SUPREME COURT & FEDERAL COURT JUDGES' CONFERENCE

BRISBANE 31 JANUARY 1997

JUDICIAL STRESS REVISITED

The Hon Justice Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG*

STRESSFUL TIMES

I first ventured into the topic of judicial stress at the inaugural judicial orientation programme conducted in Sydney in 1994 by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration. Since then, my lecture has been published[1], republished[2], mentioned[3], presented

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* Justice of the High Court of Australia. President of the International Commission of Jurists. Formerly President of the Courts of Appeal of New South Wales and Solomon Islands; Judge of the Federal Court of Australia and Deputy President of the Australian Conciliation and Arbitration Commission.

1 M D Kirby, "Judicial Stress" (1995) 1 *Aust Bar Rev* at 101-115.

2 M D Kirby, "Judicial Stress" Judicial Review Selected Papers, *Journal of the Judicial Commission of New South Wales,* vol 2, no 3, September 1995 at 199-210.

3 M D Kirby in (1995) 7 *Judicial Officers' Bulletin* at 51.

on video[4], repeated before magistrates and now in this conference before the most senior judges of Australia. If I am not careful, I will become an acknowledged expert and spend the rest of my life on the lecture circuit talking the subject to death.

It is a sign of the growing open-mindedness of the Australian judiciary that it is willing to tackle this formerly unmentionable topic. Is this just a fashion which will pass? Or is it a recognition of a deeper malaise which we see in our institution and in ourselves and which we feel the need to talk about with each other?

In the years since my original lecture was given, there has been plenty of evidence of stress in the judiciary. Treatment of the topic overseas indicates that today's Australian judges are not alone. On 8 April 1996, the *National Law Journal,* a broadsheet published in the United States, carried a front page article "Judicial Crack-ups Fracture the Bench"[5]. The story appears under a baleful photograph of Justice James Heiple of the Illinios Supreme Court, featuring in an "mug-shot", which sadly bore a credit "AP/Wide World Photos". Justice Heiple's

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4 Judicial Commission of New South Wales, Videotape on judicial stress.

5 *National Law Journal,* vol 18 number 32, 8 April 1996 at A1.

humiliation was presumably shared with a wide world. He was described as awaiting trial on charges for resisting arrest by trying to outrun a police officer who claimed to have stopped him for speeding.

The article listed a number of other recent cases in the United States:

* Los Angeles municipal judge William Ormsby who was severely and publicly censured on 20 March 1996 by a Judicial Commission "for temperament problems, including the arrest of people who had been whispering in his court room".

* An elected civil trial judge in Illinios, Michael F O'Brien who resigned on 4 December 1995 after it was disclosed that he had falsely pretended for 20 years to have received the Congressional Medal of Honour.

* A US District Judge, A Andrew Hauk of Los Angeles (83 years of age) who was censured by the 9th US Circuit Court of Appeals for making "outrageous remarks" about minorities and others.

* Former Pennsylvania Supreme Court Justice Rolf Larsen who was convicted in 1994 for illegally obtaining anti-depressant drugs.

* Dismissal of a County Court Judge William McClain in Indiana, with a ban on his practising law for two years for allegedly having "participated in sending" a used condom to a courthouse secretary on whom he supposedly had a crush.

* Most news-making of all, the fall of the former Chief Justice of New York State, Sol Wachtler, who was convicted and imprisoned in 1992 for allegedly harassing his ex-lover, including by threatening to kidnap her teenage daughter, demanding $20,000 and mailing a condom to the girl.

In Australia, we have had nothing quite like these cases. However, the statements made before the New South Wales Royal Commission into the Police concerning the alleged sexual activity of the former distinguished New South Wales judge, David Yeldham, come closest to the United States cases. As the article in the *National Law Journal* puts it: "Getting safely to the top is no guarantee against falling into an emotional abyss"[6]. Chief Justice Wachtler, like Justice Yeldham, was widely

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6 *Ibid,* at A20.

respected. There was not much further that Wachtler's career could have gone, except to the Supreme Court. But he hit a "psychological wall" in 1991 which plunged him into deep depression, resulting in the disordered, dangerous and eventually criminal activity which led to his professional destruction. In a 1993 interview with the *New York Law Journal*, after he had served thirteen months in a federal prison, Wachtler said that he had not sought to see a psychiatrist during his period of profound turmoil "because of the professional and social stigma attached, especially in the light of his gubernatorial aspirations". Instead, he turned to a family doctor who prescribed a number of prescription drugs. Combined with his then mental pre-disposition, he began a "very very dangerous road"[7]. The former judge is now working in an alternative dispute resolution service in provincial New York. He has written a book on his prison experiences.

