

**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Friday 19 December 2008

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE VIRGINIA BELL
UPON THE OCCASION OF HER RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **SPIGELMAN CJ:** It is singularly fortunate in any personal journey to meet someone who simply lights up your life. Virginia Bell is such a person. You have done it for me and I am quite confident in saying that you have done it for every other member of this Court.

- 2 I wish at the outset to acknowledge on behalf of us all what a wonderful companion you have been. Not least because of your influence on all of us over the last nine years, the sense of collegiality to which you have made such an important contribution will endure. It may well be the case that where you are going the need for companionship is greater than ours. We are content to make that sacrifice.

- 3 Your contribution in this respect was to a substantial degree determined by your personality – your equable temperament, your interest in people, your broad range of interests, your penetrating intelligence, your wit and your wisdom.

- 4 You have long been the preferred commentator at all those collegial events such as dinners and celebratory occasions by which the members of any institution strengthen their bonds with each other. Your command of the language manifest on those occasions was as mellifluous as it was

concise. The penetrating insights and the wit with which you always addressed us was characterised by a generosity of spirit. Your wit is never demeaning of others, it contains no needle, no undertones, no standing on dignity. It is, as one poet put it, “mirth that has no bitter springs”.¹

5 All the personal qualities to which I have referred were reflected in your judicial work where you manifested the generosity and fairness of someone who knows her roots and who is confident in her intellectual capacity. Your conduct in court was unfailingly polite. You brought to your work a high level of social consciousness, compassion for the unfortunate and a strong sense of justice, whilst recognising that those instincts could only be properly expressed within the bounds of fidelity to the law. If there was one word I would use to describe your approach it is “balanced”. Furthermore, your judgments reflect an exquisite ability to cut incisively to the real point in issue. And you do it every time.

6 Over eight years as a trial judge and one year as a judge of appeal you have been involved in some of the most difficult cases which have come before the Court. The competence with which you have disposed of all of these cases is admired by all of your colleagues.

7 One case that comes to mind took the best part of a year in the high security court at the Downing Centre. It involved multiple murders in a family dispute, with four co-accused tried together. Few judges could have done this successfully.² This was only one of numerous criminal trials that you conducted to universal acclaim.

8 Your Honour also delivered landmark judgments on such matters as the validity of an indictment not signed by a Crown Prosecutor;³ on the failure to pay group tax deductions as defrauding the Commonwealth;⁴ the pioneering judgment on the application of the new system for detaining serious sex offenders after their sentence had been served;⁵ and the

applicability of the privilege against self-incrimination in the Coroners Court.⁶

- 9 Perhaps the judgment that stands out for me, and which has been relied upon in every subsequent case in the field, is your exposition of the structure of the Commonwealth Criminal Code. You accurately converted into a format capable of use, and even into a format capable of explanation to a jury, the convoluted circularity and cascading definitions of the criminal responsibility provisions of that Code, which deploy words in a manner hitherto unknown in the history of the English language. Subject to those provisions being amended, we will be forever in your debt in this respect.⁷
- 10 Your Honour also delivered important judgments in civil matters such as a medical negligence case where a doctor had not informed a woman that her husband had AIDS.⁸ And, in a fine example of the common law adapting to contemporary circumstances, your Honour held that it was not defamatory in this day and age to accuse a person of engaging in homosexual intercourse.⁹
- 11 As a trial judge and in the Court of Appeal your Honour became involved in the full range of this court's jurisdiction, particularly at common law. To the depth and intensity of your experience in criminal law as a practitioner, your years as a judge added breadth to your legal knowledge.
- 12 I was aware at the time of your elevation to the Court of Appeal, reinforced at the time of the announcement of your elevation to the High Court, that you are acutely conscious of the fact that your legal experience has primarily been in criminal law. Let me assure you that this is not a weakness but a strength, as the Commonwealth Attorney-General emphasised when announcing your appointment.

- 13 Every judge of this Court and, I have reason to believe, every judge in other Australian jurisdictions, who sits in criminal trials or on a Court of Criminal Appeal welcomes the appointment to the High Court of someone with your criminal trial experience and expertise.
- 14 One of the most significant developments in the Bar over recent decades has been the increased specialisation of legal practice, particularly in the field of crime where practitioners these days generally either do none, or do nothing else. The days of generalist practice, when most senior members of the Bar did a significant amount of criminal trial work, are gone.
- 15 If the High Court is to have judges with real experience of criminal trials then contemporary appointees will all have a background that is significantly specialised in that field. I assure you that your Honour's appointment is welcomed for this reason.
- 16 Your Honour had a unique Sydney upbringing. During your childhood years your naval officer father served as the General Manager at Garden Island. Your family lived in a house on the base. You and your brother were the only children on the island and had a unique, in the strict sense, Sydney Harbour frontage experience of exploring the rocks and waters with which you were surrounded.
- 17 As the only girl on the island you acquired some of the popularity of *The Daughter of the Regiment* and, as with Marie in Donizetti's Opera of that name, it has transpired that you are of aristocratic blood.
- 18 It is, therefore, appropriate for me to conclude with two lines from the most famous aria of that Opera, an aria which has been called the "Mount Everest" for tenors as it features nine high C's. I do not propose to sing the lines.

