

## **The Honourable Heather Carter**

### **Interview with Juliette Brodsky, 24 July 2009**

#### **Part One – Early Years**

Q Well, Heather Carter, thank you very much for your time. You retired as a Family Court judge last year – 2008 - and we're looking back over your career, over a number of years and I'd like to start if I may, with your early years. You were born in Newcastle. Did you have other lawyers in your family, or are you the first?

A I was the first. I said at my welcome, when I thanked my parents (in their absence, I might add) for what they'd done for me and my two sisters - that it was a quite remarkable thing they had done because at that time my father was working at the steelworks. He was a very clever man himself, but never had the opportunities as a child – he was one of eight children – to further his education. But at a time when it was very hard for him to do so, mother of course stayed home, women did in those days, he made sure that each of their three daughters had the best possible education they could get. And this was in the face of many people saying, 'but they're girls, they're going to get married – why are you doing this'?

So my older sister became a high school principal, I became a lawyer and my younger sister became a doctor. It was a real testament to what our parents did for us.

Q And their faith in you.

A Yes, indeed.

Q So when did you first have inklings that you'd like a career in the law?

A When I was debating at school, you know, not that there's a lot of similarity between debating and being a lawyer, but I did, I loved debating and I still maintain it's one of the best training forms for all people because everybody in some way debates every day of their life when they're discussing things. The other great thing about debate of course is that you don't know what side you're going to be on, so you are forced to look at both sides of any question and that's a good thing for people.

Q What kind of debater were you, how would you characterise yourself?

A Very trenchant, I think. I remember at the conclusion of one school debate, one of the educators said 'my word, you really gave them what ho!' I was the whip, you know, which is the person of course who in that

form of debate both sums up the work that their team has done but also, perhaps more significantly so, shoots holes in what the other side has been trying to do.

## **Part Two – Studying Law**

Q So you'd had three children nevertheless by the late 1960s and that was about that time that I believe in your non-existent spare time, you then began studying law via correspondence at Sydney University.

A Yes but it would have been more the middle '60s, than the late '60s.

Q So, how did you manage to juggle the two?

A Well, in hindsight I was a bit silly, I think, to even contemplate doing it, but it didn't seem a silly thing to do at the time. My husband had studied part time and it was when he had finished his studies that I thought I could do this. I'd also found out that you could do it that way, which was in my case necessary. There were only two universities then in New South Wales where law was offered, and none of them were at Newcastle. I juggled it, I suppose, because I could do it in my own non-existent spare time, but they were little children and they were pretty good as far as having naps were concerned and that was often a time when it could be done. Because we were required, shortly prior to my commencing the system changed in the sense that previously one simply got a syllabus and then turned up for the exams, whereas in the time I started doing it, or was doing it certainly, you had a bit more supervision. We were given a series of subjects of course, but some studies as well to do and to return and if you didn't pass enough of them, they wouldn't let you sit. So that was great because otherwise, in any case I think really, there's no, the difficulty with doing things by correspondence is you don't have anybody to bounce ideas off or to talk about things with. It's a pretty lonely way of studying.

Q Your husband, I imagine, was very supportive to you during this time?

A I'm smiling because my husband's always been supportive, but again in those days, we had a family discussion before I started studying and I can recall him saying, and my solemnly agreeing that 'no, no, no it would not interfere with the children' and 'no, no, no of course I was not going to work' – and I really meant it. But the latter of course, went by the board in due course.

### **Part Three – The Young Lawyer**

Q What were your early years in the law like? You began work as a solicitor with Anthony Rose in Albert Park and then Lobb & Associates – I believe it was Colin Lobb who gave you your first wig, but that was later on?

A Yes, it was, yes.

Q So maybe first working with Anthony Rose – what was that like for a young lawyer, for you?

A Well, whilst I'd been admitted in New South Wales, I was called to the Bar there, which meant I didn't ever do articles. Because of the reciprocal arrangements between the states, those states in particular, I was entitled to be admitted but because I hadn't done articles, there was much discussion with Mr George Paton who was in charge of the admissions here in Victoria at the time. He was quite perplexed about it, but in the end decided that I could be admitted, but not having done articles of course meant that I had no practical experience and that was a difficulty. So, when it was agreed at another family meeting that I could in fact work, I had to find somebody who was prepared to take me.

I remember speaking to Eve Mahlab at the time, who had nothing, as she said, to offer me at all, but it was obvious her practice then, her agency then dealt with people far more high powered than I was. But she said, go and sell yourself – so I did, I knocked on doors. I almost persuaded a few people that they needed a lawyer when they hadn't even advertised for one, but Tony (Rose) took me on, following my answering an advertisement which asked for a solicitor with up to a year's experience, and I had none so I qualified for that. If it had been a minimum of one year's experience, it would have been a different story, and his idea was that I could assist and learn and probably in a year or two would be able almost be more worthwhile. So in a sense, it was almost like doing articles in that sense.