Press reports in October 1996 told of a Hong Kong judge, an ex-patriate New Zealander, who was "delusional" and suffering "an acute confused state"[8]. The Governor set up a judicial tribunal to determine whether that judge should be

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7 *National Law Journal* 8 February 1993 cited *ibid,* at A20.

8 *Sydney Morning Herald,* 16 October 1996 at 10.

removed from office for allegedly making false claims that two other judges had attempted to influence him in the handling of a trial of an immigration consultant, also from New Zealand. He eventually disqualified himself from the case.

In New Zealand, District Court judge Robert Hesketh, aged 39, has resigned after pleading guilty to fraud charges for overstating official travel claims to the extent of $NZ 805[9].

Are these and like cases evidence of declining standards in the modern judiciary? Or are they evidence that incidents which once would have been dealt with "discreetly" are now front-page news? Are the instances no more than examples of judges, who are human beings, straying from traditional and exceptional standards? Or do these cases evidence a larger problem which can be summed up as the impact of stress upon vulnerable members of an overstressed profession?

The Editor in the *National Law Journal* considered that there were deeper forces at work to explain the manifestations of bizarre judicial conduct in the United States[10]:

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9 Sydney Morning Herald, 29 January 1997, p 8.

10 Editorial "Judges at Risk" in *National Law Journal,* above n 5, at A16.

> "Its not very pleasant being a judge these days. Mental health professionals say they are seeing a lot of anger and anxiety in judicial clients, the apparent result of crushing case loads, novel and complex legal issues and increasing media scrutiny. Pressure is coming from outside the profession as well, with politicians such as Sen Bob Dole and President Clinton himself talking about prematurely ending the lifetime tenure of a federal judge and, New York Gov George Pataki has called for the removal of a State trial judge. The pressures have manifested themselves in a number of high profile and lurid scandals involving judges hatching kidnap plots, resisting arrest or obtaining drugs. Complaints about the third branch of government have been on the upswing, too, increasing 24% in the federal courts in the last three years, with similar or greater increases in the states. And the federal judiciary is being burdened by the federalisation of formerly state criminal prosecutions".

One of the commentaries was that "Supreme Court jurisprudence encourages politicians and the public to treat the judiciary as a political branch" of government, entitled to no more respect than politicians[11]. The result is bitter fruit for the countless judicial officers who quietly and faithfully and with self-control go about their stressful daily work.

There is no doubt that the three factors in the editorial which I have cited are applicable to the Australian judicial scene. Crushing case loads. Novel and complex legal issues.

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11 *Loc cit.*

Increasing, and I would add critical, media scrutiny with relatively few voices lifted to defend Australia's judges. The Attorneys General disclaim the task. The judiciary feel embarrassed to defend themselves. All of this is still surprising to a judicial officer of our generation because we grew up in a time when the judiciary, like the monarchy, was virtually universally respected - even revered, certainly trusted and largely unquestioned. Those days have gone forever. Everything, it seems, from the Crown, the Church, the universities and high public servants down is now subject to media scrutiny. Of course, this can be healthy. But good news is no news. Human faults are good entertainment. The highly personalised and often cynical reportage of news reflects the suspicious time of anti-ideology that we are passing through.

