"GOOD MORNING, YOUR HONOUR"[1]

by Judge C.F. Wall Q.C.[2]

[1] On 29 April 2011 in the District Court at Southport at the commencement of a sentence, Chris Wilson, representing the defendant said

"Good morning, your Honour"

[2] Mr Wilson appeared unaware of the salutation minefield into which he had stepped.

[3] On 17 December 2010 Palmer J. in the Supreme Court of New South Wales laid the first mines. In giving judgment in the case of *Wilson v Department of Human Services - re Anna* [2010] NSWSC 1489 His Honour said

> "106. The second matter calling for comment occurred in the conduct of the case in this Court but it is not peculiar to this case - it has been observed by a number of Judges in the Supreme Court and it is currently the subject of discussion between this Court, the Bar Association and the Law Society. I refer to the practice of advocates, which seems to have developed over recent years, of announcing their appearances to the Bench or beginning the examination of witnesses with the salutation *'Good morning, your Honour'* or *'Good afternoon, Mr Smith'*. I am informed that this is a practice which has developed in the Magistrates' Courts. The Supreme Court is of the view that it is a practice which should be abandoned in contentious litigation.
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> 107. Lest it be thought that this view is the relic of a stilted and now-outdated judicial self-esteem, let me illustrate, by reference to what occurred in this case, how the practice can cause substantial misperceptions prejudicial to the conduct of a fair trial.

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[1] This is a revised version of a paper presented at the Recent Developments in Criminal Law Conference, Queenstown, New Zealand, 14-17 August 2011 and at the Central Queensland Law Association Annual Conference, Yeppoon, Queensland, 26-28 October 2012

[2] Judge, District Court, Planning and Environment Court, Childrens Court, Southport, Gold Coast, Queensland

108. Mr Chapman, who is obviously a highly experienced and capable solicitor frequently conducting cases in the Children's Court, routinely greeted me with the salutation of '*Good morning, your Honour'* or '*Good afternoon, your Honour'* each time he announced his appearance at directions hearings and on each day of the trial. In accordance with the usual etiquette of this Court, Mr Moore of Counsel did not. Mr Chapman's apparent familiarity with the Judge could have caused a misapprehension in the mind of Ms Wilson (one of the self-represented plaintiffs), already distrustful of the judicial system, that Mr Chapman enjoyed a relationship with the Judge which was something more than merely professional. Such a suspicion should never be allowed to arise. A Judge should not feel compelled to allay such a suspicion by rebuking an advocate for misplaced courtesy.

109. More importantly, Mr Chapman routinely began his cross examination with the salutation *'Good morning, Ms Wilson (or Mrs Wilson)'*. He was met with a stony silence. How could Ms Wilson or Mrs Wilson greet politely the man who was avowedly intent on taking Anna away from them by destroying their evidence? A witness in their position would inevitably feel it to be the most odious hypocrisy to be compelled to return the salutation with a polite '*Good morning, Mr Chapman'*.

110. Mr Chapman, of course, noted the rebuff and, on occasion, directed a meaningful look at the Bench. I do not think he intended it, but the impression which could well have been conveyed to Ms Wilson and Mrs Wilson was that, even before Mr Chapman had begun his cross examination, he had already unfairly scored a point against them because he had put them in the position in which he could say - eloquently, by a look, not even a word - *'You see what rude and unpleasant people we are dealing with here, your Honour"*.

> 111. I wish to make it clear that, by these remarks, I intend no personal criticism of Mr Chapman. He conducted the case professionally and courteously, in what he saw to be the best interests of Anna. I am sure that, in using salutations as I have described, Mr Chapman was merely following a practice which is now routine in the Magistrates' Courts.
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> 112. However, a witness should never be placed in the position of having to greet politely a cross examiner who is an avowed opponent. An advocate should never use this technique to score against a witness. It is far better to avoid the perception that this technique of discrediting a witness is being used unfairly.
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> 113. For these reasons, the practice of salutations by advocates should be completely abandoned in all Courts in all contentious litigation."

[4] As a result of those remarks the President of the Bar Association of Queensland said in the February 2011 edition of Hearsay magazine that the

> "salutation should not be abandoned but that its use as a courtesy should not be overdone."

[5] On 11 April 2011 the Bar Association sought the views of Supreme Court and District Court Judges on the position in Queensland. The Chief Executive of the Association said at the time

> "It appears that Mr Justice Palmer is echoing the thoughts of a large number of Judges of the Supreme Court of New South Wales…"

and that would appear to be so.

[6] The views of some of the Judges of the District Court have been expressed (internally) in the following terms

(a) **Judge A**

> "As I see it there are 2 distinct issues raised at paragraphs 106 and following of Palmer J's judgment.

Firstly, the exchange of greetings between counsel and Judge and secondly, between counsel and witnesses.

In respect of the first I cannot see that any valid objection could be raised on the grounds of perceived bias by a judge for or against counsel if at the commencement of a trial or hearing there is an exchange of greetings such as, 'Good morning Mr/Ms Smith' or 'Good morning your Honour'. In my view this is merely common courtesy and one would have to have a very suspicious and/or cynical mind to interpret such a benign comment as indicating some special 'relationship' with the judge as Palmer J seems to imply. I accept that it is unnecessary to do so everyday of a trial but I see absolutely nothing wrong with doing so at the commencement of a trial or hearing.

