

SUPREME COURT OF THE NORTHERN TERRITORY
STATE SQUARE, DARWIN

CEREMONIAL SITTING
IN MEMORY OF
THE HONOURABLE JUSTICE STEVEN BAILEY

TRANSCRIPT OF PROCEEDINGS

COURTROOM 1, MONDAY 6 DECEMBER 2004 AT 9:36 AM

PRESIDING JUDGES:

THE HON THE CHIEF JUSTICE, JUSTICE B.R. MARTIN
THE HON JUSTICE D.N. ANGEL
THE HON JUSTICE D. MILDREN RFD
THE HON JUSTICE S.G. THOMAS AM

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MARTIN CJ: Mrs Jenny Bailey, Tom and Kate; members of Bailey Js wider family; ladies and gentlemen.

We gather today to commemorate the life in the law of our dear friend and colleague, Justice Steve Bailey, who passed away on 25 November 2004. This is our way, that is the way of the Court, Judges and the legal profession, joined by the Attorney-General through the Director of Public Prosecutions on behalf of the Government and the community, of recognising the valuable contribution made by Bailey J both to the law and to our community and of giving thanks for the honour of working with him and of knowing him.

On behalf of the court I extend a warm welcome to all of you. I extend a special welcome to Jenny, Tom and Kate and to other members of Bailey Js family, particularly those who have travelled from overseas at this distressing time.

The high esteem in which Bailey J was held is well demonstrated by your attendance here today. We have been joined by a number of distinguished guests who are also demonstrating their high regard for Bailey J. There are too many to mention by name, but I mention a few. With us on the Bench this morning, the Honourable Carmody J from the Family Court; the Honourable Martin A/J, former Chief Justice of this Court; the Honourable Austin Asche QC also a former Chief Justice of this Court and former Administrator of the Northern Territory; the Honourable John Gallop QC, a former Judge of this Court.

Also in attendance with us this morning, the Honourable Paul Henderson representing the Chief Minister; the Honourable Terry Mills, leader of the opposition; the Honourable Jodeen Carney, Shadow Attorney-General.

To other distinguished guests, welcome. Please forgive me for not mentioning you all by name.

We have also received a number of apologies from people who are unable to be in attendance today. I will not delay by mentioning all of them. Permit me to mention a few. In particular Riley J and Jan who I know have spoken to Jenny; his Honour the Administrator Ted Egan and Ms Nerys Evans; the Honourable Dr Peter Toyne Attorney-General; the Solicitor-General Mr Tom Pauling QC and Mrs Tessa Pauling; Mrs Anita Angel; the Master of the Supreme Court Mr Terry Coulehan and Dr Coulehan; Acting Judges Priestley and Olsen; the Honourable John Mansfield J of the Federal Court and Kate Mansfield.

I mention also apologies from former judges and acting judges of this court, the Honourable Sir William and Lady Jessie Kearney; John and Sandy Nader; Howard and Marie Olney; Ian and Lyn Gray; Magistrates Mr David Loadman and Melanie Little and Mrs Loadman.

When Leigh and I first met Bailey J on our arrival in Darwin earlier this year, we were quickly welcomed by Steve and Jenny into their home. We greatly appreciated their generosity and the warmth of their welcome.

Bailey J was a very fine lawyer and Judge. Not only did he have an excellent legal brain, but he knew how to apply that brain in a practical manner well guided by a great deal of commonsense and wonderful sense of humour. I will leave it to others at the Bar table this morning to speak of Bailey Js history and of the manner in which he conducted his court.

In my short time, very quickly I came to realise that Bailey J was always willing to assist. I will miss his wise and trusted counsel. That counsel was always honest and direct. Bailey J was a straight shooter who was admired not just by the judges, but by everyone at the court here and in Alice Springs.

It cannot be left unsaid that Bailey J was an exceptionally hard worker. Everyone at the court knew he was always the first to arrive in the morning. That practice continued despite his illness.

I made a special effort to beat him one day. As I drove in I saw to my delight that Steve had not arrived. Lo and behold before I had left my car he drove into the carpark. When I suggested that I was entitled to take some pride in the fact that I had beaten him, without batting an eyelid Steve immediately responded saying he had been in considerably earlier, but he had had to leave to take the kids to school.

I finish by reminding you of Bailey Js words in response to his welcome to this court on 3 February 1997. He said:

I am deeply honoured to have joined my brother judges. My fondest ambition now is to live up to the high standards that they and their predecessors have set. I can only promise that I will devote my best endeavours to upholding the high standards and reputation of this court.

