

THE SUPREME COURT OF  
WESTERN AUSTRALIA

FAREWELL TO THE HONOURABLE JUSTICE WHEELER

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON THURSDAY, 25 FEBRUARY 2010, AT 4.30 PM

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**MARTIN CJ:** The Court sits today to mark the retirement of her Honour Justice Christine Wheeler from the Court. I would like to particularly welcome this afternoon members of her Honour's family, her husband Gareth, her sister, and her stepson and his wife Ian and Kate; very welcome.

At the ceremonial sitting to welcome her Honour to the Bench on 30 October 1996, the Court was honoured by the presence on the Bench of the Honourable Justice Toohey of the High Court of Australia. The presence on the Bench this afternoon of the Chief Justice of Australia, the Honourable Robert French, therefore adds a certain symmetry; book-ends, if you like, to her Honour's judicial career, and I am very pleased to welcome his Honour Chief Justice French to this sitting of the Court.

I would also like to welcome Justices John Gilmour and Michael Barker of the Federal Court of Australia, Justice Stephen Thackray, Chief Judge of the Family Court of Western Australia, her Honour Judge Antoinette Kennedy, Chief Judge of the District Court of Western Australia, the Honourable Professor David Malcolm AC QC, former Chief Justice, the Honourable Chris Steytler QC, former President of the Court of Appeal, Mr Robert Meadows QC, Solicitor-General, and Ms Cheryl Gwilliam, Director-General of the Department of the Attorney-General, and many other distinguished guests too numerous to name, including members, former members of this and other Courts.

I would also like to particularly welcome those who will address the Court this afternoon, being the Honourable Michael Mischin MLC, representing the Honourable Christian Porter MLA, Attorney-General of Western Australia, who is unable to join us this afternoon, Ms Belinda Lonsdale, representing Mr Hylton Quail, President of the Law Society, and Mr Grant Donaldson SC, President of the Western Australian Bar Association.

Your Honour Justice Wheeler's career both before, upon and after appointment to the Bench has been marked by many firsts, records and distinctions. Some of those achievements are related to your Honour's gender, and they include the fact that you are the first woman to have been appointed to the ranks of senior counsel and the first woman appointed to this Court. Those distinctions have been the subject of much comment in the past and that is entirely appropriate as they are very significant landmarks on the road leading towards the equal prominence of women and men within the legal profession, albeit that the destination of that road is still, unfortunately, some way over the horizon, but I must leave something for other speakers to say, and those achievements are so significant I am confident they will not be overlooked in the addresses of counsel.

Perhaps less well known is your Honour's role in assisting to set up Perth's first women's refuge, which was yet another significant landmark in the development of appropriate respect for women in our society, but instead of focusing on gender, I would like to turn to the characteristic of age.

At the time of your Honour's welcome to the Bench in 1996, Chief Justice Malcolm, who I am very pleased is able to join us today, suggested that so far as he could ascertain, your Honour was the youngest person to have been appointed a Judge of this Court. Of course, his Honour did not then have available to him the benefit of the excellent history of this Court written by Prof Geoffrey Bolton and Geraldine Byrne.

Having that advantage, I must advise that his Honour was not quite right and notwithstanding your Honour's youth at the time of your appointment, you were not in fact the youngest person ever appointed to this Court. That achievement goes to Justice Frederick Moorhead, who was appointed to the Court in April 1902 at the age of 39. However, your Honour would not have wished to emulate Justice Moorhead's unfortunate judicial career as he suffered motor neurone disease which caused his death in November 1902. Justice Moorhead was therefore not only the youngest person ever appointed to the Court but was also its shortest serving member.

Justice Moorhead served an even shorter term than the infamous Chief Justice Wrenfordsley who served as Chief Justice between 1880 and 1883. After an unseemly dispute with the Governor, the Colonial Office decided to separate the warring parties by appointing Wrenfordsley Chief Justice of Fiji. In respect of that appointment, one of the local journalists wrote at the time:

There will not be much grief over his departure unless it be among his creditors.

