

**Sir Anthony Mason Honorary Lecture**

**"Why be a lawyer?"**

**Melbourne University Law Students Society**

**by the Hon. Chief Justice Warren A.C.**

**Wednesday 15 August 2007**

At some point in your lives a light bulb switched on in your head and I expect you have had the thought: "*Yes, I would like to study law.*"

Tonight I would like to explore the questions with you: *Why did I study law in the first place? Why be a lawyer?*

It was perhaps because doing law instinctively felt right and was seen as a prestigious profession. Was it something else? Maybe it was because the law would provide you with the opportunity to learn ideas and things that are not available in any other profession, namely, the opportunity to do justice according to the rule of law.

Now, those statements contain a number of concepts that we might try to unpack this evening. First of all, if doing law instinctively “felt right”, why was that? It may have arisen from a family tradition, a family contact, something you saw on television or a film, such as *Hurricane Carter* (the story of the African American boxer who fought wrongful conviction of a serious crime), or maybe it was a reading of a special book, perhaps, *To Kill a Mockingbird*.

Dame Roma Mitchell, the first woman appointed to a Supreme Court in Australia, described her experience as a young woman in the early 1930s seeing lines of men waiting to receive ration cards during the depression. She said:

*"I felt that justice demanded that we shouldn't have another Depression. It strongly influenced me to study law because I thought that through it people could be helped."*

Joan Rosanove, Victoria's first woman Queen's Counsel, a renowned family lawyer, spoke publicly often against injustice to women and those from a non-English speaking background. One case in which she was involved concerned a man called Kitsch, a Jewish-Czech journalist, as to whom the prime minister of the day had said would not set foot on Australian soil. Rosanove embarked upon obtaining a writ of *habeas corpus* for Kitsch, initially in the Practice Court of the Supreme Court of Victoria. A long legal battle followed, right through to the High Court. In the biographical writings concerning Rosanove, it is said that a file was opened on her by some consular authorities describing Rosanove as a "suspected person". An additional entry was said to have been added to her file, claiming that Rosanove had "revolutionary tendencies". Twenty years after the Kitsch case, it seemed that authorities would deny Rosanove a visa to enter the United States. Rosanove is said to have retorted:

*"Do I look like a revolutionary? I have defended many criminals, but that doesn't mean I believe in crime."*

Some cynics might say that those who study law do so for reasons associated with personal vanity and self aggrandisement.

The famous American attorney, Clarence Darrow, conducted his practice from a shop front window for all to see him when he was working away. He conducted high profile trials that often captivated the media. His career path is interesting. He started out as a corporate lawyer. He worked for a railroad company but after one year of law school he crossed over to represent the leader of the railway union in a controversial strike. Darrow resigned his corporate position in order to represent the union leader, thereby making a substantial financial sacrifice. But Darrow was to move on and often defend what seemed the indefensible and often extremely unpopular accused. He acted for the McNamara brothers who were charged with blowing up a building that resulted in the deaths of twenty people. Of course one of his most famous

trials was the *Scopes* trial sometimes known as the *Monkey Trial*. This was the case about the Darwinian theory of evolution where a teacher was charged with offences for teaching that theory.

If one scans the biographies and experiences of those who have come to fame in the law or been involved in famous cases, there is a strong heroic element.

Let me tell you part of the story of two heroes of the Victorian Bar. The late Judge Cairns Villeneuve-Smith was one. He came to Victoria from South Australia and practised at the Victorian Bar until his appointment as a judge of the County Court. He came to Victoria following his involvement in the case of Rupert Max Stuart, now told in celluloid form in the film *Black and White*. Stuart was convicted and sentenced in the Supreme Court of South Australia in 1959 for the murder of a nine year old girl at the beach at Ceduna. Following his conviction there was an unsuccessful application for leave to

appeal made to the High Court and then the Privy Council. The High Court observed that some features of the case caused anxiety. Later, on the basis of claimed fresh evidence that pointed to the innocence of Stuart, the South Australian government convened a Royal Commission. Cairns Villeneuve-Smith was briefed as junior counsel representing the accused. The case was intensely controversial and extensively covered by the printed press. At one point in the hearing, after periods of difficult encounters with the Commission, the Queen's Counsel leading Villeneuve-Smith was denied the opportunity to ask an important question. After heated exchange, the Queen's Counsel walked out. His junior, Villeneuve-Smith, followed. Stuart was left unrepresented and the Commission proceeded in the absence of any representation. Later, Villeneuve-Smith returned before the Commission and applied for an adjournment to enable other senior counsel to be briefed. The Commission refused. When Villeneuve-Smith appeared alone to make that application, the Commission raised the matter of the walk out.

