A CONVERSATION WITH THE HON CHIEF JUSTICE MARILYN WARREN AC

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VULJ: Thank you for taking the time to come and speak to us. I would like to begin by asking what were your aspirations for studying law, what attracted you to the profession initially, and when did you decide you wanted to pursue a career as a legal practitioner?

CJ: Well, it all happened in my last year at school. I always planned to be a teacher, but suddenly the arts degree admission requirements changed, and as I wasn't doing a language at that stage I had to find another course. One of my friends said to me, 'You should do law; you would be really good at that.' Suddenly a light bulb went off, and it was the right thing to do.

I had always been very involved at school in debating and public speaking, so the prospect of having a job, a career where you were paid to speak, sounded really good. From the very beginning that was my plan: to become a barrister, go into court and speak. When I started law, I hoped to work in criminal law because, of course, I had all those romantic ideas we acquire from watching TV: standing up, addressing the jury, turning the case around and having great success. It didn't quite turn out that way, but that was the original idea.

VULJ: What advice do you wish you'd been given as a first-year law student, and does that advice differ to the advice you'd give today to a first-year law student?

CJ: I would like to have been told more about how important it is to study hard, and to never underestimate the importance of preparation. I would also like to have had the context of the law explained much better than it was when I started. I went from Year 12 straight into law school. I did not find the transition of studying pure law subjects, such as torts and administrative law, easy. Property law and trust law were things that I didn't glide into. Some of my friends did. This involved a complete change of thinking and a different form of intellectual rigour, which I was not used to. I was also studying arts subjects, and I found it much easier to focus on history and English, which came to me easily. The whole intellectual process of problem-solving and analysis is quite different with legal reasoning, and that transition did not come to me easily; it took a long time, and when it came, it was wonderful. But for a long time, I found the law and studying it quite hard.

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VULJ: I think we can all sympathise with that. What are some of the common misconceptions people have of judges, and how has your perception of the judiciary changed since making the journey from law student to becoming a judge?

CJ: The misconceptions are obvious. If you ask a person, 'What does a judge look like', typically they would think of a man, probably an older man, and, more often than not, a grumpy old man. We're not like that: I'm not a man; I hope I'm not grumpy; I don't think I'm old. A lot of people have Rumpolean ideas; in some American programs, you still see judges portrayed that way.

When people think of a judge who is a woman, they often think of a very aggressive woman, like Judge Judy, and that's not what it's like at all. Judges are about pursuing the resolution of a case and reasoning their way through it, which is difficult. It's difficult for the parties and for counsel: everybody has to behave professionally and treat one another with respect and dignity.

The other misconception about judges in the community is that we are out of touch or not very human. However, all of us are mothers and fathers; we go to the football, we do the shopping, we do the very same things that other citizens do day in, day out. It's just that we have a very interesting job during the times that we're working.

VULJ: Do you think students are well prepared for practice by the traditional academic legal education we touched on earlier? What role do you see for practical training in the law, in particular the sorts of programs run by VU, such as the Supreme Court internship and County Court internship?

CJ: If I could start with the last question: any opportunity for a student's exposure to the courts and the workings of the law is highly desirable. It makes what you are doing relevant; it gives context. If you're studying torts and learning about principles, such as the duty of care, they are often quite removed from reality. If you go into a courtroom and you see an injured worker alleging duty of care and breach of that duty of care by someone, then suddenly all those legal principles resonate; you understand the context and the purpose. Internship programs are wonderful, as you can never underestimate the benefits of working with judges, and I think it is inspiring for young people to work up close with decision-makers and lawmakers.

In terms of preparation for legal practice, I do have reservations about modern online learning. I know that there are great demands on students these days because they have to earn an income, and lectures more often than not are recorded so that students can watch them at their own convenience, but there is nothing like the interactive experience of being asked a question and being compelled to articulate your response to the particular problem at hand.

Being a lawyer is about approaching a problem and reasoning your way through it. You may have to do that in writing, but most of the time you speak that reasoning, so the loss or decline of the interactive experience is worrying. What can be done about

it? A lot of pressure is placed on the Law Deans these days due to the increasing numbers of students and the need to provide accessible legal education. On the other hand, we need to find a balance. Seminars and tutorials, I think, are part of the solution. I have to say that I am sceptical about online interactive teaching, as I think students need to do things in the flesh.

