Entry type: Person
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Gaudron, Mary Genevieve

(1943 - 2026)

Born	19430105, Moree New South Wales Australia
Died	20260912, Sydney New South Wales Australia
Occupation	Academic, Barrister, Commissioner, Judge, Lawyer, Public servant, Queen's Counsel, Solicitor

Summary

Mary Genevieve Gaudron, born 5 January 1943, was the first female justice of the High Court of Australia, and the only one in the Court's first 100 years. She was born into outback NSW Moree's working class railway community adjacent to a camp of dispossessed Aboriginal Australians. Both communities held the status of battlers, somewhat apart from the rich white business community on the other side of the Mehi River. Fittingly, she became one of the High Court justices who decided Eddie Mabo's landmark case on Aboriginal land rights.

Throughout her career Gaudron, a colourful and lively personality, remained down-to-earth, proud of her working class origins, and humble about her achievements.

On her retirement from the High Court in 2003, Gaudron accepted a part-time appointment on the International Labour Organisation's Administrative Tribunal in Geneva. She served a term as its President before retiring in 2012 to her Sydney home.

Go to 'Details' below to read an essay written by Pamela Burton for the Trailblazing Women and the Law Project.

Details

The following additional information was provided by Pamela Burton and is reproduced with permission in its entirety.

Mary Gaudron was the first child of Edward and Grace (née Mawkes). Her father, known as Ted, worked on the State railways. Mary's mother, known as Bonnie, was dux at the Intermediate level of the Moree Public School in 1933. She and Ted married at St Henry's Catholic Church, East Moree, in 1942. Unfortunately, the couple lost their second child, a boy, as a baby from illness. They had two more girls and a boy.

Mary's childhood was an unlikely one for a future High Court justice. However, the town and her church were good to her. Whilst at St Francis Xavier primary school, she won a Diocesan Bursary that funded her high school education as a boarder at St Ursula's College, Armidale. She matriculated with straight 'A's and, at just sixteen, secured a Commonwealth scholarship to attend the University of Sydney in 1959. She was further assisted by a £50 prize from the Moree and Bullaroo Council.

Gaudron's life reads as a list of successful 'firsts' and 'youngests'. With determination and brilliance she confronted and overcame many obstacles to women embarking on professional careers. She married Ben Nurse in 1962 and received her BA the same year. She graduated in Law with first class honours in 1966, becoming the first part-time student to be awarded the University medal in law, and only the second woman. Even more remarkable, she was also working full-time and was a mother, Danielle having been born in 1964.

There were fortuitous events and circumstances that fostered her ambition to become a lawyer. Doc (H.V.) Evatt's visit to Moree in 1951 was an impetus. He was campaigning from the back of a blue Holden Ute for the 'no' vote which would block a Constitutional amendment to outlaw the Communist Party. Mary was a curious kid who wanted to know what a Constitution was. From the crowd, she put her hand up and asked him. The exchange between the driven man and the young girl resulted in Evatt sending her a copy of the Constitution. She waved it around at school telling the kids that she 'knew' what she was going to be when she grew up – a lawyer. Not just a lawyer, but a barrister. When she was later told by a local solicitor that she was aiming too high – girls don't do law and she should consider a job in the telephone exchange – she wanted to prove him wrong.

Gaudron commenced practise at the Sydney Bar in October 1968, and in 1972, became the first woman appointed to the NSW Bar Council. Sadness beset her when, like her mother, she, too, lost her second child. Ben died in 1971, aged two; just weeks before her second daughter, Julienne, was born.

In 1972 Gaudron successfully appeared in the Equal Pay Case before the Commonwealth Conciliation and Arbitration Commission, becoming the first woman to appear for the Commonwealth in a national wage case. In 1974, aged 31, Gaudron was appointed to that Commission as a deputy president, the youngest person to become a federal court judge. While there, another career highlight was her participation in the 1978 Maternity Leave Case.

