SPECIAL ADDRESS

THE LIFE OF THE TRIAL JUDGE: WHAT HAS OR IS CHANGING?

THE HONOURABLE JOHN MIDDLETON

It is a pleasure to be here at the Thirty-First Conference of The Samuel Griffith Society and to be asked to speak to such a distinguished gathering.

It is timely I participate in this conference having just attended last Tuesday night at the University of Melbourne the launch of David Kemp's book entitled '*A Free Country: Australians' Search for Utopia 1861-1901*.' The book is about the Australians of that period seeking to establish the legal and moral foundations for a liberal society in Australia. Of course, Sir Samuel Griffith was one of the most influential voices in developing liberalism. As David Kemp wrote, Samuel Griffith's 'self-appointed mission … was to bring the surging frontier under the rule of law, while standing for principle and morality'.[1] It is a mission that is still important today, with 'the surging frontier' perhaps now the so-called fourth and fifth industrial revolutions being the rise of digital technology and the era of artificial intelligence respectively occurring in Australia's diverse community, at a time when many of our public institutions are being critically examined and our democratic values are being tested. The rule of law is essential to our way of living and the justice system we all enjoy, based upon principle and morality according to the social norms that should govern all of us.

You have already heard many learned speakers present on varying topics, such as on federalism, Sir Harry Gibbs, freedom of speech, and judicial appointments. For those of you who have studied the programme, I have been billed to speak to you for thirty minutes on the general topic of Courts and Judges, entitled 'Special address'. Understandably, your expectations are high, although by now (this being the last session of the conference, including two dinners), you are all probably 'conferenced' out. Please treat this presentation as an after-conference address. It is always difficult for any presenter, even at the early stages of a conference, to know at what level to present to the audience, even if just billed as a 'normal' address. Does the presenter try to inform and educate, provide some entertainment and amusement, or attempt to do all four, namely to inform, educate, entertain and amuse? Without any particular destination in mind, like Christopher Columbus, I venture forward regardless.

Mr Eddy Gisonda, the convenor of this conference, when inviting me to speak indicated I could speak on a topic of my choosing, presumably by implication limiting me to something relevant to the law and not some travelogue from my recent time overseas. I have chosen the topic of: 'The Life of the Trial Judge: What has and is Changing?' I want to touch upon a few themes, none of which can be properly developed in the time allotted to me, but which are worthy of recognition and consideration.

I will be focussing on trial judges involved in civil proceedings, although some of what I say will apply to all trial judges. Obviously my comments are heavily influenced by my own experience as a trial and appellate Federal Court judge and as a barrister.

I start by observing that the role of the trial judge has, is, and I think will always primarily be to determine the facts. The finding of facts, often dependent upon the version of events given by witnesses, requires a deep understanding of human nature and social awareness. This has been and will be the crucial role of decision-making. Most cases turn on the facts. In 1921, Benjamin Cardozo observed:[2]

> Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts.

The trial judge has a very important responsibility to carefully analyse the evidence presented and make clear findings of fact, not the least because it is still difficult to overturn findings of fact of a trial judge on appeal. The importance of the trial judge finally determining a proceeding and doing so according to law cannot be overstated; the appeal process is a safeguard, but a successful appeal can never entirely undo a wrongful decision of a trial judge.

I do not want to sound overconfident in what I am about to say, but determining the applicable principles of law by a trial judge is not necessarily that difficult — guided by precedent, the training as a lawyer, and the assistance of practitioners. However, fact finding is often a time-consuming exercise and the trial judge has to rely on their own judgment in an environment where there is conflict, different versions of fact being urged upon the judge, sometimes difficult evaluations of reliability and credibility, and the constraints of the adversarial system and rules of evidence and practice. On appeal the judges have it easy; in most cases all the evidence and fact finding has been completed.

That the trial judge is exercising their functions in public has always been and will always be the case.

Arguably the notion of open justice commenced as far back at the 12th Century, when King Henry II created the concept of a jury trial making the attendance of trials compulsory.

Today the concept of open justice is well known to all lawyers and judges, developed in the common law and enshrined in statute.

The use of technology is one way to modernise the concept of open justice, and, as many commentators and judges have observed, helps do away with the limitations inherent in the physical and perhaps remote space of a public gallery in a courtroom. Livestreaming, for instance, extends the way a person may view a trial judge in action, without having to attend a courtroom.