Now, despite the lack of charity evident in this comment, it does seem somewhat justified by the fact that after serving as Acting Governor for a period prior to his departure for Fiji, Wrenfordsley decided that it would be appropriate to take with him a significant amount of the china, crystal and cutlery from Government House.

Unlike Chief Justice Wrenfordsley, I can assure your Honour that there will be much grief over your departure and not from amongst your creditors. Your Honour has made an outstanding contribution to the work of the Court over the period of more than 13 years over which you have served on the Bench, a contribution which will be very hard to replace.

That is not to say that your Honour has not achieved a first in relation to age. Assisted by the history to which I have referred, I am fairly confident in saying that your Honour is the youngest person ever to retire from the Bench of this Court. Good manners prevents me from saying what that age is, although the data will no doubt be available to students of history.

The relative youth with which your Honour leaves the Bench might have something to do with the fact that you were an inaugural member of the Court of Appeal and have served in that capacity for more than five years. I must say that when I made these notes and realised that the Court of Appeal celebrated the fifth anniversary of its creation on the 1st of this month, it came as something of a surprise to me. The time seems to have flown but perhaps not for those who, like your Honour, have had to sit relentlessly in that Court.

The appellate workload of this Court is unremitting. The strains imposed upon the Judges of the Court who shoulder that work are equally unremitting. Under the direction of Obersturmführer Steytler, the inaugural Court with your assistance overcame the substantial backlog of matters which it inherited at the time of its creation. That achievement is the more remarkable given the high jurisprudential and intellectual standards which have been maintained by the Court of Appeal since its inception.

Now, I am sure many of you here are thinking, "Well, of course, he would say that, wouldn't he, and perhaps wouldn't it be nice to hear that from someone else," but there is in fact, of course, an objective measure of the performance of intermediate Courts of Appeal and that is in the number of cases in which special leave is granted to appeal from those Courts to the High Court of Australia.

I will not leaden this afternoon's proceedings by referring to statistics but it is clear that the number of cases in which special leave has been granted to appeal from decisions of this Court has dropped very dramatically and consistently since the creation of the Court of Appeal in 2005. Your Honour is entitled to go into retirement basking in at least a share of that glory.

All this, of course, comes at a cost and, in particular, a personal cost. Maintenance of appropriate work life balance as a member of the Court of Appeal is extremely difficult. Family members tend to know that we are at home only because the light is on in the study. An hour's appellate hearing can lead to days, sometimes weeks, of appellate judgment writing. This all takes its toll and I fear that today marks the recognition of that toll taken upon your Honour.

Of course, judgment writing can have its frustrations. I remember appearing before your Honour in a trial which occupied some weeks of hearing. I won't mention the names of the parties but they were all lawyers and the case had all the complexities and unpleasantness that one might expect from a dispute of that kind. After writing what I assume must have been a lengthy judgment, your Honour advised the parties of the date upon which it was to be delivered to be told that they had settled.

Being lawyers, there was then of course a controversy about whether your Honour's reasons should be published notwithstanding that the case had settled and, of course, they were not and your Honour's prodigious labours were consigned to the bin. If it is any comfort, I was repaid with exactly the same experience late last year and about 190 pages of reserved decision are perched precariously on the edge of the wastepaper basket awaiting final confirmation of the settlement, but I fear I might be painting far too gloomy a picture of judicial life.

I sincerely hope that your Honour's judicial career has had its moments of satisfaction, perhaps even joy. The members of the Court of Appeal address their challenges in a collegiate and collaborative way and we will all miss your Honour's contribution to the collegiate environment of the Court. Your Honour's contribution to judicial life has not, of course, been limited to this Court. You have served in a number of senior positions on the Australian Institute of Judicial Administration, including over the last two years as the President of that important organisation.

In connection with your leading role in the AIJA you were instrumental in the development of an internationally recognised framework for Court excellence, which provides a mechanism by which Courts might evaluate and improve their

performance. Your role with that important project resulted in you being awarded the International Distinguished Service Award for services to the international judicial community by the National Center for State Courts in the United States.