The pressure of increased judicial workloads has elicited from the judiciary (who despair of securing substantial increases in numbers and resources) remarkable innovation and case management and alternative dispute resolution[12]. The system

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12 See eg T Sourdin, "Judicial Management and Alternative Dispute Resolution Process Trends"(1996) 14 *Aust Bar Rev* at 185; J R T Wood, "The Changing Face of Case Management: The New South Wales Experience", unpublished paper, August 1994, cited Sourdin at 187, 191; "Life Beyond Caseflow Management", *Journal of Judicial Administration,* v 3, no 3, February 1994 at 143-155.

could not have survived without these and other innovations devised by the judges. These changes themselves add to the stressful burdens placed upon judges today. Not only must they decide cases. They must "manage" them. By constant directions they must shepherd them through the court system: marshalling to best advantage the very scarce judicial time. These innovations create stresses of their own, as judges must learn to master new managerial techniques. They must take into account not simply the interests of the parties before them but also the interests of other litigants waiting in the queue and of the public generally[13]. But whatever they do, judges seem destined to have more and more case load pressure applied to them. In a recent essay on the future of judicial life in Canada, Dennis Hauptly observed[14]:

> "The burgeoning case load, reduced resources, and emphasis on science-related cases in the docket will require judges in 2034 to be vastly more technically literate than today's judges. ... To manage their case loads they will have significant computer resources. Their staffs will schedule conferences and trials by computer, which will electronically verify the schedules of counsel and override certain

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13 *Sali v SPC Ltd* (1993) 116 ALR 625 (HC); *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 (CA); *Cohen v McWilliam and Anor* (1995) 38 NSWLR 476 (CA); *Ketteman v Hansel Properties Ltd* [1987] AC 189.

14 D J Hauptly, "The Future of Judicial Education" (1996) 9 (#3) *Bulletin of National Judicial Institute (Canada),* 1 at 2.

> other commitments. Some cases will probably go all the way through trial without the lawyers and judge ever having been in the same room. Twenty years from now the judiciary will have to handle not only more cases, but more complex cases, with diminished actual resources per case. Judges cannot work many more hours to accomplish this. Those who have spent much time around courthouses at night will realise that there are not many extra hours left in the judge's day. Delaying the resolution of cases is not a real option, either. Anyone engaged in civil litigation knows that delays in some districts have already reached intolerable levels because of the precedence that must be given to criminal cases. The only answer ... is for judges to develop the ability to handle more cases as well in less time."

So this is our stressful world. Here are some of the instances of breakdown. There are other instances involved with depression and alcohol dependence which slow and weaken performance but rarely get much attention[15]. The rates of suicide increase with age and judges tend to come to office, with its pressures and obligations, in mature years when many others are shedding responsibilities and slowing down[16]. Long hours at work, pressures to perform in public and high expectations now coincide with repeated attacks on the judicial status and office which call into question the idealism of past perceptions of it still generally held by the holders. Add to this the constant pressure

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15 I M Chung, "Alcohol Dependence", *Law Society Journal* (NSW), October 1996 at 67.

16 C Murphy, "Fighting Misperceptions about Depression", *Washington Post Health Report,* 22 October 1996 at 16.

from outside. "Judges may be told how to behave", the *Sydney Morning Herald* intoned in September 1996[17]. "DPP: Put Judges to the Test" was the report of the *West Australian* in October[18], containing a call that judges should be made "accountable for the quality of the service they provide"[19]:

> "If a judge is lazy, inefficient, stupid or merely a procrastinator, why should there not be agreed methods of accountability and appropriate sanction. We have surrendered the right to make judicial officers accountable for the efficiency and quality of the service they provide as judges in the confused belief that accountability and independence are mutually inconsistent, and that requiring a judge to be efficient is an intrusion on the judge's independence of decision."

These, and many other news reports, demonstrate that the causes of stress in the judiciary are increasing. The champions who might once have helped to reduce or remove the causes, redress the balance and defend the institution are no longer there. In large measure, today's judges are on their own. This is why it is right that we should address this topic to our consideration at a conference such as this.

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17 *Sydney Morning Herald,* 5 September 1996. This is a reference to the Discussion Paper: Australian Institute of Judicial Administration, *Judicial Ethics*, 1996.

18 *West Australian,* 11 October 1996 at 5.

19 *Loc cit.*

BUT WHAT IS STRESS?