Ah! mes amis, quel jour de fête?

Ah! my friends, what a day of celebration?

In view of our prospective relationship it is also appropriate to mention the next line.

Je vais marcher sous vos drapeaux.

I shall march under your flags.

19 So be it.

20 **Mr M G SEXTON SC SOLICITOR GENERAL FOR NEW SOUTH WALES:** If the court pleases. On behalf of the Government of New South Wales and the Bar of New South Wales, I offer your Honour Justice Bell the warmest congratulations on your appointment to the nation's highest court.

21 The long journey to Canberra began in March of 1951 with your Honour's birth in Sydney. Your Honour was educated at Sydney Church of England Girls' Grammar School and then at the Law School of the University of Sydney from which your Honour graduated in 1976. Your Honour was initially admitted as a solicitor and practised at the Redfern Legal Centre which had only then been recently established. Your Honour practised there for six years in a variety of fields including tenancy law, criminal law and credit law. During this time your Honour was one of those who established the Prisoners' Legal Service, together with Justice Basten. It was reported that one of your clients under this scheme was Mr Christopher Flannery who, when not in prison, practised as a killer for hire, although he later himself succumbed to the dangers of this industry.

22 In late 1984, your Honour was admitted to the Bar where you read with Dean Letcher. Between 1986 and 1989, your Honour practised as a Public Defender before returning again to the private Bar. The heart of

your Honour's practice was criminal law but you also appeared frequently in disciplinary proceedings and in anti-discrimination proceedings. From 1994 to 1997, your Honour was one of the counsel assisting the Royal Commission into the New South Wales Police Service that was conducted by Justice Wood.

- 23 Your Honour took silk in November 1977. In 1999 your Honour was appointed to the Supreme Court and in 2008 your Honour became a Judge of Appeal. During your Honour's time on the Supreme Court, your Honour was a member of the council of the Australasian Institute of Judicial Administration and over the period 2007/2008 your Honour was the President of this body. Your Honour is still the chair of the Advisory Committee of the Law Faculty of the University of Wollongong.
- 24 Much has been made, perhaps too much, of your Honour's early theatrical career. On this subject, however, it is reported in Justinian and now perhaps in the Herald as well that your Honour remains the artistic director of the Glebe Supper Club. It is also reported that on your Honour's 50th birthday you were carried into the celebrations on a sedan chair by Nubian slaves, presumably not the real thing even in Glebe, where a chorus of persons dressed as cans of Sirena tuna sang "I'm in the Mornay" in reference to your Honour's favourite dish. The choice of brand is of course significant. As aficionados of canned tuna will know, Sirena is far and away the best brand available.
- 25 It was in this spirit of the demimonde that your Honour spent a year in the 1980s as the presenter of the program 'Late Night Live' on ABC Radio National. I assume that your Honour was not as loquacious as the program's long time presenter, Mr Phillip Adams. I was once interviewed on the program by Mr Adams and I can say that I did not get a word in.
- 26 Your Honour will be sworn in as a Justice of the High Court for the new term on 3 February 2009. Your Honour will then take your place as one of the seven grand inquisitors in Canberra. It was, I think, your predecessor

Justice Kirby who said that argument in the High Court consisted of questions by the judges with occasional interruptions from counsel.

