The Role of the Judge

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National Judicial Orientation Programme

Judicial Commission of New South Wales

Australian Institute of Judicial Administration

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Foreword

What is the role of the judge and how can judges perform that role well? *The Role of the Judge* attempts to answer these two questions and to provide some guidance for newly-appointed judges in their transition to the bench.

While the authors in this collection address different aspects of these two questions, some common themes do emerge. A judge's role is to administer justice according to law. In so doing, judges must bear in mind a number of fundamental principles such as judicial independence, impartiality, fairness and competence.

Upholding judicial independence is a central aspect of judicial performance. The obverse of judicial independence is the accountability of the judiciary to the public for the manner in which it administers justice.

Some practical guidance is offered about how to undertake the core functions of presiding over the court, decision-making and judgment-writing. Many of the authors highlight that the transition to a judge can be a difficult one. Of necessity, changes in conduct follow from becoming a judge and some may find it difficult to accept the restraints of judicial life. The loneliness of judicial office can lead others to succumb to judicial stress. Some practical observations are offered about appropriate judicial conduct as well as how to guard against judicial stress.

Finally, the role of the judge is discussed within a wider context, both of the changes and challenges confronting the Australian judiciary and the place of the judiciary in society. Judges are not isolated from the changes in society and must respond to those changes without compromising the judicial function.

With the exception of the paper by Chief Justice Gleeson on judicial accountability, this collection of papers on performing the role of the judge derives from the National Judicial Orientation Programme. This programme aims to assist newly appointed judicial officers with their transition to judicial office. Jointly developed by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, since its inception in 1994 the National Judicial Orientation Programme has been recognised for its excellence in judicial education. The National Judicial College of Australia assumed responsibility for the programme in 2004.

Our thanks go to the authors for generously sharing the knowledge and experience they have gained from their years on the bench. And we are hopeful that this publication will be a useful educational resource for newly appointed judicial officers.

The Honourable JJ Spigelman AC
Chief Justice of New South Wales
President, Judicial Commission of New South Wales

The Honourable Justice Peter Underwood AO
President, Australian Institute of Judicial Administration

June 2004

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Contributors

The Honourable Sir Gerard Brennan AC KBE is a former Chief Justice of Australia. Born and educated in Queensland, Sir Gerard was admitted to the Queensland Bar in 1951. He was appointed Queen's Counsel in Queensland in 1965 and subsequently in New South Wales, the Northern Territory, Papua New Guinea and Fiji. He was appointed a Judge of the Australian Industrial Court and the Supreme Courts of the Australian Capital Territory and the Northern Territory in 1976, the Federal Court in 1977, and as a Justice of the High Court of Australia in 1981. He was appointed Chief Justice in 1995 and retired in 1998. He is currently a Non-Permanent Judge of the Court of Final Appeal of Hong Kong and Chancellor of the University of Technology, Sydney.

The Honourable John Doyle AC is Chief Justice of South Australia, having been appointed to that office in May 1995. Justice Doyle was admitted to the degree of Bachelor of Laws from the University of Adelaide in 1966 and from Oxford University in 1969. He was the South Australian Rhodes Scholar in 1967, admitted as a barrister and solicitor by the South Australian Supreme Court in 1970, and a partner in an Adelaide firm of solicitors from 1970–1977. He practised at the Bar in Adelaide from 1977–1986 and was appointed Queen's Counsel in 1981. He was the Solicitor General of the State of South Australia from 1986–1995. He also served as a member of the Council of the Law Society of South Australia from 1972–1979, a member of the Legal Services Commission of South Australia from 1978–1986 and President of the Bar Association of South Australia from 1993–1995. He is the inaugural Chairman of the National Judicial College of Australia.

The Honourable Murray Gleeson AC is Chief Justice of Australia, having been appointed to that position in May 1998. He was admitted to the New South Wales Bar in 1963 and appointed Queen's Counsel in 1974. He was a Tutor in Law at St Paul's College, University of Sydney, 1963–1965 and a part-time lecturer in Company Law at the same university from 1965–1974. He served on the Council of the New South Wales Bar Association as a Member from 1979–1985 and as President in 1984 and 1985. He was Chief Justice of New South Wales from November 1988 to May 1998, Lieutenant-Governor of New South Wales from July 1989 to May 1998 and President of the Judicial Commission of New South Wales from November 1988 to May 1998. He was elected Honorary Master of the Bench, Middle Temple in 1989.

The Honourable Justice JD Heydon AC is a Justice of the High Court of Australia, having been appointed to that Court in February 2003. At the time of his appointment he had been a Judge of the Court of Appeal, Supreme Court of New South Wales, from 2000. He was New South Wales Rhodes Scholar in 1964, Fellow of Keble College Oxford from 1967–1973 and Dean of the Faculty of Law, University of Sydney, in 1978–1979. He was admitted to the New South Wales Bar in 1973 and was appointed Queen's Counsel in 1987. He has published *The Restraint of Trade Doctrine* (2nd edition, 1999), *Economic Torts* (2nd edition, 1978) and various works on evidence and equity. He is the author of *Trade Practices Law,* the current editor of the Australian editions of *Cross on Evidence,* and one of the editors of Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th edition, 2002).

The Honourable Justice Michael Kirby AC CMG was appointed to the High Court of Australia in February 1996. At the time of his appointment he was President of the New South Wales Court of Appeal, having been appointed to that office in September 1984. He was admitted to the New South Wales Bar in 1967. He was appointed a Deputy President of the Australian Conciliation and Arbitration Commission in 1975. He served as first Chairman of the Australian Law Reform Commission from 1975 to 1984. In 1983 he became a judge of the Federal Court of Australia, serving on that Court until 1984. He has held numerous national and international positions including on the Board of CSIRO, as President of the Court of Appeal of Solomon Islands, as UN Special Representative in Cambodia and as President of the International Commission of Jurists.

The Honourable Mahla L Pearlman AO retired as Chief Judge of the Land and Environment Court of New South Wales in 2003. Prior to her appointment to the bench, Ms Pearlman was a partner of Sly and Weigall (now Deacons) Solicitors. She served as President of the Law Society of New South Wales in 1981–1982 and President of the Law Council of Australia in 1989–1990. She was a member of the Judicial Commission of New South Wales from 1992–2003, and a part time member of the New South Wales Law Reform Commission from 1994–1998. She was Chairman of the Board of Governors of the College of Law and has been Patron of NSW Young Lawyers. She has served as an Acting Judge of the Supreme Court and as an Acting Judge of Appeal. Currently she is President of the Council of the State Library of New South Wales.

Aspects of judicial performance*

The Honourable Murray Gleeson AC†

What is the role of the judge? Moreover, how can judges perform that role well? In considering these two questions, Chief Justice Gleeson examines four essential aspects of judicial performance — independence, impartiality, fairness and competence. His Honour's salutary comments deal with judicial performance on both a collective and individual level. On the collective level, the Chief Justice considers judicial performance in relation to the issue of judicial independence, because the role of the judge, as properly understood, can only be performed if the judiciary is independent of the other arms of government. Notwithstanding this, the duty that inheres in the judicial office is ultimately borne by each judge alone. On this individual level, measures are identified which judges can use to perform their work in a manner that is both just and efficient.

In the past I have, from time to time, set out to explain the role of a judge to gatherings of parliamentarians, legal practitioners, students and people with an interest in public affairs. This, however, is quite a different occasion. I am speaking to a small group of experienced lawyers, all with a special and professional interest in the subject, and all of whom are likely to have some fairly well-developed ideas of their own on the topic. Most of you have already had some judicial experience and all of you have spent a substantial part of your professional lives observing judges at work. My remarks to you, therefore, will not take the form of a lecture. Rather, I will remind you of some principles of which you are already aware, and relate those principles to some practical observations that I hope may be of assistance to you in your future judicial careers.

There are four aspects of judicial status or performance that will form the basis of my remarks. These are independence, impartiality, fairness and competence.

Independence

The constitutional principle sometimes referred to as the separation of powers is acknowledged, at least in theory, in most western societies, even though its implications are in some respects a matter of debate. The judiciary is seen as the third arm of government, separate from and independent of the two political arms — the legislature and the executive. Judges maintain the rule of law, uphold the Constitution, and administer civil and criminal justice according to law.

* Revised version of a paper "The Role of the Judge and Becoming a Judge" delivered to the National Judicial Orientation Programme, 16 August 1998, Sydney.

† Chief Justice of Australia.

Because the executive government is itself a major litigant, the independence of the judiciary from the executive government is indispensable if there is to be public confidence in the administration of justice. Almost all criminal cases are conducted in the form of a contest between the executive government and a citizen. The executive government, either directly or through corporations in which it has an interest, is a party to much civil litigation. Civil litigation is often concerned with rights and obligations as between the government and citizens. Constitutional cases are often fought out between different governments in our federal structure. Courts decide whether legislation is valid and determine as between governments the boundaries of their respective powers. I think it is fair to say that the Australian public accept that in a dispute between the government and a citizen which comes before an Australian court of law the citizen will receive equal treatment. The importance of that should not be underestimated. If it were no longer accepted or assumed that citizens will receive equal treatment before the law when in dispute with governments, the consequences for our society would be extremely grave.

Although judges are servants of the public, they are not public servants. The tenure which they enjoy, the procedures which are required in the case of a proposal for their removal, and their institutional separateness from the executive arm of government, are all aimed at securing that position. The essential obligation of a public servant is, consistently with the law, to give effect to the policy of the government of the day. The duty of a judge is different. The duty of a judge is to administer justice according to law, without fear or favour, and without regard to the wishes or policies of the executive government. Judges, of course, give effect to the will of parliament as expressed in legislation, but their duty is to behave impartially in conflicts between a citizen and the executive. There may be a big difference between the will of parliament as expressed in legislation and the policy of the executive government from time to time.

Most members of the community tend to regard judges as public servants, at least until they begin to reflect upon the significance of the principles just mentioned. Judges, however, should know better. There is, on occasion, pressure from some quarters for judges to be treated, or to permit themselves to be treated, as though they were public servants. Sometimes, people in public life express frustration or indignation at the unwillingness of judges to conform to the policy of the executive government. Just as nature abhors a vacuum, so there is often an institutional bureaucratic abhorrence of independence. This is not surprising. Independence of any kind is likely to be regarded as a threat to a government's capacity to govern. Government would in some respects be more efficient, and life for those in power would be easier, if judges were public servants and were obliged to conform to government policy. However, efficiency and an easy life for those in power are not the primary aspirations of a democratic society. Those considerations are overridden by the demands of justice, and our community's idea of a just society is one in which the judiciary is, and is seen to be, independent of the executive government.

It is the duty of all judges to respect and maintain that independence. That does not involve maintaining an attitude of abrasive antagonism towards everyone in government. On the contrary, there is a great deal to be achieved through appropriate co-operation between the three arms of government. Yet, if judges do not respect and value their own independence, no one else will.

The independence of judges should not be seen, either by the community or by judges, as some kind of perquisite of office. Sometimes there is an unfortunate tendency to overstate the principle of independence and to invoke it in circumstances where it is not, in truth, under threat. There is a tendency in some people to turn every disagreement about the terms and conditions of judicial service, or the funding of the court system, into an issue of judicial independence. This creates a degree of cynicism. Such cynicism is not always unjustified. It debases the currency of principle if we overstate our case. Subject to that caution, however, I would encourage all judges to take a close and informed interest in questions relating to the independence of the judiciary.

Impartiality

Throughout the ages, and in all societies, impartiality has been regarded as of the essence of the administration of justice. The image of the just judge as one who favours neither the rich nor the poor, but gives a true verdict according to the evidence, appears in texts going back to the origins of our civilisation.

In our postmodern, deconstructionist society, there are those who regard impartiality as an illusion. Rejecting as fraudulent the notion that anyone is capable of being truly impartial, some people promote the idea that the only decent judge is one who sets out to be actively partial, using judicial power to address the injustices of society, redistribute assets, promote the interests of some social group seen as worthy of support, and administer justice, not according to law, but according to some overriding standard existing outside the law. People who take this approach consider that impartiality is bogus and the pretence that it exists, or is capable of being achieved, is an impediment to true justice.

Judges, however, are supposed to be dedicated to the proposition that the administration of justice requires both the reality and the appearance of impartiality, and that both are attainable. Anyone who does not believe that should not be a judge.

It has been wisely observed that enthusiasm for a cause is usually incompatible with impartiality and is always incompatible with the appearance of impartiality.

I need say nothing to this audience about the reality of impartiality. You have all made a sworn commitment to it. I will not insult you by canvassing the possibility that you might dishonour that commitment.

It may be necessary, however, to emphasise the importance of maintaining the appearance of impartiality. This is where, for some judges, difficulties can arise.

It is essential for a judge to maintain, in court, a demeanour which gives to the parties an assurance that their case will be heard and determined on its merits, and not according to some personal predisposition on the part of the judge. Human nature being what it is, some people are better than others at maintaining such a demeanour. I imagine that everybody here has, at one time or another, observed the performance of a judge who failed to live up to the ideal in this respect. In our experience as practitioners we have all seen judges behaving well and, on occasion, we have seen judges not behaving well. The point requires little elaboration, but we all have our own models of judicial behaviour.

Modern lawyers, litigants, witnesses and the public generally are much more ready to criticise judges whose behaviour departs from appropriate standards of civility and judicial detachment. This is a good thing. If judges behave inappropriately, they should be criticised. Of course, on occasions, some judges are exposed to wrongheaded, extravagant or unfair criticism. That is the price that has to be paid to remind all judges of the necessity to conduct themselves with dignity and decorum.

There are two practical aspects of this subject which may not be obvious and which are worth mentioning on an occasion such as this.

The first concerns prejudgment. Complaints of apprehended bias often involve, not a suggestion of personal prejudice, but a suggestion that the judge has made up his or her mind and become committed to a particular outcome before the parties have had a full and fair opportunity to present their evidence and their arguments. This can be a particular problem in an age when there is a great deal of pressure on judges to deal with matters expeditiously, to discourage time wasting and delay on the part of litigants and lawyers, and to dispose of huge caseloads in a managerial rather than a judicial fashion. Some judges respond to these pressures over enthusiastically and, in doing so, fall into the trap of giving the appearance of prejudgment. There is a balance to be held between the needs of efficiency and the imperative of maintaining both the appearance and the reality of an open mind up until the point of decision-making.

The second matter to be mentioned concerns what might generously be described as judicial humour. Some judges, out of personal good nature or a desire to break the tension that can develop in a courtroom, occasionally feel it appropriate to treat a captive audience to a display of wit. Sometimes this is appreciated by the audience, but sometimes it is not. When it is not the consequences can be very unfortunate. Judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judge appears to be taking the occasion lightly or, even worse, if the judge appears to be making fun of someone involved in the case. Without wishing to appear to be a killjoy, I would caution against giving too much scope to your natural humour or high spirits when presiding in a courtroom. Most litigants and witnesses do not find court cases at all funny. In almost ten years of dealing with complaints against judicial officers to the Judicial Commission of New South Wales, I have seen many cases where flippant behaviour has caused unintended but deep offence.

Fairness

You are all familiar with the essential requirements of fairness in the conduct of court proceedings. The judge must give both parties a proper opportunity to put their evidence and their arguments, listen to the evidence in the arguments, and approach decision-making with an open mind.

There are, however, some practical aspects of the requirements of fairness that it is easy to overlook.

In our adversarial system of litigation the parties, through their legal representatives, decide the issues that will be presented for judicial determination and the evidence that will be

relied upon for that purpose. This is not the occasion to go into the merits of the adversarial system as compared with other systems. It is the occasion, however, to emphasise one important aspect of that system. The judge only addresses such issues as the parties invite the judge to address and learns only so much of the facts of the case as will appear from the evidence that is tendered in the course of the proceedings. Fairness, to the parties, and perhaps to third parties, requires that the ultimate judgment be expressed in the light of an understanding of the limitations inherent in the process.

In the course of delivering reasons for judgment, judges sometimes make findings or comments which reflect a lack of appreciation of those limitations. There may be, for example, a background to litigation of which the judge will get only a partial glimpse. It may be quite unfair for the judge, in those circumstances, to express unnecessary value judgments, opinions or general conclusions of fact, without knowing the whole of the background in question.

Again, evidence may be given which affects some third party not involved in the litigation but which is not challenged by the other party to the proceedings. It can cause great unfairness to third parties if judges make findings of fact or comments which pay no regard to this matter. As a general rule, it is inappropriate, and often unfair, for a judge, in reasons for judgment, to make an unqualified adverse finding concerning someone who is not a party to litigation and who has had no opportunity to answer the allegation in question.

Some types of proceeding are, by their nature, particularly apt to give rise to problems of this kind. The best example I can bring to mind is sentencing proceedings. Especially in connection with pleas in mitigation, material is often put before a sentencing judge which is not in admissible form, which has never been challenged or properly tested, and which might be highly prejudicial to people who are not involved in the sentencing proceedings, including victims of crime. Such people usually have no opportunity of calling that material into question. It may be perfectly appropriate for the sentencing judge to accept and act on the basis of that material for the purpose of sentencing, but extremely unfortunate consequences can ensue if the remarks on sentence are expressed in an unqualified fashion which pays no attention to the circumstance that there might be someone who would want to have an opportunity to challenge the material if it were made public. It can be very unjust to a victim of a crime, for example, to wake up one morning and read in a newspaper an account of the events of a case which may have come from the offender, or from a witness relating at second or third hand what the witness has been told, or from a police officer, without the victim having had an opportunity to put his or her version of events. Fairness will often require that a sentencing judge express remarks on sentence in an appropriately qualified fashion to take account of this possibility. The absolute privilege which attaches to fair reports of court proceedings should lead judges to be conscious of the harm that may be done, unfairly, to third parties by an incautious manner of expressing reasons for judgment. It is not only fairness to the parties that should be operating as part of a judge's concern. Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.

Competence

We live in an age of accountability. What is required of judges is changing. That is a good thing, but it does not make life easier for judges.

I will refer to a few random aspects of judicial performance in the hope that this may be of some practical assistance.

You are to receive a paper upon the preparation and delivery of judgments. Without wishing to cut across anything that will be said in that paper, it is possible that you will be referred to an article written some years ago by Sir Frank Kitto, entitled "Why Write Judgments?" That is a subject which should regularly be revisited. I would like to place particular emphasis upon the second word in that question.

There is, I believe, a major difference between the performance of Australian judges and the performance of English judges in relation to the manner in which they deliver their judgments. English judges, including judges of appeal, are encouraged to deliver ex tempore judgments and develop considerable facility in doing so. It is a facility I would like to see developed by more Australian judges. I acknowledge that it may be that demands by our appellate courts have to some extent resulted in an increased emphasis on production of written judgments. If that is the case, then such demands should not have been made and I regret them.

One of the major contributing factors to this over emphasis on reserving judgments is the modern tendency for more and more of the material, including argumentative material, to be presented in writing. The corollary is that, at least in New South Wales, a judge is expected at the conclusion of the hearing of a case to reserve his or her decision and go on immediately with the hearing of the next case, on the assumption that in due course, and when time permits, a reserved judgment will be produced, largely by reference to written material. This is extremely burdensome for judges. If cases were conducted and argued upon the assumption, shared by the lawyers and by the judge, that an oral judgment would be delivered either at the conclusion of argument or within a very short time thereafter, the litigation itself might, in some respects, proceed more slowly, but the time of the judge would be used more productively and the ultimate result would be reached much more quickly.

Regrettably, perhaps because the judge is often the lowest paid lawyer in the courtroom, court procedures are sometimes arranged in a manner which undervalues the time of the judge and is aimed at saving the time of the lawyers. Judges, I think, should reassert themselves in this respect.

When it is necessary to reserve a judgment, it is usually both possible and prudent for the judge, immediately following the conclusion of the argument, to prepare at least the first part of a reserved judgment, that is to say, the part which outlines the facts and formulates the issues that arise for decision. This makes it much easier to come back to the judgment at some future time. The difficulty of writing a reserved judgment is increased enormously if, at the end of the hearing, the judge simply puts the papers away and goes on with the next case. When I hear a succession of cases I very quickly forget what the last case was about. Renewing acquaintance with a transcript and written submissions involves considerable

effort. It is much easier to come back to a half-written judgment than to a clean slate. If you find it necessary to reserve a judgment, I would advise you at least to get something down on paper before you become engrossed in the next case.

It is important that judges should maximise the assistance they receive from counsel. Experienced judges adopt various techniques in this regard. For example, in cases involving the assessment of damages, judges, as a matter of routine, should require the opposing counsel to provide them with detailed submissions as to the calculations for which they respectively contend. Similarly, when it comes to formulating the orders in a particular case, both sides should be required to specify, in detail, what they seek. Unless it is unavoidable, counsel should not be permitted to thrust lengthy written submissions before a judge with a casual observation that the judge can read those submissions later in chambers and counsel will move on to some other subject. We are constantly told that counsel are there to assist the judge. Obtaining maximum benefit from such assistance is part of the judicial technique. Developing that skill will greatly improve the quality of your judicial lives.

Reasons for judgments are not legal essays or articles prepared for a law journal. The purpose of a judgment is to make a decision about the issues that have been presented for decision and to express the reasons for such decision. Just as a judge who presides at a murder trial does not undertake to provide the jury with a dissertation on the law of homicide, but should confine his or her directions to such principles of law as the jury must understand in order to decide the particular case, so the reasons for judgment of a trial judge should address, and address only, the issues that require determination. The question "Why write judgments?" prompts another question, "Who reads them?" Your style of judgment composition might be affected if you ask yourselves who wants to hear or read what you propose to say, and for what purpose. A succinct method of expressing judgments will be valued by your audience just as you, as the audience, value the same quality in an advocate.

