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JUDGES DON'T SPIN

I feel a little out of my comfort zone speaking to you if I reflect on the role of a judge, in particular a Chief Justice, in the traditional sense. Historically judges were intended to be seen and heard exclusively in court. Generally the only encounters between the court bench and the press benches have been when suppression orders were made or an alleged contempt was perpetrated. Otherwise, if judges speak to the media it is usually upon their appointment or retirement. Of course, there are times when judges are cross and privately berate the media for putting things in a bad or unfair light. But it is part of the job. Serving judges do not and should not speak publicly about things they may have to decide except in court.

Let me try to approach the relationship between the judiciary and the media outside the traditional context.

I will start by talking about the nature of the courts' workload.

The busiest court in the state is the Magistrates' Court. It deals with nearly 250,000 matters per year, predominantly criminal. The County Court is the largest trial court in the State and hears nearly ten thousand cases per year, about half of which are criminal. In the Supreme Court, in the Trial Division, we dispose of 6,500 cases per year but only 300 are criminal. Our predominant trial work is commercial with a solid component of complex personal injury work, judicial review of lower courts

and tribunals and some Human Rights Charter work. In the appellate division of the Supreme Court, the Court of Appeal, the proportion is reversed. About two-thirds of around 900 cases are criminal.

This is interesting because if we follow the daily media the community would have the impression that the Supreme Court spends most of its time wearing red robes, hearing criminal cases.

The community perspective is relevant in this politically interesting year where the *Law and Order debate* seems to have gained extraordinary focus. We regularly hear politicians on both sides, but predominantly state politicians, talking about Law and Order and things that relate to it.

As a judge who applies the law and makes orders I suggest it is unclear what the expression *Law and Order* means. It means different things to different groups.

For a judge it means taking the statute made by the Parliament off the shelf, interpreting and applying it, or, applying the law of precedent, that is judge-made law or what we call the common law. Orders are what we determine to do, that is, the court's decision and its record for the world to know.

For a police officer I suspect *Law and Order* means there are perceived problems with particular offending, such as street behaviour and violence. This is accompanied by a sense of need for increased police presence through uniformed officers, cars, custodial facilities and technical resources - visible things that facilitate the prevention and detection of crime.

For the politician it possibly means the projection of an image of safety, security and control – the protective function of the state.

For the citizen, *Law and Order* probably means a sense of safety in the home, on the street and wherever the citizen moves about. It seems to be connected to place and physical presence. It is largely not connected to, say, cyber safety or security of property. It is essentially about the physical self and family and the sanctity of the home.

So then, it becomes the interest of the media and the politicians to talk about *Law and Order*. The more it is spoken about the more interest there is and presumably the more popular the media outlets become. *Law and Order* sells.

For the politician, there is an urgency to respond. Relevantly, *Law and Order* is an easier uptake. It does not cost as much as big infrastructure – transport, hospitals and schools. Increased police resources and new liquor licensing laws are a quick and cost effective response. The politician is seen to take action to make the citizen feel safe. It is a political billboard: "we are looking after you".

On the other hand, what does *Law and Order* mean to the media? In part it is similar to that of the community but with a twist. *Law and Order*, because it is about physical safety and the flipside sense of vulnerability, the community wants to know about *Law and Order*. The community wants to feel safe.

All this leads me to touch upon the topic of sentencing. Let me say it is one of the hardest things a judge does. Mostly it is a gut-wrenching experience. A judge worries about whether the sentence sufficiently punishes the individual for the crime, adequately recognises the pain and suffering imposed on the victim and the victim's family and sufficiently deters other members of the community from the same offending.

Sentencing is not about revenge. It is extremely complicated and significantly more sophisticated than many in the community think. Parliament has introduced a Sentencing Act that is 385 pages long and has about 150 sections. Judges are required to impose different sentences for different offending. Where multiple offending occurs in certain categories of offending, judges are required to double the penalty. There are difficult formulae for cumulation and concurrency. Then there are the complexities of aggregation and parity. In the public debate these things are often forgotten or unknown. Sentencing is not about "I think x years is the right amount". It is about applying principles of law. Judges are required by the Sentencing Act to take account of many things.

Sentencing is sometimes like football. Nearly everyone has an opinion. If I was asked who will win the AFL premiership this year I would say, without a doubt, the Bulldogs provided the <u>whole</u> team play with the same level of focus and commitment as Akermanis. Another judge, would strongly disagree. He would say St Kilda, absolutely, with or without Riewoldt. Another judge would say, vehemently, Collingwood, with Didak kicking the winning goal.

But what do these judges know about football? Very little – we have never played, coached, studied techniques and set plays, fitness, diet, psychology and so on, but we think we have an opinion that should be listened to.

I do not use the football analogy to trivialise sentencing. It is one of the most serious things that courts do. It haunts judges. We all remember each person sentenced and the faces of the families pleading for mercy on one side and those on the other side pleading for due punishment. It is the judge who is left to make the lonely and emotionally and intellectually difficult decision.

The community's opinion is largely formed by the media. It is very powerful in its capacity to educate the community about sentencing. This power and efficacy cannot be under-estimated.