I can say with the utmost confidence that my colleagues on the Bench this morning, Riley J and all those who have sat with Bailey J since February 1997, are in unanimous agreement that Bailey J not only devoted his best endeavours, but he achieved with distinction that 'fondest ambition'.

Mr Director, on behalf of the Attorney-General.

MR WILD QC: May it please the court, in fact I had a number of briefs here today, your Honour.

Firstly, I am instructed, as you have indicated, on behalf of the Attorney-General the Honourable Dr Peter Toyne. He is unable to attend this morning's celebration of the life and work of his Honour Bailey J. You will know, I think, that Dr Toyne paid tribute to his Honour in the condolence motion in the Legislative Assembly last week. Eloquent speeches were made by a number of the Members of the House. In them his Honour's career was canvassed. I do not propose to remind the court of that today. The President of the Law Society who will follow me soon will speak of that.

The Attorney in his speech described his Honour as an honourable man. He spoke of his humour, humanity, wit and love of his family. He was passionate about the Territory. He chose to spend substantial parts of his life here in the Territory and contribute to our community. He was hard working and fair. He served the community well, both as a Judge and chairman of the Parole Board. He and the people of the Territory, said the Attorney, are saddened by his loss.

Before being asked to represent the Attorney, your Honour asked me to speak and I prepared some other remarks. I was given by your Honour the Chief Justice, permission to personalise them and I have done so. I said then in my notes, that it is a great honour to be invited to speak notwithstanding this is a sad, sad occasion. In accepting the invitation I have done so not only on behalf of my office and its staff, but also on behalf of the other lawyers involved in the criminal justice system, the Legal Aid Commission, the various Aboriginal Legal Aid Services and the Criminal Lawyers Association in the Northern Territory. I have the necessary instructions to do so.

People have spoken in recent days of his Honour's ability and talent as an appeal and trial Judge. Some, like my friends at NAALAS who are here today, have confirmed his fairness as a Judge. It was always a pleasure to appear before him so they told me. I do not know about that. It is not always a pleasure appearing in court, more particularly when the case you are presenting, either on behalf of the prosecution or the defence, or in a civil case I suppose, is flawed. Bailey J would not let a flaw go unnoticed. Counsel would have to explain or persuade him, and he would give them that opportunity, or surrender. The fact that his Honour always conducted the incisive debate that followed courteously and patiently did not lessen counsel's burden in pushing the proverbial barrow uphill. His Honour would eventually overturn it. We were told at the funeral service on Friday of the way his Honour would deal with those sort of submissions up in Chambers. Thank goodness he did not treat us the same way in court.

His Honour gave the leading judgment in the case of WJI, decided by a Full Bench of the Court of Criminal Appeal and on which most of you on the Bench sat. It was upheld by the High Court as we know, by a majority I am pleased to say. I say that because of course it was a Director's reference to the Full Court and we pursued it to the High Court. So although his Honour has received a great deal of proper praise for his leading judgment in that case it may be that the prosecution view is slightly different to that of other commentators.

It is fair to say that his Honour's greatest interest was in criminal work. He enjoyed watching and participating in the cut and thrust of the trial process and the legal issues that it involved. His Honour's judgment in the case of Barnes is often cited, by prosecutors it must be said, for the principle that bail should not be granted to alleged offenders to enable them to undertake tribal payback involving infliction of serious harm. This has become a leading judgment.

His Honour would not lightly grant bail to any alleged serious offender, giving appropriate weight to the provisions of the Bail Act of course. This may well have

lead to the nickname given to him by Susan Cox QC and others, of 'No Bail Bailey'. I was reminded by Susan, however, that she always regarded his Honour as a kind and fair man. He was strict where justice required it and he was flexible in the face of the needs of justice.

His Honour was easily persuaded to travel to Oenpelli and hold sittings of the Supreme Court in 2001 when the merits and justice of a particular case justified it being heard within the community most affected by it. Not for Bailey J was what Edward Edmond Burke called the cold neutrality and impartial Judge. Impartial he certainly was, but he was never cold. He was a most compassionate man.

His involvement in the Parole Board and in particular in relation to the provisions relating to mandatory life prisoners he was well known here in the Territory. His Honour jointly chaired a session at the CLANT Bali Conference in 1999 which led to a unanimous resolution from the delegates that the Government review the legislation dealing with such prisoners. As we know that review was subsequently carried out and new legislation was introduced earlier this year. The first of the persons affected by that legislation and entitled to the benefit of it was released by the Parole Board chaired by his Honour very recently and I was reminded the other day that it was at a time when his Honour's health was already substantially impaired. His Honour nevertheless chaired that Board appropriately.

