The Virtue of Being Wrong

Some thoughts on courage in the law

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It is my great privilege to be invited to present the Honourable David Malcolm Memorial Lecture this evening. I am very grateful to the University of Notre Dame Australia for asking me to do so, and in particular to Professor Martin Drum, Executive Dean, Faculty of Arts, Sciences, Law and Business and Professor Michael Quinlan, National Head of School, Law and Business and other Deans and Pro-Vice Chancellors here this evening.

I am particularly and deeply honoured that Kaaren and Manisha Malcolm join us this evening, to remember and honour David Malcolm and his contribution to the law, the administration of justice and to the community. That contribution was one that transcended both state and national borders, and included, of course, the community of this University, where he served as Professor of Law in the Law School following his retirement as Chief Justice of Western Australia in 2006. Thank you, Kaaren and Manisha, for the honour you do me by your presence this evening.

This University, and indeed this lecture theatre itself, is named in honour of the Blessed Virgin Mary. One of St Mary's other titles is *Stella Maris*, the Star of the Sea. It is a title fitting for a university that sits on the edge of the great Indian Ocean. That title, Star of the Sea, might loosely be translated into the original language of this land as *Djinda Wardan*.

And, of course, it is at this place where the *Derbal Yerrigan*, the watercourse that we also refer to as the Swan River, meets the *Wardan*, the sea country of the Noongar peoples. In 1846, as he travelled up the *Derbal Yerrigan* for the first time, Dom Rosendo Salvado OSB said of this place:

> Majestic eucalypts, thick-leaved smaller trees, bush with trunks burnt half-way up, shores covered with green plants, some native and some planted by human hand – all this offered such a brilliant variety that every part of the winding course gave us something fresh to see and some fresh occasion to praise the Creator.

In that spirit I acknowledge the traditional custodians of this land, the Whadjuk people of the Noongar nation, who have cared for it and its Spirit since time immemorial. I pay my respects to their elders past and present, for their continuing stewardship of this land that has also become our home, in all of its brilliant variety and winding course.

This is the first occasion, since I was appointed Chief Justice of Western Australia in 2018, that I have had the opportunity to speak in honour of the Hon David Malcolm, whose former office I now hold.

So before I turn to my topic, and hopefully to foreshadow it in some way, permit me the indulgence of drawing out some personal connections that serve to make this occasion, this place and this time, for me, so fitting an occasion to present the David Malcolm Memorial Lecture. Anyone who knew David Malcolm would expect nothing less than that I should commence my remarks in this way.

David Malcolm was the first Chief Justice that I knew. He was appointed to the office of Chief Justice in the first year that I studied law, I worked as an associate in his Court from 1994 to 1995, and he presided in the Full Court that admitted me as a member of the legal profession in 1996. I knew *of* his predecessor, Sir Francis Burt, but I had never known Sir Francis as Chief Justice. So it was David Malcolm, and his 18-year service in the office, who defined for me what a Chief Justice is, and what a Chief Justice should be.

David Malcolm was, and is, well known as a towering intellect. From his early days in the law, as a Rhodes Scholar, as a solicitor and then as a barrister and Queens Counsel, he was the undisputed leader of the legal profession in Western Australia. As a jurist, Chief Justice Malcolm left an indelible mark on the law in Western Australia, defining a great many of the principles that guide and shape our law, which he did with great clarity and confidence. He was the intellectual leader of a Court which had no shortage of great intellects, including the late the Hon Geoffrey Kennedy AO QC, the late the Hon David Ipp AO QC, the Hon Chris Steytler AO KC, the Hon Neville Owen AO KCSG and the Hon Christine Wheeler AO KC, to name but a few.

But for all that intellectual and legal achievement, the quality for which I most remember David Malcom is 'civility'. Not simply civility in the sense of politeness, although David Malcolm was always unfailingly polite. But 'civility' in its older, deeper sense, from its Latin root *civilitas*, namely 'relating to citizens'. Of recognising the worth, dignity and value of other persons; of sincere respect for the perspectives and the needs of others. Civility in this deeper sense was a defining virtue of David Malcolm. Even in interactions involving significant disagreement, any interaction with David Malcolm always left each of the participants with their dignity intact.