In respect of the second point I consider that it is unnecessary for counsel to exchange greetings with witnesses in the witness box and this practice is probably 'misplaced courtesy' as the judge described it and should not occur.

In my view these rather trivial issues are matters of commonsense which we tell juries to exercise everyday in reaching their important decisions. Perhaps some judges should do the same on matters of trivia.

Good manners should apply in all aspects of our daily lives and should not be left at the courtroom door. I will continue my practice of greeting counsel at the commencement only of a trial by saying, 'Good morning - this is the matter of R v Bloggs could I have your appearances please'."

(b) **Judge B**

"I have read the case and firmly believe that such cases, as sensitive as they are to manage on occasions, do not justify an abandonment of plain good manners in Judges and Counsel exchanging mutual greetings. One could extrapolate any such protocol of universal application to situations where counsel has innocently [or intentionally] conducted

himself/herself so as to warrant an apology to the court. Should that be abandoned also to the intent that a wooden performance is to be expected of advocates? I know that is not what is proposed but I do disagree with the views of those members of the New South Wales Supreme Court mentioned in the judgment.

Any such view is founded on the principles of perceived bias, so that the evil to be addressed is that litigants do not leave a courtroom with a justifiable view that, because of the apparent unhealthy closeness of the relationship between Bench and counsel, an impartial hearing was denied.

All Judges should be conscious of avoiding such a situation but I cannot see that an exchange of greetings between Bench and Counsel, without more, could ever be said to be a proper foundation for an allegation of perceived bias.

The obvious sensitive area is with self representatives where the very situation would, or should, normally alert the Bench and counsel to be especially vigilant to exercise restraint in exchanges. In my experience in such cases, counsel have been scrupulous in that regard.

I see no need for any prescription on what I regard as common sense."

(c) **Judge C**

"While I would have been happier if this issue had not been raised, now that it is I feel constrained to agree with Palmer J. I would have no difficulty about exchanges of greetings initiated by the judge, who ought to be able to introduce pleasantries in an appropriate way which will not lead to anyone feeling excluded or at some disadvantage. Doesn't the judge always get first word?

Palmer J is not concerned only with greetings exchanged or offered among the legal people but with ones offered to witnesses who may in some cases see them as a ploy

designed to create nervousness or unease, if only as to the appropriate way to respond."

(d) **Judge D**

"I agree strongly with Palmer J. The traditional opening statement 'May it please the court' or 'If the court pleases' is both polite and neutral. It is incapable of giving rise to misconceptions of the sort described by Palmer J.

I run the risk of being thought rude by refusing to respond in kind to 'Good Morning' but I was told as a young man that such statements are inappropriate and in my opinion Palmer J sets out good reasons for the rule.

It is often on my mind when a member of the Bar commences his address to the jury with 'Good Morning (Afternoon) members of the jury' and pausing for a response which is sometimes forthcoming. At other times the jury look as uncomfortable as I feel while this goes on.

I would strongly support a request to the President that his members be told that such a greeting (whether addressed to Judge or Jury) is inappropriate."

(e) **Judge E**

"I too must be of the 'old school'. I agree absolutely with Palmer J."

(f) **Judge F**

"I did not use this form of address when I was at the bar, but I am not troubled by it being used to greet a judge at the commencement of the day. There is a barrister who often uses it to address witnesses in the P & E Court. It has not caused any real difficulty of which I am aware in that context, but I would not like to see it used in a jury trial."

(g) **Judge G**

"I do not have any difficulty with the bench and legal representatives exchanging brief but polite pleasantries at the

beginning of a trial, and even on each following morning. Any perception of bias should be able to be eliminated by including the litigant. But I would prefer that the lawyers did not exchange introductory pleasantries with witnesses, particularly in criminal trials. The reference to 'litigant' is meant to cover cases where a person appears on his/her own behalf."

(h) **Judge H**

"I take a position similar to Judge G which is also consistent with some earlier responses.

This is a matter on which minds will reasonably differ. However with appropriate discretion I can see no difficulty of [sic] the occasional exchange of greetings between the bench and counsel (provided all counsel are present). However I would take a different view in any case where one of the parties was self represented.

I do not consider it appropriate for counsel to commence any examination with 'Good morning'. Courtesy can be extended to a witness by an appropriately respectful form of address (e.g. Doctor, Professor, Mr, Ms etc.) and the manner in which the examination is conducted.

I agree with Judge D that it is inappropriate to put the jury in a position of having to respond to a greeting from counsel at the start of an address."

(i) **Judge I**

"I agree generally with Judge B. In relation to counsel commencing cross-examination of an angry witness with a greeting, counsel does so at his/her peril. It is all part of advocacy and interactions in court. A witness responds to such a hollow greeting as the witness sees fit. The witness is not put in the situation of having to reply politely at all.