I started only working half a day because he really couldn't afford anything more than that anyway, although the half-day often stretched out a bit more than that, but within a few months I was there full time and working full time. He had quite a broad practice. Albert Park in those days was not the trendy suburb which it now is, it's now a trendy suburb probably because of those who came before, as is often the case – you know the suburb becomes very attractive because of the people who live there who start off being, they were mostly Greek or Italian or whatever, (they) make the place lovely and then the trendies move in. Tony's wife was also Greek and that was perhaps part of his reason for

setting up there. He certainly focussed on the people who were around us who were Greek. For example, all the staff, the secretaries and the like were all Greek. So we did everything from conveyancing to wills to minor crime, appearing for those who were minor criminals, I should quickly add. My particular interest was always in the common law and that was the area that I mostly practised in.

Q Was it much the same when you went to Colin Lobb?

A No, that was at Mount Waverley, which was at that time probably a much more salubrious suburb than Albert Park, but my interest remained the same and the nature of the work I did remained the same. I did the court work, I went to court, commencing when I was with Tony and certainly continued that when I was with Colin.

Q How is it that Colin came to be the one to give you your first wig?

A Well, he was sad to see me go, but I think pleased for my sake that I was going. He was very gracious and I mean, what better present I think can you give to somebody who is going to become a barrister than their wig?

#### **Part Four – First Years at the Bar**

Q You signed the Bar Roll in 1978 and you were the 45<sup>th</sup> woman in Victoria to do so, but I believe at that time there were just over about a dozen women in active practice at that time and among them was someone you were to become good friends with - Bev Hooper.

A Yes indeed, yes.

Q Apart from people like Bev, was it a lonely experience being a woman at the Bar at that time for you?

A No, not because of any gender matters – it was lonely at first because I went from a busy life and practice, to reading which is a pretty solitary situation in many respects. I don't mean by that that my two Masters didn't assist, they did, but it was very different. I think fellow barristers generally didn't make any distinction about gender. Just as well as you say, there were so few of us, so few women, but thinking back to the group that I was particularly involved with, there were only really two women I think who were involved in that group significantly. One is now a Supreme Court Justice, Elizabeth Curtain, and the other one is myself, the rest were all chaps, yes.

## **Part Five – Equity & Crime**

Q It was good, wasn't it, for you during those years that you managed to have the benefit of being both in equity and in crime...

A Oh, superb.

Q To get as a broad a practice as possible.

A Yes, absolutely.

Q And obviously as you said yourself, you enjoyed that and having the benefit of that. What led nevertheless to your decision to specialise in family law and de facto relationships?

A Well, my absolute preference would have been to be able to do both crime and family law, but that wasn't possible. You have different – the lists are different, the court lists are different, you can't sort of just jump from one to the other as simply as that. So I really had to decide which one I would specialise in, or concentrate on - perhaps more accurately - and it happened to be family law.

Q You didn't feel some hankering for sticking around in crime perhaps?

A Well there were a lot, quite a number of similarities in some respects with the skills involved in both. Obviously they're both people law, advocacy obviously and the skills of cross-examination, understanding of flaws in evidence and so on. The basic skills of advocacy are very much common to both areas and you did still hear the odd bit of criminality in the Family Court unfortunately.

Q "People law" is not something that all lawyers would be comfortable with and that's mainly because there's so many grey areas, but for you, that never presented very much of a problem?

A No.

Q Why was that exactly, what was your fascination with it? Is it to do with the psychology of people and...

A Because it was *alive*. They were real people with real problems of whatever nature and it just was real law. Living law – all the other areas of law come into family law at some stage. If you're doing a property case, you have to be able to read a balance sheet, you have to know enough about accounting to cross-examine an accountant, a valuer, a psychiatrist, a psychologist – all those other aspects are part and parcel of it as well, and again, old fashioned equity comes into it.

## **Part Six – Magistrates Court**

Q You appeared in a range of matters and appeared at all levels of the state courts, but particularly the Magistrates' Court and that was a very rough and tumble type of atmosphere for a young barrister, I would imagine.

A Yes.

Q Can you recall any specific appearances at the Magistrates' Court that are either amusing or perhaps were a little alarming during those years?

A Well, I remember one matter where a client was charged with having committed offences at three separate, but closely geographically located Magistrates' Courts. He was not Australian. He didn't speak much English and he was illiterate. Interviews were conducted at one particular police station and very properly an interpreter was brought in and the matter was dealt with according to the way it should have been. The same thing happened at the next police station. But in the mile or so between the second and the third police station, miraculously he learnt how to read and write and in the English language. Fortunately they presented him on all three matters at the one time and I was able to reach an understanding with the prosecutor, let's say. What was even more alarming perhaps than that itself was (that) I can recall telling that same story to a police prosecutor at a quite different police station some years later, and his response, 'oh yes, look, I always reckon, if you're going to brick him, you've got to do it right'.

