

SPEECH PROPOSING A TOAST TO RETIRING JUSTICE MARY GAUDRON, AUSTRALIAN WOMEN JUDGES DINNER, SYDNEY, 22 FEBRUARY 2003

In preparing for this occasion, I have spent some evenings reading a great deal of information contained in a Queensland file marked "There's Something about Mary ...!". You may think a large Queensland file on Mary Gaudron must have been provided from the Queensland Police Special Branch! Whilst I'm sure Special Branch once had a very large file about Mary Genevieve Gaudron, this one was prepared by our resourceful Supreme Court Librarian, Aladin Rahemtula, and his helpful staff. But instead of assisting me, this mountain of information made my task even more daunting and difficult. How could I capture in a short speech the qualities possessed by this most remarkable woman: her intellect, her reforming zeal, her sense of justice, her humanity, her humour, her compassion and passion for all these things and for life itself; a woman who has unstintingly served the Australian people but insisted on and achieved family privacy.

Mary Gaudron is no silver-tail. She was born on 5 January 1943 to a working class family. Her father was a train driver. She grew up in Moree well aware of racist attitudes towards Aborigines; perhaps this first stirred the flames of her lifelong passion for equality and justice. It is well known these flames were fanned by Doc Evatt's visit to Moree, campaigning from the back of a truck for the referendum "No" case to permit the banning of the Community Party. Eight year old Mary enquired of the Doc: "What's this Constitution you keep on about?" Evatt sent her a copy; a good investment on his part, as it turned out.

Mary attended the Moree convent and, with a Commonwealth Scholarship and some help from the nuns, St Ursula's in Armidale. Sister Kennedy recalled her as "a quick-witted girl who was determined to make the best of her abilities". That was an understatement!

The Commonwealth Scholarship scheme allowed Mary, at age 16, to attend the University of Sydney where she graduated with a B A in 1963. She then worked and studied law part-time and in 1965, graduated with a 1st class honours degree in Law and the University Medal in Law whilst pregnant with her first child, Danielle. In achieving this, Mary ignored encouragements such as that received from one university lecturer who suggested she not take part in a moot because it was plain she would not take the practice of law seriously. I wonder what happened to him?

Ms Gaudron lectured in Law at the University of Sydney and completed her articles at F E Fischer & Laws, the firm she joined as a registration clerk whilst finishing her studies.

In October 1968, Gaudron was admitted to the Bar and, despite her brilliant results, experienced difficulty in finding suitable chambers, apparently because of her gender. She was undeterred and turned this into a positive experience by sharing a room with Janet Coombes, a pioneer among New South Wales women practitioners. Gaudron quickly built a formidable reputation as a fine advocate, earning the name from some male adversaries, "Mary the Merciless". She enjoyed a busy practice in all New South Wales jurisdictions but with a particular focus on industrial and defamation law. In her second year at the Bar, having appeared as junior to Clive Evatt in *O'Shaughnessy v Mirror Newspapers*,¹ both at trial and on appeal, Gaudron was briefed alone in the High Court, where she won a unanimous, glorious victory and a new trial for her client. It is legendary that during argument, she mispronounced the names of Lord Esher [Ee-sher] as Lord Esh-er and Lord Justice Lopes [Lopez] as Lord Justice Lopes, provoking Mr Justice Windeyer's comment: "Miss Gaudron, I am sure that if Lord Esher [Ee-sher] or Lord Justice Lopes [Lopez] were here today, they would prefer to hear their names pronounced in the manner I have just pronounced them." Quick as a flash of Gallic lightning came the reply: "Your Honour, if either of the learned Lords were here today, I'm sure they would be more concerned about the merits of my arguments than the pronunciation of their names." I am pleased she did not have to refer to a judgment of Lord Justice Cockburn!

In 1972, Gaudron became the first woman member of the Bar Council of New South Wales. Perhaps the most important win in this part of Gaudron's career as a barrister was when she appeared for the Commonwealth before the Arbitration Commission in the equal pay case.

