

“FROM MOREE TO MABO”

The Mary Gaudron Story

by

Pamela Burton

Book Launch by

The Hon Sir Anthony Mason AC KBE*

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It is an honour to launch this biography of Mary Gaudron. In doing so in her absence, I feel like the director of a production of “Macbeth” without any Lady Macbeth. In saying that I don’t mean to suggest that Mary is like Lady Macbeth, even if Michael Kirby calls her “Mary the Merciless” both in his foreword and on television. Mary has Lady Macbeth’s determination, steadfastness and ambition but an ambition which fortunately falls far short of “vaulting ambition”. I could never see Mary goading John Fogarty into the assassination of anyone. In any event, John is such a quiet and gentle person that Lady Macbeth herself could not have steeled him to the doing of such a deadly deed.

Mary’s absence from this event is due to the fact that she is on duty in Geneva with the ILO Administrative Tribunal, a position she has held since her retirement from the High Court. Otherwise I think that she would have been here, despite the fact that she has not authorised Pamela Burton’s biography. It is unauthorised because Mary dreads biographies, a fact attested to by the author’s statement in the preface to the book. Whether Mary’s dread of biographies is because she is concerned that scores of skeletons might come tumbling out of her cupboards or because she dislikes publicity, I do not know. I have always assumed that it is because she dislikes publicity, though she inevitably attracts it. In any event I suspect that there are no skeletons. If there are, Pamela Burton, to my great disappointment, has not uncovered them. As Pamela comes across as an enthusiastic admirer of her subject, it is conceivable, though unlikely, that she has buried the Gaudron skeletons.

Pamela already has experience as a judicial biographical researcher. Her master’s thesis was a study of Henry Bourne Higgins, an early Justice of the High Court. He was a notable figure in his day. In recent times he has been recognised as a fine lawyer, after lingering as almost a forgotten figure in the shadows for a long time.

* The Hon Sir Anthony Mason AC KBE is a former Chief Justice of the High Court of Australia

Pamela's biography is comprehensive, and interesting (though uncritical). It explains the formative influences which shaped Mary's thinking, her personality and her career. Whether Mary thinks as well of the book, as I do, remains to be seen. She generally looks at things with a critical eye, as a good lawyer does. But, if she has any strong objection to what has been written, she is not a person to suffer in silence. In the event of an objection, I will receive a searing email from gaublimey@hotmail.com which, in case you don't know, is Mary's email address.

I share two characteristics with Mary Gaudron. The first is that, like her, I am an old convent girl. I attended primary school at Kincoppal Convent, Elizabeth Bay, before it merged with the Rose Bay Convent. The second characteristic is that we emerged from a convent education, hers much longer than mine, without a profound belief in religion. If religious instruction is the primary role of a convent then we must be counted as conspicuous failures. This comment does not belie the fact that, like many others, we owe a great debt to the convents for starting us out on the great learning journey of life.

The book relates in detail the more interesting cases in which Mary appeared when at the Bar. They include the defamation case *O'Shaughnessy v Mirror Newspapers Ltd.*¹ (of which I shall say more shortly), the Equal Pay Case and another defamation case *Mackie v Consolidated Press* where Mary's argument met with a very rough reception in the NSW Court of Appeal. This moves the author to say the Court had at that time the reputation at the Bar of being a "torture chamber". We are told that one unnamed court watcher said "Grown men would faint at the withering cruelty dished out by" certain judges. This bleak picture of the Court at that time accords with that portrayed by Ian Barker QC². Dennis Mahoney, a judge of the Court at a later time, has said that the Court then believed that the judges procured "more help from the Bar by the whip rather than a kind word". He added the comment "Perhaps that was right".³

It was not right. The function of a court, particularly a court of appeal, is to encourage a calm atmosphere for rational debate in which the "give and take" of argument takes place in a milieu where there is

¹ (1970) 91 WN (NSW) 738; reversed on appeal (1970) 125 CLR 166.

