TO JUDGE IS 'TO SLEEP: PERCHANCE TO DREAM:
Ay, There's the Rub'[1]

SARAH MURRAY

Sleepy judges are not a new phenomenon.[2] The 'rub' is how to prevent justice miscarrying when a judge nods off while ensuring that the justice system does not become unworkable if momentary lapses of judicial concentration prompt calls for a retrial. How can it be ensured that justice is not only done, but is seen to be done? There is a real threat to the public's confidence in the courts if judges don't wake up to this embarrassing, but real, situation.

The debate has recently been reignited by the New South Wales Court of Criminal Appeal decision of *Cesan*[3] for which a grant of special leave was given by the High Court on 16 May 2008.[4] *Cesan* involved an unsuccessful appeal (by a 2:1 majority) to the Court of Criminal Appeal against convictions for importing ecstasy into Australia. However, it was the trial judge's somnolent behaviour which enlivened most interest. When is a sleeping judge no longer a judge? Does it render nugatory the constitutional guarantee of a 'valid' trial by jury contained in section 80 of the *Australian Constitution*? At what point can it be said that a judge who sleeps before a jury taints the judicial process such that justice miscarries? These questions were particularly pertinent in *Cesan* as the facts suggested that the judge's sleeping was not 'one-off, trivial or de minimis'.[5]

The majority in *Cesan* (Grove J, with whom Howie J agreed) acknowledged that at times it was likely the trial judge 'was asleep in a real and practical sense'.[6] However Grove J concluded that '[t]he mere fact that the judge has been asleep (on and off) during the trial does not, without more, demonstrate that the trial ha[s] been unfair'.[7] Any unfairness was mitigated by the finding that the trial judge was frequently roused through coughing or loudly shuffling papers or books[8] as well as the likelihood that counsel would have alerted the judge, once awake, to any consequential material.[9]

Firstly, the majority held that a hearing before a snoozing judge was still validly heard 'before a judge'[10] when the judicial officer 'was always physically present'.[11] Further, this meant that the constitutional prerequisites of section 80 were not infringed.[12] *Cesan* stressed the need to avoid probing into 'fluctuations in mental activity or inactivity'[13] when there was no 'constitutional requirement that there be satisfaction about the mental state of the judge'.[14] This view could also, arguably, apply to a hypothetical judge who was sober before the lunch adjournment but subsequently intoxicated. The concern was that a nullity finding would fluctuate 'with the judge's soporific and non-soporific state'.[15]

Secondly, the majority's attitude to the miscarriage point was influenced by the UK authority of *Betson* which held that 'it is the effect, not the fact, of such inattention which is crucial'.[16] The *Betson* approach is likely to stem from the floodgates dilemma which may arise if the decision of a non-alert judge is readily overturned. For *Cesan*, this meant that intermittent nodding off would only be decisive where it led justice to miscarry.[17] Of course, this begs the question: in what circumstances *does* justice miscarry before a sleeping judge?

Whether there was a miscarriage of justice in *Cesan* was raised before the High Court. The special leave application considered the NSW equivalent of the standard appeal provision which directs the court as to whether a 'miscarriage of justice' has occurred. It provides in s 6(1) of the *Criminal Appeal Act 1912* (NSW) ('the Act'):

> The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Miscarriage of justice is a broad category which may for example be shown by establishing flaws in the trial process which rendered it unfair[18] even if the court is not convinced of an appellant's innocence.[19] In relation to the concluding proviso the High Court has indicated that:[20]

> No single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt.

At the special leave hearing, counsel submitted that the weakness of the appellants' case on a number of other grounds made this 'the perfect vehicle' to further consider when miscarriage occurs within the scope of the appeal provision.[21] However, even beyond the context of criminal appeals, a number of issues arise when a judicial officer falls asleep.

Apparently, the real difficulty in such a case is evidentiary. How do lawyers prove that the judge was,

REFERENCES

1. William Shakespeare, 'Hamlet, Prince of Denmark', in *The Complete Works of William Shakespeare* (1973) act 3, sc 1, 861.

