

MURRAY GLEESON

LAUNCH OF *THE SMILER* BY MICHAEL PELLY

ADDRESS BY JAMES SPIGELMAN

SYDNEY, 27 MAY 2014

I am constrained by the subject matter of this evening's event to be short, to the point, to eliminate subordinate clauses, restrict the number of adjectives and adverbs and abjure my propensity for repetition. I will also attempt to refrain from saying anything funny, unless it can be compressed into a single sentence that cuts to the core.

Any discourse on Michael Pelly's biography must observe the requirement so well expressed by Tennessee Williams in *The Glass Menagerie*, to consider only "Things of importance going on in the world! Never anything coarse or common or vulgar." Otherwise, in the presence of the subject of the biography, one risks being subject to *the stare*. This book contains numerous references to Murray Gleeson's capacity to convey his feelings, of disapproval or worse, wordlessly just by looking. As Roddy Meagher so memorably put it: "Murray Gleeson likes flowers. He stares at them to make them wilt."

Murray would have made a great actor in Kabuki theatre. Anyone who has experienced that genre will know that the Japanese audience will wait breathlessly for, say, the middle of Act 2 when the lead actor performs *THE LOOK*. It is a great tribute to that nation's cultural unity that every member of the audience knows it is coming. If executed perfectly, *THE LOOK* will draw shouts of encouragement from the audience – such as “matte imashita” – “We have been waiting!” – by way of applause. Murray was always content with a shudder.

To the “stare” anecdotes in the book, I will add one. As Chief Justice, Murray sat as a trial judge in murder trials - something I never dared to do. As I recall the story, the first such occasion was in Taree, a triumphal return to his home district.

After the trial, Murray was asked, by a very experienced criminal trial judge, how he had dealt with objections to evidence. He replied: “I never made any ruling on evidence. I stared at either the person asking the question or the person making the objection and, on every occasion, either the question or the objection was withdrawn.” As I recall the story, this trial ended in a hung jury. This is the only result from which there can be no appeal of any kind.

This is quite typical of the career so thoroughly set out in Michael Pelly's book. There was never a misstep along the way.

Pelly recites many tales which are familiar to the legal profession.

However, there is much in this book that is new. He has done Australian legal history a great service by interviewing family, friends and colleagues whose reminiscences may not otherwise have been recorded.

As the book recounts, Murray Gleeson's professional trajectory is a chronology of the luminaries of the Sydney bar: Garfield Barwick, Jack Cassidy, Jack Smythe, Nigel Bowen, Bill Deane, Tony Mason, Maurice Byers, Laurence Street, Michael Kirby, Michael McHugh, Roddy Meagher, Tom Hughes, Bob Ellicott, Mary Gaudron, Bill Gummow, Dyson Heydon, Dennis Mahoney, David Hunt, Ken Handley, Roger Gyles, Peter Young, Graham Hill, Terry Cole, Bob Stitt, David Jackson. Each person on this list features in the book as an actor. Some as a commentator.

This extraordinary range of talent deserves emphasis. For it was out of this ruck that Murray Gleeson rose to pre-eminence as an advocate, as a leader of the profession and as a judge. Along his professional journey,

he acquired the confidence and the respect of the entire legal profession, first in New South Wales and, then, throughout Australia.

To those of us who grew up in Murray Gleeson's professional shadow it is the early chapters of this book, about his family background and education, which provide the most new information. His verbal dexterity in court, like his physical dexterity on the tennis court may, in part, be explained by the inheritance of the skills his father Leo displayed as a graduate of the Arthur Murray School of Dancing.

The core of his future professional style was on full display - not merely in his outstanding high school achievements as a debater and orator but, we now learn, revealingly, in his approach to cricket. He was not known for the reckless indulgence of pull shots or hook strokes. It appears that his favourite - and most effective shot - was the low-risk, sublimely effective leg glance. More than anything else, this batting style reflects the quality most essential for success at the bar and on the bench – the capacity for detachment.

The central spine of the narrative after these introductory chapters primarily consists of major cases in which Murray Gleeson was involved as an advocate and as a judge. From the thousands of such cases Michael

Pelly, understandably for a journalist, has, primarily but not exclusively, selected those which achieved public prominence. There were many such.

As an advocate he was involved in landmark cases on the corporations power in the Constitution, on the legality of abortions, on taxation law - including what became known as the Curren scheme – in the prosecution of Iain Sinclair, the Combe Royal Commission and the Paddington Bear Affair, the defamation of Kate Fitzpatrick, the Fine Cotton ring-in scandal and the Tasmanian Dams Case.

As a judge there was a similar diversity from which to choose: allowing Nick Greiner's appeal against ICAC, requiring the New South Wales executive to provide information to Parliament, giving finality to the Chelmsford Hospital affair, determining principles of when a criminal proceeding has miscarried because of the incompetence of counsel, accepting the battered wife syndrome principle, determining appeals in such publicly significant criminal trials as the Jeanine Balding murder, the Ivan Milat and Ananda Marga cases.

The New South Wales case that gives me most grief is the decision in which the New South Wales Court of Appeal allowed Channel 9 to gazump the ABC and take away its hitherto traditional broadcast of the

Commonwealth Games. This marked the beginning of the end of the ABC's financial capacity to compete for major sporting events on television. As the current Chairman of the ABC, this is a sad bit of history, but I felt worse at the time as the unsuccessful counsel for the ABC.