His Honour is remembered as a fair and decent Judge by the lawyers of both KRALAS and CAALAS and I am instructed to extend their condolences to the Judge's family and friends. His Honour was a fair supporter of CLANT. He attended each conference from 1997 onwards when he arrived here and was a real contributor to those conferences. He attended the somewhat irregular dinners that the association gives and he gave a wonderfully humorous speech about his experiences in Hong Kong at one that was referred to the other day.

He supported the local Bar, sometimes it seemed to me at the expense of visiting counsel. He preferred the local style it seemed to me. He was not attracted by those visitors who tried to talk down to our courts and whose arguments were sometimes patronising and pretentious and on occasions even unsound. When preparing these notes I thought that he would understand precisely what and who I was talking about when I addressed him on the subject. I then remembered of course he would not be here to hear what I was to say.

His Honour was remembered on 26 November at the Roma Bar, the day after he died. CLANT was to have its Christmas function and we nearly cancelled it. There was a ring around. The decision was made that his Honour would much prefer us to go ahead and think of him and drink a glass of red. And we did and Jon Tippet QC, the President, made a wonderful speech recalling his Honour's time in the Territory.

Steve Bailey was an immensely likeable man. I was told by his great friend Greg Cavanagh in late 1996 when it was known that Steve was coming here to be a judge, that I would really like him, 'He is your kind of bloke'. Well, so it turned out. We became close friends. In that 'we' I include my wife Lyn and Steve's wife Jenny.

My daughter Beth was his associate for 12 months in the year 2000. She in turn became a close friend of his Honour and part of his legal family. He came to our house for her graduation party. There were the oldies upstairs; the young ones downstairs, mostly law students, associates and their friends. The great unwashed, I suppose. Steve chose to entertain them and be entertained by the young ones. He was not at all pretentious or pompous. 'Call me Steve', he would say. Never Steven, 'Call me Steve'. He genuinely liked young people and enjoyed their company. He was in turn terrific company himself, with what others have described as a dry sense of humour. I thought it was rather mischievous.

The eight associates were represented - the eight he has had were represented by Kate Wickett on Friday at the funeral service. It was clear that they deeply respected and I think loved their Judge. He was mentor, teacher, friend and entertainer it seems. Five of his eight associates are here today, one having come from interstate specially.

His brothers Mike and Peter are here as well as members of Jenny's family. Our thoughts remain with them and Jenny, Tom and Kate today. I spoke to Jenny on Friday afternoon. I told her of a dinner I had had with Steve on circuit in Alice Springs late last year. He cooked for both of us. I provided the red. Just the two of us chatting as you do. A lovely evening. 'Hold on to that memory', said Jenny. We will all have such memories.

I spoke to Steve just a couple of months ago about next year's Bali conference. He said, 'I'll be there'. It was at a time when he must have known the odds were against it. He remained cheerful in his adversity and optimistic and displayed the stoicism which you would expect from this fine man.

The Court and the legal profession greatly respected Steve Bailey and will be the poorer for his passing. His family and his friends who loved him will remember a dear and true friend who for an all too short time graced their lives. I borrow these words from Shakespeare who when Julius Caesar wrote of Brutus:

His life was gentle and the elements so mixed in him that nature might stand up and say to all the world, this was a man.

May it please the court.

MARTIN CJ: Mr President.

MR REEVES QC: May it please the court. Steve Bailey J did not like counsel repeating themselves or making the same submissions in many different ways. He told me so about three months ago when I last appeared before him. If he were here today, I am afraid I would be admonished again, because it is almost impossible to

talk about the life of Steven Bailey without repeating one's self, without wanting to say in many different ways that he was a good man, because in so many different ways he was a good man.

He was a good family man. He was a good and well respected Judge and he was a good friend to many and a good colleague to many others. Above all else he was a good person.

I would not presume to intrude upon his family life, to attempt to describe in detail his status as a good family man. I can however, use his own words, the words he used when he was sworn in as a judge of this court on 3 February 1997. He said he was blessed by a marvellous family who gave him total support and encouragement. He said his family would never let him forget that he suffers from human deficiencies like all of us and he said that he too had to empty the dishwasher and take out the garbage. He said:

I am confident that they will save me from any tendency to judgitis.

He went on to explain this is a serious affliction in which the victim develops an irrational belief in the absolute correctness of his own views. May I say, Jenny, Tom and Kate, you did an excellent job.

