SUPREME COURT OF VICTORIA

AT MELBOURNE

TRANSCRIPT OF SPEECHES DELIVERED BY:

1. MS P. TATE, SC,
   Solicitor-General for State of Victoria

2. MR J. DIGBY, QC,
   Past Chairman, Victorian Bar Council

3. Mr G. PROVIS
   Past President, Law Institute of Victoria

4. A SPEECH IN REPLY BY HIS HONOUR

AT A GATHERING IN THE BANCO COURT

on

WEDNESDAY 24 FEBRUARY 2010

of

BARRISTERS, SOLICITORS, LAW OFFICIALS AND OTHERS

TO FAREWELL THE HONOURABLE JUSTICE CUMMINS

UPON HIS RETIREMENT FROM THE BENCH

…

HIS HONOUR: Chief Justice, I thank you most warmly indeed for convening this ceremonial sitting.

Madame Solicitor, thank you for your kindness. You always speak most clearly, and well, and you have again today. I greatly appreciate it. It has been a privilege to serve the State and the public. I ask that you convey to the Attorney and to Parliament my personal appreciation of, and my wishes for, their continuing and important work. I have always had excellent relations with the Department of Justice, and consider it has served the Court very well. I commend the Secretary Ms Penny Armytage and the Executive Director, Courts, Mr. John Griffin, both of whom are present today, for their work. I commend you too, Solicitor-General, for your continuing service to the State.

Mr. Immediate Past Chairman, I thank you too for your kindness. You and I have been friends for many years. I have a great love for the Bar, and I hold it in the highest regard. The work of counsel not only is demanding, but it can be lonely too; and the ethos of the Bar – its commitment, its principles, its intelligence, and its collegiality – is a precious thing we must nurture and protect. The Bar plays an indispensible, constitutional function in the administration of justice. I commend you, Mr. Digby, for your splendid term of office as Chairman of the Bar.

Mr. Past President, I thank you too for kindness. I have a high regard and great affection for the Institute and for the solicitors of this State. Many hours of unstinting effort are spent by solicitors, sometimes unacknowledged and unsung, and which are an essential foundation of the administration of justice. The public is well served by the solicitors of this State. I commend you, Mr Provis, upon your two distinguished terms as President of the Institute.

I thank you all here present for your kindness and for your generosity in attending today. Your presence means much to me.

… [following reference to personal and family matters]…

It is customary on these occasions to permit the judge some reflections and I would be obliged if you permitted me three. I speak of public matters.

First, pro-active judicial management. Over my twenty years as a judge of this Court, the Court has progressively embraced this medium and rightly so. The courts are public entities, responsible for time and cost. In a modern court, which under the Chief Justice this is, judges should engage in pro-active judicial management, early identification of issues, and dispute resolution on both the civil and the criminal sides. But this must be done in accordance with the judicial function, consonantly with the principles of balance and of fairness, and in public. The nineteenth century legal philosopher Jeremy Bentham rightly wrote:

> "Publicity is the very soul of justice… It keeps the judge himself, while trying, under trial."

In the proper fulfillment of judicial management, judges should sit in open court, at arms' length from the parties, and hearing each side equally and together. Judges should not sit behind closed doors, hear parties in the absence of each other, or engage in undue pressure. Much has been written on the efficacy of judges performing alternative dispute resolution; but the writing often is deficient on the antecedent, fundamental question of the appropriateness of serving judges doing so. There are good sources for the performance of alternative dispute resolution in private – retired judges and senior members of the profession being two – but I do not think serving judges should be such a source. Judges should judge in public, not persuade in private.

Further, I would commend the general rather than exceptional receipt of expert testimony by the means of concurrent evidence. The receipt of expert testimony by concurrent evidence not only brings substantial savings in time and cost : it brings clarity to that evidence, its parameters and the true issues in dispute; it frees the expert witness from the prism if not tyranny of partisan debate while retaining to the parties the essential capacity to test by cross-examination; and it better respects the professional pathway by which the witness is qualified to give evidence.

My second reflection is on the rights of accused persons and of victims. The courts, and the law, have a proud tradition of securing the lawful rights of accused persons. I wholly support that principled tradition. We should never descend into the mire of the unprincipled seeking of the ends by any means. Thus we should secure, and unequivocally secure, the principles of the onus of proof, the right of silence (both in investigation and in curial proceedings), proper process, and judicial discretion. But there is no inconsistency, and no necessary alternative, between the securing of the rights of accused persons and the securing of the rights of victims. What of victims' rights?

I have no doubt that every judge respects, and has concern for, victims. But in my view the curial system does not sufficiently translate that respect and concern. I consider the courts have not sufficiently secured the rights of victims in doctrine, procedure and sentence. Doctrinally, it was not the common law or the courts that rid us of the blight of provocation, behind which much domestic and other violence escaped true consequence; it was public commentators, and the media, and Parliament that did so. Procedurally, it was not the common law or the courts that sufficiently acted to preclude the re-traumatisation of victims by court process – it was Parliament by procedural reform that did so. Witnesses should be relevantly tested – cross-examination is the proper means of doing so in the adversarial system – but should not be treated as objects of warfare. The litany of procedural amendments in sexual offence proceedings correctly introduced by Parliament is testament to how far short of this ideal at times courts have fallen. On sentence, there has been a like imbalance. We know that the best way to solve crime is to solve the causes of crime. We know that mere punishment is never enough. Sentencing centrally should involve reformation, especially with young persons. Daily we see young persons who

through immaturity make one mistake and blight their lives. They should be addressed with the beneficent, not the punitive, elements of sentencing. But with sexual offences, violence, and especially domestic violence, I think courts have fallen short on sentence. Courts need to give significantly more attribution to personal responsibility, and to the consequences of that responsibility. I think that sentences imposed should better reflect Parliamentary provision and community values. In the words of my much loved law teacher Professor Norval Morris:

> "…the community's sense of a just punishment will create the polarities of leniency and severity between which the law may work out its other purposes."

The even hand of justice requires that victims properly be acknowledged and properly be respected.

My third reflection is a profound tribute to juries. They are the community at its best. The symbiosis of judge and jury is democracy at work in the law. All judges who work with juries know how responsible and how astute juries are. All judges who work with juries also know the integrity that juries bring to their work in the fulfillment of their oaths or affirmations to give a true verdict according to the evidence. Judges must instruct juries in the law, which instruction should be relevant, clear and spare. However, a different field of knowledge is entered when judicial instruction moves from matters of law to matters of experience and of psychology. The vast appellate jurisprudence of warnings to juries on matters of experience and of psychology seriously underestimates the knowledge and capacity of modern juries. A modern jury does not need to be judicially instructed to take the state of lighting into account in identification or that there can be more than one reason for telling a lie. Judicial instruction of juries not on the law but on matters of experience well known to juries and on matters of analysis well within the capacity of juries is both unnecessary and misconceived.

I commenced with Hippocrates, and conclude with recourse to that same early flowering of human knowledge in fifth century Athens. Socrates said:

> "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially".

In a modern, pro-active court, properly responsible for time and for cost, the Socratic injunction should still be fulfilled. Listening is important in a judge. Counsel's submissions should be admitted fully to the mind, as Sir Owen Dixon said upon taking the oath as Chief Justice in Sydney in April 1952. Fairness, the quintessential judicial quality, should infuse judicial proceedings. And the three pillars of justice – integrity, independence and impartiality – always must be maintained. Over the sweep of history, these are the abiding requirements of judicial office – as necessary today as they were in the time of Socrates.

I leave the Court in the best of hands. I wish every one of you well. You shall always remain in my thoughts and in my heart.