A View from the Bench

John Spender QC spent 1995 as an Acting Justice of the Supreme Court. He shares some insights into the judge's lot, offers some advice to advocates and some modest proposals for the bench.

Judges and advocates look at things differently. This is obvious, basic, and easily forgotten. Advocacy is adrenalin-driven, judging is not - or shouldn't be. The advocate's aim is to win; that is the raison d'être of his craft. The judge is there to find the truth. This means first and fundamentally to get the facts right - in my view the most difficult task in complex cases, where core factual issues are in dispute, and where other issues which illuminate the probabilities of finding core facts one way or another may also be in dispute.

Having found the facts, the judge must get the law right, and then apply the law correctly to the facts as found. If there are discretionary judgments to make, they must be made wisely, and a judgment then given which is just according to the laws of our society, and the values they reflect.

Truth in courts is an elusive quality, and the search for it is an art in which experience, perception, intuition, a feel for the probabilities of events or human conduct, and the subterranean influences of the unconscious on the mind's conscious, rational processes, all play a part, even if sometimes unacknowledged.

"Truth in courts is an elusive quality ..."

In a difficult case there can be so many variables and imponderables, events clouded by time or corrupted by partiality, prejudice, self-interest or the imperfections of memory, and contingencies and possibilities that cannot be accurately quantified or reduced to a formula, and which in the end and despite the protective colourations of legal language may be resolved by the judge through what is little more than an inspired guess. For example, how long is a severely brain-damaged 11-year-old boy injured when three, likely to live, and what kind of care will he need for the rest of his life, and what earning capacity would he have had as an adult if he had not been injured? (Issues I had to decide in *Mundy v GIO*, judgment 5 June 1995.)

So much can depend on such things as how one assesses witnesses (including that slippery and chimerical quality "demeanour" which can so mislead even the most experienced judges), or the probabilities of human behaviour, or what percentage one places on the likelihood that action not undertaken allegedly because of an opponent's conduct would otherwise have been pursued and profitably exploited, or how one weighs contingencies that might or might not occur some time in the future.

Serious litigation is a hazardous, uncertain business fought on grounds and over issues which can change dramatically in the course of a day - or which may change in the judge's *perception*, for it is how the judge sees things that counts. In courts, truth - and by this I mean how the judge sees the case and ultimately chisels it into final shape in his judgment - is never objective: it is to be found in the judge's mind. This is the battlefield that must be captured.

Good advocates make a difference. They win cases bad advocates would lose. Cases are not presented by the skilled advocate as though he was working in some kind of sterile, legal laboratory. He shapes his case, and how he puts it, to interest, beguile, and persuade the judge - the only man or woman in court in a non-jury case who counts, if you are really interested in winning, rather than impressing your solicitor, or client, or other counsel, or getting a few seconds' fame through being noticed by the media.

To persuade the judge to find for you, it helps to have some idea of how judges feel about their work, what they like and don't like, and what pressures they are under.

At the start of the day in court the judge comes onto the bench in a frame of mind different from the advocates before him. It was once explained to me by an experienced and highly regarded judge in these words: "There's no crunch. At 10 o'clock I simply go onto the bench and start judging". The judge is, or should be, attentive, curious, and non-combative (this last, a state of mind and spirit some judges find difficult to attain, or maintain).

Whatever a judge's temperament or intellect, one thing you can be pretty sure of: he takes his work seriously. (The exceptions are so few they don't matter - unless you have the bad luck to be appearing before one.) They may sometimes wish they were doing work that was less hard, or earning more money (but it is a rare judge who thinks seriously of returning to the strain of the Bar), or that the cases were easier, or counsel quicker, or that they had fewer reserved judgments weighing on their minds. But these are merely the occupational hazards of a demanding life. It is their life by choice and they rightly believe their work is important. This, I think, is the cardinal feature of the psychology of judges.

The skilful advocate understands and capitalises on this state of mind. He makes the court feel *good* about its work: that the court's work has worth and purpose and the case before it, no matter how slight or simple or how commonplace the issues, has its own intrinsic importance as an instance of the way our system of justice works, and that getting it right justifies all the time and labour and struggle that has gone into the development of that system. Each day in court must, for a judge, be a justification for his life as a lawyer.

