Supreme Court of Queensland Library
Bridge to the Past • Gateway to the Future

10th Annual Public Sector Appeals Conference

Conference dinner, Novotel Hotel, 200 Creek Street, Brisbane
Thursday 4 September 2003, 6:30pm

Chief Justice Paul de Jersey AC

I am very pleased to have the opportunity to speak with you in the course of this important conference. I particularly welcome those of you who have come from elsewhere to this the, I should say a-politically … sunshine State! I commend the concept of the conference.

My own memories of involvement in public service appeals as an advocate – I am speaking of three decades ago – focus on rather inscrutable panels who spoke a language and referred to concepts with which I was entirely unfamiliar. I expect I secured a successful outcome for some at least of my appellants, but I fear it must have been the result of their overwhelmingly meritorious cases.

Now three decades on, we undoubtedly see a system much more refined and professional, and in a desirable sense, transparent and predictable. I do not make these observations critically of the regime of the seventies. That was indeed a very different era: in the courts of law, for example, judges had only just acknowledged an obligation to give reasons for judgment in every case. No doubt the system worked well in the seventies – in public sector appeals and in the courts of law. But equally doubtless, contemporary expectations now demand a somewhat different approach.

The facility for substantial appeal has become an intriguingly entrenched feature of the western judicial and administrative systems. What intrigues me is that appeals have become so widespread, almost a regular occurrence, such that primary decisions are very often at risk of being regarded as merely

provisional, subject to review. Last year the Queensland Court of Appeal dealt with as many as 475 criminal appeals, up 20% over the preceding two years, and 774 appeals overall. Those figures are substantial.

I am not sure it is a good thing that primary decisions be treated as provisional. What explains that evolving mind-set? I do not think it necessarily reflects lack of confidence in the primary decision-maker, or even a view that important decisions should not be left to just one person. I see it more as a cultural thing: if you are unsuccessful at the first stage, of course you must be entitled to a review. This attitude permeates beyond the traditional administrative and judicial appeals, even into those areas, to Australians, of ultimate significance, where the umpire's ruling was once sacrosanct.

There is I fear a developing feeling in some areas of Australian life however that the possibility of appealing has become luxuriously distended. Some have expressed that sentiment in relation to immigration appeals and the like, although that is a controversial area into which I will certainly not trespass this evening. I do think however that legislatures should be astute to the need for some reasonable economy in according rights of review or appeal. The judicial system aside, it is difficult to see why more than one opportunity should be open; or if more than one, because of the importance of the matter, then the second subject to constraints such as limitation to error of law or the like.

It goes without saying that the contemporary practice of delivering comprehensive reasons for decisions has fed the appetite for appeal – along, that is, with the creativity of legal minds able to find egregious error in something which appears beyond criticism. There is, I suppose however, no turning back from the current practice, which is an important avenue for accountability.

Judicial officers could not these days follow the advice given by Lord Mansfield to a general appointed Governor of an island in the West Indies, finding himself obliged therefore to sit also as a Judge. It is said Mansfield told him:

> "Be of good cheer – take my advice and you will be reckoned a great judge as well as a great commander in chief. Nothing is more easy; only hear both sides patiently, then consider what you think justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong."

I imagine the legislation under which you operate frequently provides one way or the other as to the giving of reasons. It is interesting to recall that the High Court in 1986 in *Public Service Board of NSW v Osmond* (159 CLR 656, 662) held there was no general or common law obligation to give reasons for administrative decisions, and that natural justice imposed no such requirement.

So we must be careful with our expression of reasons. But then care should characterize a decision-maker at every level in the expression of language. What we say must be quintessentially comprehensible. Not like this direction to the jury on the onus of proof in a criminal case, to which I was recently referred:

> "You might think, and as to what you think it is a matter for you, that to act in the way contended for by the accused is not unreasonable or at least not unintentionally unreasonable. But as I have said and I repeat it again because it is so important and fundamental that the defence don't have to prove anything, the prosecution have to negative any defence beyond a reasonable doubt: that is fundamental and it is a matter for you as the judges of the facts and as to that anything that you think I might think or indeed if you think that I have formed an opinion the said opinion is irrelevant unless you also so think … I think."

Verbiage aside, I want to acknowledge this evening that many of you, probably most of you, not only make decisions on review: you also sometimes make the decision subject to the review. That brings up a point of tension only too familiar to me, sitting as I do on a superior court, and frequently on appeal.

When I assumed the role of Chief Justice in this State and announced with enthusiasm an intention to sit at first instance, some warned I must be prepared to endure the "ignominy" of being overturned on appeal. Their forecast was timely: over the last six years, a number of my judgments and decisions – I assure you conscientiously delivered – have indeed been overturned. I mention this to remind however that the wounded syndrome is not court or tribunal specific. We are all overturned from time to time, including courts of appeal. Fortunately we may then take refuge, if sensitive souls, in the recognition that one is never proved wrong if reversed on appeal – it is just that others take a different view.

I was interested recently to read some words penned by Lord Hailsham when Lord Chancellor of England – or Lord High Chancellor as the role, about to be abolished, was then styled. He said, and his gender specific language reflects his era of course:

> "If a judge does his stuff properly, he is bound to be controversial. There is no doubt that in their time, the great judges have all been controversial judges. They are still controversial. You have only to see the course of crucial cases on appeal, the trial judge one way, the Court of Appeal divided two to one the other – the House of Lords three to two the other way, back to the trial judge's view or sometimes with a view of their own – to know in your bones that a judge who succeeds all his day in keeping out of any kind of trouble is either ducking the issues or gifted with a degree of luck not often accorded to human beings. Though a judge who is reversed on appeal ought always to question his own conscience about his handling of the particular case, the judge who is never reversed ought to question his own conscience at least as closely as to his total performance."

So do not be discouraged by reversal, although do not court controversy!

I wish you well in your continuing endeavour tomorrow, and I will stop shortly, lest this address come to resemble a long-playing record of Scottish dance or the piano rags of Scott Joplin (P Bowler: The Superior Persons Book of Words, p 68). I hope these brief observations have been of some interest, and that they have in some relevant way enhanced the reach of what could be described as an annual "symposium", although it has much more prudently been styled a "conference". No doubt the organizing committee was conscious of the Oxford Dictionary definition of "symposium", as a "drinking party": "sorry to rush through dinner tonight, mother; Ethel and I have to attend a symposium at eight o'clock." (supra, p 138).

I wish you well for a conference which I trust, while instructive, is also entertaining!