Q Actually, how did you find dealing with the police in those years – I recall interviewing one woman barrister who said she'd got some rather rough physical treatment on a couple of occasions and got elbowed very heavily by a policeman. Did you ever have any difficulties yourself?

A No, no not at all. No, they're doing their job, they're human beings, I mean they probably start off thinking you're a bit of a girly, which is very useful, very useful, but no, they were fine. And again, I mean like anything, you have to play straight with them when you, of course you do – and if you do that they respect you.

Q The late Graham Morrish was influential for you as an advocate and I believe you were led by him in a murder trial?

A Attempted murder, yes.

Q Yes, an attempted murder trial – can you tell us a little about that?

A Well, it was a long while ago now – I'd been briefed by the late Anne McDonald, a wonderful solicitor, who went on to other things too, to

appear for a young man and I appeared at the committal and preliminary matters, but I was not prepared to – and to my mind it was a case where he should be acquitted, not should be, because he was my client, but should be because he hadn't done it, in the true sense of the word or indeed at all and I wasn't prepared at that stage in my career to put his prospective liberty in jeopardy and so that was when Graham was asked to come in. He hadn't at that stage taken silk, again he was on my list from recollection and we did it together.

It was a fascinating case in the sense that we were going extremely well, we thought, and it got to the stage of the judge's directions to the jury and it became immediately apparent - not immediately, (but) slowly became apparent and definitely the case that the judge was proceeding along a path which the Crown had inadvertently led him along which was quite wrong, and we were then faced with the very difficult decision of whether we went forward or not. This was a privately funded case, there was no legal aid involved, so it was very expensive and as I said we thought we were doing well with the jury but we took the decision we just couldn't run the risk so the trial was aborted. We got costs, wonderful, and the Crown who were excellent about it I must say, must also have reached a similar view that we had, because they subsequently decided they wouldn't represent him on that offence but on an assault, which we pleaded.

## **Part Seven - Circuits**

Q You had very broad and very useful experience working in these areas of laws in those early years at the Bar. I wanted to touch very briefly on the fact that you did a lot of work on the Bendigo circuit?

A Oh yes, the family law yes.

Q Yes, that's right and I believe you developed a very good knowledge of the difficulties of country practitioners and litigants during that time. What particular difficulties did you find they mostly faced?

A Well, (fewer) difficulties if the court went there on circuit than if the court didn't go there on circuit. Obviously, you added geographical difficulties to, the latter case. But the difficulties they faced in a sense involved the same as a lot of litigants do, and that is that they have a solicitor who has taken them all the way along the path to the hearing and then suddenly a new person comes along, the barrister, and a lot of the less experienced, a lot of less sophisticated litigants find that very difficult. Now I think that's emphasised in the country because (a) it's so small and the relationship between the litigant and the solicitor is therefore I think even stronger. It was always a difficulty especially in such an emotive jurisdiction as family law – there's a stranger coming to

take over my case now, you know – at the ultimate part of it, how can we do this? You need therefore to have a situation where you have conferences and the like and that can be difficult on circuit because the courts would set down a lot of cases which would have to be done in the most expeditious manner to get through as much work as possible, so you would not have the luxury of as lengthy a conference perhaps with your client as you often would in the city. I know when I was going to Bendigo in particular because I had a wonderful solicitor there who used to brief me to do his divorces as well, which were usually done first. There were two reasons for this, it made sure I was there on the first day, and got paid on the first day. So immediately following the divorces there would be the call over, yes it would be – after the divorce there would be the call over of the list where cases would get their dates and when you're doing a circuit, the best thing to do is to have the very first case because then it shapes on from there.

So on the Monday morning, I would do half a dozen divorces, the call over and certainly starting from lunchtime on, have conferences with the clients in the first few cases.

Q You alluded a moment ago to the surprise and perhaps some suspicion too, with which a barrister might be viewed being brought in to a case in these areas. What did you do to establish confidence with those clients in the short amount of time that you were given? How did you reassure them that you were there to do the work that they had already been busy setting up with their solicitor?

A Well you probably wouldn't ever refer to what I've just been saying with them, it's just a matter I suppose of being able to understand them quickly. You get some, probably some preliminary idea from reading the file, certainly the first thing you need and can establish with them is their confidence that you know what they want, what they say they want in their material and that you've read it and you know what the case is about. And that I think is probably the most important link you have to make. (28'01)

### **Part Eight – Circuits (Continued)**

Q Just before we move to the next topic I was interested to read that when some of those circuit courts were closed down, you actually voiced concerns. Were you among a number of people who felt concerns? Did you feel it realised any great efficiencies or was it to the detriment of Victoria that those (courts) in places like Bendigo were closed?

