Speech Given at the Ceremonial Sitting on the Occasion of the Opening of the Legal Year 2022

Fatigued: Moral Decision-Making in the Law

31 January 2022

Supreme Court of the Australian Capital Territory

Chief Justice Murrell

The Court acknowledges the traditional and continuing custodians of this land, and we pay our respects to their Elders—past, present, and emerging. We acknowledge that sovereignty over this land was never ceded. We reflect on the fact that, over the last 30 years, 500 Aboriginal and Torres Strait Islander Australians have died in custody.[1]

Welcome, Attorney-General, fellow judicial officers of the ACT Magistrates Court and other courts, retired judicial officers, members of the legal profession, and other friends of the Court.

For the second consecutive year, at the commencement of the legal year we pause to reflect on the values that guide our profession at a time when the means of delivering those services are challenged.

In 2009, Murray Gleeson remarked that:

> [T]he Court of the future will need to embrace, and respond appropriately to, the demands of the future, while remaining a Court.[2]

In March 2020, we were confronted with the urgent need to consider that which was essential to the way in which justice was delivered through the courts. What was it about the delivery of justice that had to be maintained and what could be jettisoned? Consideration of this question was a daunting task, albeit at the time we then optimistically imagined that the issues were short-term and the solutions could also be temporary. Instead, we became increasingly familiar with the Greek alphabet.

How to respond to a dramatic change in the means of delivering our services "while remaining a Court"? The courts and the legal profession provide an essential service. But what is essential about it? And what is essential about the means by which the courts deliver justice?

As with other essential services, questions about what is important may be answered by reference to quantifiable performance outcomes—response times, exam results or lives saved—in the case of courts it is often by reference to finalisation times, settlement rates, and backlogs. But at a more fundamental level the answers are unquantifiable. They are about the means as well as the ends; through the best means we achieve the best ends. That is a tenet of therapeutic jurisprudence to which we should all subscribe.

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[1] Lorena Allam, ''Beyond heartbreaking': 500 Indigenous deaths in custody since 1991 royal commission', *The Guardian* (online, 6 December 2021) <https://www.theguardian.com/australia-news/2021/dec/06/beyond-heartbreaking-500-indigenous-deaths-in-custody-since-1991-royal-commission>.

[2] Murray Gleeson, 'The Judicial Method: Essential and Inessentials' (Speech, District and County Court Judges' Conference, 25 June 2009) 6.

In every sphere of human activity, one of the key lessons of the last two years has been the importance of connection and communication, and that connection and communication is most satisfactorily achieved by direct personal engagement.

As in many other fields of endeavour, for courts and the legal profession, "meeting" is not just a means of transacting business. It promotes better decisions. Within the legal profession, meetings such as that in which we are engaged today reinforce who we are, both as individual lawyers and as a community of lawyers with shared ethical values.

Canberra: the meeting place

We are privileged that our legal community meets in Canberra, the meeting place of the nation.

In 1823, Joshua Moore established a station at what is now the site of the National Museum, at "Manarro" as it was called by local Indigenous people.[3] In 1826, he referred to the location as "Canberry", a name that came to be applied to all the surrounding areas. The local Indigenous people were referred to by white writers as the "Kamberra", "Kghambury", "Nganbra" and "Gnabra". It is popularly believed that "Canberra" is an anglicised version of a word that was used by the local Aboriginal people meaning 'meeting place'.[4]

The Canberra region was a significant meeting place for Indigenous peoples to meet for marriages, ceremonies, and trading.[5] Hanging Rock, an undercut boulder within Tidbinbilla, has been a meeting place for centuries. Important ceremonies were held at Tidbinbilla Mountain and other sites within the Namadgi National Park. Within the Canberra area there are more than 3,500 known Aboriginal heritage sites.[6] The Canberra area has been an important meeting place for a very long time.

In 1927, the provisional Parliament house was completed, and the federal Parliament (comprising 112 males) moved its meeting place from Melbourne to Canberra.[7] At the time, Canberra was a town of scattered suburbs with three small shopping centres (at Civic, Manuka, and Kingston) and five temporary hotels providing for a recorded population of 5,915. As prohibition was in force at the time, Parliament and hotels were "dry" and residents had to travel to Queanbeyan to drink.[8]

The Griffin plan for Canberra was completed by 1918, although implementation was interrupted by the First World War and the Depression.[9] By the mid-1930s, the Australian War Memorial, a new hospital and public schools were under construction. The Second World War again interrupted building activities into the 1950s, when the new National Capital Development Committee proclaimed three objectives: that

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[3] 'The Early History of the ACT', *National Capital Authority* (Web Page) <https://www.nca.gov.au/sites/default/files/3EarlyHistory_0.pdf>.
[4] Ibid.
[5] 'Aboriginal Cultural Heritage of the ACT', *ACT Government* (Web Page) < https://www.environment.act.gov.au/ACT-parks-conservation/healthy-country?a=396904>.
[6] Ibid.
[7] Greg McIntosh, 'As it was in the Beginning (Parliament House in 1927)' (Research Paper No 25, Social Policy Group, 27 March 2001)
[8] Ibid.
[9] Peter Freeman, 'Building Canberra up to 1958', *National Capital Authority* (Web Page) <https://www.nca.gov.au/education/canberras-history/building-canberra-1958>.

