REFLECTIONS FROM THE PRESIDENT

DICTUM EDITORS, TAHA KHAN, ASHLEIGH KEMP AND JULIA SWIFT PUT THE HON JUSTICE CHRISTOPHER MAXWELL, PRESIDENT, COURT OF APPEAL, SUPREME COURT OF VICTORIA, UNDER THE SPOTLIGHT

Dictum: What are the challenges faced by the Court of Appeal in the next 5 years?

President: I think the challenges we face are to continue to meet community expectations for both speedy dispute resolution and clarity of explanation of how we arrive at our decisions. We have made some real progress, I think, in the efficiency of how we do things, both on the civil side and recently on the criminal side, and I am pleased with the progress to date. We have seen a dramatic fall in the backlog of our criminal appeals in the last 15 months because of some major process reforms we have introduced. We now have to turn our attention to civil appeals.

Perhaps the most significant measure of success on that front is the timeframe from filing to disposal, and I think our biggest challenge is to reduce that time to something which meets community expectations. By that I mean for a sentence appeal 6-8 months, conviction appeal 8-10 months, and civil appeal about the same. We are still some way from achieving that.

It is an objective of every court to publish reasons that are no longer, and no more complicated, than is absolutely necessary to dispose of the case. Again, I think we are making good progress, as we are conscious ourselves that we need to try and write shorter judgments to get through the work faster. Also, the shorter the judgments are, the more accessible they are. We do publish summaries of judgments in major cases, and I think our communication with the community is enhanced when we do those summaries. At the moment we are not resourced sufficiently to be able to do those more regularly. We will need to work out ways in which we can better publicise summaries of judgments, particularly in relation to sentencing and the results of sentence appeals. Sentencing is a very important part of informing the community about the consequences of criminal behaviour and making general deterrence real rather than theoretical.

Dictum: What considerations do you take into account when you overturn the decisions of a lower court?

President: I will give a very conventional answer to that. The role of this Court is to conduct an appeal by way of re-hearing. Our role is to examine all of the issue(s) in the proceeding, with the benefit of the trial judge's findings, and to decide whether, on our assessment of the law and the facts, an error has been established. In doing so, we don't assume either that the decision is correct or that it is wrong. We just take it at face value and it is up to the party bringing the appeal to show that the result was affected by error in some way or another.

In the sentencing area, we approach the task slightly differently. It is of course necessary to show error but, because it is a discretionary exercise of power, we don't ask ourselves how we would have exercised the discretion. We apply the well-accepted tests from *House v The King*,[1] – that is to say: Was the discretion exercised according to law? Was an irrelevant consideration taken into account? Were the relevant considerations taken into account? Was the sentence outside the range reasonably open to the sentencing judge on the material? Unless one of those grounds is made out we don't interfere, even if we ourselves might have imposed a different sentence.

[1] (1936) 55 CLR 499, 505.

My own view is that the Court of Appeal should be slow to interfere where the sentencing judge has obviously considered the matter very carefully, has addressed all the considerations and come to a reasoned conclusion. The matter of sentencing is for trial judges, not appeal judges. Of course, we do intervene where necessary, but we exercise a kind of reserve power, as I would see it.

Dictum: Is there disparity between the expectations of the community and the sentences handed down in Victorian Courts?

President: Well, as I said in my speech last December,[2] there is an untold story here. Research shows that what Courts do *is* in line with community expectations. The Melbourne University study which I quoted[3] showed that, when cross-sections of community members from different occupations were given the information relevant to particular sentences, they almost never disagreed with what the sentencing judge had done. It concerns me that this is not the impression conveyed by some parts of the media, and I think it is important to public confidence that it be widely understood.

I think the notion of complying with community expectations really begs an important question, which is: How do you ascertain what community expectations are? There is a variety of views about how sentencing should be done, both generally and in particular cases of public interest, and no one view is more correct than another. The way in which the community's expectations are conveyed to the court is via Parliament's fixing of the maximum sentence. As we've said in a number of cases, the maximum is a measure of the seriousness with which the community views the offence in question.

The job for the judge in the case is to work out where in the scale of available penalties the particular offence fits, having regard to the sentencing parameters. The Court of Appeal in a number of cases has drawn attention to areas of sentencing where the guidance provided by the maximum sentence appears not to have been reflected in sentences being imposed. How sentencing practices should change is a matter which the Court of Appeal is actively engaged in investigating.

Dictum: The right to equal representation is hindered where a disadvantaged client has been turned away from Legal Aid based on their wish to plead 'not guilty'. What can be done to ensure that these clients can obtain legal representation while they maintain their innocence?

President: I think every judge in this Court, and in every trial court, would endorse the notion that there should be a properly funded legal aid system, so that any person with an arguable defence to a charge of any seriousness should be able to be represented to present that defence. I use the words 'arguable defence' deliberately. I don't myself think that public money should be expended on providing a defence in cases where, on proper assessment, there is no arguable defence. (I should add that I am aware of no instance where that has occurred.)