A critical factor in sentencing is deterrence. As judges we cannot ensure the sentencing goal of deterrence without support and cooperation from the media. If young people are to learn that standing around, egging on and encouraging an assault on an individual is an offence, one way is to read about what happens to offenders in the newspaper, see it on television news or hear it on the radio. More can be done. Using modern technology it is possible through *You Tube* and *Twitter* for young people to see and learn what has actually occurred; learn the fact that a person committed an offence by encouraging another in a criminal act and importantly has been the subject of a sentence by the courts.

There is ongoing discussion in the media and therefore the community as to the sentences imposed in the most extreme or worst cases. So we see in very bad sexual offences, violent assaults or frightening killings that the media reports the cases where the sterner sentences are imposed. Conversely, the media will report upon the hard cases where an individual is involved in particularly serious forms of offending and the sentence is perceived to be more lenient than it ought to have been, or in the cases where, on appeal, the sentence has been reduced.

What the community generally does not know is of the thousands of cases dealt with by Victorian courts each year. This in part lies with the obligation on the courts to develop means of communicating what they do.

Recently the Supreme Court introduced a monthly sentencing summary on its website setting out the sentences imposed, the nature of the offending and the judge who imposed the sentence. Ideally all courts should be resourced to provide this

very basic information to the community and the media. It would then be possible for the media to produce periodically a general summary of numbers of offences in particular categories and reveal the range of sentences imposed. For example, it could be said in a particular month the Magistrates' and County Courts dealt with *x* numbers of assaults where the range of sentences was from *y* to z years of imprisonment. It would be a start.

The community needs to understand that there are consequences in the criminal justice system for criminal behaviour.

Judges will impose the sentences they think fit at law but deterrence within the community will not be achieved unless knowledge of the sentences is conveyed to the community. Judges try by encouraging the community to attend the courts, bringing school groups in to watch and putting information on courts' websites. we are helped by hyperlinks to the courts' websites. It would be easy to introduce television into the courtroom, put courts on *You Tube* and run permanent live audio. The trouble is it is probably a bit like Parliament. It is only the exciting juicy parts that the community would be interested in and by and large would turn proceedings off. But there are other concerns we should have. Judges vehemently avoid the phenomenon of the personality judge. We are concerned to focus on what we do, deal with the case before us impartially, fairly and according to law. Judges are different from politicians and business leaders. We are not about "spin" but about delivering justice.

The difficulty for judges is that we are at the end of the line. Other than ensuring a sentence takes account of deterrence we have virtually no role in prevention of offending. We can do no more than express our concern, even frustration about particular types of offending and the failure of the community to abide the law. Let me give you an example. Eight years ago I sat as a trial judge in two separate

murder trials involving knives. In each case the convicted accused was eventually sentenced to a term of imprisonment for manslaughter. In those cases I expressed concerns about young men carrying knives. Nothing I said was novel. Years later judges are saying the same thing but offending involving knives continues.

Recently Justice Coghlan spoke in schools about a particular case of violence to help young people understand that there are consequences for their actions. Underlying the judge's remark is a belief that more can to be done in our schools and within the younger sections of our community to understand the consequences and risks of their actions.

That said, it is not as simple as courts being called to provide "tougher sentences". The Court of Appeal has indicated the need for increased sentences in particular categories of offending such as manslaughter and other forms of violence and also sexual offending involving children. Sometimes the community is mislead by the media into thinking that ad hoc sentences may be imposed in particular cases. As a matter of legal principle it would be unsound on one given Monday to decide that a particular class of offence would be subject to tougher sentencing than the same offence was subject to on the preceding Friday. Sentencing cannot be irrational, uncertain or unpredictable. It is subject to careful legal principles.

It needs to be remembered that the courts do not make things up as they go along. It also needs to be remembered that the courts are confined to the cases before them. The courts are limited by the way in which the cases are conducted, principally in criminal matters, the way in which they are prosecuted.

So, for example, it is difficult where the prosecution has not urged a custodial sentence or a particular range of years at trial level to then, on an appeal, question the adequacy of current sentencing practices for that category of offence. There

have been occasions where the Court of Appeal has analysed the adequacy of current sentencing practices for an offence, aggravated burglary, and demonstrated that the sentences imposed in 20 earlier cases did not appear to reflect the very high maximum which Parliament had fixed. The Court observed that this "is a matter of the first importance to the administration of criminal justice in this state". However, the Court of Appeal is hamstrung where the very topic of current sentencing practices has not been the subject of argument on the appeal. And so in the example I mention the Court did not express a concluded view[1]. Again in sentence appeals this week the President of the Court of Appeal has made comments about apparent inadequacy of sentencing practice when regard is had to the applicable maximum for cultivation of a commercial quantity of cannabis. The responsibility for litigating this issue lies with the Director of Public Prosecutions.

So I suggest the courts do what they can but are constrained by their incapacity to communicate to the community the way in which the media can. Secondly, the courts are constrained by the way in which cases are run before them. If sentences are to be increased it lies with the prosecution to identify inadequacies in sentencing practices and to urge increased sentences where appropriate. It cannot be left until appeal because more often than not the case has been conducted in a different way below.

