AJOA CONFERENCE

Speaking Notes

7 – 9 October 2022

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Dr McIntyre has traced the history of, and discussed, the institutional structures which protect the independence of the judiciary and the many and substantial forces which threaten it.

I thought that I would add, from the perspective of a judge, to Dr McIntyre's consideration of those essential qualities of a judge which are also critical if that independence is to be maintained. They are qualities which build and sustain an independence of mind and spirit.

Independence of mind is neither stubbornness nor obstinacy. Not only are those two traits inconsistent with the judicial oath; ultimately, they are destructive of true independence of mind. They

are inconsistent with rationality, which is the essence of judicial decision-making. For the same reason, independence does not mean that the judicial mind must be impervious or anaesthetised. Indeed, judges should embrace challenging views as did ***Marcus Aurelius*** who challenged others to refute him, a challenge which trial judges think appeal courts are all too ready to accept. 'Show me I'm making a mistake or looking at things from the wrong perspective', Aurelius continued, 'I'll gladly change. It's the truth I'm after, and the truth never harmed anyone. What harms us is to persist in self-deceit and ignorance.'

And, it is important, I think, to add that for Aurelius, truthfulness was the courageous recognition of reality.

We well understand the qualities of the good judge, yet every day we are challenged in our efforts to stay true to them. For many, it is the strain of the relentless flow of cases – the drinking from the

fire hose which leads us to shut down in the hope of some relief from stimulation overload. For others, the greatest threat to the judicial mind is overconfidence in their infallibility, a condition which afflicts some from birth, but for others only after years on the bench when they can find nothing new under the sun. For reasons like these, we close our minds to invitations to think differently, to try another way. Conversely, for some, a lack of confidence or, even worse, the imposter's syndrome, can paralyse original thought and leave us clinging to the ideas of others.

On the Temple of Apollo at Delphi, these three maxims are inscribed:

Know thyself
Nothing to excess
Make a pledge and destruction is near

All three aphorisms reflect virtues of caution, modesty and self-reflection. To know thyself is a warning to those whose boasts exceeds their capabilities. In a sense, to know thyself is to know your

place. Indeed, that was the Platonic conception of justice. The aphorism, however, also encourages self-examination and self-criticism, not merely as a method of self-improvement but as a means of understanding how and why others act. The maxim concerning pledges can be taken literally, and was in some ancient writings spoken of as a warning to guarantors, but it also can be understood as advice against over-confidence in the opinions we hold.

The nothing in excess maxim does reflect the other two, but it is my least favourite. Please do not take it as a reason to take a tepid approach to your judicial work.

The aphorisms and the virtues they reflect hold true today.

Today's judges too must know their limitations. We must know when to back our own judgment or, on the other hand, to not only hear but gratefully receive the insights of others. That requires us to be more attune to the intrinsic validity of the insight, the logic of the argument, than the identity of the speaker. Striking the balance between those two courses is the tricky bit.

These maxims also speak to the question of impartiality. Let me attempt to explain why. We are not given access to a well of pure justice when we receive our commissions. We are not mere conduits of the law. The decisions judges make are the product of their knowledge of the law and their evaluation of the facts. They both may sometimes be defective, but with practice and study, gross errors can be reduced over time. And some errors may better be described as professional differences of opinion between the trial judge and the intermediate appeal court, and between Courts of Appeal and the High Court, and within those courts, as the case may be.

However, there are other reasons why different judges sometimes reach different conclusions on the same or a similar questions. One reason is that the intelligence we apply to judicial decision making is not artificial, it is not robotic; it is human. And so, it must be accepted that it will be influenced by our values.

Now let me make an important disclaimer after Justice Gageler's keynote address of yesterday. By values I do not mean partisan,

political bias or even strongly held opinions bearing on the issues which fall for decision. There is no place for such biases in the independent judicial mind. If what I say is so misunderstood, I am afraid that my amoval is imminent.

To be impartial does not mean to rid ourselves of our values, life experiences and perspectives; but we do need to have insight into them and to understand how they may either enhance or distort our decision-making. It is a good thing that there is diversity in gender and in cultural, religious and class backgrounds on our courts so that all judges are exposed to different perspectives, and in order to enhance the legitimacy of the Courts. We have come some way towards ensuring that our judges reflect the composition of our society but have even further to go.

A judge's values may also be informed by his or her understanding of the history and nature of our society, and system of government. Our diverse backgrounds and our views of the world may affect our evaluation of witnesses and our discretionary judgments on

matters like damages and sentencing; the weighing of incommensurables. They may affect our evaluative judgments on matters like whether there is a duty of care and whether it is breached; whether commercial conduct is fair or unconscionable. We view the legal controversies brought before us through our personalised lenses. The same controversy may take on a different hue or colour when viewed through the prism of the participants, the witnesses, other judges or the kaleidoscope of the public.

Of course our individual experiences and perspectives have no determinative role to play in judicial decision-making. A party's success cannot depend on the luck of being assigned a judge who looks and thinks like him or her. However, there is a danger when a judge assumes that his or her lens is the only one, or the one most likely to achieve a 20/20 vision of the facts or is the only one which the reasonable person or fair-minded observer could possibly have. Judges who think like that will not even realise that they have carried their baggage into their decision making.

On the other hand, there are jurisprudential and legal policy values which do properly inform our judgments.

Some such competing legal policy values are:

Personal responsibility, as against, social responsibility.