Conclusion

These observations are not intended to carry the suggestion that you suppress your individuality or that you should conform to some tedious and inflexible routine. On the contrary, the most important piece of practical advice I can give you is that you should enjoy being a judge. The work of administering justice according to law is important and honourable. The task of preparing reasons for judgment, oral or in writing, is often demanding but it is also capable of giving intellectual satisfaction. Responding to the challenge of being a just and efficient judge is a task worthy of any lawyer's mettle. I wish you success and happiness in your judicial careers.

Judicial duties*

The Honourable Sir Gerard Brennan AC KBE†

In this essay, Sir Gerard contends that a judge's role is to serve the community by administering justice according to law. In his consideration of the nature of judicial duties, he emphasises the importance of judges faithfully discharging these duties. The discussion focuses on a number of essential duties including presiding over the court, pronouncing judgment, maintaining impartiality and its appearance, and upholding judicial independence.

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. 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 addressing the subject "The Role of the Judge", I shall start by saying something about the general approach to judicial duties.

Judicial duty

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

* Revised version of a paper "The Role of the Judge" delivered to the National Judicial Orientation Programme, 13 October 1996, Wollongong. Previously published in (1997) 3(2) *The Judicial Review* 65.

† Chief Justice of Australia 1995–1998.

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 0.06 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 counterproductive. Intellectual humility (even if it does not show), a sense of duty, 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.

Presiding over the court

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 *sang-froid* is sorely tested. You may find it helpful to quietly 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.

Judgment

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?".[1] There are two passages that bear repetition in this context. The first is this:[2]

> "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:[3]

> "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 a 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 telltale 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

1 (1992) 66 *Australian Law Journal* 787.
2 Ibid at 790.
3 Ibid.

of our public image ahead of the sheer hard work of judging. There is no prohibition against a judge giving, or authorising the giving, of information about the function of judging to the media and the public 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.

Impartiality

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 laudable causes. 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 to actively 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.

The judicial community

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.

Performing the role of the judge*

The Honourable John Doyle AC†

Newly-appointed judges face many challenges in their transition from advocate to decision-maker. In this essay, Chief Justice Doyle examines some of these challenges — including the need to accept the restraints of judicial life, how to responsibly wield the power the law gives judges, the importance of an appropriate courtroom demeanour, and the need to guard against cynicism and burnout — and provides some guidance about how best to meet them. The challenges facing individual judges are considered within the context of the changes and challenges confronting the Australian judiciary. As members of that institution, judges are affected by institutional changes. In particular, the Chief Justice considers the changing concept of the judicial function and contends that judicial accommodation of the changes in society will help maintain public confidence in the judiciary.

Giving advice to this group on performing the role of a judge is not easy. Some of you have held office as a judge for some time and are no longer new to the office. Others are recently appointed. All of you have had considerable experience of judges, observing judges at their work. Most of you will have your own views about how the office should be discharged.

Reflecting on the topic on which I am asked to speak, I was unsure how I should approach it. Should I concentrate on the fundamental principles that sustain the judicial office, such as judicial independence and impartiality? These principles are of fundamental importance, but there is little that I can say about them that would be new to you. Should I attempt to provide practical advice drawn from my experience? My experience may not be relevant to the court in which you will sit. Undertaking this task may suggest that I believe that I have all the answers. But I have been a judge for only five years, and with the wisdom that all barristers have, I used to say that it takes a judge about five years to settle into the office. On that basis I have only just emerged from the preparatory stage of judicial life.

I propose to follow a middle course. I will reflect on the changes that face a newly appointed judge. For those of you who have been judges for some time, this will give you a chance to reflect on your own experience and perhaps you may share those reflections with others in the group. For those who are newly appointed, this will give some warning of what to expect. In that context I propose to talk about some dangers to be guarded against.

I propose to say a little about how one maintains enthusiasm for judicial work. This is an important issue. Most of us here will hold judicial office for about 15 years or more. That is

* Revised version of a paper delivered to the National Australasian Judicial Orientation Programme, 6 August 2000, Sydney.

† Chief Justice of South Australia.

quite a long time. The burden of the work, the pressure to dispose of it promptly, and the lack of variety in some courts, can all combine to take their toll. They can produce a deep-seated dissatisfaction that manifests itself in a world-weary cynicism about the judicial function, as well as boredom with it. It is helpful to think about how this can be avoided.

Finally, I propose to speak briefly about some challenges that confront the Australian judiciary as an institution of government. We are one of the three arms of government. In that context I will refer to some of the fundamental principles which sustain the judiciary and which we must maintain.

Making decisions

On being appointed a judge, we move from the role of adviser or advocate to that of decision maker. This is a dramatic change. For me, I must say, it was a relief. I was tiring of the role of advocate, contending for an outcome that was in the interests of my client. I wanted to have the responsibility of decision-making, although I did not fully appreciate what I was undertaking. Lawyers carry a heavy responsibility in advising and representing clients. But making the decision brings with it an added responsibility. As lawyers our advice and advocacy can be significant in affecting outcomes, sometimes decisive, but other factors nearly always play a part in the ultimate outcome. As a judge the decision that we make, usually alone, is the decisive event, although of course that decision is itself the product of a number of factors. We must decide the facts and we must decide the law. Each task brings with it particular difficulties. The responsibility that the judge carries is a heavy one.

A judge knows, or should know, that in most cases the judge's decision will be a significant event in the lives of the litigants, and possibly in the lives of others who are involved in the litigation. The judge's decision, and the manner in which it is expressed, can have a significant effect on a person's reputation. The decision may:

- affect a person's liberty
- cause or avert a financial catastrophe
- play a decisive part in long-term family relationships
- affect the lives of many people.

We should never forget how important our decisions are for the people affected. Our decisions deserve all the care and skill that we can muster. A judge who regards the judicial decision as merely part of a professional routine at the end of a hearing or trial has missed the point. Making a decision is more than a step in a process. It is central to our work as judges and how well we do it in the broadest sense is of vital importance.

Deciding a case can be satisfying, especially when one believes that the truth has emerged and that the relevant law is clear and can be applied with confidence. Other cases are not so satisfying. Sometimes, although a decision must be made, the evidence is unsatisfactory and one is conscious that decisions of fact while correct on the evidence, may not truly reflect all the facts. Sometimes the law is far from clear. But in the end we must make a decision and we can only do our best.

Sometimes a judge becomes almost paralysed by the responsibility of decision-making and finds it extremely difficult to reach a decision. This can cause undue delay and can sometimes produce decisions that seem to be an attempt to please both parties. Such attempts rarely succeed.

To a degree, difficulty in decision-making is understandable. The path to justice is not always self evident. Contemplating the consequences of the decision for the losing party can be a deterrent to making what seems the right decision. But such contemplation does not help to elucidate the right decision.

I believe that we can and should comfort ourselves with the thought that we can only do our best. We will all encounter cases in which the right answer is well concealed. We will all encounter cases in which a decision according to law produces a result that we regret. Sometimes justice requires a decision that we would rather not make. It is pointless to think that the right decision will emerge without much effort on our part, it is pointless to think that we will never have doubts about the correctness of our own decisions, and it is pointless to think that the result of our decisions will always be palatable to us, to the litigants or to the wider public.

Accepting our responsibility for making a decision and for the consequences of the decision can be difficult, but that is what we are appointed to do. I referred a moment ago to the way in which the responsibility can almost paralyse a judge at times. In those situations we must face the fact that someone must decide the case, no-one else is likely to find it any easier, and so we must get on and make a decision.

The difficulty of decision-making can produce a very different reaction. Sometimes one encounters a judge whose attitude to decision-making is light hearted. Such a judge says "Why worry? The Court of Appeal can correct me if I am wrong." Of course it can. But this attitude is a denial of personal responsibility. It can be an excuse for a failure to make the effort that should be made to prepare a sound judgment. Appeals prolong the anxiety for the litigants and for others involved. They add substantially to the cost of the process. Sometimes on appeal it is difficult to do justice while avoiding a re-trial. To avoid a re-trial the appeal court may find it necessary to decide matters that ideally should have been decided by the trial judge. Appeal courts exist because we all will make mistakes from time to time. But appeal courts are not there to lessen our individual responsibility for the decisions that we make.

Most of us do not like being reversed on appeal nor should we. Of course, in some cases views can legitimately differ about the correct result and a different result on appeal does not indicate error below. In some cases attention is focused on appeal on points that were not given the same attention at trial, and one cannot expect the trial judge to have seen the case in the manner in which it is presented to the appeal court. But, to my mind, reversal for a plain error of fact or law should cause a judge some heartache, because of the impact upon the parties. Reversal on appeal should not be a source of idle amusement.

We are appointed to hear and to decide cases. We are expected to do so efficiently, fairly, impartially and competently. There is no excuse for not trying our utmost to do this.

Members of an institution

As legal practitioners we are members of an important profession. Lawyers often become trusted advisers of long-term clients and, by and large, are regarded by the community with some respect. As a rule our private lives are our own. And even when acting in a professional capacity, and representing the legal profession, my impression is that, in general, lawyers do not see themselves as representatives of an institution.

All that changes on appointment as a judge. A judge is a member of a significant public institution. The judiciary is an institution in which the public has an interest and of which the public has legitimate expectations. In the public eye we represent that institution. We represent it at all times. Although most people will recognise a division between the discharge of the judicial office and a judge's private life, the office to which the judge is appointed is one which the judge occupies at all times. Conduct in our private lives impacts upon our fitness for judicial office in the eyes of both the public and our fellow judges.

As I said, a judge becomes a member of a significant institution and, as such, the judge's conduct will be judged by reference to that institution and will reflect upon it in whatever circumstances the conduct occurs. A judge's conduct at court and away from court is open to public scrutiny. Most people accept that the nature of the scrutiny will vary according to the circumstances, but that is as far as it goes.

It is not necessary to emphasise this. Judges realise that there are restraints that affect them in their private lives. These restraints limit the things we can do away from court; they limit what we can say on certain occasions; and they limit how we should conduct ourselves. The judicial office and title bring with them public respect and some deference. In return, the public expect from us a high standard of conduct because our office attracts that respect and deference.

It can take a little time to adjust to this. The first reaction to appointment for most of us is to reassure others that we will not change, that we will continue to live our life as before, and that we will not become pompous or distance ourselves from friends or from our accustomed way of life. Hopefully, most of that will be true. But there are a number of ways in which we do have to accept restraints on our conduct, even if that forces some change on us.

Getting the balance right can be difficult. Until this stage in our lives most of us are not accustomed to being seen as representatives of an institution which has such wide-ranging expectations of its members and of which the public has expectations. But acceptance of the office and the status that goes with it requires that we accept the restraints that come with it. A person who is unwilling to accept those restraints should not accept the appointment.

That is not to say that upon appointment we should retreat from life, as if joining a contemplative religious order. Judges should be in touch with the community that they serve. Judges cannot sever contact with friends, let alone with family. And being in touch with the community does not mean treating Australians and the wider world as something to be observed from a distance, as if through a telescope. Being in touch means being truly part of the community. But there are things that we can no longer do, and while we are in the community we need to be conscious of the community expectations that come with the office that we now bear.

Power

Judges wield power, the power that comes with making significant decisions that have the backing of the power of the State. Power attracts deference. Judges receive deference from court staff, from the legal profession, from witnesses and litigants, and from many other people simply because they are judges.

The deference accorded to a judge is seductive. It can lead to unfortunate consequences. The deference that we receive, the authority that we wield in court and the fact that people must listen when we speak, can delude a judge into thinking that on appointment the mantle of infallibility has fallen on the judge's shoulders, and that the judge is now a better and wiser person than before.

It is not a bad idea to remind ourselves fairly regularly that we are the same person we were before, and that people pay more attention to what we say only because of the office that we occupy, not because what we say is any more worthwhile listening to than it was before our appointment. For most of us, fortunately, families and friends provide an effective antidote to the delusions of grandeur that can come with power. The media and our fellow Australians on talkback radio often provide their own regular doses of antidote, and sometimes the antidote comes with quite nasty side-effects. All of this helps us keep our feet on the ground.

Nevertheless, it is as well to remember that the power that we exercise and the status that we have is given to us by the law. It does not come to us because of our intrinsic merit.

In court

Most judges remember the first shock of facing the courtroom, rather than having most of it at our back, with only the judge and court staff in front. Most judges remember the sudden uncertainty about when to stand up and what to do at certain stages. That soon passes.

Each judge will have an individual style in court, hopefully a natural one. Each of us will have a preferred way of doing certain things. There is plenty of scope for individuality.

But to some extent we must subdue our individuality, recognising the nature of the task in which we are engaging. Every judge must ensure that in court he or she is impartial and appears to be impartial. Maintaining the appearance of impartiality can be hard work and, for most of us, requires some effort at times. It does not always come naturally and sometimes the maintenance of impartiality may run counter to what we would like to do. Maintaining impartiality can require patience and sometimes what others would call inefficiency. For example, putting a weak point, a fumbling counsel or an unsatisfactory witness swiftly to the sword can be exhilarating and may seem conducive to the efficient dispatch of a case or an argument. But behaving like this can easily convey the impression of prejudgment to a litigant and to other spectators. So can excessive references to the length of time a case is likely to take, the length of cross-examination and the length of time counsel is taking to make a point. As can studious disinterest in a poor argument. We do have an obligation to manage the court efficiently, but justice requires impartiality, and sometimes the appearance of impartiality requires, as I said, what may appear to be inefficiency.

There are other things that have to be watched under this head. Courtroom demeanour is important. It is something to be worked at. We should aim to ensure that counsel, solicitors, litigants, witnesses and spectators leave the courtroom believing that the participants in the case have been allowed to do their best, have been given a fair go, and that their testimony or submission is fairly considered. This does not mean that consideration of efficiencies must be ignored or that firm views cannot be expressed. But every effort must be made to remain polite, even to those who test judicial patience; to be attentive, even to those who utter platitudes and shroud their statements in obscurity; and to appear willing to listen to those whose cause you know is lost.

I do not wish to create the impression that judicial behaviour is a kind of facade or that a judge is a smiling executioner. First of all, sometimes, a new insight or unseen point will emerge from the case. It is a great danger, and one to which some lawyers are prone, to think that almost from the outset they know what is coming and have seen all the points in the case. Sometimes a good point can escape the gravitational pull exerted by the black hole of an incompetent or hopeless argument. But quite apart from those pragmatic reasons to hold one's hand, justice is about how cases are heard and not only about the outcome.

I can do no more than urge a newly appointed judge to reflect on his or her demeanour in court and to consider carefully the impact on others. Sadly, I suspect that everyone in this room has on a few occasions seen a judge behaving badly. Hopefully, the memory of that will be a sufficient spur to avoid doing the same.

Maintaining enthusiasm

It may seem rather gloomy to raise so early in your career the issue of how one maintains enthusiasm. I have a reason for doing so. Once the novelty of the office wears off and the anxiety of one's ability to perform the task begins to ease, certain tendencies can emerge.

These tendencies usually manifest themselves in certain recognisable ways:

- First, the judge experiences a kind of cynicism about the process. The judge begins to think of litigation as a game or contest, a view found in some practitioners. The judge begins to see the judge's role as merely part of the contest. The judge begins to think that the judge has seen it all and that everything that happens in the courtroom is a matter of mere tactics. Each case is a competition, not a real issue affecting the lives of real people.
- Secondly, coupled with this cynicism can come an impatience, sometimes justified, with forms and procedures which seem to prevent the judge from getting to the heart of the matter (as the judge sees it) straight away. They prevent the judge disposing of the case quickly and moving on.
- Thirdly, the judge begins to think that there is an obvious solution to most cases, the solution of course being one that the judge alone has seen and which, conveniently, will rarely involve the tedium of a reserved judgment. The failure of counsel and the litigants to settle, or to see the solution that the judge sees, begins to frustrate the judge, and the judge hears the case with a mounting sense of frustration as the inevitability of a reserved judgment begins to emerge.

These are tendencies which, I suppose, grow out of experiences that we have in legal practice. They are tendencies that probably affect all judges at times. But if they become entrenched they cause a real problem. A judge in whom these tendencies are entrenched is unlikely to perform satisfactorily. Such a judge is suffering burnout. The judge will feel an increasing dissatisfaction with judicial life, and that will become increasingly evident to others.

These tendencies can occasionally afflict all of us. The danger is in letting them get entrenched.

I believe that the solution lies within ourselves. As long as we understand truly what we are doing and value it appropriately, this problem cannot occur. I say that it cannot occur because if we really understand what we are doing and really value it, we cannot help being enthusiastic about it and gaining satisfaction from our office.

A judge should bear in mind constantly that the judge is not umpiring a competition. A judge administers justice and, whatever some may say, the right to justice is one of the most fundamental of human rights. The entitlement to justice is asserted most insistently by our fellow Australians and when they feel that justice has been denied they are understandably aggrieved. We deal with a matter of fundamental importance to the community.

A judge should also remember that, with very few exceptions, the outcome of a case will have a real affect on the lives of the individuals concerned. For many people the case the judge hears will be their only contact with the legal system and with a judge. That judge will, for those persons, be the embodiment of the legal system. The judge's conduct and handling of the case will shape the participants' impression of our courts and of our system of justice.

Cynicism and burnout are the result of a failure to value what we are doing and to realise the importance of what we are doing. As long as we are conscious of those things, the task will remain a challenge and will remain worthwhile.

Challenges

You are joining the judiciary at an interesting time.

Like any institution, the judiciary changes as society changes. My impression is that for much of the twentieth century there was little change in the judiciary as an institution and in the way in which it worked. But since about 1980 there have been signs of significant change. This change presents us with a challenge. The challenge is to maintain the fundamental principles by reference to which the judiciary functions but to accommodate the changes in society that produce pressure for change in the judiciary.

Briefly, what are these changes and challenges?

Today's society is more questioning of the judiciary and less inclined to accept authority. The judicial system is founded on public confidence in the judiciary's integrity and efficiency. The judiciary has realised that it has to foster that public confidence. Public confidence can no longer be assumed. This causes us, as an institution, to communicate with the public about our work in ways unthought of 20 or 30 years ago. We need to do that, and we need to do it well, but we need to do it without compromising the judicial function. This is a significant challenge.

The efficiency with which we perform our work is under scrutiny as never before in my time. The scrutiny comes from different sources. People involved in the litigious process are one source of scrutiny. Governments which hope to get increased "outputs" for the public funds that they commit to the courts are another source. This scrutiny has resulted in some testing of the assumptions on which our methods are based. There is no reasonable basis to resist this sort of scrutiny. Indeed, it should be welcomed. But some of this scrutiny rests upon the dangerous assumption that the work of a judge can be measured in terms of units of output, and that the litigants and the cases that we hear can be quantified and measured. There is an assumption that justice can be measured out in units. This is dangerous because, while the demand for the efficient use of the public resources committed to us is reasonable, the failure to recognise that, at its heart, the administration of justice cannot always be an efficient process and that other values are at stake, endangers some of the fundamental principles on which we operate. Unfortunately, these failures cause some to see our insistence on justice as a rejection of efficiency. For this reason, managing the process of change is a challenge. By that I mean it is a challenge to ensure that we act as efficiently as we can, but nevertheless act justly. Unless we manage this process well, the demand for cheaper justice may overwhelm us and cause damaging changes to the way in which justice is administered.

Another challenge is presented by the development of information technology. Information technology is already changing how we work. It is going to cause us to rethink some of our procedures in quite fundamental ways. All of this will be to the good if it increases efficiency and makes justice more accessible to Australians. Information technology presents a different sort of challenge, because it is going to make us learn to work in different ways.

The concept of the judicial function is changing, I believe. No longer does a judge simply hear a case and produce a decision. Judges now accept a responsibility for the efficient conduct of the process, be it civil or criminal. Judges are expected to be sensitive to and to accommodate a variety of matters affecting how we do our work. I mean things such as cultural disadvantage, gender bias, social disadvantage and so on. In the criminal jurisdiction judges must consider the interests of victims and there are increasing demands to consider the impact of the process on the privacy of individuals. As we go about our work, much more is expected of us than was expected of a judge in earlier times. There is a much greater emphasis on continuing judicial education and we are constantly being reminded that we need to work at our skills across a broad front, not just on our technical legal skills.

There is a raft of challenges in this area, but they are satisfying challenges. They are satisfying challenges because, I believe, they are challenges that call us to perform the task or judge in a better way.

Conclusions

In the end all of these things come back to certain fundamentals. The fundamentals are principles like judicial independence, judicial impartiality, maintaining competence for the task in hand and remembering that the justice that we administer is administered in a social context and must be responsive to that social context.

The challenges are demanding, but approached in the right way they can only add to the satisfaction that comes from discharging the judicial office.

Becoming a judge*

The Honourable Mahla L Pearlman AO†

The transformation from practising lawyer to sitting judge involves immense changes. New restraints arising from the judicial office mean that becoming a judge has implications for how one behaves in court as well as privately. This essay provides some practical observations about the changes in conduct that follow from becoming a judge and about how to ensure one's actions meet the new standard of judicial propriety that applies. The author proposes that judges should be guided by the following principles to avoid compromising judicial integrity — dignity, restraint, moderation, discretion, circumspection, courtesy and respect.

