Don't you know who I am? – ego and identity in the administration of justice

An address delivered by Chief Justice RS French at the Bench and Bar Dinner, Sydney, 8 May 2009.

The title of this short reflection is 'Don't you know who I am? – Ego and Identity in the Administration of Justice'. The question it poses has been asked in many parts of the world, and recently in New South Wales. Its common consequence when put by a public figure to some apparently lesser mortal is scornful dismissal in the short term and public ignominy in the medium to long term.

'Don't you know who I am', is not a question I need to put to you tonight. I have been more than adequately introduced by your President and subjected to detailed life review by Ms Junior. Indeed, for the past few weeks she has pursued my family, friends, former law partners and secretaries with frightening persistence trying to determine whether I have a past. She has demanded evidence, including photographic evidence, of my prior existence. Photographs from the 1980s were offered but rejected as too recent. Her excellent denouement is now behind us. But while awaiting it I felt a little like a one person native title claim group required by a ruthless inquisitor to prove the continuity of my existence back to my birth date.

As a general rule, the question 'Don't you know who I am?' is fraught with difficulty because in the circumstances in which it is usually posed it carries the implication that the person asking it stands outside a framework of rules or conventions applicable to the ordinary run of humanity.

There is a useful website called Youfool@don'tyouknowwhoIam.com which collects 'Don't you know who I am?' stories. One of those stories illustrates quite well the problem that the question throws up. A celebrated game show host boarding a United Airlines flight at Los Angeles International Airport tried to take with him a bag which exceeded the maximum size for carry on luggage. A United Airlines employee asked him to put it into a metal template to see whether it fell within the size limits. The game show host refused her request and began passing his luggage straight through into the x-ray machine. He said to the employee 'Don't you know who I am?' She replied, 'I don't care who you are, these are the rules'. She later sued him for serious hand injuries sustained during the conversation. How her injuries were caused does not appear from the web site.

'I don't know who you are, these are the rules' identifies the issue with precision. The questioner's public office or celebrity status derives from functions and achievements not relevant to the preference they seek.

A kind of 'Don't you know who I am' question was put by King James to Sir Edward Coke, chief justice in the Court of Common Pleas in 1612. 'These are the rules' was the substance of the response that the chief justice gave to the king. The king claimed to govern by divine right, that the judges were his delegates, and that he could decide any case for himself. According to Bracton, Coke said:

> True it is, that God has endowed your Majesty with excellent science and great endowments of nature. Your Majesty is not learned in the laws of your realm of England and causes which concern the life, or inheritance, or goods, or fortunes of your subjects, are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it.

Coke was subsequently removed from office, but the sentiment lingers on and informs our understanding of the separation of judicial and executive powers.

'Don't you know who I am?' is plainly not a question to be asked by judges or by members of the bar, however prominent. Indeed, outside the framework of the judiciary and the profession the general response is likely to be a blank stare and the perfectly reasonable answer, 'No I don't'. This is particularly so of the High Court. In the last survey which I read, albeit it was some years ago, a very large percentage of the population did not know that Australia has a High Court.

In preparing this talk I undertook some research to see whether or not there was anything on the web which could cast light upon current public awareness of the High Court. I discovered a web site called Product Review. It posts descriptions of products and invites commentary upon them. It gives the products a star rating out of five. One of the products it has posted is the High Court of Australia. This product has attracted a user rating of two stars out of five, based on two votes: one posted on 20 June 2006, the other on 10 July 2007. The 2006 vote lists as a 'Pro' – 'Really nice inside. Has a kind of old Englandy feel about it'. And as a 'Con' – 'Boring as. Not much to do and see there.' The 'Overall' conclusion offered by this voter was 'Pop in for a squiz … then head for the pub' . The more recent voter of July 2007 concluded:

> Overall: a great place to go to enjoy the towering monument but it doesnt really have much features. (sic)

Coke's riposte to King James spoke of the long study and experience necessary to understanding the art of law. With that understanding

come certain attributes. Those who are long in years at the bar and those of any longevity on the bench will include in their suite of professional attributes a certain harsh modesty even if it be well concealed beneath apparently impregnable self-confidence and persuasive authority. It is a modesty which will have been tempered in the character-building fires of the adversarial furnace, fanned by the sometimes not so light breezes of judicial rebuke or irony. It will have been informed by an understanding of the inescapably human dimension of legal institutions and their limitations as well as their aspirations to do justice according to law. It is part of our common lot.

For me the character building process began quite early. I discovered the limits of my powers of persuasion with respect to the most fundamental of propositions when addressing a magistrate on the burden of proof in the Court of Petty Sessions in Perth in the 1970s. He observed in the course of my submissions, 'Well your client wouldn't be here if he hadn't done something'. This was my first encounter with legal realism at work. In a practical sense, he was right. Nevertheless, I regarded my inability to divert him into a serious consideration of the golden thread as a significant forensic failure.

Such tales could be multiplied into the usual dinner talk sequence of war stories, but I shall mention only one other in which I was the victim of what I regarded at the time as an inappropriate display of judicial emotion. I tell this story because it is relevant to a slightly larger theme.

It was my first civil trial in the Supreme Court of Western Australia. It was probably about 1974 or 1975. It was a dispute, the details of which I have repressed, about the ownership of a horse. I was acting for the plaintiff, a horse owner who had entered into an arrangement with a trainer, the details of which I have also repressed. The trainer, a feisty and articulate spirit, represented himself in the proceedings. The evidence disclosed that the horse had come from East to West. The trip across the Nullarbor had not treated it kindly. It arrived in Western Australia on the verge of classification as a broken down hack fit for the glue factory. Despite its unpromising condition, the horse flourished under the skilful care of the trainer and began to look like a money earner. It was this conjunction of circumstances, having nothing much to do with the merits of the case as I saw them, that excited his Honour's moral passion. In an ex tempore judgment, with significant emotional content, he described the trainer as having 'lavished love' on the horse. He dismissed the claim. My client, who was not completely attuned to the real world at the time, asked me that most difficult of questions – what happened? I gave him the only possible answer – you lost!' The sting of losing my first civil case in a superior court to an unrepresented horse trainer did not break my spirit. It did, however, contribute to the harsh modesty of which I spoke earlier.

