are resistant to a global and internationalist perspective may display an indifference to injustice at home that spills over to injustice elsewhere.

With Evatt's brilliance came a restless ambition and a kaleidoscope of interests beyond the judicial and even beyond the legal world in which he first made his mark. His passionate interest in Australia's colonial history was reflected in many books he wrote during his judicial years. His steadfast

⁹ See e.g. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

defence of modern art against the contempt of others, highlights his broad interests. His engagement with judges in other countries illustrated his international outreach, unusual for Australians, soon to face new international institutions. His wide network of international friends and familiarity with their judicial work singled out this brilliant man amongst Australia's judges of his time or indeed of any time.

It was as if Evatt's spirit was yearning for larger worlds to conquer as his judicial duties obliged him to focus on the blemishes in the law that revealed themselves in the 1930s. Many will see the internal contradictions in Evatt's life (such as his defence of White Australia) as portents of the ultimate collapse of his mind, which was the grossest catastrophe that a "brilliant boy" like Evatt could suffer. Evatt's life had many chapters of triumph. But there were also not a few chapters of tragedy. These features make Evatt's extraordinary life a rich source for fresh biographies.

The central value of this new book on H.V. Evatt is that it reveals a decade in his life not previously examined in such depth. It leaves Evatt, along with Dora Chester at the conclusion of the *Chester* case and at the opening of the 1940s. We must hope that the subsequent story will be told with the same attention to detail and with empathy for the main character, despite his blemishes. In the drama that was Evatt's life, he deserves to be remembered and not forgotten by Australians. Gideon Haigh's new book helps to explain why.

Sydney

Michael Kirby

30 April 2021