

Kenneth Marks



ON 4 December 2005, the Honourable Kenneth Henry Marks died after a long illness.

Into his 81 years he packed a remarkable amount — bomber pilot, equestrian, racehorse owner, successful advocate, Supreme Court Judge, Royal Commissioner, mediator and arbitrator.

“Ken” Marks was born in St Kilda on 10 September 1924 and educated at what was then known as Melbourne Church of England Grammar School. His biography indicates that his years at that school were not happy ones, although he seems to have retained many close friends from those days.

At the early age of 16 he enrolled in an arts/law course at Melbourne University. But in 1943, part-way through his course and against the opposition of his parents, he joined the RAAF. He became a Lancaster bomber pilot, flying fifteen missions over Europe before the war ended in that theatre. In his own words he “returned to Australia just in time to see *Rainbird* win the 1945 Melbourne Cup”.

He returned to his studies at Melbourne University in 1946 with an inquiring mind, a belief in the rights of the individual and a thirst for equality. In pursuit of his ideals, he joined the Labour Club and the Communist Party in 1948. However, visits to Eastern Europe and the sight of Soviet oppression in Czechoslovakia and Poland disillusioned him. He lost his faith in the workers’ paradise. In his biography, *In Off the Red*, he said, “I have lacerated myself for my stupidity, unwittingly supporting evil.”

He completed his law degree and, after serving articles with Cedric Ralph, he was admitted to practice on 1 September 1950. He signed the Bar Roll on the same day. He read with Sir John Starke, and one could often see the influence of his master in his succinct and pragmatic approach to the problems he faced.

At the Bar he had a broad practice. The breadth of that practice is perhaps illustrated by what David Jones said at his welcome as a judge of the Supreme Court of Victoria. David Jones referred to Ken Marks’ “great scholarship, dedication and tenacity, whether it be arguing some constitutional point about electoral boundaries before the High Court, wallowing in offal before an arbitrator, seeking out the cause of extensive bushfires or urging a jury to award fair and adequate damages to a badly injured plaintiff”.

Ken was heavily involved in issues of compensation for injuries and his work was largely responsible for the passing of the *Motor Accidents Act 1973* which brought in a system of compensation for persons injured in motor accidents.

His interests were wide. He was a member of the Board of the Faculty of Law at Monash University and a member of the Alternative Dispute Resolution Committee of that University’s Commercial Law Centre. He had an interest in science and technology and was concerned to ensure that they were applied for the benefit of the individual.

Ken Marks took silk in 1967. He served on the Bar Council for many years, including a stint as Deputy Chairman and then as Chairman. Part way through his Chairmanship, on 15 June 1977, he was appointed a judge of the Supreme Court.

As a judge he was quick, concerned and thorough. He certainly did not hesitate to make it clear to counsel how his mind was working and what problems, if any, he had with the argument being put to him.

In a farewell written in *The Age*, Rabbi John Levi and William Ormiston said: “In the early 1980s litigation was an entirely reactive process whereby the judge appeared at the appointed time and sat largely silent until the hour fixed for adjournment. Marks fixed one aspect of that very quickly as it was impossible for him to sit silent; his interventions were notorious.”

On the Bench he was not just a skilful, hardworking, meticulous and vocal judge. His enquiring mind, which had led

him to an interest in alternative dispute resolution, also caused him to look at case management as a way of streamlining and speeding up litigation. He became the judge in charge of the newly revamped Commercial List in 1986, which was created pursuant to the new Rules of Court introduced at the end of 1985.

He ran the Commercial List with efficiency and speed, and left his mark throughout the whole of the Supreme Court’s civil business. It is not unfair to say that his actions changed the face of civil litigation in Victoria. Many of the changes which have occurred would have taken place in any case. But he was the catalyst, the initiator and the original driver.

He was the first judge of the Supreme Court to refer a question to a Special Referee (on 25 July 1985) in *Inter-Computing Pty Ltd v Falcom Australia Ltd*. In 1990, in *Bond Brewing Holdings Ltd v National Australia Bank Ltd*, he appointed a professor in New York to make enquiries and to give his opinion as a special expert and subsequently conducted, with the referee, a telephone conference in open court in which counsel for the parties took part.