Villeneuve-Smith said to the Commission, with steely courage and resolve:

*"I did my duty as a junior and would do so again."*

Eventually, the late Sir John Starke QC (later a judge of the Supreme Court of Victoria) was briefed and Villeneuve-Smith returned to appear as junior. Ultimately the death sentence of Stuart was commuted, although he remained imprisoned. The aftermath was very difficult for Villeneuve-Smith. It was described this way:

*"The Adelaide establishment did not take kindly to the efforts of Villeneuve-Smith (and the rest of the Adelaide legal team) to ensure natural justice for Stuart. They were ostracised. Consequently, and encouraged by Starke, Villeneuve-Smith made the difficult and momentous decision to uproot himself from the state in which he was the last in line in generations of distinguished lawyers."*

The Stuart case demonstrates the courage that one junior counsel had to display. Imagine the way Villeneuve-Smith felt when he returned to the Commission to seek the adjournment: the anxiety, the nervousness, perhaps the fear, but, that was overcome by the courage of the junior counsel, Villeneuve-Smith, in fighting for the fundamental rights of his client Stuart.

Another hero of the Victorian Bar, to continue this thread, was the Honourable Barry Beach QC (later a judge of the Supreme Court of Victoria).

Following serious allegations of corruption in the Victorian Police Force, an inquiry was appointed. Beach QC was appointed as the inquiry. Coincidentally, counsel assisting was Villeneuve-Smith.

The Beach inquiry ran for well over 200 days, covering the period of 15 months. It dealt with issues that went to the



heart of our democratic system and explored the most serious allegations of police corruption in this state. There were sensational reports in the daily press. The inquiry was described later in these terms:

*That inquiry had a profound and cleansing effect on the police force. [His Honour's] integrity, courage and independence and devotion to principles and truth, both in the inquiry and in its aftermath, won the highest respect and admiration of the Bar.*

It was said at the time that Beach “weathered a storm, which would have destroyed a lesser man.” The Beach inquiry was courageous. It made findings against 55 members of the police force. Not one conviction was secured.

As I move through these stories a common thread appears of individuals who were called upon to demonstrate not only great intellectual, tactical and strategic skills as advocates but the courage to take on the unpopular or controversial cause,

sometimes in the face of mountainous public opposition and even criticism by the government of the day.

You will recall your studies in constitutional law on the Communist Party Case. The government of the day introduced the Communist Party dissolution legislation targeting the dissolution of the Communist Party in this country. Its genesis was a coal strike in 1949, where the Communist Part of Australia exercised industrial power and used the weapon of the strike to bring industry to a standstill and caused impact on the community. Proceedings ensued in the High Court seeking a declaration that the legislation was unconstitutional. At that time, the deputy leader of the opposition, Dr H V Evatt, was an avowed anti communist. He was also a former justice of the High Court of Australia. Legend has it that no one at the Victorian Bar would accept the brief to act for the Communist Party in the proceedings for fear of recrimination or, indeed, because of loathing for what the organisation represented. Dr Evatt took on the brief in

the face of resistance from his political party, the government of the day and the community. Regardless of his views as to the propriety or constitutionality of the legislation and the way the hearing played out, Dr Evatt was courageous.

Significantly, the Communist Party case and the conduct of Dr Evatt lies at the heart of the cab-rank rule applied by the Victorian Bar, namely, to ensure that individuals who require legal representation receive it and that there is an obligation on counsel to accept the next brief regardless of personal beliefs, the morality of the cause or the individual being defended. The purpose is to ensure that justice is done.