Having established that plenty of reasons exist for stress in modern judicial life and that a number of cases have occurred where unmanaged stress has spectacularly demonstrated itself in judicial breakdown, it seems an excess of caution to describe what stress is. Especially is this so for those of the audience who come from Sydney or Melbourne. According to recent press reports, Sydney has overtaken Melbourne to become the "stress capital of Australia"[20]. Some 54% of Sydneysiders say they are under more stress than they were in 1995. Only 47% of Melburnians feel more stressed than a year before. The survey is conducted annually by a major insurance company, presumably because of the toll which stress takes upon the health of the community and thus of policy-holders. The latest poll showed that women's stress levels in Australia are rising quite rapidly. In 1996, 47% felt more stressed compared with 43% in 1995. In this regard, at least, women have caught up with men[21].

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20 *Daily Telegraph* (Syd), 27 September 1996 at 9.

21 *Ibid.*

This poll was not addressed to the particular issue of stress in the judiciary. But judges are citizens too. It seems likely that some of the factors which have led to an overall increase in stress levels in the community wash over onto judges, even before the impact of an inherently stressful professional life takes its toll.

Judges have not been discouraged in the past from describing the obvious. So let me suggest what we all know: but what is increasingly the subject of physiological and psychological research.

An article in a popular magazine identified three simple ways of testing whether you are as relaxed as you should be[22]:

> "First, feel the nape of your neck with the palm of your hand. If the area between your shoulder-blades feels cooler than your forearms or hands you are in a state of stress. One of the direct physical affects of anxiety is to slow blood flow to the peripheral areas like the skin at the back of the neck. ... Perhaps the old saying 'hot under the collar' should have been 'Cold under the collar".
>
> Your second test is to try to catch yourself at an unsuspecting moment. Are your jaws or teeth tightly clenched, is your brow furrowed or are your hands balled into fists? ...

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22 *Panorama*, August 1996 at 36.

> Thirdly, try clearing your mind for 30 seconds. Stop any one thought dominating your consciousness. ... If you can't keep specific things from returning and disturbing your respite, you score minus on this test."

These homely tests, which we can all perform, are actually backed up by quite detailed research, including by Australian universities. In the Department of Physiology at the University of Sydney, experimentation has shown that animals become addicted to the natural opiates which their bodies release in response to stressful situations. Unfortunately, they then display a craving for the very stress which triggers the release of these natural opiates. According to Dr Nick Labidas of the Department, human subjects, exposed to stress, release body opiates to which they too can become addicted. Although such stress can be harmful to the body and psyche of the subject, people crave it because it provokes the release of the addictive chemicals described as "similar to those resulting from the use of chemical opiates such as morphine and heroin"[23]. What an irony it would be if this new research revealed that many of the judges, who are required by law to punish severely some people who become embroiled in the use of addictive, narcotic and illegal drugs, are themselves victims of "the ultimate addiction" - to the stress of their work.

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23 University of Sydney *News,* 12 September 1996 at 2.

There is no doubt that stress plays a positive role in human life in heightening the performance of the subject. In this regard, lawyers and judges are not immune. They often have to deal with issues of the greatest importance for the life, liberty, pocket or reputation of the litigant or client. As the brain sends signals to the body to mobilise its capacity to respond to a situation of stress, the so-called "stress hormone" (corticotropin) is released. Glucose, simple proteins and fats are emitted to stroke the muscles and to ready them for a vigilant and powerful response to the stress situation. This release, in turn, increases the delivery of nutrients and oxygen to the heart. The heart beats faster. Blood pressure goes up. The breathing rate increases. I am afraid that judges and lawyers have more than their fair share of this hormone rushing around their systems, simply because they are daily engaged in a form of combat. It may not be the kind of physical combat for which nature designed the hormone. But it is certainly, quite often, confrontational and challenging. It requires judges to summon up the emotional and physiological responses that have such a powerful effect on body and mind.

STRESS AND THE HIGH COURT

You might think that elevation to the High Court of Australia removes stress as the judicial tyro surveys the entire scene and is released from the stressful experience of uncontrolled case-flow and reversal by those placed in higher

authority. It might have been so with some of the 40 jurists appointed to our country's highest court. But the history of the Court denies any suggestion that, with appointment, comes an angelic calm. Alas, the record demonstrates that, sometimes, the kinds of persons appointed to the Court are prone to exert stress on themselves and on each other.