He was Chairman of the Supreme Court’s Computerisation Committee and Chairman of the Computer Assisted Transcript Committee.

He retired from the Supreme Court on 28 January 1994. At his farewell he spoke strongly against the choosing of judicial appointees, primarily with a view to making the Supreme Court “more representative”. He said, “Editorial and other media comment appear to throw doubt on the hitherto accepted principle that judicial officers are best chosen predominantly for their capacity to perform well the tasks required of a judge of a superior court. If these comments are taken seriously and the executive yields to them, the maintenance of the traditional reputation of the courts will falter. It is not sufficient to appoint judges by reference solely to extraneous characteristics which might seem attractive to persons ignorant of the demands of a good justice system.”

Following his retirement he was immediately appointed to chair the Standing Review and Advisory Committee on Infertility to review State legislation in the field of IVF. Subsequently he became nationally known as the Royal Commissioner who inquired into the death of Perth lawyer, Penny Easton, and

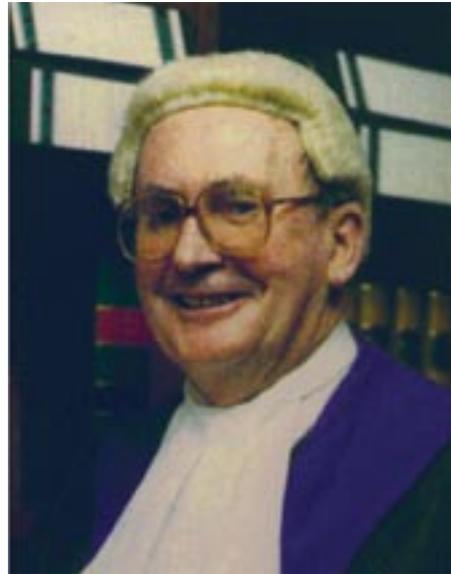
who carried out that Inquiry with courage and determination in the face of strong attacks from the Keating government.

He was a man of many parts, dedicated, complex, loyal, impatient, persistent and caring, self-critical and anything but self-important. He did not take himself seriously. But he did take his work seriously and he did take life seriously. He was a very hard man to move once he had determined in his own mind what he thought was right. But he was very concerned to do what was right.

At his farewell he adverted to the importance of the independence of the Bar in terms which revealed both his concern for those who cannot defend themselves and his innate dry sense of humour: "There also appears to be a failure to understand the notion of independence of the Bar. It is its independence and the individualism of its members and the competition between its members which enabled the weak to be fearlessly defended against the strong, the poor against the rich and the subject against authority. *The Law Reports* are littered with evidence that these things are so. It may well be that the Bar and, for that matter, the Bench is a wonderful sanctuary for egomaniacs. I cannot think of better therapy or a more useful end to which this rampantly common human proclivity might be put."

He leaves behind his wife, Sheila, two daughters, Kate and Geraldine, and three grandchildren. To them we extend our sincere sympathy.

Judge Bruce McNab



The following eulogy was delivered by Judge John Nixon at a service held at Flemington Racecourse.

WINDBAG, as Robert,¹ implied, loomed large in Bruce's psyche.

If anyone had the temerity to ask Bruce "when were you born?" he would invariably reply "in the year *Windbag* won the Cup". Whether the questioner was any better informed is one matter but as any keen racegoer knows *Windbag* won the Melbourne Cup at this very track in 1925. So at the time of his death Bruce was in his eighty-first year. Perhaps the fact that he was so attached to *Windbag* was a factor contributing to Bruce's lifelong interest in racing but I'm more inclined to think that it had far more to do with his intense dislike of long or misleading submissions by counsel.