Attitude, it was said in the navy, is the art of gunnery. If your attitude is right, if you *want* to be a good gunner, you will be; if it isn't, you won't. So it is, I think, in an advocate's

attitude to his work and to the bench.

Good advocates lift a judge's spirits; they are welcome in court precisely because they are good. The judge knows the case will be well presented, the issues focused on, the law explained, the irrelevant excluded, and that time (or not too much time) will not be wasted. The bad advocate is a depressant and an irritant. Dear God, you think, not him again. Who do you have in front of you? another judge may ask. (Judges, like barristers, talk about their cases and the advocates in them.) "X" you reply. "Commiserations, the case will never finish", or "Hopeless. You'll have to do it all yourself", or "She knows her stuff".

If the question is asked: How do I persuade this man or woman to do what I want him or her to do? I would answer that the guiding rules are to make the judge feel that the day's work is a worthy task, and to make easier the job of getting things right.

Judges don't have to worry about where the next case is coming from - the litigation river never dries up. What they do worry about is getting through and getting right the case at hand, and all the ones to follow, and the ones they have reserved on and which may be banking up, and which may worry them at the end of the day, or disturb their nights or weekends. Their core concern is to get things right, and to get the judgments out.

Most advocates have heard judges complain about the time spent on reserved judgments; most, I suspect, think this is an exaggeration, a piece of judicial self-justification. It isn't. I found the writing of reserved judgments to be pretty much a common and major cause of concern among judges, and undoubtedly the principal labour outside court. The time needed and the demands of this task surprised me. It is a quite different dimension to writing an opinion which, no matter how difficult, is not determinative of events. The judge, when giving judgment (subject only to an appeal), is the final arbiter of issues whose outcome may in the true meaning of the word, be fateful to the disputants.

Getting things right - or trying your best and expressing your findings logically and in clear English - is a demanding grind. A half-day case may throw up points of law that take two days at your desk to resolve. The facts in another case may waver on a knife edge and you spend hours looking for the key, the bits and pieces of evidence that, jigsaw-like, you seek to put together and make sense of to get the right result.

I am sure that these days far more judgments are reserved, and generally are longer, than was the case, say, 30 years ago. The reasons aren't hard to find. Juries have largely disappeared; an avalanche of legislation, often of great complexity, has come out of the State and Commonwealth Parliaments to redress perceived injustices, create new remedies, close down practices thought to be wrong or unfair, and to level whatever playing field is the flavour of the time. The courts themselves, led by the High Court, have been far more adventurous in the creation of remedies and discretionary defences and generally in extending their grasp - sometimes assisted by the legislature - for example, in the exercise of the inherent and invested supervisory jurisdiction of the superior courts.

Let me give two examples.

Take a secured loan between a bank and a customer, supported by a third party mortgage and guarantee. Not too many years ago, if the principal debtor defaulted the bank would have little trouble realising on its security or getting judgment on the guarantee.

Today, the mortgagor-guarantor might be able to pray in aid any one or all of the following as defences or cross-claims: negligent advice (*Evatt v MLC*, 1969); misleading and deceptive conduct (*Trade Practices Act* 1974, *Fair Trading Act (NSW)* 1991); unconscionable bargain (*Amadio*, 1983); relief under the *Contracts Review Act* 1980; perhaps an estoppel of some kind (*Waltons Stores*, 1988, *Verwayen*, 1990).

Look at a major growth area: administrative law. Not long ago, when the public perception of an individual's private rights was more limited and attitudes to authority perhaps more submissive and the tidal wave of administrative review and the developments in the rules of natural justice had yet to appear on the law's horizon, two cases I heard would probably never have reached the courts. One concerned a challenge to the stewards' decision over a protest in a trotting race (*Tippet v The Harness Racing Authority of New South Wales*, judgment, 16 June 1995), the other a complaint that procedural fairness had not been observed in disciplinary proceedings in a TAFE Institute (*Burns v TAFE Commission of New South Wales*, judgment 15 November 1994).