There could, I submit, be no greater quality for a person tasked to lead the arm of government responsible for quelling disputes and controversies. It is one to which all of us who find ourselves in any leadership role should aspire, however imperfectly we might meet that aspiration.

And so it is a great personal honour to be the first of David Malcolm's successors in office to present this lecture and to do so in this place, where, as I have said, David Malcom was a Professor of Law and where my own late father,

Michael Quinlan, was the Chancellor, preceding the term of the Hon Neville Owen. Professor Michael Quinlan AO was himself a man of great civility and integrity, to which a son could only ever hope to aspire.

This year will mark the 10th anniversary of David Malcolm's passing. It is surely a coincidence that I was asked to present this lecture during such an auspicious anniversary; but a coincidence for which I am very grateful. And indeed the date is a further happy coincidence too. Today marks the Feast of St Peter Damien, the 11th Century Benedictine monk and reformer, with whom I share given names. Peter Damien liked to define himself as *peccator monachus*, a 'sinner monk'.[ii] Peter Damien was keenly aware of his limitations and he knew what it was to be 'wrong'. At least we have that in common.

And thus, at long last, to the title of my remarks, *The Virtue of Being Wrong*. I borrowed the title from a book by the English theologian, the Rev Dr James Alison: *The Joy of Being Wrong*.[iii] But it was another quotation of his that begins to capture some of what I want to address this evening.

James Alison, as some of you will know, is well known in Church circles for having publicly dissented from certain official teachings of the Catholic Church. The nature of that dissent is not my concern. What struck me, however, was something Dr Alison said in the context of that dissent. Having clearly stated his position, he said this:[iv]

> I may be wrong, and I certainly couldn't be right without running the risk of being wrong.

This simple, even obvious, insight captures something very important about the virtue of being wrong, or the virtue of being prepared to be wrong, that I want to suggest is in danger of being lost in our public discourse, and in our public duties.

And it is a danger, I want to suggest, that can be seen emerging in the legal profession and in the judiciary as a result. It is a danger that is a threat to the administration of justice and our culture more generally, to which we should all take notice and which we should all seek to resist.

The fear of being wrong, or the fear of being seen to be wrong, is, I suggest, on the rise in our world. And it is a fear that has moved from the admirable hesitancy and prudence that characterises good decision-making: that is, taking time to develop experience and competence and to obtain the material necessary to make informed decisions. It is, rather, a fear that is becoming, or has become, pathological: a threat to good decision-making.

Fear, in this pathological sense, is an ethical failure. In classical terms, it is the absence of the virtue of courage. Some reflection on the virtue of courage may bear this out.

For Aristotle, of course, every virtue is the 'mean' between two vices, a vice of deficiency and a vice of excess. The virtue of generosity, for example, lies somewhere between the vice of being miserly or stingy (deficiency) and the vice of being profligate or wasteful (excess).

In the case of courage, the extremes are fear and rashness. As Aristotle put it:[v]

> In the field of fear and confidence the mean is courage; and of those who go to extremes … the one who exceeds in confidence is called rash, and the one who shows an excessive fear and a deficiency of confidence is called cowardly.

While my focus so far has been on the vice of deficiency (excessive fear), for reasons that I will come to, we should not forget the vice of excess (rashness).

Aristotle had this to say of the 'rash man':[vi]

> The man who exceeds in confidence about things that are fearful is rash. The rash man is considered to be both a boaster and a pretender to courage; at any rate he wishes to *seem* as the courageous man really *is* in his attitude towards fearful situations, and therefore imitates him where he can. Hence such people are usually cowardly as well as rash, because while they make a show of confidence when circumstances permit, they cannot face anything fearful.

Of course, as his exclusively masculine language reminds us, for Aristotle the notion of 'courage' was still bound up with notions of bravery in the face of *physical* danger and, in particular, to the paradigm of the courage of *soldiers*.