On behalf of the members of the Northern Territory Bar Association, may I express our sincere condolences to Jenny and Steve's family. Whilst we have all suffered a great loss by his passing, your loss is of course infinitely greater than ours.

Bailey J was a diligent and fiercely independent judge. The Director has already spoken of his great qualities as a judge, particularly as they were displayed in the criminal jurisdiction. I respectfully agree.

I want to add some comments about his work in the civil jurisdiction. As many of you will know Bailey J obtained a Bachelor of Laws Degree with first class honours from the University of London. In that year he was awarded the University Medal. He then obtained a Master of Laws which was awarded with distinction. He was offered a teaching post at the University of London immediately upon the completion of his degree. An offer previously unheard of and testament to his academic eminence. His wanderlust got the better of him and he immigrated to the colonies and a teaching post at the University of Western Australia. He taught in commercial and civil law. So whilst criminal law became his main focus in more recent years as a Judge. He began his career in the law on the civil side.

On the civil side, just as with the criminal side, he was not a Judge who was affected by the legal equivalent of political correctness. Instead he dispensed justice according to the law, not according to popular fashion or fads, not according to his personal view of the law, but according to the law as expressed by the Parliament and the courts. Some may have thought this approach conservative or black letter law. I think he would say that he simply applied legal principle as his office required him to.

However, he was willing to speak out when he saw the system failing, when the law, by reference to which he was duty bound to dispense justice, was unclear. One example was his decision in *Metal Roofing and Cladding Pty Ltd v Eire Pty Ltd*. A case dealing with a claim for pure economic loss. In agreeing that the appeal should be dismissed his Honour said:

The only comment which I would wish to add is to emphasise the present disgraceful uncertainty in the law dealing with claims for pure economic loss in negligence.

He referred to the High Court's decision in *Perre v Apand* and he said:

I have laboured through the 437 paragraphs and a good deal of the material referred to in the 539 footnotes of the seven judgments upholding that appeal. With the greatest of respect there is nothing there in terms of agreement on basic guiding principles to assist with resolution of claims such as the present. I appreciate that these observations will be of no comfort to either the appellant in the present matter, or countless future litigants, until such time as there is a consensus as to the fundamental principles in this branch of the law of tort.

Bailey J also had a good radar for rubbish. That is euphemism for a much cruder expression that you will hear in a moment. He apparently used that well-honed radar in a case of one of the persons who was involved in the invasion of the Northern Territory Parliament, as part of a protest against the Northern Territory's drug laws. I say that because the website of the Network Against Prohibition records this about an appearance one of its members made before Bailey J:

Bailey J explained (in that patient and painstaking manner favoured by judges when addressing appellants without legal representation) that our previous amended appeal was rubbish. This helpful legal advice led to this more detailed amended appeal.

He was not always so delicate with counsel, I have to say. In one criminal appeal some years ago he wearily and quietly advised counsel, defence counsel, after two hours of indulgence, that his submissions on a particular point were 'bullshit'. Defence counsel, thinking his Honour had forgotten himself and seeking the retraction he felt sure would come, inquired in an oily fashion, 'I'm sorry, your Honour, I'm not quite sure I heard your Honour correctly'. The judge lent forward and replied in a much louder voice, 'I said, Mr X, your submissions are bullshit'.

To consider Bailey Js contribution to the Territory only in terms of his tenure as a Judge is to significantly understate that contribution. As others have or will point out, he worked as a parliamentary counsel and policy lawyer in the Northern Territory from self-government until 1985. In those roles, together with Mr Ian Barker QC and Mr Graham Nicholson, he was the architect of much of the Territory's early legislation and legal policy initiatives. It was a huge task starting from scratch and

again the manner in which he discharged the job was a testament to his great capacity.

As well as being a devoted family man and a lawyer of distinction, Steven Bailey was a modest man. Whilst he was obviously intellectually gifted, that did not lead to him displaying arrogance or excessive pride. In fact the word 'humility' best describes his attitude to life.

He was entertaining company, as the Director has said, stimulating conversationalist and he had a dry and wicked sense of humour, usually self-deprecating. A good example of that sense of humour can be found in his address to court on his swearing in that I have already mentioned. When he spoke about his arrival back in Darwin in 1997 he compared that with his original arrival here 19 years earlier in February 1978. Of the 1978 arrival he said:

On that occasion I nearly caused a major traffic accident when I stopped at a railway crossing on the Stuart Highway in Parap.

