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JUDICIAL COMMISSION OF NEW SOUTH
WALES

DISTRICT COURT OF NEW SOUTH WALES

ANNUAL CONFERENCE 2018,
LEURA

MY FIRST JUDGES - TEN LESSONS

The Hon. Michael Kirby AC CMG

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RETURN TO ORIGINS

I congratulate the judges of the District Court of New South Wales on another year of service. The court was established in 1858.¹ It is 160 years since its creation. This is the second time I have addressed this annual conference. The first occasion was in 1988, soon after my appointment in 1984 as the fifth President of the New South Wales Court of Appeal.² It must have been an unmemorable address on that occasion. It has taken 30 years for the invitation to be renewed. The

* Text for the address to the dinner of the Judges of the District Court of New South Wales, Leura, New South Wales, 3 April 2018

** Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96).

¹ *District Court Act 1858* (NSW) (22 Vic No. 18).

² After Wallace P, Sugerman P, Jacobs P and Moffitt P.

Chief Judge at the time (appointed in 1971) was Judge James Henry Staunton QC. Not a single one of the judges then present is here to tell the tale. Most have died. So the secret is safe with me. The event took place in a Sydney CBD hotel. The setting was modest and the meal meagre. The present Chief Judge, Justice Derek Price, or perhaps the Judicial Commission of New South Wales, since established, have a healthier regard for occasional touches of luxury as evident in Leura. I am looking forward to my third invitation, preferably before I pass to the great beyond.

In the intervening years there have been many changes, most notably in the appointment of women judges. In 1988 there were none. I pay tribute to the first women judges appointed to the court in the interim: Judge Jane Matthews (1980) (later appointed to the Supreme Court of New South Wales and the Federal Court of Australia); Judge Angela Karpin (1991); Judge Cecily Backhouse QC (1994); Judge Robyn Tupman (1996); Judge Helen Murrell SC (1996); and Judge Deborah Payne (1997). Judge Murrell is now Chief Justice of the Australian Capital Territory. Judges Tupman and Payne are present on this occasion.

At a recent farewell, in the Supreme Court of New South Wales, to Justice Carolyn Simpson, she finished her remarks with two notable exhortations.³ The first was a heartfelt tribute to the Judges of the District Court (and to Magistrates of the State) who undertake the great majority of the judging in the State, sometimes with crushing lists that would daunt lesser spirits. She also encouraged the women lawyers

³ Justice Carolyn Simpson, Farewell Speech, Supreme Court of NSW (Court of Appeal), Banco Court, 27 March 2018.

present to aspire to judicial service. That aspiration is no longer confined to the possession of the Y chromosome.⁴

Continuing in a nostalgic vein, I intend to look back, even before my first judicial appointment in 1975, indeed before my admission to articles of clerkship (1959). I wish to call to mind the first judges whom I met on my journey in the law. They were not magistrates; nor were they judges of the District Court. Although I enjoyed excellent schooling, with a maximum pass in the school leaving certificate in 1955, I could not secure articles in any of the large and well reputed legal firms. Most of them have since changed their names, doubtless in consequence of their error. But I know who they were. My university tutor in criminal law (Barry O'Keefe, then famous as the brother of the popular singer, Johnny) urged me to apply to smaller firms that practiced in litigation. So it was that my Aunt Lillian retyped my applications and I was eventually appointed to M A Simon and Co. Its offices were small and humble, in O'Connell Street, Sydney. I shared my office with two other clerks. Occasionally we had cases in the District Court. But from day one, the litigation in which I was engaged was substantially in the Workers' Compensation Commission of New South Wales (WCC).

On my first day of articles in 1959, before I had even visited Deputy Prothonotary Herbert to be cautioned never to steal the office postage stamps, I attended the courtrooms of the original WCC.⁵ Judges of that court enjoyed the same status of a judge of the District Court. There was no jurisdiction in crime. The boundaries of the jurisdiction were set

⁴ An expression of Justice Mary Gaudron, first female justice of the High Court of Australia (1987)

⁵ Established by the *Workers' Compensation Act 1926* (NSW) s 31(1). The Commission was created as a court of record exercised together with wide administrative powers. C.P. Mills, *Workers Compensation (NSW)*, Butterworths, Sydney, 1969, 438.

by Premier Jack Lang's 1926 Act. Yet there was variety enough and many technical legal issues for determination. I came to know well the abilities, foibles and personalities of the four judges who then served on the WCC. When I think of my past in the law, they are present in my mind, beckoning me back to those days of early encounters with our profession and its judges.