- 27 Your Honour will bring to the High Court, as your Honour brought to the Court of Appeal, many years of experience as a trial lawyer. This is always an important element in the composition of appellate tribunals, because trial lawyers have a particular appreciation of the vagaries of a trial and why its results should not be easily overturned in the absence of a real miscarriage of justice.
- 28 Your Honour's record since the time of your admission to practice has been almost entirely one of public service. You now face a further and even more demanding contribution to the Australian community. The government of New South Wales and the Bar of New South Wales wish your Honour many productive years in this new and well deserved phase of your Honour's career. If the court pleases.
- 29 **MR H MACKEN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:**
May it please the court. Whilst you are leaving this court is, at first blush, a very sad occasion, this is in fact a wonderful day, a red letter day for the profession, for women, for the State of New South Wales and indeed for Australia. The solicitors of New South Wales are very, very pleased that you leave this court in such circumstances.
- 30 In regard to your forthcoming appointment to the High Court, if anyone has the capacity to take on the position of such power, privilege and prestige with the level of awareness, understanding and enthusiasm necessary to fulfil this duty, it is your Honour. Whether this new role calls for any reining in of your Honour's theatrical bent or your humour and wit for which you are renowned, remains to be seen. I hope not and I doubt if it will.
- 31 While your Honour has dallied in journalism and theatre sports and would have excelled in both these worthy pursuits, your heart and soul obviously lay firmly with the law and all that can be achieved through it. That is not

to say these considerable attributes have not come into play from time to time during your legal career, where you have successfully harnessed both your radical sympathies and conservative values to deliver justice in accordance with the law. That could equally be conservative sympathies and radical values. However, not all of your pursuits have proved so successful. One long-time friend who shall remain nameless so that he or she can continue to be considered a friend, described your Honour as an appalling cook. As mentioned earlier, your one and only claim to fame in the culinary department is the dish tuna mornay. On the other hand, it can be said that you are a great consumer of what others dish up. Some of them are here today.

32 As the daughter of a naval captain your Honour moved around, attending schools in Sydney, Brisbane and London. The bulk of your schooling was at SCEGGS in Darlinghurst where academically you excelled. However, adherence to the school motto 'Let your light shine' was sadly missing when it came to your sporting prowess. As Margaret Hole noted in your swearing in ceremony in this court in 1999, Thursday afternoon sport was to be avoided at all cost. Your Honour, with you in sport, the light was out. On the dinner circuit your Honour was far more engaging. Some of your famous or infamous speeches involved discovering and then exploding traditions which your Honour felt needed addressing. These included the lift rule at Wentworth Chambers where you mourned the advent of women to the bar for muddying the waters in terms of the strict order of seniority in which counsel entered and left the building.

33 David Marr, Sydney Morning Herald feature writer, describes your Honour as loyal, wonderful, wise and a demanding friend but a living disappointment to your journalistic friends for your failure to reveal information and so dubbed you 'Madam Oyster Mouth'. A client said to me once "if you keep my secrets, I'll keep yours". He said that your Honour's trademark in both public and private life is your ability to deliver a unique combination of severity and good humour, someone who observes the rules and maintains her strong roots to fundamental values. To this day,

David says he still does not know whether you were joking when you tried to dissuade him from writing the biography of the late Sir Garfield Barwick in the 1970s in favour of the retailer, Joyce Mayne.

- 34 New South Wales public defender, Andrew Hasler SC, was quoted this week in The Australian as saying “In every generation there is a barrister about whom judges say if I murder my wife or husband I want them to represent me. When she was at the bar, that person was Virginia Bell”. In fact, rumour has it that your Honour has been immortalised in a song by the punk rock group Mutant Death, a verse of which goes “The police they came and got me, they threw me in a cell, they said I had one phone call, I rang Virginia Bell”. I also heard that when the band performed that song at the Redfern Legal Centre, the rendition was so awful that colleagues pulled the plug on the PA system. Notwithstanding that, your Honour’s reputation as a tireless worker for the underdog saw many prospective clients pick up the phone and call Virginia Bell.
- 35 Coming from a loving and supportive family, your Honour was keenly aware of having been afforded advantages that many people had not been fortunate enough to have been given. Your mother recalls visiting your Honour during the time you were working as a volunteer at the Redfern Legal Centre. Your only pair of shoes had worn through, there was no food in the fridge and yet you were more concerned about helping those worse off than yourself. It is a measure of the woman you are and reflective of the service you give to all.
- 36 Your Honour is a strong advocate for prison reform and was a driving force behind the prisoners’ action group, Women Behind Bars and active in Guthrie House, a community base residential rehabilitation and transition service for women involved in the criminal justice system in New South Wales.
- 37 Your Honour, as has been mentioned, has presided over many high profile cases and made history in some controversial civil liberty cases. Your

judgments, whilst occasionally not unanimous, are always well reasoned and considered and respected. Both your parents John and Mary, are extremely proud of your Honour as is your older brother Chris, not so much for your appointment to the High Court, although they are delighted, but more for your enormous capacity for compassion, kindness and loving care. Describing you as a ‘lively little devil’, Mary said you never held grudges, never asked permission to do something, you just went ahead. Like your late grandfather used to say, “That little pet will do anything that she wants to do” and indeed you have from barrel girl, journalist, presenter, thespian, fighter for the underdog, the self perpetuated rumour of a former go-go girl, maybe that is go girl go. We are very proud to claim your Honour as Australia’s Virginia Bell.