A I think it was to their detriment. It started I think long before that. I think the first one I could recall closing was Shepparton. That at least had some other options, they had Albury and Bendigo for that matter

who could look after those people. But I think what happened with Shepparton was that people, the locals didn't make enough noise...

Q Perhaps they weren't aware of what was going to happen, do you think?

A I think it was announced that it was likely to happen and I think if they had rallied a little, it might have been able to be averted.

Q Really?

A Oh yes.

Q Enough political pressure brought to bear on the local member, for example?

A Yes. In the end, it comes down to money. To run a circuit is very expensive. I mean at the very least you have a judge, a court officer and the judge's associate, who all have to travel, be accommodated and the like. You need to have premises which in some cases are solely used by the Family Court. Bendigo was an example of that because that was a permanent counselling area, so that could be used all year round. They're very expensive. But I think, you know, when the people can't come to the courts, the courts need to go to the people.

Q Did you write to the government of the day?

A No, I spoke about it and agitated - well, agitated is too strong a word. By the time Bendigo was closed, I was a judge of course, in fact I think I presided over the last circuit there, which was pretty bittersweet.

### **Part Nine – Working in Family Law**

Q It was said of you that you always appreciated a challenge. Was there any case at that time or do you recall the cases that were particularly challenging? Family law being the very emotive area that it is and with the knotty difficulties that go on between partners and whether they're married or in de facto relationships – do any spring to mind for you?

A No, nothing springs to mind in particular, no.

Q So they were all challenges that you ironed through quite nicely?

A Well you can, it's a rare case in which you can't predict the outcome. I mean obviously you don't, in a property case you're never able to predict it to the penny, but you'd have a pretty fair idea and most children's cases you often sort of cry out which way they're going to go as well. The difficulty, or challenge was to get that across to the judge and to achieve what you thought was the right result. I had one case

which was a terrible case in the sense that a mother of, I think, two or three children had been alienated from them by her husband. She had a mental illness, and I must say I thought it was he who had driven her mad following their separation, I might add, and it was terrible because she was never going to be able to win and you'd have to say nor should she, but the fact was that these children were completely estranged from her. The other thing that was particularly terrible about the case was it went for so long because it just kept growing. All in all, I think it went over the best part of a year, so we'd have perhaps two weeks at a time and then have to come back and then you'd spend the first few days going through all the things that had happened since you were last in court which prolonged it of course, not just in that sense, but prolonged the agony as well. I found that a very, very hard and sad case, very hard case.

Q There was a period during those years when people working in the family law jurisdiction were somewhat under threat. There were some highly publicised cases of family court judges being targeted. Did that ever at any stage make you feel nervous about your chosen area?

A Well no, it heightened the awareness I suppose – I remember on one occasion Justice Fogarty as he then was, was under threat and I was appearing in a trial before him which went for many, many days and we all got very jumpy. They had a policeman sitting I think outside the court, a policeman sitting inside the court in the most ridiculous position. I mean if somebody charged in through the door, the door would have gone back and knocked the policeman out, you know. But I think we'd all worked out, you know, that if any of these things happened, we'd all dive under the Bar table or bench or whatever and no doubt, Fogarty J had been instructed to do just that. But it was very, very jumpy, yes.

### **Part Ten – Kevin Foley & Barristers' Clerks**

Q During those early years at the Bar and before you left for Western Australia, you were on Foley's list and you spoke to me very warmly of your clerk, (the late) Kevin Foley, and you described your clerk, or you said rather that good clerks are like very good theatrical agents.

A Yes, and there's a comparison I think I made when we spoke between a barrister and an actor. The clerk is the equivalent of your manager, barristers are never out of court, they're doing paperwork in the same ways actors are never out of work, they're merely resting. So there is that, and of course barristers are great actors anyway. There has to be a fair streak of an actor, I think, in a barrister, especially one who is before a jury.