Although the original WCC was abolished in 1984,⁶ a new commission was established in 2007. I acknowledge the presence of its President, Judge Gregory Keating, on this occasion. Lately, with Judge John O'Meally,⁷ I have recorded an interview of recollections of those early years in the WCC.⁸ Doing so has stimulated my memories of the first judges I came to know. Although they were not judges of the District Court, they held the same rank and carried similarly heavy loads of decision-making. Vivid memories of them remain with me. Reflecting on those memories, there are important lessons to be derived.

I am sure that there would be similar memories from the District Court of those almost forgotten years. Some of today's judges may, in the earliest bloom of youth, have appeared before the WCC or heard its judges spoken of.

⁶ *Compensation Court Act 1984* (NSW).

⁷ Judge O'Meally was appointed a judge of the Compensation Court (1984-2003) and a judge of the District Court with retrospective seniority. He was later appointed president of the Dust Diseases Tribunal (1989).

⁸ Published by Benchmark TV Production.

MY FIRST JUDGES

Judge Theo Conybeare

Judge Conybeare's courtroom and chambers were on level 9 of the City Mutual building in Sydney. This is a lovely art deco edifice, still standing on the corner of Hunter and Bligh Streets in Sydney. Above the steps leading to the entrance to the building and public lifts was a bronze relief showing humanity in need of protection. Doubtless this was intended to symbolise the insurer which paid for it. But it was suitable enough for WCC, and particularly for its chairman.⁹

I sat in Judge Conybeare's court within a week of commencing my articles. It was large and modern, with facilities that far outstripped those in the old Sydney Barracks that accommodated the District Court of New South Wales at the time.

Judge Conybeare, as I later found, had been born in 1902. He was educated at North Sydney Boys' High School and at Sydney University and admitted to the Bar in June 1928. His practice was mainly before the District Court and the WCC. His most notable brief involved appearing as junior counsel for Sir William Dobell when the award of the Archibald Prize for the latter's portrait of fellow artist *Joshua Smith* was contested as a 'caricature' not a 'portrait'. Mr Conybeare's side won.

Mr Conybeare took silk in 1951. Shortly afterwards, he was appointed a judge and chairman of the WCC in succession to Judge Ralph

⁹ M.D. Kirby, "Conybeare, Alfred Theodore" in *Australian Dictionary of Biography*, Vol. 13, MUP, Melbourne, 1993, 489. See also (1951) 25 ALJ 53.

Perdriau.¹⁰ As a judge, he was “unpretentious, courteous and a stickler for gentlemanly conduct and legal technicality. He took pains to understand the facts (including the complex medical evidence involved in many cases) and awarded compensation under the statute the provisions of which were often quite technical.”¹¹

On the first occasions that I sat through contested cases (and there were many in those days) I was astonished at the Chairman’s professionalism and capacity. At the end of the evidence, before turning to the next case awaiting decision, he would pause momentarily and then deliver an oral judgment. To a young clerk, sitting before him, it was a remarkable performance. The product of enormous concentration and skill derived from experience, he would recount the facts, state the law, apply the law to the facts as found, reach his conclusion and announce his award.

Later in the New South Wales Court of Appeal I had to perform the same task. It gets easier with years of experience. It is a marvellous skill when first observed. Some practitioners found him prissy and pedantic. But he left an impression on me of what was expected of a busy trial judge. There were too many cases to reserve many of the decisions, other than on rare occasions, and then for good reason. Judge Conybeare was firm and insistent on high standards, which he displayed in his own performance. He left an indelible impression upon me. It was as if, on every day, he was striving to be worthy of the rank of judge and as the senior judge of the WCC. In time, I would come to understand those feelings well.

¹⁰ (1951) 24 ALJ 117.

¹¹ (1975) 49 ALJ 644.

When he retired from the WCC in 1972, Judge Conybeare took part in the early days of anti-discrimination law for employment and occupations. He conducted an inquiry and made recommendations for the reform of the 1926 Act to provide for rehabilitation and to abolish common law damages. Not much was done to follow up the former. The latter remained a source of controversy and partial statutory change. He died in 1976.