"Transmogrify" is an unusual word. It means, so my *Macquarie Dictionary* says, to change as if by magic. That is what has happened to you all here today, as well as to me five years ago. We have all undergone the magical change from practising lawyer to sitting judge.

My task is to talk about that magical change. I emphasise the word "change". I thought it would be useful if I outlined the changes in conduct which one must make on becoming a judge. I speak from my own short experience on the bench, but also from my role as a member of the Judicial Commission of New South Wales.

I mention the following matters in no order of importance. They are all matters which a new judge thinks about, or at least ought to think about.

Dignity and restraint

Perhaps a more appropriate title for what I am about to say is "Shooting off one's mouth"! I refer to remarks made by judges during a hearing which are off the cuff and sometimes intended to be funny, but which instead reveal an appalling lack of courtesy, thoughtlessness or just a gross lack of sensitivity towards the feelings of litigants.

As some of you know, the Judicial Commission of New South Wales is required, amongst other functions, to deal with complaints about judicial officers, meaning judges and magistrates. In my estimation, the greatest number of complaints arise from remarks made by a judicial officer in the course of a hearing.

* Revised version of a paper delivered to the National Judicial Orientation Programme, 9–14 November 1997, Sydney.

† Chief Judge of the Land and Environment Court of New South Wales 1992–2003.

I give you two examples.

A magistrate was hearing an application for an apprehended violence order by a wife against her husband, who, according to her evidence, had subjected her to violent attacks over 12 years. The husband asserted that he had given up alcohol and would not "ever lift my hand again". In response, the wife said that this was the last chance she was giving to her husband. The magistrate then made the following remarks:

> "Well it takes two to tango doesn't it, it takes two to tango, you go and find out what that means, it's a bit of give [and] take because you — no such thing as last chances when you're married you're stuck with it forever. Forever so it takes two."

Not surprisingly, the wife took serious offence at these remarks. She complained that they suggested that she was in some way responsible for the violence which she had suffered. In fact, as his next remarks showed, the magistrate was expressing some concern about the three young children of the marriage and the necessity, in their interests, of keeping the marriage together.

Those remarks do not warrant parliamentary removal from judicial office. They do not constitute judicial misconduct in that sense. But in my opinion those remarks demonstrate a lack of judicial propriety.

My next example comes from my own court. Proceedings were pending which were an appeal against the refusal of a local council to grant development consent to the use of certain premises as a sex-on-premises venue for homosexual men. Those premises were not to be run as a brothel in the sense that sex would be available for money. Rather, they were to be run as a venue where homosexual men could gather, socialise and, if so minded, indulge in sexual activity.

There was an interlocutory application for the proceedings to be heard by a judge instead of an assessor. The following exchange took place:

Counsel: "It's for a club or a community centre."

His Honour: "For what?"

Counsel: "For the gathering of homosexual men."

His Honour: "That's not exactly the same thing as a Greek club, is it?"

Counsel: "It is not, your Honour, but State Environmental Planning Policy Number 4 doesn't distinguish between what the purpose of the club once was…and the ability under that policy to change it to a club or social club…"

His Honour: "Well, a club's a place for social intercourse not a place for practising sodomy, is it?"

Counsel: "Well, your Honour…"

His Honour: "Well at least not the clubs I belong to I hope."

Further on, his Honour made the following remarks:

> "Well…I certainly think it is desirable to be heard by a judge, I mean, even though the *Anti-Discrimination Act* forbids people to attack homosexuals for their unfortunate characteristics, nevertheless sodomy's still regarded as an unnatural offence or an unnatural behaviour by most people in the community, so I suppose it does have a social and public interest."

Those remarks provoked an immediate complaint both to me as head of jurisdiction and to the Judicial Commission. Once again, the remarks do not justify parliamentary removal from judicial office, but they were remarks offensive to some members of the community, and not just the homosexual community. They should not have been made and demonstrated an appalling lack of appreciation of the feelings of the persons involved in the litigation.

I want to make clear what I am advocating here. I am saying that one's unfettered utterances as a practising lawyer must be restrained once one has been elevated to the bench. There is no room for unbridled comment.

That is not to say that one must abandon one's warmth and humour. There is a place for an understanding comment which may put a witness at ease, or careful humour which may reduce the tensions of the courtroom while still maintaining its dignity.

I think Sir Thomas Bingham, when Master of the Rolls, summed up the proper approach, in a speech on judicial ethics which he delivered in 1993, when he said:

> "But I have no doubt that the modern judiciary would, as it should, regard itself as the servant of the public, not its master; would recognise that the dignity of judicial office is enhanced and not reduced by the display of ordinary good manners; and would recognise that the appearance of justice is almost as important as its substance, if indeed the two are separable."

Socialising

Being on the bench does not mean that one must live as a monk or that one has taken the veil, so to speak. But it does mean that one must socialise discreetly. Instead of rushing off from party to party without a care in the world, as you did when you were a barrister or solicitor, you must pause and examine the circumstances. You must ask yourself — will my attendance be seen as prejudging the case or as being biased in favour of one party or another — or — will my attendance bring the court into disrepute?

It is sometimes hard to observe the appropriate proprieties. One's colleagues are often one's friends and it is difficult to reject an invitation to a convivial event at an old friend's place. But if the friend is at that moment appearing or instructing in a hearing before you, you should avoid that event. You may be observed. You may find there witnesses for one party or another, or even one of the parties themselves.

It is also hard to observe the appropriate proprieties when one is on circuit. I was once hearing a case over several days in Armidale, in northern New South Wales. I asked my associate to check with the registry as to the best places to eat in the evening. A certain restaurant was held out to be far and away the best, a five-star eatery. My associate eagerly

booked. We drove up into the courtyard on the particular evening. The bar could be observed from the car park and there, having a pre-dinner drink, was the lawyer for one of the parties, surrounded by several of that party's expert witnesses. We beat a hasty retreat and I am still waiting to sample that restaurant's much-praised cuisine.

On this subject reference is often made to a book by Justice Thomas of the Queensland Supreme Court, entitled *Judicial Ethics in Australia*.[1] The book is useful and I commend it to you. To some more cynical amongst you, it may be thought to be rather quaintly anachronistic in some of its suggestions as to what may or may not constitute judicial misconduct. But Justice Thomas deals with a range of considerations relevant to judicial ethics and he makes some telling points. On the subject of socialising, I quote just one short passage:[2]

> "*Punting*
>
> It has been suggested that a judge should not be seen to stand too frequently at the betting windows of race tracks and that his wife should not be the first to adopt the most daring fashion but surely there is nothing wrong in punting or in avant-garde fashion. The scene changes, of course, if he/she becomes an inveterate gambler, a dangerously heavy punter or a social butterfly. All things in moderation."

Moderation and discretion are the guiding precepts. They are not precepts which were essential when one was a practising lawyer, but they provide a good guidepost for the judge.

In this respect, intuition is often a good guide. If you have a "gut feeling" that a course of conduct may be inappropriate, don't do it. One's intuition is nearly always right.

Be alive to your status. You have been "elevated", and I emphasise that word. Although not often displayed, there are many who are envious of the honour of your appointment, both legal practitioners and members of the public. Such persons may be ready to comment to others, out of jealousy, concerning any aspect of your life and be eager to quote your remarks out of context. Be aware of these risks.

Relationship with the legal profession

Another change which occurs when you become a judge is your relationship with members of the legal profession.

It is almost incredible how even your quite close acquaintances feel constrained by your new status. I feel very strange when I go to professional social functions and am addressed as "Judge" rather than "Mahla", especially by those solicitors with whom I spent years in carrying out Law Society tasks.

I don't like the awkwardness that one's status engenders in one's professional acquaintances, but I do very little about it. It is, I think, part of the job. One must learn to cope with some reserve and awkwardness because it is part of the profession's respect for the judicial institution.

1 1988, Law Book Co, Sydney.

2 Ibid, p 43.

A related aspect is one's relationship with particularly close legal friends. I am reminded of a story told to me by a judicial colleague. He said that when he was a young barrister he was invited, along with his opposing counsel, to morning tea with the judge on the first day of the hearing. The opposing counsel and the judge were great friends, and they fell about laughing and joking in a manner from which he felt totally excluded. Accordingly, he became slightly concerned that their friendship might have a detrimental effect on his presentation of the case and its ultimate conclusion.

I have myself been guilty of such behaviour. It is my custom, because I was a solicitor, to invite both counsel and solicitors to morning tea. On one such occasion, the QC for one of the parties had been a close friend of mine since law school. Our conversation was totally about old friends and shared experiences, and it dominated the morning tea chat. Apart from its rudeness, it had, I am sure, equally the same disconcerting effect on the representatives of the other parties.

Once again, the guiding principles are discretion and restraint. There is a place for close encounters with one's special friends, but it is not in the courtroom or in chambers when one is carrying out one's judicial duties. It is possible to be polite, cheerful and welcoming, so long as all practitioners are treated with the same degree of familiarity.

Advocacy

A skill which one has to acquire on elevation to the bench is to cease to be an advocate for a client, but, instead, to hear and dispose of the case right down the middle, without, as it has been called, "stepping into the arena".

A failure to observe this requirement is not only inappropriate judicial behaviour, it may amount to an error of law.

An example is to be found in a case called *Burwood Municipal Council v Harvey*.[3] In that case, the Court of Appeal in Sydney overturned a decision of a judge of my court on the ground of excessive judicial intervention in the hearing of the case. In that case, the claimant for compensation for resumption was unrepresented by counsel but assisted in the presentation of her case by her husband. Neither the claimant nor her husband were legally qualified. As found by Kirby P,[4] the judge became involved in a lengthy and detailed cross-examination of one of the witnesses who was a valuer, which appeared to be an attack on the witness's conclusions and an attempt to extract an admission that the witness's methodology and conclusions were fatally flawed. Kirby P found that the judge was perfectly polite and impeccably courteous to the husband and to the legal representative for the other party, but "he simply took over the conduct of the trial". The following passage from the judgment of Kirby P succinctly makes the point:[5]

> "Advocacy is for the bar table. The judicial officer sits on an elevated bench, not to promote a sense of self-importance, but to symbolise his or her removal from the fray."

3 (1995) 86 LGERA 389.

4 Ibid at 399.

5 Ibid at 396.

A related matter is the writing of judgments. That is a skill which I believe does not come naturally to all but a select few. The point I wish to make is that writing a judgment is not like writing an opinion. An opinion offers advice to a client about the law as applied to some factual situation. But a judgment involves giving reasons for a decision. It involves finding facts and applying the law to those facts as found. On becoming a judge, one has to put aside one's skill at opinion writing and instead learn a different skill. I want to emphasise that it is a different skill and a new judge should not be disdainful of learning to acquire it, no matter how adept one was at writing opinions.

Furthermore words which can readily be used in an opinion may be completely inappropriate for a judgment. They could be misconstrued or seem unnecessarily offensive to a party. Your judgment, unlike an opinion which is intended solely for your client, is a public record and will be scrutinised as such. Accordingly it must be prepared with circumspection.

Comity

I think that an important aspect of judicial life is to afford respect to the decisions delivered by one's colleagues in the same court.

This is often referred to as "judicial comity", which implies a courteous attitude between equals. The expression has several legal uses, which are usefully set out in an article by Judge Geraghty of the Compensation Court of New South Wales.[6]

The legal use of the expression "judicial comity" is the requirement that judges of courts of equal rank or co-ordinate jurisdiction should, as a general rule, follow the decisions of other judges of equal rank. That is not to say that decisions of other judges of equal rank have binding or precedential effect — one does not need to slavishly follow the decision of a colleague on the court if one thinks that the decision is wrong. Judges act independently, of course, and must independently form a view.

In the article I have mentioned, Judge Geraghty explains the principle by quoting a passage from the judgment of Holland J in *Michael Realty Pty Ltd v Carr*,[7] where his Honour, following some English authorities, said:

> "There is no rule of law which binds a judge to abide by the decision of another judge of co-ordinate jurisdiction, but a judge of first instance will, as a matter of judicial comity, usually follow the decision of another judge of first instance in the same jurisdiction, unless convinced that the judgment was wrong…"

As Judge Geraghty explains, the principle of comity is based on courtesy and respect. However, I think that courtesy and respect require the matter to be taken one step further. I feel that it is courteous and respectful to alert your colleague to the fact that you are going to depart from that colleague's decision. Such prior notice is not meant to allow the judge to convince you that his or her judgment is sound and ought to be followed; as I have said, judges are independent and must bring their own minds to bear on the matter. Prior

6 "Judicial Comity" (1996) 8(4) *Judicial Officers Bulletin* 25.

7 (1975) 2 NSWLR 812 at 820.

notice serves no more purpose than to courteously alert the judge that his or her decision is to be doubted before he or she observes that fact in hard print on the day the judgment is delivered.

Speech-making

In these days of public scrutiny of courts, of public attacks on judicial decisions, and of the engagement of public relations officers by individual courts, the question of whether or not judges should speak out has become a somewhat vexed inquiry.

Someone has to defend the courts, and perhaps that is the courts themselves, especially having regard to the former Commonwealth Attorney General's well-known assertion that he is a politician above all and does not regard himself as the first law officer of the Commonwealth with a duty to embark on the defence of judges and courts.

However, my task is not to talk about speeches in defence of the court system. Rather, I wish to consider the question whether, upon appointment to the bench, one should resign from the speech-making circuit and cancel one's entry on your agent's books.

Bernard Levin expressed a point of view on this subject in one of his regular articles for *The Times*. He was moved to write the article by an outrageous public utterance made by an English judge. Mr Levin said this:

> "There is an amazing debate going on concerning the question whether judges should be permitted, or even encouraged, to make speeches on matters of public concern, to take part in television and radio programmes, and to write articles in newspapers.
>
> And I call the argument 'amazing' because the thrust of it is in *favour* of such a development, whereas I would have thought that anyone who values his sanity would be concerned to ensure that, so far from judges being allowed to weigh in on any subject which takes their fancy, they should never be permitted to open their mouths off the bench for any purpose more controversial than to say 'thank you' to the leader of a scout patrol which has helped them across the road, and indeed that even when on the bench they should be obliged to confine themselves entirely to a limited range of possible expressions, such as 'five years', 'costs against the plaintiff, and 'usher, shut the windows'."

If that rather tongue-in-cheek passage reflects Mr Levin's view, I do not share it. Judges are members of the community and they should not be aloof from participating in the community. If they are articulate and have something to say, they should not desist from saying it. It provides a face to the judiciary and that is not a bad thing. But, just as with socialising, speech-making is a venture which should be embarked upon with care. When you were a solicitor or barrister, your views, though no doubt fascinating, had no immediate effect when uttered in public. But a judge's views uttered in public may have a deleterious effect. They may demonstrate some bias or prejudice or lack of discretion. They may be construed as a direct attack on government or government policy. The clue is to speak about those matters which are general, which do not bear directly on any hearing or pending decision, and which are not extreme or immoderate.

I encourage the judges in my court to speak on public occasions about how the court operates, or about the mediation facility which it provides, or about recent decisions of the court which expound some principle or explain the operation of the law. A number of the litigants or witnesses in my court are professionals in other fields and, as a consequence, we are constantly being asked to speak at meetings of architects, town planners, engineers, surveyors and others. I think we should do so, provided that we bear constantly in mind that our task is to avoid compromising our judicial integrity.

Once again, Sir Thomas Bingham had important remarks to make about this subject. In the 1993 speech to which I have earlier referred he said:

> "If judges are fit to judge they should be able to exercise a reasonable judgment on whether to speak to the media and what to say if they do. Issues do, perhaps increasingly, arise on which it is desirable that the voice of the professional judiciary should be heard…There is also, I suppose, a faint hope that the more grotesque caricatures of the modern judiciary will lose credibility if the public generally has a better idea of what judges are actually like. But there has now been enough experience…to indicate the very real damage which can be done if judges did not exercise their new freedom with the greatest circumspection."

A final word

I hope you do not take these remarks as a litany of restraining rules that will make the job unenjoyable. As some of you know, I have spent almost 40 years in the law. I loved being a solicitor and I do not regret a moment of it. But judicial life is challenging, rewarding and special. Despite its constraints, it is wonderful, and I thoroughly recommend your transmogrification to the pinnacle of your career.

Practical impediments to the fulfilment of judicial duties*

The Honourable Justice JD Heydon AC†

The duty of the judiciary is to arrive at results which are correct in law and to secure a fair trial. In so doing, judges must be both dignified and efficient, because the day-to-day behaviour of the judiciary can either maintain or damage public confidence in the administration of justice. In this essay, Justice Heydon contends that the practical conduct of modern trials presents particular difficulties for judges striving to achieve a fair trial. In considering how to surmount these difficulties, Justice Heydon dogmatically states some general principles about the judicial role, describes some difficulties in usefully applying them in practice, and seeks to offer advice about overcoming them.

The duty of the judiciary

The social function of courts of law is to temper and dilute the untrammelled discretionary exercise of power — State power, commercial power and other types of power — against those who lack power. By affording a means through which legal rights can be established and enforced, the courts seek to prevent instincts for violent self-help or revenge from leading to anarchy. Their prime role, to use a phrase of Judge Learned Hand, is "in protecting the weak and controlling the rapacious".[1] Citizens in general understand this. They regard the courts as places where judges endeavour to act impartially, competently and diligently as between the powerful and the weak, and to do so in a calm and reasonable fashion. They do not see governments or wealthy corporations as having any position of advantage in judicial eyes, and no advantage in reality beyond the intrinsic strengths of their case, whatever they are, and beyond a strong capacity to fund litigation. That perception of reality is generally correct, but it is important that both the reality and the perception continue.

In carrying out the social functions just described, the duty of the court is to achieve a just result which is correct according to the law — or, in the case of discretionary judgments, one of the range of just results which is correct according to the law. But the duty of the judiciary is not simply to arrive at results which are correct in law. For example, the correct measure of damages payable in a given case could be selected randomly or guessed, but the mere fact that the correct figure had been arrived at would not disentitle litigants from

* Keynote address delivered to the National Judicial Orientation Programme, Sydney, 13 October 2003. Previously published in (2004) 6(4) *The Judicial Review* 429.

† Justice of the High Court of Australia.

1 Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter" in *Lectures on Legal Topics*, 1926, p 105.

complaining about what had happened. This is because in each particular case, there is a further duty. For trial judges it is a duty to secure a fair trial — not a perfect trial, but a fair trial. And there is a corresponding duty on appellate judges to determine whether the litigants did in fact receive a fair trial.

The duty to secure a fair trial, or to examine whether a fair trial took place, has an additional correlative obligation. It is desirable that those who participate in particular pieces of litigation, and citizens generally, can observe on a day-to-day basis various key characteristics in judicial decision-making. These characteristics include:

- the actuality and the appearance of impartiality
- decorum and calmness in judicial deportment
- economy, restraint, patience and prudence in control of proceedings
- respect for other organs of government and for other decision-making bodies
- the application of convincing reasoning in the development of conclusions, and, above all
- adherence to the law.

These are all traits associated with the idea of the "rule of law". In short, the courts are a branch of government which must be both dignified and efficient. To some extent their efficiency depends on their dignity.

There are three fundamental reasons why it is important that courts should seek to display these characteristics in each case they hear:

1. One is that the more strongly those characteristics are present, the more likely it is that a fair trial will take place and that appellate investigations into whether one took place will proceed soundly.
2. The second is that the more strongly these characteristics are present, the more likely it is that a just result correct in law will be achieved.
3. The third is that the more strongly those characteristics are present, the more confidence the public will have in the overall administration of justice.

While many modern contentions about the need for the law to remain in touch with contemporary mores and to reflect public opinion are in my view wholly erroneous, this is one respect in which the opinion of citizens at large is unquestionably important. Why is it important that public confidence be maintained in the administration of justice? For litigants, their relatives, witnesses and even for legal practitioners, the experience of litigation is usually a distressing, even a harrowing, one. Both the processes by which courts arrive at their orders and the orders themselves can be extremely damaging to the peace of mind, self-esteem, reputation, financial interests and liberty of those involved in the litigation. The powers of judges operate within a narrow sphere, but within that sphere they are intense and extreme. Nor are they easily controlled by appeals, for numerous rules make it difficult for appellate courts to review various categories of decision by trial judges, for example, those which turn on the assessment of credibility, or depend on the atmosphere of the trial, or relate to matters of practice and procedure, or reflect the exercise of discretionary judgment. The public will accept the detriments and pains which litigation causes so long as they perceive courts to be evils which are necessary. They will not accept them if they perceive

the pain which courts inflict to go beyond the legitimate necessities of the process, either in the course of the actual hearings or in the reasons for judgment delivered at the end. They will not accept them if parties or witnesses are excessively criticised, or non-parties are criticised without having been heard. Above all, they will not accept them if they think courts lack probity, competence and diligence.

The importance of public respect for the courts stems in part from the fact that courts are unique among the arms of government in being relatively powerless. Alexander Hamilton[2] contended that the courts had to have "complete independence" of the two other branches of government, because the judiciary was "beyond comparison the weakest of the three". It has "no influence over either the sword or the purse". It has "no direction either of the strength or of the wealth of the society". It has "neither FORCE nor WILL but merely judgment". It is for those reasons that the independence of judges is secured by formal or conventional guarantees of the continuance of existing salary levels and of tenure, by immunities from liability for defamation and other torts, by inhibitions on appeals, and to a limited extent by the sanctions for contempt of court. These things exist not to benefit judges but to advance the public interest in having a judiciary independent of both State power and private power. Chief Justice Marshall informed the Virginia State Convention of 1829–1830 that a judge must be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience".[3] He said: "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."[4]

In much more recent times Wells and Sangster JJ in *Fingleton v Christian Ivanoff Pty Ltd*[5] advanced the same view. They said that our civil liberties are "all as nothing if courts do not have their complete independence assured to the extent that they own no master save that of the law, and are subject to no external influence save that exerted upon them by the principles and precepts of intellectual and personal integrity". They also said that "courts cannot perform their task effectively if they are not respected and their decisions are not accepted without question — save, of course, by appeal in due course of law".

