3062

THE SYDNEY INSTITUTE

WEDNESDAY 19 AUGUST 2020

JUDGING IN THE AGE OF COVID-19

TRANSCRIPT RECORD OF Q&A BETWEEN GERARD HENDERSON (SYDNEY INSTITUTE) AND THE HON. MICHAEL KIRBY (PAST JUSTICE OF THE HIGH COURT OF AUSTRALIA)

THE SYDNEY INSTITUTE

WEDNESDAY 19 AUGUST 2020

JUDGING IN THE AGE OF COVID-19

TRANSCRIPT RECORD OF Q&A BETWEEN GERARD HENDERSON (SYDNEY INSTITUTE) AND THE HON. MICHAEL KIRBY (PAST JUSTICE OF THE HIGH COURT OF AUSTRALIA)

Gerard Henderson: So thanks for a stimulating address. Obviously from what you're saying in your talk, you can see, not a benefit, but an opportunity out of COVID-19 for reform. So, let's go through a few of those areas. Do you think it's likely, for example, that the New South Wales Court of Appeal that you mentioned, or the High Court that you spoke about, will change? Say, in 2022, will it be doing what they were doing in 2020? Or do you think it'll all just go back to normal?

Michael Kirby: It probably will all go back to normal. Lord Reed, the President of the United Kingdom Supreme Court, has said that distance communication has worked very well and we're quite happy with it and we don't mind doing it; but we're looking forward to getting back together. That is a feature of judicial life. It's a pretty lonely existence because you have an individual duty to resolve cases, and you have to try and reach agreement with your colleagues. The discussion and engagement with other colleagues,

and talking things through with other colleagues, is easier in a normal court situation. And it is both a valuable and pleasant aspect of the judicial experience. So that will drive people back. The inherent conservatism of the law will probably also drive people back. The fact, for example, that when they sit by distance hearing in the Court of Appeal, they'll robe up and not just sit there in mufti.

Gerard Henderson: Yes.

Michael Kirby: That's the deep desire to try to make the thing look like a real court and remind them of the fact that it is a real court. Including to remind the judges. So it'll be precious to go back to business as usual. But I do think people have been surprised by the value of the virtual media. I've been surprised by the large numbers of seminars that are now being held by Zoom and Microsoft Teams. That never happened before. Now it can happen so easily. Now it can reach out across continents to get people like Richard Susskind to take a part, that might have been rather difficult in earlier times.

So there are real advantages in doing discussion and communication that way. Susskind is very optimistic that lawyers, having changed, they'll change again. They'll change further. I'm not quite so sure they'll do that. I do think he is a bit inclined to undervalue the problems, particularly in the case of criminal trials and jury trials and particularly, for example, in the case of letting the public have access to courts. If you want to get access to a court, the list of the Federal Court has the phone number you can ring to listen to audio. But if you actually want access to the video, you have to apply to the associate of the judge who is in charge of the case. And that is an inhibition

on public access that hasn't existed up to now. And public access to scrutinise the judges whilst they are judging is a very important feature of accountability that we've inherited from the common law tradition.

Gerard Henderson: Go back to your initial point there and tell us about the loneliness of the long serving judge. For example, there are a couple of High Court positions coming up in a few months or so. Let's say someone who's a practising barrister gets that appointment or an academic gets that appointment, someone other than the existing judge. They virtually have to drop their circle of friends and contacts in the legal profession, don't they? So then it becomes pretty lonely? Or were you able to associate with barristers and solicitors when you were on the court?

Michael Kirby: Well, it's interesting you ask that question because there has been a tradition that a barrister is like a potential judge in waiting. And they know the rules. They will not embarrass the judge they have lunch with. In the old days, there was a common room in the Bar's central building, Wentworth chambers, in Sydney. And all of us used to go down there at lunchtime. You might have a bowl of soup or a sandwich. But you would sit at any table. You might be sitting with a High Court judge, or a magistrate. That was a wonderful feature of life at the Bar when I was starting out. It died away in the 1980s, I think. And it doesn't exist now. There are the restaurants nearby but there isn't that communal life.

It's not considered inappropriate for judges to mix with other practitioners, particularly with barristers; that does happen. I don't want to overstate the loneliness. The loneliness is more that you're so busy and you're so

concentrating on getting the reasons out quickly, that you tend not to find time to make a lot of contacts. And that drives you back into your family or your partner. It means you're not having the same vigorous social life that you had before.