It is not physical courage that I am concerned with in these remarks, so much as 'moral courage', an expression that is relatively recent in English. It is often traced to the work of English utilitarian philosopher Henry Sidgwick, who defined 'moral courage' as 'facing the pains and dangers of social disapproval in the performance of what [a person believes] to be duty'.[vii]

And it is no less important than its physical variant. As Professor William Miller put it:[viii]

> Moral courage plays to a different beat than does the general kind of physical courage demanded of soldiers. Moral courage is *lonely* courage. It often requires making a stand, calling attention to yourself, or running the risk of being singled out in an unpleasant and painful way. Modesty, fear, even stage fright pose themselves against it. Physical courage can just happen. You go to war; you're ordered to attack, you do. You are never singled out, you remain part of the group, you follow orders, having been trained to do so without too much questioning, if not grumbling. When however, physical courage requires egregiousness, isolation, loneliness, we [see] that it requires moral reserves on the order of those we are presently supposing moral courage regularly needs. It is the loneliness that makes moral courage so especially commendable, and in its finest instances it is as admirable and nearly as sublime as the most tragically moving examples of physical bravery.

So the fear of being wrong, which I posit is on the rise, is a deficiency in the virtue of *moral* courage. It is that kind of fear that is a threat to good decision-making; especially lonely decision-making.

If I am correct in this regard, namely, that the fear of being wrong is on the rise in our world, the outcome, however, is not an increase in 'right' decisions. It is not as if the fear of being wrong leads us to greater care and to better decisions. On the contrary, the fear of being wrong, I want to suggest, leads to less 'right' decisions.

And that is because, as James Alison's simple insight reminds us, the risk of being wrong is a condition for the possibility of being right. So the only way to eliminate the risk of being wrong is to remove the possibility of being right. And the only way to do *that* is to remove, as far as possible, decision-making itself.

There are many ways that we see this occurring, in our universities, in our politics and in our public discourse generally: ways in which decision-making, the risk of being wrong, is sought to be avoided or eliminated.

One way, perhaps the most obvious, is to simply abdicate decision-making to another. To transfer the responsibility of judgment to another person. 'This is not my decision to make, it is someone else's'. How often do we see critical decisions in our contemporary world referred to ever more diffuse forms of decision-making where the locus and responsibility of any particular individual or group of individuals is harder and harder to locate?

There are, however, other, more subtle, ways in which decisions are avoided in our present day.

Decisions may, for example, be continuously postponed; awaiting some mythical point in the future where information is complete or conditions are perfect, often in the hope that the need for the decision will somehow disappear.

And finally, perhaps most insidiously, decision-making can be avoided by a carefully cultivated ambiguity, in which ostensible decisions are made, or expressed, in a form which, with the benefit of hindsight, can be 'reinterpreted' to mean whatever the 'decision-maker' wishes them to mean. This phenomenon is perhaps the most to be deprecated, as it leads to mendacity and to distrust.

So much for its manifestations in our culture, again, if I am correct that the fear of being wrong is on the rise, what might the causes of this phenomenon be.

Can I suggest three, closely related, causes: cultural, technological and economic.

The cultural forces, which I have spoken about elsewhere, include a combination of emotivism and expressive individualism that has produced, in us all, a potent attachment to our own evaluative judgments, be they political, ethical, or aesthetic. And with that attachment to our own evaluative judgments, the notion has developed that *all* evaluative judgments are merely expressions of preference, feeling or attitude and are therefore all radically and essentially *subjective*.[ix]

This potent attachment to individual evaluative judgments has created a hyper-critical and censorious culture, in which all discourse is interminable precisely because of the absence of any agreed or common criteria by which one evaluative judgment might be preferred over another. And one in which 'debate' has become a contest of wills, rather than a contest of reason.[x]

Combining this hyper-critical (but criteria-free) culture with technological developments such as social media and the instant 24-hour news cycle, produces a capacity for social disapproval and disgrace unimaginable to those who coined the phrase 'moral courage' in the 19th Century. When Henry Sidgwick referred to 'the pains and dangers of social disapproval', he was in all likelihood thinking of the faculty lounges at the University of Cambridge or, at worst, the pages of *The Times*. He could never have foreseen the instantaneous onslaught of millions of keyboard warriors on Twitter or a mainstream media that too often takes its lead from social media, rather than *vice versa*.