² "Judicial Practice" in *Appealing to the Future: Michael Kirby and his Legacy*, I. Freckelton and H. Selby (eds), Thomson Reuters, 2009 at 563.

³ *ibid* at 565-566.

respect on one side, matched by courtesy on the other. Such an atmosphere is more likely to lead to calm and dispassionate examination of the legal issues than a climate of antagonism or hostility. I was going to say that there are infrequent occasions when a judge, like a good jockey, needs to give his sluggish steed a show, or even a flick, of the whip. But I recalled that one racing authority banned the use of whips on racehorses. If horses need to be protected from whipping, so do barristers.

The book contains much material that is new to me. Some of it is anecdotal and unsourced. Unsourced or controversial material is usually more diverting than information firmly founded in fact. The author mentions an anecdote related to Mary's success in her very early years at the Bar in the *O'Shaughnessy* case. Mary appeared for O'Shaughnessy who was the director of a stage production of "Othello" in which he also played the part of Othello. The production was the subject of a devastating review by *The Australian's* drama critic, Katharine Brisbane. It was suggested that O'Shaughnessy had distorted the production in order to enhance his own role as Othello. Mary lost the case before the trial judge and jury and again in the Court of Appeal (of which I was then a member) but won a unanimous judgment in the High Court.

The book identifies Professor Blackshield as a source for an exchange between Mary and either Chief Justice Herron in the Court of Appeal or Chief Justice Barwick in the High Court. In that exchange the Chief Justice (whatever his appellation was) reproved Mary for persistently mispronouncing Lord Esher's name in citing a judgment of his when he was Master of the Rolls. We are told that she replied by throwing the law report on the floor and saying

"Your Honour, I'm sure that if he were with us to-day under whatever appellation, he would have been capable of appreciating the legal argument I'm attempting to put to your Honour".

According to the account, the Chief Justice responded

"Point game and set to Miss Gaudron".

I don't have a recollection of this incident and I think I would recollect such a dramatic event as Mary throwing a law report on the floor. Perhaps it took place in the High Court, though I can't believe that Sir Garfield would have delivered the riposte attributed to the Chief Justice. Sir Leslie Herron might well have done so as he was interested in sport and given to the use of sporting metaphors. According to a footnote, the account of the exchange accords with the memory of Mary's instructing solicitor. If only Mary were here, the matter would be put beyond doubt.

Some time after the case I congratulated Mary on her success in the High Court. Her response – a typical one – was simply to say “I was surprised by your judgment. I thought you were a much better lawyer than that”.

Another incident related by the author arose out of the hearing of a special leave application before Mary and myself in Perth relating to the Rugby League salary cap. To warrant a hearing in Perth, where Rugby League is looked down on as a dull and unsophisticated form of gladiatorial combat, the application must have been urgent. But then all legal proceedings relating to sport are said to be urgent and of transcendental importance. During the argument Mary said to me “This is just a slave market, isn’t it?” A whisper is a form of communication that Mary has never been able to master and so it was on this occasion. The remark was clearly audible in Court. Had the hearing been in Sydney there would have been repercussions. The panjandrums of the Rugby League would have been excited into public protestation. At the time I thought that the “slaves” were highly remunerated compared with those who were sold off in earlier times in the slave markets of the Eastern Mediterranean, North, West and East Africa. My impression was that the “players” were happy to sacrifice their “freedom” so long as they were more highly remunerated.

There is the foreword to the book by Michael Kirby to which I have already referred. We live in an age when no book is publishable unless it boasts either a foreword, a launch or a review by Michael Kirby. Perhaps some bestsellers boast all three. This is an illuminating foreword. It depicts the impact of Mary’s irreverent cigarette-smoking and champagne-quaffing persona on the phlegmatic male personalities who inhabited the High Court of Australia in his time. It brings out also the sense of deprivation Michael suffered when Mary left the High Court. And it brings out his high regard for Mary. The book describes their relationship as “complex”.