- Q So, give us a bit of a verbal portrait of Kevin Foley.
- A A big man, from the old school of clerk, the sort we inherited from Britain, or the British system. He had a temper...
- Q Did you bear the brunt of it at any point?
- A No, but you saw or heard sometimes some of the staff who for whatever reason - I'm sure it would have been a good one - did hear from him. When he succeeded his father, he did modernise a lot of things and in particular, this is before I came to the Bar, but he certainly brought a degree of modernity to the accounting system. He was, in those days of course, whilst the clerk was supposed to be the clerk to the barrister, I think very few barristers would ever not feel that they were really working for the clerk, rather than the other way round. He was the clerk who got you work, who received payment and pursued payment from the solicitors, who was very important to your life.
- Q Was it important to keep on the good side of such people, did you find? I know sometimes barristers I've interviewed have alluded somewhat to the fact that you had to?
- A Well, I think that's sort of insulting both, particularly to the clerk as much as anything. Also, I suppose, to counsel. Kevin, I don't think Kevin was like that. I mean Kevin certainly always, and any good clerk should, match the barrister to the case and vice versa. And they would also, should also stand up for you and he certainly did. I know I told you when we spoke earlier and you were a little surprised that he was also quite protective. But I recall, and this is what I spoke to you about, I recall he'd been on holidays and he came back and asked me how I was and I said, 'I'm tired' and I said 'I've done three or four trials back to back' and he said 'I know'. And he would too, because he would have checked on everybody probably by then. And he said 'don't kill yourself, it's important to pace yourself, take some time, we'll say you're in chambers, doing paperwork'. So, he was kind and protective as well.
- Q You spoke of actors and barristers being very similar creatures. Were you a person yourself who functioned on adrenalin...?
- A Oh yes.
- Q One minute, sheer boredom and the next minute the sheer adrenalin and the ups and downs of that, or do you feel you yourself took a more measured approach to court appearances and then perhaps, as you say, doing some paperwork and the like?
- A No, I mean I hated paperwork. I like the adrenalin and it's a good thing if it's harnessed properly, I mean nerves are a good thing if they're harnessed properly and you should never get to the stage where you don't get at least a little thrill of anticipation. To you, it might be just

another case, but it's the only case in the world to your client and I don't think I ever went into court without this little bit of a butterfly or so, but if it heightens the adrenalin in the proper sense of the word, in a way which is useful, it's a good thing too.

Q Would you characterise yourself as more of like a scene-stealer or were you the solid leading actor?

A (Laughter) I hadn't thought of any of those things. Well you're the leading actor, I suppose for your team and your side, you sometimes get the great pleasure of having wonderful cross-examinations, that could be perhaps the equivalent of stealing the scene, you know. I can recall one case where an ex-wife was applying for a change of maintenance or it may have been the other way around, for their children and I had a conference with her and we were on our way over to court and she just happened to mention in passing that her ex had been an accountant. And I said 'an accountant'? And she said 'yes'. I thought that was very interesting because I'd seen the transcript of the previous proceedings and as it happened, we had the same judge who had heard the previous proceedings. So I was cross-examining this chap and said, you don't have much of an idea about numbers as I understand. 'Oh that's right'. I said, 'indeed at the previous trial (page 97 your Honour), his Honour congratulated you on the fact that your new wife knew a lot more about money matters than you did, do you remember that?' 'Oh yes.' And I said, 'in fact you said to his Honour (page 73 your Honour), that you didn't, couldn't read a balance sheet' and with that, 'yes, yes, yes'. And I said 'how many years was it (that) you were an auditor at a particular firm?' and he said 'seven'. The judge put down his pen. Now you don't get a case like that with that sort of opportunity every day, but it's so much fun when you do.

Q So you think to yourself, snookered!

A Oh yes. Got ya!

### **Part Eleven – Moving to WA**

Q Heather, everything was going very nicely for you at the Bar and you were involved extensively in various other activities at the Bar too during those years and then along came some kind of surprise from left field – in the early 1990s, you and your husband transferred to Perth?

A Yes, we did.

Q And that wasn't something that you were expecting...

A No, it wasn't.

Q And it would have led to a rather difficult decision on your part to leave a thriving career at the Bar and move to an unknown future in WA?

A Well, it was a difficult thing to do, but the decision wasn't difficult to make, I mean of course I had to go, but I remember saying to my husband at the time that apart from him, it meant leaving everything I held dear in the world, you know, my children – they were grown by then, one with my very first grandchild, my home of which I was very fond and of course my work. So the decision wasn't hard to make, but the actual doing it was hard.

Q When you got there, you could have joined a firm of solicitors with a very established list of clients but you chose the harder route - to establish an independent practice at what was a much smaller Bar?

A Yes, the Bar at that stage in WA was probably not as big as my list. There were no barrister's clerks at that stage. Subsequently I think there are a couple, but it's very much a smaller system than we ever had and it – so you had no-one to introduce you. What happens, one of the things that a barrister's clerk does is that a solicitor will ring to discuss a particular case, will perhaps, often have somebody in mind, but sometimes not and of course sometimes that person might not be available anyway. So, it's then the task of the clerk to sell somebody else on his or her list. That's what Kevin did and that's what John Kelly and all their assistants do.

Q So how did you overcome any initial suspicion of you as an outsider, as someone from those dreaded eastern states?

A I guess it was just a matter of, well my first brief came from Michael Holden who subsequently became a judge and indeed the Chief Judge of the Family Court of WA and like any situation, it's a matter of I suppose being seen, and that's the only way that you can, in the absence of a clerk, get the chance. So you get a couple of cases and if you do them well, word of mouth, it's the only way it can come about.