Nor has your public service been restricted to the judiciary, having served on the Senate at the University of Western Australia for 10 years, including four of those years as Pro-Chancellor. As your Honour retires your Honour is entitled to look back on a judicial and legal career well served and to look forward to a stimulating, lengthy and active retirement. On behalf of the Court, it only remains for me to thank you for your contribution to the work of the Court and to wish you every happiness in your retirement. Mr Mischin?

**MISCHIN, MR:** Thank you, your Honour. If it please the Court, I have the privilege today to represent the Attorney-General at this special sitting, on the occasion of the retirement from this honourable Court after 13 years of service of her Honour Christine Ann Wheeler JA. Delivering a valedictory address for her Honour is a particular challenge. It is not because there is little to say about her and her achievements or her contribution to the administration of justice. Her achievements speak for themselves and it is not a reflection of their value or the extent of her contribution that I do not go into them in detail. Indeed, it is because if I am any judge of these sort of occasions, they will be covered by others and repetition has never been a virtue.

No, the challenge arises in being able to say enough about her Honour of a personal nature, a greater challenge that she is by reputation a very private person and one jealous of the separation of her professional life from her domestic life. Unlike many in the profession, she has not sought the limelight or what is commonly regarded or termed as a high profile. Instead she has been content to earn and maintain the respect of her peers and of the profession by diligent, thoughtful and committed exercise of her talents and by the performance of her responsibilities to the best of her ability.

In fact, when her Honour was appointed to the Supreme Court Bench in 1996 the then Attorney-General in his welcoming address noted that she was not someone who yielded readily to anecdotes. Her Honour has surrounded herself with loyal friends and colleagues who are most reluctant to offer any gossip about her, about her quirks, her foibles, her bad habits or her embarrassing moments. It is a level of confidentiality that I am sure the President of North Korea would be envious of.

They have maintained that level of discretion for her term on the Bench. I toyed with the idea of making up some

stories but in a sober moment decided against it. So I will confine myself to a couple of salient achievements, ones that should give us pause to reflect not only upon her qualities, the qualities that lead her to attain those achievements but how far the profession has come since then.

Her Honour commenced her career as a professional research assistant to the then Solicitor-General Sir Ronald Wilson and was admitted to practice in 1980 and quickly established herself as one of the best legal minds in the Crown Solicitor's Office and she progressed rapidly through that office. It was in 1994 that she became the first woman to be appointed a Queen's Counsel in Western Australia and a senior judge at that stage remarked that it was not a minute too soon as he was convinced that she was likely to be appointed a judge in the near future.

Sure enough, in 1996 her Honour became not only the first woman to be appointed to this Court - I had thought the youngest person to be appointed to this Court, I stand corrected. Plainly, I do not have the research facilities that are available to his Honour the Chief Justice, but nevertheless an admirable achievement. So far as her appointment as the first female member of this Court is concerned, I hasten to add that her Honour has never drawn upon her gender for advantage in her progression through the profession and has always insisted upon competing against her male colleagues on an equal footing, but one must acknowledge the recognition of palpable talent and commitment that accompanied that distinction of being the first female judge of the highest Court in our State.

At a time when the appointment of women to judicial positions in this State is unremarkable it is easy to overlook the level of excellence that resulted in her being chosen above her peers and other candidates for that position.

So far as an advocate is concerned I cannot say much better than his Honour Kirby J on the occasion of his impending retirement from the High Court last year. He was interviewed by The Australian newspaper. Not unreasonably the interview tended to focus on his own life and achievements but in the course of it he paused a moment to tip his hat to Wheeler J, noting that she was a great advocate who wielded her intellect and charm with considerable success in his Court.

Other personal qualities of which I should make some mention include her adherence to principle. A small but telling example is how some years back I understand she was instrumental in changing the venue of the Supreme and Federal Court judges' Christmas lunch, adamant that it should not be held at the Weld Club which restricts membership only to men. Indeed Wheeler J has been a resolute advocate for the rights of children and women over the course of her career and has spoken out strongly in defence of women's rights and their position in society.

