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THE ROLE OF THE JUDGE

NATIONAL JUDICIAL ORIENTATION PROGRAMME

NOVOTEL NORTHBEACH, WOLLONGONG

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Chief Justice of Australia  
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## "THE ROLE OF THE JUDGE"

I must begin by offering to each of the newly-appointed judges my congratulations - not, as is ordinarily said, on your elevation but on your acceptance of an office which is of pivotal social importance and your willingness to expend much of your time and energy and all your talents in performing its duties. You have been appointed to your respective courts because you have demonstrated the capacities which are needed to be a judge and your attendance at this programme of induction is a tribute both to your desire to fulfil your office with distinction and to that humility of mind that is essential to your being able to do so.

I suppose you have all experienced the sense of novelty in sitting when others stand, in presiding rather than participating and in finding yourself alone with your own thoughts when the time for decision arrives. Sometimes the new judge finds the transition too rapid, forgetting for the moment his or her position on the other side

of the bar table. As you know, those incidents give the profession a good story or, in cases where the judge keeps on the mantle of the advocate, grounds for much headshaking and mutterings of foreboding.

In the following sessions of this seminar, there will be papers on practical aspects of the judicial function. I was given as a topic for this address the subject "The Role of the Judge", so I shall start by saying something about the general approach to judicial duties. I understand that you have access to - I do not assume you have read - what I said to the Supreme and Federal Court Judges' Conference on "Why be a Judge?". I shall not repeat what is in that paper, except in one important respect.

A judge's role is to serve the community in the pivotal role of administering justice according to law. Your office gives you that opportunity and that is a privilege. Your office requires you so to serve, and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but

the judge will not succeed and will not find satisfaction in his or her duties unless there is a continual realisation of the importance of the community service that is rendered. Freedom, peace, order and good government - the essentials of the society we treasure - depend in the ultimate analysis on the faithful performance of judicial duty. It is only when the community has confidence in the integrity and capacity of the judiciary that the community is governed by the rule of law. Knowing this, you must have a high conceit of the importance of your office. When the work loses its novelty, when the case load resembles the burdens of Sisyphus, when the tyranny of reserved judgments palls, the only permanently sustaining motivation to strive onwards is the realisation that what you are called on to do is essential to the society in which you live.

You are privileged to discharge the responsibilities of office and you are obliged to leave it unsullied when the time comes to lay it down. What you say and what you do, in public and to some extent, in private, will affect the public appreciation of your office and the respect which it ought to command. The running of the risk

of being .06 while driving home from a dinner party or a minor understatement of income in a tax return could have public significance. The standards of Caesar's wife are the standards that others will rightly apply to what you say and do and, having a high conceit of your judicial office, they are the standards you will apply to yourself. These standards apply to matters great and small. In some respects, the management of petty cash or the acquittal of expenditure can be a matter of great moment.

Hand in hand with a high conceit of the office is a humility about one's capacity to live up to the standards set by one's predecessors and expected of the present incumbent. There are few judges who are sufficiently self-confident not to entertain a doubt about their ability to achieve the expected level of performance - and, so far as I know, none of those possessed of that self-confidence has done so. Of course, with growing experience the anxiety about one's capacity to perform the duties of office abates. But this is not attributable so much to self-satisfaction as it is to a realistic acceptance of the limits of one's capacity. Provided one does one's

best, anxiety about any shortfall in capacity can be counter-productive. Intellectual humility (even if it does not show), a sense of duty and self-esteem, the exposure of every step in the judicial process to public examination and peer group pressure are the factors which inspire a judge to the best achievement of which he or she is capable.

The first role of the judge is to preside and to hear. It is your court and, unless you are sitting on a collegiate bench, the atmosphere of the court is chiefly in your hands. From time to time, you will experience a mounting frustration as a bumbling counsel fails to tell you what the case is about, or a witness prevaricates, or the key issue in the case is missed or some idiosyncrasy of counsel, party or witness proves bothersome. At such times, judicial sangfroid is sorely tested. You may find it helpful quietly to set yourself a test: can I stay calm or shall I yield to the temptation to put an end to the source of the frustration? The desirable answer is obvious, but the technique of how to achieve it depends on the individual personality of the judge. A sense of humour helps. I do not mean the

bon mot that extracts a dutiful show of mirth from counsel nor the flippancy that might lead a litigant to think that the trial is regarded as a mere entertainment. I mean a sense of humour that allows the mind to concentrate on the issues without taking oneself and one's preconceptions too seriously. If humour fails, the situation is ameliorated by a certain remoteness created by the physical separation of the bench from the well of the court and the wearing of the judicial robe. Although both of these features undergo critical evaluation from time to time, I doubt whether curial decorum could be so easily preserved without them.

