

## Examining the Judge

Launch of Issue 40(2) UNSW Law Journal

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The scholarly law journals play an important role in the development of the law and the UNSW Law Journal has an honoured place among them. I am delighted to launch the forthcoming issue. Issue 40(2) has as its focus "the individual judge". That focus is essentially a tender one: to mention a few articles, Thornton and Roberts write about invisibilities in the private lives of women judges, Josev writes about the dearth of biographies of Australian judges and Partovi, Smyth, Zukerman and Valente write about joint judgments and the individual judges' loss of identity. At the risk of sounding churlish against this backdrop of concern, I suggest that we should not become preoccupied about the id of the individual judge.

Partovi and his colleagues have endeavoured to identify the principal author of 140 joint judgments delivered by the Mason Court by the use of a form of linguistic profiling. They quote a line from an article on judgment writing by Kiefel J in which her Honour referred, in the context of jointly authored judgments, to the individual judge's loss of identity<sup>1</sup>. The burden of her Honour's analysis was on the

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<sup>1</sup> Kiefel, "The Individual Judge", (2014) 88 *Australian Law Journal* 554 at 557.

desirability of a final appellate court speaking with fewer, rather than more, voices. Needless to say, there is no reason to think that there will be a departure from the collegial decision-making which characterised the French Court under the stewardship of Kiefel CJ. The same trend is evident in the decisions of the Supreme Court of the United Kingdom under the Presidency of Lord Neuberger. Issue 40(2) contains an interesting survey of Lord Sumption's judicial work. In this connection, I note Lord Sumption's pointed observation that "a judge may dissent or he may concur for different reasons. This can be personally satisfying. But it is not much of a service to the public"<sup>2</sup>.

The public service that is done by the delivery of joint reasons is the clear and certain statement of the law. Professional advisers can advise their clients with some confidence as to what the law is, and judges can decide cases with some confidence in the law that they are to apply. If the price of certainty and clarity is the loss of the individual judge's "voice", I suspect that few outside the Academy would count that a bad thing.

The results of the study by Partovi and his colleagues are introduced with Andrew Lo's statement that "[o]bscuring authorship removes the sense of judicial accountability, making it harder for

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<sup>2</sup> Sumption, "A Response" in Barber, Ekins and Yowell (eds), *Lord Sumption and the Limits of the Law*, (2016) 213 at 213.

experts and the public alike to understand how important issues were resolved and the reasoning that led to these decisions"<sup>3</sup>. With respect, this strikes me as peculiar obduracy on the part of the Academy: the names of all of the judges who subscribe to the judgment are set out above it and each judge accepts responsibility for all that appears under his or her name. To trespass on the language of management, the process is both transparent and accountable. And as for understanding how the important issues were resolved, the answer lies in the reasoned judgment.

The essence of the judicial function is the determination of a dispute by the making of a final order that binds the parties. The reasons in no small measure are designed to explain to the losing party why it lost. A set of reasons may go through several drafts before the judge, or judges, subscribing to them are satisfied with the result. The idea that successive drafts or memoranda passing between judges should be made publicly available might be thought antithetical to the function of finally quelling the controversy.

Partovi and his colleagues acknowledge Sir Anthony Mason's view, that judges have an institutional responsibility with respect to

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<sup>3</sup> Partovi et al, "Addressing 'Loss of Identity' in the Joint Judgment: Searching For 'The Individual Judge' in the Joint Judgments of the Mason Court", (2017) 40(2) *University of New South Wales Law Journal* 670 at 673, citing Lo, "A Judicial Whodunnit: Shedding Light on Unsigned Opinions", *Cognoscenti* (online), 30 July 2013.

judgment writing that outweighs self-expression<sup>4</sup>. Nonetheless, they go on to say that it is naïve to consider that judges have higher standards of collective responsibility than the broader community or to think that the motivations of judges differ from those of the community generally. I have no difficulty with either proposition. Nonetheless, to my mind their acceptance goes nowhere to explaining why we should encourage judges to be other than collegial in their decision-making.