38 On behalf of the solicitors of New South Wales, I wish you every success in your new role and take this opportunity to wish you and your family a happy and safe festive season. Your departure from this court is a little like Santa Claus’ departure, a little sad but with a promise of so much more joy to follow. As the court pleases.

39 **BELL JA:** Thank you Chief Justice, Mr Solicitor, for your generous remarks and Mr Macken, thank you for yours. I feel bound to say that given some of the material, I feel you have let me off lightly.

40 A week, as I am sure H L Mencken must have said, is a long time in the law. This time last Friday I was comfortable in myself, as they say, if looking ahead with a certain sense of longueurs that affects judges facing the prospect of the vacation and that long six weeks with not a single damages appeal to engage their restless intellects.

41 The prospect of my new role has had an unsettling effect on me which is hard to understand since, as early as my days at the Redfern Legal Centre, I had no difficulty in perceiving the errors of principle made by the High Court and in seeing how readily they could be corrected.

- 42 Age has brought a degree of circumspection and despite the breadth of the work that my time on the Common Law Division has exposed me to, there remain a couple of pockets of the law with which I have had little acquaintance and which I fear may start to intrude on me in my new role.
- 43 Many of you will be relieved to know that I studied constitutional law under Professor Pat Lane, who had that extraordinary ability when he raised his forehead from between the thumb and middle finger to distil principle from the great cases with such penetrating clarity that in that moment, in that room, you thought you understood it. That was in 1971. I rather understand from something that Justice Gummow said to me yesterday there have been some developments in that area. To face the prospect of coming to terms with new law, just at a time when the Council of the New South Wales Seniors' Week approached me to become an Ambassador for Seniors is rather daunting. Generally it is thought enough to try taking on a new language.
- 44 I can only hope that I come to enjoy my new role as much as I have enjoyed my nearly ten years as a judge of this court. The range of work in the Common Law Division has been varied and challenging. Inevitably, as the Chief Justice has pointed out, the legal profession is becoming more specialised and judges like myself reflect that fact. I have had the advantage of working with judges who will forgive me if I describe them as being from the 'old school', who, in the course of their successful practices at the bar, covered the entire range of work of the Common Law Division. The Honourable Timothy Studdert, who is here today and whose presence so touches me, and many like him, have been magnificent exemplars for me in learning how to be, I hope, a good trial judge.
- 45 In the first half of my time at the court, the Chief Judge of the Common Law Division was the Honourable James Wood who also touches me by his presence here today. I was one of his counsel assisting throughout the Royal Commission into the NSW Police Service. His encouragement and

support of me at the Commission and throughout my time and his on the court has been unfailing and is very much appreciated.

- 46 In more recent years I have enjoyed the support and the friendship of Chief Judge McClellan and I thank him for his good counsel.
- 47 I have not had the length of experience of the great Common Law judges with whom I have served on this court, but I believe that I have acquired an appreciation of the role and the difficulties that confront trial judges in the conduct of cases including jury trials and I trust that that will be of value in my new role.
- 48 Jury trials of course have been very much my stock in trade. What was new to me as a judge, and at first somewhat bemusing, was the 7A defamation jury trial. A curious procedure to me and I felt at times to the jury. No evidence, just barristers talking seemingly endlessly about the attributes of the ordinary reasonable reader and always in metaphors drawn from the English cases that predated *Youssouf v MGM*, “The ordinary reasonable reader does not live in an ivory tower”; “He or she is not a Pollyanna”; I used to think to myself ‘lucky for him’, and my favourite, “He or she is not avid for scandal”. It is the marvellously evocative language of England between the wars. I can only hope that under the 2005 Act, a new generation at the defamation bar will keep up this tradition and of course for a part time medievalist, as I am, there has been nothing as nice as those questions that arise with respect to the pleading of imputations. Nothing since the early days of the University of Paris in the late 12th century quite rival the NSW defamation list.
- 49 Apart from developing all these new skills as a lawyer, the other very pleasing discovery when I came to the court was how nice judges are. This is something of which the public, and some members of the profession, have an insufficient understanding. At a social event some time ago across the way in the old Hospital Road complex, with Rachel Whealy and her quartet playing a sort of an up-tempo cantata if you can