In his insightful essay "Transition to the Bench", Justice Kim Santow[24], of the Supreme Court of New South Wales, recounts candidly the special stresses which were placed upon him when he was appointed to the Supreme Court from a large firm of solicitors. Yet some of the most telling comments in his essay are of the highly charged and stressful circumstances of the High Court in the 1930s and 1940s. Several of the stories are taken from private letters sent by the Justices to each other, now accessible to researchers in the archives. Others appear from a monograph written by Mr Grant Anderson on Sir Owen Dixon, based on the judge's diary.

Earlier research by Mr Clem Lloyd[25] had revealed the bitter exchanges that occurred within the Court at that time. Many of

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24 G F K Santow, "Transition to the Bench" unpublished address to Australian Judicial Orientation Programme, October 1996.

25 C Lloyd, "Not Peace but a Sword! - The High Court Under J G Latham" (1987) 11 *Adel LR* at 175.

them, it has to be said, arose from the combative attitudes of Sir Hayden Starke. According to Lloyd[26]:

> "Until Evatt left the Bench in 1940, his relationship with Starke dominated the Court's internal workings. Starke refused to have any consultation with Evatt, to exchange reasons for judgments and draft judgments with him, or even to supply him with final judgments. Starke applied similar sanctions to other judges, particularly Dixon, but only with Evatt was the veto absolute. Starke invariably joined Evatt and McTiernan in his strictures to Latham, but his personal relationship with McTiernan seems to have been more cordial.
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> Evatt, in turn, refused to cooperate with Starke, leaving Latham in the invidious position of having to coordinate the work of two irrascable gifted lawyers who communicated only in the most stiffly formal terms. When Latham was absent, as he often was through illness in 1036-37, relations were even more tense because Starke acted as Chief Justice. In such circumstances it seems remarkable that the Court functioned at all. That it did was largely due to the refusal of McTiernan and, more surprisingly, Evatt, to provoke a public brawl:
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> > 'Evatt and McTiernan have endured Starke's failure or refusal to consult them and at least outwardly there is calm if not peace'. [Dixon to Latham 11 August 1936].
>
> Evatt regarded restraint and forbearance as a public duty:
>
> > 'I regret to say that Starke's behaviour as Presiding Justice towards colleagues - and I refer to McTiernan and myself - has been disgraceful. It is only one's sense of duty to the court that prevents scandal'. [Evatt to Latham 6 May 1936]."

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26 *Ibid,* at 182.

Earlier Starke had turned his scorn on Gavan Duffy, whose daughter he had married. Justice Santow records some of the remarkably vicious exchanges retold by Sir Robert Menzies who appeared many times before the warring Justices[27]. Grant Anderson's memoir shows that Dixon himself was not immune from these tensions[28]:

> "Sir Hayden Starke was a rude and difficult man both to his brother judges in and out of court and to counsel. Indeed, he once referred to his brethren as 'worms'. Starke's behaviour prompted Dixon to remonstrate with him on more than one occasion. Dixon clearly disliked some aspects of Starke's personality. For example, after Starke had made some distasteful remark at Sir Gavan Duffy's funeral, Dixon recorded that Starke was a 'pitiless man'".

Sir Garfield Barwick recounted an event when, on an extremely hot day, he and Sir George Rich attended the burial ceremony of Sir Isaac Isaacs in Melbourne. Starke was heard to lean over to the octogenarian Rich and say: "George, are you sure it's worth your while to go home?"[29].

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27 Santow above n 23, at 3.

28 G Anderson, "Sir Owen Dixon", unpublished monograph cited by Santow, above n 23, at 2.

29 Told in Santow, above n 23, at 4.

The more one delves into the diaries of Sir Owen Dixon, the more one learns of the tensions of his early decades in the Court before he reached the central seat. Surprising to me was the discovery of the depth of his antipathy towards Latham. Dixon recorded in his diary a conversation with a physician whom he shared with the Chief Justice[30]:

> "I said that I would be obliged if he would not discuss me with Latham. ... I thought it best to tell him that Latham's character was my objection. Then, as he was going, I said that Latham had rung me up and said he wanted to give me an Associate; probably a spy".

