

CLOSING ADDRESS TO 2005 CQLA CONFERENCE

28 August 2005-08-25

At the outset, thank you to the conference organisers for providing me with another opportunity to address you at the conclusion of this, our annual conference. From their point of view it probably makes it easy to fill the slot that nobody really wants. From my point of view I get the chance to meander through a topic of my choice.

Every lawyer likes to talk. In the main, however, it is easier to pretend great wisdom late at night after an ample dinner and a plentiful quantity of acceptable wine than it is to persuade an audience of that fact at 11:30 on a Sunday morning and when following speakers as accomplished as those we have just heard. I confess that their topic was far more interesting than anything I could come up with.

The solution to my dilemma is one which was practiced with great success by the most experienced and successful teachers of my school years. If you behave, sit up and pay attention I will let you go home 5 minutes early. In fact, if you are particularly well behaved I will let you go even earlier.

At the time, I thought the teacher was doing me a favour. It is only in retrospect that I realised that the teacher was even keener to get away early than I was.

The best way to fill in the gap between now and, dare I say it, 5 minutes to 12 is to talk about something with which I am familiar. That obviously excludes any topic of general interest such as those with which Brian and

Allan can regale you. On this occasion the choice comes down to “The Judge.” At least it is something I know something about even if what I know is of interest only to me.

When he left Rockhampton to practice in Brisbane Duncan McMeekin remarked to me that one thing that would be different about practice in Brisbane was that he would not have the intimate knowledge of the judge that he had in Rockhampton and which gave him a decided advantage over visiting counsel irrespective of who the Central Judge was at any given time.

Why, you may ask is a knowledge of the judge such an advantage? John Buchan, a lawyer and writer best known as the author of “The 39 Steps” and as a former Governor-General of Canada, delivered an address to the Ellesmere Law Society at Oriel College in Oxford in 1922 on “The Judicial Temperament”. For any interested, the speech is reproduced in full in (1999) 73 ALJ 260.

The office of judge is a peculiar one. John Buchan, by then Baron Tweedsmuir of Ellesfield, said this by way of introduction:

“The bench gives a man (of course, 1922 was long before we discovered that women were also capable of appearing to stay awake throughout a long and turgid exegesis on the law by a monotonous counsel with the afternoon sun beating on the window panes of the courtroom and the glass of lunchtime claret shifting comfortably in the stomach.). ... The bench gives a man the right to speak in public without contradiction or interruption, a right not granted at all to the politician, and accorded to the clergy

only for a few brief minutes once a week. It provides a compulsory and sympathetic audience for the worst jokes. It offers secure income, considerable leisure (sufficient to even spend time reading 80 year old speeches by long dead pulp fiction writers) and, in England, various decorative titles, from the plain knighthood of the puisne to the earldom of the Lord Chancellor who has been long in office.”

Well there is at least a partial answer to the question of why you had better get familiar with the judge. Judges are men, and nowadays women, who are accustomed to being listened to with enthralled rapture even when the utterances are inane or idiotic and are people with enough time on their hands to brood over someone who didn't respond to their satisfaction. At my swearing in as a judge in Brisbane in 2000 I recounted by way of advice to young barristers a story told to me by Justice Callinan many years ago. It concerned a counsel whom he named but whose name I have forgotten, who along with his opponent and their respective solicitors went into the usual paroxysms of laughter when the judge made a lame joke as was only to be expected. The court settled down in due course and the barrister commenced to ask his next question. As he did so he put his hand up to his mouth and to stifle further laughter. Through chuckles he managed to blurt out, "I'm sorry your honour. I was still thinking about what your Honour just said." Whether he won the case because he read the judge's ego better will never be known; but his grovelling sycophantism certainly did him no harm.

David Ross QC of Melbourne, the author of *Ross on Crime* and *Ross on Advocacy*, wrote an article in the *Australian Bar Review* this year¹ in which he sets out the characteristics of the good judge. If judges were to be selected on the basis of David's criteria perhaps the only candidate for the upcoming vacancy on the High Court would be the Archangel Gabriel. I have never been able to work out whether the Archangel was a man or a woman but presumably IT would only be selected on merit. The qualities which define the good judge as enumerated by David are that the judge should be a true servant of the law, lacking in righteous indignation (perhaps this excludes even the Archangel), even tempered and wise. The judge should work diligently before the case in preparation. In court the judge should be impartial, open minded, light of touch, unobtrusive and non-interventionist. The judge should be nice to counsel, give an indication during submissions as to the way he is thinking and in giving judgment should be logical, possessed of commonsense, knowledgeable about human affairs and should not unnecessarily make adverse findings of credit.