Of course, open justice puts the trial judge in the limelight. The question of accountability and scrutiny by the public and the media arises. Jeremy Bentham once stated that open justice was a means 'to keep the judge … whilst trying, under trial'.[3]

Then the trial judge is accountable in other ways, not just by their performance in court. For instance, a former senior judicial officer made some comments (which were published in the press) on the timely delivery of judgments in the Supreme Court of New South Wales and the Federal Court of Australia. These comments were later taken up by a journalist, relying upon various data as to the court's and individual judges' performance. Addressed by Chief Justice James Allsop AO in a speech delivered in January 2019 (now published in the latest edition of the *Australian Law Journal*),[4] the comments and data needed to be put in context.

The point to make for the purposes of today, as the Chief Justice did, is that the work of the courts (including individual trial judges) is becoming more accessible to the public through digital technology. The work and life of a trial judge (not only their activities in court) can now be readily accessed and scrutinised. This is not to be regretted, or seen as undesirable, but it needs to be recognised.

Of course, public scrutiny is not new, even if sometimes pointed. There was the famous incident of the Birmingham newspaper in 1900 which contained a criticism in the following terms of Justice Darling who was holding the local assizes in England:[5]

> If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public house, he has a very fair conception of what Mr Justice Darling looked like in ruling the Press against the printing of indecent evidence. His diminutive Lordship positively glowed with judicial self-consciousness. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the imprudent little man in horsehair, a microcosm of conceit and empty headedness. One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Justice Darling's biographers states that "an eccentric left him much money". That misguided testator spoiled a successful bus conductor.

Commentary which is not to the point or even fair needs to be endured to the extent it does not undermine the authority of and the exercise of judicial power by the courts. Reform may be

needed to clarify the scope of the contempt of court offences, although the total abolition of the offence of scandalising the court may go too far. There needs to be a balance. I do not subscribe to the view that malicious comments about a court lead to a total collapse of public confidence in the legal system. As was observed by the High Court of Australia in *Gallagher v Durack*,[6] 'the good sense of the community will be a sufficient safeguard against such a breakdown.'

Sadly, not all criticism of judges comes from outside your own court. One of the best examples (if that is the right phrase) of such criticism can be found in the same-sex marriage case in the Supreme Court of the United States decided in June 2015,[7] and the dissenting opinion of the late Associate Justice Scalia. In that case, it was decided that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

Justice Scalia did not hold back in his criticisms of the majority:[8]

> But what really astounds is the hubris reflected in today's judicial Putsch … They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds — minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly — could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the

> democratic process when that is called for by their "reasoned judgment" … The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.

Then, continuing in footnote 22, he said:

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

There have been instances close to home of justices in the same court being accused of involving themselves in a 'cat fight', with an unfortunate collapse of judicial comity, but Associate Justice Scalia did raise the bar.

Sometimes, subtle criticism of judges occurs. I observe that when I have decided a proceeding in which a commentator approves, they refer to me as Justice John Middleton. When a commentator disapproves, they just refer to me as Middleton and the tone of the report is dismissive. Then when I handed down the penalty decision in the Centro proceeding,[9] there was concern in certain quarters that the Court's penalty was too lenient. This was graphically displayed by a cartoon displaying myself (the actual depiction was in itself flattering) with a person (presumably a Centro director) being bent over my knee with his

pants down being spanked by a feather, the caption being 'You're a very naughty director.' But worse was yet to come. Just the other day there was a very hurtful comment. My Associate brought to me a newspaper article where reference was made to me as a 'long serving' judge with no other accolades — what about 'eminent', 'learned', 'well-respected'? My Associate reminded me that it was not all about me, and the taking of an appointment is not to gain fame, fortune or as is now apparent, flattery!

Whatever the downsides for a trial judge, making court proceedings and the work of the court easily available to the public is important. The media play a vital role in reporting upon and providing to the public accurate accounts of court proceedings. The court, and the trial judge, should facilitate court reporting and media access. In *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority*, [10] a case dealing with the so-called supplements scandal, the media (at least in Victoria) showed an immense interest in the proceedings and the process. I allowed the first case management hearing to be televised (that turned out not to be riveting viewing) and the delivery of a judgment summary (which I was told by some colleagues was a little more interesting than the first case management hearing only because, even after fifteen minutes, no one quite knew which way I would decide — apparently it was read like a detective novel and nobody knew who did it until the end.)