What a contrast these remarks make with the formal, courtly statements that appear in the *Commonwealth Law Reports* at the ceremonial retirements both of Latham and of Dixon[31].

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30 Anderson above n 27, at 31.

31 (1952) 85 CLR vii; (1952) 85 CLR xi at xii; (1964) 110 CLR v at ix, xiii ["He was replaced by my friend here, Sir *John Latham*, whom I am very glad to find next to me, in good health and I am not going to say anything about him: he has always been kind to me. And he knows very well that if I did say anything about him it would be simply that he and I have remained the closest friends, notwithstanding judicial comradeship. And that was a new change in the High Court. But I want to say that it was a permanent change, and never has a man left this central seat, I should think, with more gratitude to his colleagues than I feel"].

To put it no higher, the stress levels of the High Court of Australia in the 1930s to the 1950s would have been hard, even for the strong-minded, to bear. The advent of the sharp tongued Justices of the 1950s, with minds as sharp to match, would doubtless have created their own tensions and rivalries within the Court. The advent of Sir Garfield Barwick as Chief Justice, a strong proponent of the power of human will carefully targeted, certainly brought with it new tensions. His attempts to get the Justices to consult together over their opinions came to nought when his efforts were seen by the most gentle of them - Sir Keith Aickin - as an inimical invasion of his judicial space. Aickin simply refused and Barwick's dream fell apart.

Further stresses arose after the appointment of Justice Lionel Murphy to the Court. Chief Justice Barwick's antipathy to the new appointee was scarcely veiled. Murphy's well known charm may have won over other colleagues; but never Barwick. By comparison with the extent to which it seems now to be revealed that Latham[32] and even the saintly Dixon[33] were giving

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32 Lloyd above n 24, at 201-202.

33 Anderson at 48 cited in Santow above n 23, at 13 ["Less well known, though revealed in Grant Anderson's monograph, is that Dixon quietly advised the Governor-General and several State Governors on constitutional issues. He also advised Sir William Owen as Chairman of the Petrov Royal Commission and Colonel Spry of the Australian Security Service. He even advised the Attorney-General on

Footnote continues

advice on controversial matters to the Executive Government, Barwick's rather formal and even stilted letter to Sir John Kerr in November 1975, advising on the constitutionality of "the course on which you had determined"[34], pales into relative insignificance. However, this action, and Murphy's sharp rebuke and rejoinder, can only have led to terrible tensions as the Justices went about their daily work. The formal courtesies and niceties were doubtless observed. But the deep undercurrents were known to most observers of the Court. When, later, Justice Murphy faced his trials and inquiries, and then the fearsome ordeal in his closing battle with cancer, the pressures on the Court were great again. Sir Harry Gibbs, who failed to persuade Murphy not to sit, referred to the differences obliquely in his remarks on Justice Murphy's death[35]. Each man - Gibbs and Murphy - had been true to his own vision of the Court's role and of the judicial function.

Here I must draw the curtain for this potted history approaches my own time. But whenever we think that the tensions and stresses in the High Court of Australia reach

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the drafting of certain Commonwealth Bills. And what would one say today of Frankfurter, who advised Roosevelt on his "New Deal" legislation, while on the Bench?"].

34 G Barwick, *A Radical Tory*, Federation, 1995, p 291.

35 (1986) 160 CLR v at vii.

unendurable proportions, we do well to read of the histories of the United States Supreme Court where the animosities which have so frequently poisoned personal relationships have not always been cloaked with the genteel observance of form which has usually marked at least the external face of our country's highest court[36].

PART AND PARCEL OF THE JOB

In my earlier forays into the topic of judicial stress I have collected some of the causes of judicial stress. A number of them go with the territory. They arise from the very nature of judicial work. Its inescapably lonely features. The pressures ever to act in a rational and efficient way under public scrutiny in a courtroom where some observers are only too ready to find fault but where the judge has few opportunities, legitimately and safely, to let off steam.

