Print Page Close Window

Farewell To The Honourable Justice B T Sully As A Judge Of The Supreme Court Of New South Wales

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

MONDAY 19 MARCH 2007

FAREWELL TO THE HONOURABLE JUSTICE B T SULLY AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

MR M J SLATTERY QC, PRESIDENT NEW SOUTH WALES BAR ASSOCIATION : We are gathered here today not just to surprise your Honour, as we probably have, but respectfully to mark your Honour's last public appearance on the bench of this court.

It is with more than just a tinge of nostalgic regret that we all sadly recognise that after today your Honour will no longer be sitting on this bench. On behalf of the New South Wales bar I wish to thank your Honour for your Honour's dedicated service to the people of New South Wales for the last eighteen years and to farewell your Honour from this court.

Your Honour has unlimited commitment to the law and a powerful belief in what it can do for our community. Much about this quality that burns brightly in your Honour's judicial life struck me forcibly late one January a few years ago.

At the end of that summer vacation Chris Ronalds SC, Mullin Jawarka(?), Tony McEvoy and a number of members of the Bar Association staff and I were organising a group of indigenous law students to be taken on a tour first of barristers' chambers and then of the Supreme Court. This was as part of an orientation program to try and make the law a less forbidding place to them than it might otherwise have been and to encourage them to continue with their studies and enter practice.

I saw that your Honour was one of several duty judges at work at that time. I rang your Honour. I asked you whether you would speak to the students after you had finished your bail applications for that day. Your typically warm and unaffected response to my request which is so familiar to us who are honoured to be your friends was, "But, my dear boy, of course".

When I brought the students up to see your Honour you finished your bail applications and came down into the well of the court and sat with them for close to an hour. I still remember the day with great clarity. They were absolutely enthralled and so was I. Your Honour spoke to them from the heart. Your Honour cannot speak any other way. You explained to them something that I doubt they will ever forget and which says so much about your Honour's approach to the law.

You said that, just as they were at that point, as a law student you had neither pre-existing connections with the law or any special advantages that would help your career. You gave them much to hope for by explaining that nevertheless you had been welcomed by the law in this state and that they undoubtedly would be too. You expressed your fundamental belief that the legal profession is truly open to all and that you had been fortunate to enter and to progress through it due to the kindnesses and good grace of so many others. Finally, you expressed to them your profound belief as to the equality of all people before the law. That day you celebrated the values of your judicial oath that you have lived every day on the bench.

Yet there are things that you did not mention to those students about your life in the law. You did not mention your immense learning in the common law. You did not mention the courtesy you give to every person in your court room including accused persons, court staff, witnesses and counsel. You did not mention your clear sense of the significance for the wider community of everything that a judge says and does in a court room. The students did not have to be told any of this though because it was implicit in

everything that you told them that day.

Your Honour embarked on your legal career after graduating in law from the University of Sydney in 1959 and after practising as a solicitor you came to the bar in 1962. Although you practised in many areas of the law, both in common law, crime, commercial law and equity, by the time you were a senior junior you were already undertaking extensive work for the Commonwealth including prosecution work. Your precision and obvious ability made you counsel of first choice for the Commonwealth in Customs matters, criminal matters and commercial matters. Partly because of this work you became one of the first New South Wales counsel to become admitted in a number of other state and territory jurisdictions and you maintained chambers both in Sydney and in Canberra.

Your Honour took silk in 1979 and after that time was probably best known for your prosecution of some of the largest drug possession and importation trials of that era. At the bar your Honour practised in a way that inspired others. Your Honour was a model prosecutor long before the Commonwealth had declared itself a model litigant. There are senior prosecutors who still remember acting for defendants against your Honour as a prosecutor where your candour, your openness and your sense of fairness were outstanding. In short you were a model of professional and co-operative detachment.

When at the bar you were a much loved member of the twelfth floor. To your fellow floor members and the bar generally your personal generosity with your time was well known. You were an active member of the Bar Association and served as a member of the Bar Council from 1976 to 1979 and once again in 1988.

After your appointment to this bench coming to your Honour's court was always, as it is today, something special. You daily celebrate the authority and traditions of the court by having the proclamation read. You deliver judgments that are a model of English expression and you speak to victims of crime and accused persons with a courtesy that will often startle them. In Robert Bolt's play, A Man For All Seasons, he records Sir Thomas Moore's contemporaries describing the Lord Chancellor as a man born for friendship. This is also an apt description of your Honour.