In her article, Josev identifies a number of reasons for the relative paucity of biographies of Australian judges, the most convincing of which is that Australians are largely uninterested in reading about the lives of judges. This, I suggest, reflects well on the judiciary and, more broadly, on our constitutional arrangements. When Partovi and his colleagues assert that "many Australians would certainly sympathise with the underlying idea that there ought to be some visibility over who authors the decisions of the High Court"<sup>5</sup> I would caution to be careful what you wish for.

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<sup>4</sup> Partovi et al, "Addressing 'Loss of Identity' in the Joint Judgment: Searching For 'The Individual Judge' in the Joint Judgments of the Mason Court", (2017) 40(2) *University of New South Wales Law Journal* 670 at 674, citing Mason, "Reflections on the High Court: Its judges and judgments", (2013) 37 *Australian Bar Review* 102 at 110.

<sup>5</sup> Partovi et al, "Addressing 'Loss of Identity' in the Joint Judgment: Searching For 'The Individual Judge' in the Joint Judgments of the Mason Court", (2017) 40(2) *University of New South Wales Law Journal* 670 at 673.

In the recent United States Presidential election a significant percentage of voters identified the determinative consideration in their electoral choice as whether Mrs Clinton or Mr Trump would have the power to appoint the next Associate Justice to the Supreme Court of the United States. In one of the Presidential debates each candidate was asked about the qualities that she or he would wish to see in a Justice of the Supreme Court. Mrs Clinton said that she would look for a Justice who would uphold *Roe v Wade* and who would overrule *Citizens United* and Mr Trump made clear that his preference was for a judge who would be "pro-life" and pro the Second Amendment. The perception that some of the controversies that come before the Supreme Court of the United States are decided along political lines is one that no doubt the Court regrets, but it would seem to be a perception that is widely held and which extends to the federal judiciary generally.

Last Thursday, the *New York Times* reported the decision of the Fourth Circuit Court of Appeals in the revised travel ban case. By majority, the Court upheld the primary judge's ruling that the ban contravened the First Amendment's preclusion on the establishment of any religion. In its report the *New York Times*, a respected newspaper of record, stated "[t]he appeals court vote was 10 to 3

and divided along ideological lines, with the three Republican appointees in dissent"<sup>6</sup>.

The Justices of the Supreme Court of the United States are subject to a form of celebrity that would be disquieting to an Australian judge. For \$24 you can buy a Ruth Bader Ginsburg coffee mug featuring a rather grim portrait of her Honour under the words "I dissent". By contrast, few Australians outside the law schools are likely to be able to name the Chief Justice, let alone the puisne Justices of the High Court. It is, I trust, inconceivable that the outcome of an Australian election might turn on whether a Coalition or a Labor Government would be in a position to make the next appointment to the High Court.

It is undeniable that some decisions of the High Court have a significant impact on our society. The reason I suggest why the community is uninterested in the judges who make these decisions is because of an unstated acceptance that the decisions are made on legal merit and not on the political or ideological sympathies of the judge. In my experience, that acceptance is justified. As with so many things, it could not have been better illustrated than it was by Gleeson CJ in a speech made at the time of the High Court's Centenary. Gleeson CJ pointed out that, as at that time in his

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<sup>6</sup> Liptak, "Appeals Court Will Not Reinstate Trump's Revised Travel Ban", *New York Times*, 25 May 2017.

tenure as Chief Justice, the Court had only once divided along lines such that the Justices appointed by a Coalition Government were of one view and the Justices appointed by a Labor Government were of a different view<sup>7</sup>. The matter over which they were divided was hardly a matter of great political moment, it concerned the liability of a local government authority to a pedestrian who had slipped on an uneven pavement.

The declaratory theory of the common law has been dead for longer than I have been in practice. But to acknowledge that judges are involved in making law is not to accept that they have a free hand to mould the law according to their personal views. Lord Sumption is quoted as discouraging comparison between his lectures and his judgments stating "As a judge, I am not there to expound my own opinion. My job is to say what I think the law is. By comparison, in a public lecture, I am my own master."<sup>8</sup> The author of the article is somewhat dubious of the statement. I do not share the author's scepticism. Judges may differ in the application of common law principle or the canons of statutory construction in ways that reflect differing judicial philosophies, but each judge is

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<sup>7</sup> Gleeson, *The Centenary of the High Court: Lessons from History*, Australian Institute of Judicial Administration, Banco Court, Supreme Court of Victoria, 3 October 2003.