I remember my first lecture at law school as part of a large group studying criminal law. We all had to sit in allocated seats before the lecturer, who was an eminent lecturer in criminal law and had written all the textbooks, walked in. He looked down at the seating plan and he said, 'Mr X, what advice would you give the Queen in *Dudley v Stephens*?' Everybody in the whole lecture hall was electrified in their seat and listening because we knew we could be asked next.

VULJ: In the past law has carried the unfortunate reputation of being a stuffy academic pursuit. Has this changed over the years, and what place is there in the profession for students who began their studies in vocational courses?

CJ: I don't think it's a stuffy profession at all. People often don't like lawyers because they tend to be associated with situations where people are in a lot of trouble. It's a bit like going to the dentist. A lot of people don't like going to the dentist, and as you only go to lawyers if you're in really difficult circumstances, that's part of the negativity.

I don't think lawyers are stuffy: certainly, legal thinking is different, and that in and of itself can lead people to think that we are. There's a lot of tradition, pomp and circumstance that underlines the law, much of which we forget about. The Supreme Court can be quite ceremonial, depending on the special circumstance – such as wearing robes and wigs. When the judge comes in, everybody stands; everybody sits when the judge says so. Formality is centralised around the judge. Law is not a committee-based resolution; it's not a matter of holding hands around a table with a social worker. It's actually a serious business. As a result of this seriousness and the court's formalities, people tend to think that we are stuffy. I don't think we are, and I actually think much of the stuffiness has gone out of the law. It's serious. That is understood by the community.

VULJ: There are increasing numbers of universities that are offering law degrees. Do the newer universities differ in their approach to teaching in your experience?

CJ: So far as I can gather, they do differ. I previously mentioned online learning, and there are some universities focussing on that. Indeed, I recently spoke to a professor from Queensland, and he described his campus as a cyber-campus, where everything is in the online cloud, and there is no physical contact with students.

Some of the universities offer a JD program, which involves a greater percentage of mature-age students or students who already have an undergraduate degree. They bring a particular maturity to the study of the JD. Then there are others who have

a burning passion to study the undergraduate law degree. They don't want to wait; they want to do this quickly as possible. It's highly desirable that we have courses that suit all kinds of people, because it is evident that people approach study differently. You asked me before about JD courses and how people cope with those programs. I think for the mature age student, the JD courses are a wonderful offering. The person who has just finished Year 12, however, should have the opportunity to achieve the law degree.

VULJ: What are some of the common mistakes junior practitioners make in court and in practice? Are there any areas you think should be given a greater focus by legal educators?

CJ: Every opportunity that a law student can have on their feet should be utilised. It doesn't matter if you make a fool of yourself, or if you feel uncomfortable or nervous. If you can get up on your feet and argue a case or present a submission, you get better at it each time. I think students should get involved with as much mooting as can be managed. I certainly encourage students to arrange their own informal meeting. Much can be done at lunch times and after hours, on weekends. The more speaking and preparation, the better the performance.

Some of the mistakes I have seen include not enough preparation, and therefore the junior practitioners are not on top of the brief. In addition to this, if a person is on top of their brief, some individuals make the mistake of assuming they have to tell the court everything. This depends on which court you are making an appearance in. If you are in an appellate court, the court will have read the papers. A barrister does not need to start telling the court all the facts and grounds of appeal. The judges already know that.

A practitioner is more likely to persuade a forum if the individual starts out by saying, for example, 'There are three issues at stake in this appeal. They are: one, explain; two, explain; and three, explain. I will now address those three principles, leading to the conclusion that grounds one, four and six should be allowed.' The judges then make a note; some type up the introduction. The judges are now focused, and they understand where they're going to be taken. Furthermore, this removes any kind of uncertainty; it enables the court to focus on the case in terms of how you, the lawyer, want to run it, which is very important.

VULJ: A study claims that, since 1993, more than 50 per cent of law students on a national basis are female. There is a body of evidence that suggests that women are under-represented in many areas of the legal profession. Is there enough being done to remove barriers to advance women in the profession?