As remedies proliferate and issues multiply, so has the task of judging, and of judgment writing, become harder.

And let us not forget the advances of the information

highway (one of the most misleading descriptions of our times): mountains of documents, voluminous submissions, acres of case references. An exaggeration perhaps; but contemporary electronic aids can encourage in complex cases an absence of selectivity and the kitchen sink approach to advocacy - when in doubt, throw it in.

How does the advocate take advantage of the burden this puts on judges? He *helps.*

In all but the simplest of cases a chronology puts things into immediate perspective, and saves the judge from the tedious task (and one that can distract attention from the oral argument) of noting dates and events in his bench book. The same applies to a written submission: it gives (or should give) an immediate distillation of the issues of fact and law. Clarity, relevance, compression, and accuracy of exposition of facts and law are the guides. The aim of written submissions is not just to make the judge's task easier, and to get him or her to understand more quickly the case you are putting, but to so put the case that the judge can use them (and is persuaded to do so) when giving judgment. The best written submissions may be adopted by the judge to structure the judgment: this is intellectual seduction (of the judge by the advocate) at its highest.

In my view, long written submissions are to be avoided. This can be more a matter of style than anything else: some advocates prefer to spell things out in greater detail. But the trouble is that length and completeness can be bought at the expense of clarity, and the argument can become turgid and convoluted and not attract the eye to the key points. Quoting evidence may sometimes be necessary; but as a rule should also be avoided. Simply refer precisely and accurately to the evidence and what you say it spells out. The same applies to cases. I think it is better to state the principles the cases decide, and keep quotations to the minimum. And be selective in choice of authorities. I recall one judge who was about to go into court. It was a few minutes before 10, and we were both waiting in the corridor behind the courts. The day was sunny and brilliant and there was good reason to feel happy with the world. He looked most unhappy. Nearby, ready to be wheeled into court, were two or three trolleys piled with books and folders. "What do you have?" I asked. "A strike out application", he said. "What are these trolleys of books for?" I asked. "Someone has listed over 90 authorities for me to look at", he said. There was a grim tone to his voice; I don't think it was a very happy day in his court. The point is: if the High Court has said it, or the Court of Appeal has said it, don't go further. Citing a whole number of authorities which really go to the same point is a burden on the judges and a burden on their staff - and one they don't welcome.

Another irritant in written submissions - and one which should always be avoided - is when a gloss is put on facts or law which they don't bear. When it is said that the effect of evidence is A, but it turns out to be B when the judge looks at it, or it is submitted the High Court has said C, when it hasn't *quite* said that, the worth of the submissions can be wholly destroyed. This damages the case the advocate seeks to put, and the advocate's standing.

Integrity and honesty of advocacy are fundamental. Nothing does an advocate so much harm as to get a reputation for lacking honesty or integrity in his or her approach to the court. Advocates who put assurances to the court which aren't honoured, who claim prejudice when obviously none exists, who will assert that some evidence was given or some statement made by counsel on the other side when it wasn't given or wasn't made, do themselves a great deal of damage. Courts have to be able to rely on advocates; but some gain the reputation among the judges (and don't think judges don't discuss these things - they do) as disingenuous, or willing to bend the truth, or simply as dishonest. An advocate who gets this kind of a reputation will rarely lose it. Not a ripple of distrust may disturb the judge's demeanour; on the surface he may be just as affable to the advocate he distrusts as he is to the ones he trusts; but the question mark over the advocate's honesty remains in the judge's mind.

Anything that makes the judge's task easier should be done: summaries, cross-indexes, a dictionary of medical terms, or whatever. And don't think that the business of writing judgments is necessarily left until the case is over. Some judges will begin roughing out a judgment from day one of a longish case, starting perhaps with a statement of the issues, and a chronology of events which don't appear in dispute. When you see the judge industriously writing on the bench on day three, he may not be simply taking notes of evidence; he may be writing his judgment. So, if you want to win, think how from the first moment of the first day you can begin the process of persuasion.

Incidentally, I think that starting to write a judgment early in a case has distinct advantages. It focuses the judge's mind upon the main issues; it allows him to make provisional assessment of the facts, and witnesses - all of which can be revised. And it gives him a framework in which to work, and in which to assess the case and define and refine the issues with counsel as the case proceeds.