In some instances making digitally available a full judgment and it being read out by the trial judge can be of great benefit; it will explain the complete basis of a particular decision. A recent example is the judgment of Chief Judge Kidd in the County Court of Victoria in the Cardinal George Pell criminal proceeding and the Chief Judge's explanation of his reasons for

that particular sentence. Sentencing is not an exact science, it involves balancing and considering many factors: to have that explained in an objective and logical way by the trial judge to the public, provides transparency to the process and confidence in the legal system.

Undeniably judges in one way or another make decisions that involve public policy and may give rise to a continued controversy after a particular proceeding has completely disposed of the dispute between the parties. Judges are frequently required to consider what is in the public interest, to assess social norms, considering the consequences of their decisions beyond their effects on the parties to a proceeding before them. Then it must be recognised that the modern trial judge's role is strongly affected by the increased intervention of Parliaments. A large part of what judges do now involves the interpretation of and application of legislation, often involving government or public instrumentalities. A trial judge must take care that the rule of law not be used to claim a supervisory role over organs of the State going beyond the true constitutional role of the judiciary.

Undeniably, public perceptions, opinions and beliefs play a role in a judge's approach. Whilst the judicial process is, as it should be, immune from public opinion, judges are increasingly being called upon to consider social norms reflecting public or community values in their decision-making. If judges did not do so, they would lose the confidence and trust of the public and would lose their authority.

A change that has and will continue to impact on the life of the trial judge is the diversity of our society. This has been commented on by Justice Emilios Kyrou in an article entitled 'Judging in a multicultural society'.[11] As his Honour reminded us, an individual's culture may impact their experience of the

court and trial judges need to be able to accommodate these different cultures. A witness's cultural background might affect the way they give evidence. Examples include the body language of a witness, and manner in which they answer questions. Of course, Australia's cultural diversity is so extensive that it would be impossible for judges to become familiar with all the cultural differences that they are likely to encounter. However, the trial judge must now at least have an awareness of those differences so as not to lead to any miscarriage of justice.

Another important element of maintaining public confidence and trust is impartiality. Impartiality, referring to the determination to deal equally with all parties to a proceeding without favour to any, is an essential characteristic of the trial judge. It connotes an absence of bias, actual or perceived; a state of mind where the decision-maker is disinterested in the outcome.

Maintaining complete impartiality is not possible: One must recognise this fact and accommodate this reality. Quoting the American judge Oliver Wendell Holmes:[12]

> (A)ny man who says he is impartial about any subject on which he speaks is either ignorant or a liar, and that the honest is one who, aware of his partiality, guards against its abuse.

All trial judges have their prejudices. Returning to Cardozo, '(T)here is in each of us a stream of tendency … Judges cannot escape that current any more than other mortals'.[13] After all, judging requires drawing upon personal experience. It also relies upon logic, precedent and accepted standards of conduct. It relies upon human feelings and awareness of the human condition.

Which leads me to the next point and the existence of Artificial Intelligence. I doubt whether any system of AI can fully replicate the human brain, or deliver a comparable level of 'intelligence', however that is defined. However, I acknowledge that a great deal of money and human brain power is being employed to develop a computer that is capable of artificial general intelligence, matching its makers or even with superhuman intelligence.

Just the other day I read about the droid that will give you health advice. Tests of socially equipped robots are apparently taking place in medical facilities in the United States, Europe, Japan and here in Australia. Apparently, some patients were happy to talk to a robot for extended periods. (I can see a place for robots with some legal practitioners who take longer than I would like for them to get to the point.) However, even in the medical area, whilst some functions can be carried out by robots, the consensus is that there will not be doctorless hospitals, as doctors and nurses are needed to actually care for people.

Similarly, there will always be the need for the human interface of the trial judge in many disputes. Undoubtedly, we are moving into the world of AI in courts. We have introduced the 'paper-less' court. We are moving to a people-less court to deal with some disputes. But decision-making in many disputes involves many aspects. In addition to the matters I have referred to, it involves the ability to be aware of and assess the social impact of decisions. This does not deny that change is occurring in this space. Judges need to adapt to technological change. The trial judge will need to manage information on a larger scale than ever before. This will continue to be a challenge. In addition, we will need to develop what hopefully will be taught to law students: critical thinking, communication, collaboration and creativity. Even with technology, lawyers need to use their

critical thinking; an example recently given by the dean of law at the University of NSW, Professor George Williams is even when using e-discovery systems, you need to consider whether the system is picking up too many or too few documents.