It can be argued that, for Mary Gaudron, a 'disadvantaged' working class environment aided her in this success; it gave her cause to think; to question things she observed around her. Both her family and her Catholic education encouraged that. From a young age she was curious about the way the world worked and how people behaved. It also helped that, as a child, she had the benefit of being immersed in a sub-community that was welded together by union solidarity; something she no doubt recalled when resolving workers' wage disputes as a judge of the Commission.

In early 1981, at only 38, she was appointed NSW Solicitor-General, the first female State solicitor-general and she became Gaudron, QC. She married her second husband, John Fogarty, and later that year, their son, Patrick, was born.

NSW State solicitor-general was a job she enjoyed, despite some rocky moments. She was attracted to the Wran government's agenda of social reform but it was sidetracked by crime and corruption issues that would not go away. This was the time when the so-called 'Age tapes' revealed dicey dealings of magistrates, police and politicians with crime bosses, gamblers and drug dealers. Gaudron became a controversial figure. Yet an analysis of her opinions confirms that she was 'frank and fearless' in the advice she gave. Those who worked with her marvelled at the speed with which she could carefully study and absorb mountains of briefing material, arrive at the essence of a problem, and provide firm and correct opinions. Premier Neville Wran always followed her advice. 'Gaudron's law' was a powerful force behind the scenes.

In this role Gaudron displayed a high level of understanding and expertise in Australian federalism and the interaction of State and Commonwealth powers – a capacity that became one of the reasons why she was later recognised as suitable for appointment to the High Court. She appeared before the High Court in several significant constitutional cases. In 1982 in the Commonwealth v Hospital Contribution Fund, a case concerning the arrangements within the State courts for the exercise of federal jurisdiction, she persuaded the court to overrule the two previous High Court decisions on the point. Other significant constitutional cases in which she appeared before the High Court included Hematite Petroleum v Victoria and Stack v Coast Securities (No 9) in 1983 and Gosford Meats Pty Ltd v New South Wales in 1985. She also appeared in Miller v TCN Channel Nine in 1985, a case concerning the constitutional guarantee of free trade and commerce between the states (section 92). Importantly, she appeared in the Tasmanian Dam case in 1983, a landmark in Australia's constitutional history over the use of the Commonwealth's external affairs power.

In February 1987 Gaudron was appointed to the High Court of Australia by the Hawke Labor Government. She participated in many cases contributing significantly to the development of Australian law. A number of her decisions were recognitions that discrimination, often disguised or indirect, had to be exposed and eliminated, and that due process had to be followed, if a fair system of justice was to be achieved.

She did some deep thinking about the meaning of equality, and how it differed from ‘sameness’. She incorporated the concept of discrimination to develop the notion that people with differences that mattered should not be dealt with in the same manner if equality was to be achieved, and that differences that didn’t matter, should be disregarded in order to give equal justice. Put simply,” ‘Equal justice’ is justice that is blind to differences that don’t matter but is appropriately adapted to those that do.” In 1998 she stated frankly that the racism she saw directed towards indigenous Australians while she was growing up sensitised her towards all forms of discrimination.

While legalistic in her approach, not liking to strain the language of enactments, and obedient to precedent, she was noted for reaching many decisions that represented a shift in the law that accorded with current social expectations. By way of example here, her joint majority judgement with Justice Deane in the case of Banovic provided a legal analysis of indirect discrimination which demonstrated that equal treatment did not equate with non-discrimination. The case concerned the employer’s practice of ‘last on, first off’ for retrenching workers. On the surface it was not discriminatory, as more men than women were retrenched. However, a group of eight retrenched female workers successfully claimed they were discriminated against because of the employer’s preference for recruiting men. They waited longer to be employed and lacked employment seniority, and were therefore more vulnerable to retrenchment. The majority of the court agreed that the ‘last on, first off’ formula was flawed in a workforce that was predominately male.