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36 See eg the remarkable insolence of McReynolds J to Cardozo J and Brandeis J, because they were Jewish, told in P J Cooper, *Battles on the Bench,* Uni Kansas, 1995, ch 5 "How do they fight? Internal and Personal battles". There have been similar conflicts in the House of Lords: R Stevens, *The Law and Politics: The House of Lords as a Judicial Body*, 1979, 287ff.

Judges constantly complain about the lack of substantive feedback over their performance. Justice Santow records how an advocate has the flush of victory or the consolation, in defeat, of sympathetic colleagues. For a judge, the delivery of a decision produces "just a sense of emptiness, anti-climax"[37]. All that then awaits is appellate criticism or academic calumny.

The increasing workload of modern judges has already been mentioned. But it cannot be fully understood unless it is realised that there is not much of the judicial function that a judge of our tradition can delegate. We have resisted the bureaucratisation of the judicial role. I hope we will continue to do so. But something has to give. This is why there is now increasing attention in Australia to new techniques of performing the judicial function.

In addition to these features of the work, there are also personal factors, normal in a person who in mid-life takes on the new and challenging career of a judge. That person, man or woman, will normally be faced with mid-life passage. It is a time often associated with loss of parents, departure of children, health problems and the decline of bodily and sexual self-image.

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37 Santow, above n 23, at 16.

Judges like other Australians are today prone to marriage breakup. They too can suffer personal loneliness. They are vulnerable to the stresses these events in life bring, simply because of the enforced loneliness that is expected of them in discharging their central professional functions.

To all these conventional pressures must be added new ones. The judge of today lives in a time of rapid change of legislation and common law principle. Even long settled rules are swept aside or reformulated[38]. The judge is expected to keep up with these changes. He or she is under pressure to understand new insights about society. New attitudes to women, to ethnic minorities, to homosexuals, to new religions and family organisation, even to the media. The judge may find it very unsettling to have basic notions about society and the law challenged and over-thrown. A few will respond with a rearguard action, adhering to unreconstructed old ways. But most strive to adjust their conduct - and even their thinking - realising that the judicial office is not theirs to pursue their own idiosyncratic views. But to serve the law and the community as it sees itself.

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38 For example *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 over-ruling the rule in *Rylands v Fletcher.*

Stress is not shared equally by judicial officers. There are special burdens in working, under vigilant attention, in country towns. There are tensions of another kind in trying to clear the crushing lists of urban courthouses. Chief Judges and Magistrates have special burdens as they attempt to perform their judicial functions whilst coping with ever-increasing administrative responsibilities and new and possibly uncongenial obligations to deal with the media and an often critical community.

HOW TO COPE

Removing the judge who is "hooked on stress" from the "ultimate addiction"[39] may be extremely difficult. Death in office or compulsory retirement may present the only assurance of eventual release. But for many judges, it is the realisation of the existence of stress and the willingness to talk about it and to address its manifestations that offers the path of personal resolution. That is why the discussion of the topic at this conference is beneficial to us all. Coming out of the closet on stress is no bad thing. Most judicial officers cope adequately

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39 Sydney University *News,* 12 September 1996 at 1.

with stress. Some do so brilliantly. A few positively thrive. But it is for those who are having problems that realisation and sharing are most important.

Responses to cope with stress can range from meditation (which, I understand, one of the High Court Justices practises), yoga and other relaxation techniques to religion, prayer and finding spiritual meaning and importance in work as a lawyer and a judge[40].

When the University of Massachusetts introduced a clinic in yoga and meditation in 1979, it was considered by the medical and nursing professions "like voodoo or witchcraft"[41]. But now stress reduction education and training in techniques of "mindfulness meditation" are winning over acceptability. More than 160 hospitals across the United States offer similar programmes. There are like facilities in Australia. They are most in use in dealing with cancer, heart disease and HIV/AIDS. But their lessons are relevant to the needs of otherwise quite

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40 Kirby above n 1; see also R Cogswell, "Kirby J's Tenth Lesson", NSW Bar Association *Stop Press,* October 1996 at 15.