As one of the male inmates of the Court in the pre-Gaudron and Gaudron eras, I wonder what it is like on the High Court to-day, now that it has no less than three female Justices. We shall have to wait for a future biographer to tell us whether it is a world of cigarettes and champagne or a tea-house where Chief Justice Robert French pours out the tea and asks Justice Gummow, a very old friend and colleague of Mary, to hand out the scones, the cucumber sandwiches and the cakes, a task which, I am sure, he would discharge with self-effacing aplomb.

Such an image stands in marked contrast to that of the original High Court whose Justices were given to the consumption of sterner stuff than camomile tea. Sir Edmund Barton had a nickname which was a tribute to his achievements in this area of human endeavour. And at a general meeting of his club, the Athenaeum Club, (a gentlemen's only club) called to consider its impending insolvency, he is reported to have urged that the Club should drink its way into profitability. Mary has been an opponent of clubs inhabited only by gentlemen. In this respect I doubt that she recognises any difference between men and gentlemen. She would have favoured the demise of the Athenaeum as a gentlemen's only club. But she would have admired the ingenuity of the Barton solution to the problem the club faced.

That Mary has had a great and beneficial impact on the law and the practice of the law cannot be doubted. She is a fine and principled lawyer who has been a resolute defender of the rule of law and the values of the common law. She is noted for her insight into constitutional law and her command of administrative law and criminal law. Mary has fought vigorously for equality of opportunity and treatment of women in the law and she has taken up other causes where she has perceived that injustice has been done. Though a strong opponent of discrimination against women, she has been equally strong in her insistence on merit-based advancement. One of her very important victories as a barrister was in appearing for the Commonwealth before the Arbitration Commission in what was known as the 1972 "equal pay decision", a major step on the road to equal pay for women.

Times have changed. When I entered the Faculty of Law at Sydney University at the end of World War II there would not have been more than 30-40 females in a year of over 300 students. Now female law students outnumber male students in most, if not all, Law Faculties in Australia.

That situation is not replicated at the Bar which remains a male-dominated profession. And this has consequences for the judiciary because it is from the Bar that most judicial appointments are made. The imbalance was even greater when Mary Gaudron was at the Bar. Only a woman who had her courage and determination could succeed as she did and follow in the footsteps of that notable Australian Dame Roma Mitchell in South Australia.

It has been suggested that Mary's outspokenness in support of equality for women may have hindered rather than helped her own advancement. You should read the account in the book of her controversial speech at the annual Bar Dinner in the early 1970s. David Bennett is reported by the author as saying

“Whether or not “[her]” speech advanced or impeded her career prospects must be left for her biographer to explain.”

The answer to the Bennett question must be a resounding negative. Mary was appointed a Deputy President of the Arbitration Commission some three years later and, in 1981, New South Wales Solicitor-General. Her appointment as Solicitor-General, followed by that of Keith Mason, coinciding with the appointment of John Doyle in South Australia and of others in the other States meant that quality of State representation in the High Court was extremely high.

The biography paints a vivid picture of Mary's personality largely through her words and actions. Her personality is described as “formidable”. She is described as having “tantrums”. I was not aware of them being directed at me or perhaps I have forgotten them. In my experience, while always vigorously maintaining her own view, she was an extremely co-operative member of the Court and would volunteer to do things beyond the call of duty.

Pamela Burton's biography is the story of a career full of life, incident and achievement, of a female barrister who started out without any advantages except ambition, determination, a first-class mind and nimble tongue – mind you, they *are* themselves advantages which few of us possess - and who became the first female Justice of the High Court and a very fine one at that.

I draw your attention to the front cover (which features a segment of Sally Robinson's well-known portrait of Mary (commissioned by the New South Wales Bar Association) and a wonderful black and white photo on p.397 of Mary, cigarette in hand, apparently pulling a VB beer behind the bar of what appears, from my mid-20th century knowledge of old Sydney watering-holes, to be a waterfront hotel.

In conclusion, it remains for me to congratulate the author and to pay tribute to the UWA Press for continuing to publish significant legal biographies. Some years ago it published a biography of Sir Ronald Wilson, another colleague on the High Court.