<sup>8</sup> Lee, "The Judicial Individuality of Lord Sumption", (2017) 40(2) *University of New South Wales Law Journal* 862 at 892, quoting Sumption, "A Response" in Barber, Ekins and Yowell (eds), *Lord Sumption and the Limits of the Law*, (2016) 213 at 213.

seeking faithfully to apply principle to the case in hand. Differences in the application of rules or principles tend to be within confined bounds. In practice, judges of widely differing backgrounds and philosophies hearing the same matter will commonly arrive at the same result. It would be troubling if it were otherwise.

Of course on occasions judges are called upon to decide novel questions involving matters of policy for which there is no clear rule or principle. *Cattanach v Melchior*<sup>9</sup> is the paradigm case: the High Court held by a narrow majority that the parents of a child born as the result of negligent advice about a sterilisation procedure were entitled to damages for the cost of raising the child. The arguments against the award of damages called in aid claims about society's values. The judges in the minority accepted those arguments, holding that the law should not countenance placing a value to the parent on the life of the child. The majority held that damages could be calculated without setting-off the value of the life of the child. In their joint reasons, McHugh and Gummow JJ observed that the coalminer, forced to retire because of injury, does not have his damages reduced because he finds himself free to sit in the sun each day and read his favourite newspaper<sup>10</sup>. Fortunately for the health of our system, cases which raise acute policy issues of this kind are relatively rare.

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<sup>9</sup> (2003) 215 CLR 1.

<sup>10</sup> *Cattanach v Melchior* (2003) 215 CLR 1 at 39 [90].



I cannot leave Issue 40(2) without some comment on the topic of feminist judgment writing. Hunter and Tyson report on the results of their study of the sentencing remarks of Betty King J of the Supreme Court of Victoria in an article titled "Justice Betty King: A Study of Feminist Judging in Action". The authors observe that King J may not identify as a feminist but they conclude that her remarks in domestic homicide and domestic violence cases are exemplars of feminist judging<sup>11</sup>. I do identify as a feminist. Nonetheless, I share with many women judges, including I rather suspect, King J, doubts about the claims of the feminist judging school. Of course proponents of that school are apt to counter by saying that women who have been appointed to the judiciary are almost inevitably captives of the patriarchy.

My views are shaped by my experience of nearly 20 years as a judge. I am now one of the oldest judges on our Court. When I was first appointed to the Supreme Court of New South Wales I was one of the younger judges. I have sat in the NSW Court of Criminal Appeal with male judges close to 20 years older than me – men with very different experiences of life and, perhaps, very different political views. But, to make the point again, in my experience the differences did not affect the approach to the resolution of the issues raised by the case in hand.

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<sup>11</sup> Hunter and Tyson, "Justice Betty King: A Study of Feminist Judging in Action", (2017) 40(2) *University of New South Wales Law Journal* 778 at 804-805.

King J is praised for taking domestic violence seriously, and for her compassion and openness to experiences removed from her own when dealing with issues involving Aboriginal women<sup>12</sup>. The quoted passages from her Honour's reasons for sentence display compassion and sensitivity. The tenor of the article is apt to assume that male judges are less likely to display these same qualities. At the risk of being dismissed as a captive of dominant paradigm, I would question that assumption. When I was first appointed to the Supreme Court, Wood J was the Chief Judge of the Common Law Division. By way of example, I recall that his Honour discharged a female defendant, who had fatally shot her husband after a long course of cruel abuse, on a bond. This was an unusually lenient disposition. With compassion economically expressed, Wood J said "she has suffered enough". And, Wood J was the author of the *Fernando* guidelines<sup>13</sup>, which have since been embraced by the High Court<sup>14</sup>. Their application requires sentencing courts to acknowledge the endemic presence of alcohol in some Aboriginal communities and, in Wood J's words<sup>15</sup>:

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<sup>12</sup> Hunter and Tyson, "Justice Betty King: A Study of Feminist Judging in Action", (2017) 40(2) *University of New South Wales Law Journal* 778 at 804.