Among the conditions for the maintenance of public confidence in the administration of justice, then, is behaviour by members of the judiciary from day-to-day which suggests impartiality, professional competence, honesty, diligence and an absence of prejudgment or over-hasty judgment. The efficient operation of the entire legal system depends on the reputation, so far as it is good, which modern judges have inherited from the past. The efficient operation of the legal system in future depends on that hard-won reputation being maintained and, if possible, improved, as a result of the impressions which litigants and other citizens develop based on the daily experience of the judiciary at work.

2 C Rossiter (ed), *The Federalist Papers,* 1961, No 78, pp 465–466.

3 *Proceedings and Debates of the Virginia State Convention of 1829–1830,* 1830, p 616.

4 Ibid, p 619.

5 (1976) 14 SASR 530 at 548.

The modern trial

In some respects the conditions in which judges must strive to achieve a fair trial and to behave judicially have changed significantly. Delay has always been a deplorable characteristic commonly associated with litigation, but modern commercial conditions and procedural changes have in some ways increased the likelihood of delay. These factors were becoming prominent before the courts began moving towards electronic trials and, so far as electronic trials become the norm, they may become accentuated. The central difficulty is the tendency for every aspect of litigation to become bloated, flabby and excessively voluminous — allegations in pleadings, the content of discovery, the contents of statements and affidavits, cross-examination, oral and, in particular, written argument, citation of authority, and summings-up and judgments themselves.

There are some particular features of the modern trial which may raise problems.

The public nature of trials

The first concerns publicity. With extremely limited exceptions, the theory of our trials and appeals is that the entire hearing will take place in public. In the days when all pleadings were read aloud, when all testimony was oral, when those few documents which were tendered were read aloud, and when there were no written submissions, trials really did take place in public. The fact that they did so, and the fact that to a lesser extent they continue to do so, are salutary influences towards good behaviour. Judicial bias, bullying, impatience, ill-temper and incomprehension are all vices much more likely to emerge if no-one is present but the parties and their legal advisers, particularly when the victim of the misconduct is an unpopular or unattractive figure represented by weak, inexperienced or easily overborne lawyers.

Quite apart from those persons actually present in court during a public trial, there are the broad powers of the media to publish what happens, substantially unrestrained by the laws of defamation. The somewhat unattractive motives of the mass media for publishing some of what they publish must be put on one side: what matters is the effect which flows from the existence of the facility to publish. Further, the influence of professional opinion in ensuring the performance of judicial duties in a manner which reveals probity, competence and diligence cannot be overstressed. There is no more common sight in our courts than practitioners unconnected with a case observing its progress as they wait for their own cases to be called on in that or a nearby court. They are a class not noted for the quality of mercy. If they notice anything meriting particular praise or blame, it will not be long before the profession as a whole hears about it. This could not happen if trials did not take place in public.

And it is not just the hearings that must take place in public. The reasons for decision must be published in open court and made available to all so that they can be evaluated not only by appellate courts, but also by the profession, by academic lawyers and by the media. In that way the public at large, with or without expert assistance, can analyse the probity, competence and diligence of the courts, and the efficiency with which they effectuate retribution against and deterrence of offenders, and compensation for the injured.

There are two dangers to be guarded against in relation to the public trial.

The first danger is the transaction of judicial business in chambers or on the telephone. It is not uncommon for conversations between judge and legal representatives to take place in judicial chambers about cases. Sometimes they start with relatively innocent topics like the length of a particular cross-examination or the need for the allocation of further hearing days. Sometimes they relate to whether contested adjournments should be granted. Sometimes they foreshadow applications to disqualify the judge on the ground of bias. Very often these conversations are well-intentioned. The trouble is that a debate about how long a cross-examination will take can result in the sending of a message that it is taking too long; a debate about an adjournment can lead to criticisms of the conduct of those seeking it; the foreshadowing of a disqualification application can result in things being said which, as with the other instances just given, should only be said in public.

It can happen that judges offer hospitality during short adjournments or after a day's hearing is over. If hospitality of that kind is limited to counsel, it often causes resentment among solicitors and sometimes excites suspicion among litigants; but such occasions have advantages for bench and bar which would make a complete ban an excessive reaction. It is therefore a matter for individual taste whether those occasions for the enjoyment of judicial hospitality should be offered and accepted. But it is necessary for considerable self-restraint on all sides to be exercised so that the occasion does not extend beyond the most innocent social function. Anything of a non-social character should take place in open court and only in open court, so that the litigants and the public can see what is happening. This is true even of applications which may cause a momentary loss of judicial self-control, such as a captious disqualification application — indeed, it is perhaps particularly true of them.

The same observations apply to telephone conversations, even if representatives of the litigants are all participants in the conversation. It goes without the need for any elaboration that ex parte telephone conversations or visits to chambers, except in circumstances of the most extreme urgency, are wholly improper.

The other problem about the public administration of justice in modern conditions relates to the extensive employment in some modern trials of documents — pleadings, affidavits, statements, documentary tenders and submissions — not read out in open court. This is not a problem for the parties, who have access to all these things. But it obstructs non-parties from developing an understanding of the proceedings — members of the public sitting in court, the media in their operation as a mechanism to vindicate the public character of justice, and other citizens who seek to be informed by the media.

There are rules of court, like Pt 65, r 7 of the New South Wales *Supreme Court Rules* and O 46, r 6 of the *Federal Court Rules*, for example, and there are also principles on which the courts act under general sections in their constitutive statutes and in their inherent jurisdiction, permitting non-parties, like the media, to have access to certain documents in the court file before, after or during litigation with the leave of the court.[6] In view of the need which the media have for publishing reports of court cases with some speed and the importance of this facility in securing open justice, it seems desirable that when the parties refer extensively to documents which have been filed, tendered or otherwise relied on, applications by the media for access should be dealt with quickly and with some liberality.

6 There are useful discussions of the relevant principles in *Australian Securities and Investments Commission v Rich* (2001) 51 NSWLR 643 and *Hammond v Scheinberg* (2001) 52 NSWLR 49.

Bias

Let us next examine bias. The judicial oath requires judges to act without fear or favour, affection or ill will. Take fear first. The protections given to a judge — of salary level, tenure and immunities from suit — are designed in part to remove inhibitions and fears from the judicial mind. They are designed to protect the ideal described thus by Lord Bowen:[7]

> "There is no human being whose smile or frown; there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English judge on the bench, or move by one hair's breadth the even equipoise of the scales of justice."

The relevant fears to be borne in mind are not only those of angry executive or legislative responses. They can include fears of press criticisms or other public criticisms, well-informed or not. Judges must suppress these fears. A judge who cannot overcome them ought to engage in some other form of legal work.

The other main kinds of bias are the desire for advancement of one's own interests — "favour" — or the interests of some litigant or cause with which one sympathises — "affection" — or the damaging of some person or cause whom one dislikes — "ill will". A ban on pecuniary bias has been fundamental to the legal system at least since King John promised in Magna Carta that right and justice were not to be sold. It may be over-optimistic to say so, but it seems extremely unlikely that any modern Australian judge would take a bribe, and indeed pretty unlikely that any litigant would think that an offer of a bribe would be likely to succeed. It also seems extremely unlikely that a modern Australian judge would decide a case in a particular way because that outcome might affect the value of the company in which the judge, a relative or friend owns shares, or because the outcome would otherwise improve the judge's financial position. Even outside the operation of the rules relating to ostensible bias, the dangers are so obvious that judges are able to guard against them.

Much more difficult are instances of political, racial, ethnic, religious, social or class bias. They are more difficult because the judge may not be conscious of these forms of bias. The same may be even more true of gender bias. All that can be done is for judges to seek to be alive to the problem and to dredge up out of the depths of their subconscious what attitudes of this kind they may hold. If that process leads in due course to the identification of a conscious bias, self-disqualification may be appropriate unless rational thought about it dissipates the problem.

There is one other form of bias which, in the interests of realism, should be noted. It is not usually unconscious bias, though it can be difficult to control. Joint unhappy experiences over a long period of time can cause some judges to develop a detestation of some counsel, the feeling often being mutual. I do not think this state of affairs has ever succeeded as a ground for disqualification, and in general it should not succeed. Both sides have to subordinate their personal feelings to professional duty.

7 Quoted in *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530 at 548.

Judicial duties during proceedings

The next key judicial duty to consider is the duty of the judge to master the issues in the proceedings. The High Court has recently described as a "paramount judicial duty" the duty to give proper consideration to a party's case.[8] The judge must understand what the plaintiff wants, why it is said that the plaintiff should have it, and why the defendant resists it. If the pleadings do not make these questions clear, or if there are no pleadings, the court is entitled to require the parties to deliver short opening addresses. This process is vital not only as a preliminary to deciding the case, but also as a means of deciding which evidentiary tenders are relevant. Since no-one is legally omniscient, it may also be necessary for the judge to seek early assistance on what principles of law are relevant to the decision of the case. In particular, in modern times when statutes of all kinds are frequently amended in complex ways, it is vital to ensure that the parties and the court are working off the correct statute. This is a task too important to be left to the lawyers alone: their most solemn assurances on the point must be anxiously and thoroughly checked.

The next duty is to rule on the admissibility of evidence as it is tendered. In my opinion this is one island of immunity from the rising tide of a general duty to give reasons. It is also an area where there is not much practical utility in giving reasons except on fundamental questions of relevance, because there it sensibly enables counsel to modify the future conduct of the proceedings. Nor is there a duty to hear counsel in support of every objection. Yet it is common now for every objection to be attended by speeches supporting and opposing the objection, and by the giving of reasons for the ruling. A return to the more economical practices of former times is desirable, because it is highly unsatisfactory that the flow of oral testimony, particularly that elicited in cross-examination, should be interrupted significantly. If a jury is sitting, it distracts the jury, whether they have to leave the court or not. And it gives witnesses under cross-examination forms of relief from the legitimate pressures of that process which they should not have.

The next duty is to understand what the parties submit that the evidence they tender means and signifies. If that requires judicial questioning of witnesses, the need to avoid dropping the mantle of a judge and assuming the role of an advocate must be kept constantly in mind.[9]

Related to that duty is a duty to maintain control over the bulk of the evidence and the time which the controversy takes to try. The modern conditions referred to above have made this duty both particularly acute and particularly difficult to comply with. Where oral evidence which is unnecessary in the sense of being only marginally relevant is elicited in chief, the shared tedium of the experience usually ensures that objections succeed even if the tendering party fails of its own motion to bring the process to a close. However, there is an unresolved theoretical question about the tender of remotely relevant evidence. The leader of one school is James Bradley Thayer:[10]

8 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at 464 [63].

9 *Jones v National Coal Board* [1957] 2 QB 55 at 63–64 per Denning LJ.

10 *Preliminary Treatise on Evidence at the Common Law*, p 516.

> "The law of evidence undoubtedly requires that evidence to a jury shall be clearly relevant, and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not merely be remotely relevant, but proximately so. Again, it must not unnecessarily complicate the case or too much tend to confuse, mislead or tire the minds of that untrained tribunal, the jury, or to withdraw their attention too much from the real issues of the case."

Two leading modern adherents to that position, and not only for jury trials, are Lord Hoffmann[11] and McHugh J.[12] This view is sometimes said to confer on the court a kind of discretion. The other view is that evidence is not to be excluded merely because it is of slight probative value unless some exclusionary discretion operates, and decisions on relevance are not discretionary.[13]

A related difficulty for trial judges arises where though the evidence tendered is undoubtedly relevant, it is merely repetitive of other evidence tendered earlier.

The coming years may see the emergence of principles to control judicial intervention against evils — the waste of time and money — that result from not very useful or excessive tenders.

Excessive documentary tenders also create problems. One often gets the impression that no skilled legal mind of any degree of seniority in the relevant legal team has given consideration to whether each document in a large bundle or bundles is necessary, useful or even helpful. It is vital to encourage a greater sense of discrimination and judgment on the part of those who decide what documents should be tendered. One way of doing so is to indicate that the parties should not assume that any account will be taken of any document not specifically referred to in oral evidence or address.

So far as repetitive cross-examination is concerned, there is authority recognising the power of the court to terminate it: it is a power to be exercised only with caution[14] and in some circumstances only after advance notice that it may be exercised has been given,[15] but it certainly exists.

The final address

The next aspect of the trial which can cause difficulty is the final addresses. They are often delivered, in non-jury cases, when the time allotted for the hearing is about to expire. Hence written submissions are often employed in substitution for, or substantial supplementation of, oral argument. Of course written submissions can in themselves be useful, particularly in complex cases; and they do have the merit of enabling appellate courts later to find what was in issue at the trial at the end of the day, and thereby reject arguments advanced for the first time on appeal. But it is a truth which ought to be universally acknowledged

11 *Vernon v Bosley* [1994] PIQR 337 at 340.

12 *Palmer v The Queen* (1998) 193 CLR 1 at [55].

13 *Smith v The Queen* (2001) 206 CLR 650 at [6]; *Festa v The Queen* (2001) 208 CLR 593 at [14].

14 *Wakeley v The Queen* (1990) 93 ALR 79 at 86.

15 *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 23.

that barristers will say things in written submissions which are sillier, longer and more repetitive than they have the courage to say orally. The burden of dealing with written submissions, particularly days or weeks after the hearing has ceased, is often much greater than that of dealing with crisp and focused oral submissions at a time when bench and bar have the evidence freshly in mind. One aspect of the burden flows from excessively detailed reference to only marginally significant evidence. Another flows from voluminous citation of authority. This is assisted now by recourse to computer-generated cases which would never have been reported in earlier times and indeed are not reported now. Yet in many instances the mass of authority cited gives no more help than would be obtained from consideration of a key statement of principle in a well-known leading case. The occasions on which trial judges have to ascertain and declare the law because no appellate or single judge authority exists are relatively rare. Anything which controls the excessive citation of authority, with the burden which it creates for the conscientious judge who reads all the authorities cited, deserves consideration. One practice, incidentally, which might reduce excessive citation by counsel would be for judges to abstain from excessive citation themselves. Judgments are not chapters in a treatise or law review articles or law reform commission reports. They are statements of the reasons, and no more than the reasons, for the conclusions reached and the orders made. At least for trial judges, the making of careful and clear findings of fact in relation to the issues posed is a much more important activity than scholarly display, unless the case is one of the relatively rare cases where intense scholarly activity is necessary.

The unsatisfactory aspects of the modern trial raise the question whether the modern judicial role should not change back towards what it was four or five decades ago. Then it was common for ex tempore judgments to be delivered after presentation of argument entirely orally. Now, except on the part of a handful of judges and except for brief interlocutory hearings, this is rare.

There are famous historical examples of able lawyers for whom reservation was the exception. Sir George Jessel never reserved at first instance and did so only twice in the Court of Appeal. When Viscount Sumner sat as Hamilton J in the King's Bench Division for three and a half years at the start of his judicial career, he never reserved judgment. Viscount Sumner, in his biography of Sir William Page Wood VC, said of that judge, the future Lord Hatherley LC, that he only reserved judgment once, though he admitted that the ex tempore judgments were "occasionally ill-arranged and fragmentary". But it must be remembered that at least the first two of these judges were of extraordinary intellectual power, energy and self-confidence. While even now in England ex tempore judgments seem commoner than in Australia, it was regarded as an occasion for special praise by the Court of Appeal when Roskill J delivered an ex tempore judgment of considerable ability after a complex five-day trial.[16]

16 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 580–581: see generally *Hadid v Redpath* [2001] NSWCA 416 at [46]–[49].

There are numerous advantages in ex tempore judgments:

- The first relates to the judge's personal position. If one is confident that the parties' arguments have been presented competently and that one has grasped the issues, reached clear factual conclusions, is aware of the applicable principles of law, and is capable of stating satisfactorily what one's reasoning process is, there is very little point in reserving judgment, particularly in courts which do not have access to transcripts. One is better equipped to deliver judgment immediately than one would be after forgetting some of the impressions formed during the trial. The time spent in improving one's style or grammar, or festooning the judgment with more detailed evidence references or citation of authority is not well spent, and whatever advantages are gained do not compensate for the delay.
- Secondly, it is desirable for a particular judge to do whatever is necessary to prevent large numbers of reserved judgments piling up. The greater the overall number of these cases as a class, the longer will be the delay in the judge producing a judgment in any particular one. Delay causes stress to the parties, and may work other forms of prejudice to particular parties not capable of being compensated for by interest. In Magna Carta King John promised not only not to sell justice, but also not to delay it. Delay also excites suspicions about the quality of the judgment when eventually it emerges. Compared to the position in England, current legal culture in Australia is far too tolerant of delays of up to six months, though even we tend to become critical of delays much longer than that.[17] Thus in *Rolled Steel Ltd v British Steel Corporation*[18] Lawton LJ criticised reservation for eight months after a 19-day trial. In *Bishopsgate Investment Management Ltd v Maxwell*[19] the English Court of Appeal, speaking through Hoffmann LJ, said that five months' reservation after a five-day trial was excessive. In *Bristol and West Building Society v Mothew*[20] Staughton LJ said, in declining to give advice to the trial judge before whom an assessment of damages was to take place, that "our judgment is already long delayed". The delay was two months and two days.
- Thirdly, appellate courts will make assumptions in favour of an ex tempore judgment which they will not make for a judgment reserved for some time. A failure to refer to evidence in an ex tempore judgment, or to analyse it fully, is more likely to be excused on the ground that the recency of its tender makes it unlikely that it was overlooked. But the same failure in a reserved judgment may support an appeal.[21] Indeed, delay beyond a certain point may require the trial judge to explain why the appellate court should not draw a conclusion that the issues were not understood and that impressions of witnesses were forgotten, may call for a more comprehensive statement of the evidence, and may necessitate a fuller analysis of it.[22]

17 *R v Maxwell* (unreported, NSWCA, 23 December 1998) — Bruce J was criticised by the New South Wales Court of Appeal for reserving judgment for 10 months in a murder case which lasted about three weeks; *Moylan v Nutrasweet Co* [2000] NSWCA 337 — Bruce J's reservation for 14 months after a long trial was criticised by the New South Wales Court of Appeal, which allowed the appeal.

18 [1986] Ch 246 at 310.

19 [1993] BCC 120.

20 [1998] Ch 1 at 27.

21 *New South Wales Medical Defence Union Ltd v Crawford (No 2)* (unreported, 30 June 1994, NSWCA).

22 *Goose v Wilson Sanford* (unreported, 13 February 1998, English Court of Appeal) — 21 month delay by Harman J in giving judgment after a 27 day trial.

- Fourthly, procedural unfairness can be engendered by reserving judgment. It increases the chance that new thoughts, new arguments or new lines of authority occur to the judge which were not raised by either party; it also increases the chance that some point which was raised by a party may be overlooked. An ex tempore judgment delivered after oral argument, on the other hand, will almost always reflect precisely the contentions advanced by each side. All relevant minds will have educated each other on the key points, and will have a full and fresh grip on them. At the close of the ex tempore judgment, either party can rise and protest that some matter was dealt with on which that party was not heard, or that some other matter which should have been dealt with was not dealt with. The justice or otherwise of that protest can be instantly evaluated, and if it is just, it can be responded to immediately. In short, the delivery of ex tempore judgments minimises the risk of non-compliance with the rules of natural justice.
- Fifthly, ex tempore judgments can tend to produce a more efficient trial. If it is known that the judgment is likely to be ex tempore, it is likely that only the best points will be advanced, only the key evidence will be referred to, only the necessary authorities cited. The prospect that an ex tempore judgment will be delivered, by precluding any written submissions except those filed well in advance or those which are very simple, may cause more court time to be taken in oral argument, but it will encourage more clarity and conciseness in that argument, and a clearer, more pointed judgment. There is a tendency among some counsel who appear at first instance to treat the trial as an occasion for only the most perfunctory of oral submissions, perhaps because the call of the next case is growing loud, perhaps so as to leave the stage clear for a broad ranging appeal in the event of defeat. Trial judges are entitled to insist on the maximum of help in oral address, not merely in relation to the eliciting of evidence or the composition of long and unrealistic written submissions. Ex tempore judgments encourage effective oral argument, and effective oral argument is more likely to produce a satisfactory ex tempore judgment. Ex tempore judgments also encourage discipline of thought in the judge because they increase the importance of understanding every nuance of the case as it happens, of marginalising and discounting the irrelevant, and of organising the factual material by reference to the legal issues as it is tendered. This does impose a strain on the judge which not all can easily bear, because it calls for intense concentration as the judge balances the evidence as it is given with the impressions formed of earlier evidence and with that likely to be experienced in response to the evidence which the parties say is to come. It can also require intense work out of court during the trial. And it results in ex tempore judgments sometimes having a scrappier and more disorganised appearance than reserved judgments — scrappiness and disorganisation being sometimes seized on by the loser, not always convincingly, as pointers of a trial which has miscarried.

Sir Frank Kitto, in his celebrated essay "Why Write Judgments?",[23] contended that there should be more reserved judgments, not less. He was writing 30 years ago, when unreserved judgments were more common than they are now. He did record one argument for not reserving judgments.