Q I believe eventually though when you did get going, you seemed to develop quite a reputation as a very trenchant and well-organised practitioner.

A Well, I'll admit the well-organised part!

Q You also though did something that was a little more unusual. At one point you decided, or you became rather a magistrate.

A Yes.

Q How did that broaden your outlook and experience as a practitioner? In what ways?

A Well, you're seeing it from the other side of the bench literally. What happened was that the chief, the principal registrar in Perth was going to be an acting judge because one of the regular judges was taking long service leave and they needed somebody not to replace Caroline but to fill the vacancy I think whilst she was acting as judge and I was asked to do it, which was a shock to me, I hadn't thought of such a thing actually. Clearly in that capacity you, well you have to act judicially. One of my first concerns was heavens, I'm going to be making decisions for people's lives and I thought in fact you do that every day as a barrister in the sense that you offer advice which you hope they'll take. So you are in a sense, acting in that respect. You needed to have probably a more detailed understanding of the bureaucratic part of the act and what goes on behind the scenes – I mean that's very useful and I suppose the other thing that you can say about that experience was it was great preparation for what later came along in the sense that a barrister's life is relatively free. You finish your case and provided your clerk doesn't find out, you can go and have a long lunch. As a public servant, or a servant to the public, you of course work from 9 to 5 or much longer, finish one case and maybe have a peanut butter sandwich before the next case lands on your desk and to stop being a barrister one day and become a judge the next, would be very difficult indeed. Now partly because my practice in Perth was never as busy as it was in Victoria, I didn't have that huge alteration to my lifestyle as it were, when I took up that position. But it was a wonderful experience I enjoyed it very much.

## **Part Twelve – Returning to Victoria**

Q You came back to the Bar, the Victorian Bar in 1996 and recommenced, I suppose you might say, work as a barrister, but not long after that you were invited to become a Family Court judge.

A Yes.

Q At that point, I was interested to know – you'd just got back into the swim of things, I suppose, and you were busy again – did you have any dilemmas about whether or not to become a judge, or to continue to lead the freer life as a barrister?

A No, I mean, firstly again what happened was there was a phone call from somebody in the-then Attorney General's staff wanting to arrange an appointment and what had been happening was that he did his own field work as it were, would interview people who he thought might be able to assist in identifying people who would be suitable appointments and it was on that basis that I saw him and he asked – and I'd thought about this knowing what was behind it and I told him that I couldn't. I was not going to sit in judgment on my colleagues, but I said I'd be

happy to tell him what I thought the qualities that he should be looking for, which I did.

Q And the qualities were?

A I can't really remember now what I said but I said the qualities are obviously somebody who knows the law, somebody who is compassionate, somebody who is fearless, all that sort of thing and at the end of it he said would I be interested myself and I said perhaps I would and that was that and then I didn't hear anything further for quite a long while. In fact, Paul Guest was appointed and I was the appointment after him.

Q Yes, you weren't toying with the idea of perhaps applying to take silk?

A Yes I was. I was probably reaching that stage before I went over to the west, but Kevin wanted me to do it anyway and I said no, I said I just don't think that would be quite right to take silk here knowing that I would be going somewhere else because there was quite a long lead up time to our eventual move to the west, but I knew I was going.

Q Would it have counted against you – the fact that you'd been working there?

A No, probably not, but I just didn't think it was quite right to take silk – I just didn't think it was quite right.

Q Had you concerns at any point that you might get less work perhaps as a silk?

A I don't think I'd got to that stage of thinking about that, it just didn't seem to me to be right to be saying to the Chief Justice of the Supreme Court of Victoria, I want to take silk please, knowing that I'm only going to be here for 5 minutes more. It just didn't seem to fit comfortably.

Q After your appointment to the Family Court in 1998, I believe and I'm quoting here a Bar News article, 'a senior barrister was heard to remark at the time of your appointment, "thank God they've appointed her, I will never have to be opposed to her again"' – do you take that as a compliment?

A Yes, I don't know who that was, I don't even know whether it was merely apocryphal but I can say that there definitely was a male barrister who I thought I knew who saw the notice in the lifts and of course in the lifts at the Owen Dixon are where official notices are placed – if it's not in the lift in Owen Dixon, it's not right. So that's where you have the results of Bar Council elections and so on, and when appointments are made that goes up there. And we were in the lift and he said 'who's she?' and I said 'it's me actually'. He was not a family lawyer, and I think he was probably very pleased about that subsequently, so it was good.

Q I imagine you gave him quite a look?

A Yes.

Q A speaking look! (Laughter)

### **Part Thirteen – Judicial Appointment**

Q You've been also described as the last judge in the Family Court to have worn a wig...

A Well, in Melbourne, yes.

Q In Melbourne and that is somewhat unlike many of your colleagues in the Family Court from Victoria who opt for a more, shall we say, an informal approach. Was it because you felt it was necessary to be viewed with a certain degree of formality?