<sup>13</sup> *R v Fernando* (1992) 76 A Crim R 58 at 62–63.

<sup>14</sup> *Bugmy v The Queen* (2013) 249 CLR 571.

<sup>15</sup> *R v Fernando* (1992) 76 A Crim R 58 at 62–63(E).

"[T]he grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects".

Sentencing courts today are more sensitive to the needs of victims of crime, and they have a better appreciation of domestic violence than I recall from my first days in practice. This change seems to me to reflect broader changes in society's attitudes, changes which very largely have been driven by feminist advocacy. My point is that the impact of these changes is evident in the way, regardless of their gender, judges approach the sentencing of offenders and the treatment of the victims of crime.

My caution about the concept of "feminist judging" tends to be reinforced by some of the analyses of *Monis v The Queen*<sup>16</sup>. Man Haron Monis was charged with a number of offences arising out of his admitted conduct in sending letters to the parents and relatives of soldiers killed on active duty in Afghanistan. The letters were critical of the involvement of the Australian military in the conflict and referred to the role of the deceased soldiers in derogatory and insulting terms. Section 471.12 of the *Criminal Code* (Cth) makes it an offence for a person to use a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive. Monis challenged the validity of the

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<sup>16</sup> (2013) 249 CLR 92.

provision arguing that to proscribe the use of a postal service to communicate objectively offensive material impermissibly burdened the implied freedom of communication on governmental and political matters for which our Constitution provides.

As Monis' challenge concerned the scope of an implied constitutional guarantee, all seven Justices usually would have sat to hear it. In the event, one of our number was about to retire and the Court was constituted by six Justices. Regrettably, we were evenly divided on the question. The three male Justices held that s 471.12 did impermissibly burden the implied freedom and the three female Justices determined that the burden was not "undue" and, for that reason, the enactment of the offence was within the legislative power of the Commonwealth Parliament. Suffice it to say that the arguments on each side of the question were finely balanced.

The scope of the implied freedom is a topic of considerable academic interest. In this case, interest in the decision had the added piquancy of a Court evenly divided on gender lines. This prompted a deal of academic comment including the publication of a book of essays devoted to it<sup>17</sup>. Professor Zifcak wrote an article on

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<sup>17</sup> Appleby and Dixon (eds), *The Critical Judgments Project: Re-reading Monis v The Queen*, (2016).

the case which was published in *The Australian*<sup>18</sup>. It was Professor Zifcak's thesis that the women Justices gave prominence to the fact that the offence concerns the receipt of offensive material in the home or workplace, which he characterised as the private domain. He referred to psychological studies which were said to provide persuasive evidence that male and female conceptions of justice differ. Men, Professor Zifcak said, tend to define justice in formal and contractual terms. By contrast, women, he said, are inclined to see it in contextual and relational terms in which the private sphere assumes greater significance. Professor Zifcak suggested that the split in *Monis* provides an "intriguing example" of the distinction between male and female conceptions of justice.

As I have noted elsewhere, Professor Zifcak's thesis may be weakened by a consideration of the history of the proceedings. It was an appeal by special leave from the unanimous decision of the New South Wales Court of Criminal Appeal, which had upheld the validity of s 471.12 upon a view that the provision did not infringe the implied guarantee. In circumstances in which the High Court was evenly divided the Court of Criminal Appeal's decision was affirmed<sup>19</sup>. That Court had been constituted in *Monis*' case by the

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<sup>18</sup> Zifcak, "Justices split on gender lines over tenor of cleric's letters", *The Australian*, 15 March 2013.

<sup>19</sup> *Judiciary Act* 1903 (Cth), s 23(2).

Chief Justice, the President of the Court of Appeal and the Chief Judge of Common Law, all of whom at the time were men. If Professor Zifcak's thesis is right, I can only marvel at the serendipity of three of the most senior male judges in New South Wales having been gifted with a female sense of justice.

On this uplifting note, it remains only to congratulate Zoe Graus, the editor and her editorial team for all their work. Editing a peer reviewed journal is an exacting task. They have succeeded in putting together a very readable and stimulating collection of papers placing judges under a microscope, which, as you may have gathered, we are inclined to resist to the death.