Robert has detailed Bruce's background and the family relationship and I will only say this. At Scotch College Bruce was not only an outstanding scholar but also an accomplished cricketer, footballer, tennis player and table tennis player. At the University of Melbourne he was a resident of Ormond College while completing his law course. Bruce was indeed an outstanding law student and he won the Supreme Court prize awarded to the top student in the course. In achieving that high honour Bruce relegated Richard Newton, later to become Mr Justice Newton of the Supreme Court of Victoria, to the position of runner up. Richard Newton had been an odds on favour-

ite to take the title and the loss of the odds on favourite may have contributed to Bruce's racing motto "Odds on look on". Bruce's sporting achievements for Ormond College were well recorded and on more than one occasion he delved into the archives at 346 Burke Road to obtain a copy of the *College Magazine* which he would read to me in order to provide corroboration of his sporting prowess at cricket while we were having a quiet chardonnay or two. As a batsman he held down No. 11 position in the batting order, and as a No. 11 batsman he made Glenn McGrath look like Ricky Ponting. His claim to fame was as a bowler. Knowing Bruce as you all did, no one would visualize him running in like Brett Lee delivering thunderbolts — that wasn't his form. No, Bruce was a slow medium bowler who, from a short run, loped in and if the conditions were favourable he could occasionally swing the ball both ways. To those who know their cricket Bruce was a bowler in the mould of Bill Johnston.

On many occasions Bruce regaled me about the final of the inter-collegiate match between Ormond and Newman. Bruce prided himself on having total recall and I must say that his story had the ring of truth about it as on each occasion he described the match to me he was very consistent and the *College Magazine* confirmed his story. Ormond batted first and were all out for a paltry 114. Bruce didn't trouble the scorer. At stumps Newman was 0/52 and one of the openers was heard to say to his partner, "We'll get the runs without loss — there's nothing to this bowling." I hasten to add that Bruce had not bowled on that first day. I've heard the story so many times I felt as though I was actually at the match. Coleman opened the bowling when play resumed on the second day and Bruce was at first slip. The Newman opener snicked the first ball and as the Ormond Magazine recorded McNab took the most spectacular catch ever seen on the University Oval. It became 2/52 by the conclusion of the over. Bruce opened the bowling from the other end and according to the write up in the Ormond Magazine McNab was unplayable. I'm well aware that a lot of barristers had similar feelings when appearing in Bruce's court. Newman collapsed and were dismissed for 85. Bruce took 7/12 and in the Magazine he was written up as a devastating bowler, a match winner and no doubt in today's terminology he'd be "Man of the Match".

It wasn't until some years later that Bruce confessed that he had written the article himself.

Bruce signed the Bar Roll in April 1948 after finishing articles with his Uncle, Frank McNab earlier that year. He was much in demand and established a very wide general practice very quickly as his Clerks Arthur Nicholls and Percy Dever extolled his virtues. Bruce incidentally was at the Bar for twenty-four-and-a-half years and was a Judge of the County Court for precisely the same time. Bruce was much sought after as counsel appearing for Boards of Inquiry, and he regularly appeared in that rather relaxed atmosphere. It rather suited his style and they were lucrative briefs.

Bruce held the retainer for the former State Electricity Commission of Victoria and for many years he was successful in exculpating the SEC from liability following fires alleged to have been caused by its electrical transmission equipment. He developed what was termed the "McNab theory". This theory maintained that fires could not be started by accidental contact between electrical conductors or power lines. The SEC got away with this theory for many years and it's not putting it too highly to say that the SEC, relying on the theory, saved millions of dollars.

However, following the disastrous bushfires in the Western District in 1976 Sir Esler Barber presided over a Board of Inquiry into the fires. The McNab theory was exposed as being total nonsense by the Inquiry but by that time Bruce had retreated to the safety of the County Court Bench and it was left to Alan McDonald, later Mr Justice McDonald, to salvage something from the carnage. As counsel assisting Sir Esler Barber I had immense pleasure in telling Bruce that his so-called theory was "bunkum". Bruce thought for a minute and dryly replied, "Oh well, Jack, think of all the money I saved the State for all those years."

As part of his extensive general practice at the Bar, Bruce appeared for the stewards in a number of Racing Appeals before the VRC Committee. His claim that he never lost for the stewards was correct but it should be viewed in context — no one else did either. Sir Robert Menzies and Sir John Young each appeared on one occasion only before that august body representing rank miscreants. Each vowed that he would never again appear after his experience before the Committee of the time. Appellants had a dismal record indeed in that jurisdiction.

