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THE HON JUSTICE MICHAEL KIRBY AC CMG

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Australia's senior judges have engaged, at last, in a debate about the subject of judicial stress. This is definitely a step in the right direction.

The principal commentator on my paper (Justice Thomas) (Qld) was inclined to deny stress. In some of his comments, there seem to be indications of anxiety about the "howls of derision" which would accompany public awareness of judicial discussion of this topic. But if it is a serious topic, judges should be the last people to be deflected by popular reactions if they are born of ignorance or prejudice. So far as I know, we do not ordinarily tailor our responses to problems concerning others so as to avoid "howls of derision". I fail to see that we should

* Text on which was based a reply given by Justice Kirby following Justice Thomas' commentary and discussion at the Supreme Court & Federal Court Judges' Conference held at Brisbane on 31 January 1997.

adopt a different attitude in respect of a suggested problem concerning ourselves.

There is an objection, perhaps legitimate, that I did not define "stress" in my paper. It was described, clearly enough, in earlier versions of my paper¹. But because Justice Thomas goes on to say that stress is (as I also believe) a "natural reaction" and a "natural part of being alive", I hope I will be forgiven for this lack of definition. I wanted to avoid a pedestrian approach to the topic, in deference to the distinction of my audience. I thought it reasonable to assume that judges knew generally what stress was. The complaint reminds me of the English judge in the 1940s, famously out of touch, who reportedly asked "Who is Shirley Temple?". Presumed judicial knowledge has come some way since then.

The second suggested reason given by Justice Thomas for not discussing stress is even more doubtful in my view, namely that it would be a "Godsend to whingers". There follow references to the increased workers' compensation claims which have arisen in recent years involving stress. Clearly, this is an important phenomenon in modern compensation and employer

¹ M D Kirby, "Judicial Stress" (1995) 13 *Australian Bar Review* 101 at 113-114.

liability law². But the proposition that judges should not talk about the subject for fear of promoting compensation claims seems a trifle unworthy. Such claims will be judged on their merits as established by the evidence and applicable law. No judge should properly approach the determination of such claims with a bias against them. The innuendo that people who make such claims are, by definition, "whingers" is not one to which I would subscribe.

It is at least open to suggestion that the increase in stress claims by workers arises out of a heightened awareness about stress in our society since stress was first described in 1936. People generally (judges perhaps excepted) are more willing to speak candidly about such topics today without fear of a torrent of derision either from society or its decision-makers. This may be an area of medical science where we have advanced in our understanding of human psychology and the pathology of stress. Such advances do happen. For example, within living memory, judges had to enforce laws against adult homosexual conduct in private. The judiciary of this country - like the country itself- has made progress. We should always be open-minded to science and to new ideas.

2 See eg A Terry, "Work-Related Stress: Litigation as a Prevention Strategy" (1996) 12 *Aust NZ J Occup Health Safety* 535. Cf T Cox, "Stress Research and Stress Management - Putting Theory to Work", NES, London, 1993.

Justice Thomas did accept as a source of stress one factor which, as it happens, has never stressed me. I refer to the earnings of senior barristers. He suggested, no doubt in jest, that this was such a source of anxiety as to produce "instant ulcers" in "practically every judge". His suggestion was repeated by Justice Mildren (NT). Personally, I doubt the accuracy of this diagnosis. I am more inclined to agree with Justice Handley (NSW), in his comment, that when judges think about the lives of advocates they realise that, in the stress business, they are better off on the Bench.

However, I would not myself draw from that comparison the conclusion which Justice Handley seemed to suggest, namely that stress is not, therefore, important to judges. The stress of the Bench is different in quality and intensity from that to which legal practitioners, and especially advocates, are subjected. The timeliness of our discussion of stress is demonstrated by the repeated references to the subject in recent law journals in this country³ and abroad⁴. And I am not EVEN referring to the articles written by myself.

3 See now I Chung, "Coping With Stress as a Lawyer" (1997) *Law Soc J (NSW)* (March 1997) at 64. The article records that the New South Wales Law Society established "Lawcare" in 1991 to provide a confidential service for practitioners who have personal or emotional problems which are interfering with work performance. Factors mentioned include work, family or financial pressures, alcohol or other

Footnote continues

I did not explore judicial stress to seek sympathy for the employment package of judges, still less for myself. My explorations have generally been offered at the request of conference organisers. Since my days in the Law Reform Commission the raising of new and sometimes unwelcome topics seems to have been my fate. I have done no more than to call to attention a large and growing amount of writing on the subject. If so many judges and those observing them in so many places are interested to explore these themes, it scarcely seems appropriate to adopt a self-denying ordinance in Australia for fear of what others will think or what others might do.