In 1974, Justice Gaudron was appointed Deputy President of the Arbitration Commission - at 31 the youngest person ever to be appointed a Federal judge. Her presentation of her commission as a judge was interrupted by baby daughter, Julienne's cries of "Mummy, mummy" and Grandma Gaudron swiftly whisked Julienne out of the court. These days I think the swearing-in of women judges who are mothers of young children is so commonplace that such cries bring smiles of delight from those present in the court room rather than banishment for the child and carer. The Sydney Morning Herald of 9 April 1974 celebrated

¹ (1970) 72 SR(NSW) 347.

Gaudron's important historic appointment with an article entitled, "The Law and the Laundry. Australia's youngest judge has no time for the ironing" and included important information on Justice Gaudron such as: "How does she cope with the demands of career and family? "It's quite simple. I don't." she said. "I live in a constant state of mess and two piles of clothes – one to be washed and one to be ironed." Perhaps this was the catalyst for Mary's insistence on family privacy.

You may have heard the well known rumour that Clyde Cameron, the Minister for Industrial Relations, had to persuade Whitlam to appoint such a young woman to the federal judiciary and did so by emphasising her academic brilliance and her University Medal but in Cabinet he took a different tack and stressed her humble childhood and solid working class background, only to be interrupted by Whitlam: "Next you'll be telling us she was born in a bloody manger!"

Perhaps less well-known is Mary's depth of knowledge of activated sludge, gained first in her time in the Conciliation and Arbitration Commission, and built on in her travels in the Middle East where aeronautical mechanical difficulties resulted in her spending 72 hours in the company of three US sewerage engineers, whose lives revolved around Saudi Arabian activated sludge. It seems the 72 hours felt more like six weeks and they spoke of nothing else the entire time, except when the most sociable one decided to check out Mary's personal particulars. He then announced to his colleagues, "Say, Bud, this here chick's a judge." Bud replied, "Sure that's interesting. Ask her if she knows anything about Newfies." The sociable engineer replied, "She's not a goddam dog judge, she's a goddam Federal judge, a Federal aberration judge."

As Deputy President of the Arbitration (or should that be "Aberration") Commission, Justice Gaudron was involved in an important decision which has influenced the availability of maternity leave in Australia. In 1979 and 1980 she served as foundation chair of the New South Wales Legal Services Commission. In May 1980, she resigned from the Arbitration Commission, apparently in protest over treatment of colleague, Justice Staples. Mary Gaudron returned to lecturing, this time at the University of New South Wales Law School.

In 1981, Gaudron was appointed a QC and New South Wales Solicitor-General, the first woman to occupy that office in any Australian State and the youngest person ever to be appointed to that position. Gaudron S-G, QC appeared frequently before the High Court in significant

constitutional cases including *Actors Equity v Fontana Films* in 1982;² *The Tasmanian Dam Case*;³ *Hematite Petroleum v Victoria*⁴ and *Stack v Coast Securities (No 9)*⁵ in 1983; and *Miller v TCN Channel Nine*⁶ in 1986.

She made time to be wooed and won by her husband, John Fogarty, who must himself be a formidable advocate to have persuaded Mary to remarry and to produce a third child, in the interests of equity, a boy this time, Patrick.

Gaudron S-G, QC, partner and mother, managed to continue her community service as a member of the Council of Macquarie University from 1981 to 1986 and Chair of the Advisory Council of the Centre for Technology and Social Change at the University of Wollongong from 1984 to 1986.

Friday, 6 February 1987 was an historic day for all Australians and a day of celebration for women lawyers. Justice Gaudron became the first woman judge and the 37th judge to be appointed to the High Court of Australia. High Court judges appointed by the Hawke government did not take the previously customary title and Justice Gaudron also declined the award of Companion of the Order of Australia, refusing to give reasons for that decision in accordance with protocol.

In Justice Gaudron's swearing-in speech, she referred to her delight at the presence in the court of Dame Roma Mitchell, whose contribution to advancing the status of women merited particular acknowledgement. She added: "My constitutional duty is to all Australians but I hope that consistent with and by reason of the discharge of that responsibility I shall be able to contribute as effectively to the status of women lawyers as has Dame Roma." Mary Genevieve Gaudron, you have done that and even more.

At the risk of offending by omission, let me touch on Justice Gaudron's work as a High Court judge in which she contributed to every important area of Australian law.⁷ This work includes recognition of native title in *Mabo*;⁸ a workable theory of s 92 of the Constitution in *Cole v*

² (1982) 150 CLR 169.