Inevitably there will be questions about how to allocate public money for criminal defence and, logically, you would fund those cases which had arguable defences above those that did not. Fortunately in Victoria and other States, we have an outstanding legal pro bono system so that, in cases where Legal Aid might have declined to fund a 'not guilty' plea as distinct from a 'guilty' plea, it is still possible that the defendant could obtain pro bono assistance to run the trial.

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2 'The Law's Untold Story', *The Age* (11 December 2011), (edited version of a speech by Justice Chris Maxwell, President, Court of Appeal, Supreme Court of Victoria, to the International Commission of Jurists Victoria Sentencing Forum).

3 Chris Maxwell, 'The Law's Untold Story', *The Sydney Morning Herald* (11 December 2011), available at <http://www.smh.com.au/opinion/the-laws-untold-story-20111210-1oorg.html>.

Our experience in the Court of Appeal is that there are almost no unrepresented criminal appellants. In almost every criminal appeal, the appellant has legal representation and the vast majority are funded by Legal Aid. Legal Aid regards criminal defence as of fundamental importance and, within the financial constraints under which they operate, they give it very high priority. Of course, it greatly assists the Court of Appeal that we have appellants represented, because it obviously means that the grounds they wish to put forward are better argued and therefore easier for us to understand and determine.

Dictum: In your welcome speech in 2005 you described the delays in the Court of Appeal as 'clearly unacceptable'.[4] In a 2006 address you outlined the impressive progress that had been made in reducing delays.[5] In 2012 is the Court of Appeal still facing the same issues of delay? If so, how do you think these can be further addressed?

President: I have really touched on this earlier. The answer is, yes we are. Despite our best efforts and despite an increase in the number of permanent judges of appeal from 10 to 12 over the last three years, we are still not able to dispose of cases as quickly as we'd like. As I mentioned before, there has been steady improvement, but now that we have reduced the backlog on the criminal side, we are looking to take the next step and significantly reduce the duration – that is, the time from application to finalisation – and we have got to continue to explore ways to do that.

The major reform we introduced at the start of 2011 was modelled on the approach taken in the criminal division of the English Court of Appeal. We now have a team of highly qualified criminal lawyers working in the Court of Appeal Registry whose responsibility it is to critically review the material filed for a criminal appeal, get it in proper shape, and then prepare a summary of the case and identify the issues. This means that, by the time the appeal papers get to the judges, a fair amount of the necessary preparatory work has already been done. For example, the summary I mentioned, which will then be agreed by the parties, is a great way of speeding things up, because it enables us to give judgment on the spot ('*ex tempore*'), rather than reserving it. Of course, that system requires a whole lot of work to be done by the Registry, in making sure that the grounds of appeal are in proper form, the appropriate transcripts have been organised, there is clear argumentation on both sides, and there is a proper summary. This means that the workload of the judge in dealing with the case is streamlined. Now we need to continue to enhance those procedures, and we need to be able to extend them to the civil side.

Dictum: What do you see as the major challenges to judicial independence in Australia?

President: I can only speak to my experience in Victoria. I hold no fears for judicial independence in Victoria. Successive governments – and I have been here since 2005 – have respected the independence of the judiciary unreservedly. There has not been a hint in the seven years I have been here of any change in that attitude. The fact that the Supreme Court has to be publicly accountable for efficient use of public money, and has to make a proper justification when seeking additional funding, seems to me to be both entirely appropriate and, from the point of view of judicial independence, completely irrelevant. There is no suggestion that one gets funding for deciding cases in a particular way. The concern of those who control public funds is that the justice system operates efficiently and that Victorian taxpayers can see that the system operates to put public funding to good use. We in this Court accept the discipline of public accountability without question, and without any sense that it has any effect on our independence.

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4 A New Approach to Civil Appeals, President Maxwell address to the Victorian Bar (2006) <http://www.austlii.edu.au/au/journals/VicJSchol/2006/13.pdf>

5 Justice Chris Maxwell, 'A New Approach to Civil Appeals' (Address to the Victorian Bar, Melbourne, 23 October 2006).

Dictum: Why is statutory interpretation so important to the law?

President: As wiser heads have commented in recent years, there is little left in legal practice or in adjudication that does not involve statutory interpretation to a greater or lesser extent. The days of pure common law questions or questions of pure equitable principle are not gone, but such questions are few and far between.

The vast majority of cases we hear in this Court raise issues of statutory interpretation. It is the most litigated area of law, apart from substantive criminal law, so it seems to me self-evident that practitioners and judges need to be skilled at statutory interpretation. As you probably know, the Chief Justice and I have been arguing since 2007 that law schools need to rethink the priority they give to statutory interpretation, and make sure that it is given the prominence that it deserves. Law schools are, after all, about training lawyers and, if lawyers need to be good at statutory interpretation, as I think they do, law schools need to make sure that students learn those skills.