One does not need to resort to now partisan terms like 'cancel culture', to see the likely effect of these developments on 'the risk of being wrong' and the willingness of those charged with decision-making to take such risks. It is to cause people shrink from, or skirt, such decisions precisely so as to avoid that risk.

Wait, I hear you say. Haven't I just contradicted myself? Isn't the attachment to our individual evaluative judgments, and our hyper-critical culture, evidence that decision-making in our world is alive and well? That people are forming and expressing judgments and opinions, all the time, with no fear of contradiction or being 'wrong'.

To answer this objection, it is important to recall Sidgwick's definition of 'moral courage' as involving the 'performance of duty' and Miller's description of moral courage as *lonely* courage. The decision-making to which I am referring is that which is required by the performance of duty, and which has real consequences in the real world, for which the decision maker must accept responsibility. The hyper-critical and censorious culture I have identified is not constituted by those

who must make decisions for which they have responsibility. It is constituted precisely by those who do not bear, and need not accept, any responsibility for their evaluative judgments; namely critics who revel in pointing out 'where the doer of deeds could have done better',[xi] but are never called upon to make difficult decisions themselves.

This distinction is sometimes not easy to see, where criticism of decision-making is often hailed as the height of 'moral courage' and 'speaking truth to power'. And sometimes of course, it is. But more often, and increasingly in our world, criticism, particularly uninformed and 'rash' criticism, is the opposite of moral courage, while masquerading as moral courage in disguise. As Aristotle said of the 'rash' person, who 'exceeds in confidence': such a person is both a boaster and a pretender to courage and wishes to *seem* as the courageous person really *is*. It is precisely this exponential rise in 'rash' criticism in our technological age which makes the 'pains and dangers of social disapproval' for the lone decision-maker so difficult to withstand.

All of which is to say that I hope it is obvious that the excessive fear of being wrong, that I have sought to identify, is one that is, in many ways, perfectly understandable, and probably inevitable in a world that is moving as rapidly as our own. And so the critique that I seek to offer is not intended to single out any one individual or group. It is a problem that confronts us all.

Including, as I indicated at the outset, those of us in the legal profession and in the judiciary. This should, of course, come as no surprise. The judicial system cannot be separated from the broader cultural, technological and economic forces in which it operates, even where those forces are in tension with its core principles.

And, of course, the justice system depends for its efficacy on those within it running the risk of being wrong. While it is specifically designed to produce the 'right' outcome, it can only achieve that by admitting of the possibility that it may be wrong and accepting the risk of that being the case.

Much of the administration of criminal justice, for example, is concerned with the evaluation of risk, in contexts which require predictions, or at least prognostication, of future events. This has always been the case in the criminal law, in relation to matters such as sentencing and bail, where risks of reoffending are a mandatory, and increasingly important, consideration. It is, however, the *central* principle underlying the relatively new, but ever expanding, powers conferred on courts providing for preventative detention. Legislative schemes for preventative detention expressly require that decisions be made as to whether a future risk of reoffending is an 'unacceptable risk'.[xii] Those schemes necessarily recognise, and depend for their efficacy on, there being such a thing as an 'acceptable risk'. As has often been said, those legislative schemes do not require that there be 'no risk of reoffending', including for the reason that 'such a requirement could never be met'.[xiii]

All predictions of the future are contingent propositions; they always carry with them the risk that they might, ultimately, be wrong. At the same time, as we have already seen, a prediction of the future could not be right, without running the risk that it may be wrong. The only way to avoid the risk that such a prediction might be wrong is to not make it at all; to elide the decision.

Similarly, in many areas of civil law, the due administration of justice requires that predictions and conjectures be made as to future, and even hypothetical, events.[xiv] All such predictions and conjectures carry the risk that they might, ultimately, be wrong, although in the case of hypothetical events, that risk can never be manifested; it always remains, essentially, unknowable.