³ (1983) 158 CLR 1.

⁴ (1983) 151 CLR 599.

⁵ (1983) 154 CLR 261.

⁶ (1986) 161 CLR 556.

⁷ "Oxford Companion to the High Court of Australia", Blackshield, Coper, Williams, Oxford University Press, 2001.

⁸ (1992) 175 CLR 1.

Whitfield;⁹ clarification of implications of Ch 3 for federalism in *Re Wakim*¹⁰ and identification of the implied freedom of speech in *ACTV v Commonwealth*¹¹ and *Nationwide News v Wills*.¹² She also contributed to the progression of administrative law in areas including standing (*Bateman Bay's Local Aboriginal Land Council v Aboriginal Community Benefit Fund*¹³) and natural justice (*Ainsworth v Criminal Justice Commission*¹⁴); the reform of criminal procedure (*Dietrich*¹⁵) and the reform of conflict of laws (*Pfeiffer v Rogerson*¹⁶). She has been influential in the development of the criminal law in a myriad of decisions, for example *Zecevic v DPP (Vic)*;¹⁷ *Doney*;¹⁸ *Edwards*;¹⁹ *Farrell*²⁰ and *HG v The Queen*²¹ to name just a few. Her views on discrimination are a common thread woven through many of her decisions, including *Street v The Queensland Bar Association*²² and her decision with McHugh J in *Castlemaine Tooheys v South Australia*²³ and *Ha v New South Wales*.²⁴ The principle of non-discrimination is integral to her jurisprudence on Ch 3 of the Constitution. She has contributed to the jurisprudence on gender equality in cases such as *Baumgartner*²⁵ and *Singer v Berghouse*.²⁶ Justice Gaudron was the High Court's acknowledged expert in the important and prolific field of industrial law.

I am sure Mary Gaudron's proficiency as a caver, scrambling into dark abysses, swimming against the tide and diving into unexplored caverns, squeezing through narrow, uncomfortable rocky passages and along dangerous craggy ledges in the hope of finally reaching the light, must have been great preparation for her work as a High Court judge.

Justice Gaudron's legacy as a judge is not limited to her weighty contribution to Australian jurisprudence in her judgments. She has provided a role model to all Australian women and men, but especially young women and girls. She has been proof that no doors are permanently closed, even if sometimes they do not seem very open. She

9 (1988) 165 CLR 360.
 10 [1999] HCA 27, 17 June 1999.
 11 (1992) 177 CLR 106.
 12 (1992) 177 CLR 1.
 13 [1998] HCA 49, 6 August 1998.
 14 (1992) 175 CLR 564.
 15 (1992) 177 CLR 292.
 16 [2000] HCA 36, 21 June 2000.
 17 FC 87/027.
 18 (1990) 171 CLR 207.
 19 (1992) 173 CLR 653.
 20 [1998] HCA 50, 13 August 1998.
 21 [1999] HCA 2, 9 February 1999.
 22 (1989) 168 CLR 461.
 23 (1986) 161 CLR 148.
 24 Matter No S45 of 1996, Matter No S165 of 1996.
 25 (1987) 164 CLR 137.
 26 (1994) 181 CLR 201.

has played an important educative role, not only in her judgments and in her significant speeches in the outspoken and forceful support of women lawyers and women judges, but also by educating the six male members of the High Court of Australia, both by her presence and her interaction with them, on and off the Bench.

Justice Gaudron's early retirement is a great loss to the Australian people but she leaves a lasting mighty legacy on many levels. In 1984, she was asked if she had any regrets and unlike Frank Sinatra she had: "A thousand. I'd like to have studied mathematics, I'd like to have travelled to the Moon. I'd like to understand the theory of relativity and the mind that dreamt it up. I'd like to have studied philosophy ... a thousand regrets." What! No mention of the laundry or activated sludge! Mary, in between your important work for the ILO in Geneva and sipping wine with your friends and family in France, I hope you will now have time to remedy some of those regrets.

We all thank you. Good luck with the next stage. Ladies and gentleman, an Irish toast.

The health of the salmon to you,

A long life,

A full heart,

And a wet mouth.

Mary Gaudron.