41 C Krucoff, "Stress Reduction at Center Stage" *Washington Post Health Report,* 5 November 1996 at 11; B McConnell, "Stress and the Modern Lawyer" (1996) 146 *New LJ* 693 at 694.

healthy people living stressful lives. Such courses tend to concentrate on simple rules. Most of them involve training in breathing. Taking deep breaths and holding them for 3 seconds, slowly exhaling over 3 seconds, repeated 3 times is a standard technique[42]. Controlled breathing sends messages to the subconscious to relax the physical tension, to slow the breathing and to get the emotional state back on keel.

A second standard technique is sometimes described as "imagining exercises"[43], aimed at ridding the mind of fears, hostility and depression by thinking positively. Objective and well documented empirical research has shown that this can often aid medical therapy. There is no reason why it should not work to reduce judicial stress.

A third technique is laughter. The physiological aspects of laughter (like sneezing and orgasm) are not fully understood. But laughter typically involves a physical release. It is a muscle relaxant. Many of those who work under great stress, but can cope, find ways to look for humour in their daily lives. It can be of great benefit in a courtroom, as every judge and advocate

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42 M McKeon, "Cold Under the Collar" above n 21.

43 *Loc cit.*

knows - although some judges have been known to overdo it - doubtless evidencing their own stress.

There are various other responses specific to the judicial life. Stop taking on more committees. Turn to non-verbal activity as a diversion to the cerebral work of judging. Find physical means for release of tension. Take a vitamin B supplement. Just about the only thing which Sir Garfield Barwick failed to include in the new High Court building in Canberra is a gymnasium and a heated swimming pool. Politicians are usually more self-indulgent. The Junee prison has, I am told, no fewer than six gymnasiums. Yet judges, engaged in a sedentary life, have none supplied. There, surely, is an example of modern priorities.

Of course, some causes of stress and tension are out of the control of the judge. That may be a cause of stress in itself. Diminishing public esteem. Increasing workload with fewer resources. Reduced salaries. Threatened pension rights. Media criticism. New laws. Fresh and burdensome judicial obligations.

When one thinks of the stress of the life of an Australian judge today, one might be tempted to ask why new recruits come forward to accept the mantle? But come they do. And the reason is clear. With the pressure comes a job of true nobility. I have always felt this, through various judicial offices in Australia. It was brought home to me with the greatest clarity

when I sat for a year as President of the Court of Appeal of Solomon Islands. Between tropical downpours and fierce sunshine, I sat in the court at Honiara with judicial colleagues from Solomon Islands, Australia, New Zealand and Papua New Guinea. I looked into the faces of the people of that land. They trusted me. And they trusted the law which I administered to deal justly and properly with their problems. If, in Australian society, we live in an environment which is much more questioning, critical and even cynical, it remains for us, every day, to be worthy of the trust and equal to the challenges of our own expectations. We are successors to a tradition of 800 years. We know that those who went before had the same foibles and weaknesses as we do. We realise that ours is human justice. For a judicial system more perfect, most of those who come to our courts and those who criticise them must hope for ethereal judgment which is not ours to administer.

Oliver Wendell Holmes Jr, approaching his 60th birthday and celebrated for his work as Chief Justice of Massachusetts, surveyed his life as a judge without knowing that an appointment to the Supreme Court was shortly to be his. With the spirit of humility, but proper pride, which we may also display, he

summed up his life's work in a way that showed that he, certainly, had his pressures and tensions under control:[44]:

> "I ask myself, what is there to show for this half lifetime that has passed? I look into my book in which I keep a docket of the decisions of the full court which falls to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly a half a lifetime. A thousand cases when one would have liked to study to the bottom and say his say on every question which the law has presented ... I often imagine Shakespeare or Napoleon summing himself up and thinking: 'Yes, I have written 5,000 lines of solid gold and a good deal of padding - I, who would have covered the Milky Way with words that outshone the stars'. We are lucky enough if we can give a sample of our best and if in our hearts we can feel that it has been nobly done."

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44 O Wendel Holmes Jr cited in J H Wootten, "Creativity in the Law" (1972) 4 *Aust Journal Forensic Sciences* at 107.