Many of Chief Justice Gleeson's judgments in the Supreme Court will stand the test of time. However, inevitably, it is the judgments in the High Court, as the court of final appeal, that will prove most influential in the decades to come. Pelly discusses many of the key cases on constitutional law - the corporations power, foreign affairs power, judicial power, the constitutional protection of political speech, the right to vote and one-off cases such as whether a British citizen has now to be treated as a foreigner. In addition there are numerous cases on the principles of statutory interpretation, particularly in the context of immigration appeals. There is also a wide range of criminal judgments on matters such as the principle of double jeopardy and the identification of miscarriages of justice. In the civil law there are important cases on the scope of negligence - restoring an appropriate focus on the personal responsibility of the injured. Further, the acute moral dilemmas of cases on 'wrongful birth' and 'wrongful death' have been resolved for purposes of Australian common law.

The story is filled out by references to Murray Gleeson's speeches. No one has ever articulated more forcefully or more effectively the social significance of the roles played by the profession and by the judiciary, in maintaining the rule of law and judicial independence. In addition, the book reflects the demands of leadership, particularly on issues which engaged public interest, such as the backlog of common law cases in the New South Wales Supreme Court, the suicide of David Yeldham, the judgment writing paralysis of Vince Bruce and the allegations made by Senator Heffernan against Michael Kirby.

The most novel content of the book for many lawyers is the information Michael Pelly has been able to obtain about the internal workings of the High Court with respect to the process of judgment writing. There is a great deal of detail, not all of it edifying. One of the most revealing aspects of Murray Gleeson's character in this biography, albeit unintentionally revealing, is the fact that not one piece of this new information comes from him.

The life that is celebrated in this biography is not only a legal life. Scattered throughout the book are observations which reflect a major transition in Australian society. I refer to his Catholicism. This was his

mother's but not his father's religion. Nor was it the religion of his wife Robyn, who is quoted in the book as saying that if her father had been alive at the time he would never have allowed her to marry a Catholic.

Murray Gleeson is quoted as saying that, as the first Catholic ever appointed as Chief Justice of New South Wales, he was gratified that no one thought that fact was worthy of comment. However, as Gough Whitlam told him at the time: “Until recently nobody with your name could have been appointed to that job.”

Gough Whitlam would have had in mind the election of Philip Lynch as deputy leader of the Liberal party in 1973, the first Catholic to hold such senior office in that Party, regarded as remarkable at the time. One only has to take a cursory look at the Abbott Cabinet to realise how much things have changed.

This was one of the great transitions in Australian life. For over a century the schism between Catholics and Protestants was the basic division of Australian society – in politics, commerce, class, education, marriage and every form of social intercourse. When Murray Gleeson graduated most of the significant law firms in Sydney had either never had a Catholic partner or had never had a Protestant partner. It was no accident that he

found articles at Murphy and Maloney. I presume Freehill, Hollingdale and Page had a preference for Riverview boys at the time.

Nothing better reflects this social division than the fact that the Police Commissioner of New South Wales had long been alternatively a Catholic and a Mason, a practice that continued until the late 70s. Unlike the office of the Governor, Premier or Chief Justice, that of Police Commissioner was much too important to allow either group to monopolise it.

This all-pervasive, century-old division disappeared within a decade or two, without conscious effort and without a trace. It was a definitive transition of the same general character that occurred in the middle of the 19th century when the previous tectonic division of Australian society - whether or not you had been a convict or a descendant of convicts - just dissolved. Nothing indicates the Australian capacity for tolerance better than such peaceful, unremarked abolition of long-standing social conflict.

This schism is reflected in the song which, according to Pelly, Murray Gleeson led the family in singing on the drive from Pymble to visit his mother in Wingham. The song was by the English comedy duo Flanders

and Swann. It is not the one I remember – *The Hippopotamus Song* with its glorious refrain: “Mud, mud glorious mud”.

The song was entitled *Misalliance* about two kinds of creeper - the honeysuckle, which spirals clockwise and the bindweed, which spirals anticlockwise. Growing on either side of a door, according to the songwriter, the two kinds of creepers wanted to meet and get married. However,

*“To the Honeysuckle’s parents it came as a shock,
‘The Bindweeds,’ they cried, ‘are inferior stock!’
They’re uncultivated, of breeding bereft;
We twine to the right and they twine to the left’.”*

The class-based distinction is clear in this passage. However, there is also a political message. Indeed class and politics were closely intertwined throughout the Catholic/Protestant division era. When Murray Gleeson came to the Sydney bar, his religion was a fundamental aspect of his career prospects. By the time he became Chief Justice of New South Wales, it was just irrelevant.

In most nations in the world, divisions of this character fester for centuries. To the outsider they often appear as inane as the conflict

triggered in Lilliput, as Gulliver recounts, between those who believe boiled eggs should be opened at the fat end and those committed to opening at the thin end. Murray's career personifies the extraordinary Australian capacity for peacefully dissolving tension.

For a person steeped in the principles of the common law, as Murray Gleeson was and is, his life in the law as an advocate and as a judge is, appropriately, analogous to the development of the common law, as manifest in the sequence of cases that constitutes the narrative structure of this biography.

As the great American Judge Learned Hand put it, in his review of Benjamin Cardozo's book *The Nature of the Judicial Process*:

“The ... structure of the common law ... stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built on the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.”ⁱ

Murray Gleeson's life and work - in the words of Judge Learned Hand, who shared Murray's philosophy of judicial restraint – is such a “slowly

raised monument” built on the work of his predecessors and he has “left a foundation upon which his successors might work.”

Both the monument and the foundation are wondrous to behold.

ⁱ Book Review 35 Harv. L. Rev. [479, 479 (1922)]