Apropos advocacy again, her Honour is known to be a person of few but measured words and when she spoke you could be sure it was worth listening to, but actions can speak louder than words. It has been reliably related to me that when hearing cases when she starts flicking her hair back over her ear observant advocates are alerted to the fact that the point that they were making may not be the strongest. Quick witted ones are wise to pursue another course of argument. I only wish that someone had pointed this out to me an awful long time ago.

I need say no more about her Honour's professionalism other than to say that not only did she discharge her judicial duties efficiently and effectively and with dignity but also with compassion and an understanding of human nature.

In concluding it would be remiss of me not to mention one other contribution and legacy that she leaves the Court. Some will know that her Honour is an enthusiastic and accomplished clothes designer and maker and designed many of the elegant clothes that she has worn. What may not be widely known is that she, together with his Honour Pullin J, designed the practical and functional judicial garb worn by judges today. It is probably illustrative of my ignorance of the subtleties of fashion but I could not

help noticing that after no doubt many hours of anguished deliberation and after drawing upon every spark of their combined talent and creativity, and with access to the full range of fabrics and styles and colours available at the disposal of the western world, they came up with what appears to be a zip-up smock in basic black. I blame Pullin J for this and I urge him not to give up his day job.

Your Honour, the administration of justice in this State and the character of the Supreme Court will be the poorer for your retirement. Those who remain will lose not only the company of a brilliant legal mind but also a loyal, generous and warm friend. On behalf of the State and Government of Western Australia and on my personal behalf I would like to thank you for your service to the people of Western Australia and to accept our very best wishes for a long and fulfilling retirement with your family. May it please the Court.

**MARTIN CJ:** Thank you, Mr Mischin. Ms Lonsdale?

**LONSDALE, MS:** May it please the Court. I am really honoured to be able to represent the president of the Law Society of Western Australia to thank her Honour Justice Christine Wheeler on the occasion of her retirement and thank her for her 13 years of dedicated service to this Court.

This is truly an historic occasion because, as his Honour the Chief Justice has said, your Honour was the champion of many firsts for women in the law. I was admitted in 1992 just 60 years after Enid Marjorie Russell became the first woman to be admitted as a legal practitioner in this State.

I recall that about that time I had a conversation with a senior member of the profession and I asked him if there were any female Silks. He told me that there was not but that one of the cleverest people he had ever known in the law was your Honour and that he could not understand why your Honour had not yet been appointed.

Our conversation it seems was portentous because shortly after that, in 1994 in fact, your Honour was appointed to the ranks of Silk, marking a victory for fair-minded people and in time it seems a loss of revenue to the Weld Club as a consequence of the Bar's decision to hold the annual Silks' lunch elsewhere.

As counsel your advocacy skills received praise and recognition from the highest ranks of the profession. In a speech in 2004 Justice Michael McHugh recalls your Honour appearing as lead counsel in many important cases in the High Court including the case of Wik. He described your

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Honour's advocacy as truly outstanding. As my learned friend Mr Mischin has said, McHugh J was not alone. You also had a fan, it seems, in Kirby J.

I understood that Kirby J's quote was in fact that your Honour used your feminine wiles, which worked even on him. Coming from anybody else one would be tempted to conclude that he was being patronising to women but I think that we know Kirby J well enough and we know that he does not suffer fools gladly or indeed an advocate who displays less than the fiercest intelligence and preparation. He must have been very impressed.

Unfortunately, at the time your Honour was appointed the Bar suffered and indeed continues to suffer from a shortage of women of the stature of your Honour amongst its senior ranks. From the profession's perspective it was somewhat regrettable that your Honour's talents were so in demand that your appointment to the bench followed shortly after you became Queen's Counsel and it seems that McHugh J also lamented your appointment for the loss of your advocacy in the High Court.

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There would have been many young barristers, particularly young female barristers, who would have relished the opportunity to have appeared as your junior but, sadly, there was only ever a very small window of opportunity before your appointment to this Court in 1996.