Of course, there are some things you can't do. One of the rules I was told was you're not allowed to go to a hotel, a pub. I never went to pubs anyway. So I didn't feel that was a huge loss for me. But for some people, not going to pubs was a difficulty. So they abandoned pubs and joined clubs. Actually, they are much more likely to bump into people who are in litigation in a club than they are in a pub.

Gerard Henderson: Unless they're in the criminal jurisdiction of course. You might find more crims in pubs than in clubs I guess.

Michael Kirby: Oh …

Gerard Henderson: You're not sure?

Michael Kirby: I'm not sure about that. But we won't go there. I'm not a member of any club because the clubs I would be interested in being a member of don't admit women. That, I think, is something that is not acceptable now.

Gerard Henderson: You mentioned the criminal law, so let's look at juries. As you know, there's trial by judge alone in all jurisdictions in Australia except Victoria and Tasmania. They have trial by jury only. Victoria is now making

exceptions because of COVID-19. Some people can make an application now to have a trial by judge alone in Victoria. The concept of trial by judge alone, is available in all Australian jurisdictions (although I am not sure about Tasmania). That eliminates the jury because the juries can't get close to one another. In New South Wales they may continue but you know more about jury rooms than I do. I'm not sure how juries can meet in these kind of restrictions. Are you an advocate for trial by jury? Or do you see the point of trial by judge alone?

Michael Kirby: Well, I see the point of trial by judge alone. Again, if you apply an efficiency criterion, there are arguments both ways. In a trial by judge alone you don't have to explain every step to the same degree you have to a jury. And the Judge has to give reasons; while a jury doesn't give reasons. Therefore you've got generally no immediate hook on which to hang an argument of disquiet if you feel disquiet about the outcome in a jury trial.

My brother David was a judge at the Supreme Court of New South Wales. He did wall-to-wall murder. His work in the court was very substantially big criminal trials. He was very successful at it, and very fair. He said his experience was there were only one or two cases in all the years he was doing jury trials where he thought the jury got it wrong. He thought juries were a very good mechanism for a fair conduct of the trial and fair outcomes. He thought it was very rare that they got it wrong.

Of course, from the point of view of the working judge, once you've given your directions to the jury, which are now to some degree in books of directions, you don't have to go away and then write out a long judgement in

which you set out the explanations. Generally, appealing against juries on the grounds of unsafe and unsatisfactory outcomes is quite a hard road to hoe. And generally, is an ingredient for finality, which many people think is one of the great advantages of jury trials.

Gerard Henderson: But your brother did concede, as Judge Weinberg did in the Court of Appeal in Victoria and Cardinal Pell, that occasionally juries get it wrong. You're talking about two in a period of what, 20 years or something?

Michael Kirby: Yes. Well, it was about 15 years.

Gerard Henderson: 15 years.

Michael Kirby: But, of course, there are always exceptions to any general rule. I think we should not get into the mode of throwing the system out because of one or two instances which leave a sense of disquiet and which are revealed and corrected. Generally speaking, you don't have just one person's opinion. You have 12 persons' opinion. Nowadays, people are better educated and they're more inquisitive. They're more likely to ask questions and to have the matter carefully analysed. I think our system is a pretty good system. And the jury has traditionally been a protection of liberty.

Never forget that Australia was peopled by individuals whom English juries had held had stolen something worth more than two pounds. If it was more than two pounds they'd be hanged. And many stole fine pieces of jewelry, undervalued by the jury because they thought it an unfair law. Australia has

a lot of people walking around who are the descendants of people who would have not been here but for jury trial.

Gerard Henderson: So, in the current climate where jury trials have been delayed in many jurisdictions because of the difficulties of holding them, what are the rights of the accused then?

Michael Kirby: Well, it cuts both ways. There have been cases where the accused believes he/she should get bail because he/she will be hanging around in prison waiting for a trial. Yet, parliament has made it much more difficult for prisoners awaiting trial to get bail. There are some interesting cases coming up where the judges are having to balance the long-term deprivation of liberty against the risks of flight or not turning up for the trial. That, too, can sometimes be dealt with by technological means such as electronic devices that indicate where a person is, that monitor the person. However, I think the cases that are coming up in the courts are addressing issues where there's a clash between the right to speedy trial and the delays that are caused by COVID-19.