2. *Stathooles v Mount Isa Mines Limited* [1997] 2 Qd R 106; *R v Betson* [2004] 2 Cr App R (S) 52; *People v Degondea*, 769 NYS2d 490 (2003); *People v Donley*, 731 NE2d 1260 (2000); *Hummel v State*, 617NW2d 561 (2000); *R v Edworthy* (1961) Crim LR 325; *R v Langham and Langham* (1972) Crim LR 457; *R v Moringiello* [1997] Crim LR 902; David Pannick, *Judges* (1987) 78.

3. *Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007).

4. Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008).

5. Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008), submission of Mr BW Walker SC.

6. *Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [189]–[190].

7. Ibid [190].

8. Ibid [194].

9. Ibid [189]–[190].

10. Ibid [200].

11. Ibid [194].

12. Ibid [203].

13. Ibid [200].

14. Ibid [203].

15. Ibid [202].

16. *R v Betson* [2004] 2 Cr App R (S) 52; Ibid [197].

17. *Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [211].

18. *Nudd v R* [2006] HCA (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ), 9 March 2006) [7] (Gleeson CJ).

in fact, asleep? In *Cesan* many witnesses testified that the judge was snoozing during the trial, snoring and was even seen 'slumped in his chair'.[22]

Palmer has drolly pointed out that some judges may possess 'an innate and cultivated ability to appear awake when in fact asleep, an attribute which would undoubtedly be the envy of many a wearied colleague'.[23]

The next challenge is convincing the court that the timing of the sleeping or snoozing was of some consequence in a substantive sense. This task may be rendered easier when the hearing is before a single judge. But, as in *Cesan*, where the (hopefully) 'bright-eyed' jury[24] play a key role, the judge's slumbering must sufficiently affect the trial's conduct in terms of the judge's ability to give directions and make rulings on the admissibility of evidence.[25] The unresolved question then becomes: if a judge strategically sleeps only during the 'insignificant' parts of the trial is there still damage done?

The complexity of mounting a successful challenge on both fronts was demonstrated in *People v Degondea*.[26] The court found that a judge might be awake even if he or she shut their eyes[27] and that this may not taint the trial or result in 'constructive judicial absence'.[28] However Friedman J did note, in that case, that:[29]

> cases may arise where a new trial would be warranted by proof that the trial judge was actually asleep while presiding, or that he or she was affirmatively engaged in other activities inconsistent with attention to the courtroom proceedings.

Such an extreme judicial situation occurred in *Turner v State of Texas*[30] where the prosecution verified that the trial judge had slept while key defence witnesses testified and was therefore unable to consider all the evidence in exercising his discretion. Justice Young has noted that injustice may be tempered in slumbering judge cases by the Judge reviewing the record of proceedings.[31] Although this may assist it may not however allow issues such as witnesses' credibility to be accurately determined.

The High Court, during the special leave hearing, implicitly suggested that judicial diversion during trials will not be tolerated, whether from sleepiness or other factors such as boredom.[32] Counsel for the prosecution submitted that it was to be expected that over a long trial a judge might 'disengage from the proceedings' or begin 'to think of something else' other than the trial at hand.[33] Chief Justice Gleeson doubted this statement and instead suggested that it might only occur with barristers.[34] Justice Heydon suggested that a remedy might be necessary if a judge becomes distracted because '[t]hose responsible for finding facts and applying the law to them should be concentrating at all stages'.[35]

It is likely that faith in the administration of justice may falter if very technical arguments are crafted at the evidentiary or the substantive step which side-step the reality that the judge was not sufficiently alert, even due to medical reasons.[36] Courts need to ensure that they do not unwittingly trivialise the fact that the judge 'slept' and, in so doing, taint the public's confidence in the courts. Public confidence in the courts is vital to the Australian judicial system as it imbues legitimacy.[37]

Although there are some debates surrounding the use of the concept,[38] Justice Kenny has explained:[39]

> Public confidence in the judiciary largely depends on how the courts are perceived to succeed…The converse,

19. *Weiss v The Queen* (2005) 224 CLR 300, [45] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

20. Ibid [44].

21. Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008), submission of BW Walker SC).