Your Honour's approach to the law with judicial colleagues was always collegiate but when your own personal conviction about the law drove you to dissent in appellate matters you never failed to follow what you saw as the just result and to give expression to it with a lucidity which was always persuasive. Being the respecter of the traditional role of a judge that you are, you generally avoided the temptation to speak extra curially. Despite that, your views about the inadequacy of some of this state's criminal procedure legislation is well-known and rightly so. State legislators would learn much about the peace, order and good government of the State of New South Wales simply by reading your Honour's judgments.

Your Honour's generosity with your time was as much the mark of your judicial career as it was of your time at the bar. You have lectured to law students, written papers for the Judicial Commission, given CPD programs to crowns and public defenders and for many years mentored counsel to assist them in their progress at the bar. When the Bar Association had a dining room a long time ago you could often be seen on Friday mornings at breakfast surrounded by three or four young counsel as you gave them the benefit of your time and your experience.

Your Honour understood what work/life balance was long before there was a need for it. Your Honour more than most well recognises that despite yesterday's hullabaloo it is today that is the seventy-fifth anniversary of the opening of the Sydney Harbour Bridge. Your Honour is a resident of the lower North Shore and walks across the bridge almost every day. Your Honour has neve been seen doing this in a yellow cap or wearing a light bulb.

Your Honour's passion for the opera is well known to the whole of the profession. Perhaps its passions and dark deeds have much in common with the criminal law. Your Honour is a man of faith, a man of reason and a man of the law. Your excellence as a judge has made it a privilege for all of us who have appeared before you over the last eighteen years. At your Honour's swearing-in on
24 July 1989 the then President of the bar, now the Honourable Acting Justice Ken Handley AO QC, expressed his pleasure at being the first person to address you as a judge of this court. He wished you a long and distinguished career on this court. The bar has a good record in expressing such sentiments. That is now a wish fulfilled.

It is now my honour to be the last person to address you as a judge of this court. I wish you a long and happy and well deserved retirement. I am sure that in time too that will be a wish fulfilled.

Sully J: Mr President of the Bar Council, I cannot say in all honesty that I am surprised

to see you here since with typical consideration you contacted my Chambers a fortnight ago, said that you would like to come and asked whether I would mind if you did. I am glad to say that on that occasion also, if memory serves, I said, “But of course, dear boy, of course”.

That you have come here at all and that you have come here, as I imagine to be the fact, having re-arranged a lot of appointments in a very busy life pays a signal honour to me and I believe through me to the court; I am very grateful.

I am grateful too for the kindness of what you have had to say. Typically, it is too generous but, as we know on the highest of authority, the flesh is weak, and I have to say that I am proud and happy and not a little gratified to hear the kind things that you have been moved to say on this occasion.

As to the remainder of you ladies and gentlemen who have done me the great honour of coming this morning, what can I possibly say except that I am not so much moved as overwhelmed by your kindness? I am assuming, of course, that you are motivated by something other than a base desire to make perfectly certain that I am in fact going, as to which you need have no concern because I am, I am.

While I am in a thanking mode there are some people in Court of whom I should speak briefly. May I explain that on Wednesday in this week I propose to host a reception at which I will have a chance of saying what needs to be said to the Court staff and the reporting staff and those people who in so many ways have made my time on the Bench a happier and more productive one than it might otherwise have been. That will be the right time and the right place for an extended acknowledgment of those people; but in such a splendid company I would wish to acknowledge, at least and however briefly, my own immediate staff.

My associate, Mrs Altwasser, has been with me for fifteen and a half years. My tipstaff, Mr Maloney, is the only tipstaff I have had. I cannot put into words how much I owe both of them. They have in so many ways by their loyal support and hard work kept my Chambers functioning as more or less a going concern.

It would be a very poor return, I think, for all your kindness if I were to impose upon you now something widely recognised; rightly feared; and acknowledged by its progenitor in terms as: the Sully monologue. There are, however, just some things that, if you will bear with me for a few moments, I would like to say; because they are things that have to do with trends which I have noticed during my eighteen years here. They are interrelated trends and they are things which have an impact, certainly in the aggregate, not only on the Court itself, but upon the practising profession upon whom the Court relies so much.

The first of the trends is what I would describe as an ever-widening gap in public understanding of our constitutional history. Not of our constitutional law, of our constitutional history. I suspect that for most Australians constitutional history starts with the white settlement of this country and more or less finishes with the proclamation of the Commonwealth in 1901.

It is timely to remember that the Constitution was itself set in place by people who adhered as a matter of course to principles upon which the freedom of all of us ultimately depends: the continuity of the Crown, which never dies and which gives, therefore, constitutional stability and historical continuity to the expression of the nation’s identity; representative parliamentary government which ensures, more or less, that those who are governed have, more or less, some say in how they are governed; the separation of powers; the rule of law as the ultimate guarantor of personal freedom; Constitutionally independent Courts and Judges as the guarantors of the rule of law.

