

Conferral of Degrees Ceremony

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Division of Law, Macquarie University
17 April 2003

Occasional Address by
The Honourable Justice P.A.Bergin
Supreme Court of New South Wales

1 Vice-Chancellor, Members of the University, Graduates and guests: It was an honour to receive the invitation to address you today and, if I may be personal for one moment, may I say that the acceptance of the invitation was made all the more enjoyable by the warmth of my memories as a student of what was then the School of Law of this University under the leadership of the late Justice Peter Nygh and his successor the late Professor John Peden. The academic excellence and professional integrity of those two former Deans of the School of Law exemplify the attributes for which I hope you will strive. Part of that journey is today complete and what a great day it is in your lives.

2 You are entitled to feel proud of your achievements. Your families and your friends who supported you in various ways in your academic pursuits are rightly proud of you today. To their recognition of your achievements may I add my sincere congratulations. Without wishing to dampen your justified elation, I pose the question - Where to from here?

3 Some of you may decide to become part of the academic community and teach and research the law. The importance of this role cannot be overstated - without our professors, lecturers and tutors in the law, the legal profession as we know it today would not survive. The richness of the fabric of the law is enhanced by the open and sometimes vigorous debate about its direction or development. This debate is so many times sparked by academic commentary.

4 Some of you may intend to practise the law either as a solicitor or as a barrister. Others may wish to practise or work in corporate life or as government advisers. You know from your studies that the legal profession is no ordinary profession or occupation.[1] It is a profession of exceptional privileges and exceptional obligations. The lawyer becomes the client's confidante, adviser and advocate whilst at the same time complying with a paramount duty to the Court.

5 Four years ago, the Chief Justice of the High Court of Australia, the Honourable AM Gleeson AC, made an observation that you may think is very powerful.[2] It was this:

Concern for human rights is most valuable when it reminds us of the need to protect the rights and interests of minority groups, the underprivileged, the unpopular, people whose legitimate concerns are at risk of being swept away by a majority. ... However, concern for human rights is misdirected if it merely encourages us to the relentless pursuit of our personal interests, ignoring responsibilities. A world in which the strong take what they want and the weak accept what they must might satisfy the dictates of competition policy, but it knows little about respect for human rights and dignity.

6 There are I suggest a number of important messages in what the Chief Justice said, one of which is the need to be true to your responsibilities irrespective of your personal interests, whilst maintaining respect for human rights and human dignity.

7 Today the conferring of your degrees recognises your academic excellence. The achievement of that excellence is in some dependant upon not only intellectual ability but also upon the complex combination of a desire to be the best and a need for recognition. In others it may be driven by a very inquiring mind and the delight of academic pursuit without a zest for competition or need for recognition.

8 Whatever be your motivation, the irresistible conclusion is that you possess the very special attributes of intelligence, commitment and the emotional maturity and discipline to become, as you have today, law graduates. If you were in the future to use as a touchstone the Chief Justice's message of being true to your responsibilities, irrespective of your personal interests whilst maintaining respect for human rights and human dignity, your careers will be all the more rewarding.

9 In these troubled times it is apt to remember the words of another of our Chief Justices of the High Court, Sir Gerard Brennan:

The freedom of Australian society rests on a paradox. We hold the political branches of government to account at frequent intervals so that the exercise of legislative and executive power is continually subject to the supervision of public opinion. Yet we insist that the judiciary be isolated from the clamour of the hustings in order to ensure that the application of the law proceeds fairly and inexorably.

10 Sir Gerard referred to the dominant characteristic of judges as their independence. He said:

There is one duty: to find the facts and apply the law impartially and competently. There is one conscience to be satisfied: the judge's own. There is one aspiration: to do justice according to law.[3]

11 I respectfully agree with the views expressed by Sir Gerard however there is an aspect of judicial independence that I would like to explore with you.

12 Trials are conducted in public and Judges' decisions are supported by reasons given in public. Every aspect of judicial work is open to public scrutiny, as opposed to public supervision as in the case of the legislature and the executive referred to by Sir Gerard. Criticism of the judiciary, sometimes legitimate, is tolerated because judges are independent and the institution is resilient enough to bear it. The capacity to openly debate the attributes of the system coupled with the existence of the Judicial Commission of New South Wales gives the community a well-founded confidence that our judicial system is both independent and incorruptible. However there is another aspect to the maintenance of judicial independence that is not widely appreciated. It is that judicial independence is dependent in part upon the integrity of the members of the legal profession.

13 Should you become practitioners it will be necessary for you to make an oath or take an affirmation that you will "truly and honestly conduct" yourselves "in the practice of a legal practitioner of the Supreme Court of New South Wales" and that you will "faithfully serve as such in the administration of the laws and usages of the State according to the best" of your "knowledge, skill and ability". You will have a duty to remain true to that promise that you will make publicly and solemnly.

14 A most significant feature of your existence as a solicitor or barrister is the integral role you will play in my life. My independence will be in part dependant on your integrity and upon the premise that I will be able to trust you implicitly.

15 You may have followed with some interest the recent major corporate collapses both in this country[4] and in the United States of America[5]. You may have seen reports from the USA of professionals in that country shredding documents[6] to assist clients, and perhaps themselves, to avoid detection for wrongdoing or liability for poor or corrupt corporate governance. Sadly, from those reports it appears that professional people may have allowed their integrity to be shattered by greed.

16 Let me now turn to matters closer to home. If a client were to pressure a lawyer to act inconsistently with the lawyer's duty to the Court, we all lose. The lawyer loses because the client will in the long run know that the lawyer can be manipulated and will therefore not have any real respect for the lawyer or the system, a continued flow of business perhaps, but not respect. The client loses because there is a lack of respect for the lawyer and probably the system. Judicial independence is in danger of compromise because Judges have assumed that the implicit trust in the lawyer is justified when it is not.

17 Manipulation can take many forms. It may be subtle or it may be direct. One very powerful form of manipulation is the threat, either real or perceived, of losing a client, if particular action is not taken or particular advice is not forthcoming. Loyalty to the client does not mean compromising your integrity. With your attributes you will be exquisitely placed to reject any attempts at any inappropriate manipulation. To repel such attempts is to maintain the trust between the judiciary and the profession and thus, in no small measure, to assist in the maintenance of the independence of the judiciary.

18 Striving to make successful the service of the law to the community can at times require enormous courage, including the courage to speak out for unpopular causes and to challenge what you perceive to be an abuse of power. With your special attributes as law graduates, you will also be exquisitely placed to speak out on matters of public importance. At times, a leader has to educate and persuade the community that its interests are best served by abandoning some accepted opinions and practices and adopting new ones.[7] I look forward to hearing and reading your contributions as you strive for that professional integrity exemplified in the lives of the late Justice Peter Nygh and the late Professor John Peden. I wish you every success.

1 *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, per Kitto J at 298.

2 The University of Sydney Graduation Ceremony, 7 May 1999.

3 Law Graduation Ceremony, University of Queensland, Occasional Address, 4 June 1996.

4 HIH group of companies.

5 Enron Corp. and WorldCom.

6 "Andersen indicted over Enron Collapse". The Age. 15 March 2002: "Worldcon: The Fall of a Telecom Titan". Daniel Kadlec. Time Magazine. 8 July 2002: "Congress to investigate mass Enron paper shred". Mark Tran. The Guardian. 21 January 2002.

7 University of Newcastle Graduation Ceremony, Friday 8 May 1998, The Hon. Justice Michael McHugh AC.