I think I have some understanding of what his Honour Justice Kirby meant by the use of your Honour's feminine wiles. Whilst your Honour's reputation on the Bench has been primarily for your fierce intellect, your Honour has never fallen into the trap of becoming rude or cantankerous or belied any indication of being fed up or weary from your years of hard work on the Bench.

Now, this has been greatly appreciated by all, particularly those counsel of vastly inferior intellect to your Honour's own, and I have that on very good authority. Indeed, it has not gone unnoticed that your Honour has always been particularly patient and gracious with self-represented litigants. In a Court as busy as the Court of Appeal, it is tempting perhaps to regard a self-represented litigant as an unwanted irritant. However, your Honour would always give those without representation an opportunity to be fairly heard. Indeed, I observed these traits in your Honour only last week in an exchange with a self-represented litigant who appeared to me at least to have had more than his fair share of hearings.

Your Honour's retirement is very well-deserved. The life of a Judge of the Court of Appeal is a very punishing one. The long hours you are required to dedicate to that role invariably mean, as his Honour the Chief Justice has said, that personal sacrifices will need to be made.

The Law Society is particularly grateful for your Honour's contribution to the Law Society's continuing professional development programme. In this way, those in the profession who may not have had the privilege of appearing before you have had the benefit of your knowledge and wisdom. The Law Society would like it to be publicly known that your Honour, along with your fellow Judges of this Court, make great financial and personal sacrifices for the privilege of serving our community in order to uphold one of the most important institutions of our democracy. We are most grateful for your service and we wish you well for your retirement, may it please the Court.

**MARTIN CJ:** Thank you, Ms Lonsdale. Mr Donaldson?

**DONALDSON, MR:** May it please the Court. It is my sad duty to appear today to represent the Bar upon your Honour Justice Wheeler's retirement from the Court. Your Honour has been an iconic member of this Court and of the profession in this State and indeed in this country. Though in some respects the passage of time has dimmed somewhat our perception of the extraordinariness of many of your Honour's achievements, in this respect it is apt to note Christina Thompson's observation in a paper in the Australian Review of Books many years ago to the following effect:

A lot of people view the past as if it were an extension backwards of the present, but that is not true. The past was different. The past was indeed different, and one aspect of the difference is that sometimes when we think of the past, we don't put to one side what we now know, so that what was in the past extraordinary becomes thought of as commonplace.

So I fear it is with certain of your Honour's achievements in the profession. When your Honour was appointed as the professional assistant to the Solicitor-General and then as a senior assistant Crown Solicitor and then as a senior assistant Crown Counsel, no woman had ever filled positions of such prestige and seniority, and your Honour's appointments to these positions was successively extraordinary. The appointment of women to these positions is now commonplace.

As we heard, your Honour was the first woman appointed as Queen's Counsel in this State and the first woman to be appointed as a Judge of this Court. Regrettably, neither of these are yet commonplace, but at the times of your Honour's appointments these were extraordinary attainments, and they were extraordinary principally because the profession at those times was not blind to gender and your Honour, along with other women in the profession, confronted hurdles in the profession that men did not. These hurdles were many, and many were high. Inspired and assisted by your Honour and others, there has been some change in this respect at the Bar and in the profession more generally, though much work remains to be done.

When one reflects upon your Honour's career in the profession, there are not all that many of us who can appreciate the full breadth of what your Honour has done. There are a few who can recall that your Honour toiled for many years in practice and as a part-time teacher of law. In the sadly long-gone days when the cream of the practising profession also taught at the Law School, some had the unique experience of being taught Constitutional Law at the one time by your Honour, by Chief Justice French and by that wonderful teacher Dr Jim Thomson.

As Justice Heydon observed when commenting upon Justice Lehane's commitment to teaching at the Sydney Law School, no-one who has not done it can fully understand the dedication called for in carrying out little-recognised and scarcely-remunerated work of this type for three or four hours a week whatever the weather, whatever one's health, whatever the clamant needs of clients, whatever the intense pressure of other demands on time and energy. So, of course, it was with your Honour, and there are many of us who are most grateful that your Honour took the time and made the sacrifice to teach us. I might add, to the great benefit of the University of Western Australia, teaching was only a small part of the contribution which your Honour has made to the university over many, many years.