A little later in time from the Communist Party Case, a different drama was played out. Robert Peter Tait was convicted of a brutal murder and sentenced to death. His defence of insanity was rejected by the jury. There was widespread opposition to the hanging. After a long appeal process, the execution of Tait, having been twice postponed, was rescheduled. Proceedings were brought on, first of all in

the Supreme Court, and then in the High Court seeking a stay of execution on legal grounds. There was a dreadful urgency that surrounded the case, including late night sittings of judges. With less than 24 hours remaining before Tait was due to hang, three High Court justices flew to Melbourne to join two other colleagues. Sir John Starke, whom I mentioned earlier in relation to the Stuart case argued for a stay of execution. Counsel for the government, the prosecution suggested that the executive government would not resile from the decision to proceed with the execution. Sir Owen Dixon, the Chief Justice, responded:

*"When you say it to this court, you are saying it to a court which has supreme jurisdiction in Australia, and in effect saying "well, even if you want time to consider the case we will not give it"."*

The Chief Justice announced that the case would be adjourned and that the execution would be postponed:

*"Entirely so that the authority of this Court may be maintained".*

The intensity of the court atmosphere on such an occasion can only be imagined. On each side counsel faced the court urging a particular cause. The Court was confronted by a state government, seemingly intent on a particular course reflecting disregard for the authority of the highest court of the land. Each player on that occasion was called upon to demonstrate commitment, courage and integrity to their role and the law. Ultimately, Tait's death sentence was commuted.

If we switch from our continent to the United States of America again, the courage of and the need for an advocate is demonstrated in the trials of the Scottsboro Boys. Some teenage boys described as "hoboes" were riding on a freight train during the depression. They travelled with other young men, black and white, and two white women down to

Alabama. A stone throwing fight erupted and eventually the black men succeeded in forcing all but one of the white members off the train at a station. The train continued to travel at high speed but some of those ejected from the train complained of an assault by a gang of blacks. The station master wired ahead and a posse stopped the train further down the track. Dozens of men with guns rushed at the train and rounded up every black youth they could find. Nine captured black youths who came to be called "the Scottsboro Boys" were tied together, loaded onto a truck and taken to a jail. One of the white girls who had been on the train told one of the posse members that they had been raped by a gang of 12 blacks with pistols and knives. The Scottsboro Boys were charged. Newspaper coverage was intense. The boys were inadequately represented at their trial and found guilty. Ultimately, after appeals, the United States Supreme Court overturned the convictions in the landmark case of *Powell vs Alabama* holding that the right of the defendants under the 14<sup>th</sup> Amendment's due process clause to competent legal

counsel had been denied by the State. New trials were ordered.

The story of the Scottsboro Boys is a long one and quite involved. It is a story worth a visit by law students. Young men were held in jail in controversial circumstances for years whilst the legal process played out. Their story demonstrates the significance and importance of legal representation for the under privileged and the disadvantages and the need for lawyers to be able to stand up for an unpopular cause. Such cases are not confined to the underprivileged and disadvantaged. It applies equally to the manufacturer of an allegedly dangerous product, major corporations and limitations. Unpopularity is irrelevant. It is the administration of justice that must prevail through the application of the rule of law.

Lawyers throughout their professional lives, young and old, face intellectual challenges. The law presents opportunities

that not only call for courage but also for intellectual rigour combined with stamina and determination.

Another North American example is the work of Justice Ruth Bader Ginsburg, an associate Justice of the United States Supreme Court. In 1971 Justice Ginsburg helped to win a landmark victory in a Supreme Court case call *Reed v. Reed*. The case involved an Idaho statute that precluded women from being appointed administrators of estates of deceased persons. The United States Supreme Court struck down the legislation on the ground that it discriminated against women and was unconstitutional. It was a landmark case in American law by virtue of its constitutional recognition with respect to the unconstitutionality of gender discrimination. To further emphasise the point with respect to gender discrimination, Justice Ginsburg often provided representation in cases involving male plaintiffs. One example was *Weinberger vs Weisenfeld* which involved a young widower whose wife had died in childbirth. The plaintiff wanted to work part time so



he could care for his infant son. Because he was a man, he was ineligible for social security benefits. Justice Ginsburg won the case.

Across professional practice there has always been a long history, particularly here in Victoria of using the law to assist those who need help in the protection of their rights. In the late 1970's and into the 1980's a number of solicitors and barristers travelled north, especially from Victoria, to the Northern Territory to act in the interests and protect the rights of indigenous Australians with respect to land rights and also in criminal trials. They included individuals such as Justice Frank Vincent, now of the Court of Appeal of the Supreme Court, recently retired Justice Geoffrey Eames also of the Court of Appeal, Justice John Coldrey, a judge of the Trial Division of the Court and others including Jeffrey Sher, QC. Sometimes they were called, colloquially, the "Territorians". Needless to say, their arrival in the Northern Territory was not always well received. In his book *Lawyers in the Alice-*