Bruce's lifelong interest in racing

overlapped into his life at the Bar and as some may remember he ran a Book on the appointment of silks and judges. Bruce had an uncanny knack of having deadly accurate odds on appointments, often appearing to know about appointments before the appointee himself. Over the years he made a small fortune from this enterprise, and his winnings often provided a bank for the following Saturday. Bruce would never admit it but the fact was that he was very friendly with the proprietor of Ravensdale & Sons and had a standing arrangement to be notified the very moment silk gowns or judges' robes were ordered.

As a barrister Bruce was a master tactician, a formidable opponent who always had his clients' interests at heart and who achieved good results for them, often in very difficult cases. He had a wicked sense of humour. It was, given his record at the Bar, inevitable that Bruce would be promoted, if that be the right word, to the Bench and that duly occurred in 1972. Bruce's timing was impeccable. He was appointed to the County Court on the Friday before Derby Day, he was sworn in on the following Monday and, of course, Tuesday was Cup day so he was paid for a public holiday.

Shortly after his appointment I appeared for a defendant in an industrial accident case which was listed before Bruce. Having been opposed to him at the Bar I knew that life for me wouldn't be easy. Liability was in issue but realistically I was hoping to get perhaps a reduction for contributory negligence of perhaps up to one-third. The case finished within the day and Bruce reserved. He announced that he would give judgment the following day. Marie told me that while he was writing his judgment at home she heard a burst of raucous laughter from Bruce and she enquired as to what was so funny. Bruce apparently replied, "I've just fixed Jack right up. I've stitched him up." Indeed he did and the only solace I got out of the case was that his assessment of damages was quite low. Bruce didn't like giving money away even if it was somebody's else's money.

Bruce never lost his sense of humour while he was on the Bench but he was not always what is now described as politically correct. Bruce on one occasion presided over a burglary trial at Geelong. The accused, whose surname was Burr, had a record of convictions for burglary which extended over several pages. The Burr family was akin to the Timkins in that wonderful series "Rumpole of the

Bailey". In spite of what Bruce regarded as overwhelming evidence of Burr's guilt the jury returned a verdict of not guilty. While the jury remained in Court, Bruce announced "Discharge Mr Burr from the Dock" and then added "By the way, Mr Burr, don't do it again!"

On the day following Bruce's death the Bar Council on behalf of the Bar inserted a notice in the daily papers in which it was said amongst other things that he had served as a Judge of the County Court for a remarkable 25 years. In a sense that is right but I prefer to regard Bruce as a remarkable Judge of the Court over that time.

He was a remarkable Judge because first and foremost he had a great knowledge of the law and the ability to apply the law succinctly to the facts of the case before him. Juries loved him and the jurors literally hung on his every word. He maintained his sense of humour and displayed at all times a great understanding of human nature and people, leavened, mostly at appropriate times, with wit. Bruce possessed what is sometimes called "the common touch" and he was as much at home with the racecourse tout as he was with the Governor of the State. As a Judge of the County Court Bruce displayed great commonsense as well as practical wisdom. Probably he was a Judge of the Court in the right era given his temperament; he was very impatient with any judge who sought a day out of Court to write a judgment or prepare reasons for sentence. As a judge he was incisive, accurate and he got it right. In all respects he was an ideal County Court Judge.

Bruce dealt promptly and efficiently with his workload on the Court except perhaps for his last case before he retired from the Court in June 1997. Bruce was in the WorkCover List at the time and he heard evidence over several days in what counsel in the case regarded as a cause célèbre. Bruce reserved for almost a fortnight and the expectation was high that the decision would clarify that area of the law. Bruce delivered judgment as follows: "The Applicant is a malingerer. Application dismissed." Bruce's door was always open for a brother or sister judge to discuss any problem and he was always willing to help or advise, that is if you could find him.

Whilst the door of his chambers was always open it was quite another thing to find Bruce there. As Robert said, at lunchtime he adjourned just a little early so that he could make the Savage Club, and when he adjourned his Court at the end of the

day he was in the lift making his way home before anyone could say “protest”.