As with your Honour's commitment to teaching, little is now remembered of your Honour's great contribution to law reform in this State. In your Honour's time at the Crown Solicitor's Office, your Honour carried responsibility for much in the way of legislative law reform, and this State's record in this respect is a prominent, though poorly understood one.

Happily, your Honour's brilliance as an advocate remains the stuff of vivid recollection and of legend. Justice McHugh, we heard, commented shortly before he retired from the High Court to the following effect:

Some of the finest arguments that I have heard in nearly 16 years on the Court have come from women advocates. The argument of Christine Wheeler as junior counsel in a special leave application in *Bropho v Western Australia* and Carmel McLure's argument in *Rosenberg v Percival* rank with the very best arguments that I have heard while on the Court.

Your Honour's many appearances in constitutional matters in the High Court gave rise to renown. It is rumoured that your Honour could quieten Sir Daryl Dawson and also on occasions Justice Gummow, and the quote I have from Justice Kirby, who is often misquoted, is as describing himself as having been mesmerised by your Honour, though, no doubt, not to the point of quiescence. Because of the quality of your Honour's many appearances in the most complex of matters before the High Court, your Honour's reputation as counsel in the High Court was one of pre-eminence, and that this reputation was earned largely while your Honour was a junior and over a period of what was really a small handful of years was truly remarkable.

It is for me, I must say, your Honour, unnerving to reflect that your Honour has served for 13 years on this Court, and at the risk of sounding old, it seemed like just yesterday. Prior to your Honour's appointment to the Court of Appeal, your Honour presided over trials of every kind in this Court. Your Honour's reputation as a commercial trial judge was high and as a judge presiding over criminal trials one of fairness and compassion. There was no area or aspect of trial work in which your Honour did not excel and in all of it with a visage of pierced calm.

Your Honour's appointment to the Court of Appeal at its inception was acclaimed by the profession. Your Honour's judgments exude a certain elegance and unpresupposing lightness of touch. They appear to have been painted with a brush rather than processed by a computer. Your Honour's immense learning did not overburden judgments. Concise analysis of precedent and principle were interspersed with, say, a prescient reference to a letter from Holmes to Pollock that was perfect in its exactness and in its capacity to clarify.

Your Honour will be greatly missed by the Bar. Appearing before your Honour was a privilege and addressing your Honour never seemed a contest between Bar and Bench but, rather, a joint endeavour toward understanding and a just result. Your Honour was one of the Bar's brightest stars and whatever it is that your Honour has planned for the long future ahead, please go to it with the assurance of the Bar's gratitude, admiration and best wishes. May it please the Court.

**MARTIN CJ:** Thank you, Mr Donaldson. Justice Wheeler.

**WHEELER JA:** Chief Justices, distinguished guests, colleagues, thank you all for coming and special thanks as it is a rather hot day to be either walking down here or leaving your car somewhere nearby in the sun. You may know that on this side of the Bench there is always a burning

interest in precisely where someone's words are going and how long they will be speaking and I propose to encourage best practice by telling you I will be talking about three broad areas: a response to some of what has been said, coupled with a minute's self-indulgent reminiscence; answering the question some have asked about why I am retiring; and a truncated version of what, if I gave people their true deserts, would be a very long thank you list.

You will find I speak longer than I did at my welcome but you will still be out of here in under 15 minutes. To those at the Bar table, Mr Mischin, I was nervous to see you as you and I had worked together in the same office for some time and I should thank you I think for your tact or your bad memory, whatever has accounted for your kindness. Ms Lonsdale, I am sorry I had much less to do with the Law Society in the second half of my career than the first. My excuse I think is that superwoman I am not.

Mr Donaldson - I will come back to you later actually but you, like the other speakers, have acknowledged the position of women still in the profession and I appreciate that. I still do, not often, after almost 14 years here, encounter women in senior roles and if one were unkind one could almost think either that lawyers do not take inequality in their own backyard particularly seriously or that they are not bright enough to do much about it. But as you say, there have been some changes. Some individuals have done a great deal.