Gaudron was also attuned to discrimination against women in domestic situations, and in the case of Van Gervan v Fenton she added persuasion to her reasoning. In that case the Court considered the method of assessing the notional value of the time spent by a wife who provided attendant care services to her injured husband. The majority held that compensation should be measured by reference to the market value of the services provided rather than to the family member’s forgone earnings. Gaudron agreed, but took the opportunity of strongly dispelling assumptions behind the argument that deduction from the market value should be made for the domestic services previously provided by the injured man’s wife. She said that the argument that services given by his wife before the accident were ‘needed’ by her husband, rather than being part of a normal domestic relationship was an assumption that implies ‘incompetence and selfishness of a very high order.’ The argument was that the injured man already had the services of a wife and, therefore, to the extent that the accident gave rise to a need for those services, no requirement for compensation for those services arose. ‘At best’, she said,’ that equates a wife to an indentured domestic servant – which she is certainly not’.

Gaudron’s legalistic approach permitted an effective block to various attempts by the Federal Government to restrict the right of review of administrative decisions concerning immigration. She was influential on later courts in developing reasoning to the effect that, if an administrative decision ignored principles of procedural fairness, it was not a ‘decision’ from which a review could be prohibited under Commonwealth law. Helpful here was what she called the ‘genius’ of the Constitution – ss 75(v). This gives to everyone in Australia the right to approach the High Court to compel Commonwealth authorities to perform their constitutional and statutory duties, and to prevent them from acting in excess of their powers. Understanding its intricacies is not easy, she conceded, as this ‘small subsection … has been known to reduce grown men to tears’. In its application it ‘guarantees the rule of law’ in Australia, because it operates to ensure that the right to a hearing is not thwarted by arbitrary decisions. She has enshrined ss 75(v) by having her few words about it stencilled into the portrait commissioned from artist Sally Robinson by the NSW Bar Association.

Throughout her career, Gaudron remained troubled by the way Australia treated its Aboriginal peoples. Perhaps the most publicised case of this time is Mabo No 2 about which so much has been written. Justices Deane and Gaudron came under particular criticism for what has been described as a ‘moralising tone’ in their joint judgement in describing the dispossession of the Aboriginal peoples of most of their traditional lands as a ‘national legacy of unutterable shame’, and ‘the darkest aspect’ of Australian history. The Aboriginal land rights case of Wik followed, and was perhaps more important in practical effect. Gaudron, like Justice Gummow, utilised her special knowledge of equity principles in their application to real property rights and entitlements, and in her separate majority judgement demonstrated her analytic textual approach and application of logic to reach what might be described as a social justice-oriented outcome.
A more insightful perspective on Gaudron’s life is that, from childhood onwards, she developed a set of guiding values that remained with her throughout her professional life, strongly influencing her decisions as both lawyer and judge, and serendipitously, shaping the opportunities which came her way. While it was a driving motivation throughout her legal career to prove she was intellectually equal to the best of the men who had made it, there was more. She wanted to achieve social change, and recognised the law as a tool for achieving social justice. Her complex personality and her strong views on how people should treat each other have their roots in a colourful and extraordinary life story.

Gaudron’s decisions on immigration, citizenship and refugees are amongst many where applications of her principles have effected increased protection for the vulnerable. Gaudron’s analysis and development of concepts of ‘equal justice’ and the intertwining notion of ‘discrimination’; decisions concerning implied rights in the Constitution; and her concern for fair trials and procedural fairness are part of her legacy to Australia’s legal history.

Events

2001 - 2001
Inducted into the Victorian Honour Roll of Women

Published resources

Resource Section
Mary Gaudron, Brodsky, Juliette, 2011,
http://www.nswbar.asn.au/the-bar-association/pioneering-women/#/16_mary_gaudron

Law, Kerwin, Hollie and Rubenstein, Kim, 2014,
http://www.womenaustralia.info/leaders/biogs/WLE0624b.htm

Resource
Pioneering Women at the NSW Bar: 1921-1975, New South Wales Bar Association, 2011,
http://www.nswbar.asn.au/the-bar-association/pioneering-women/

Book
From Moree to Mabo: the Mary Gaudron Story, Burton, Pamela, 2010

Newspaper Article
Justice left hanging in the breeze, Brown, A.J., 2011,
http://www.smh.com.au/national/justice-left-hanging-in-the-breeze-20110401-1crbg.html

Site Exhibition
Australian Women Lawyers as Active Citizens, Trailblazing Women Lawyers Project Team, 2016,
http://www.womenaustralia.info/lawyers

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