It is not necessary for a judge to demonstrate mastery of the issues by the making of informed comments on the running of the case. The hearing is for the purpose of informing the judicial mind about the material required for judgment, not for the purpose of staging a debate or providing a public and privileged platform. That is not to say that judicial silence should mask the issues on which the judgment might turn; it is to say that exchanges should have some point and that silence is the appropriate alternative if they do not.

A second, and more important, point can be made about the function of presiding at a trial. A trial - including a criminal trial - is not the occasion for diminishing the dignity of any person in the courtroom. It is an occasion for the dispassionate finding of facts and application of law, not for the humiliation of any of the trial's participants. At the end of the trial - even a trial in which an accused has been convicted and sentenced - the participants in the trial should be able to leave the courtroom with their dignity unaffronted. That is not to say that a judge should not comment, and comment forcefully, on the conduct of a participant in the proceedings as revealed in the courtroom where such a comment is relevant to the imposition of a sentence, the credibility of a witness or the professional conduct of an advocate, provided the comment does not exceed what is necessary for the purpose of the decision and the object of any adverse comment has been given an opportunity to deal with the ground of criticism.



As you know, unrepresented litigants constitute an increasing percentage of those appearing in the courts. The trend is likely to continue. Unrepresented litigants often present a real obstacle to the efficient disposition of the court's lists, as the judge must take additional care to ensure that, even if they be incapable of adequately advancing their own case, no points of merit are buried in what is oftentimes a mass of distracting irrelevancies. There is a tendency to want to even the scales by assisting the unrepresented litigant to develop his or her case or to attack the opponent's case. That is a tendency to be detected and resisted. The judge's role is to keep the ring, not to enter the fight. By all means let the relevant rules be understood, but then the judicial duty is to retreat to the calm isolation of the judgment seat.

When the hearing is complete, the lonely moment of decision-making has arrived. Nobody but you can make the decision or frame the reasons. Yours is the sole responsibility. Help may be sought from more experienced or more learned judicial colleagues but ultimately there is only one judicial mind that must assent to each

step in the reasoning and to each part of the order made. In formulating the reasons for decision, you give a public account of the reasons which have led you to exercise the coercive powers of the State - the powers which the State has vested in you - by making the orders on which you have decided. Of course, the parties are those most immediately interested in your reasons, and the unsuccessful party is the one who is primarily entitled to a fair statement of the reasons why you have exercised your powers against that party's interests or contentions. Read, and be comforted by, Sir Frank Kitto's "Why Write Judgments?" in 66 *Australian Law Journal* 787. There are two passages that bear repetition in this context. The first is this (at 790):

"The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance."

Later, Sir Frank said:

"Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all."

The finding of facts is perhaps the most difficult aspect of judgment. What is needed is a finding on every constituent element of the charge, the claim or the defence which is not conceded expressly or impliedly. It is no use reciting the submissions on either side without reaching the conclusion. That might give an impression that the judge was attending to the argument, but it is not judging. Be cautious in the use of the umbrella phrases: "I prefer the evidence of X to the evidence of Y where their evidence conflicts". That smacks more of a formula than it does of reasoning, especially when the real choice may be - 'as it often is - between two defective recollections. There are some tell tale phrases that can alert you to a part of the judgment that requires further consideration: "clearly" is a word that contains more of an assertion than a reasoning to a conclusion, and the assurance that "after giving the matter earnest consideration, I have come to the conclusion that" says nothing about

the reasons for the conclusion. Rather, it conveys an uneasy impression of a failure to give the matter the consideration it deserves.

Provided the essential facts of charge, claim or defence are found, a lengthy judgment is seldom required. To be sure, an argument that is being rejected should be rejected with reasons but a distinction should be drawn between a judgment and an academic exposition of the law. There are occasions, especially in courts of appeal, where extensive examination of authority is required or desirable, but that is seldom the situation in a trial court. Thinking, rather than writing and, even more, rather than dictating, is the critical factor in judgment.