There are still some serious issues I think, particularly in relation to the accommodation of part-time practice and maybe some more concerted attention to mentoring. I was very lucky in the early days of my career with those who assisted me, beginning with Sir Ronald Wilson, but informal mentoring does not, I think, always spring up naturally between senior men and women, for reasons which are fairly obvious, and that I think can be a problem.

Looking to my own career, one would think from the exaggerated accounts given today that I was marked out for distinction from the moment I set foot in Court. I actually have evidence though that that may be so. In less frugal times this Court had a posh leather-bound Bench book and one of those for 1981 has been located. That was the year following my admission. Someone had taken the trouble to note my name on the inside cover and the fact of recording I found very flattering when I learnt about it. The entry itself may be open to interpretation. It reads, "Crown Law Department, Miss Wheeler, small pale girl."

1981 was, of course, also the first year I appeared in Court on my own as a real legal practitioner and, cleaning my cupboard yesterday, I found the transcript of my first appearance, which, as I had long forgotten, was

25 February, 29 years ago today. It was a costs application. I lost comprehensively. My opponent received roughly twice, perhaps more than twice, what we were prepared to offer. I have always regarded it as a sort of success though because it gave my opponent the chance to hone his skills on what was a very fine argument, if I say so myself, and I would regard that as a significant contribution to his later elevation to the position of Chief Justice of Australia.

I have joked about it but it is a bit of an occupational hazard that people properly are so respectful, and that people are forever saying things like, "Your Honour has put it so much more clearly than I ever could." Not of course some people, but many people. One does need to keep that sort of praise in perspective and that need for a reality check is why, more than anything he said today, which I nevertheless appreciate, I appreciated a compliment that Mr Donaldson paid me some years ago now. I had decided in my first few years as a Judge some obscure point of commercial law and when I happened to see him in a coffee shop he told me that he and some others at the Bar had thought it a very good judgment. I expressed pleased surprise because it was not an area that I had practised in as a Barrister, to which he replied, "Yes, we were all surprised too."

A number of people have asked why I am retiring now and it is a legitimate question for a number of reasons. I can rule out one reason. At a recent Judges' conference one of my interstate colleagues, vying no doubt for this year's Donaldson prize for ambiguous compliments, told me that he did not think I looked anywhere near 70. Well, I am not.

My husband inspired me by developing after his retirement, a number of his talents and to a high degree. I have had for some time interests in areas a long way removed from the law. I would like to see whether I have any talent in them and, if so, to develop it. In addition, I have always enjoyed being involved with the broader community in areas like the University of Western Australia and the Perth International Arts Festival - those sorts of roles and I have noticed that if you Google "volunteer opportunities" there are so many interesting looking ones that it is hard to choose from them. At present I intend to take a gap year and prioritise.

I want to spend more time with my husband. When we met we both had small children so our time just on our own has been limited all these years. Those children are now at an age when their family and study and work commitments mean that if we want to see them as much as we would like we are the ones who have to be flexible.

Those are the positive reasons for retiring.

Negatively, there are aspects of the judicial role that distress me more over time. The workload has been referred to but everyone works hard, I think.

Before I mention one of the things that has been bothering me I should be clear that I do not mean to suggest in any way that the work that I have been involved with as counsel and Judge these 30 years or thereabouts is not worthwhile. The peaceful, predictable fair determination of disputes and the enforcement of the criminal law are the bedrock of a free and democratic

society. It is a privilege to be involved in that enterprise. Also, it is necessary that those who harm or seek to harm others, or the property of others be punished and it is sometimes necessary to put people away for a long time so they cannot harm others.

However, what bothers me increasingly is this combination of things that all of us here who have ever taken an interest in criminal law know to be true. We know that as a broad generalisation the prospect of imprisonment does not deter anyone from committing a crime, and in particular, there is no apparent connection between any particular length of sentence or average sentence and any deterrent effect. We know that average sentences and crime rates appear to move independently of each other. Yet, if I had a dollar for every time I have used the word "deterrence" in a judgment in connection with fixing a sentence, Gary and I would be flying first class return to London when we go later this year.