Even when the justice system is not concerned with future or hypothetical events, however, that is, when it is concerned with events of the past which have or have not occurred, the risk of being wrong is an essential and necessary part of that system, without which it could not function. This should be obvious. The very notions of *proof*, and in particular *standards of proof*, depend upon the recognition that *any* conclusion that a past event **did** occur, must run the risk that it **did not** occur. A conclusion that, on the balance of probabilities, an event in fact occurred, carries with it the risk (even a substantial risk in some cases) that that conclusion is wrong. Of course the application of that standard of proof is designed to arrive at what is 'right' or 'correct' (such that, as a matter of proof, if 'an event is more likely than not to have occurred the law treats it as a certainty'[xv]), but in order to do so it must run the risk that it is wrong.

In this way it may be seen that different standards of proof (proof on the balance of probabilities vs proof beyond reasonable doubt) are, in a sense, simply reflections of the law's tolerance for the risk that it might be wrong. The requirement for proof beyond reasonable doubt in a criminal case, for example, reflects a very *low* tolerance for the risk that a particular conclusion (the guilt of a person) might be wrong. But even there, as is sometimes said in this context, proof beyond reasonable doubt does not require proof beyond *all* doubt. Even there, in order that the right decision be made, the decision-maker must run the risk of being wrong.

The risk of being wrong, is therefore, a necessary feature of the justice system. And, of course, it is not confined to judges and other judicial officers. The legal system is dependent upon all those who form part of it making decisions that carry that risk, not least the legal profession and members of the Executive. All are called upon and indeed, have a duty, at different times, and for different

purposes, to make decisions that must run the risk of being wrong. And so an excessive fear of being wrong, or being seen to be wrong, can lead to significant threats to the administration of justice as a whole.

Let me give a few examples. Again, in doing so, my intention is not to single out any one individual or group. These are problems that we all face, to a greater or lesser degree.

One example, indeed the example that caused me to reflect on this topic, concerns the sometimes-fraught issue of bail pending trial or sentence. A decision to grant an accused person bail always involves an assessment of the prospects that the accused will comply with the conditions of bail and whether the accused will, or will not, reoffend while on bail. Any such decision, to be right, must run the risk that that assessment will, in the future, prove to be wrong (in the sense that the accused does reoffend while on bail). Bail is granted to tens of thousands of accused persons every year. The entire justice system would come to a grinding halt without that being the case.

At the same time, whenever a person on bail commits a serious offence, particularly a serious violent offence, the initial decision to grant bail is almost invariably characterised, in retrospect, as a failure of the decision-maker or, sometimes more generously, of 'the system'. Of course, that may be perfectly understandable, not least to the victims of the later offence. A risk has materialised, with catastrophic results, and it is human nature to suppose that the decision-maker could, and should, have seen the future event with the same clarity with which it can be seen in hindsight. The tragic reality, however, at least in most cases, is that there is very little to distinguish the circumstances of the case in which the risk did materialise from the tens of thousands of cases in which it did not.

Nevertheless, the 'pains and dangers of social disapproval' both personal and institutional that attend that single decision can, and I suggest do, have a significant impact on the fear of being wrong in relation to the making of those decisions generally. And not in a way that necessarily produces better, and more 'right', decisions; but in a way that can lead to avoidance mechanisms that can undermine decision-making as a whole.

In the case of bail, for example, the view is often expressed, at least anecdotally, that there has been a substantial and significant decrease in police bail being granted under the *Bail Act* for minor offences that would not attract a term of imprisonment even if proven. Recent media reports, for example, referred to more than 100 accused persons being dealt with in a single Sunday sitting in the Magistrates Court, with the presiding judicial officer observing that the decision whether to grant bail had been 'handballed' to him and predicting dire consequences of such a practice.[xvi]

Whether this anecdotal experience in fact reflects a discernible trend or a change in policy would require further research; it has been some years since there has been published research in relation to bail practices in this State. Nevertheless, it is not difficult to see how, in our current cultural climate, such a situation can have come about. No-one wishes to be the person who made a decision that turns out to be wrong, so the best way to avoid that risk is to refer the decision to someone else.