The Racing Appeals Tribunal commenced its operations in January 1984. Jim Forrest, Judge Forrest of the County Court was appointed Chairman, Bruce was a Deputy Chairman and I was fortunate to be “tail end Charlie”. Bruce loved his work on the Tribunal, which was the final avenue of appeal in thoroughbred racing, harness racing and greyhound racing. In 1990 when Jim Forrest retired, Bruce was appointed Chairman and he held that position until 2001 at which time he retired as Chairman but remained as a member of the Tribunal until January 2004. His knowledge of and expertise in the racing industry was extensive, and many a miscreant met his match on appeal although, contrary to what occurred before the inception of the Tribunal, a number of appeals have been allowed.

Bruce was instrumental in arranging annual conferences between the Racing Appeal Tribunals of the other States and Territories and in more recent times with New Zealand. This all came about when Bruce in the mid 80s was at a law conference held in Vienna. He met up with the late John Kable — a very talented Tasmanian barrister who headed that State’s Tribunal. No doubt, knowing them both as I did, the meeting would have been held in a bar. As a direct result very beneficial conferences have been held regularly and these conferences, held at the time of an important local race meeting, have led to a valuable exchange of information and knowledge. How else would Bruce have attended two Brisbane Cups, two Sydney Cups, two Adelaide Cups, two Launceston Cups, the Alice Springs Cup, the Darwin Cup, the Auckland Grand National, the Christchurch Guineas and the two-day meeting of the Cairns Amateurs? Some may ask why no Perth Cup? Well the reason is obvious — the Perth Cup is run in the long vacation.

However, there was indeed a Perth Conference held at a far more suitable time. Never will I forget the day in the Committee Room of the WA Turf Club. Two things were notable: Wilson Tuckey was the Chairman of the Club and Bruce over the afternoon had one or two charonnays. He couldn’t back a winner so for a diversion he told anyone who would listen that he was an expert in reading palms and thus could predict a person’s future. The news spread like wildfire and a few minutes later there he was seated like royalty in an armchair with a queue of at least 10 women awaiting their turn.

Wilson Tuckey’s wife was second in line and the anticipation on her face had to be seen to be believed — she was literally shaking with excitement and she was not alone in that. Bruce fancied himself as a fortune-teller and he continued reading palms until well after the last race and the bus was ready to take us back to the hotel. No one has ever provided better free entertainment in any committee room on a race day.

Bruce loved his racing and inasmuch as the Tribunal has played a part in the racing industry then it can be truly said that he has made a giant contribution.

He loved to have a punt and now that he’s no longer with us those of you who have shares in Tabcorp had better keep a keen eye on the stock market. But Bruce really was a modest punter who concentrated mainly on the multiple forms of betting. However, he had at least one huge result. Libby and I were overseas in 1978. When we left Bruce had a battered old Subaru which was so old it probably had miles rather than kilometres on the clock. It was before the days of government cars. On the very day we returned Bruce telephoned and said, “Marie and I’ll come round for a drink to welcome you back.” The McNabs arrived in a brand new Toyota Crown with all the trimmings. Bruce introduced himself as Quaddie Mac and I think he liked that name. He’d won a huge quadrella, at of all places, Werribee. An old aunt had phoned him and said that she had a strong tip for a horse called *Idee Fix* — I can remember the horse’s name as Bruce also told me this story more than once. *Idee Fix* was 100/1. It was in the third leg of the quadrella — he had a fancy himself in the first two legs — so he took those one out and with *Idee Fix* in the third leg he took the field in the final leg. Bruce was on top of the world, as well he ought to have been, but he did rub salt into the wound by saying, “If you’d been here Jack I’d have told you about *Idee Fix*.” That would have been a first! Bruce loved trifecta betting and he was a numbers man; he often took three, four and six as his Trifecta numbers simply because he lived at 346 Burke Road.

He had some favourite sayings and if a leading trainer had two horses in the one race with one a short-priced favourite and the other at long odds, he’d say to me, “Remember the old maxim, Jack — ignore the selected and back the neglected.”