have such a thing, Justice Einstein put his arm around me in a manner which I did not judge to involve too great a degree of workplace harassment. He surveyed the group and said to me smiling, "We're a happy court". It was and is a true remark, much of it reflecting the ambience that you, Chief Justice, have created. We are a court in which judges are drawn from a range of backgrounds with differing experiences, a circumstance in which I know you take pleasure. The Chief Justice is fond of observing that we are a broad church. I should add that it is a remark that he tends to make more frequently when I am in the near vicinity. I must thank the Chief Justice for the privilege of working with him. As a dilettante medievalist, it is a pleasure to have been in his outer orbit. That he can write the judgments of the quality that he writes while completing a scholarly history of Becket among his many intellectual pursuits, can dazzle lesser mortals. His move into the 17th century with Lord Ellesmere and Coke is a lapse into modernity with which I have come to terms.

50 I have spent this year in the Court of Appeal, the busiest intermediate Court of Appeal in the country. Those who entertain the view that judicial life permits one to lead the lives of gentlemen and women have little idea of the workload of the Court of Appeal. It would be impertinent of me to say anything about the judges of appeal, beyond to record my respect and my admiration for them, for their very superior legal and practical forensic skills. It has been a great privilege to be part of that court even for a short time.

51 When I started, the Honourable Keith Mason was President of the court and he does me the great honour of being present today. It is not for me to say what a marvellous President of the court he made, but to acknowledge his kindness to me. In June of this year Justice Allsop took over the rudder. I always endeavour to speak of Justice Allsop, who many of you would know still lectures in maritime law, in the language of the merchant marine, because it is the one platform on which we can speak on terms of equality. He is a superb lawyer and I wish to thank him for his

personal generosity to me and to say how much I will miss his companionship.

- 52 I think in the enthusiasm of the moment, I may have said “very superior”. This is because I am speaking in an almost ex-tempore fashion and Justice Simpson has not had the opportunity to correct my work. It will be difficult for me, and for any who have to read me, without that assistance. Justice Hislop has always assumed the larger role of advising me on my language and that counsel will also prove hard to replace. I need not worry about losing contact with Justice Howie since I expect to be berated at every turn by his Honour about any matter touching on the criminal law over the entire body of which, as a number of you will appreciate, he claims exclusive intellectual property.
- 53 When Justice Heydon was in this seat making this speech in similar circumstances, albeit I suspect feeling a little more relaxed and comfortable than I, he made generous reference to the quality of the advocacy of the members of the criminal bar in the conduct of appellate work in this court. I would wish to join in those remarks. I am proud to have been a public defender and while skill in criminal advocacy is not confined to the public defenders, they are conspicuous both at appellate and trial level for their forensic ability.
- 54 Earlier this week a message was left for me by a solicitor working in the Legal Aid Commission who has worked there for many years. She was out of the office when I returned her call. The message left details about whom was to be contacted in her absence since it was her day off, but it also included her mobile phone number for those clients who were anxious and wanted to be able to speak to her. After more than twenty years working with the Legal Aid Commission it was eloquent of her dedication which is the attribute of many solicitors working in legal aid, something that is deserving of recognition on an occasion such as today.

55 It remains for me to thank all the court staff, the court reporting branch, the library staff who are so helpful to all the judges and so forgiving of those small lapses with the “judge only overnight loans”. Many of my tipstaves are here today and I thank them for all their assistance. Stephanie Betar, my long-term associate, the nicest and most well-liked of people in the court, has agreed to forsake the congeniality of the Court of Appeal and walk with me on the journey to the unknown, and for that I am very grateful.

56 I would like to thank everyone who has done me the honour of attending this ceremony today. I am deeply conscious of the great honour of being appointed to the High Court. It need hardly be said that I will do my best to acquit myself in this new role. It is a somewhat daunting prospect and I will be very grateful for the odd friendly face from the New South Wales bar across that cavernous divide in Canberra.

¹ Rudyard Kipling *The Childrens Song*.

² See *R v Darwiche & Ors* [2006] NSWSC 1167. See also *R v Darwiche* [2006] NSWSC 848, 878, 922, 923, 924, 926, 927, 928 and 929.

³ *R v Halmi* (2005) 62 NSWLR 263.

⁴ *R v Iannelli* (2003) 56 NSWLR 247.

⁵ See *R v Tillman* [2007] NSWSC 528; *Attorney General for the State of NSW v Tillman* [2007] NSWSC 605.

⁶ *Correll v Attorney General of NSW* [2007] NSWSC 1385.

⁷ *R v Sengsai-Or* (2004) 61 NSWLR 135.

⁸ *BT v Oei* [1999] NSWSC 1082.

⁹ *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432.