22. Ibid [28].

23. Ben Palmer, 'May the Judge Sleep' (1927) 61 *American Law Review* 321, 325.

24. Cf Ibid 327–8.

25. See importance of this criterion in US context in cases such as *Hummel v State*, 617 N.W.2d 561 (2000).

26. 769 N.Y.S.2d 490 (2003).

27. See also *Hummel v State*, 617 N.W.2d 561 (2000). See also Palmer, above n 23, 325.

28. See also Jason Lofts, 'The Case of the 'Sleeping Judge'' (1987) May *New Zealand Law Journal* 166.

29. *People v Degondea*, 769 N.Y.S.2d 490 (2003) [5].

30. *Turner v State*, 2002 WL 31255583 (2002) (Unreported).

31. Justice PW Young, 'Gentlemen You May Snore – Case Note; Cesan v Director of Public Prosecutions (Cth)' (2007) 81(12) *Australian Law Journal* 909.

32. Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008).

33. Ibid, submission of Ms WJ Abraham QC.

34. Ibid (Gleeson CJ).

35. Ibid (Heydon J).

36. Young, above n 31.

37. But see *Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [103].

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> however, also holds, at least to the extent that in order to succeed in the task, the courts need the confidence of the public. This is because the courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously.

Chief Justice Gleeson has maintained that the cornerstone of public confidence rests on judges acting with 'independence, impartiality, integrity and professionalism'.[40] Pertinently to this discussion, his Honour acknowledges that these ideals are met 'within the limits of ordinary human frailty'.[41] These judicial qualities necessarily link up with the procedural principle of natural justice with its twin expectations of an unbiased and fair hearing. Public confidence can be jeopardised by decision-making which is partial or which fails to allow a party's argument to be presented to a 'judge who must listen attentively to it'.[42] The importance of faith in the courts being maintained is specifically addressed by the inclusion of apprehended as well as actual bias under the natural justice umbrella.[43]

A related, but more subjective, consideration is the defendant's perception of the fairness and integrity of the process. Procedural justice literature suggests that litigants' experience of the fairness of the court process should not be underestimated.[44] Erosion of faith in the fairness of court proceedings can affect citizens' faith in the operation of courts and the degree to which they obey or respect determinations that are handed down.[45] A key aspect of the perception of fairness is whether a party has been heard in a respectful way by a judge who is trusted to take the party's case seriously.[46] Similarly, literature on a 'dignitary theory' of judicial process[47] or therapeutic jurisprudence[48] has a comparable underlying theme that the individual's genuine experience of justice can play an important role. Arguably, this experience may affect the way that a party presents their case and therefore the fairness of the proceedings.

Ultimately, the courts need to appreciate the damage that can be done by a snoozing judge. There is a risk that a litigant will not respect a court's decision if there is a perception that it was decided disrespectfully or without due consideration. More generally, this may result in the lodgement of more appeals and the public vesting less confidence in the curial process. Any distinctions that a court makes when confronted with a slumbering judge allegation must take into account the importance of the appearance of justice. Admittedly, there is a need to avoid unnecessary retrials[49] and courts may face statutory or constitutional obstacles.

However, courts must contemporaneously safeguard the legitimacy of the system in these (hopefully) rare cases. As a consequence, judges have a role to play in validating the experience of an appellant and any resentment which may flow from being tried by a sleeping judge. Even if the appeal is not ultimately allowed, courts can respond 'therapeutically' and, in so doing, 'preserv[e]' their 'legitimacy' at the same time.[50]

There may be another way of tackling this dilemma when juries are involved. When in *Cesan*, before the Court of Criminal Appeal, a further cause for concern was raised by Basten JA in dissent. This was the impact of the napping on the jury's impression of the process. His Honour concluded that, unless the outcome would have remained unchanged:[51]

> The judge's conduct not only undermined the specific directions given [to the jury], but, in a broader sense, tended to undermine the likelihood that correct directions were taken seriously and carefully applied.