The more fundamental problem is that it's very difficult to have close, intimate and vigorous, and sometimes contesting, discussion. One of the problems with COVID-19, I was told by my dermatologist the other day, is that dermatologists can't spend too much time with one person because of the risk of the droplets that might contain the virus. Therefore, if you are a dematologist, you've got to break down the time that you're in another human being's space. And that's difficult to do in a jury trial because, however big

the jury room or however big the room is that they substitute for an ordinary jury room, the dialectic is still going to be quite intimate.

Gerard Henderson: Some juries, as you know, are out for a long, long time. In some drug cases and some crime cases, they can be out for 3,4,5,6 days. It's a long time.

Michael Kirby: They now allow juries to separate in ways that they didn't before. When I started out in the law, it was very common for juries not to be allowed to separate. Once they have been sworn in as the jury, they had to stay together in case they picked up untested information. Today, that is a live problem with media and the internet: allowing people access to information that they haven't got in the court room. And that is something against which judges would warn jurors. But that is a real live problem in today's world of media and communications.

Gerard Henderson: That can't be resolved, can it? No one takes iPhones away from jurors these days, whereas in the past, they were locked up, very briefly.

Michael Kirby: They were locked up. But then allowed to go home where their iPhone was waiting for them. Most people nowadays don't believe that they're alive if they don't have their iPhone.

Gerard Henderson: Let’s take a court like the High Court or the Court of Appeal in New South Wales. It might be a criminal case, it might be a civil case, but to what extent are the judges required to do it by Zoom or by

Microsoft Teams. And how often do they talk about the issues? Do they go away separately and write their own papers? Or do they coalition with one another? Do they develop arguments with each other? What's the system that's most likely to prevail?

Michael Kirby: The system in Australia, at least the system that I was familiar with, was that judges meet before they go into court in the first place. In a short meeting, they talk about their initial impressions of the case. They then may have lunch together or may not. They will then have a meeting at the end of the day and have a discussion.

In the High Court of Australia, because the judges didn't necessarily live in the same state and didn't have the advantage of being available in chambers all the time, they had a system of conferencing. That was on the Tuesday after the two week session that you had for sittings. The High Court's schedule was rather similar to Parliament's. You were on for two weeks, and then off for two weeks, while you were supposed to be writing judgements. At the beginning of that period, there would be an audio visual link, a closely confined and secure link, to the chambers of the Chief Justice then in Sydney and to the judges in their chambers throughout the Commonwealth. There would be discussion about the case and discussion about who should be invited to write the first opinion.

Gerard Henderson: So that's there before the virus.

Michael Kirby: Yes. The High Court has really been a pathfinder in this technology. When I was on the Court of Appeal, as I was for 12 years before

I went to the High Court, we never had any audio visual communication for advocacy or any such thing. But when I went to the High Court, it only took about 10 minutes to get used to it. You are beamed been to the courthouse in Adelaide where at the Bar table, the barristers wear their wigs and robes. They would get up and make their submissions. And the camera pans in and goes straight to the advocate. So, it's very similar to the advocate being in front of you in the Canberra courtroom. Sometimes it's even better because the audio is better and clearer. And if I became like my grandfather, a bit hard of hearing, it was actually an advantage that you could get a very clear audio and very clear visual.

Gerard Henderson: Now that's the case with a Court of Appeal. What about a court of first instance? What about if there's a witness? Does it matter whether the witness is coming through on video or the witness is present in the court? It might be the accused. It might be a witness.

Michael Kirby: Some judges are very traditional. My former colleague, Justice Michael McHugh, was very traditional. He said you have to be in the presence. You have to feel the atmosphere. You've got to know. The only problem with that theory is that there's an lot of science that has looked at it and people cannot judge the truth telling of a witness by how impressive they are; or how they look you in the eye; or how they're very direct. That is a complete furphy. Therefore, once you start looking at the science, you get to the point, as the High Court has in its decision in the famous decision *Fox v Percy*, in which the court says it's better to have an ounce of evidence than many pounds of impression. Because impression can be wrong.

This is a problem, say, with Aboriginal witnesses. They commonly don't like looking you in the eye. Their culture is not to look you in the eye and they speak very softly and quietly and avert their eyes. There are cultural norms in some European communities which are similar. In Asia, people generally speak to people of power with great deference. Not always, but sometimes. Therefore some of the truths of the past need to be reexamined. I don't think witnesses would be much of a problem. It's interesting that in the Federal Court, which is mainly exercising civil jurisdiction, they haven't reported any problem – 80 per cent of their trials are going ahead in a normal way with video links. The judge might be in one place and the barrister in a different place and the witness in a third place.