*Aboriginals and Whitefellas' Law*, Jon Faine recorded interviews of some of the experiences those individuals. They acted for individuals who pleaded "not guilty" to serious offences. In some instances, it was the first occasion that a plea of "not guilty" had been entered in local living memory. Let me read to you what Justice Vincent described one time after he had travelled hundreds of miles along a dirt road to appear for some accused:

*"I stood up in the courtroom, announced that I appeared on behalf of all of the accused and today everybody was pleading "Not Guilty". I've never seen a more obvious look of horror on the face of any individual in my life as I observed on the magistrate that day."*

In the interviews those lawyers record the experiences of intimidation by the media and the threats to their safety and well being. They tell of learning not to mix as people were "always looking for fights and always trying to bait you...". They also tell of receiving threats. Nonetheless, those

lawyers, mostly later to become judges, were courageous individuals who were concerned to ensure the protection of the rights of individuals with respect to court proceedings, land rights and otherwise. They played a very important part in the administration of justice.

Recently, Chester Porter QC has published a book *The Conviction of the Innocent – How the Law Can Let Us Down*. It is full of stories such as Captain Dreyfus, OJ Simpson and other famous cases. The author tells the story of what has happened to individuals without the assistance of a competent lawyer or sometimes without the assistance of a lawyer at all.

The lecture this evening marks the contribution to jurisprudence by the Honourable Sir Anthony Mason, former Chief Justice of the High Court of Australia (and now a member of the Court of Final Appeal of Hong Kong). I have taken you through a journey of different lawyers' stories. My effort has been to prompt internal questioning: why be a

lawyer? The former Chief Justice was a leader of the High Court who made important contributions to the law. The contribution made by the Mason court to the right of political communication, the rights and interests of indigenous people, the fundamental rights of an accused person in a criminal trial, the application of international law to domestic law, administrative law and important decisions with respect to fiduciary obligations, promissory estoppel and unconscionable conduct will be well known to you. I mention these matters because sometimes courts are criticised where they develop and decide what is regarded as new law. The criticism labels the development as judicial activism. The labelling or branding of judicial deliberation and determination is unfortunate. Ultimately, a judge does not determine a conclusion and then set about reasoning to justify that conclusion. To do so would be disingenuous, dishonest and contrary to the judicial oath. In the context of a student lawyer conducting a personal inquiry, why be a lawyer,

inspiration is gained from viewing moments of powerful intellectual application by eminent jurists.

But let me raise this prospect with you – when a lawyer develops an argument that is novel and forges new legal territory, it requires not only ingenuity, creativity and intellectual rigour, but also courage. Usually the decision by a judge to adopt the new approach will be courageous and at times intimidating. Recently, the High Court of Australia in *Farah Constructions v Say-dee* was critical of an intermediate appellate court for purporting to “bite the bullet” in the context of unjust enrichment. It is sometimes forgotten that when judges write their judgments they do so with great care and consideration and respect for the judicial traditions that precede them. A judge will decide the case in accordance with careful reasoning; if it is erroneous reasoning it will be corrected by a higher court. One of the reasons why we have more than one judge sitting at the intermediate level and higher is that ultimately interpretation of the law and

development of the common law is a matter of legal opinion. So, it is very important that lawyers have an opinion reached within a framework of formal legal principles.

There are moments when as a lawyer, even as a judge, courage is called for in the face of trenchant criticism. Judges face that ordeal constantly with the scrutiny of their judgments and the criticism that is received from the media and the community generally through modern communications. However, lawyers, but in particular judges, are adjusting to that and becoming better communicators than historically had been the case. In this respect Sir Anthony Mason showed much vision and leadership opening up the courts to the media in order that the community could be better informed about the important processes and decisions of the courts. The community is far better educated and informed about what occurs in courts than was the case say 20 years ago. For that reason, it is not unusual to find politicians expressing views about judicial actions and

decisions and, on occasion, expressing dissatisfaction. This calls for courage and intellectual application by judges, particularly when they are unable to answer misconceived or ill-founded criticism. Recently at a federal level, there was a suggestion that a court or judicial officer might leak news of the issuing of a warrant in sensitive circumstances. Such criticism invokes uncertainty and reduces confidence in the judiciary. However, there is little that judges can do in the face of such comments, because ordinarily the courts go about their daily business and do not speak publicly. However, it is useful for young lawyers to be properly informed that judges of the Supreme Court of Victoria deal with applications for surveillance warrants on a very regular basis. Indeed, I have granted such warrants myself. As Chief Justice of the Supreme Court I have never received or heard of a complaint, concern, or lack of confidence in that process. The Supreme Court has dealt with those types of applications for decades and I am not aware of any reason why that practice should discontinue. Indeed, it is important that

young lawyers appreciate the importance of the role of the courts in exercising independent and careful consideration and scrutiny of conduct that places the rights of the individual citizen in question. But to return to the point, judges face criticism and must bear it with courage. It is part of the judicial burden.