Canberra should remain a "Garden City", should develop a modern system of communications by road and air, and should eventually become a cultural centre for several aspects of Australian culture.[10] Canberra has become a meeting place for many cultural communities, home to such iconic institutions as the National Museum, the National Portrait Gallery, and Mooseheads.

But while the courts and the profession are well situated in this long-established meeting place, for the past two years we have been unable to meet as we would wish, in the way that we consider most easily promotes the interests of justice.

How has our way of meeting changed?

Virtual meetings have many advantages, but in other respects they are not well suited to a trial court, where important decisions may hinge on persuasive oratory and subtle interpersonal exchange involving visual cues, particularly between counsel and judge.[11] Practitioners have complained of a loss of the "chemistry" between cross-examiner and witness.[12] If "chemistry" means counsel's capacity to overbear a witness by personal presence, then I am not persuaded that anything of value has been lost.

The difficulty with replicating rituals that have symbolic and practical significance in a physical courtroom is a real loss. For example, the High Court has issued a Videoconferencing Hearings Protocol that states that practitioners need not rise for the entry and exit of the Court.[13] No doubt the Court was sick of seeing practitioners' pelvises.

Practitioners now pine for the rush of high anxiety at the prospect of physically appearing before the notoriously harsh judges of this Court (and in our sister jurisdiction, the Magistrates Court), much preferring it to the emotional wasteland of virtual isolation.

We may be physically fitter than ever (our activities having been largely confined to the wholesome outdoors), but in other respects the past two years have induced fatigue: emotional fatigue, cognitive fatigue, and moral fatigue.

While we are still temporarily buoyed by holiday activities, it is opportune to reflect on how fatigue may impact on the many, many decisions that we will make during the forthcoming professional year, and the associated risk of "decision fatigue".

Consider the frightening prospect that an adult makes approximately 35,000 decisions per day.[14] In the case of judicial officers and members of the legal profession, some of those daily decisions dramatically impact the lives of others.

Many of you will be aware of the work of Daniel Kahneman, the Nobel-prize winning psychologist and behavioural economist, on the decision-making process. He contends that the human brain has two systems of thinking and decision-making, System 1 (fast thinking) and System 2 (slow thinking). In fast thinking we operate on autopilot, unreflectively applying our experience and thinking shortcuts (heuristics) to

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[10] Ibid.
[11] Richard Susskind, 'The Future of Courts' (2020) 6(5) *The Practice* 1–5.
[12] *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, [19].
[13] High Court of Australia*, HCA Video Connection Hearings – Protocol*, 1 August 2021.
[14] Barbara Sahakian and Jamie Nicole LaBuzetta, *Bad Moves: How decision making goes wrong, and the ethics of smart drugs* (Oxford University Press, 1st ed, 2013).

plough through many of the 35,000 daily decisions. Slow thinking is effortful; it requires our full attention and rigorous focus on the problem at hand. It is inherently fatiguing.[15]

Kahneman's observations are not entirely new. During the Second World War, French philosopher Simone Weil wrote extensively about the nature of fatigue. In frustration, she opined:

> [T]hey listen to me with the same hurried attention which they give to everything… "I agree with this", "I don't agree with that" … In the end they say: "Very interesting", and pass on to something else. They have avoided fatigue.[16]

She argued that we are ethically obliged to pay attention to and engage with events around us. In other words, attentiveness is a moral imperative that, inevitably, brings fatigue.

Perhaps there was a simpler time when the intellectual workloads of legal professionals were lighter. When judges had plenty of time to contemplate sentences as they were conveyed by horse and carriage from one courthouse to the next.

Nowadays, in the words of James Spigelman, "we have substituted the tyranny of distance with a tyranny of immediacy".[17] Electronic content rushes relentlessly at us via text messages, work emails, social media posts, smart watch vibrations, and eerily targeted advertisements.