23 R Blackburn (ed), *Judicial Essays,* 1975, p 7.

> "Sir Owen Dixon once taunted Sir Hayden Starke. Starke had said that he would put a case away and let it simmer. Dixon replied: 'You mean put it away until you have forgotten the difficulties'."[24]

But Sir Frank Kitto suggested that there could be unworthy motivations underlying ex tempore judgments, like a desire "to be rid of the case, or get through the list or…to be thought an inheritor of the mantle of a Jessel or a Harvey."[25] He thought that, apart from urgent cases, judgment should "be reserved in every case, at least in the higher Courts, where decision hangs upon a balanced assessment of evidence or upon a thoughtful application of legal principles."[26] He said: "Quickness of decision is no substitute for thoroughness in consideration and the utmost care in the formulation of reasons."[27] In my opinion that is exaggerated. Certainly matters must be considered thoroughly and with the utmost care. This can be done by thinking about the case while it unfolds, and by the precise testing of the propositions advanced in oral argument. It is right to reserve if a judge feels that the issues or the law or the evidence are not fully understood, or that it is not possible to set out the reasons for judgment without taking more time for consideration of them. But a judge who feels that the case is understood, that clear conclusions have been reached, and that the reasons for them can be clearly stated on the spot, should not feel restrained from giving judgment at once.

Conclusion

The practical conduct of trials and appeals in modern conditions raises many other problems for judges determined to carry out their fundamental duties. Perhaps the greatest of these relate to litigants in person. A related problem is that of litigants who are represented, but not by competent practitioners. However, it is not possible to deal with any of them on this occasion. Despite the problems facing judges, the calling is a vital, honourable and even in some ways an enjoyable one. I hope you find happiness in it.

24 Ibid, p 11.
25 Ibid, p 9.
26 Ibid, p 9.
27 Ibid, p 10.

Judicial stress*

The Honourable Justice Michael Kirby AC CMG†

Although many advocates are familiar with the stresses of the court room, they become subject to a new set of stressors on their elevation to the bench. Daily exposure to sharp differences, disputes and argumentation, combined with the essential loneliness of the judicial office, render judicial officers specially vulnerable as a group. In considering the nature of judicial stress, Justice Kirby identifies its causes, classifies its features and suggests a few solutions which may be particularly useful to those beginning their lives as judicial officers.

An unmentionable topic

Life in the courts can be a stressful business. Yet stress is a condition which neither judge nor advocate is supposed to admit to — still less write about. They are members of learned professions subject to the cultural inhibitions inherited from the English tradition of the bench and bar. The Australian phlegmatic self-image may even reinforce this inherited model. Judicial officers are subject to the role imperatives of an occupation still overwhelmingly made up of men. In common with most inherently stressful occupations, they share a conventional disinclination to recognise and to speak openly about this unmentionable topic. Yet recent studies have shown that lawyers are amongst the professions most likely to suffer from depression and stress.

In various studies judges have been found to evince "alarming" levels of tension and stress. According to the biography, *Learned Hand: The Man and the Judge*,[1] even a great judge such as Hand was "amazingly insecure," thinking himself weak and even cowardly; his low view of his own abilities only sporadically uplifted by his growing fame.

The time has come to break the silence. Bringing stress out into the open will be good for us all. I can write about the topic because, after 30 years in various judicial offices, subjected to a lot of stress over that time by the work, the legal profession, politicians, the media and (on occasion) my colleagues, I feel I can discuss stress without the embarrassment which others might feel. By identifying its causes, classifying its features and suggesting a few solutions, I may contribute usefully to the orientation of those who are beginning their lives as judicial officers. What I say may also have relevance to other judges, lawyers and others. Judicial

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† Justice of the High Court of Australia.

1 G Gunther, *Learned Hand: The Man and the Judge*, 1994, Knopf, New York.

stress is just one variety of stress in human beings. But daily exposure to sharp differences, disputes and argumentation render judicial officers especially vulnerable as a group.

Others in Australia have referred to judicial stress. Thus, Justice Thomas of the Supreme Court of Queensland, has written a delicate insight into the human problems of judicial life in Australia, which was thought suitable for publication for the edification of American judges.[2] But generally, in Australia, stress in the judiciary is mentioned only obliquely, not spoken of directly.

In the United States, special support systems have been established for some judges, such as those working in rural areas. Their particular variety of judicial stress has engaged considerable attention in that country.[3] Beginning in the 1980s, it became relatively common in judicial training courses in the United States, to provide a programme on judicial stress and how to handle it.[4] Dr Isaiah M Zimmerman, a psychologist, was first invited to speak on the topic at the 1980 conference of Chief Judges of the United States. His essay, reproduced in the *Judges' Journal* of the American Bar Association, became a classic.[5] It was also considered relevant to judges in Canada.[6] Stress invoked a rash of articles in the early 1980s, most of them by psychologists, lecturing judges on their high levels of stress and how to manage it.[7] This writing did not make it to the Antipodes. Yet now, even in England, as the rules against judicial comment were loosened in the 1980s, judges have come to reveal the causes of some of their feelings of stress. I regret to say that one of the chief causes disclosed by some judges is "the sting of humiliation when [the judge's] sentences are overturned by the Court of Appeal."[8]

The attention to stress in judicial life is paralleled by a renewed concern about stress in the life of the practising lawyer. In New Zealand, lawyers were placed in the "high risk category" for stress, particularly for their susceptibility to alcohol dependence.[9] The reason why this should be so, was explained by a leading Canadian barrister, Mr Gordon Tweedie, who admitted to long-term alcohol and drug dependence and described the professional stresses that had brought about the vulnerability of particular practitioners. He also mentioned the special vulnerability of judges. According to Mr Tweedie:[10]

2 JB Thomas, "A Down-Under Circuit: The Life of a Judge in the Remoter Parts of Australia" (1991) 74 *Judicature* 208.

3 K Fahnestock, "The Loneliness of Command — One Perspective on Judicial Isolation" (1991) 30 *Judges Journal* 12.

4 M Middleton, "Judges Told How to Deal with Stress" (1981) 67 *American Bar Association Journal* 1100.

5 IM Zimmerman, "Stress —What it Does to Judges and How it can be Lessened" (1981) 20 *Judges Journal* 4(8).

6 (1984) 26 *Canadian Journal of Criminology* 6 sub nom "The Judge and Stress"; see also R Ray, "Help is Available for Addicted Lawyers and Judges" (1991) 18 *CBA National* 26.

7 CR Showalter and DA Martell, "Personality, Stress and Health in American Judges" (1985) 69(2) *Judicature* 83; see also S Abrahams, "Workshop Examines Way to Help Disabled Judges" (1982) 65 *Judicature* 327; Middleton, op cit n 4; R Sangeorge, "Psychologist Says Judges Suffer From Stress" (1981) 108 *New Jersey Law Journal* 12.

8 R English, "Judgment Days", BBC *Worldwide*, July 1994, 16.

9 See [1986] 241 *Lawtalk* 3.

10 See R Ray, "Help is Available for Addicted Lawyers and Judges" (1991) 18 *CBA National* 26.

> "In our society we isolate judges...All of a sudden a lawyer at 40 goes from fraternising with friends to becoming a judge. He can't golf, go to dinner or socialise with his former colleagues. An active man [sic] is now isolated and lonely. It leads to the old expression — if you're hungry, angry, lonely and tired, you are one step from a drink."

One group which has been examined closely from the point of view of stress is law students. A major survey was carried out in the United States to examine the role of legal education in producing psychological distress among law students and new lawyers.[11] It was found that, whereas law school should be the very place in which practitioners learn to cope effectively with the demands of the legal profession, attention to the psychological well-being of law students was actually stunted by the process of their legal education. At best, stress and how to cope with it was completely ignored.[12] At worst, excessive workloads, serious problems with time management, overcrowded, impersonal lecture rooms, and concentrated attention on analytical skills without equal regard to interpersonal development, produced very high distress levels. They were found to have actually prevented the alleviation of symptoms and the preparation of law students for good lawyering.

Given that Australian law schools, at least at the time when most judicial officers of today were trained, followed much the same model as those described in the United States study, it is little wonder that lawyers are so frequently criticised for their lack of skills in dealing with clients, witnesses and each other. The judicial officer in Australia today is typically the product of a legal education system which, in the United States, produced extremely high levels of psychopathological symptomatology and recurring depression. Perhaps in our more robust and easy-going country, our lawyers were immune from some of these outcomes. But the parallels are uncomfortably close.

As evidence that Australian lawyers are beginning, belatedly, to turn their attention to this issue, one has only to look at issues of the professional journals. In the Victorian *Law Institute Journal*, an article told of the breakdown of a lawyer, named Tom, who reacted to professional stress with sleeplessness and a constant sense of impending doom. He eventually turned to alcohol. He could not escape for a time, because he refused at first to acknowledge the real causes behind his symptoms.[13]

In New South Wales, the *Law Society Journal* urged upon its members the ultimate lesson of *Donoghue v Stevenson*,[14] viz that lawyers should demonstrate a duty of care to themselves. They should be alert to their special susceptibility to the diseases of Western civilisation, including cardiovascular disease, diabetes and stress.[15]

11 G Andrew, H Benjamin et al, "The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers" (1986) *2 American Bar Foundation Research Journal* 225.

12 Ibid at 226.

13 "Tom — One Lawyer's Story" (1990) 64 *Law Institute Journal* (Vic) 1020.

14 [1932] AC 562.

15 J Brown, "Physical Fitness — The Duty of Care to Oneself" (1990) 28 *Law Society Journal* (NSW) 68; see also MR Liverani, "Mid-Life Crisis or Epiphany?" (1994) 32 *Law Society Journal* (NSW) 46 at 47.

In the United States, concern about the impact of legal stress upon the actors in the drama of litigation has now extended to jurors. The National Center for State Courts has reported new initiatives to cope with the stress-related symptoms suffered by jurors, particularly in long and harrowing cases. Their symptoms range from the mild to the severe. They are most acute where jurors are sequestered, cut off from their families and friends, and exposed to repeated re-examination of highly distressing, haunting facts — a gruesome murder or horrible automobile or aeroplane accident.[16]

At the conference of the International Bar Association in Melbourne in October 1994, another oft-forgotten group at last came into their own. The spouses and partners of lawyers (and one might add, judges) are also subjected to stress. It can come from shared anxieties, from the experience of lonely absences and from empathising with a companion under seemingly inescapable pressure. For the first time, the International Bar Association included a session in its conference, addressed by psychologist Dr Richard Gates, on how the 1990s led to increased demands on all professionals and on lawyers in particular. Dr Gates, it was promised, would "lead the audience in general discussion about their own experiences of living or working with lawyers under pressure, how they have coped and perhaps some strategies for coping better."[17]

So it will be seen that stress in the law, and even on the bench, is out of the shadows. Save for cultural norms or "macho" inhibitions, there is no reason why stress should be hidden, being a reality of professional life. The role of stress in human behaviour is increasingly the subject of scientific scrutiny. It is conventionally explained in terms of the body's response to danger when it makes its choice between fight and flight. In part, the phenomenon has a positive role in heightening the performance of the judge and the lawyer to deal with what is often an issue of the greatest importance for the life, liberty, pocket or reputation of the client or litigant. A so-called "stress hormone" (corticotropin) has been isolated as have glucocorticoids. As the mind signals the body to mobilise its resources in a situation of stress, glucose, simple proteins and fats pour out of storage to stroke the muscles. To increase this delivery of nutrients and oxygen the heart beats faster, blood pressure goes up and the breathing rate increases. The stress hormone has been found in the placenta of the human neonate. It is said to be associated with the human sleep cycle.[18] It seems reasonable to infer that lawyers and judges normally have a lot of this hormone rushing around their systems.

At the time of my first appointment in 1974, a jest was told, which I remember. It was ascribed to Justice Bernard Riley. It suggested that the judicial life had advantages. Those anointed would find, however, that "the tension went out the window with half their income". The part about the income was certainly true. But the part about the drop in tension has not been true for all judicial officers.

16 "Juror Stress: What Price do Jurors Pay?" (1992) 19 *NCSC Report #10*, 3.

17 International Bar Association, *Conference Programme*, 1994, p 23.

18 Noted in *The Australian*, 13 August 1990, p 9; see also RM Sapolsky, *A Guide to Stress, Stress-Related Diseases and Coping*, 1994, Freeman, New York.

At the outset it is necessary to put stress in the Australian judiciary in proper context and perspective. In many countries, judicial officers are subjected to daily perils and risks to their lives and safety — and to that of their families. In contrast, the stress faced by Australian judges is less intense. But it is serious enough.

I will analyse the typical causes of judicial stress before turning to some of its features and a few suggested solutions.

Causes of judicial stress

Nature of the work

The transition from practising lawyer to judicial officer involves a journey to loneliness, at least to some degree. Many new appointees tell of their dread of the official welcomes and professional inaugurations where the critical spotlight is unswervingly placed on them as individuals, not as advocates or representatives of parties.

Loneliness of office is also, to some degree, inescapable. An element of distance and remove are a usual part of the judicial life after our tradition. There is a definite role expectation for judicial officers in Australia. It governs even the most gregarious initiates. Justice Thomas paints a vivid picture of the ceremonial arrival of Mr Justice Cooper at the Normanton Courthouse in the nineteenth century. In rustic surroundings, but in full judicial robes, the judge had to portray the assurance and confidence of the judicial office which he paraded before the people down the main street of the town.[19] Whether Cooper ever felt any doubts is not disclosed; although it appeared unlikely. Yet until now, there has been little in the way of formal preparation for the judicial life. Because most judicial officers came to the higher courts from the bar, their lives as advocates were hitherto seen as preparation enough for their lives as judges. It is a truism that expertise as an advocate may not necessarily fashion a good judge. Studying judges for decades may simply lead the observer to replicate common errors. Many newly appointed judicial officers have complained that there are few people whom they can ask about rudimentary problems of judging. This can be a cause of uncertainty, self doubt and stress.

When a solicitor was appointed from practice to judicial office in the Supreme Court of New South Wales, and took the highly sensible precaution of sitting for a time to observe a judge of his division, there was much ill-considered criticism at the bar. Yet, in my time, at least two newly appointed judges of the Court of Appeal (Cripps JA and Powell JA) took the sensible course of sitting with the judge administering the motion list before embarking on that duty themselves. Rationality and efficiency should overcome tradition where tradition unreasonably enlarges stress, involves pretence and has no professional necessity. On the very day that I was sworn as President of the New South Wales Court of Appeal, I was required to preside in motions necessitating countless rapid decisions with the provision of accurate reasons. Sitting on each side of me was a vigilant colleague. It was highly stressful. But in those days, that was what was expected.

19 Thomas, op cit n 2.

A source of stress for many judicial officers derives from role expectation and role playing. Judicial officers are expected, as Sir Robert Megary once put it, to be as wise as they are paid to look. A psychologist, Dr Walter Menninger, told United States judges of the judge who asked: "What can I do on the bench that will reduce the urge to scream?"[20] More often, the problem is yawning, not screaming. But the frustration can certainly build up. The judge is expected always to react in a way that is "unobtrusive and acceptable". The response must not interfere in the manifestly lawful and just solution to the problem before the court.

Some judicial officers, on appointment, complain about the immediate drop in their income. Several fine judges in Australia have been lost both to federal and State courts, because of this complaint. Although judicial salaries and benefits doubtless seem very high to most people in the community, it is usually said that they can only be compared with the judicial officer's alternative sources of income, viz in the practising legal profession. A family accustomed to the income of a senior barrister or solicitor, may complain about the drop. The pressures of unfulfillable demands, and even recrimination, may flow over to the judicial officer. Whether objectively warranted or not, this is certainly a source of subjective anxiety for some. Complaints are often made about the severe discrepancies between the social status usually accorded to judicial officers and the salaries and other benefits that they receive. A return to the profession, as an easy release from this source of stress, is likely to occur much more frequently in the future. Until the recent past, it was unthinkable.

Many judicial officers also complain about the lack of feedback concerning their performance. As a practising lawyer, there are many who will speak with candour and with constructive suggestions to their colleagues. But practitioners and litigants are inhibited in what they can, and will, say to a judicial officer, except through the formal process of appeal and judicial review. The lack of feedback accentuates the feeling of loneliness which many newly appointed judicial officers experience. Unless they are members of an appellate court, it is the nature of their occupation to sit alone. I recall how Sir Nigel Bowen, as Chief Justice of the Federal Court, would sometimes come and sit in the back of my courtroom — as of other new appointees — to observe the "new judge." But this is rare, if not unique. For the most part, the judge receives little by way of day-to-day assessment. He or she is thrown back upon personal staff who tend to have a feeling of loyalty or, at least, discretion, which suppresses criticism. It must be voiced, if at all, in professional gossip or the usually measured opinions of appellate courts.

Another stressful feature of the work of judicial officers today is the increasing workload which they must bear. This is not a phenomenon confined to Australia. It has forced a kind of bureaucratisation on the judiciary in the over-worked courts of the United States. Throughout the common law world, judges are over-burdened.[21] For example, the workload of the New South Wales Court of Appeal in my time had increased threefold since the establishment of the court in 1966. Yet, for many years the judicial strength of the court was unchanged. Many judicial officers feel the stress of the never-ending tide of cases, the

20 W Menninger quoted in Middleton, op cit n 4.

21 See eg SN Silva, "Interview" (1994) 19(1) *Dana* 5 at 7 (Sri Lanka Court of Appeal).

increasing backlog and the perceived incapacity to do much to reduce it. A great source of that stress is the conviction that however hard they may work, they do not have the means to provide simple solutions because they are locked into legal and professional requirements which produce delay inherent in the careful handling of individual cases.

Another feature of the very nature of judicial work which adds to stress, is the limited capacity of judicial officers to delegate their judicial functions. True, some functions may be given to judicial registrars. Other administrative functions may be given to list clerks. Still other functions may be assigned to personal staff. But, at least in the tradition of the Australian judiciary, the personal obligation of consideration and decision-making rests upon the shoulders of the sworn judicial officer alone. It cannot be shifted. Most judicial officers have a strong sense of that responsibility. It comes with their personal, undelegable duty. But it adds to the stress. Whereas other occupations can shed intolerable workloads, judicial officers have a strictly limited power to do so.

On top of these problems, comes the social isolation. The judicial officer, after appointment, may typically find it harder to make firm friends. Some become anxious that signs of friendship, for example from the practising profession, are self-interested and not genuine. Friendships of the past are often diluted, both by the judicial officer's obligation to preserve manifest independence and by the profession's obligation to keep ever open the right of vigorous criticism and appeal which the defence of clients' interests may require.

For all of these reasons, the judicial office carries the potential of presenting the incumbent, particularly a new incumbent, with obligations and duties that are unusually stressful. Of course, no-one is obliged to accept judicial appointment. Nowadays, more than in the past, lawyers realising the disadvantages of judicial service, frequently decline appointment. They preserve their professional independence and the higher income that goes with it. To this extent, the judiciary tends to be a self-selecting group of lawyers who have a general idea of what the work entails. It is the discovery of the detailed requirements of office that awaits them. The isolation, the high role expectations, the financial disadvantages, the lack of feedback, the ever increasing workload and the limited power of delegation, add up to special sources of stress which it is important to acknowledge if the judicial life is to become tolerable, and even enjoyable.

Lack of appreciation

One aspect of the social isolation and lack of feedback, referred to above, is an important source of judicial stress. This is the sense of a lack of appreciation for the enormous efforts the judicial officer typically makes in order to be worthy of the high calling and of the ancient tradition. For some, a feeling that he or she has been passed over for a higher office, when others seemingly less worthy have been preferred, is a source of pain and disappointment that adds to stress. We have all known judicial officers who allowed their exaggerated estimate of the importance of promotion to get the better of their temperament. Now that promotion within the Australian judiciary is more common than it was formerly, it is important that incumbents should preserve their own integrity and that of the judicial office. To be anxious about something over which the judicial officer can, and should, have no control or influence, is pointless. A healthy scepticism about political decision-making will help cope with this source of anxiety.

Some judicial officers become anxious about what they see as a decline in the niceties of respect for the bench in general and themselves in particular. Justice Thomas' tale of the somewhat pompous Cooper arriving on a country circuit in Queensland is well targeted to deflate the pomposity of judicial officers of high expectation. As Justice Thomas observes:[22]

> "Sadly, a circuit visit these days is something of a non event in the town. It is no longer safe for a judge to assume that he will be met by anyone upon his arrival. Some may feel a nostalgia for the golden era when the arrival of the judge was an important event."

Once the newly appointed judicial officer appreciates the true limits of his or her own importance, the lessons of humility will not seem so painful.