This led to Basten JA's conclusion that justice had miscarried. Although in the minority, and expressly disapproved by the majority, this spotlight upon the assumed impact on the jury presents an interesting approach.[52] This focus also averts the difficult task of proving not simply that the judge was asleep but that the siesta overlapped with critical moments during the hearing.

In the special leave hearing counsel for the Director of Public Prosecutions submitted that Basten JA erred in focusing upon the jury. Abraham QC pointed out that:[53]

> there is no reason to put aside the presumption that the jury will follow the directions of the trial judge. In my submission, one gives little credence to the jury if it is suggested– and I will suggest it is pure speculation– the conclusion of Justice Basten on that point, it gives little regard to the jury and their role in the matter that it is suggested that they may well have not followed directions simply because at certain times during the trial the judge was asleep…the appropriate approach is to look to see what, if any effect this conduct has had, and that is what the majority of the court did…the respondent's submission is to give very little regard to the position of a juror to suggest simply because at some stage in the trial the judge was asleep that somehow they would throw away their oath and ignore what they are being directed to do.

It could be argued that there is no risk of injustice (or the perception of injustice) when parties are in a position to rectify the state of affairs by rousing the heavy-eyed decision-maker.[54] This did not sufficiently occur in *Cesan*.[55] Therefore, the issue became whether the appellants had waived the right to later challenge

38. See for example discussion of who constitutes 'the public' in Stephen Parker, *Courts and the Public*, (1998) 12; Enid Campbell and H.P. Lee, *The Australian Judiciary* (2001) 278; whether 'confidence' can amount to a 'construct' in Chief Justice Murray Gleeson, 'Public Confidence in the Courts' (Paper presented at the Confidence in the Courts Conference, Canberra, 9–11 February 2007) 2; Note also Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' [1998] 20 *Sydney Law Review* 183.

39. Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, 210.

40. Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558, 561.

41. Ibid.

42. Kenny, above n 39, 216.

43. *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [6]–[7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

44. Tom Tyler, 'Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform' (1997) 45 *American Journal of Comparative Law* 871, 893. For a summary of some of the literature see Edgar Allan Lind and Tom Tyler, 'Early Research in Procedural Justice' in Tom Tyler (ed), *Procedural Justice – Volume I* (2005) 3.

45. Tyler, above n 44, 871–874. See also Tom Tyler, *Why People Obey the Law* (1990) 103.

46. Tyler, above n 44, 887–891.

47. Jerry Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885; See also Robert Summers 'Evaluating and Improving Legal Processes – A Plea for 'Process Values'' (1974) 60 *Cornell Law Review* 1.

the judge's behaviour (particularly when one appellant had unhelpfully written to the judge expressing gratitude for a 'fair trial' and acknowledging guilt!). The explanation given for the inaction was that counsel's instructions were that interjecting might 'upset' the judge.[56] This predicament is likely to be common.[57] However, it places parties in an untenable dilemma where failing to challenge a judge's sleepiness may prevent a later challenge while choosing to remonstrate may get the judge offside. As Tranberg notes, 'it must be recognised that the very act of bringing to a judge's attention their neglect can provoke the bias that the action wished to correct'.[58] This reticence is confirmed by a response to a letter to the editor asking how to stir a sleeping judge:[59]

> The terrifying thing about it is the idea that someone would seriously consider waking a sleeping judge. Letting a 17-year-old pack (or draft) my parachute -- yes; climbing behind the wheel of a '72 Vega and dropping in a Barry Manilow eight-track — in a heartbeat; but 'Ahem, rise and shine, your honor ...' Sleeping dogs, sleeping giants, sleeping babies, sleeping sickness, Sleeping Beauty, sleeping judges — all the same thing. Don't go looking for trouble.

It may be that, in the criminal context, the only solution for hesitant defendants is curial confirmation that the obligation to 'stir' is cast upon the prosecution. The other option is for assistance to be given by judicial associates and court officers. In *Cesan*, there was some evidence that the court officer had awoken the Judge by 'bang[ing] the table with some papers' and that this had made the 'snoring sto[p]'.[60]

The High Court will hear the *Cesan* appeal later this year. The case will give the High Court the opportunity to properly consider the issue of miscarriage of justice in the case of a slumbering judge. However, notwithstanding the result, as Plato sagely extolled 'how far better it is to arrange one's life so that one has no need of a judge dozing on the bench'.[61]

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At the High Court hearing on 3 September 2008, the reasons for which are yet to be handed down, the High Court ordered that the *Cesan* appeals be allowed and that the appellants' convictions be set aside and retrials ordered.