Similar criticisms are made from time to time, particularly in other Australian jurisdictions, in relation to prosecutorial decision-making, and in particular the decision as to whether a particular prosecution has sufficient prospects of success to justify the continuation of proceedings. Those criticisms are often expressed

in strident terms, for example, that a 'prosecutor is required to do more than shepherd incredible and dishonest allegations … through the criminal justice system, leaving it to the jury to carry the burden of decision making that ought to have been made by the prosecutor'.[xvii]

Whether these criticisms, in other jurisdictions, are justified is not for me to say. It would be impudent for me to attempt to do so. It is sufficient to observe that the decision whether to proceed with, or continue, a prosecution is an onerous duty, with significant consequences, which, in my experience, is exercised diligently and professionally by prosecutors every day. But it is also one that requires moral courage and one in relation to which 'facing the pains and dangers of social disapproval' may be particularly challenging. It is therefore not difficult to understand the temptation to leave the burden of that decision-making to another.

This temptation to leave the burden of decision-making to another is not confined to the criminal law. Indeed, in some areas of civil litigation, it is having a paralysing effect on the administration of justice. The cost, delay and complexity of commercial litigation is, of course, all too apparent to all in our justice system and the burden that it places on that system, as a whole, is profound. There are a number of possible causes for this phenomenon, including, of course, the size and complexity of modern commerce itself. Nevertheless, part of the explanation must surely lie in the abdication of decision-making on the part of legal advisors, in which no argument is too tenuous for it to be abandoned and, in which litigation becomes, instead of a series of decisions made by legal representatives designed to refine and clarify a dispute, a process of accumulating an ever-expanding list of claims and counterclaims until they are ready to be handed over to the court.

One does not need to look far in order to find judicial laments in relation to this phenomenon; from the High Court's admonition that the task of a pleader 'does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it'[xviii] to the identification of 'the unfortunate tendency', when billions of dollars are at stake, 'to attempt to raise any and every issue that might be thought to be arguable'.[xix] Perhaps less remarked upon, however, is that these tendencies may reflect a failure in moral courage; a failure to take the risk of giving up any point for fear that the decision to do so might be wrong, albeit that in this case, the fear may be less to do with 'the pains and dangers of social disapproval' and more to do with economic and business imperatives and the need to remain 'client focused' at all times.

Lest it be thought that this critique is confined to the legal profession, let me turn the spotlight closer to home: on the judiciary itself.

An excessive fear of being wrong, or being seen to be wrong, I suggest, has the capacity to affect members of the judiciary at all levels, and in some cases that effect can be quite profound. It manifests itself most clearly in relation to the fear associated with appellate review. Increasingly, appellate review of judicial decisions is no longer viewed as a necessary and expected part of a judicial process which, as I have endeavoured to show, depends for its efficacy on those within it running the risk of being wrong. On the contrary, too often a successful appeal is regarded by many in the legal system (including judges themselves), as an adverse verdict on the judge himself or herself, on his or her character and competency and, indeed, on his or her fitness for office.

Again, this fear is not an admirable hesitancy or prudence directed to an improvement of decision-making generally, but an irrational one which impedes, rather than promotes, 'right' decision-making. And in many ways the increase in this excessive fear is a product of the same cultural and technological causes I have referred to earlier.

Appeal judgments, for example, are no longer simply provided to the parties, later collected in law libraries and, occasionally, published in law reports many months after the date of their original publication. Like everything else in our online world, appeal decisions are published and disseminated immediately and broadly, on a variety of websites, where they are read and shared by many. This public transparency of judicial decision-making is, of course, a good thing and has produced a great many benefits. But we must accept that it comes at a cost, including the adverse impact of public admonition on the judicial officers concerned (or at the very least their *perception* of public admonition). It is no surprise that the ongoing research into judicial stress reveals 'appellate review of judgments' as one of the primary stressors for judicial officers.