One of the chief sources of anxiety about the lack of appreciation can arise because of the judicial duty to sit in court and dispense justice with a never-ending flood of cases approaching the court door and a strictly limited capacity to deflect or reduce it. Medical practitioners and dentists in emergency wards have similar obligations to cope with highly important and stressful moments in people's lives. But in our society such individualised high responsibility is comparatively rare. Most vocations enjoy a much greater opportunity to share the load and thereby to cope. Many judicial officers, anchored in their courtrooms, face a sense of dread that the work keeps coming in ever-increasing quantity, that they strive to do battle against the tide, and that few appreciate, or even notice, the efforts they put into their work on the public's behalf

Whereas in the past, judicial officers, in Australia at least, could comfort themselves with the almost universal admiration in which they were held by the public and the media (and in which they held themselves), nowadays this can scarcely be said. Judicial officers — from the High Court to the Local Courts — are subject to the badgering attacks of the media, politicians and others. There is an incongruity about the public's misconception of judicial work and the actuality, which is known only too well to the judicial officers. There are few with whom the judicial officer can share these feelings of frustration and even resentment. The result is that judicial officers are typically obliged by convention to bottle up their frustrations and to continue the struggle against the growing tide of litigation. They must do so in the face of a highly critical media, indifferent politicians and an uncomprehending public. The combination of these realities can result in intolerable stress in some individuals. Or it can produce cynicism as the incapacity of the individual judicial officer to overcome the rising workload or to meet unwarranted calumny, ultimately tames him or her to do the best that can be done and to surrender the fruitless quest for perfection and proper appreciation.

Personal factors

In addition to the foregoing features of the judicial task and its characteristics in Australia today, some mention should also be made of the features of the personal lives of judicial officers which make them vulnerable to stress, often precisely at the moment when they are first ushered into their judicial chambers.

22 Thomas, op cit n 2 at 208.

Mid-life passage (or "crisis") is a well-established psychological phenomenon. As described, it is usually associated with the death of parents, the departure of children from the home, a deterioration in health, in physical self-image and in sexual activity. It frequently coincides with similar developments in the life of a spouse or partner. The much higher levels of marriage and relationship breakdowns in contemporary Australian society will probably mean that more judicial officers in the future will suffer the stresses of break-up and personal loneliness. Such features may reinforce the vulnerability of people appointed to judicial office.

Some elements of this passage can be positive. It may encourage an appreciation of the fragility of life and the importance of the small number of persons who greatly matter. But it can also be negative, resulting in questioning of long-term relationships and a retreat to work as a means of escape from the stressful business of personal emotional challenges. A newly appointed judicial officer may have enough stress in the courtroom, so that the addition of personal stress will present risks of burnout and even breakdown. These outcomes can manifest themselves in numerous ways: repeated loss of temper in the courtroom; gross delay in the delivery of reserved judgments; incapacity in decision-making; and hostility to the world at large. At least one Australian judge, faced with some of these stressors, found escape in suicide. Fortunately, this is an extreme solution, which is rare. For most, the answer is redoubled effort, despite the fact that the judicial officer well knows that it will have a strictly limited impact on the sources of pressure which may seem at times completely insoluble.

Future stress

As if the foregoing were not sufficient, a number of phenomena add to the stresses faced by Australian judges today. They include the masses of legislation which pour from our parliaments and frequently change the law, just when we thought we were beginning to understand it. New legal procedures demand new techniques of judicial control of the courtroom. New rules for the conduct of trials and new principles of sentencing produce an urgent obligation to keep pace with legislative and common law changes in a way that judicial officers of earlier generations would have found intolerable. Completely novel notions, such as the introduction of the jurisprudence of fundamental human rights, begin to intrude into the life of the Australian judge to an extent that would have been unimaginable in law school days.[23]

To the pressures of new law, must also be added the pressure of new technology. Judicial officers today, in middle age, must learn to use computers and word processors. Increasingly, they are exposed to telecommunications hearings and the use of video recordings in trials. Now we are on the brink of voice recognition software programmes. Before long, most of us will dictate our opinions to a machine which will recognise our voices and reproduce, with near perfect accuracy, a written text. Training and adaptation to the new technology has added to the stresses of judicial life today.

23 See eg *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 at 42; *cf Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 (CA) at 272; *R v Sandford* (1994) 33 NSWLR 172 (CCA) at 177.

There is now more changeover in the personal staff of judicial officers. The old convention of an elderly retainer, chosen usually from the defence services, has been replaced by the appointment of young law graduates. They can certainly add stimulus and new perspectives in the personal office of the judicial officer. But their service tends to be temporary. By the time they have been rendered most useful by their training, it is time for them to move on. They are then replaced by new staff, requiring new personal relationships with eager young people who need to be trained from scratch.[24]

Another peril and stress has been added to the judicial life. Judicial officers today are much more accountable to the public than they were in earlier times. This is not, of course, necessarily a bad thing. But it certainly adds to pressure when judicial officers are singled out and pilloried in the media for perceived mistakes or departures from popular or media wisdom. The harassment of judges by television interviewers, who have confronted them in public streets, adds a pressure that would not have been imagined by the judiciary at the time of my first appointment in 1974. Better communication through the media to the community they serve will be enhanced by the appointment of media liaison officers to the courts. But sadly, the media is often interested only in an "angle" or in combative entertainment. Few judges will escape entirely the wrath or derision of the media during their judicial career. Whilst they must remain alert, in case the criticism is justified, and lest they have truly lost touch with community values, they must equally preserve their fidelity to the law and to their consciences. Our judiciary does not march to the drum of editorialists.

Finally, the Australian judge today must operate in a rapidly changing society where few of the values of youth remain unquestioned or unchallenged. Judges must learn to adapt, even to speedy change. They must become alert to the community's new sensitivity to the rights of women, the rights of Aboriginals, the rights of ethnic communities, the rights of homosexuals, the rights of the handicapped, and so on. Most judicial officers, being themselves members of the community, respond sympathetically and positively to these changing perceptions of justice. For some, however, there will be a generational, individual or cultural disinclination. Changes in long-settled ways of the law and the courts may be beneficial. But it may also be stressful, particularly to some older judges, bearing the attitudes and values of their generation and training. They should, and must, adapt to changing times. For the judicial office is not theirs to pursue their own humours, but to serve the law and the community.[25] This said, the process of change in directions that may be personally uncongenial will undoubtedly be stressful. If the judicial officer is unwilling or unable to accept the changes, especially in the law itself, integrity will point in the direction of resignation or retirement rather than a futile last-ditch stand.

24 Thomas, op cit n 2 at 209.

25 See eg Lord Halsbury LC in *Sharp v Wakefield* [1891] AC 173 (HL) at 179 applied; *Dwyer v Kaljo* (1992) 27 NSWLR 728 (CA) at 744.

Special categories of judicial stress

Rural

One category of judicial service that has been acknowledged as specially prone to high levels of stress in the United States, is that in isolated rural communities.[26] For some, service in a country town might be congenial, particularly for a judicial officer with a young family, provided there are good educational facilities and, nowadays, occupational opportunities for the spouse or partner.

But for many judicial officers, assignment to a remote rural district can offer only acute isolation. He or she is unable to mix socially with a wide group of people in case doing so causes continuous embarrassment and necessitates disqualification from judicial decision-making for apprehended bias. The judicial officer must avoid the appearance of favouritism for friends and acquaintances, but must also avoid penalising them, or their clients, in order to be scrupulous and to appear as such. In rural districts, there is usually a loss of personal anonymity. These are reasons for adhering to the centralised organisation of the higher courts in Australia and to the provision of country circuits which many judicial officers actually find congenial. Circuits do not present the same sources of stress, at least in Australia, where the judge can usually stay in a modern motel rather than the gloomy "judges' lodgings" which sometimes cast a lonely blight on judicial service in England.[27]

But changing times in circuit life in Australia are noted by Justice Thomas. Whereas in the past, home hospitality with members of the profession was a common feature, now it has declined. Challenges of judicial bias have occurred arising out of social contact between the judge and local practitioners perceived to favour one side of the record. Justice Thomas also appears to lament:[28]

> "...provincial towns large enough to attract a circuit are no longer isolated and there is little novelty in visitors. It is hard enough these days for the working spouse to persuade the home spouse to put on a dinner for any guest, let alone for a judge who is hardly likely to be a ball of fun. Whatever the reasons, home hospitality is a fairly rare benefit."

Urban

The urban judicial officer is the most likely candidate to experience the stress of judicial burnout and overwork. He or she will work during court hours under the unrelenting pressure of court lists. The coincidence of judicial working hours makes contact with peers difficult unless special efforts are made in the lunch hour. According to the literature, this is the group of judicial officers which most needs attention to health and regular medical checkups.

26 See BR White, "The Special Role of State Judges" (1991) 30(2) *Judges Journal* 6 at 10; see also K Fahnestock, "The Loneliness of Command — One Perspective on Judicial Isolation" (1991) 30 *Judges Journal* 12.

27 In England, the arrangements about "judges lodgings" have partially changed in recent years. This has led to complaints and even letters to *The Times* by judges claiming that their assignment to discounted hotels presented security problems and has reduced HM's Judges to little more than "travelling salesmen". Opinions about judicial accommodation on circuit are not uniform: see *The Times*, 28 September 1994, p 7; 3 October 1994, p 10.

28 Thomas, op cit n 2 at 209.

Appellate

The appellate courts, at least, have the advantage of professional collegiality. But they have their own sources of stress, including high competition amongst their members, clashes of personalities and even, occasionally, irrational behaviour. The record of the conduct of Mr Justice Starke in his dealings with Mr Justice Evatt in the High Court of Australia in the 1930s, reveals the nadir to which the personal relationships of that court had sunk at that time.[29] There are similar tales in the House of Lords following the judgment in *Liversidge v Anderson*.[30] Lord Atkin was isolated and ignored by his noble colleagues for suggesting that they had taken their principles from Humpty-Dumpty, not the law books.[31]

In any group of talented professional colleagues of high ability, working closely and continuously together in contentious business, tensions will occasionally surface. It then becomes the duty of the judges to sort out the stresses and pressures and to restore, so far as can be done, working arrangements which ensure the discharge of their duties in a proper manner. In the New South Wales Court of Appeal, good collegial relationships were cemented in my time by fortnightly meetings of all the judges to review the business of the court. These meetings are supplemented by regular luncheons and occasional dinners. Group psychology presents paradoxes and pressures. The judiciary is not immune from these. Working so closely together can sometimes be stressful, but it can also be creative and enjoyable. In the High Court various factors conspire to make such collegiality more difficult to attain. But by the time they are appointed there, the justices are usually pretty hardened characters.

Chief Judges

A special class of judicial officers subjected to particular stresses nowadays are Chief Justices, Chief Judges and Chief Magistrates. They are often on the receiving end of complaints by the public, the media, politicians, professional bodies and disaffected litigants. Their capacity to effect change in an institution of highly motivated and highly opinionated individuals is limited. Much depends upon these chief judicial officers. Before the community and the media they are increasingly perceived not only as working judges but also as the representatives of their courts. This, in turn, adds to their burdens. The skills that were required of Chief Justices in earlier times have radically changed in the last two decades. At least to some extent, Chief Judges are expected now to keep abreast of court management, social change, legal trends, judicial philosophy, law reform, macroeconomics, the law reviews, world events, cultural occasions, legal conferences and suitable charities. They must defend their judges' reputations and privileges, whilst seeking to ensure unreasonable increases in productivity and the informal handling of sources of complaint falling short of judicial misconduct. These duties add special pressures to the life of a Chief Justice, Chief Judge or Chief Magistrate in Australia today. The fact that many such office holders are themselves

29 See CC Lloyd, "Not Peace But a Sword — The High Court Under JG Latham" (1987) 11 *Adelaide Law Review* 175.

30 [1942] AC 206 (HL) at 209.

31 R Stevens, *The Law and Politics: The House of Lords as a Judicial Body 1800–1976*, 1979, Weidenfeld and Nicolson, London, pp 287ff.

appointed to such offices directly from the practising legal profession, without prior judicial service, adds to the pressure upon them, about which they can speak to relatively few. One way of easing that pressure is by adopting collegiate decision-making and sharing the responsibility of court governance — seeing it as a modern managerial exercise instead of an imperium of unyielding commands.

Characteristics of judicial stress

Every judge and lawyer knows the characteristics of judicial stress. They have been noted by a lifetime of watching courtroom performances. But one's own reactions may not be so well appreciated. No-one may be so rude as to mention them.

Judicial stress may be cognitive, resulting in difficulty of concentration and constant glancing at the clock, as much as to ask, "When will I be released from this burden?" Or it can result in a resigned lack of interest in the work and a fatalistic belief that every day will be the same, and that nothing that the judicial officer can do will much affect the unrelenting workflow and the crushing backlog.

Alternatively, stress can take a physical toll. It might attack the judicial officer's digestion. It might cause nausea, diarrhoea, a sense of agitation or, in some, an uncontrollable urge to fall asleep and thereby to blot out the pain of an uncongenial life.

In relationships, both inside and outside the court, stress may produce an outburst of temper, an egocentric exhibition of self-confidence or the cynicism of a hardened pessimism. This produces a lack of concern about the cases, which are just permitted to wash over the judicial officer, leaving him or her relatively untouched by their pain.

Of course, these are exaggerated consequences of stress. Most judicial officers absorb it, directing it sometimes to creative activity, imagination and endless innovation, unerring politeness, accuracy and prompt decisions. Such people — and there are many — are paragons. They endure what observers have described as "appalling" personal stress. It is when the cognitive, physical or behavioural outcomes of stress begin to interfere with the judicial performance, that the judicial officer, the court and the community itself, have a legitimate interest and an obligation to look for the cure.[32]

Coping with judicial stress

The cure, if there is one, is a subject upon which expert psychologists and others have written, with far more knowledge than I can impart. Typically, they make the point that the judicial reaction to the predicament of stress will depend largely upon the personality and characteristics of the particular judicial officer and his or her insight into the existence of stress and ways of coping with it.

The first step on the path to relieving stress in judicial, as in other, life, is to admit its existence to oneself and to close friends. Thereafter, it is necessary, if stress is creating a problem, to look to personal and professional responses which will attack the sources of stress, both in the work environment and in the personal life of the judicial officer.

32 CR Showalter and DA Martell, "Personality, Stress and Health in American Judges" (1985) 69(2) *Judicature* 83 at 85.

A judicial officer under stress will do well to resist the ego-tempting invitation to join another committee or to serve in some new and worthy public cause which adds to time deprivation. Yet a deflection of the mind to outside interests, books outside the law, music and theatre, will often be beneficial to those who are stressed. Sometimes the judicial officer will need to reorganise his or her personal life. Some turn to transcendental meditation and yoga, others to relaxation techniques, others to religion, still others to physical exercise or tai chi; others to music-whilst-they-work, others to massage, flotation or other therapy. Some resort to overseas travel; others retreat to an intense home life. Almost always the relief is found in non-verbal activities.[33] Some develop hobbies and take an interest in bodies and causes compatible with their office, although not strictly legal or judicial. Most just do it "cold turkey."

Physical responses to stress are urged by all the books — cutting down sugar and salt; taking Vitamin B supplements; reducing the intake of caffeine, nicotine and alcohol; taking adjournments to break the day; walking out of the court building during the lunch hour; or clearing the mind of law, advocates and litigants with their stressful disputes and endless arguments.

Perhaps out of a belated recognition of the pressures imposed on judicial officers, court buildings of the future will include facilities for physical exercise and relaxation. It is not without significance that the new Parliament House in Sydney included a gymnasium and a heated swimming pool. The lives of politicians are certainly stressful. But the needs of the judiciary in this regard should not be overlooked, as they have been in the past.

Within the profession of the judiciary there are initiatives which can be taken to help reduce stress arising from the workload. A careful diagnosis of the build-up of cases can lead to a program for the efficient despatch of an accumulated backlog. The reorganisation of court business and change to time honoured procedures, should be contemplated in the effort to attack one of the major causes of judicial stress — the never-ending workload and the feeling of helplessness in reducing it. Judicial officers cannot be reduced to automatons. Nor can they provide true justice to a fixed timetable set by computers. But their efficiency can be improved by the provision of better equipment, improved library and research facilities, increased professional staff and better computer-aided listing and case monitoring. Properly mobilised, these resources can increase the judicial throughput. Doing this may help to reduce judicial stress.

Even if it seems unlikely that judicial salaries in Australia will much improve, other benefits of judicial office may be enhanced, notably the provision of improved study leave, sponsored participation in judicial conferences, better technology, and regular communication amongst judicial colleagues at all levels of the hierarchy concerning the work, the shared problems and frustrations. Just speaking of such matters can provide relief.

33 See JW Gardner, *On Leadership*, 1990, Free Press, New York, p 134. Gardner, who knew and worked with several United States Presidents and Congressional leaders, cites Montaigne's injunction: "I endeavour to free this corner from the public storm, as I do another corner of my soul."

A new beginning

The judicial orientation courses and judicial education conferences are steps in the right direction. They encourage a more open-minded approach to sensitive issues which judicial officers must consider as they serve the people in changing times and in a new millennium.

It is in this spirit of open-mindedness and honesty that I have offered this essay on judicial stress.

In equal measure with the stress in the life of a judicial officer there is excitement, intellectual stimulation, personal satisfaction, still much public esteem, a general sense of social utility and worthwhileness, and a never-ending feeling of the privilege it is to be a judicial officer in a country ruled by the law. It is indisputably an exciting time to become a judicial officer in Australia today. We are the latest servants in a tradition of 800 years. It is a fulfilling life, stress and all.

Further Reading

MD Kirby, "Judicial Stress — An Update" (1997) 71 *Australian Law Journal* 774.

JB Thomas, "Get up off the Ground" (a critical commentary on the Update) (1997) 71 *Australian Law Journal* 785.

MD Kirby, "Judicial Stress — A Reply" (1997) 71 *Australian Law Journal* 791.

MD Kirby, "Attacks on Judges — A Universal Phenomenon" (1998) 72 *Australian Law Journal* 599.

J Doyle, "Judicial Standards: Contemporary Restraints on Judges — *The Australian Experience*" (2001) 75 *Australian Law Journal* 96.

D Drummond, "Towards a More Compliant Judiciary?" (2001) 75 *Australian Law Journal* 304 and 356.

Judicial accountability*

The Honourable Murray Gleeson AC†

What is the desirable nature and degree of oversight of judicial activity? In this essay, Chief Justice Gleeson considers why accountability, or judicial responsibility, is worth pursuing. Accountability promotes good decision-making and community acceptance of the outcomes of both the judicial and administrative processes. The objectives of accountability are served by a number of long-established principles governing the performance of the judicial function. This is not the case, however, with the administrative function and the Chief Justice advocates that the judiciary recognise the right of the legislature, the executive and the public to know what administrative decisions are being taken by the judiciary and why.

Introduction

In public debate about the role of the judiciary, the concepts of independence and accountability are frequently invoked for rhetorical, rather than analytical, purposes. They are sometimes used as mere incantations. Both deserve better treatment. Inter-related as they are, a full appreciation of their implications is essential to any evaluation of our present system and of proposals for change.

In a democratic community, in which the institutions of government are expected to operate with integrity and efficiency, such institutions will necessarily be subject to appropriate forms of accountability. The issue is not as to whether there should be accountability, but as to the kind of accountability that is appropriate. Judges were once subject to a direct and extreme form of accountability. In England, from Norman times until the reign of the Stuarts, judges held office at the pleasure of the executive government (the King). Not even the most determined advocates of increased judicial accountability today profess a desire to return to that situation. Nor is there a single or simple answer to the problem of the nature and degree of oversight of judicial activity that is desirable.

This is hardly surprising. It is generally accepted, in other areas, that the concept of accountability is flexible and, in its practical application, varies according to the context in which it is being considered. Everyone agrees, for example, that company directors should be accountable. Putting that consensus into effect, however, is not so easy. Directors owe legal,

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† Chief Justice of Australia.

moral and social duties of various kinds; they have responsibilities to the body corporate, and to its shareholders, its creditors, the consumers of products of the corporation, the public generally, and government. At times those responsibilities might conflict. The formal mechanisms to enforce directors' duties are complex. They include removal from office, liability to civil actions for damages, and exposure to prosecution for breach of penal laws. On the other hand, members of parliament are subject to a simpler mechanism of formal accountability. They run the risk, once every few years, of being voted out of office. Ministers of the Crown are, in theory, accountable to the Governor General or the Governor, and in practice, to parliament, the primary sanction being liability to loss of office. Public servants are subject to forms of accountability that are different again.

Where the focus of attention is the matter of sanctions, the possibilities are various. The sanctions may be formal or informal. They may involve dismissal or suspension, awards of damages in civil actions, penalties such as fines or imprisonment, or exposure to public criticism, and perhaps even disgrace. In New South Wales, public officials, including judges, may be publicly and officially declared corrupt; a sanction which, in most cases, would have devastating public and personal consequences. Indeed, public officials may be declared to have engaged in corrupt conduct even though they have not committed any unlawful act.[1] In this respect, and in other important respects, the position of the judiciary in New South Wales is significantly different from that of their counterparts in other Australian jurisdictions, including the Commonwealth.

No one disputes that the value of accountability must, on occasion, yield to other values. For example, members of parliament enjoy an absolute immunity from liability to suit in relation to what they say in parliament. A member of parliament may, in circumstances where the words are likely to be given the widest publication, and to have extremely damaging consequences, utter the most serious and baseless defamation, without fear of being sued for damages. The usual form of accountability which attaches to the publication of defamatory matter, liability to damages, is set aside in the higher interest of unfettered freedom of expression in parliament.

The idea of accountability

Accountability, or responsibility, can range from a rigid subjection of one person to the control of another, to a degree of responsiveness on the part of one person to the interests or wishes of another.[2] Professor Cappelletti[3] constructed three models of judicial responsibility:

1 *Independent Commission Against Corruption Act* 1988 (NSW), ss 8, 9; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 129.

2 The correlative concept of power has been seen as involving a continuum between influence and domination: PH Partridge, "Some Notes on the Concept of Power" (1963) 11 *Political Studies* 107–125, referred to in I Thynne and J Coldring, *Accountability and Control: Government Officials and the Exercise of Power*, 1987, The Law Book Company Limited, Sydney, p 2.