It is important, I think, to remember from time to time that those things did not just happen. They were hammered out in those epic constitutional struggles in England in the late sixteenth century and, predominantly, in the seventeenth century. That accumulated wisdom of the centuries is something not lightly to be cast aside. One looks around these days at what its proponents are pleased to call law reform and, really, wonders whether they have the faintest grasp of the historical continuum that lies behind what we have, and that ought to be, at least, some guide to what they are proposing for us to do with what we have. The Bar is celebrated, among other things, for the education programmes that it has in place. May I suggest, Mr President, that a properly structured course in those basic processes and events of constitutional history would not go amiss. That is a field, if ever there was one, in which the contemporary Bar can and should be setting the example, indeed the pace.

The second of the four trends has to do, precisely, with that phenomenon of law reform. Sir Owen Dixon, the mighty Dixon, during his lifetime used often to speak of what he called “the high technique of the common law”. He meant by that, as he explained, strict logic informed by a properly respectful understanding of the historical continuum of

the common law. He understood, - who better?, - that the paradigm of the common law is in truth a paradox. The common law holds in balance two things which are not easily reconciled in terms of pure philosophical concept. One is the concept of continuity and stability informing that principle of the common law that any citizen of good sense and goodwill is entitled to know, and can easily enough find out, what in any particular context his rights and, more importantly, his obligations and responsibilities, might be. On the other side of the balance is a capacity for change in order to breathe with, and answer to, the changing expectations and requirements of civil society, civil in both senses of the word.

The common law has always, by a peculiar practical genius, kept those two things in balance; but it is a fragile balance and one easily disturbed. It is particularly vulnerable to current trends in law reform. Those trends are marked by what a lawyer would call the reversal of the onus of proof. Proposals for law reform these days normally start with people who are single issue obsessives; or people who have an unwholesome ambition for personal power and aggrandisement; or people who, to speak frankly, are plainly, not to say floridly, unstable. Such a proposal when once made, these days tends to take on a momentum all of its own; and part of that momentum is to put the proposal forward aggressively as though it is a matter of course that the proposal must be right unless somebody can prove that it is wrong.

Any intelligent approach to law reform surely puts a very different cart before a very different horse; or, perhaps, restores the horse to its proper place before the cart. It seems to me imperative to get right back, in every aspect of law reform, to that simple proposition: it is for the proponents of the reform, not to explain with a lot of empty rhetoric what they want, but to put on the table in clear and precise terms what they say is wrong with what we have; what they say we should have instead of what we have; and how they demonstrate that what they are proposing would improve on what we have;.

One looks at the efforts, to choose a neutral word, of current law reform and one wonders, really, whether they have not taken their motto from the saying famously attributed to Attila the Hun: that the grass never grew again where the hooves of his horse had once trodden.

The third trend, one of particular anxiety to a Judge of the Court as you would understand, is what seems to me to be the creeping bureaucratisation of the Courts. I speak in that regard in particular of this Court, since it is in this Court that my own judicial life has been spent; and I should emphasise, as I perhaps ought to have done before the beginning of this monologue, that I speak, of course, for myself. The creeping bureaucratisation of the Court is not something that one can describe in dramatic sweeps. The process is more subtle than that, but it is a real one.

Part of it is what I would call an all-pervading cynicism: that is to say, cynicism in the sense defined famously by Oscar Wilde as the capacity to know the price of everything and the value of nothing. Fundamental to the way in which the Courts are being treated these days is that they are not Constitutionally independent arms of government at all; but are profit-earning cost centres forming part of a particular bureaucratic empire; and that that is the way they are to perform, to be required to perform and to be seen to perform.

There is, as well, a steady hollowing out of what I would call fundamental respect for the Court: not for the Judges as individual citizens, but for the Court composed of the Judges as a Constitutionally legitimate arm of government.

You see it all around: once again not in terms of broad dramatic sweeps, but in the little things, in the failure of what I would call the ordinary decencies of civil commerce among civilised people.

And there is, of course, a phenomenon with which you will be familiar even from outside the Court and that is the constant trend to hedge in judicial discretion; which is another way of saying, a constant trend to hollow out one of the great principles of the common law which is that justice, especially in criminal cases, is individual justice, attuned as best fallible human judgment can manage it, to the particular requirements of the individual case.