Judge Alf Rainbow

The second judge of the WCC when I arrived was the first judge I encountered on the very day my articles commenced. His court and chambers were on the 8th floor of the building. He was avuncular and more informal, as befitted someone who had, at Cambridge University in his youth in England won a blue for rugby union and a half blue for swimming.¹²

After Cambridge, Judge Rainbow returned to Sydney and was admitted to the Bar in 1923. He took silk in 1946. That was the year in which he was appointed a judge and member of the WCC. During his service, he was appointed for a time to clear up the matrimonial cases backlog in the Supreme Court, which then had that jurisdiction. He was quick of mind and impatient with meritless technicalities and long winded argument. At the end of a day clearing a particularly lengthy list of divorce cases assigned to him, he reportedly declared; "What God hath joined, Rainbow hath cast asunder". He did not secure a permanent appointment on the Supreme Court, possibly as a punishment for his irreverence.

¹² (1945) 19 ALJ 15.

This did not change him or stop him taking an active part in prisoners' aid. Although his professional work involved no crime, he joined the board of the Half Way House, as it was then called. This and other engagements demonstrated feelings of support for the underdog. He was also very active in the Australian Rugby Union, ultimately becoming its president.

Judge Rainbow appeared to have great confidence in his capacity to assess truthfulness of witness testimony.¹³ He also crafted persuasive oral reasons for judgment. True to his personality, he would sometimes inject humour into his opinion, something that rather shocked me at the time. When he died in 1964 it was observed, correctly, that he was admired for his capacity and appetite for work... and [willingness] to meet the convenience of a litigant or doctor.¹⁴ Above all, he was an effective judge whose reasons were persuasive, even when they were adverse to my clients.

Judge William Dignam QC

The third judge of the WCC in seniority in 1959 was Judge W. J. Dignam QC. Given his interesting career, it is surprising that the surviving records of his life and service are so meagre. He was another federation child, being born in 1901. Bill Dignam was educated at De la Salle and Christian Brothers' Colleges in Sydney and at Sydney University. He was admitted to the Bar in 1926. He had political connections. These led him to be appointed a member of the Attorney-General's committee on the state statute law and a wartime member on Commonwealth and State functions.

¹³ Before *Fox v Percy* (2003) 214 CLR 118.

¹⁴ (1964) 37 ALJ 300.

Dignam became close to Dr H.V. Evatt KC. Evatt's functions as Federal Attorney-General and Minister for External Affairs opened doors for him. He was appointed leader of the Australian delegation to the Brussels conference on the International Copyright Convention of 1948. He went on to serve in December of that year as a member of the Australian delegation to the Third General Assembly of the United Nations, held in Paris. It was at that Assembly that Evatt was elected President of the General Assembly and he presided when the *Universal Declaration of Human Rights* was adopted on 10 December 1948.

Dignam had been appointed KC in 1946. He also served as first Australian High Commissioner to Eire (1946-50). As his father had been born in Dublin, this was a great honour for him. However, on the election of the Menzies Government in 1949, and completion of his diplomatic appointment, he returned to Sydney, out of work. Reportedly, he was seen sitting in the back of the WCC courts for a few days before his appointment was announced. He then served there as a judge from 1950 to 1971. Few judges could have come to their offices with such distinguished international credentials. I got an impression that he felt that his judicial fate had not reflected his deserts.

Judge Dignam was always friendly to me and tried to engage me with work on the *Australian Digest* of which he had been joint editor. However, as a judge I have to say that he was much less impressive than his colleagues. He was extremely sensitive to any expected slights. He also seemed incapable of giving convincing reasons. When he dismissed workers' claims he simply announced, typically, that 'the claim failed' and that there would be 'an award for the respondent'. This

cast on me, as an articled clerk, the obligation of explaining the loss of their claims to shocked and anxious clients. Later, the Court of Appeal was to insist that judges of the District Court (and by inference, the WCC) were obliged to give reasons for their decisions.¹⁵ That appellate decision arose from orders made without reasons by Judge Des Healey in the District Court. The ruling coincided with the retirement of Judge Dignam. Although he occasionally invited me into his chambers for morning tea (a not uncommon practice in those days, generally extending also to articled clerks) I disliked the invitation to Judge Dignam's chambers, partly because of his arbitrary exercise of judicial powers. But also partly because of his strong halitosis. Try as I might, I have not been able to forget either of these features of Judge Dignam's service. He had a number of adopted children and was reportedly kind to animals. But he was not my favourite judge. There were too many scars from unreasoned decisions.