Similarly we speak - I have spoken - of rehabilitation as a sentencing objective (and an important one). Yet we know that in practice people come out of gaol, if anything more likely to reoffend for a number of reasons.

We know that when members of the community are given detailed information about actual cases the sentences that they think are appropriate are often lower, and often a lot lower, than those of Judges. To qualify that, at least we know that is so in Victoria and Tasmania and many other jurisdictions and I suspect West Australians are not all that different. We know that if you give members of the community choices they tend to prefer scarce dollars to be spent on programmes that prevent crime.

The takeaway message of course is that, in short, imprisonment does little to deter crime and may even increase it, and that people in the community do not seem to be as keen on it as some headlines might suggest.

As I have said though, the criminal law must be enforced and that means sentencing in accordance with established principles and authority. In many cases the result is appropriate and at times it may be too lenient. However, reasonably often, it seems to me, it means that people - often young people, people with small children, people with mental problems - are in gaol for longer than is strictly necessary or sometimes when not necessary at all.

I know all of my colleagues struggle with these issues, as I do. I know we are not Law Reform Commissions and I know we are not legislators and it is imperative that we remember that. So I can only say for myself that the

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disconnection to a degree between what I do, as I see my duty to do it, and what empirical evidence suggests it would be better to do is one reason - not the sole reason, but one reason that maybe it is time to give it away.

That by the way is the end of part 2, but this next little anecdote is a bridge to part 3.

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At my welcome I thanked my son . I said he thought I was right even when I was wrong. I was praising his loyalty but he was young (he was under 10), so he thought I was questioning his judgment, and in public too! I spent the night grovelling, explaining and apologising. I hope I have not created any misunderstanding of that kind here in explaining my reasons for retiring.

My son is in Canada on a working holiday. He no longer thinks I am right even when I am wrong but he does always give me the benefit of any doubt and if he were here I would thank him for it.

At my welcome I also thanked my mother who died some years ago. Instead I need today to thank someone who has known me nearly all my life and who still puts up with me, my sister whose support I greatly value. My husband it would be futile to try to thank, as I owe him so much and I am pleased that his family is part of mine, or perhaps vice versa, and that Ian and Kate have come here to demonstrate that.

I have had terrific staff. From my first associate, Colin Philipppson who I see here today, there was then a succession of keen, intelligent, hyper-qualified and hard-working young women and men who have been my associates and research associates. I have had three cheerful, unflappable helpful orderlies. I have had for longer or shorter times quite a number of tremendously competent secretaries. I think Sandra Murphy has put up with me the longest, for which I am grateful.

Outside my personal staff there are others, too many to mention, who I have worked with in one way or another in this court, especially, in recent years, those stars from the Court of Appeal office. All of those people understand the importance of what we do here and put tremendous effort into it and I am grateful to have had the chance to work with all of them.

All of you here fall into one or more of the overlapping categories of my family, my friends and my colleagues and I thank you all for your good wishes and for doing me the honour of coming.

Finally, thinking about all of the sorts of things that past experience suggested might, whether true or not, be said today I reflected on the principal reasons apart from the support of those people I have mentioned, for whatever I may have achieved to date.

You do not have to go back very far in my family history, to my great-grandparents, to find people who were unable to write even their own names, yet I have been well educated by any standard. I recall my female teachers at school who had to retire when they married and thereafter became part-time. I remember a time when even equal pay for women was not taken for granted, yet I have not found

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those difficulties. I am fortunate - I think we are all fortunate - to live in a place and time where transitions of this kind can be so readily made. But, coming back to anything I may have achieved, the phenomenon was explained in this way more than 2,000 years ago (and some of you will have heard me quote this passage before):

I returned and saw under the sun that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise nor yet riches to men of understanding, nor yet favour to men of skill, but time and chance happeneth to them all.

The short answer is that time and chance have been very good to me and for that and, for all of you, I am most grateful.

**MARTIN CJ:** Thank you, Justice Wheeler. The court will now adjourn.

AT 5.17 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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