That David Ross should be counselling me on the standards of perfection is a little ironic. I should give you a tiny insight into the man himself. David and I are friends being regular visitors to Bangladesh on the Ausaid sponsored Advocacy Training courses conducted each year under the auspices of the Australian Bar Association and frequent correspondents during the balance of the year. David is a silver haired distinguished looking man who still dresses in black tie for dinner. When introduced to other guests at a function in Dhaka where most of those invited were European ambassadors or senior members of the Bangladesh judiciary, he introduced himself as "Assumed Name" on the basis that

¹ (2005) 26 Aust Bar R 102

their English was probably poor and nobody listens to the names of the people they are introduced to at official functions anyway. He was right. Nobody batted an eye-lid. As I said, David's "good judge" is a counsel of perfection. Apparently, it is only Queen's Council and not judges who are entitled to be mischievous. I don't claim perfection. A little mischief is oftentimes therapeutic, although I do try to stay out of things and keep an open mind. Before the ideal "good judge" any approach to advocacy should work because that judge is not influenced by style but solely by the merits of the case even when counsel is unable to articulate them. For the other judge's however, the right approach can be very helpful.

It should by now be clearer why knowing your judge is important. Since I possess few of the qualities described in any significant measure, it is important to know which ones I do have so you can play to my weaknesses on the others.

I recall doing a trial before Justice Derrington some years ago. My client was a rogue and that was apparent from his evidence. My opponent addressed at length on my client's credibility to an obviously receptive audience. He finally finished and started to say why his case should succeed. At that point the judge stopped him. "Mr X, you're not suggesting I should believe your client. Are you?" He had misread the judge. Justice Derrington did not like to be lectured on the obvious. Unfortunately for me, my client was so obviously dishonest that I lost anyway on that occasion.

One of the principle qualities of the good judge identified by Buchan in his address was the absence of bias. In the context of the original Palm Island inquest and the Morris inquiry, bias has become a subject of

considerable excitement to the fourth estate. Well let me tell you something significant.

All judges have biases. In my court we universally come from the bar. The bar, or at least that section from which I and most of my judicial colleagues on the Supreme Court came, is a group of snobbish upper middle class gossips. In Buchan's words, *An advocate is a human being, a member of society, and no mere debating machine, and in his progress through life he is certain to acquire prepossessions and antipathies. If he is a negative colourless soul, then he is obviously unfitted from the start for true success in any calling.* The test of the good judge is how well the judge can overcome his or her biases and not permit them to influence the decision. By way of example Buchan cites the incident of eminent Scottish judge, Lord Young before whom counsel began his speech with, *"My Lord, my client is a most eminent and most respected minister of the Free Church of Scotland"*. Counsel then paused to allow the judge proper time to absorb his clients standing. *Lord Young looked down under grim eyebrows: "Go on, sir, go on. Your client may be a perfectly respectable man for all that.* Had counsel known his judge he would have appreciated that Lord Young, distinguished jurist though he was, had a great dislike of religious dissent.

Buchan does not criticise judges for having prejudices. Indeed he said in his address' *"Now there is nothing to be said against the retention of these prejudices, I believe in every man having a good stock of them, for otherwise we should be flimsy, ineffective creatures, and deadly dull at that . Since a judge is a human being, he must be permitted to have his share in the attributes of mortality. But he must be capable of putting them aside. He must have the power of separating a question from the*

'turbid mixture of contemporaneousness' with which it is dogged. It is a task which requires supreme intellectual honesty, a complete absence of the 'lie in the soul', and it is the first duty of a judge.

What Buchan is speaking of is the ideal judicial temperament. Despite our best efforts, most of us fall short. How short is what the good advocate wants to know and what he takes advantage of in presenting his case.

Why do experienced counsel do better in court generally than inexperienced ones? Why do counsel as a whole do better than solicitors? One of the skills that cannot be taught and can only be acquired by spending time on your feet in court is the ability to play to the judge. The very best advocates may present the same case differently and often quite differently depending on the identity of the judge. A presentation one judge might find attractive another might find uninspiring.