Again, the effect of this wide and immediate dissemination of appeal judgments is magnified by what I have described earlier as a hyper-critical and censorious culture; a culture from which lawyers and judges are by no means immune. Regrettably, some lawyers, and judges, like nothing more than the schadenfreude that comes with a judge being 'rolled' (as it is usually described). Witness the industry of tawdry online legal gossip sites that delight in reproducing every apparent reproof of judicial officers; the more acerbic the reproof, the better. And there is a (thankfully small) minority of the judiciary - those graced with the rare gift of never being wrong - who are always happy to oblige with a 'quotable' snide or acerbic reproof of their colleagues.

The excessive fear wrought by these developments, as in the other examples I have sought to give, does not result in better, more 'right' decision-making. For judges, however, the risk of being wrong cannot be avoided by the obvious method of simply abdicating decision-making to others. In this regard, judicial officers are, of course, the end of the line: there is no one to whom the responsibility of judgment can be transferred.

For this reason, when it comes to the judiciary, the adverse effects on decision-making are found elsewhere; in the other ways in which decisions are avoided: including procrastination and obscurantism.

The most obvious effect can be seen in the procrastination that comes with the imagined hope that, with more time, and more information, the 'right' decision will somehow reveal itself. In short, we write too much and we reserve our decisions too often. The proliferation of long written reasons for even the most routine judicial decision has become a blight on the administration of justice; and it is an extremely difficult blight to remedy. No matter how many times the principle is repeated that 'reasons for decision need not be lengthy or elaborate',[xx] they continue to grow and become more and more elaborate. And much of that tendency is the result of an approach to judicial decision-making that is more concerned at arriving at a result that will not later be found to be 'wrong', than by the conscientious articulation of what the judicial officer has concluded is 'right'. It is a tendency born of a standpoint that views one's primary 'audience' as the appellate court, rather than the litigants themselves. And it is one that has found its way into every aspect of judicial work, even the most personal of decision-making: the sentencing of offenders. It is now, for example, regrettably commonplace to see extremely lengthy sentencing remarks, delivered to an offender, which are replete with extensive quotations of appeal decisions. Not only are such remarks self-evidently directed almost exclusively to the appellate

court, but they are also likely to alienate, rather than communicate to, the primary audience: the offender.

This tendency, I want to suggest, is the product of fear and it does not lead to better decision-making. On the contrary, in addition to unacceptable delays and the inevitable drain on scarce judicial resources, procrastination and endless summaries of evidence and recitation of case law rarely produce the 'decision' itself; and they may simply serve to mask it. And, of course, as I have just said, the essential function of reasons - to communicate and explain why a decision is the way it is - may be entirely lost.

A related tendency, born of the fear of being wrong, is a certain obscurantism in the making of judicial decisions. Paradoxically, given our tendency as judges to write too much, by this I mean that, at the same time, we often do not say enough. While a lengthy judgment may include a comprehensive catalogue of all of the evidence, and an exhaustive survey of all of the case law, in the end all of that verbiage may simply serve to obscure the fact that the only thing missing is the 'agony' of the decision itself: the point at which the judge must, in conscience, choose one outcome over another. And must explain that choice. The mere statement of a conclusion, without more, is not a *reason* and there can be a tendency to say very little (or 'just enough') so as not to expose one's conclusions to greater scrutiny, particularly where those conclusions are attended by doubt or even regret. Again, to obscure our thought processes in this way may be an understandable protective mechanism against the fear of being wrong, but it ultimately undermines the transparency of the law itself. And it does not lead to more 'right' decisions.

It may seem obvious, but it bears repeating: judges are, ultimately, appointed to *decide*. And to do so 'uprightly, deliberately and resolutely'.[xxi] In so doing a judge should not be timorous in using the full advantage that he or she has been given in discharging that duty[xxii] and to do so without looking over their shoulder for fear as to what might be coming next.

Please do not think that in making these observations I am talking about someone else. I am acutely aware that the phenomena I am describing, the fear of being wrong, and the impulse to act out of that fear, rather than out of a conscientious pursuit of our duty, is a challenge that faces us all. We could all do with greater moral courage in accepting that responsibility and the risks that come with it.

