

KOORIE HERITAGE TRUST INC
DINNER, MELBOURNE, 15 NOVEMBER 1999
TO HONOUR THE MEMORY OF THE LATE A R CASTAN AM QC

RON CASTAN REMEMBERED

The Hon Justice Michael Kirby AC CMG*

LET WORLDS COMBINE

"Let these two worlds combine.
Yours and mine.
The door between us is not locked.
Just ajar"

We reach into poetry to express our thoughts about the life and work of Ron Castan. There is something in poetry and music - in their rhythms, rhymes and harmonies - which help us to transcend ordinary expression. So I reach for the poem of Jack Davis, an Australian Aboriginal poet¹. It is a poem written for the worlds of Aboriginal and non-Aboriginal Australians. But it applies equally to

* Justice of the High Court of Australia.

¹ J Davis, "Integration" in Lorraine Mafi-Williams (ed) *Spirit Song: A Collection of Aboriginal Poetry* (Omnibus Books, Sydney) 1993.

the worlds of Jews and Gentiles; men and women; Anglo-Celts and later migrants; gays and straights; old and young. The worlds which Ron Castan shared with all of us:

"There is no need for the mocking
Or the mocked to stand afar
With wounded pride
Or angry mind.
Or to build a wall to crouch and hide.
To cry or sneer behind.

...

Your world and mine
Is small.
The past is done.
Let us stand together,
Wide and tall
And God will smile upon us each
And all
And everyone."

I can remember the first time that I met Ron Castan. It was in Sydney in the 1980s. It was at a function organised by the Friends of the Hebrew University of Jerusalem, to which he was to devote much time. He was already a leading member of the legal profession of Victoria. He came to the Sydney dinner as the newly elected President of the Council for Civil Liberties. I think the organisers had expected only one of us to accept. But we both did. Each of us spoke about issues touching liberty.

As I watched Ron Castan make his address - with fire and passion combined in equal measure with intellect and feeling - I asked myself: who is this restless spirit? Who is this radical man so different from my Sydney stereotyped image of a Melbourne Silk -

with their envied rosettes and their studied politeness? I could see that I was in the presence of a man with a mission.

As I looked at Ron Castan he seemed to be a person on the fast track for appointment to the senior judiciary. When it was announced in late 1995 that Sir William Deane would be the next Governor-General, it could easily have happened that Ron Castan might have been appointed in his lace to the High Court of Australia. Justice Deane was, after all, a leading expositor on the Court of the law as it affected Aboriginal Australians. Ron Castan was the leading advocate in the well of the Court for Aboriginal reconciliation through law. So the call could readily have gone to him. But on 14 December 1995 the Federal Attorney-General telephoned me. History had another plan for Ron Castan.

Everyone in the law knows that the common law system shares its laurels between the judges and the advocates. It is advocates, as much as judges, who shape the destiny of the common law. By their imagination, learning, courage and forensic skills, advocates create the agenda and map the course of the greatest legal developments. Ron Castan was to be one of the most important of the cartographers. His legacy is indelible.

Before my arrival on the High Court, he had already made his mark in important cases such as *Salemi*², a decision in the field of migration and administrative law. In my time on the Court I saw him in many cases, large and small. He appeared in the *Levy Case*³ to advocate the extension of a constitutional immunity from legislation that would inhibit free speech and public debate. The last case in which he appeared before the Court was of quite a different character. It was the *Figgins Case*⁴ which concerned little more than the land law of the State of Victoria. It had climbed to the High Court through the decisions of an arbitrator, a single judge and the Victorian Court of Appeal. Ron Castan won that case. There was no real passion about it. It was just technical land law. It is important to understand this about him. He was a fine, skilful and knowledgeable lawyer. He had the talents to make the most technical questions come alive.

Yet the biggest contribution which Ron Castan made to the shape of Australia's law, on the brink of a new century, was in the great cases which restated the legal relationship between Australia and the Aboriginal and Torres Strait Islanders whose forebears were

² *Salemi v MacKellar [No 1]* (1976) 137 CLR 388; *Salemi v MacKellar [No 2]* (1977) 137 CLR 396.

³ *Levy v Victoria* (1997) 189 CLR 579.

⁴ *Figgins Holdings v SEAA Enterprises* (1999) 73 ALJR 720.

in this land before the settlers came. In two hundred years time, and more, they will still talk of *Mabo*⁵. There was no more radical design than that which Ron Castan conceived with his colleagues to rewrite 150 years of settled land law. It was a plan breathtaking in its boldness. It challenged fundamentals. It did so in an area traditionally resistant to change in every legal system - rights in land.

