

SPIGELMAN CJ  
AND JUDGES OF THE  
SUPREME COURT

Wednesday 12 August 1998

SWEARING IN CEREMONY OF  
THE HONOURABLE DAVID KIRBY QC  
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

KIRBY J: Chief Justice, I have the honour to announce that I have been appointed a judge of this Court. I present to you my Commission.

SPIGELMAN CJ: Thank you, Justice Kirby. Please be seated while the Commission is read. Mr Wescombe, would you please read the Commission.

(Commission read)

I now ask you to rise and take the oaths of office; first the oath of allegiance and then the judicial oath.

(Oaths of Office taken)

Mr Acting Prothonotary, I hand you the oaths, to be placed among the Court archives. Madam Sheriff, I hand you the Bible, so that the customary inscription may be inserted in it in order to be presented to Justice Kirby as a memento of this occasion.

On behalf of the Judges of this Bench, and on my own behalf, I congratulate you on your appointment and welcome you as a member of this Court.

My own personal position is of much joy, for the simple reason that most of my time at the Bar was spent sharing Chambers with your Honour, and most of my time on the Bench will be spent sharing the Bench with your Honour.

From the Court's point of view, the Courts have endured long enough without a Kirby on it.

THE HONOURABLE J W SHAW QC MLC ATTORNEY GENERAL  
OF NEW SOUTH WALES: May it please the Court.

Your Honour, Justice David Kirby, I welcome your Honour as a judge of the Supreme Court of New South Wales, and I congratulate you on your appointment.

You have had a an extensive career in the law, predominantly as an advocate, and have appeared in many cases and inquiries which involve legal principle and, from time to time, the public interest.

As a boy, you attended the Fort Street Boys High School and then studied arts and law at the University of Sydney. In 1967 you graduated from the University of Sydney with honours in law. You were then an articled clerk at Bartier Perry & Purcell, and subsequently at Hickson Lakeman & Holcombe, where you practised as a solicitor between 1967 and 1969.

In February 1973 you were admitted to the New South Wales Bar, and also in that year you accepted the post of Secretary of the Council for Civil Liberties. You have practised at the New South Wales Bar ever since, and in 1985 you were appointed a Queen's Counsel.

I first came across your Honour, I think, in 1972, when our lecturer in evidence, the Challis lecturer in evidence at the University of Sydney, the late Mr Trevor Martin, was appointed as a Judge of the District Court. Your Honour took over that class in the latter part of the year. You were an enthusiastic and conscientious teacher of the law of evidence, and most of us passed the exams.

Subsequently, when I was an articled clerk and solicitor, I was pleased to brief you in a variety of Common Law matters, and when we were both at the Bar I appeared against you at least once in this Court.

Your Honour practised generally at the Common Law Bar. You were widely briefed, particularly, but not exclusively, by plaintiff's firms and the solicitors briefing you appreciated your meticulous attention to the drafting of pleadings and the expeditious provision of advices, as well as your courteous manner to clients, to articled clerks and to solicitors.

In the early 80's your Honour developed a particular interest in being involved in extensive inquiries, both as Counsel Assisting and as counsel representing one of the contending parties. This practice demonstrated an attention to detail, a concern for the ascertainment of complex facts, and an interest in searching for solutions which might assist the public good into the future. Your interest in those inquiries was met by

a steady flow of briefs, with one inquiry following another, interspersed with shorter pieces of litigation.

In 1980 you were appointed as the Commissioner to conduct an inquiry into the Kyeemagh-Chullora freeway. In 1981 you were the delegate for a Corporate Affairs Commission investigation into Broken Hill Metals. In 1982 you were the Commissioner for an inquiry into the Warringah Transport Corridor. In 1987 you conducted an inquiry into Balanced Property Trusts for the Corporate Affairs Commission. In 1989 you were the Counsel Assisting an ICAC inquiry into Waverley Council. In 1993 you were counsel for the Police Service in an inquiry into the conviction of Andrew Kalajzich before Mr Justice Slattery. In 1995 you were the Counsel Assisting Judge Staunton's inquiry into the Seaview air disaster.

When I, as Attorney-General, was involved in the establishment of an inquiry into the Gretley coal mining disaster, I did not think it would be improperly disclosing any confidence to say that his Honour Judge Staunton, who was appointed to conduct the inquiry, was firmly of the view that you ought to be appointed Counsel Assisting, and I gratefully accepted his Honour's advice in that regard.