Judge Colman Wall

The fourth judge of the WCC as I originally found it, was Judge Wall. He was younger than the others. In his entry in *Who's Who* (there is none in the ADB) he gave the date of his admission to the Bar (1939), his marriage (1936) and his appointment to the WCC (1954). Apart from recording his recreations of skiing and walking, there is no other personal information on his life.¹⁶ His birth year must have been about 1913. The year of his death goes unrecorded in the *Australian Law Journal*.¹⁷

¹⁵ *Pettitt v Dunkley* [1971] 1 NSWLR 376.

¹⁶ J.S. Legge (ed.) *Who's Who in Australia* 1974, Herald, Melbourne, 1974, 1005

¹⁷ A brief item on his appointment appears in (1955) 28 ALJ 153.

Still, for young lawyers like me, he was a paragon of a judge. He was always courteous to lawyers, clerks, witnesses and litigants alike. He was never impatient. He was graceful and attentive. His reasons were convincing. He only had one fault. This was that, if the witness (usually the worker) was caught out in a lie, it was next to impossible to restore credit to his testimony. The claim then commonly failed.

When, in the circuits of WCC, I would observe Judge Wall in the dining room of the hotel, I remarked on his unerring personal equanimity. Sitting there with his tipstaff and court reporter, he had the aura of a judge. Even when not on the bench, he knew that he was under scrutiny of young lawyers like me. His judicial demeanour was perfect.

BASIC JUDICIAL VALUES

In recent years I have served on the Judicial Integrity Group, supported by the United Nations Office on Drugs and Crime (UNODC).¹⁸ That group containing many chief justices who prepared the *Bangalore Principles* setting out the essential qualities of a modern judge. Those principles include adherence to seven basic values, derived ultimately from international human rights law. These values are: Independence; Impartiality; Integrity, Propriety; Equality; Competence and Diligence. At a recent meeting discussing these values, it has been suggested that the additional values of Courage or Valour should be added. The decision of the High Court of Australia in *The Australian Communist*

¹⁸ UNODC, Commentary on the *Bangalore Principles of Judicial Conduct* (September 2007) Vienna, 23 ff. See also International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Geneva 2007.

*Party v The Commonwealth*¹⁹ and in *Mabo v Queensland [No.2]*²⁰ are arguably instances of courage, certainly of wisdom.

Most of the judges I have known over my 60 years in the profession have measured up well, by reference to each of these values. Each of us who are, or have been appointed to judicial office, realise that we are greatly privileged to have been appointed as judges in Australian courts. In our own different ways we have sought to meet the international standards and to be worthy of the trust placed in us by the community, the legal profession and the litigants.

TEN LESSONS

A reflection on the memories I hold of the first judges I encountered in my professional journey brings me to at least ten lessons for the judges of today who carry on the judicial tradition of Australia, including as maintained in the District Court of New South Wales:

1. Each of us is journeying on a grand judicial tradition. Every day we are subject to the scrutiny of the legal profession and of the young clerks and novitiates who look at us, seeking to distil from our performances, what it means to be a judge in our country. Every appointed judge must strive to live up to the expectations that history, principle and law, impose upon us;
2. There is an exceptionally high premium on professionalism. This includes knowledge, experience and hard work on the cases and

¹⁹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

²⁰ *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

on the attainment of the abiding judicial values. A judge, like Judge Conybeare, who demonstrates this talent, sets a standard that those who watch and learn from and later, if they have the chance, seek to emulate;