How easy it might have been for the Court to have taken a tiny step, a mere toehold towards a new legal principle. To have held that there was something special in the Murray Islands off the coast of Queensland. To have held out the hope that later, in a hundred years perhaps, a larger and wider principle would emerge in the manner of the common law - from precedent to precedent, as Tennyson said. But instead, the Court, beckoned by the advocacy of Ron Castan and those of like cause, rewrote the major premise. In a moment, 150 years of *terra nullius* was cast aside. A new chapter in the legal rights and national dignity of Australia's indigenous peoples was begun.

Mabo was decided before I joined the High Court. But soon after I arrived came a new test, equally important, in the *Wik Case*⁶.

⁵ *Mabo v Queensland* (1988) 166 CLR 186; *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1.

This was the case in which the idea written in *Mabo* was to be extended beyond theory into practice. This was the claim to push the *Mabo* principle into highly practical relevance in the vast areas of our continental country over which pastoral leases had been granted. Ron Castan helped to conceive the idea of *Wik* and to draft its pleadings. In the end he was not its advocate but his mind was present in the concept. The Court was narrowly divided and as is known, the *Wik* succeeded by the narrowest of margins: four Justices to three⁷. When in two hundred years lawyers and others in Australia talk of the critical turning points in our law, *Mabo* and *Wik* will surely be amongst them. And then they will talk of the advocates who conceived, supported, organised and achieved these successes, Ron Castan will be remembered.

He was, of course, always a slightly mischievous advocate. Years ago, when the practice of court dress in Australia began to change, the High Court laid down the rule that barristers appearing at its table should dress in the manner approved by the Court by which they were admitted. In his last case before the High Court, a message was sent to the Justices by Ron Castan. It was received moments before the hearing began. Could he please have permission to appear in Court without a wig? Somewhat

⁷ Toohey, Gaudron, Gummow and Kirby JJ; Brennan CJ, McHugh and Dawson JJ dissenting.

provocatively he added, "In the same manner as the Justices themselves". Ashen faced, we passed his note one to the other. One Justice, I will not reveal her identity, suggested that we could scarcely insist upon the wearing of a wig when we had abandoned it ourselves a decade earlier. As sometimes happens (you may have noticed) there was a difference of opinion amongst the Justices. There were dissenting voices. But the message went back: "If you wear the rosette, you wear the wig". As we sailed into Court, there was Ron Castan at the podium with rosette and wig firmly in place; and a large smile to greet the Justices.

THE LESSONS OF LIFE

As we reflect upon Ron Castan's remarkable career, we are bound to ask why he became the man and the advocate he was. Why did he not just take the highly profitable path of the commercial silk, with fat briefs packed with trust deeds and conveyances in vellum? What rescued Ron Castan from the life of elaborated debt recovery, which is what most of the biggest commercial cases really involve? A life such as his demands that we answer these questions for they are important for an understanding of the law as a profession:

- The first lessons he learned in life were from his parents. From his late father Mossie and his mother Annia, now in her nineteenth year. I am glad that she is present to hear the praise of her son and the love and respect which so many

held for him. The values which his parents, Russian Jewish immigrants, instilled in him lasted all his days. His forebears and those of his wife Nellie teach us the fearful losses which the world suffered in the Holocaust and the high moral obligation we have to prevent its repetition, whether in large and small ways. This the young Ron would have come to appreciate. These were lessons that endured.

- As a Jewish boy at the Carey Baptist Grammar School in Melbourne he learned what it was to be different. Each one of us is different. At school, I too found that I was different. A civilised life teaches that difference is the glory of the human species. As the mind of Ron Castan, schoolboy, was formed, it came to appreciate the richness to be absorbed from different cultures and different identities. Avidly he kept his mind open; and he did so to the end.
- In his professional life it was open-mindedness that helped him to take the leap of the intellect that was to prove so critical in the *Mabo Case*. In Lae in Papua-New Guinea in 1973, led by Bill Kearney QC, he took part in a claim by two groups of indigenous peoples against the Crown. They sought to assert their title to land in the districts of their ancestors. Lionel Murphy once told me that the greatest thoughts that ever occurred in the law happened by serendipity. They do not occur by the processes of logic. They do not emerge by linear reasoning. They spring into the mind from the most unusual

sources and at the most unexpected times. And let it be acknowledged