

Conferral of Degree of Doctor of Laws honoris causa: speech to graduands

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Thanks to my wife Jan Bailey and our daughters Alissa and Eleanor who have always supported me and tolerate my sometimes excessive work ethic. Success depends upon help from others. Thanks to those who brought my work to the attention of Council and all the members of Council who thought me worthy of this prestigious award.

My journey in law has been to improve the way that courts do their work. What is their work?

Courts manage power so that it is not abused. The powerful in a community want conflict resolved so that their wealth and power is not put at risk. To do that you need to prevent conflicts escalating by resolving them consistently and fairly and that will only happen if you have independent courts that apply established principles. A Rule of Law. One of the earliest is in the Louvre in Paris – the Babylonian King Hammurabi's code from 1750 BC is carved into a stone column. He had independent courts administering a rule of law nearly 4000 years ago. The Rules of Law need to evolve to suit their society. Justinian codified the laws of the Roman Empire which were administered by Magistrates and this Roman law is the foundation of much of European Law. When Henry II consolidated the Norman conquest of Anglo-Saxon England he imposed his authority through judges who went out on circuits, or assize, throughout the kingdom, summonsed the locals who formed a jury and dispensed justice behind a large log or bar. They compared decisions so that they were consistent. Thus was the common law system of judge made law born, with juries and barristers who were summonsed to appear at the bar.

Kings and more recent leaders of executive government often forget the wisdom of leaving conflict resolution to the independent courts and interfere, ignoring people's rights. King John did this and his Barons rebelled and their complaints were resolved by the King binding himself to the Great Charter, the first code of basic human rights. Magna Carta states that:

“No free man shall seized or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals by the law of the land. To no-one will we sell, to no-one deny or delay right or justice.”

King John bound himself to the Rule of Law administered by an independent court system.

Tyrants in government try to manipulate independent courts by appointing compliant rather than independently minded judges. This was very evident during the great

upheavals of the Parliamentary revolution and then the Restoration in England. Partisan judges such as the notorious Lord Chancellor 'Hanging Judge' Jeffries sentenced some two hundred people to death in a judicial reprisal on behalf of James II after the Monmouth rebellion. These injustices led to the right to have legal representation at trial. This same protections of strong legal representation became part of our mainstream legal system after excessive law and order campaigns through reward statutes led to many innocent people being gaoled and hung. A lawyer controlled adversary process with the judge as a mute referee became the norm by the 1700s. The adversary process protects the party who can afford an expensive lawyer against unfair prosecution and marginalises the effect of the judge. But the very guarantees of fair process that protect the rule of law sometimes have been so exploited by lawyers that they deny access to justice because of expense and delay. Dickens was complaining of this in *Bleak House* and 'Access to Justice' has been ineffective title of many reports during my career in the law.

A result of the adversary process can be that wealth can buy a better lawyer and a better result. That is why the best barristers can charge so much. Truth is often a casualty of adversary battles especially when our approach is to pick over what happened several years ago and reduce all our remedies to the application of what is sometimes wryly called the green poultice that heals all injuries: money. But money does not heal all wounds. What it does do is provide incentives to lie: plaintiffs to exaggerate and defendants to minimise. Our processes do not bring people together, they drive them further apart. We would do better to try to understand and address the present problems of our litigants rather than reducing everything to a money making exercise.

Having said that I am pleased to report that much has improved in the courts system since I was an eager young graduate like you all.

In civil disputes Courts have wrestled control of civil litigation from lawyers and provide predictable cost scales. A vibrant mediation industry has grown up, encouraged by courts, to assist parties to regain control over their disputes and manage their conflict sensibly themselves. Rather than mediation being Alternative Dispute Resolution we are rapidly moving to a profession of conflict managers where court determination is a last resort, now the alternative itself to main stream dispute resolution.

When I started the practice of the law victims of crime were marginalised witnesses who often felt they were the ones on trial. Now they are respected and consulted through the process and victim offender conferencing is more common. We have adopted more sophisticated approaches to sentencing. We have specialist courts to address mental health, drug, family violence and gambling issues and we engage with communities especially in the Nunga Court so that Aboriginals do not see themselves as marginalised but instead respected and integrated into our community rule of law. We are learning that many antisocial people have been traumatised by their

upbringing (sometimes by State care) and are relatively immune to punishment. Punishment does not generally improve people. Often encouragement and patience does.

But the Rule of Law cannot just be imposed. It depends on each of us understanding and taking responsibility for the problems in society. We cannot trust our politicians and media to do this for us. Some politicians denigrate our courts and lawyers. This undermines the Rule of Law by diminishing community respect for it. They diminish the effectiveness of our courts by underfunding them. They still try to manipulate courts by appointing judges on the basis of favouritism not merit. This is dangerous.

The mainstream media are declining and seek to remain relevant by making us fearful. Politicians and media feed off each other in a short term media cycle. Law and order and tough on crime are often used as a diversion from the real issues facing society despite crime rates being low. There were 421 homicides in Australia last year, a five year low¹. Only a handful of homicides are biekie related and they usually kill each other, not strangers. Terrorists only kill a few of us. Nearly all the conflict you will face in your lives will be from people you know. 40% of murders are by men killing their partners. It is not the 'others' that the media and politicians like to demonise that are the main causes of problems in our society. It is us. To have a better society each of us has to learn to better manage conflict ourselves so that we minimise the need for courts.

Education is key to understanding the problems we face and the best solutions to them. It give access to knowledge and the skills to be sensibly sceptical and to analyse information effectively. We should all use these skills to live sustainably. By that I mean to leave our place in a better condition than it is now. As part of that we should treat each other respectfully and learn how to resolve conflict not escalate it.

Your graduation is recognition that you have developed your minds to a high level. Use these tools of intellect you have been given to leave your part of the world a better place than it is now.

¹ ABS: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2014~Main%20Features~Homicide%20and%20Related%20Offences~9> (accessed 17 December 2015)