A Yes, in a sense, part of the costume as it were...

Q There's a lot of argument I know and it rages on for years and years about whether or not we should do away with wigs...

A At least once a year, in judge's conferences you know, if it's going to be raised again. I'll never forget hearing a woman barrister say when robing was reintroduced to the Family Court, that's for everybody, that she'd overheard somebody say, 'oh, look they're letting barristers in here now', because of the witchdoctor gear, and I thought well, it's not a far step from that to having real judges here now either and that was just I think the public perception when the idea was, we are just like you, we are real people, we sit up here not so much as judges, but as your friends – but you can get too friendly and you do need some distance.

Q I'm interested in your view, given the changes in family law over the years and particularly since you came to preside over so many of these decisions. What really does work better – having a certain degree of informality which you mentioned a moment ago, or the necessity for having an atmosphere that in some ways I suppose induces people to behave perhaps a little differently to what they might otherwise normally do? I was speaking with a barrister about this just a couple of days ago and he felt very strongly that while mediation is all very fun and he's practised in that area as a mediator/arbitrator, he still felt the formal court of law was a very important way of establishing a particular kind of atmosphere in order to effect particular outcomes.

A Yes I think you certainly do need to have some high degree of formality. That's not to say that people, the litigants, can't be put at their ease to a

point, but they don't want to be, have their case heard by somebody who is laughing and joking. I mean every judge makes the odd joke and of course everybody laughs like crazy, because it's the judge who made it, and there's nothing wrong with having a pleasant atmosphere. It doesn't have to be so rigidly formal that it's uncomfortable, completely uncomfortable, but you also have to be careful, I suppose with making a joke. The litigants should not see for example, a judge laughing and joking with a barrister. If it were their barrister, they'd think it was lovely of course, but the other litigant wouldn't. So whilst you want to have a pleasant atmosphere in that sense, and whilst as I say you will probably know, or certainly would have seen most of the practitioners before, you must never have the people whose case is being decided feel that...

Q Their concerns are being trivialised in a way...

A Oh yes, being trivialised or that you're too – you can't be too chummy with them I suppose is the other word I'm looking for.

Q Did you ever have many disagreements with fellow judges about this kind of thing, or were you generally all in concert when it came to this kind of approach?

A I don't recall really having discussed it in any detail. I don't think we ever really spoke about it, I think it was just something you – well something I always understood and it can be a temptation you know, in the sense that, you know this person not in the sense that you, you have to preserve that distance too. There are always of course some that you like more than others – you mustn't let that show either.

### **Part Fourteen – Judicial Perspective**

Q Did you ever find it difficult to keep an impassive face?

A Yes I found it difficult both as a barrister, well I suppose I remember being told by somebody to whom I was opposed that he was finding it difficult to negotiate with me because I kept looking, you know, 'ha ha ha', or aghast or whatever and I apologised and said 'look it's just my face, it's a bit mobile, I can't help it'. I had to concentrate on a more stoic appearance in court quite often, again not in the sense that you can smile at somebody, you don't have to be grim and frowning all the time, but you mustn't let, unless it's useful, it be seen that you are believing or not believing somebody. I mean sometimes when you hear the most preposterous things it can be quite useful or it's not wrong to...

Q Raise an eyebrow...

A Raise an eyebrow.

Q So an eyebrow would be about as expressive as you were allowing yourself to be?

A Well, that can be pretty expressive especially when you do one at a time, yes, accompanied by a bit of a sneer, yes.

Q What about though during times of very heightened emotion in family court cases, because as we all know, there can be some very, very upsetting cases to have to preside over when you may, I don't know whether you have in fact, been at least in the, not so much the line of fire, but when someone might have given you an absolutely filthy look for example, when you've made a ruling for example or something like that. What were your methods for coping with that kind of strain?

A Well, is that from a litigant or from a member of counsel?

Q Actually either, I suppose primarily from litigants, but I imagine every now and then there might have been counsel who might have had some reason to take issue with you, if not publicly, then at least in their own minds about the ruling.

A Speaking of mobile expressions, yes, or outbursts, yes. I think a filthy look I would ignore, an outburst, no – depending on what was said of course. But it would be a matter then of one of two things, the first choice would be to, it can only be of course if the person is represented and sort of say, Mr so and so, your client is saying things I really don't think you'd want him or her to say, do you want a moment – that sort of thing. Of course if they're not represented it becomes more difficult.

### **Part Fifteen – Self Representation**

Q Did you ever find yourself thinking, I know there's that old joke that people who defend themselves, it's the old saying, they have a fool for a client. Did you find yourself thinking that at times or...

A No...

Q Were there ever cases where it actually worked well?