CJ: The numbers now are coming through as even higher than 50 per cent. I sit on admission ceremonies most months, and near to 70 per cent of the applicants being admitted are women. But, further along when we go into court, the judges and I are not seeing women proportionately represented as either the instructing lawyers or as counsel appearing in cases. There may be a greater proportion in the lower courts, such as the Magistrates' Court, and also at the Victorian Civil and Administrative Tribunal, but in the County Court, and certainly in the Supreme Court, we're not seeing the numbers.

How do we solve this? It's not easy. Women have to do a lot themselves. They can do things individually and in small groups, but also in larger collective groups and professional associations such as the Victorian Women Lawyers, Victorian Barristers Association, and the Australian Women Lawyers. These groups allow women to network and maximise opportunities to get a part in a case. The bar is endeavouring to make change by raising the level of awareness for the lack of female representation in the bigger briefs. One way this can be done is for the more senior barristers to request a woman barrister as their junior in cases. There is no quick fix to this. I do think there needs to be an increasing consciousness of the problem. It is absurd to think that we have numbers reaching close on 70 per cent without a corresponding level of representation.

VULJ: What do you see as some of the emerging trends in the profession and the practice of law, and how do you think the role of lawyers will have changed in 20 years?

CJ: Technology. We're sitting now in one of our e-courts; this court was built six years ago, and already its technology has been overtaken by a new court room, which has been built where the Kilmore East bushfires trial is being conducted. The biggest trend will be towards technology, technology, technology.

We will, I believe in the next five years, move to the paper-free courtroom. Judges try to achieve that, but there is a great deal of resistance from lawyers who want to bring paper, folders and trolleys into court, so technology will be a big thing. Use of technology in terms of preparing cases for court, assisting the judge, preparing witnesses, cross-examining witnesses and the collection of facts will be quite a phenomenal change.

In commercial cases in particular, we have to find a solution to better manage discovery. We all thought that technology would provide the solution. It hasn't. What has largely happened is that it's gone the other way, and we find there is more paper and more documentation being put into cases without closer careful scrutiny of its relevance. So discovery is something that has to be changed. I think we will find that the courts will reduce the opportunities for unlimited discovery in trials.

We will continue to see more intensive judicial intervention and management of cases. The cost of justice is enormous. We're fast approaching a situation where only two classes of people will be able to access justice in this state: the very rich who can afford the lawyers, and the very poor who have access to legal aid. But even then, with

current legal-aid budget cuts, it will only apply in criminal cases. We have to be very careful about what is happening in the middle. In terms of growth areas and growth jurisdictions, we're seeing in this court an increase in class actions, environmental law cases and human rights cases. These are three particular areas to watch.

VULJ: What impact will the rise of social media have on the legal sector, and do you think its uses carry positive or negative ramifications?

CJ: Well, it all depends. People these days communicate through social media without thinking where their communications will end up; we already start to see in cases not just emails but Twitter, blogs and Facebook – all of those social media opportunities where people often say things without thinking about the consequences.

People may, in a moment of anger, passion or just general carelessness, put things into print; once it goes off into cyberspace, it can't be controlled or pulled back. We will see the impact of social media in terms of evidence being given and the capacity to cross-examine individuals as to their past, point out inconsistencies in statements and attack their character. In commercial cases, we see people saying things in the flurry of a commercial transaction that may well become the smoking gun in a case of breach of contract, misleading and deceptive conduct, or some other commercial dispute.

Consciousness and awareness of what is being said on social media is something that requires great care and sensitivity. It has the potential to be an excellent tool, but it does have attached risks.

VULJ: A recent survey conducted in the United States revealed that 46% of 623 judges use social media. Is there a place for judges on social media, and, if there is, what type of ethical issues are involved?

CJ: Judges have to be very careful. We are not Judge Judy; we should not be a judge with a prominent public personality. We should, in effect so far as we can, be a faceless, largely anonymous individual.