In 1996 you were appointed to the New South Wales Privacy Committee, and I am informed that that Committee has benefited from your keen appreciation of the significance of privacy issues and broader questions of civil rights. Your recent work for the Committee concerning principles relating to employment screening has been a real contribution to

the Privacy Commission's response to the report of the Police Royal Commission.

You are a committed, experienced and widely-respected legal practitioner. This is, of course, an entirely appropriate background for your appointment today as a justice of the Supreme Court of New South Wales. You are equipped to confidently take on the challenge of this appointment.

I have great personal pleasure in welcoming a person of your capacity, integrity and expertise to this Bench. Your Honour, I offer you my personal good wishes and, of course, the collective support of the Bar of New South Wales for what I am sure will be the continuation of a significant career in the law.

**MS M C HOLE SENIOR VICE-PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.

Your Honour, on behalf of the Law Society of New South Wales, I extend the congratulations of our fourteen and a half thousand members in respect of your appointment today.

I note that your brother, Donald, is one of those solicitors, being the senior partner at McClellands, here in Sydney.

Born in Sydney in 1943, a year I share with you, as mentioned you were educated at Fort Street Boys High School, after which you attended and graduated from the University of Sydney with an honours degree in arts/law. You then undertook articles first at Bartier Perry & Purcell, with

Aleco Vrisakis, and later with your brother, Michael, at Hickson Lakeman & Holcombe.

Whilst at Hickson Lakeman & Holcombe, you commenced your long involvement with civil liberties and appeared for the respondents in the notable 1968 High Court case of Crowe v Graham, a case which greatly influenced the changes in censorship which occurred in Australia around that time.

Your recurring memory, I understand, of the case is of his Honour Mr Justice Kitto holding one of the offending publications between two fingers at arm's length in an effort to avoid the pollution of titles such as "censor" and "obscenity".

Your continued involvement in civil liberties encouraged you to take on a good deal of pro bono work, much to the concern of your then partners. However, the profits generated elsewhere more than made up the leeway.

In 1973 you became Secretary of the Council of Civil Liberties, and you were admitted to the Bar.

In 1980 you began the work for which you have become best known, that of major inquiries, ranging from your first, into the then proposed Kyeemagh-Chullora freeway in 1980 to, most recently, the Gretley coal disaster near Newcastle.

That first inquiry, in which you recommended against the construction of the Kyeemagh-Chullora freeway, has been described by some as Kirby's effort to protect the environment in that part of southern Sydney.

That the freeway is now going ahead as part of the M5 extension, partially underground, is perhaps a tribute to your original desire to protect the total environment in the area.

Some of the other inquiries in which you have been involved have had a considerable impact on the community and its activities generally.

The Seaview inquiry, in which you were Counsel Assisting, led to major changes in Australia's aviation safety regime.

Similarly, the Independent Commission Against Corruption inquiry into Waverley Council, in which you were Counsel Assisting, uncovered significant corruption in local government and sensitised both the public and the State Government to the impact of corruption on democratic government.

Having taken silk in 1985, you first experienced the judicial role to which you have now risen with two terms as an acting judge in the District Court.

Your family, including your parents, Donald and Jean, brothers, Michael and Donald, sister, Diana, your wife, Judy, and your children, can justifiably be proud of your achievements and your elevation to the Bench.

Once again, we offer congratulations, and assure your Honour of the continuing support of the solicitors of New South Wales into the future.

As the Court pleases.

**KIRBY J:** Chief Justice, your Honours, Mr Attorney, Miss Hole, ladies and gentlemen. This is obviously an important time in my life. I wear the wig, I might say, of my brother, Michael, a gift from him, and I do so with

the knowledge that he wore it on the last occasion when he sat as the President of this Court. These robes, I might say, were also a gift from Michael. However, as I reflect upon my life. I recognise that not a great deal has changed.

In 1956 I entered Fort Street, as has been mentioned. I followed in the footsteps of Michael. He had been there the previous year. As I entered, it must be said, that Michael harboured ambitions for me, which was just as well, because I harboured none for myself. He had the ambition that I should, in five years' time, become a prefect, just as he had been a prefect the year before. And so it was that a five year campaign began.

I came home from school one day to find laid out on my bed a complete football outfit: The football jersey of Fort Street, the white shorts, the maroon and white socks. Michael had quickly recognised that if I was to achieve greatness, it would more likely be on the sporting field than elsewhere.