Reflecting particularly upon the judicial role, a lot has been said recently about judicial appointments.

I would hope that as law students many of you would have an aspiration of judicial appointment. It is instructive to remember that once upon a time the most eminent jurists were law students just like those here this evening. Perhaps I might develop my theme, why be a lawyer, a little further and postulate the question, why be a judge?

First of all, it is the obvious extension of the lawyer's role in ensuring that the rule of law applies in our society. This concept, the rule of law, is not some remote constitutional theory recited in texts such as Dicey. One only has to read



the judgments of Sir Anthony Mason and Sir Gerard Brennan in *Giannarelli vs Wraith* where the paramount duty owed by the advocate to the court was articulated. Sometimes this principle is difficult for individual advocates and clients to understand. If a client is paying money then a client invariably expects that the ultimate duty owed by the advocate is to the client. However, not so. In order that justice prevails and the rule of law is protected, the paramount duty of the advocate must be to the court. As said in *Giannarelli*, the principle is fundamental to our society. If I might articulate in very simple terms, imagine a major sporting event if there was no umpire or referee who could enforce a decision. Chaos would prevail. Imagine a society where undemocratic processes prevail and there is no independent judiciary and court system. Sadly around the world, such societies exist. We are truly privileged to live in the society we enjoy here in Australia and the lawyers play a critical part in ensuring that privilege is continued.

I mentioned the judicial burden. As a lawyer, I believe the highest privilege is to have the opportunity to sit as a judge and decide cases. It is the greatest contribution that a lawyer can make to the community. It is critical to our justice system, therefore, that individuals of experience, wisdom and knowledge be appointed to our courts. I have spoken about this on other occasions, including the important burden that lies upon an Attorney General to make the best appointments. That position applies equally to all levels of the judiciary including tribunals. Let me demonstrate the point. In Victoria, we have a very significant tribunal, the Victorian Civil and Administrative Tribunal (VCAT). It hears over 90 000 cases a year and its jurisdictions are unlimited in important areas. Some of its major jurisdictions include planning, freedom of information, discrimination, and guardianship. Frequently, the government is a party. From the beginning of 2008 there will be a new area of law and I anticipate that VCAT will be one of the main jurisdictions where the new area will be agitated, namely, Human Rights. Under the *Human*

*Rights Charter and Responsibilities Act* the courts and tribunals of Victoria will have special responsibilities. Victoria will have the opportunity to lead the development of the national jurisprudence on human rights law. In light of the volume of litigation at the lower end of our courts and tribunals hierarchy, I expect that human rights issues will be important. They will come to rise in the context of cases where citizens' rights against other citizens and citizens' rights against the state will be tested. All the more important then to have lawyers participate in the process of protecting and enforcing rights and developing the jurisprudence therein. The Magistrates' Court and VCAT, being the lower jurisdictions, provide a wonderful opportunity for young lawyers to gain experience not just as instructing lawyers in a case but hopefully, the opportunity to be an advocate.

The head of VCAT is appointed from the bench of the Supreme Court. This is reflective of the importance that attaches to VCAT, its work and its volume of work. In all

likelihood for the individuals here tonight, VCAT is the jurisdiction where young lawyers are more likely to have immediate contact with our courts and tribunals hierarchy. I expect, therefore, that you may soon have the opportunity to conduct a case before the tribunal; to have it heard and determined by a judge of the highest court of the state with the commensurate knowledge, wisdom, experience and judicial skills that are the hallmark of a Supreme Court judge.

When the opportunity arises it will be exciting but frightening at the same time. So it might be said that in answering the question, why be a lawyer, it is because you wish to be challenged and intellectually taxed. It might be so but you will enjoy the stimulation and exhilaration of doing law, that is, applying law so as to assist others.

I hope through this excursion I have stimulated reflection on the other things that the law provides for you – the opportunity to learn ideas and things that are not available in

any other profession. It is a wonderful profession and I extend to each of you every encouragement in the journey that lies ahead.