No doubt technology will help us find the law, assist in informing, supporting and advising people using the justice system, in replacing some human functions, and assist in judges' work.

However, the basic functions of a trial judge will remain: processing litigation and court operations, deciding individual cases efficiently, inexpensively and justly, interpreting the law to apply to new circumstances and technologies, supervising administrative decision-making, and applying the rule of law. Trial judges must continue to demonstrate to the public that their decisions are rational and fair, and according to law. They must act according to the facts and in accordance with reality.

Of course, in carrying out these functions, whilst no longer standing aloof from the community, judges must still be bound by certain limitations such as avoiding making extra judicial comments on contentious public issues, involving themselves in conduct that may impact on their own appearance of impartiality, and acting in any way to undermine their ethical reputation.

After all I have said, you may now be asking why be a judge? Sir Gerard Brennan AC posed this very question in 1996 delivering a paper which was subsequently published in the *Australian Bar Review*.[14] I do not consider the answer to that question is different today or will be in the future. After examining the essential elements of the judicial functions and manner of performance, Sir Gerard concluded:[15]

> Why be a judge whose every professional word or deed is open to public scrutiny and criticism? Why be a judge who cannot reply to critics lest the appearance — if not the reality — of impartiality be lost? Why be a judge who, under the pressure of work, foregoes other delights of intellectual life — not to mention the demands of family life and the abbreviation of recreational or other extra-curricular activities? …
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> We know that the dignity and the fulfilment of the aspirations of free men and women in our complex society depend on the faithful performance of judicial duty. In a complex society, justice would be unattainable without the sophisticated skills and unquestioned integrity of the judiciary. The high importance of the judicial office makes it a privilege to be invited to the bench; the responsibilities of the office create a continuing challenge to proper performance. The trust reposed by the community in the judiciary is an enduring comfort. The stimulus of judicial work is enhanced and its burdens lightened by the support of other judges whose character, intellect and industry command our unfeigned respect. The satisfactions of judicial life of necessity flow from an inner conviction of the service of society in a pivotal role, from the satisfaction of the aspirations of litigants, of the profession, of the public and most importantly, of oneself, and from the mutual esteem of judicial colleagues. These are the considerations, I suggest, that give the true answer to the question: Why be a judge?

Like Christopher Columbus, I come back to where I started. I think Sir Samuel Griffith today would answer the question Sir Gerard posed and then answered in the same way — emphasising the importance of the rule of law, and adherence to

social norms (being principle and morality). One important aspect which will remain unchanged is a trial judge's judicial function being carried out in accordance with their oath of office. Whilst variously worded, but in essence the same as that taken by a Federal Court judge, 'to do right to all manner of people according to law, without fear or favour, affection or ill will'.

The judicial life of the trial judge has, is and always will be in our society, aimed to fulfil the performance of that judicial duty, to secure the trust of the community and uphold the rule of law in accordance with principle and morality.

Endnotes

1 David Kemp, *A Free Country: Australians' Search for Utopia 1861-1901* (2019), 167.

2 Benjamin Cardozo, *The Nature of the Judicial Process* (1921) 128-9.

3 Jeremy Bentham, *The Works of Jeremy Bentham* (1843) 316.

4 Chief Justice James Allsop, 'Courts as (Living) Institutions and Workplaces' (2019) 93(5) *Australian Law Journal* 375.

5 Robert Megarry, *Miscellany at Law: A Diversion for Lawyers and Others* (1978) 23.

6 (1983) 152 CLR 238, 243.

7 *Obergefell v Hodges*, 192 L Ed 2d 609 (2015).

8 Ibid 6-8.

9 *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430; [2011] FCA 1003.

10 *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1.

11 Emilios Kyrou, 'Judging in a multicultural society' (2015) 24(4) *Journal of Judicial Administration* 223.

12 Discussed in Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (2018), 259-60.

13 Ibid 12.

14 Sir Gerard Brennan, 'Why be a Judge' (1996) 14 *Australian Bar Review* 89.

15 Ibid 96.