We are the personification of justice, but that personification should not be overreached or dominated by our own personality. Social media on a private basis can be done, but, in my view, a judge would have to be very careful. Social media can be used by the courts and judges in a positive way to communicate to the community about law developments and high profile cases of public interest. However, this needs to be done in a way where it is not dominated by the personality of the judge. So, for example, we use Twitter in the Supreme Court, but we do not do it in a controversial way. We do not promote ourselves; we just use Twitter to inform the public of important events, such as a particular decision or the appointment of a new judge.

VULJ: Currently the accreditation for mediation is not mandatory. With the growth of mediation, is it now appropriate to require mediators to be properly accredited?

CJ: It's not a bad idea. There are people I know who are brilliant mediators - I've seen their work first hand - and they are not accredited. Then there are people who are accredited but are not particularly good mediators. The accreditation doesn't really help them. So far as the individual member of the public paying money to the lawyer for a mediator, there's a reasonable expectation that the person knows what they're doing is qualified. The trick is, for those doing the accreditation, to make sure that the mediators are of an appropriate standard.

Accreditation is important for the reason that very few cases, these days, end up at trial, indeed even on appeal. Only a small percentage, three or four per cent, of cases come into the court; most of the cases are resolved through mediation or some other alternative form of dispute resolution.

VULJ: Do you think there should mandatory mediation across a broader range of areas within the law?

CJ: Well, I'm not sure what you mean by broader areas, but certainly in this court, virtually no case goes to trial without at least one round of mediation, and sometimes a number of mediations. We also, in most appeals, require the parties to submit to a mediation before their appeal will be heard. This is in the civil jurisdiction, of course. ADR has not been looked at in Victoria for the purpose of the criminal law. The criminal jurisdiction could look at mediation in terms of discussions between the prosecution and the accused person to see whether there are opportunities to reduce the length of the case, even to reach a conclusion as to a negotiated plea. This now happens informally in the criminal jurisdiction, but I have often wondered if the process would be more effective if there were more formality and structure attached to mediation, rather than a quick chat over the phone or an informal meeting.

VULJ: Lawyers are increasingly expected to participate in mediation and other forms of dispute mediation. In your opinion, will other forms of dispute resolution grow?

CJ: Absolutely. As I said, virtually no case goes to trial, or indeed appeal, in the civil area without having been through mediation. We also have looked at some other forms of ADR: a non-binding legal opinion is one; use of a judge-appointed judicial referee in complex technical cases is another. Judges, these days, are looking for every technique they can possibly utilise to reduce the duration of the case.

VULJ: Should legal educators change the curriculum to ensure that these forms of dispute resolution are a more important part of law degrees?

CJ: It would be a very good idea. I can give you the example of the current Kilmore East bushfire trial. The experts are being called in, and giving evidence in, groups. This will be quite a challenge to barristers who have not done this before, who now have to lead questions from a group of witnesses rather than focus on the single witness. Also, cross-examining a crowd will be a challenge for any advocate. However, they're the kind of modern techniques that need to be developed. What will happen is that the judge – in some cases the jury, but more often than not just the judge will have to listen to the experts, so the judge will probably become more interventionist and endeavour to extract from the witnesses, plural, the reason or the evidence that underlies the particular outcome that has been pursued.

VULJ: There has been an increase legal services outsourcing from Australian law firms. What are some of the impacts this may have on Australian lawyers?

CJ: I've not seen it myself first-hand; however, there are obvious impacts on Australian lawyers. If, for example, discovery is outsourced and sent offshore, the legal profession and the judiciary need to be satisfied that those doing the work understand the legal principles and go about the task the way it would have been attacked in the local jurisdiction. Assurance of quality itself is a challenge. There needs to be certainty about that because the lawyers will ultimately rely upon the individuals who perform the task offshore. Determining what measures need to be in place to ensure quality, accuracy and ethical compliance with the standards that apply in this state is one of the challenges.

VULJ: Is there a concern that the outsourcing to overseas countries will compromise the integrity of the profession within Australia itself?

CJ: This is something that will need to be addressed to ensure that ethical standards are met. I can't answer by saying that a particular country has unethical standards. The individual who is outsourcing needs to satisfy themselves that the work is being done in accordance with Victorian and Australian standards. How they do that is a challenge for them, but is also yet to be the subject of any other guidelines or regulatory prevention provision.