And that renewed moral courage requires each of us to embrace the responsibility for the decisions we are called upon to make. That responsibility is, of course, different for everyone. For lawyers, it involves a recognition that the decisions that they are called upon to make, particularly those decisions which carry the risk of social disapproval and economic cost, are essential to the administration of justice and cannot be abdicated to others. For judges, particularly trial judges, it involves the recognition that the oath they have taken is no more, and no less, than to make their *own* decisions according to law; that they have not been appointed to predict, or mimic, how another judge might approach the same decision. And, in relation to all those separate and diverse roles, it involves a recognition that one can only ever be 'right' by running the risk of being wrong.

Which is not to say that the virtue of being wrong leaves no room for legitimate criticism, collegiate correction and, at times, formal censure or reproach. All of these have their place in any properly functioning human endeavour. I have, for example, been rather critical of a number of things this evening; although I hope with at least a modicum of self-reflection.

Nevertheless criticism, correction and even censure within our system of justice, must always be exercised judiciously, with due proportion, and only ever for the purpose of upholding the integrity of the system itself. And to do so, it must never give way to the hyper-critical and censorious pose that so characterises our broader culture.

In short, it requires *civility*; the kind of civility which marked the life and work of the Honourable David Malcolm, whose memory we honour this evening.

Thank you for your attention.

[i] I gratefully acknowledge the assistance of my staff, Matthew Mason, Julie Jupp and Anne Hatten in the preparation of this lecture. I also extend my sincere gratitude to the Hon Andrew Beech SC, for his helpful suggestions.
[ii] *Letter of Benedict XVI to the Camaldolese Order for the Feast of Saint Peter Damian*, 20 February 2007.
[iii] Alison, J. *The Joy of Being Wrong*, 1998, The Crossroad Publishing Company.
[iv] Alison, J. *faith beyond resentment: fragments catholic and gay*, 2001, The Crossroad Publishing Company, 183.
[v] Aristotle. *The Nicomachean Ethics* (translated by J A K Thomson), 1953 (*Ethics*), 43 (1107b 0 - 5).
[vi] Aristotle. *Ethics*, 68 - 69 (1115b 29 - 34).
[vii] Sidgwick, H, *The Methods of Ethics*, 1913, London: MacMillan, 333, cited in Miller, W, *The Mystery of Courage*, 2000, Harvard University Press (*The Mystery of Courage*), 254 and Press, E, *Moral Courage: A Sociological Perspective*, Society (2018), 55:181 - 192, 181.
[viii] Miller, W, *The Mystery of Courage*, 255.
[ix] Quinlan, P, *The Rule of Law in a Social Media Age* (2023) 93 ALJ 353, 358.
[x] Quinlan, P, *The Rule of Law in a Social Media Age* (2023) 93 ALJ 353, 360.
[xi] Theodore Roosevelt, Speech at the Sorbonne 23 April 1910.
[xii] See e.g. *High Risk Serious Offenders Act 2020* (WA), s 7.
[xiii] *Director of Public Prosecutions (WA) v DAL [No 2]* [2016] WASC 212 [33], *The State of Western Australia v Narkle* [2019] WASC 404 [13].
[xiv] *Malec v JC Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638, 642 - 643.
[xv] *Commonwealth of Australia v Amman Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64, 145.
[xvi] https://thewest.com.au/news/court-justice/perths-weekend-court-stresses-bubble-to-the-surface-again-as-101-accused-flood-sunday-session-c-13219166.
[xvii] See *R v DS* [2022] NSWDC 441 [43]; *R v Martinez* [2023] NSWDC 552 [95].
[xviii] *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 [27].
[xix] *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825; (2015) 329 ALR 1 [4].
[xx] *Chief Executive Officer, Department for Child Protection and Family Support v IGR* [2019] WASCA 20; (2019) 54 WAR 222 [112].
[xxi] Burnet, G. *The Life and Death of Sir Matthew Hale, Kt: sometime Lord Chief Justice of His Majesties Court of Kings Bench*, 35.
[xxii] *East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis)* [2020] WASCA 147 [396].