A I can't think of any case where it wouldn't have worked better with a competent practitioner. You're obviously, you're too close to it, far too close to it. You have the difficulties of giving evidence in effect and cross-examination particularly when you're cross-examining the former partner, it's awful. So I can't think of a case which would not have been better run if there had not been, without – if there had been a competent practitioner there. It's never an advantage to appear for yourself.

- Q Did it happen often?
- A Yes, more and more, because of the restrictions on legal aid.
- Q Have you spoken out about that, against the growing restrictions on legal aid?
- A Well, I did at my farewell certainly, and yes from the bench at times, yes and there were occasions also when in particular cases of sensitivity for example and with all the parties and their lawyers' blessing, I've written to Legal Aid to say this is a worthy case. I know you've got these problems... and they were always receptive, not always able to assist, but generally they did.

### **Part Sixteen - Retirement**

- Q So you retired last year (2008). Do you have any regrets yourself about the conduct of family law matters over the years, not so much from a personal practitioner point of view, but from the way you see things going. What are your concerns about the state of family law these days, looking back?
- A Well, firstly I think the unwarranted criticism that is given to the (Family) Court. It needs to be remembered that the judges and those who work in the Court do not write the legislation. They are at liberty and often sometimes invited to make submissions about legislation, but so is everybody and there is a 'let's kill the messenger' sort of approach unfortunately. The lack of proper provision of legal aid is always a concern and there have been examples in the court which demonstrate how good it can be - I'm thinking in particular of Magellan cases in which a case is identified at an early stage as involving for example, child abuse or alleged child abuse whether mental or physical or whatever and it gets a streamlined process assigned to it. It goes into a discreet list of cases, legal aid - and this is all done with cooperation of legal aid and DHS. The parties are funded, a children's representative appointed and funded by legal aid of course. DHS investigates and participates and just history has shown how much better and more expeditiously these cases are dealt with, but of course it's expensive.
- Q But an expense worth having.
- A Absolutely.
- Q While you were working as a judge, you were known for an enviable work ethic. Once you retired, did it feel strange not to be so hard at it so early to work, so late to leave?

A Yes but it was a strangeness which I was able to embrace very wholeheartedly. It did, yes, I mean I always preferred to, as it were, have my second cup of coffee in chambers rather than fight the traffic to get there, that's one aspect of it. But whilst I'm not a particularly, or used not to be much of a morning person, I'm more of a night owl, I just found it best to get in there when it was quiet.

Q And you could have some thinking time too...

A I could have some thinking time and I refused to do anything without my cup of coffee and a cryptic crossword puzzle before I'd go anywhere. So I would get up between 5.30-5.45 and do all those things, and get in there early and get some good time in and on the same, similar sorts of reasons, I don't like bringing work home. It's too easy not to do it for a start, so I would more commonly if I needed to do some work out of hours, I'd go in on a weekend – you'd never have everything that you needed at home anyway, so I found it easy to make that initial step – I will get up now and go to the office, having gone there I would actually do the work. Whereas if I brought it home, oh I might just have a cup of coffee or read or do such and such and I always, and this was much the same as when I was a barrister, I needed to know what I was doing tomorrow and I wouldn't go home until I had worked that out. I wouldn't necessarily have read everything that I needed to read but I would know that I'd read enough that I'd be able to do the rest of it, first thing in the morning because some of my colleagues for example, wouldn't read cases in the interim lists which you might have, you'd certainly have ten or more. My view always was well I would, I wouldn't read every word, but in the same way as I never went into court as a barrister without having read my brief. I wasn't going to go into court as a judge without knowing what that case was about. But other people just found it unproductive because the case might settle and well you've wasted your time, well too bad. But that was my view.

Q So, whose example in that regard was most influential to you, being as well prepared as you were?

A I think it just was something that you did, both as a solicitor when I was doing court work, but you've got to know your facts and the law of course, but you've got to know what the case is about, what your good points are, what your bad points and weaknesses are. You just can't get up there and do it by the seat of your pants.

Q So looking back, then, your proudest achievement, your happiest memory?

A Well my happiest memory, quite frankly I think will always be, tinted with sadness of course, was my farewell. I mean when you leave, stop being a judge, if you wish you are commonly offered a ceremonial sitting as a farewell, but it's a court setting. I recall when I was appointed, my whole family were there and my grandchildren were there and I told

them, I said this is a court, you know, there'll be speeches and stuff, but you don't clap. It's not like going to a school prize day or anything like that and that's the fact of it. At the end of my right of reply on my farewell ceremony, the practitioners applauded and you know, it brings tears to my eyes even now, it really does and my daughter said to me later, she said 'we didn't do it, mum, we didn't do it' and I said 'I know you didn't - I could see who started it'. But that was just I think the most moving thing I think I've ever experienced.

Q That is an absolute testimonial of the high regard they had for you.

A It just was wonderful.

Q Heather Carter, thank you.

A Thank you.

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