3 "Who Watches the Watchmen?" (1983) 31 *American Journal of Comparative Law* 1.

- The first was a situation of dependency or subservience of the judiciary, or the individual judge, in which a judicial decision could be over-ruled by the executive or a judge could be dismissed for making an unacceptable decision. It was this kind of relationship between the King and the judiciary that gave rise to some of the conflicts leading up to the English Act of Settlement.
- The second was a model of autonomy in which the judiciary was totally separated from government and society. The author contended that such a situation existed, for a time, in post war Italy.[4]
- The third model was described as "responsive" or "consumer oriented," involving a balance between independence and accountability. This model, it was said, reflected the central ideal of a democratic system, "an ideal which frequently goes under the name of checks and balances — that power should never go uncontrolled and that even controlling power should not be irresponsible, that is, itself uncontrolled."[5]

Recent Australian publications on public sector management have canvassed various forms and degrees of supervision, control and reporting that may be involved in accountability.[6] It is evident that the objective of striking an appropriate balance between the requirements of effective and efficient autonomy and of appropriate responsibility can be elusive.

It is important, in determining what the balance should be in a given case, to have a clear idea as to why accountability, or responsibility, is regarded as an object worth pursuing.

There may be many different ways of categorising the ends that are served by accountability, but for present purposes, they can be divided into two: the first, pragmatic; the second philosophical. One objective of a properly constructed system of responsibility, under which A is controlled by B, or is responsive to the wishes of B, or is in some other degree accountable to B, is to improve A's performance; to make A more effective in whatever function is to be performed by A. Another objective of such a system is dictated by the political philosophy which informs our system of government. Power should not go uncontrolled, and must be responsible, and responsive, to the community.

Those considerations are applicable to the judiciary, as an institution, and to judges as individuals, just as they are to any other area of governmental activity.

In the context of the making of individual decisions in disputes that come before the courts, or in the trial of persons accused of crime, effectiveness primarily involves making the right decision. In this context the right decision is a decision that is just, according to law. The objective of accountability is that, provided it takes an appropriate form, it should promote good decision-making.

4 Ibid, p 60.

5 Ibid, pp 61–62.

6 J Uhr, "Corporate Management and Accountability: From Effectiveness to Leadership" in G Davis, P Weller and C Lewis (eds), *Corporate Management in Australian Government*, 1989, Centre for Australian Public Sector Management, Griffith University, Brisbane, Ch 11; J Wanna, C O'Faircheallaigh and P Weller (eds), *Public Sector Management in Australia,* 1992, Centre for Australian Public Sector Management, Griffith University, Brisbane, Ch 17. Published by The Macmillan Company of Australia Pty Ltd, South Melbourne.

The public are also interested in the integrity of the decision-making process. The method by which decisions are made must be, and be seen to be, just. The decision maker must be impartial, and the decision-making process must be transparent and fair. This is because the acceptability of judicial decision-making is essential to the stability of the community. Courts deal with the prosecution of offenders, and with the resolution of civil disputes between citizen and citizen, or between citizen and government. In the case of almost every judicial decision, there is at least one loser. Judicial decisions may provoke vigorous disagreement, but the peace and security of the community depend upon there being a general willingness to abide by them.

In short, in pragmatic terms, the ends to be served by accountability in judicial decision-making concern the quality of individual decisions, and community acceptance of the outcome of the judicial process.

At the level of political philosophy, democracy demands that all forms of governmental institutions are, in an appropriate manner, and to a sufficient degree, responsible and ultimately answerable to the citizens.

The matter needs to be considered, not only in terms of the position of individual judges, but also in terms of the courts of which they are members and of the judiciary as a collective body or institution. For courts, effective functioning includes dealing with the business of the court with due despatch and by procedures which are fair, which serve the ends of justice and which allow for reasonable access to the courts by citizens. For the judiciary as an institution, effectiveness includes the maintenance of the rule of law and the preservation of a just society.

In considering the forms of accountability applicable to the functions of the judicial branch of government, it is convenient to begin by examining the accountability that presently exists. As might be expected, this varies with the function in question. Judicial consideration of this issue usually distinguishes between two functions: adjudicative and administrative.[7] This distinction is not entirely satisfactory. An increasing number of modern judicial activities are not easily assigned to one category or the other. Moreover the distinction tends to overlook the third level of consideration; the judiciary as an institution. However, it provides a useful starting point for discussion.

Adjudicative accountability

The inter-relationship between independence and accountability is demonstrated by their applications to the making of judicial decisions. Paradoxically, they both lead to similar results.

The fact that judges are not amenable to sanctions administered by the executive government on account of unpopular decisions is generally regarded as an aspect of judicial independence; and so it is.

The most obvious sanction that might be imposed by a government aggrieved by a judicial decision is dismissal. The great constitutional battles in England which secured the result,

7 Eg *Mackeigan v Hickman* [1989] 2 SCR 796.

established in the Act of Settlement, that judges hold office, not at the pleasure of the King, but during good behaviour, were fought in the context of a struggle for power between parliament and the King. It was the capacity of the judiciary to make binding decisions determining the limits of power as between parliament and the executive that originally made it so important for parliament to secure the judiciary's independence of the executive. Much of the civil litigation that comes before the courts is litigation between citizens and the executive government. All criminal cases are fought as contests between the executive government and an alleged offender. The importance of securing the independence of the judiciary from the executive government is self evident.

The same conclusion follows, not from the application of the principle of independence, but from the proper application of the principle of accountability, once the purposes of accountability are clearly understood. One objective of accountability is good decision-making. Such decision-making in disputes between citizens and the executive government is promoted by leaving decisions in the hands of persons who have nothing to hope for and nothing to fear from the government. Another objective of accountability is to secure public acceptance of such decisions. The same follows. There is nothing in democratic theory which requires that judges be accountable to the executive government; the principle of the separation of powers dictates the opposite. Independence and accountability are not opposed, but work towards the same end.

Function of decision-making

There are long established principles governing the way in which judges perform their function of decision-making. These principles are aimed at serving the objectives of accountability. Judges are required to make their decisions only after they have heard full argument on both sides of the question. Judicial proceedings must be conducted in public. Reasons for decisions must be given, and must be stated publicly. Such reasons are routinely subject to appellate review.[8]

The above features of the judicial process are so firmly entrenched in the Australian legal system that it is easy to take them for granted, and overlook their significance. Consider, for example, the duty to give reasons for judicial decisions. When this duty is related to the objectives intended to be served by accountability its importance is apparent.

First, the existence of an obligation to give reasons promotes good decision-making. As a general rule, people who know that their decisions are open to scrutiny and who are obliged to explain them, are more likely to make reasonable decisions. Second, the general acceptability of judicial decisions is promoted by the obligation to explain them. Third, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions.

8 *Scott v Scott* [1913] AC 417; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465; Sir Frank Kitto, "Why Write Judgments?" (1992) 66 *Australian Law Journal* 787.

This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from judges, how many other decision makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those made by judges, are made by people who may choose whether or not to give their reasons. Many such decision makers strongly resist attempts to oblige them to give reasons. Nor is it the case that reasoned decision-making is required of all judges, even in communities whose legal and cultural background is similar to our own. In the United States, for example, appellate courts commonly dispose of appeals either without giving reasons at all, or after a statement of reasons in the most abbreviated form. That, however, is not our tradition. The reasoning behind various judicial decisions is often the subject of widespread comment, both learned and popular. Unfavourable comment may range from restrained criticism to violent abuse. Even so, judges must submit to the discipline of exposing and explaining their reasoning.

Similarly, the requirements that judicial proceedings be held in public, and that judicial decisions be subject to appellate review, are forms of accountability of substantial importance. Such requirements promote good decision-making and the acceptability of the outcome of the judicial process, and they are consistent with the idea that democratic institutions should conduct their affairs in a responsible manner. People who live in a community where justice is administered in public may easily overlook the fact that there are many places where that is not so. So much decision-making, including governmental decision-making, takes place in private, that the public need to be reminded of how unusual the judicial process is in this respect.

The ultimate form of accountability, which is consistent with the principles considered above, lies in the capacity of the Governor General, or the Governor, to remove judicial officers upon an address of both Houses of Parliament.[9] This is the method of removal that has applied to superior courts in England since the Act of Settlement, although the requirement of an address of parliament did not apply consistently to colonial judges until the second half of the nineteenth century.[10] Such removals have been rare, but one occurred recently in Queensland.[11]

These are the formal mechanisms of accountability applicable to federal judges, and to the judicial officers of the States and Territories of Australia, with the notable exception of New South Wales.[12] The position in New South Wales will be examined below.

Informal mechanisms of accountability

It is important to bear in mind less formal, but nonetheless significant, kinds of accountability. The corollary of the obligation of judges to conduct their business in public and to give reasons for their decisions, is that they are exposed, and are regularly subjected, to public comment and criticism. The practical importance of this should not

9 Eg The Constitution of the Commonwealth of Australia, s 72; *Constitution Act* 1902 (NSW), s 53.

10 An interesting examination of this history is to be found in PA Howell, "The Boothby Case" (unpublished Masters Thesis, University of Tasmania, 1965).

11 In the case of Mr Justice Vasta.

12 The Australian Capital Territory has, by the *Judicial Commissions Act* 1994, provided for the establishment of ad hoc tribunals but none has yet been constituted.

be underestimated, especially in an age when attitudes towards authority are no longer deferential, and are frequently the opposite. Being a judge is not a suitable occupation for the thin skinned. It is commonly, and erroneously, supposed that the law of contempt of court exists to protect judges from criticism. This belief is false, and based on ignorance of the law.[13] Public obloquy is a powerful sanction, and one to which judges are exposed by reason of the circumstances in which they operate.

Another matter of practical importance is peer review. This exists in a formal way in the appellate procedures to which judicial decisions are subject, but it also has a significant informal aspect. Judges generally value the good opinion of their peers and are sensitive to collegiate disapproval. There is nothing surprising about this; when one considers the responsibilities with which judges are entrusted, it is to be expected that most of them would be the sort of people who would take seriously the opinion of right thinking members of their profession. That opinion may be manifested, for example, in a rebuke from a Chief Justice, or even a suggestion that retirement be considered; something that most judges would take very seriously indeed.

Immunities

Any description of mechanisms of judicial accountability must also have regard to immunities. Just as members of parliament are immune from action in respect of what they say in the course of parliamentary debates, so judicial officers are immune from suit in respect of judicial acts.[14] The existence of this immunity has not gone unquestioned.[15] However, it is not understood that there is any current move in Australia to abolish or qualify it.

Such an immunity is not unique to judges. In the litigious context, it also extends to advocates, jurors and witnesses. In the wider governmental context, no one seriously suggests that, in the interests of accountability, a Treasurer ought to be liable in damages for economic harm suffered as a consequence of an ill advised decision; nor are parliamentarians at risk of being made liable in damages for the consequences of ill-considered legislation (especially since such a liability could only be brought into existence by an Act of Parliament).

A lesser known immunity of judges is their immunity from being obliged to submit to investigation of their reasons for their decisions. In a recent Canadian case[16] the Supreme Court of Canada considered this immunity in the context of a Royal Commission established to enquire into the charging, and prosecution, of a person accused of murder, and his subsequent conviction and sentencing. It was held that the legislation was not effective to abrogate the privilege which entitles judges to refuse to testify about the grounds of their decision. They must give reasons for their judgments, but they cannot be examined about them. That privilege was established in the seventeenth century, when the House of Lords made an unsuccessful attempt to have Lord Chief Justice Holt explain why he had quashed an indictment for murder.[17]

13 *Attorney General for NSW v Mundey* [1972] 2 NSWLR 887 at 905–910.

14 *Sirros v Moore* [1975] QB 118; *Moll v Butler* (1985) 4 NSWLR 231; *Yeldham v Rajski* (1989) 18 NSWLR 48.

15 Eg AA Olowofoyeku, *Suing Judges: A Study of Judicial Immunity,* 1993, Clarendon Press, Oxford.

16 *Mackeigan v Hickman* [1989] 2 SCR 796.

17 *Knowles' Trial* (1692) 12 How St Tr 1179.

The Supreme Court of Canada said:[18]

> "The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence."

Of course, such a privilege may be abrogated by valid legislation. This is not the occasion to explore the interesting question of the potential scope for such legislation, having regard to the principle of separation of powers, especially in the Commonwealth area.

Position in New South Wales — Judicial Commission

As was noted above, to any description of the formal mechanisms of judicial accountability in Australia there needs to be added an account of the position that applies in New South Wales. Since 1986, New South Wales has had a Judicial Commission which receives and considers complaints against judicial officers. This is a precedent that has not been followed either by the Australian Government, or by the governments of other States and Territories, with the exception, to an extent, of the Australian Capital Territory.

At the time the Judicial Commission was established, it was said to have been modelled on similar organisations which have been set up in most States of the United States of America. Parliamentary debates suggest that California was the model particularly in mind.[19]

When the *Judicial Officers Act* 1986 was originally enacted, the tenure of State judicial officers was defined by s 4 of that Act. Judicial officers remained in office during ability and good behaviour, and could not be suspended or removed except in accordance with the *Judicial Officers Act,* or another Act of Parliament. Section 4 has since been repealed and, by the *Constitution (Amendments) Act* 1992, a new Part 9, dealing with the judiciary, was included in the *Constitution Act* 1902 of New South Wales.[20] Section 53 of the *Constitution Act* provides that no holder of judicial office can be removed from office except as provided by Part 9. It goes on to provide that the holder of a judicial office can be removed by the Governor on an address from both Houses of Parliament seeking removal on the ground of proved misbehaviour or incapacity. By definition, holders of judicial office include judges, masters and magistrates.

The functions of the Judicial Commission, which was established by the *Judicial Officers Act* 1986, are not limited to dealing with complaints against judicial officers. For example, the Commission also has an important role in relation to judicial education. It can justifiably claim leadership in Australia in that field. However, it is the complaints function that is of present relevance.

18 [1989] 2 SCR 796 at 830; see also *Valente v The Queen* [1985] 2 SCR 673 and *Beauregard v Canada* [1986] 2 SCR 56.

19 For a general description of similar institutions in the United States, see J Rosenbaum, *Practices and Procedures of State Judicial Conduct Organisations,* 1990, American Judicature Society, Chicago. For a summary of decisions, see *Judicial Discipline and Disability Digest,* July 1986–December 1988, Supplement 1990, Mathias, Lawton and MacManus (eds), American Judicature Society, Chicago.

20 By a referendum held in March 1995 the provisions in the *Constitution Act* preserving the independence of the judiciary were entrenched.

Any person may complain to the Commission about a matter that concerns the ability or behaviour of a judicial officer. (It seems reasonably clear that, in this context, ability means the same thing as capacity.) As might be expected, having regard to the tenure of judicial officers, the Act draws a fundamental distinction between complaints about matters which could justify parliamentary consideration of the removal from office of a judicial officer, and other complaints. Complaints of the former kind are defined as serious.[21] Other complaints, unless they are summarily dismissed,[22] must be classified as minor. This statutory classification can give rise to misunderstandings, because complainants, not unnaturally, may well regard matters as serious even if they could not, viewed objectively, be considered as justifying parliamentary consideration of the removal of a judicial officer.

Complaints which are classified as serious go to a Conduct Division constituted either by three judicial officers, or by two judicial officers and a retired judicial officer.[23] The ultimate power of a Conduct Division is to make a report to the Governor, setting out its decision as to whether the complaint is wholly or partly substantiated, and whether the matter could justify parliamentary consideration of the removal of the judicial officer from office. As a rule, proceedings before the Conduct Division are in public, although there is a discretionary power to conduct them in private.[24] If it were decided to proceed for removal of a judicial officer, following the report of a Conduct Division, the matter would then need to go to parliament.

The Judicial Commission has no power to discipline or suspend judicial officers. There is a power in the relevant head of jurisdiction to suspend a judicial officer on an interim basis in certain circumstances. A minor complaint may be referred to the relevant head of jurisdiction.[25] A Conduct Division may deal with a minor complaint, but if the complaint is substantiated all it can do is to inform the judicial officer of its opinion or decide that no action need be taken.[26]

Save for proceedings which go to the Conduct Division and are dealt with in public, all of the proceedings of the Judicial Commission are to be conducted in private.[27] Although the Commission makes an annual report to the Attorney General, its reports do not make public that which the Act requires to be treated as private. The information to be included in reports is limited to information about the number of complaints received and disposed of in various ways, and about the nature and pattern of complaints.[28]

Before the Commission classifies a complaint as minor or serious and, in the latter case, refers it to a Conduct Division, the Commission is obliged to conduct a preliminary examination of the matter itself.[29]

21 *Judicial Officers Act* 1986, s 30.
22 The grounds for summary dismissal are set out in s 20.
23 *Judicial Officers Act* 1986, ss 21, 22.
24 *Judicial Officers Act* 1986, s 24.
25 *Judicial Officers Act* 1986, s 21.
26 *Judicial Officers Act* 1986, s 27.
27 *Judicial Officers Act* 1986, s 37; see also s 36.
28 *Judicial Officers Act* 1986, s 49.
29 *Judicial Officers Act* 1986, s 18.

Following that preliminary examination, it is obliged summarily to dismiss the complaint if it is of the opinion that one of a number of circumstances exists.[30] One such circumstance is that the person complained about is no longer a judicial officer. Complaints are to be summarily dismissed if the Commission is of the opinion that they are trivial, frivolous, vexatious or not in good faith, or if there was available a satisfactory means of redress, or of dealing with the complaint or the subject matter of the complaint. The most obvious example of the latter possibility is a right of appeal. There are also other grounds for summary dismissal.

A substantial majority of the complaints that have been made to the Judicial Commission have been summarily dismissed.[31] A small number have been classified as minor and referred to the head of jurisdiction, and an even smaller number have been referred to a Conduct Division. Since 1986, six complaints have been referred to a Conduct Division. Two were classified as minor and were ultimately held to be baseless. One, relating to medical capacity, was classified as serious. A report was forwarded to the Governor and the judicial officer resigned. The remaining three were classified as serious and in each case the judicial officer resigned, either before the Conduct Division commenced to deal with the matter, or before it concluded its deliberations.

The number of complaints received by the Judicial Commission is not large. There are, in New South Wales, 273 judicial officers and they deal with approximately 300,000 cases annually. In the year 1993–1994, there were 31 complaints against judicial officers. This is fairly representative of past years.

Most of the complainants are unsuccessful parties to litigation. Some matters have been referred to the Commission by the Attorney General, and there have been complaints made by the Bar Association and the Law Society. The majority of complaints involve allegations of actual or apprehended bias, or failure to give a fair hearing. In the case of most court proceedings in New South Wales, there is either a written transcript or a tape recording of the proceedings. The Commission regularly resorts to this source of information when considering, for example, allegations of discourtesy or failure to give one party to the proceedings an opportunity to present his or her case.

In considering the nature of matters that come before the Judicial Commission, it is important to bear in mind two things. First, the Commission is not a forum for the administration of criminal justice. If an allegation of criminal conduct were made against a judicial officer, then the officer would be entitled to due process of law and, in the ordinary course, the matter would be taken up by the prosecuting authorities. Of course, the Judicial Commission might have to deal with the aftermath of a successful prosecution or, alternatively, its own enquiries in relation to a complaint might disclose information which might have to be referred to other authorities. Second, the existence of the Independent Commission Against Corruption has a bearing upon the work of the Commission. Allegations of corruption against judicial officers would ordinarily fall to be investigated by the Independent Commission Against Corruption rather than the Judicial Commission. In practice, there are arrangements under which the Independent Commission Against Corruption is kept regularly informed of complaints to the

30 *Judicial Officers Act* 1986, s 20.

31 The details appear in the Annual Reports of the Commission.

Judicial Commission which are of such a nature that they ought to be brought to its attention. There is routine liaison between the two Commissions. In the result, it would not normally be expected that the Judicial Commission would find itself dealing with allegations of criminal conduct, or allegations of corruption that would properly come before the Independent Commission Against Corruption.

The Commission provides what is regarded by many as a useful mechanism for formal consideration of problems that in the past had to be dealt with informally and, sometimes, in a rather awkward fashion. Most of the matters that now come to the Judicial Commission would, in earlier times, have arrived on the desk of a Chief Justice or other head of jurisdiction, or an Attorney General. Presumably that is what still happens in other Australian jurisdictions.

Higher levels of accountability in New South Wales

An evaluation of the work of the Judicial Commission could require a comparison with what occurs in other jurisdictions and, because that is not publicly known, such a comparison is not possible. It is, for example, not possible to say whether the existence of a formal complaints mechanism promotes complaints. Perhaps it merely channels into one body complaints that in the past, or in other jurisdictions, would be made to heads of jurisdiction, or an Attorney General, or members of parliament, or the press. There is nothing to prevent a person who complains to the Judicial Commission from, at the same time, complaining to somebody else. I have no doubt that some complainants also approach the Independent Commission Against Corruption or members of parliament.

One thing, however, is clear. As a result of the existence, since 1986, of the Judicial Commission, and, more recently, the Independent Commission Against Corruption, judicial officers in New South Wales are subject to formal procedures of accountability significantly different from those that apply to their counterparts in other Australian jurisdictions.

To an outside observer, this difference between the system of accountability that operates in Australia's largest jurisdiction, and the system that operates in the other Australian jurisdictions, must be striking.