The competent and conscientious performance by judges of the duties of their office is the most effective way to maintain respect for the rule of law. It is hard and not glamorous work, but judges are not public relations officers and it is a false priority to try to put the fostering of our public image ahead of the sheer hard work of

judging. There is no prohibition against a judge giving, or authorising the giving, to the media and the public information about the function of judging provided, of course, the discussion does not trespass upon the decision of a particular case or an issue that might have to be judicially decided. And, I should add, provided the discussion is not an exercise in self-promotion. Judicial inability to control editorial treatment of an interview and to engage in media controversy may point towards a prudent reticence, but that is a matter of discretion. Because the media are often willing to report a judge's observations on matters of contemporary interest, some few judges choose to make public statements on subjects outside their judicial expertise. If they be experts on other subjects, their expertise in those subjects may warrant the making and publication of the statements, but if their authority derives solely from the judicial office and the judicial office is used as a descriptive badge of authority, the privileges of the office are misused.

I should say something about impartiality, the supreme judicial virtue, and the appearance of impartiality. They can be impaired in

a variety of ways, some of which are too obvious to require comment. Those ways include too close a connection with, or expressions of support for, causes - albeit the causes are laudable. Impartiality and its appearance can be impaired by such an intellectual predilection for one view of an issue falling for determination as precludes, or appears to preclude, a fair consideration of contrary argument. And beware of expressions that emphasise forward-looking, right-thinking or politically-correct attitudes, for such expressions might be thought to trim a judgment to the breeze of public or political approval.

A bastion of impartiality is independence - independence not only from the Executive Government but from other centres of power. I need not dwell on that topic. Independence is not only essential to the judiciary; it is one of its greatest attractions. Nothing to fear, nothing to gain by the performance of the judicial office. That leads me to say something about the prospects of judicial promotion. There is nothing dishonourable about hoping for promotion when an appropriate vacancy occurs; but it is

dishonourable actively to seek a promotion. Ambition and its twin, envy, can corrode a character and destroy the harmony of a court.

Judicial appointment is not a stepping stone in a career; it is *prima facie* a dead-end job of the highest importance.

If promotion should come, it should be supported by those who have had an opportunity to form an opinion on the quality of the work done and the judicial demeanour manifested in doing it.

Finally, I should mention intra-curial relationships. Although each judge should have and retain a fierce sense of personal independence and be prepared to accept the consequences and the criticisms of his or her own judgments, a court cannot operate efficiently without a shared objective of getting the work done to a standard that enhances public confidence in the Court as a whole. Life on the bench is a sheer delight when one's colleagues command unfeigned respect. Let there be the gravest divisions of legal opinion, or of judicial style, of expedition or even of native ability, among the members of a Court provided only that each member is genuinely respectful of each other and extends co-operation and camaraderie

to those who share the burden of the Court's caseload. None of us chooses his or her judicial colleagues; that is the prerogative of the Executive Government. But overall the Executive Governments of this country have appointed judges with the requisite competence and experience, and for that we may be truly grateful. Sometimes you may think another judge is not up to standard. Then it is necessary to remember that one's own reputation is not advanced by derogating from the reputation of another judge of the Court; rather, individual reputation is enhanced with the enhancing of the reputation of the Court to which the judge belongs.

Be not uncaring about the small courtesies and conventions of judicial life. They are the natural incidents of a civilised elite who are conscious of the importance of their service to the community and who desire to give and to receive the respect which their office demands and which their efforts merit. You have joined or you are joining that elite - an elite of service, not of social grandeur - and your membership of it can be a source of great personal satisfaction and no little pride. You will not grow affluent on the remuneration



that you will receive; you will work harder and longer than most of your non-judicial friends; your every judicial word and action and some other words and actions as well will be open to public criticism and the public esteem of the judiciary may be eroded by attacks that are both unjustified and unanswered. But if, at the end of the day, you share with colleagues whom you highly esteem a sense of service to the community by administering justice according to law, you will have a life of enormous satisfaction. Be of good and honourable heart, and all will be well. You have made a major decision. On behalf of the institution of the judiciary, I thank you for your commitment. It will be for you, in the fullness of time, to decide whether you have made the right decision. I am sure you will find that it was.