The big challenge for Courts is to try and reduce the uncertainty which attends questions of statutory interpretation. Too often there are differences in views within one appeal court, or between levels of the court system, about the interpretation about a particular provision. It seems to me that what this Court said in *Momcilovic*[6] about the need for certainty of interpretation is crucially important. At present, I think, there is not enough certainty as to how you interpret a particular provision.

Dictum: Do you think the legal system is currently too isolated from the general public? Is there a need for more community input in the law?

President: I think community awareness of how the legal system works is not nearly as high as it should be. In a sense there is no solution to that because, unless you work in a particular field, you will never really understand it. Whether it is dentistry, or plumbing, or architecture, you can't hope to understand all the technicalities. On the other hand, the legal system is so important to so many people that we as a community should do better to help people understand what actually goes on.

I think that the practice, recently introduced, of having the sentencing remarks of judges broadcast has helped quite a bit, because it actually gives the listener a sense of what actually happened in court. I think community feedback about the performance of the court is also really important. After all, if the court is not serving the community adequately and there is dissatisfaction about how we go about it, there should be every opportunity for those concerns to be expressed and for us to respond to them. I don't think we have any good mechanisms for that, other than the general media, which of course provide a very important forum for discussion of those things.

As to whether we are 'out of touch' I don't think that is an accurate description. Judges live their lives in the community, going to supermarkets, taking their children to football, having discussions with friends and relations about the affairs of the world. No individual judge is in touch with the full cross-section of the Victorian community but then few Victorians are. The fact that the court is constituted by people with law degrees, who may not be representative of those in the community without law degrees, just reflects the nature of the task. It is a technical set of skills you need. As has always been the case, no individual judge is expected to understand or reflect the views of the entire community. But we do look to have a sufficient mixture of judges – a mixture of backgrounds, a mixture of experience – a blend that is sufficiently differentiated to make people feel that judges are like them.

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6 *R v Momcilovic* (2010) 25 VR 436, 463-4 [97]-[98]; *Momcilovic v The Queen* [2011] HCA 34.

Dictum: How do you relax and leave the pressures of the Court behind you?

President: Well, I run around the block three nights a week and I watch my children play sport.

Dictum: What is your favourite book and movie?

President: My favourite book is 'Eucalyptus' by Murray Bail. My favourite movie is ['I had better be careful here' laughs] 'Mutiny on the Bounty'.

Dictum: Do you have a favourite lawyer joke?

President: No. Even if I did I wouldn't tell you. [Laughs.] I think we have a hard enough time without telling jokes against ourselves.

Dictum: When you started studying law what were your aspirations?

President: I think at that stage I wanted to try and go into the diplomatic service but, as soon as I started actually practising as a lawyer, I realised that it was exactly what I wanted to do. That is why I think clinical education should get more prominence in the law curriculum than it does. I believe that, for many young people, law in the abstract is hard to get a grip on. Law in practice is exhilarating.

Dictum: If you could design the ideal law curriculum what would it include?

President: It would be much more like the old Articled Clerks course, where you were actually doing it by day and studying it by night. I think law is essentially a practical discipline. It is, of course, intellectually rigorous, and you need proper instruction in principles and doctrines but, in my experience, you learn those better, and you learn how to apply them properly, if you are at the same time engaging in the real work of solving legal problems.

Dictum: Is there one piece of advice that you would give to a young law student?

President: If, like me, you don't find the study of law grabs you particularly, stick with it, because the chances are you will find the practice of it really exciting and rewarding. It can be a launching pad for all sorts of careers, not just conventional legal practice but also law in the private sector, law in the public sector, law in administration. It is a great intellectual discipline to acquire, whatever you do with it.

Dictum: How can access to electronic materials aid the Court in speeding up process matters, and do you think that entirely electronic productivity is possible?

President: I think we can go a very long way towards pure electronic adjudication – certainly in an appeal court, where all the evidence is already in. We have already had experience conducting electronic appeals where the trial transcript, the appeal submissions, and the case law are all in electronic form. One of the challenges for courts is to maximise their use of those electronic capabilities.

Obviously, electronic research is a great timesaver, so I think that has sped up the work that judges do. I don't know that hearings are any faster because of things being available electronically, although it may save time not having to reach for the folder because everything is on screen. I don't have much experience with that yet but I can only assume it will continue to facilitate.

Concerns are sometimes expressed about there being so much material online that Courts get bombarded with authorities, but I have not particularly noticed that as a problem. I have noticed that people always put in a longer list of authorities than they end up needing, but that is a natural precaution.

Dictum: Do you think Australia in 2012 is a tolerant place?

President: I do. I think it is one of the strengths. I can only speak of Melbourne, but my experience is that it is a tolerant and welcoming place.

Dictum: What is one thing that most people do not know about you?

President: This is known to some people, but I did coach an under 13 boys football team to a premiership – South Melbourne Districts 2003.