Not that he neglected my studies. I was required, in those early years, to submit essays to him from time to time for his correction and helpful comment. He was, you would appreciate, a most unusual brother, but a wonderful brother.

But here I am, almost 45 years later, and I'm still wearing his clothes and, no doubt, some of my judgments may find their way to the High Court for his correction and helpful comment.

It remains for me to thank my clerk, Michelle Hedger, who has looked after me, and to say something about my family, and those who

have been important in my professional life. Before I do so, let me mention a very special member of my family who is not present, but is with me always in spirit. That is my late wife, Marie-Line Hervic. She used her own name. She died on 30 September 1986. It is almost twelve years ago. She was thirty-four, and we had been married for almost fourteen years. She was, on any view, a remarkable person and she would be very proud of me today, as I am of her.

She was, as well, I might say, a generous spirit. She was a barrister and, indeed, her wig sits upon the head of someone in this room, who is the step-daughter of my wife, Judith. That is complicated I grant you, complicated for me, and I almost need a map to find my way around my extended family. Most people in this life count themselves as privileged, as lucky, if they have one good marriage. I have been blessed with two wonderful marriages.

My wife, Judith, is herself a widow, and another generous spirit. I know that that generosity of spirit will mean that she will not resent, in the least, my remarks about Marie-Line.

I now should thank Judith for her love, for her loyalty and for her tireless work.

I see my children sitting in front of me: My son, Nicolas; my daughter, Elisabeth; my son, with Judith, Patrick. I see their smiling faces, and I thank them also for their love.

That is a family that I had a hand in creating. I am also blessed in the family which created me. My mother, unfortunately, is not able to be here today. She is almost 83. We had hoped that she might come, but I

have undertaken that, after this ceremony, at some stage today, I will take this wig and these robes and repeat this speech to her, so that she might participate in this ceremony.

My father, however, is here, and I see him in front of me. My mother and father met on St Valentine's Day sixty-six years ago; more than sixty-six years ago. They have been married for almost sixty-two years; a remarkable union.

My father, I believe, instilled, into each one of his children, a sense of fairness. My mother was an example of passion and compassion. My brother, Michael, I have mentioned already, but my brother Donald is also here.

Donald was a twin. His twin was David Charles. David Charles died at the age of eighteen months. I was the next child. They called me simply David. I became like a twin to Donald, and he remains to this day my true friend.

My sister, Diana, is also here. She is the only member of the Kirby family who had the originality to do something other than law. She is a much-loved nursing sister at the Royal Prince Alfred Hospital.

As I look around this room, I see the faces of many people who have been important in my professional life. I see solicitors who have briefed me, silks with whom I have appeared. I see my opponents, down the years, in many cases. Some of them are now Judges. I see others, Judges before whom I have appeared. And one very much learns the craft of being a barrister, and ultimately of being a judge, by watching other experienced

practitioners go about their daily work. So it is with me, and so it is that I owe a debt to many people in this room.

Let me mention four people to whom I owe a special debt. Barry O'Keefe, the person with whom I read, the ICAC Commissioner. I read with Barry O'Keefe in 1973, when he was the busiest practitioner at the Bar, I think; certainly the most energetic. He was always cheerful and always generous with his time.

Secondly, Michael McHugh QC, now Justice McHugh of the High Court. I appeared with Justice McHugh, or Michael McHugh as he then was, in some cases, some of them very prominent cases, and for me it was a great privilege and an education.

Thirdly, and most recently, I have had the privilege, as has been mentioned, of acting as Counsel Assisting to Jim Staunton QC, the former Chief Judge of the District Court, both in the Seaview inquiry and the Gretley coal disaster inquiry. Again, it was a privilege to watch a gifted and experienced judge at close hand.

The final person I should like to mention is not here. He, in fact, died more than twenty years ago, on 6 February 1977. His spirit still inhabits these courts, and certainly inhabits my mind. I refer to Sam Simblist QC, who was made a Judge shortly before he died. He was a great teacher of mine. I can still hear his wonderful deep voice, and he is still a point of reference in my life. I would like, on this occasion, to acknowledge my debt to him.

I should finally conclude by thanking each person who has come here, taking the time, in busy lives, to attend this ceremony. Thank you.

SPIGELMAN CJ: The Court will now adjourn.

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