You, Mr President, I know have a particular interest in this field. Permit me to encourage it. The Chief Justice himself gave a very telling lead, if I may presume to say so, in the speech that he addressed to the opening dinner of this law year. Those are foundations upon which all of us who care about the rule of law should now be assiduous to build. There should be no mistaking, no mistaking, the seriousness of the matter of which I speak.

The fourth and final trend is one which is of particular interest and concern to me; and it is the trend that has to do with the current standards, if that is the word I want, the

current intrusions, of the media. The Chief Justice of the High Court, no less, was reported recently as saying that complaining about the media is like complaining about the weather, as to which I suppose the logical answer is: well, there is weather and there is weather.

The media, as we all know, react with savage vindictiveness to any attempt to apply to them those standards of transparency and accountability that they are insistent on applying to other people; and yet it is important that from time to time certain fundamental truths be recognised and affirmed. May I suggest some of them?

The media are not a Constitutional arm of government. To suggest that the media have a Constitutional standing equivalent to that of the Executive; of the Legislature; and of the Judiciary, is not only constitutionally illiterate; it is, at one and the same time, a constitutional phantom, a legal fiction, a political subversion and a moral absurdity. The media are major money-making cartels. They are not knights in shining armour. Their agenda is power. Their strategy is fear. Their tactics are a combination of ridicule, sometimes of the most savage personal kind; of a confusion of fact and opinion to the point where the one is virtually indistinguishable from the other; and of a masterful manipulation, not of the lie outright, but of what is more important because more potentially dangerous, of the finely calibrated half-truth.

All of those things have been brought together, in recent times in particular, in a media campaign in the Sydney metropolitan media which in my time has never been surpassed for the persistent, wilful and vicious mendacity with which it has been conducted. I speak strongly about the matter because I feel strongly about the matter. It is not some trifling incident of civil discourse or of public affairs. It is something which, if it is not checked resolutely, will hollow out precisely those freedoms which the Courts, supported by the Bar, fearlessly independent, are supposed to recognise and maintain.

It is time, Mr President, for the Bar to think outside the circle. It is time to take the fight to the media by insisting, not that they tell us what they are against, for that is easily done, but to tell us what they are for. If their proposition is, for example, that we need an increase in criminal convictions, that is a completely logical point of view. But what actually are they for? Are they saying that there should be no presumption of innocence: yes or no? It is not a difficult question. If the answer is yes, then you cannot have the principal hypothesis that there must be an increase in convictions. If the answer is no, then who is to set the criteria by which it will be judged whether the presumption of innocence runs or not; and who will define the criteria and administer the criteria and so forth? It seems to me that a response to the media that insisted, may I say again, upon their saying with precision what they are for, would soon enough demonstrate that like the emperor in the fable, more often than not they simply have no clothes. There is I think, Mr President, work, and worthy work, for the current heirs of the common law to undertake in that particular field.

I would draw together the four trends of which I have been speaking in words not of my own, but of somebody whose intellectual rigour I greatly admire, and that is Mr Justice Brandeis, sometime of the United States Supreme Court. In a famous dissent in a matter called **Olmsted v the United States** Mr Justice Brandeis said, if my memory is not too vulnerable to the passing of the years, words to this effect:

"Experience should teach us to be most on our guard to defend liberty when the purposes of government are beneficent. Men who are born to liberty are naturally alert to repel the invasion of their liberty by evil-minded rulers. The greatest threats to liberty lie in the insidious incursions of men of zeal, well meaning but without understanding."

When, as is demonstrably so often the case, those who are making the insidious incursions these days are not only without understanding, but are anything but well meaning, then there is, indeed, a tocsin to be sounded by those of us who are unrepentant in the view that the common law, for all its imperfections, represents one of the great achievements of western civilisation and one of the most tried and true methods of protecting, not the great and the powerful but the poor and the powerless.

To be called to serve that principle, as are you, ladies and gentlemen of the Bar, is not simply a job, it is a great vocation. It is one of my proudest recollections that for so many years - vanity prevents my putting an exact number on them - I myself practised at the Bar. I was proud to do so. I love the Bar now as much as I ever loved it when I had the honour and the joy to practise at it. I believe in it. I believe in what it can do for the good of the whole of the society which it exists to serve. Its motto: that it is the servant of all but yet of none, is not, as I see it, a finely-tuned piece of rhetoric. It is a fundamental statement of a principle, the maintenance of which fearlessly, especially in the face of the trends of which I have spoken, is absolutely essential if we are not to find ourselves

affluent, but affluent slaves.

May I once again thank all of you for your kindness in attending this morning. I cannot tell you, I truly cannot, how much it means to me. I wish you every success and happiness in your own futures.