Most of you will know that the old North Australian Railway was closed in 1977. He described the incident as follows:

The driver immediately behind me, in a fearless frank submission, suggested I might like to move along as there was little chance of a passing train.

He added:

I cannot recall precisely his helpful instruction, but I do remember being impressed by his ability to focus on the issue and also his facility for adjectives.

That self-deprecating, understated and dignified style was typical of Steven Bailey.

For all these reasons and may I conclude by saying to Steve's family, the Supreme Court of the Northern Territory, the Northern Territory legal profession, and indeed the whole Northern Territory community, have lost a Territorian of distinction with the passing of Steven Ronald Bailey. Our thoughts are with his family.

If it pleases the court.

MARTIN CJ: Madam President.

MS SHORT: Good morning, your Honours, distinguished guests, ladies and gentlemen. Bailey J's life was a life tragically cut short. He still had so much more to contribute to his family, legal profession and the community. In a profession where by its adversarial nature people tend to disagree, Bailey J was universally well regarded. This is a testament to his intellect, legal proficiency, humanity and his

engaging personality. The close-knit Territory legal fraternity is all too well aware of the gap left by the loss of his friendship, leadership and wit.

Bailey J had a distinguished legal career both in Australia and overseas. Steven Ronald Bailey was born in England and undertook his Bachelor of Laws at the University of London from where he graduated with First Class Honours and won the University Medal.

In 1975 he migrated to Australia to take up an academic appointment as a senior tutor in legal studies at the University of Western Australia. He then started lecturing in law at the University of Newcastle in New South Wales. Bailey J moved to Darwin in 1978 to take up a position at the then Department of Law and from 1981 until 1985 he was the Director of the Executive and Policy Division of the Department.

In 1985 the Bailey family moved further north for Steven to take up a position as Senior Crown Counsel in the Prosecutions Division of the Attorney-General's Department in Hong Kong. Here Bailey J's career flourished. From 1992 until 1994 he was the Senior Assistant Crown Prosecutor and then in 1994 he was appointed as a Judge of a District Court in Hong Kong.

Bailey J returned to Darwin in 1997 to take up a position on the Bench of the Northern Territory Supreme Court where he served until his recent untimely death. During his time on the Bench, Bailey J was also involved in the National Steering Committee for the annual National Supreme and Federal Court Judges conference and he was appointed as the Chairman of the Northern Territory Parole Board in 2000.

His significant contribution to the Territory's legal profession cannot be questioned, but it is the man, not the career, that will be sorely missed. The primary responsibility of a judicial officer is to uphold the judicial oath and administer the law without fear or favour, affection or ill will. However, as Judges are placed under constant scrutiny by the media, the community and the profession, increasingly high expectations are attached to people who hold judicial office. At times the expectations must seem limitless.

While giving a speech in Belfast in 1998, the Honourable Justice Michael Kirby of the High Court of Australia described a judge's broader role as follows:

In addition to the work of a Judge in conducting trials and deciding cases there is the role for the Judge as an intellectual leader and citizen. By his or her conduct in the courtroom and elsewhere, the Judge should uphold respect for universal human rights. By activities in the legal profession and in contact with judicial and legal colleagues overseas, the Judge inescapably has a leadership role.

However, the expectations do not end with upholding human rights and the assumption of leadership responsibilities; ethics, personal conduct and relationships also fall under the microscope. Recently the Australian Institute of Judicial

Administration published a 30-page guide to judicial conduct providing guidelines to deal with everyday occurrences and situations which may raise a conflict with the general expectations placed on judges. These expectations result in all judges facing a complex balancing act of upholding professional standards, maintaining the necessary isolation for impartiality, battling community accusations of living in a glass tower and sustaining a worthwhile balance.

Despite the challenges, Bailey J managed to command respect as an accomplished Judge with a reputation for his compassion, commonsense and a firm but fair approach and he also maintained an active involvement in the local community and social engagement with the legal profession, including participating in this year's Law Society's annual cricket match, albeit playing for Mildren J 11, not the President's 11.

Despite ailing health, Bailey J continued balancing his involvement with work, family, friends, colleagues and the community. On behalf of the Law Society and its members I would like to offer our sincere condolences to Bailey Js family, particularly his wife Jenny and his children Tom and Kate.

If it pleases the court.

MARTIN CJ: Ladies and gentlemen, thank you for your attendance. That concludes our sitting.

Would you please join us on level 4 for morning tea and refreshments.

The court will now adjourn.

ADJOURNED 10:11 AM INDEFINITELY