In what was described in the judgment, the cross-examiner appeared to be the transparent goose. In the circumstances,

the absence of a polite greeting in reply would not and did not reflect badly on the witnesses. Cross-examiners often try to ingratiate themselves with witnesses in a variety of ways in an attempt to pluck the fruit before chopping down the tree."

(j) **Judge J**

"For what it is worth I note that at para 106 Palmer J said that the Supreme Court was of the view that the salutation 'should be abandoned in contentious litigation'. I think that is right.

Whether the greetings should be abandoned all together is another matter. I don't think it is appropriate for Counsel to greet witnesses, whether for the purpose of ingratiating themselves or for any other reason. That can clearly make the witness feel compelled to respond with the possibility that the witness will feel uncomfortable. If the witness doesn't reply, who is to know what impression that will leave on the jury."

(k) **Judge K**

"I agree completely with the NSW Supreme Court position. I add that my associate told me this week that at the College of Law legal practice course, students are taught clearly not to say good morning."

(l) **Judge L**

"I agree with Judge H, who has with respect put things very sensibly, subject to one possible qualification, which may be just a matter of emphasis.

I do not approve of counsel, when resuming cross-examination after overnight adjournment, saying 'good morning' to the witness (let alone anything more), when that follows an aggressive or even disparaging cross-examination the previous day. I do not care if this does rebound on counsel, I regard it as intended to put the witness under improper pressure, and for that reason it should not be

> allowed. I would like to have a proper basis for reprimanding such counsel.
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> No doubt the Bar Association will have to take into account the views of other courts as well before giving a ruling; I would prefer the one ruling to apply to all courts."

[7] Unsurprisingly the District Court has yet to agree upon a uniform approach to the issue.

[8] In early May 2011 the Chief Justice expressed his "personal" view as follows

> "Especially with the increasing incidence of self-representation, we must be astute to perceptions which may arise from the apparent association between the bar and bench. To begin with an introduction, however courteously intended, which may discomfort an unrepresented party on the other side, is simply not appropriate.
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> So is the commencement, by an apparently friendly greeting by barrister to witness, of what may well turn out to be a challenging adversarial cross-examination.
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> The time-hallowed introduction from bar to judge is the uncontroversial 'if the court pleases' or its variant, and for witness, simply into the fray.
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> I urge Counsel to avoid any more personal flourishes: they run the risk of impairing perceptions of the impartiality of the process, and of the dispassionate capacity and performance of Counsel…"

[9] The Judges of the Court of Appeal are of a similar view. Also in early May 2011 the President said

> "I discussed this issue with the judges of appeal at our monthly meeting today. We agree with the views expressed by the Chief Justice."

[10] The view of the Bar Association as later expressed by the President on 10 May 2011 seems to be as follows

> "This does seem a pedestrian topic but as the comments of Palmer J in *Wilson*, and the Chief Justice and the President [above] make plain

> the implications are not without moment. Notwithstanding the virtue of common courtesy, members need to take heed."

[11] The Criminal Law editor of Queensland Lawyer said in (2011) 31 Qld Lawyer 246 at 248

> "Ultimately, the best advice seems to be that within the bounds of common courtesy, one should not commence either examination-in-chief or cross-examination by wishing the witness 'good morning' or 'good afternoon'. This approach might be relaxed should the circumstances dictate. For example, where no other opening will do, or in the case of a timid witness whose cross-examination is not to be confrontational. Such a witness might best be put at ease by this kind of opening. Similarly, witnesses giving evidence by telephone might require some such introductory greeting, if only because telephone manners probably require it. Difficulties could arise, however, in the case of an appropriate greeting. If one is offered, how would opposing counsel deal with it, especially in front of a jury? An objection could be productive of more harm than the greeting itself and any response to it. It could lead to the objecting counsel being treated with contempt or derision by the jury. This might, in turn, harm the case of the party represented by that counsel. Probably, the wisest course in a case where the greeting attracts a hostile response from the witness will be for counsel to treat it as an appropriate matter for address. The opportunity can then be taken to discomfort opposing counsel by explaining why such greetings are regarded as being unfair."

[12] Thomas F. Gaffney[3] in "Borrowed manners: Court etiquette and the modern lawyer" (2012) 86 ALJ 842 at 851 said

> "In recent times a regrettable practice has arisen of advocates announcing their appearances beginning with the salutation 'good morning your Honour', rather than the proper phrase 'May it please the Court'… I do not seek to add to the analysis of Palmer J, other

[3] Tipstaff to Justice P.A. Bergin, New South Wales Supreme Court

> than to note that the practice can have unfortunate and unintended outcomes for an advocate before the Court."

[13] I'll leave the last word on this subject to Keane CJ of the Federal Court. At the 2011 New South Wales Bar & Bench Dinner in Sydney on 13 May 2011 His Honour said

> "This is the Bar, where, only twenty years ago, Sir Nigel Bowen had to persuade its members that it was not a breach of the etiquette of the Bar for its members to shake hands on greeting each other.
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> It is in Sydney that barristers may not say 'Good Morning' to the judge lest they be suspected of trying to steal a march on an unrepresented litigant, and lest the practice lead to an outbreak of common courtesy."