Gerard Henderson: So when a judge goes away to consider a case, what you have suggested is, probably, that the transcripts have more value than an impression given either directly in a court or by video link?

Michael Kirby: I wouldn't want to over emphasise this because you don't have a lot of time to sit there and go through it again and again and again, looking at material. Sometimes it might be useful. I noticed that in the appeal in the High Court concerning Cardinal Pell, there was a question of whether the Court of Appeal of Victoria was wrong going to the video material which had been available of the testimony of the complainant in that case. But if material is available, and if it's part of the record, then there's no reason, in principle, why a judge and a jury shouldn't be allowed to see it repeated. Including over and over again if it's gripping or important.[i]

Gerard Henderson: I think in the *Pell* case in the Court of Appeal, the majority judges, two of them said we look at the complainant and the complainant is convincing, compelling and the minority judge said you look at the complainant and the complainant is not convincing. So you're better looking at the evidence rather than getting impressions about how people sound, which I think is consistent with what you're saying. But not so much of what Michael McHugh is saying.

Michael Kirby: The High Court has, in *Fox v Percy*,[ii] and in many cases since, said that nowadays witnesses will not necessarily be accepted just because they look impressive. It's much better to put the testimony together. We had a case in the High Court - Mallard's case[iii]. That case came up seeking special leave. The bench of three, which included Michael McHugh and me, refused special leave. Then, ten years later, they came back when Justice Edelman was Junior Counsel in the case. They argued on the basis that when you put all the evidence together. It didn't fit. I sat on that case and offered to recuse myself. The parties said, "No, we're quite happy for you to sit." I was the last of the three who were still sitting returned for the second time. And the court found that it didn't fit. Mr Mallard was not only not really proved to be guilty, he was probably actually innocent. Our search is not "is the accused innocent?", but "has the Crown proved that the accused is guilty beyond reasonable doubt?"

Gerard Henderson: We'll finish in a minute. But, for anyone who's interested, that's a Western Australian case, isn't it?

Michael Kirby: Yes. Mr Mallard was later was knocked down on the road and killed. But at least his case came to justice in the end. It's a case which explains the burden that a judge faces. If you have any sensitivity to think that one was guilty, 10 years earlier, of refusing special leave on the basis of the arguments that were put then, I didn't have the benefit of the argument that was ultimately put, which was, it is not logical. It does not fit together. We cannot affirm the conviction consistent with rationality.

Gerard Henderson: Now, since your days in the Law Reform Commission, influential days, you've been calling for reform, with some success. Today, again, you're suggesting further changes that could be made coming off COVID-19 in order to make trials less expensive. You make the point that most sensible people wouldn't go into court if they knew what they were going to experience there in terms of cost or whatever. What chances are there that some of these changes you've been talking today will happen?

Michael Kirby: There is a good chance that they will come about. The law and the bench have reacted so positively, and they had to, because COVID-19 is passed by close communication. Therefore, they had to find a way. The technology had suddenly become available on Zoom and Teams. That made it possible. And that isn't a big change. That's the problem I have with Professor Susskind. He thinks because everybody went there in their wigs and robes and did it by video, that everybody now wants to change everything. Well, lawyers aren't like that. Lawyers are very suspicious, including myself. You've got to make sure that you're not changing something that is there for a really good and important purpose.

There's no doubt that there would be cases, types of cases, cases involving government claims, claims against government departments where particular disputes are mass produced. China couldn't cope with its population unless it had some systems for dealing with things quickly, cheaply, and maybe not perfectly. But we have to think of what we can do.

I had a case recently, personally, with a neighbour. I was purchasing a property. I found out very quickly how much it would cost if I took my very reasonable grievance to a court. The cost was totally prohibitive. I couldn't afford it. I would have been a fool to do it. And so I didn't. And, in the end, it was disposed of. But if that affects a well heeled gentleman like me, it certainly would affect many people. Including people who are affected by COVID, and the economic impact of the epidemic. Reform of the law must adapt not only to a pandemic. It must adapt to the costs of litigation, and the potential of new technology to reduce that cost without endangering manifest justice.

Gerard Henderson: Michael Kirby, many thanks.

ENDNOTES

---

[i] (2020) 94 *ALJR* 394; [2020] HCA 12
[ii] (2003) 214 *CLR* 118; [2003] HCA 118 at [30]
[iii] (2005) 224 *CLR* 125; [2005] HCA 68