Personal autonomy, as against, public welfare

Free commerce (caveat emptor), as against, fair dealing

Certainty and coherence, as against, fairness in the particular case.

The relative weight which is given to such competing values in a particular case may vary greatly between judges. The oscillations of the pendulum in the development of the general law, and in statutory modifications and abrogations of it, around those values are well known to you. Please notice that I have used the word oscillations not swings.

The law reports of the decisions of the High Court in the last two decades of the 20th century record great changes in the common law of negligence, unconscionable conduct, judicial review, statutory construction and constitutional norms like the Kable doctrine, and the constitutional freedom of political communication. There followed a retreat from the high water marks of those decisions, and a greater prescription in the general principles formulated by them, in the reported decisions of the High Court in the two decades which followed.

There is no doubt in my mind that both the reforming decisions, and the reactions to them, were informed not only by the common law method, but also by the relative weight given to different legal policy values by the judges who decided them. The tension between differing legal policy values is the lifeblood of the development of the general law. The oscillation of the pendulum should not always be seen as a correction of a wrong view, but as part of that development.

Seneca would say that for a sailor who knows not which port he or she sails, no wind is favourable. To put it another way, I think we judges should avoid attracting the sort of unkind joke made about Christopher Columbus. Judges should know when controversies raise competing legal policy considerations and, after deciding them, should know, which legal policy their judgment reflect.

Those developments in the law which are ultimately sustainable are those which accurately reflect changes in the community's underlying values. Those changes to the law which are inconsistent with the stage of socioeconomic development which a society has reached will fall by the wayside. Those that are too far ahead of it will be brought back into check. There are many ways by which judges can better understand where their society is at. But the point I wish to make is that only if we have self-critically examined our own values, only if we understand that there are multiple lenses through which to view controversies, can we avoid the trap of subjective idiosyncrasy in our decision making. Only in that way will the law be anchored in the society it orders.

If we are confident that we have self-critically applied our independent judicial minds to the judicial method, we will be less concerned and affected personally, and institutionally, by the criticisms of others.

Of course, many decisions we make will continue to attract public opponents, whether they be tabloid populists or keyboard warriors closeted in social media echo chambers.

Let me now tell you of an outstanding example of the kind of courageous decision which can be taken by a judge with a true independence of mind and spirit.

I speak of former South Australian Chief Justice Len King. He was a child of the depression. He matriculated from St Joseph's Memorial School, Norwood at age 14. He worked as a clerk with Shell before serving in the RAAF in Papua New Guinea, in the Second World War. He then studied law with the benefit of the post-war Commonwealth Reconstruction Training Scheme

Len King succeeded as a Catholic lawyer in a largely Anglican controlled profession. He took silk in 1967. As Don Dunstan's Attorney-General, he introduced wide ranging legal reforms especially in consumer protection. He was appointed to the Supreme Court in 1975 and as Chief Justice in 1978.

Let me return to the story I wish to tell. Late at night on 4 January 1983, Louise Bell, was taken from the bedroom of her family home in the southern suburbs of Adelaide. She was 10 years of age. Her disappearance was discovered at about 6 o'clock that morning. On 28 February her pyjama top was found on the lawn of a nearby residence. It bore material from an estuarine environment. Her body was never found.

The disappearance of Louise Bell created much publicity and anxiety in the community. Indeed a Judge was later to say that the South Australian community was shocked and outraged by the abduction.

There was some circumstantial evidence which raised a suspicion that Raymond Geesing, a person known to police as a paedophile, was involved but it fell far short of proof that he had committed the offence. It was not much more than that he resided nearby. However, four witnesses testified that after his arrest Geesing made prison yard admissions to them.

On appeal, one of those prisoners recanted his statement and deposed that he had given false evidence after he was leaned on by another of the prisoner witnesses. The Full Court presided over by Chief Justice King, who wrote the judgment of the Court, set aside the conviction as unsafe, no doubt well aware of the community agitation Geesing's acquittal would cause.

Just short of six years later in January 1989 a young boy, Michael Black, disappeared from a reserve on the River Murray near the town of Murray Bridge. His body was never found. However, Dieter Pfennig was convicted of his murder. The evidence against Pfennig included circumstantial evidence of his presence at the reserve at about the

time that Michael Black disappeared. It also included evidence of his abduction of another boy about a month later who was found, and Pfennig apprehended, before serious harm befell him. A High Court appeal on the admissibility at trial of that evidence, in the decades to which I earlier referred, substantially rewrote the law on the admissibility of similar fact.

Pfennig was a school teacher and was a very keen canonist. He often canoed in the Onkaparinga River and drew a mural of that area on the wall of one of his sheds.

On 11 November 2016, after advances in DNA profiling, Pfennig's DNA was found on Louise Bell's pyjama top. Dieter Pfennig was charged and convicted on a trial by judge alone of the abduction and murder of Louise Bell. It was the trial judge who made the observations about the community's shock and outrage, which I mentioned earlier

The judge found that the pyjama top had been submerged in the Onkaparinga River and later washed in a tap water before being deposited on the neighbour's property.

It is not often that courageous decisions like those of Chief Justice King are so demonstratively proven to be correct. However, there are many occasions every week on which judges, faithful to their oaths, make unpopular decisions. Their loudest critics are usually grumpy old men on talkback radio or tabloid opinion pieces.

Their reasons, which, with the greater accessibility provided by on-line publication are now more widely read, manifest the impartiality and rationality which is the essence of judicial power. They are the decisions which maintain our independence and enhance our legitimacy.