It might be argued that the media are restricted in their capacity to help the courts communicate information because of suppression orders.

There are times when the media are doubtlessly frustrated by suppression orders and their breadth. Conversely courts have a paramount concern to ensure the right of an accused person to a fair trial. We must manage the risks of disclosure to potential jurors of information about the accused. It is very difficult for judges as there is a

[1] See DPP v LEL Hajje [2009] VSCA 160 [33]

balance to be achieved between the public interest in knowing about the case and the public interest in an accused person having a fair trial. These matters are becoming more difficult for judges as technology expands. We have seen in cases in the Court of Appeal that the courts will not surrender control of court proceedings and abrogate their responsibility to ensure a fair trial. Sometimes the courts are criticised for making orders that are easily abused outside the jurisdiction or within cyberspace. That said the courts will not surrender.

Sometimes the difficulty faced by the courts involves understanding the nature of the technology available and the way in which it can be used to disseminate information. It is important in cases where a suppression order is contemplated that the technical .side of the contemplated.dissemination is understood by the lawyers representing the media and conveyed to the court. Of course just as in the real world there are individuals who are clever an:d advanced in their skills with technology so too the same applies to judges. There are judges who are computer savvy and there are others who are brilliant lawyers but prefer the handwritten document and largely do not use computers except for basic e-mailing purposes.

All this brings me to talk about the role of the court and in particular the Supreme Court in a modern globalised world. We find ourselves in our commercial litigation and also our criminal litigation where we want to be sure that we are doing things the best way. As a result we have reached out to see what is happening elsewhere.

Shortly, the Head of the Criminal Registry of the English Court of Appeal will come to Melbourne Master Roger Venne. He will sit in chambers and in court with judges, meet with the profession, the prosecution and Legal Aid and advise us on the English system compared with the Victorian system. Hopefully Master Venne will be able to tell us of new ways so that we might improve our criminal appellate work and reduce delays. In the commercial context we have sent judges to London and

North America to look at what is being done in commercial centres around the globe. Interestingly we have found that Melbourne is a world leader in alternative dispute resolution and case management.

As Victorians and Melburnians we are generally people who do not talk very much about what we do. We are modest and overlook the leadership role Victoria can and should play. The Human Rights Charter is an example. It is disappointing that the only Australian state to have applied a Charter has not taken a leadership role in the national debate on a Bill of Rights.

In Victoria we should be very proud of our judiciary. We should also be proud that we have such an effective and articulate fourth estate. The trick for both sides, that is the judiciary and the media, is to seek out ways in which we might complement each other. As I have already said, there are opportunities for the media to use its unique position to help the courts achieve greater effectiveness in the deterrence of crime. This should not be lost in the current discussion on *Law and Order*.

Whilst judges will always avoid the personality judge factor we must come to terms with the fact we have an obligation to communicate to the community information about what we do and why we do it. In the Supreme Court we have set about this through our Communications Committee and communications policies. My presence today with my colleagues, Justices Whelan and Forrest, is a strong indicator of the Supreme Court's commitment to its side of the equation. But it does not finish there, last year we invited a panel of representatives of the media to speak to judges of the Supreme Court about the media's perspective as to how courts function. Marco Bass from the ABC and Norrie Ross from the Herald Sun gave up their time to talk to us. Courts, particularly the Supreme Court, have media officers who help us communicate. In the Supreme Court we have meetings at the beginning of the year where we invite the media in and talk about the year ahead. All these

things are very simple but when put together demonstrate a dramatic shift in the way in which courts operate and are capable of being portrayed in the media.

My next request of the media is to ask if some judges might visit the production and newsrooms and news desks. Judges are on a steep learning curve. The news is immediate and courts must respond to its dissemination in the digital form. It will help if we know how it works on the ground in the 21st century.

As a judge and a consumer I observe the universal quality of the journalism we enjoy here in Melbourne. If I think of the reporting of some of the larger cases, both criminal and civil, the capacity of journalists to reduce to a very confined form the salient points of a case and the reasons for a judge's decision it is often astounding. The quality is consistently high and often superb. Likewise the capacity of the film and radio media journalists to leave a courtroom and walk out onto the footpath and describe with consummate ease what has just occurred in court frequently astounds me.

So we have on the one side a very skilled and capable media here in Victoria. On the other side we have a judiciary, and I speak in particular of the Supreme Court, engaged day-in / day-out in cases that are "the news". Whilst there are times where the media will present a case in a particular way so that a judge feels they have been unduly bruised – you know the sort of thing I mean: shame pages, personal photographs of judges, inaccurate headlines and the like what does a judge do? Some of my colleagues withdraw and others become very cross. Some colleagues are more robust than others. I do not wish to suggest that the media should alter its focus in order to curry favour with judges. But it should be remembered that judges are not politicians or business leaders. They do not answer back. They are vulnerable and easy game for the media. When politicians talk about *Law and*

Order in a context where different meanings are applied by different groups it is an easy shot to criticise the courts.

It is good and refreshing to recall that "judges don't spin".