He was a man who loved racing right throughout his life and he loved nothing more than a day at headquarters — i.e. here at Flemington.

Bruce was not only a remarkable judge for almost a quarter of a century, he was, as Robert said, a remarkable family man. He was married to Little Marie as he affectionately called her for almost half a century. I have no doubt that he was devastated by her death last June. Bruce and Marie produced three great sons and to date there are no less than 10 grandchildren who were devoted to Grandpa Bruce and to Marie.

The last six months or so were not kind to Bruce and as a friend for so many years it was indeed sad to see him in a steady decline and so obviously unhappy with and frustrated by his predicament.

But I prefer to remember the many happy days which we spent together; some of those days were in this very room — Bruce proudly wearing his McNab tartan tie — if I hadn’t known him better I’d have thought that his wardrobe only extended to that one tie. Other times were spent at the Malvern Hotel — i.e. after Court of course and on a Friday — a very happy table which included mine host, Adrian Schrader, Rollo Roylance, Bill Guillano, Geoff Rickards, the late Kevin Curtain and others — those were indeed happy days. At Seabrook Chambers on Grand Final Eve — Bruce in his towelling hat which was once a white hat but time hadn’t been kind to it — he was generally first to arrive and often the last to leave — happy times at 346 Burke Road, at our house, at Noosa as well as at Anglesea. Those are my memories of Bruce — memories which I will treasure forever. He was indeed a remarkable man in so many respects who never took himself too seriously. He loved life.

He was much loved by all who knew him.

Farewell, Bruce. Rest in Peace.

Footnote

1. Bruce McNab’s oldest son.

WITH the passing of Bruce McNab, the Victorian Bar has lost one of its greatest characters. In a golden era of advocacy, which included such legends as Starke, Revelman, Rapke, Crockett, and Coldham, McNab stood out in winning the respect and friendship of his contemporaries at the Bar. Academically gifted (he was a Supreme Court prizewinner) and equipped with a fine, incisive mind, he made his mark before both judges and juries with his advocacy. McNab never took silk, yet it was typical that after his appointment to

the Bench that the then SEC, for whom he had held the retainer, replaced him with the services of a QC. But McNab's greatest contribution to the Bar was his wicked sense of humour and his infectious love of life. He became legendary with his book on the appointment of silk each year. Unbeknown to many, George Ravensdale, the Court outfitter, was a close neighbour. With inside knowledge as to who had ordered silken robes, McNab was able to lay his odds with great accuracy.

Racing was his lifelong love and he was able to combine his profession with his pleasure, serving on and then chairing the Racing Appeals Tribunal. His career as an owner of racehorses was less distinguished and rare success was the occasion of great celebration.

In 1971, the third floor of the old Owen

Dixon Chambers was one of those nodes of comedy and entertainment that occur rarely in the history of the Bar. Along with McNab, Scurry (the inaugural head of the Crimes Compensation Tribunal), Nixon (later Judge, QC) and "young" Dee (later Judge, QC) formed the nucleus of a remarkable gathering of some of the greatest wits of the Bar. Assembling at the Metropolitan Hotel each Friday, the wins and losses, heartaches and joys of each week would be relived and dissected and subjected to the sharp focus of McNab's humour. Promptly at 6, he would retire to go home to his family, for they were his greatest love.

McNab was fortunate to enjoy the love and devotion of his wife Marie and he valued her and his sons more than any success in his professional career.

McNab only had two readers and I was fortunate to be one of those. He taught me little law but a lot of his legal wisdom. He inspired devotion from his staff — his long-serving secretary Marilyn Sebire followed him to the County Court to become his Associate. As a judge he was both efficient and merciful. Appeals from his decisions were few, and successful appeals even fewer.

With a practicing Bar approaching 2000 advocates, there will never be the intimacy that was part of a Bar of only a few hundred, and it is to be regretted that there is unlikely to be another barrister so universally respected and enjoyed as Bruce McNab.

Tony Lewis

Margaret Benoit Major Exhibition

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Sunlit Trellis oil 46 × 61 cm



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