

**Speech Given at the Ceremonial Sitting to Mark the Retirement of Justice
Elkaim**

9 December 2022

Supreme Court of the Australian Capital Territory

Justice Elkaim

My talk will be concise but not learned. I pay my respects to the Traditional Owners of this land and to their Elders past, present and emerging. Thank you, Mr Tompkins, for your welcome. Ironically, everyone else here is hoping for my farewell. Thank you, Chief Justice, Mr Attorney, Ms Curran and Ms Choudhury for all the nice things you have said about me.

It's not often that a judge praises a politician. However, I would like to specifically express my admiration for the current Attorney-General, who has defended this Court when under attack. He has also been responsible for three excellent appointments: the new horse-riding, rock-climbing, tennis playing and generally adventure-seeking Chief Justice; the effervescent Kennett J; and my replacement, Baker J, who I'm told was chosen because she is the opposite of me in every possible regard.

It has been six and a half years since I came here. They were different times. There was a different Chief Justice and there was an assortment of random judges, three of whom have since been replaced and, I'm happy to say, are here today. I thank them for that.

When I arrived I had an expectation of the work that I would be doing and I was particularly looking forward to its diversity. I have done a lot of cases that I would not have encountered as a judge of the District Court, but I have also heard many more criminal cases than I anticipated. The Office of the Director of Public Prosecutions will tell you that this is a great disappointment.

Almost every sentence I have imposed has not been long enough. As far as leniency is concerned, the Court of Appeal has sometimes agreed with the DPP, but I have never gone out of my way to be lenient. I have simply tried my best to be just.

I am forever grateful to the former Chief Justice, who told me I should wear my leniency as a badge of honour.

When I started, I came under the effective tutelage of Helen Murrell CJ, who I knew from the District Court. Her Honour took over the reins of this Court and imposed an efficiency and discipline which was much needed. My wife and I also had the great benefit of the friendship of her Honour and Paul Westwood.

On the subject of guidance, I owe an enormous debt to Richard Refshauge AJ, who is always available to answer my basic questions and direct me to one of his numerous judgments on everything possible. The only time he became exasperated was when I asked him if I should order interest on the compensation I had awarded to the victim during a jury trial. I would also like to thank John Burns for his assistance, and Hilary Penfold as well, for the assistance they gave me when I was learning about crime.

Thank you to all of my fellow judges, especially including the associate judge, for their friendship over the years, which has made a sometimes trying job easier to deal with. I have walked with them, even shared a bathroom with one of them, chatted over lunch in the common room, or sometimes at a pub after work. Their comradeship has provided me with the diversion that is required from sometimes quite awful cases. I have also had the benefit of friendships with people in the Magistrates Court, and even, incredibly, a judge of the Family Court with a ponytail, Doc Martens shoes and an assortment of earrings.

Another great benefit I had was having associates, including an executive assistant, who were able to help me in understanding criminal procedure. All of my associates have been young, clever lawyers, who I am sure will achieve great success. They have also pretended to find me amusing and responded in kind, for example with the Coffee Purchasing Act, as you have heard. I'm very happy to see many of them here today.

The Court staff have been wonderful. The principal registrar, the registrar and the registry have always been helpful and supportive. The sheriff and her officers have kept me in order, as well as the Court, and I have derived great pleasure in chatting to the sheriff's officers while waiting to go into Court or during an adjournment.

The library has kept me up to date with the law and news, and quickly published my judgments without regard to their quality. They have also ensured there is no coconut on the cakes made for the monthly morning teas. The press in Canberra have always honoured true journalism when reporting about me – that is, to report fairly and honestly of things that have occurred in Court – and I thank them.

I have said some nice things about the former Chief Justice. I am now going to say some nice things about the current Chief Justice. It's not easy taking over a Court which is working well. There is an inevitable expectation that things will keep going well. Things have kept going well because our new Chief Justice is hardworking, fair and, as far as the judges are concerned, she leads from the front and has no expectation greater than the one she imposes on herself. I am sure the success of the Court will continue in her hands.

As far as highlights of my work are concerned, I think the most interesting case was also the most tragic. It was a medical negligence claim in which the Canberra Hospital was sued for the mismanagement of a woman pregnant with twins.

Ultimately, contrary to the wishes of the parents, the twins were born, with one of them being severely disabled. I found negligence on the part of the hospital, but the plaintiffs failed on a causation issue. Their appeal failed, as did their application for special leave in the High Court. I can honestly say that I wish they had succeeded.

The case that gave me the most pleasure involved statutory interpretation relating to the Wreck Bay Community. My interpretation of an ACT Act was overturned by the Court of Appeal, incredibly. The appellant in the High Court was represented by Mr Kennett of senior counsel, as he then was. He was persuasive. The High Court told the Court of Appeal that it was wrong. Not only did I derive great satisfaction from this result, but it also entitled me to my second entry in the records of the Court of Appeal Reversal Club. Membership of this club, whose president is here today, is the aspiration of every first-instance judge.

I would like to thank the local profession for its competency whenever one of its members has appeared before me. I will miss noticing the cut of Mr Pappas's suits. I will miss Mr Purnell and I both being confused by his submissions. I will miss the minimalism of Mr Sabharwal, who never responded positively to an invitation to

question a witness. I will miss those Crown prosecutors who ran cases efficiently and, above all, fairly.

The Covid pandemic was a challenge, although I did enjoy the competing arguments that arose from the emergency judge alone legislation, but most enjoyable of all were the weekly Zoom sessions I had with friends in Sydney, which kept me connected and amused. Hammerschlag J and Stephen Klotz are here today, and I genuinely thank them for their friendship, together with the Honourable Peter Jacobson. I also thank Judge Levy, whose frequent calls kept me in touch with insanity.

When discussing my retirement, the most common question I am asked is whether I will miss Canberra. The answer is, I will miss no traffic, some people, and easy access to exercise, in particular riding my bicycle. I hold no grudges against Canberra for my bicycle accident, notwithstanding the metal now in my body and the shaking in my hand. The person who will miss Canberra is my wife Susannah, who enveloped herself in the many attractions of the ACT. She has ridden her bicycle throughout the Territory, walked all over the Territory, joined book clubs, mulched half of the Arboretum, and made good friends. Most of all, she supported me when I undertook this adventure.

I would like to thank my daughters and their families for coming here. Because they live or have lived in different places, it has been a long time since we have been together. So goodbye and good luck. It has been an absolute buzz. Thank you.