48. See generally, David Wexler and Bruce Winick, *Law in a Therapeutic Key-Developments in Therapeutic Jurisprudence* (1996); Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.

49. *Weiss v The Queen* (2005) 224 CLR 300, [47] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

50. Nathalie Des Rosiers, 'From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' (2000) Spring *Court Review* 54, 62; Amy Ronner and Bruce Winick, 'Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance' (2000) 24 *Seattle University Law Review* 499.

51. *Cesan v Director of Public Prosecutions* (Cth) [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [109].

52. Cf *Weiss v The Queen* (2005) 224 CLR 300, [38]–[40] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). Note also that Basten JA at the same time rejected as 'ill-founded' the appellants' submission that 'the exercise of [federal] judicial power will miscarry if the 'appearance' of doing justice' fails (*Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [103]–[104]).

53. Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008), submission of Ms WJ Abraham QC).

54. Young, above n 31, 909. See also Palmer, above n 23, 324–5. Note also Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008), submission of Ms WJ Abraham QC).

55. Transcript of Special Leave Proceedings, *Cesan v The Queen; Rivadavia v The Queen* (High Court of Australia, Gleeson CJ and Heydon J, 16 May 2008), submission of Ms WJ Abraham QC).

56. *Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [31] and [32].

57. For example, *Stathooles v Mount Isa Mines Limited* [1997] 2 QdR 106.

58. Heidi Tranberg, 'While You Were Sleeping – What to do about Sleepy Judges' (1998) 20 *University of Queensland Law Journal* 130, 131.

59. Learned Ham, 'Keep Dreaming' (2007) January/February *Utah Bar Journal* 18.

60. *Cesan v Director of Public Prosecutions (Cth)* [2007] NSWCCA 273 (Unreported, Grove, Howie JJ and Basten JA, 5 September 2007) [41] (Basten JA).

61. Plato, *The Republic* (1st ed, 1955) 147 referred to in Pannick, above n 2, 224.

MENTIONS

Reintegration of Indigenous prisoners

The Australian Institute of Criminology (AIC) recently released a new study showing that Indigenous offenders are readmitted to prison sooner and more frequently than non-Indigenous offenders and that Indigenous offenders tend to be readmitted to prison for the same kinds of violent offences each time, usually assault.

The study, based on data from all Australian jurisdictions, covers nearly 9000 males incarcerated for violent offences and released from prison over a two-year period. It found widespread recognition of the need to tailor programs and initiatives to Indigenous prisoners and the need to focus on the factors that underpin violent crime. Efforts to respond to the needs of Indigenous prisoners across Australian and New Zealand jurisdictions include services involving Indigenous elders, liaison officers, official visitors and chaplains. A range of innovative initiatives are operating and include Indigenous-specific transition and rehabilitation teams, a minimum security institution and a live-in program, as well as family violence and sex offending programs.

For more information, or view the report and summary paper, visit aic.gov.au.

2008 National Access to Justice and Pro Bono Conference

The Law Council of Australia and the National Pro Bono Resource Centre have teamed up once again to host the second National Access to Justice and Pro Bono Conference. To be held in Sydney on 14 and 15 November 2008, the conference key theme is 'Working Together'.

The two-day conference will deliberate on issues surrounding legal funding models, a review of the jurisdiction of the Federal Magistrates Court, access to justice in rural and remote areas as well as improving the accessibility of justice for Indigenous people and other disadvantaged litigants.

As well, there is a pre-conference program on Thursday 13 November.

- Managing and meeting the needs of self represented litigants
- Legal Education Workshop: Law students learning by doing — linking law schools, law firms & government

For more information, visit the conference website at <a2j08.com.au>