It would, perhaps, have been helpful if at least one of the commentators on my paper had been a psychiatrist or a person regularly engaged in researching, counselling or treating stress. I suggested this course to the conference organisers; but to no

drug dependence or relationship breakdowns. A 24 hour telephone contact is given.

- 4 Eg B McConnell, "Stress and the Modern Lawyer" [1996] *NLJ* 693; D Carnahan, "Judicial Temperament and the Art of Judging", California Judges Association *The Bench*, vol 36 no 3, 7, 13 (1996); P Coyle, "Bench Stress" *ABA Journal* (US) December 1995 at 60. The latter concerns "dealing with problem judges". It records the rapid increase in complaints against Federal and State judges in the United States of America and the unremarkable opinion: "Judges are humans. We expect something better from them but, as in other fields, you get people who are mean or nasty or racist or sexist or homophobic". *Ibid*, at 61.

avail. Whilst it is true that some judges will cope with stress by denial, there will be others who actually may need assistance yet feel disinclined to talk about it or even perhaps unaware that they may have a serious problem⁵.

It was interesting for me to observe at the dinner which preceded this discussion the number of jests which were targeted at this session. The response was quite similar to what reportedly occurred when Prime Minister Hawke and the then head of his department (Sir Geoffrey Yeend) watched *Yes, Prime Minister* together. They each laughed. But at different places. So indeed did the spouses and partners of the judges at the conference dinner. In any future exploration of this topic it could be useful to have a commentary by one of them. They would be much more likely to speak without fear of being thought a "wimp" or a "whinger".

Justice Heenan (WA), in his comments on my paper, continued the appeal to humour - was it to laugh the topic away? Humour can certainly be a useful way to deflect the stress of public performance or the exploration of awkward themes. I took Justice Heenan to be in basic agreement with Justice

⁵ See the courageous article by Paul Menzies QC "The Bite of the Black Dog" in NSW Bar Association *Stop Press*, October 1996, at 6.

Thomas. At the end of the invited commentaries, I wondered: would any Australian judge acknowledge stress - or would the response be denial?

In discussion, Justice Daryl Davies (Fed Ct) urged more golf as relief - as it happens an instinctive suggestion of the non-verbal activities recommended by the experts. Justice Demack (Qld), the Northern Judge in Queensland, mentioned isolation - but this was to be balanced, in his case, against the advantages of being largely in charge of one's own ship - with a high degree of autonomy: bringing its own particular satisfactions. Justice Jane Mathews (Fed Ct) spoke of the special burdens of sentencing convicted prisoners to long periods of imprisonment. Most judges cope with this by seeing themselves as the instruments of the law, settled authority and sentencing principles. It is in the finely tuned exercise of discretion and the leeways for choice that the stress of such decisions may arise. Justice Cohen (NSW) suggested that stress may be something we see in others but deny in ourselves. I tend to agree. The ego is such a fragile thing. However, it must be kept intact by the judge acting out a public office as the community expects. I was sorry that Justice Demack, one of Australia's longest serving judges, and at one time a Judge of the Family Court of Australia, did not recount the particular stresses of working in that court. Intense feelings that accompany divorce and custody disputes can sometimes be contagious within a courtroom. Judging in the Family Court would be specially stressful. It is one reason why I consider that there might have been wisdom in the old

system of judicial rotation so that a judge is not assigned to work of one kind for too long, lest stress or boredom take over and affect judicial performance.

So here is the topic of judicial stress. The path that Australian judges take is ours to choose. We can certainly retreat into denial. We can keep our anxieties and concerns strictly to ourselves. We can exclude non-lawyers with insight and expertise to offer. We can react by trying to laugh the subject away. Or we can bring time-honoured judicial qualities to bear: Open-mindedness to new ideas. Honesty about newly perceived facts. Attention to people with relevant expertise and experience. Courage on our own part. Compassion and respect for fellow human beings.