This all leads into a question for those on the bench and those at

the bar which is larger than the question 'Don't you know whom I am?' That is 'does it matter who you are?' To what extent do personality and personal values have a legitimate part to play in the administration of justice, both on the Bench and at the Bar table. If before a trial, the question were asked about the judge or counsel – 'Do you know who he or she is?' – is it right to say that the answer should be irrelevant?

We regard it, and rightly regard it, as fundamental that judging requires the reality and appearance of impartiality on the part of the judge. There should be no basis upon which a reasonable person could say that a judge's conduct or decision in a case is affected by personal interests or agendas or extraneous influences.

There is a step beyond that standard, however, which is perhaps linked to the depiction of justice as a blind goddess indifferent to the circumstances of those who appear before her. Legal realism has dispensed with the caricature that brings that symbolism to an extreme. Judges true to their oath or affirmation try to do justice according to law within boundaries which are not easily defined but are generally understood. They appreciate that every now and again the law will diverge from the justice of the case as they see it and that the divergence will be intractable. They appreciate that, even then, their duty will be to apply the law. There is nevertheless room in judging for choices to be made which are informed by what might popularly be called moral values. Such choices may arise when a judge is required to decide whether conduct is reasonable, in good faith, unconscionable, careless or reckless. Sometimes different judges acting properly within their judicial function will make different choices.

Within the limits of the judicial discipline there is room, as there must be, for judicial diversity. The institutions of the law are human and so long as they are, diversity is inescapable. Sir Anthony Mason in an article published late last year and entitled 'The Art of judging' said that having sat with many judges over the years

he had not encountered any two who shared an entirely identical outlook. He said:

> There are judges who tend to be conservative in some areas of the law, notably property, commercial and taxation, and less so in relation to matters where social issues are involved. There are other judges who interpret statutes in the light of the pre-existing common law and others who are more disposed to give the words of the statute full value, uninfluenced by what was the common law. Then there are literalists and others who are more inclined to draw meaning from context or purpose. And there have been judges who were known to give generous awards to plaintiffs in personal injury cases and others who were reputed to be niggardly. The list of potential points of difference does not stop at this point.[1]

He added however:

> Despite these differences in outlook, common to all the judges with whom I have been associated has been a keen sense of the common law tradition of judicial decision-making and a dedication to that tradition and to judicial integrity.[2]

It is therefore useful for advocates to ask about the judges before whom they appear: 'Do you know who he or she is?' The law is a human institution and advocacy is the human art of communication and persuasion. It can properly take account of the person to whom it is addressed.

What then of the advocates? Does it matter who they are? The answer is plainly yes. Their personalities and personal attributes cannot be detached from their advocacy.

We have all seen examples of advocates we have admired for their capacity to engage the court with argument and submissions not necessarily reflective of their personal views but somehow informed by their personality. Tom Hughes, whom you have honoured tonight, is one such. The late Sir Maurice Byers, formerly a member of this association and formerly solicitor-general for the Commonwealth, was another. In the early 1980s he appeared for the Commonwealth intervening in a matter in the High Court in which I appeared for an applicant in Federal Court proceedings under Pt V of the Trade Practices Act. With my good friend, Geoffrey Lindell, I was defending my statement of claim against a constitutional challenge. Fortunately, the Commonwealth, and therefore Sir Maurice, was on our side. I made submissions on the validity of provisions of the Act imposing accessorial liability for misleading or deceptive conduct. Justice Dawson, formerly solicitor-general for Victoria, taxed me with the hypothetical case of the office boy who might be held liable as an accessory to a contravention for bearing a misleading message from the managing director of one company to the managing director of another. I offered conventional and rather unimaginative responses about the nature of the incidental power under the Constitution. When Sir Maurice rose to put the Commonwealth's argument in support of validity he said nothing about Justice Dawson's interventions until the end of his submissions when he remarked:

> And as for that wretched office boy who probably hails from Victoria, I have nothing to say.

For those of you who did not know Sir Maurice it is sufficient to say that the comment was quintessentially his. I do not think that anybody else could have said it as he did.

Assuming the essential requisites of legal knowledge, high integrity, diligence and good oral and written communication skills, who you are as a person can properly inform your advocacy. There is however a caution which I would add. There are some advocates who have a strong belief in the justice of the case in which they appear because it reflects their personal values. That of itself is not necessarily a bad thing although it can be an impediment to critical judgment. But there is a small subset of such advocates who seem to think that it is enough to be on the side of the angels and that rigorous consideration of the law is a 'black letter' approach which somehow pollutes the moral purity of their case. They are seldom of much help to anyone. For those who are tempted down that path may I paraphrase briefly the closing words of a truly engaging sermon on the life of St Paul which I heard at Gray's Inn in London in 2006. The sermon was delivered by a worldly-wise clergyman who had worked as a tea planter and a wine buyer. He said:

> What the life of St Paul shows us is that God helps the meek and the humble. He also helps the articulate and the pushy – and particularly the competent.

In conclusion, who we are is relevant because it properly informs our advocacy and our judging. How we do the job, according to well established standards of integrity and excellence, is much more important.

Endnotes

1. Mason, 'The Art of Judging', (2008) 12 *Southern Cross Law Review* 33 at 38.
2. Ibid., p.39.