Information overload has shrunk our attention span. A Microsoft study found that the human attention span is now only 8 seconds, a decrease of nearly 25 per cent in just a few years.[18] Danish researchers reported that:

> the allocated attention time in our collective minds has a certain size but the cultural items competing for that attention have become more densely packed. Content is increasing in volume, which exhausts our attention and our urge for "newness" causes us to collectively switch between topics more regularly.[19]

Complex decision-making involves effort. Well before the pandemic, our decision-making resources were stretched, inclining us to apply fast thinking to problems that required slow thinking.

Studies show that fatigued individuals demonstrate passive behaviour during decision making and are prone to choose default options. Cognitive capacity declines, and reliance on impulsiveness and heuristics increases.[20]

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[15] Daniel Kahneman, 'Thinking, Fast and Slow' (Penguin Books, 2011) 20–21.
[16] Simone Weil, 'Seventy Letters: Personal and Intellectual Windows on a Thinker' (Wipf and Stock, 1st ed, 2015) 197.
[17] Chief Justice Spigelman, 'Opening of Law Term: Just, Quick and Cheap – A Standard for Civil Justice (Speech, Opening of Law Term Dinner, 31 January 2000).
[18] Chuck Murphy, 'The Shrinking Attention Span & What It Means for Marketers', *Boston Digital* (Web Page, 27 August 2019) <https://www.bostondigital.com/insights/shrinking-attention-span-what-it-means-marketers#:~:text=In%20fact%2C%20a%20study%20by,an%20answer%20fast%20and%20easy.>.
[19] Dream McClinton, 'Global attention span is narrowing and trends don't last as long, study reveals', *The Guardian* (online, 18 April 2019) <https://www.theguardian.com/society/2019/apr/16/got-a-minute-global-attention-span-is-narrowing-study-reveals>.
[20] Grant Pignatiello, Richard Martin and Ronald Hickman Jr, 'Decision Fatigue: A Conceptual Analysis' (2020) 25(1) *Journal of Health Psychology* 123.

The pandemic has meant that many important decisions be made quickly. Unfortunately, fast thinking has unduly influenced some decisions. I am tempted to cite as example some of the political decisions that have been made with only passing consideration of the health evidence and apparently without reasoning through the long-term consequences of the decisions.

But let's not be complacent about our own decision-making. When fatigued, like politicians we too are inclined to fall back on fast thinking.

Personal observation will tell you that tired and hungry judges tend to take the easy way out, and this is borne out by the research.[21] Unfortunately for litigants, the easy way out usually involves a refusal of the application under consideration.

The need to conduct virtual hearings has only added to judicial fatigue. Apart from the inevitable technological problems, we have lost the rich interpersonal exchange associated with in-person hearings and there has been no "drama of the court room" to demand our focus. I'm sure that practitioners feel the same.

Yet, as judges and legal practitioners, we are ethically obliged to fully consider the problems with which we are confronted. We must eschew temptation and apply slow thinking rather than operating on autopilot.

How are we to achieve that?

First, we can re-characterise our fatigue. For Simone Weil, moral fatigue was not necessarily negative. It reflected a willingness to engage with the moral aspects of our world and confront injustices that deserved attention. It was a sign of connection and receptivity. It served to remind us of the vulnerability that we share with others and the need to be considerate in our interactions.[22]

Second, we can capitalise on our good luck. Most of us are lawyers because we find the law to be endlessly interesting. Research shows that interest in subject matter is a strong counterbalance to the mental effort required to make more complex decisions and to the fatigue that might otherwise be associated with solving more complex problems.[23]

Third, Kahneman proposes that the solution to the problem of fatigue impacting decision-making is not continual hypervigilance—that is unrealistic—but rather to 'learn to recognize situations in which mistakes are likely' and, in those situations, to consciously engage in slow thinking. It's a matter of prioritising brain effort.[24]

Another way of countering poor decision-making is by consulting others before making important decisions. Diverse perspectives build better decisions. That is particularly so in the law. We are a profession of words, both spoken and written. Through those words we share ideas, we persuade, and we arrive at better solutions.

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[21] Kahneman (n 15) 43–44

[22] Rebecca Rozelle-Stone, 'Fatigue: obstacle or necessary counterpart to moral attention?', *ABC* (Web Page, 13 April 2021) <https://www.abc.net.au/religion/simone-weil-fatigue-and-moral-attention/13299758>.

[23] Marina Milyavskaya et al, 'More Effort, Less Fatigue: The Role of Interest in Increasing Effort and Reducing Mental Fatigue' (2021) 12 *Frontiers in Psychology* 1, 3.

[24] Kahneman (n 15) 28.

We look forward to a year in which, as much as possible, we meet in the way that is most readily suited to delivering justice and, through those meetings, we achieve both excellent decisions and a strong, engaged legal community.