Last, in what is in some ways a statement of the obvious: avoid the urge to put bad points. There is always the temptation to believe that a point you think to be absolutely without merit may somehow save the day. If it is that bad, it won't, and if you put it, it's very badness *may* detract from the quality and acceptance of the essentials of what you think to be the best of your case. In an ideal world this should not happen; a bad argument shouldn't by association damage a good one. But our world isn't, and never will be, ideal.

Now for one or two less obvious things.

Sitting on the bench can be dull; evidence can be tedious; cross-examination repetitious to the extreme; the mind can glaze over and attention wander. As it does, so the eye wanders. And whether the day is dull or not, the judge's eye will move about the court: judges have their fair share of curiosity. What are the sorts of things judges may be looking at?

Body language attracts attention. Advocates know - or should know - more about their cases than judges do. If a question is asked and when the answer is given, the instructing solicitor reels back in horror, or the junior looks distressed and agitatedly grabs hold of the leader to whisper words of advice into his ear (such as why did you ask that question, you damn fool?), be sure this will jog the judge's attention. Why such a reaction; what is the importance of the question - what have I *missed* which so excites them? The rule is, I think, to play a poker face. If the answer given is the last one you want, whether from your plaintiff-in-chief (as you think how to dig yourself out of the hole in which he has just planted you and his case), or in cross-examination, look unruffled and unsurprised, as though what you have been told is just what you wanted to hear.

Incidentally, your opponent will also be watching your body language, and listening to the timbre of your voice. His or her ear will be acute to detect stress in your voice. Moral: never let your defences down.

One other less obvious thing: never underestimate the judge. The advocate, complete in the assurance of his own brilliance and the rightness of his cause, may come to court with the opinion that old so and so (with a bit of spoon feeding) is all right, but not half as smart as he is. The advocate may be right; but what he forgets, is that the judge has been sitting there for a long time. The bench, like advocacy, is a learning curve without end. But on the bench, unlike advocacy, you are constantly being force-fed law from at least two competing sides and you will usually spend far more time in court than the great majority of advocates. Instead of having to do all the research yourself, the research is (or should be) put before you. Each side contends for superiority; you sift, examine, evaluate. By this process the judge is taught, and if the judge is a busy one, that man or woman will be taking in a great deal of law in a judicial career. Hence, even a pedestrian lawyer - assuming, contrary to all evidence, that a pedestrian lawyer has ever been appointed to our superior courts - can, by the simple process of being there and having to do the work, become a very sound and knowledgeable judge, particularly on matters of daily practice, procedure and evidence. And so, no matter how smart you may be, never underestimate the human being sitting on the bench. If you do, you may be in for a very unpleasant surprise.

"Judges ... are the closest to absolute rulers that we know"

Now, if I may borrow from Swift, one or two modest proposals for the bench.

When I went to start my year on the Supreme Court I was surprised to find there was no guidance on how a judge should run things. There was no short course on case management, nothing on how to write a judgment, no guidance on the merits of reserved as against ex tempore judgments, nor how to go about the task of giving an oral judgment as soon as a case finishes (an art form all of its own and a most difficult one), nor on how to run a court. How should you *act* when you get on the bench? What latitude should you give to advocates to argue points of evidence or procedure, when and how should you intervene to question witnesses in examination or cross-examination, how do you cut short a cross-examination which is going nowhere without leaving open a ground of appeal or (which can be worse) giving the impression that you have made up your mind? Nor did I find any internal guidance on such everyday but important things as what cases should get expedition or how you should go about fixing cases in your own list.

Judges were uniformly helpful when I asked for advice. But I believe the truly fundamental point is that we need to move away from what I think to be an outdated approach to judicial appointments which assumes that any competent counsel can go onto the bench without any kind of training as a judge. Like anything else, judicial techniques can and, I believe, should be taught, and the notion that you can pick them up as you go along, or from a seminar of a couple of days should be wholly discarded. Judges should be trained *before* they take up their appointments, and that training should be highly professional and exacting.