I don't think I am letting out any closely guarded secrets when I say that Justice McPherson on the Court of Appeal has always been at heart more an academic and a legal historian than a modernist. References to nineteenth century chancery cases and the Statute of Queen Anne or comparisons between the position in Queensland and the comparable position under Roman Law are likely to win you brownie points. On the other hand retired Chief Judge and former Rockhampton District Court judge, Pat Shanahan, was famously reported in the *Courier Mail* on one occasion for dressing down counsel who cited an English decision. He made it plain in no uncertain terms that English cases had little authority in his court.

You can make mistakes. I was junior counsel on one occasion in the High Court in a matter concerning the construction of certain provisions of the then *Social Security Act*. My learned leader informed me that Chief Justice Mason who was presiding on the hearing of the appeal the following day was another legal historian and our cause would be advanced if my leader could take him through the history of the provision from its origins in England in the nineteenth century and various Australian precursors to the legislation the court was being asked to construe. Obediently I did as instructed. I worked until the early hours preparing a lengthy note tracing the legislation from its origins. When the hearing commenced my leader stood up and informed the Chief Justice that he was going to explain the history of the provision from its original form. Chief Justice Mason looked at him and said, “Mr X, when you have finished that tedious journey will we be any the wiser?” My leader replied, honestly, “No”, to which Mason said, “well can we get on with the real substance of the appeal.” My note was cast aside and we lost the appeal.

John Marshall, Chief Justice of the United States for 35 years from 1801, the man credited with defining the constitutional position of that court and a lover of fine Madeira, described the greatest judicial quality in a famous dictum: “*The acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not to heed a damned word he says.*”

Last year at this time I took the opportunity of paying tribute to Magistrate Tom Bradshaw on the occasion of his looming retirement.

Since then, of course, my wife, Bronwyn has been appointed as a magistrate in his stead.

There is connection between this change in personnel and knowing your judge. We all knew Tom and his style. Tom was the quintessential old style magistrate. He had come up through the system from Deps Clerk to Clerk of the Court to Magistrate class 3 and so on. Magistrates were public servants and were taught how to do the job. Importantly, he was predictable and followed the procedural precedents set by those who preceded and taught him. Those who appeared regularly before him knew how to handle him. The days of a homogenous approach by magistrates to the disposal of work are long gone. You have to deal with each magistrate's individual quirks as you find them. Tom has gone and we are unlikely to see his style again.

Fortunately for you, I know Bronwyn well, having been married to her for almost 28 years and can offer some advice. Some of you will have learned this already from bitter experience. Bronwyn is a lawyer with an academic bent. Unless it can be demonstrated that there is a sound basis for it she will not necessarily do things the way they were done in the past or in the way another magistrates might think it should be done. She expects those appearing to know the source of her power to make the order that is sought and to be able to tell her. She is also committed to the provision of a fair hearing for those appearing rather than to simply processing the work. If, as a result, matters take longer, you will just have to be patient. Be aware of those two matters and your success rate will climb.

Bronwyn's appointment was, of course, not the only significant personnel change since last year's conference. Gordon Roberts retired in March after 33 years as registrar to take up the position as associate to Judge Britton. Gordon's achievements and record were outlined in a special sitting of the Supreme Court at the time. Since then we have been fortunate to have had Kate Bannerman as acting registrar. Kate's period as acting registrar is almost over. She is not applying for the permanent position but is returning to Brisbane. Applications for the permanent position of Central Registrar close on 5 September.

Aside from personnel changes the most significant event in the calendar this year was the biennial Charity Law Ball which I think everyone agreed was a great success. People of my age were a little critical of the volume of the band but then we are just grumpy old men and women who will never be completely satisfied. Whether you enjoy the following slide show or not depends on how much you misbehaved on the night.

Thank you to the Chief Justice and Kay for again attending, also to Justice Coleman from the Family Court, Judge Britton and Christine and Judge Irwin and Louise and Magistrate Rinaudo for their support. Such support is important to the status of what I believe is one of only three regional law association conferences held regularly and the only one not to have missed a year in recent times. The continued support of the Law Society is also not only important but appreciated. Finally, I would like to congratulate George on his organisation of this conference which I believe has been a huge success. So well has George done that he might consider doing it again next year; unless of course, someone else is prepared to put their hand up for President. One of the perks of becoming

President is that I will tell next year's conference how well you have done.

You have all been well behaved. As a reward you may all go home early.
Pencils down! Sit up straight! Arms folded! Class dismissed!