3. Efficiency and a willingness to innovate are expected of the modern judge. He or she must be speedy and yet not too speedy. Waiting to accommodate unexpected exigencies is noted and remarked upon, as was the case of Judge Rainbow after his death. Rigid rules sometimes need to bend to unavoidable or explicable human necessities;
4. It is important always to be courteous to clerks, to advocates, to parties and to witnesses. It is best to remember the clerks at the beginning of their journeys. Years later, they will recollect and speak. Sometimes they may even write our obituaries. In the law, memories are long and occasionally unforgiving;
5. Every judge must be on the lookout for foibles that become all too well known within the profession. Judge Dignam was reputed to disbelieve witness who did not look him in the eyes when they took the oath to tell the truth. Yet cultural and personal factors can sometimes intervene. Judge Wall's distrust of those caught out in a lie could well have been tempered by a larger understanding of reasons of embarrassment or otherwise that sometimes explain a falsehood, reasons lying somewhere short of fraud;
6. A judge should be ready to stand aside from a case where there may be a perception of bias, though none is actually felt, and may

reasonably exist in the eyes of the reasonable beholder.²¹ On the other hand, judges must not be too swift to stand aside because doing so may be seriously unfair to others;²²

7. Even outside the courtroom, a judge is always potentially on display. Seeing Judge Wall in the same dining room on circuit filled me, at the time, with a sense of privilege. It seems foolish now to say this. But judges need to know how clerks, many practitioners and ordinary citizens still have elevated opinions and expectations for the judges. It is a reason for prudence. A judge in office carries higher expectations than almost any other public official;
8. Judges must remember that time (and the law) change. They must keep up with the change. Judge Dignam did not feel obliged to give reasons. Happily the law soon forbade that approach. When I came to the Court of Appeal, Justice John Clarke declared that I brought to the discharge of my office not so much the Age of Reason but the age of reasons. One of my greatest disappointments as a judge was the reversal of the Court of Appeal's decision in *Public Service Board of NSW v Osmond*²³ concerning the obligation of administrators to give reasons for their decisions;
9. Every moment of the judge in court is working time. Whilst every judge's methods and techniques are different, Justice Dennis Mahoney (my successor as the President of the New South Wales

²¹ *Clenae Pty Ltd v ANZ Banking Group Limited* (2000) 205 CLR 337.

²² *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358.

²³ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 reversing *Osmond v Public Service Board NSW* [1984] 3 NSWLR 477.

Court of Appeal) taught me an important lesson soon after my appointment. “It is easy”, he taught me, “To sit back and enjoy the arguments of the parties or the testimony of witnesses. True, the judge must keep an eye on the big picture and the overall impressions. But every moment, the judge should be preparing for the decisions and rulings that must be given and for the vicissitudes that may thrust sudden obligation to action.” In my case, following this advice, I was always preparing tree diagrams of arguments noting the major and minor premises in the case so that I could retrieve the points quickly, efficiently and accurately at the moment of decision.²⁴ The enjoyment of judicial office is generally something to be experienced in retrospect. At the time of its exercise, it is invariably hard work requiring unrelenting concentration.

10. The final rule is to remember the little things, that if forgotten, will stand out in the memory years and decades later, perhaps undeservedly. Judge Dignam’s halitosis is a reminder to clean one’s teeth after meals and before social encounters. The slightest blemish or disarray of clothing will be remembered and doubtless recounted with great mirth in Bar common rooms, and nowadays, on *Facebook*. Once the faults enter cyberspace, they are there for eternity. A paragon of legal rectitude and diligence may then be reduced to an object of contempt or pity.

I depart this occasion with a fresh expression of gratitude for the invitation. Also with an expression of praise and thanks for the Judges

²⁴ An example of this appears in Plates 28.1 and 28.2 in A J Brown, *Michael Kirby: Paradoxes/Principles* (Federation, Sydney, 2013) 388; M.D. Kirby.

of the District Court. In the old days judges in New South Wales received an annual published law almanac. It announced the full names of all the judges and the dates of their appointments. Before this occasion, in default of an almanac, I visited the District Court's website. On the homepage there was a portal "about us". I clicked on, expecting to see the surnames of my hosts. They were not there. Ultimately, under "contact us" I found a list of the names of the judges in alphabetical order, providing minimum information apart from the contact details of the associate.

A reflection on the judges of the District Court of my youth reminds me the individuality and high experience of each of them. Appointment to this court is an appointment to a judicial office of high responsibility. It is not simply a job. The names of the current (and past) office-holders should be celebrated and honoured. Appointment is a badge of distinction. Anonymity and submergence in public administration can be left for other office-holders. Judges are individuals, with personal commissions to do justice to all in accordance with the law. I leave this occasion with Justice Carolyn Simpson's words still ringing in my ears. Words of praise. Words of thanks.