Next, there is the question of judicial attitudes. While there is no crunch of the kind that advocates experience when they stand up in court at the start of the day, running a court is not without strain. You may have to make decisions on the run on issues that arise suddenly and without adequate argument or without as much knowledge of the law - for example, a difficult point of evidence - as you would like. There is also the strain that comes from a long case, or from difficult issues, or from arguments which are badly put. All this can result in one feeling less than happy with those who are appearing, or about the completeness of one's grasp of the issues. But no matter what you may feel, I think it is of great importance - and no doubt a counsel of perfection which I don't suggest I always met - to run as pleasant a court as possible. The word "pleasant" may seem odd in this context; courts are not pleasant places. They are hard and demanding, and can be brutal on those who have to appear in them. The strain on the lawyers can be considerable; the strain on their clients and witnesses in these alien and intimidating places is usually far greater.

It is because of the strains inherent in the adversarial system that judges should try to run as pleasant and relaxed a court as possible. I believe this is the way to get the best out of those who appear before you, whether lawyers or witnesses, and it also leaves people more likely to think that they have had a fair day in court. And, how the courts are perceived by those who are the consumers of justice - litigants who may come before the courts only once in their lives but for whom that occasion may make or break their futures - is all important.

Judges in their courts are the closest to absolute rulers that we know; courtesy and restraint should be the mark of those with such power.

My last word is on the subject of judicial accountability. This is the age of accountability, none of us is exempt. If asked what they want from a judge, I think most litigants would say a fair hearing and a quick result. There is a serious question to be asked about judges who fall too far behind, who have too many judgments outstanding and who take too long a time - absent compelling reasons like ill-health - to hand down decisions. When a judge gets into difficulties, like anybody else, he or she should be helped.

This could be done in various ways. Informally, at first by the Chief Judge of the Division to find the causes of the problem. Has the strain of too many reserved decisions eroded the confidence and order of mind the writing of judgments demands? Are there other reasons: emotional, temperamental or intellectual?

Once the causes are determined, there should be a thoughtful and professional programme of assistance which would give the judge in trouble time off the bench to get up to date and, as it were, to start afresh.

But if it turns out that, for whatever reason, the judge simply is not capable of processing cases in a reasonably timely fashion, then it must be acknowledged that a mistake has been made and another occupation should be found for that person, perhaps by the allocation of simpler cases, or by the mechanism of a form of early retirement.

A challenge to judicial independence?

I agree that this kind of approach to judicial failure would amount to a fundamental change to the way we do things, but I would argue that such a change would recognise that judges are also liable to be judged, and if a man or woman on the bench is incapable of doing things in the way they should be done, the judiciary and the government of the day owes a duty to the public to do something about it. ❑

Best-Kept Secret

"The Medico-Legal Society of NSW is the best kept secret in Sydney", said President Dr Jennifer Alexander. "While the Society has nearly 600 members and regularly attracts more than 100 people to its academic meetings, most doctors and lawyers do not know of its existence."

The Society holds four (4) academic meetings each year at which medical and legal speakers debate current issues of interest to the two professions. In March of this year the topic under discussion was euthanasia. On that occasion, two medical speakers, Professor Malcolm Fisher and Professor Peter Baume, who hold opposing views, and lawyer, Caroline Marsh, debated five propositions which were aimed at encouraging discussion on the ethical and legal aspects of the Euthanasia Debate to the exclusion of the religious and moral concerns.

The five propositions were:-

1. Legislation to legalise voluntary euthanasia is essential to protect doctors from charges of murder or manslaughter.
2. Legislation which clearly defines the boundaries of voluntary euthanasia would ensure there is no 'slippery slope' to non-consensual terminations of life.
3. The doctor-patient relationship will be enhanced by the legalisation of voluntary euthanasia.
4. Voluntary euthanasia is not necessary in a society in which good palliative care is practised - and,
5. The right to choose one's manner and time of death, should be enshrined in law.

The debate itself and the questions which were later put to the speakers, covered a wealth of views.

The proceedings of all scientific meetings are published quarterly and mailed to all members. To join this unique Society write to:-

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