In an article published in 1990[32] the Chief Judge in Equity of the Supreme Court of New South Wales criticised the current arrangements in New South Wales and suggested, as an alternative, the establishment of Australia wide machinery for the determination by a judicial tribunal of the existence of misbehaviour or incapacity which could warrant a judge's removal from office. I am not aware of what, if any, consideration has been given by any Australian government to those carefully formulated proposals.

To summarise, the formal mechanisms of accountability that exist in relation to the Australian judiciary generally are to be found in their obligation to operate in public and to give reasons for their decisions, and in the exposure to appellate review of their decisions, together with the fact that they may be removed from office by the Governor General or Governor upon an address of the relevant Houses of Parliament. In the case of judicial officers who are members of a New South Wales State court, to that must be added the complaints mechanisms of the Judicial

32 MH McLelland, "Disciplining Australian Judges" (1990) 64 *Australian Law Journal* 388.

Commission of New South Wales and the Independent Commission Against Corruption. There are, in addition, important informal mechanisms of accountability, especially exposure to public criticism and peer review.

Administrative accountability

Financial autonomy

Judicial discussion of the related subjects of independence and accountability ordinarily distinguishes between the performance of adjudicative and administrative functions.

At the two extremes, this distinction is useful and important. If the making of a judicial decision in an individual case is taken to be one extreme, then the other extreme would be the handling of finances by courts which enjoy financial autonomy. For practical purposes, and putting to one side the special case of South Australia, it is only the courts in the federal justice system that have such autonomy. The High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Administrative Appeals Tribunal, operate on one line budgets and, except in the case of the High Court, where the responsibility is collective, the Chief Justice of the court (or President of the tribunal) has the legal responsibility for making decisions as to the expenditure of the funds provided by the government. In the case of the State courts, with the exception of South Australia, from a financial point of view the courts are administered by a department of the executive government responsible to a Minister. The judiciary have no capacity to make decisions affecting the allocation or expenditure of funds. In particular, they have no capacity to make decisions on issues as to priorities which arise in that connection. That puts them at a substantial disadvantage by comparison with their federal counterparts in terms of their ability to make administrative improvements, but it also spares them questions of financial accountability.

It remains to be seen, in relation to the federal courts, exactly what practical form financial accountability will take. Of course, the courts are required to make reports to the relevant Minister on their expenditure of funds, and they are subject to audit. So long as nothing untoward occurs in relation to such expenditure, questions of accountability are, for practical purposes, largely limited to matters of adequate reporting. The difficult question, that one hopes will never have to be answered, is what would occur in the event of some alleged misapplication of funds? This could arise, for example, if it were suggested that an improvident contract were entered into in relation to the acquisition of supplies. In a situation where it is the Chief Justice who is responsible for the management of the resources made available to a court, it is not easy to foresee exactly what practical form of accountability would operate in such a case. Would it be political accountability on the part of the Minister responsible to parliament? Or would there be a more direct form of accountability on the part of the Chief Justice? And, if so, exactly what form would that take?

These are novel questions for the Australian judiciary, but there is United States experience which may be relevant. There, there are many courts, including federal courts, which enjoy financial autonomy, and heads of jurisdiction regularly deal directly with local legislatures in relation to finances.

The answer may be that, just as the parliament has conferred financial autonomy on federal courts, so it would lie within the power of parliament to take such autonomy away. This would appear to be the ultimate sanction for abuse of such autonomy. No doubt, when parliament initially gave such autonomy to, for example, the Chief Justice of the Federal Court of Australia, it was well aware of the implications of the recipient's tenure of office. Conferring financial independence upon a person who can only be removed from office by the Governor General upon an address of both Houses of Parliament is something rather different from conferring financial independence upon a person who can be removed from office by a Minister. In practice, however, the problem may never arise. Funds made available to courts are modest and judges are likely to be conservative in their management. Proper audit procedures, and adequate requirements as to reporting, should serve the purpose.

Accountability and matters of judicial administration

Whilst the distinction between the adjudicative and the administrative functions of judges is useful and relatively easy to apply when dealing with cases at one extreme, it must be acknowledged that there is a large intermediate area of judicial activity which is not easily assigned to one category or the other. One of the problems affecting the subject of judicial independence and accountability in modern times is that this uncertain area also happens to be a growth area.

The authorities establish that certain kinds of activity that are sometimes described as administrative are, in terms of independence and accountability, assimilated to the position of judicial decision-making. The simplest example is the assignment of cases to judges.[33] Clause 14 of the United Nations Basic Principles of the Independence of the Judiciary provides that the assignment of cases to judges within a court is an internal matter of judicial administration. The reasons for this are obvious enough. Just as external interference in the actual making of judicial decisions is repugnant to our notions of judicial independence, so is such interference with decisions as to the assignment of judges to hear particular cases. This can often be a sensitive matter, especially from the point of view of public perception, and the community demands assurance that decisions made by Chief Justices, other relevant heads of jurisdiction or heads of division on the assignment of cases are just as free from outside pressure as decisions of cases themselves. In *Valente v The Queen*[34] Le Dain J referred to the collective independence of tribunals as extending to such matters directly affecting adjudication as assignment of judges, sittings of the court, court lists and allocation of court rooms. It appears to be generally accepted that the principle of separation of powers would, either by law or convention, protect the assignment of cases to judges from any wider form of accountability than applies to judicial decision-making.

A more difficult situation, however, exists in relation to certain other administrative functions that are usually confided either to the Chief Justice or to committees or bodies of judges within a court structure. The Canadian authorities assimilate decisions as to times and places of court sittings to judicial decision-making, although the reason for that is not as obvious as in the case of assignment of cases. One of the reasons why this is becoming a problem area

33 Cf *Rajski v Woods* (1989) 18 NSWLR 512.

34 [1985] 2 SCR 673 at 709.

is that, with greater public interest in the efficiency of the operation of the justice system, wider concern is being shown about aspects of the arrangement of court business that were previously regarded as matters of judicial administration and left to the judges themselves. Court rules and procedures, techniques of case management, listing arrangements, the giving of priorities to certain types of cases, and a number of other administrative matters are all capable of having a substantial effect upon the efficiency with which a court disposes of the business that comes to it. Some of these are matters where, either for legal or practical reasons, the decision-making has to be left to the judges themselves. However, not all such matters come within that category. Moreover, as Ministers find that they are being called to account, in parliament and in the public arena, for the degree of efficiency with which the court system operates, they are sometimes frustrated by their inability to deal directly with what are regarded as problems giving rise to inefficiency.

This, in recent times, has become a difficult area of the relationship between the executive and judicial branches of government. The executive government has the power of the purse, but although, at least in State jurisdictions, the judiciary have no control over the application of financial resources, for practical purposes they have effective control over the other administrative matters of the kind referred to above.

What form of accountability should exist in relation to such matters? If a State Attorney General were challenged as to the adequacy or efficiency of the arrangements that exist in relation to circuit sittings of a Supreme Court, then the Attorney General would presumably respond that that is a matter within the control of the Chief Justice. In New South Wales, at least, it is the Chief Justice who decides the times and places at which the Supreme Court will sit. The Supreme Court Rules so provide.[35] However, decisions as to circuit arrangements are of considerable political sensitivity. Local members of parliament are actively lobbied by their constituents, and proposals to vary circuit arrangements attract the keen interest of local lawyers and citizens. Again, the arrangements that exist within a court as to the priorities that will be allocated to certain types of case are usually determined by the Chief Justice or the relevant head of jurisdiction. In a time of scarce resources and overburdened court lists, a decision that, for a certain time, a specified degree of priority will be given to criminal cases over civil cases can have important consequences for litigants.

In the past, there has been no procedure of accountability in relation to such matters. Pressures of public comment and opinion are, of course, significant. Members of parliament do not hesitate to complain if they think their constituents are being treated unfairly in respect of allocation of circuit time, for example. The interest of the press can be aroused in relation to such subjects. On the other hand, it is unlikely, even in New South Wales, that a bona fide decision on such a subject would attract the attention of the Independent Commission Against Corruption or the Judicial Commission.

Informing the public

There is, however, another form of accountability that has in recent years been voluntarily adopted, and that is of particular significance in relation to matters of this kind. Since 1990,

35 Pt 1A, r 1.

the Supreme Court of New South Wales has published an Annual Review. The matters referred to in it are not matters in respect of which the judiciary is under a legal obligation to report to anybody. However, it is acknowledged that the public has a legitimate interest in being informed about the decisions that are taken concerning administrative matters of the kind to which reference has been made. The Annual Review contains a substantial body of detailed information about the internal administration of the court. It covers the work of each division of the court; sets out statistics as to progress in dealing with the business of the court; provides comparative figures year by year; and explains the reasons for various decisions of an administrative nature. It also discusses the problems confronting the court and explains the manner in which they are being addressed. Similar information is now published by the other courts in the State court system. A number of other Australian jurisdictions adopt similar procedures.

This acceptance of the public's entitlement to information about the way in which the courts function is also reflected, within the New South Wales court system, in the appointment of a Public Information Officer of the Supreme Court of New South Wales. This appointment has been a considerable success, and has been generally welcomed by the media. The officer is a ready source of information about court matters of which journalists take extensive advantage and also prepares information for the public about the operations of the courts, and the judiciary as an institution.

There is also, in New South Wales, a Civil Justice Research Centre, which is an operating division of the Law Foundation. That body conducts research into, and regularly publishes information concerning, such matters as the costs of litigation, the practical effect of case management procedures, and the demographics of users of the court system. Sometimes such information is both revealing and surprising.

For example, an assertion that is repeated so frequently that it has come to be regarded as axiomatic is that only rich people or poor people can afford to come to court; middle income earners have no access to justice. After puzzling as to how to reconcile this article of faith with what I was personally observing as to the people who were actually litigating in the Supreme Court, at least in personal injury cases, I asked the Centre to prepare, after empirical research, a profile of the users of the Common Law Division of the court. The study found that the average annual income of plaintiffs was $33,636 for men and $24,758 for women. This was fairly typical for the whole community. Of course, the explanation of this result is related to the nature of the work of the division and the fee charging practices of lawyers who operate in that field. The point is that an exercise of that kind can be useful and informative, and the work of the Centre is a valuable aid to informing the public about the way in which the justice system works in practice.

In recent years there has been a great deal of change in the approach taken by the courts towards the provision of information as to how they operate. This is accountability of the responsiveness, rather than the control, variety. Many of the subjects in question are of such a nature that the purposes to be served both by independence and by accountability require that the courts be seen to operate in a manner that is free from political interference. At the same time, the problem of access to justice is, amongst other things, a political issue. The problem is how to reconcile the imperative of accountability with the circumstance that decision-making powers which have an important bearing on access to justice are vested in

people who have security of tenure and who must be, and appear to be, beyond the reach of political influence. The best practical solution to the problem lies in the recognition, by the judiciary, of the right of the legislature, the executive and the public, to know what administrative decisions are being taken by the judiciary, and why. Judges have traditionally accepted that the corollary of their adjudicative independence is an obligation to make their decisions openly and with full reasons. The same reasoning must apply to their administrative independence.

As was observed in relation to financial autonomy, the ultimate sanction for the abuse of any form of independence is its loss. Abuse of independence can consist not merely in the making of perverse or insupportable decisions; it can also consist in a refusal to satisfy legitimate public expectations as to the provision of information. Although some forms of administrative independence are like adjudicative independence, such that their removal would require something in the nature of a revolution, others are not. They could be taken away. It is, therefore, in the interests of the judiciary and of the public that, whilst not submitting to external control in these matters, the judiciary behave with appropriate responsiveness, especially in relation to furnishing information.

The future

Dr Henry Kissinger[36] made the point that the original separation of powers theorists saw the concept as dynamic; the objective was to avoid despotism, not to achieve harmonious government. Like the economic theorists who saw the public good as served by selfish individual competition, or the balance of power statesmen who saw progress resulting from the pursuit by States of their self interest and did not seek to avoid crises, or even wars, those who supported the separation of powers believed that each branch of government, pursuing its own interests, would, in the result, restrain excess. Harmony between the three branches of government is not the natural order of things, nor is it necessarily and unequivocally desirable. There will be constant tensions as to areas of control and responsibility, and there will be changes in circumstances that will unsettle previous resolutions. There is no ideal or permanent balance; rather, there is a relationship that constantly changes, although the rate of change increases or abates at various times.

For the purposes of the present topic, we are living in a time of accelerated change. The reasons are numerous. The relative powers of the legislature and the executive constitute a subject of current interest, and it is unlikely that the role of the judiciary would be left unquestioned in a re-examination of that subject. We live in an age of consumerism and of demands for increased access to justice. These subjects are of political concern and politicians are unlikely simply to pass them over to the judges to deal with. Insofar as judges exercise powers that bear upon the matter, there is inevitably a demand to call them to account. We also live in an age that questions, rather than accepts, all forms of authority.

It is inevitable that existing arrangements will continue to be under scrutiny. It was originally an alliance between parliament and the judiciary, against the executive, that established the fundamentals of those arrangements. Parliament's strategic interest will continue to be

36 *Diplomacy,* 1994, Simon & Schuster, New York.

to shore up the judiciary's independence of the executive. There are three main possible sources of threat to the independence of the judiciary:

- The first would arise where the executive dominated parliament.
- The second would arise where parliament, responding to political expediency, preferred tactical to strategic objectives.
- The third would arise where, in the estimation of the public, the judiciary no longer deserved their independence.

Tensions between the three branches of government will certainly involve, amongst other things, demands for increased judicial accountability. When those demands are considered rationally, attention will need to be directed to the objects of accountability. How will a particular proposal promote effective decision-making of an adjudicative or administrative kind? How will it affect the acceptability to the public of the judicial process or the court system? How, for example, will it affect the impartiality of the judge and the judicial process? How does it relate to our political theories of what is constitutionally appropriate?

Pressure for greater accountability

It is beyond question that, in terms of less formal accountability, there has been greater progress in the last five years than had occurred in the previous 50 years. And in New South Wales in the last ten years there have been substantial changes in terms of formal accountability.

Nevertheless, there is constant pressure for more and more accountability.

From time to time suggestions are made that, as in many State jurisdictions in the United States, Australian judges should be subject to the process of popular election. Those suggestions frequently come from people who are not fully informed as to what occurs in the United States. If, by saying nothing more about them, I appear to be less than respectful towards such proposals, it is to be hoped that it will not be inferred that this is unintentional.

There is, however, another form of quasi-accountability that has gained serious support in some quarters. Candidates for judicial appointment in the United States, State and Federal, are being increasingly required, by the process of election or appointment, to parade their "attitudes" for popular and governmental consideration. Insofar as this applies to people before appointment it seems to involve some kind of advance accountability. Governments are occasionally exhorted to establish procedures of this kind in Australia so that they, and the public, may know the calibre of prospective appointees. The asserted lack of accountability of judges after appointment is often advanced in support of suggestions of the kind just mentioned. It is to be hoped that this paper will lead to some re-examination of the assumption that there is a lack of accountability. The objectives of accountability identified at the commencement of this paper (good and acceptable decision-making) must also be borne in mind.

If it be agreed that the public acceptability of the outcome of the judicial process is a primary objective, and that the reality and the appearance of impartiality of adjudication is a key element in whatever arrangements are devised, then this must weigh heavily against such

proposals. If candidates for judicial office were required to submit, for the prior approval of the executive government, their attitudes towards, or opinions upon, issues likely to arise for judicial decision, then this would surely undermine confidence in judicial impartiality and independence.

To require potential appointees to commit themselves, publicly, to views on issues likely to arise for their decision as judges, would be to subvert the theory that, following appointment, they will decide cases impartially, after hearing full argument from the interested parties. And if prospective appointees are to be examined in advance, by persons including representatives of the executive government, presumably the subjects on which their views will be most closely investigated will be those which concern matters likely to be of interest to the government, including matters likely to arise in litigation to which the government is a party. Citizens who are in dispute with the government will have the satisfaction of knowing that the judges who decide their cases have passed through a formal procedure designed to assure the government, prior to appointment, of their ideological soundness.

It may be argued that under the present arrangements it would be naive to assume that governments do not seek to inform themselves, so far as they are able, of the opinions of people being considered for appointment. No doubt they do. It does not follow, however, that we should institutionalise a process calculated to mock notions of judicial impartiality and independence.

There is a trend, which will continue, towards the formulation of corporate plans or charters for courts. This is discussed in the recent Access to Justice Report published by the Sackville Committee.[37] I have nothing to add to the discussion of the subject in that Report.

The development of time standards is a subject of significance for the institutional accountability of courts and the judiciary. It is also a subject that raises, in an acute form, the problem of the overlapping responsibilities of all three branches of government. To illustrate the point, let me take an example from North American experience. In the United States, both in the Federal and State jurisdictions, and in Canada, for reasons that need not presently be elaborated, there are time limits within which persons accused of crime must be brought to trial. In some cases those time limits are, at least by New South Wales standards, quite strict, and if they are not adhered to then an accused person must be set free. They can, of course, be waived by an accused. It would be possible, in an Australian jurisdiction, for a legislature to enact similar legislation or for a court to declare that it aspired to bring all persons to trial within a specified time. Two questions would need to be addressed. The first is the question of resources, and the second is the question of the consequences of failure to comply with the relevant time standard.

It may be very easy for the judges of a court to agree that, to the extent of the resources made available to them, they would establish procedures to endeavour to see that all persons accused of crime come to trial within a specified time. But what would be the value of such an aspiration unless it were accompanied by a commitment on the part of the executive government to provide the resources necessary to achieve that end? And what would be the sanction for failure

37 Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, 1994, Canberra, AGPS, pp 350–359.

to achieve the result unless, for example, the legislature were willing to enact legislation to the effect that persons not brought to trial within the specified time should be permitted to go free? It is not intended to suggest that there is no answer to those questions, but they require careful consideration.

Time standards are a matter that require co-operation between the various branches of government, and co-operation of that kind has, in the past, not been conspicuous. One of the principal reasons for inefficiencies that have burdened the justice system in the past, and for the difficulty in getting rid of them, is a kind of standoff that has existed between the executive and the judiciary. This has sometimes been dignified as a proper regard for independence, but that is over generous. In truth, the capacity of the courts to function with reasonable efficiency depends upon a combination of factors, some of which are under the control of the legislature, some of which are under the control of the executive, and some of which are under the control of the judiciary.

Accountability which embraces responsiveness

It is only when we face up to the implications of that problem that a way forward will emerge. It is easy for the judiciary to take the attitude that they will simply decide cases according to law, and by just procedures, in the manner and to the extent to which the resources provided by the executive government enable them to do so. If resources are inadequate, they are not to be blamed. It is easy for the executive government to say that the judiciary are provided with funds, and it is up to them to devise and implement procedures that will enable those funds to be expended in such a way that all citizens have reasonable access to justice. It is easy for the legislature to say that the executive and the judiciary between them must provide access to justice or answer to the elected representatives of the people. Ultimately, however, the problem is to find a way of identifying and combining in a suitable fashion the responsibilities of the three branches of government.

The judiciary's best answer to pressure for accountability involving control of the judiciary lies in embracing that form of accountability which involves responsiveness. The community accepts, and insists upon, adjudicative independence, so long as judges function openly and explain their decisions. Similarly the community will allow, and come to demand, administrative independence, but only so long as judges function in that area with the same openness. It is a collective responsibility of the judiciary to see that the community values judicial independence and, at the same time, to meet the legitimate expectation that judges, in appropriate ways, give an account of themselves.

Independence and accountability*

The Honourable John Doyle AC†

The judiciary is an institution. As members of that institution, judges have a responsibility for its functioning and maintenance. In this essay Chief Justice Doyle contends that the institution of the judiciary is founded upon judicial independence. This independence is balanced by the accountability of the judiciary to the public for the manner in which it administers justice. Accountability has traditionally been achieved through judges sitting in open court, giving reasons for their decision, and having their decisions subject to review by a higher court. Modern approaches to accountability impose additional requirements relating to performance indicators and benchmarking. The Chief Justice, however, questions whether there are relevant and important matters in the administration of justice that cannot be reduced to measurable outputs and benchmarks.

As newly appointed judges, you are probably thinking mainly about how you will discharge your office as a judge and about the changes in your life that will come with appointment to judicial office.

You will soon realise, if you have not realised it already, that the judiciary is an institution, and that you are now a member of that institution. I propose to raise with you a matter that concerns the judiciary as an institution, although it can have an impact on us as individual judges.

I propose to speak about the accountability of the judiciary as an institution for the public funding that it receives, as well as the use of outputs and outcomes as a measure of the work of the judiciary and as a basis for funding decisions.

As the third arm of the State (the legislature and the executive being the other arms), the institution of the judiciary is an important part of our constitutional structure and of our system of government.

The institution of the judiciary comprises all members of the judiciary at any one time. Those who are part of the institution must accept a responsibility for the state of the institution. We should see ourselves as the occupiers of the institution, rather than the owners. We are responsible for the functioning of the institution and for its maintenance. We are entitled to make changes to it. But we are not entitled to change the institution at will. Any changes that we make must be consistent with the principles on which it is based

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† Chief Justice of South Australia.

and must be with a view to it exercising its constitutional function effectively, having regard to contemporary circumstances.

We must ensure that as an institution the judiciary is forward looking. We must aim to administer justice in a way that reflects contemporary conditions and is consonant with contemporary attitudes. But equally we must adhere to the principles on which the institution is founded. We must not unthinkingly adopt transient fashions or anything that would compromise the fundamental principles of justice.

We should also acknowledge the collective experience and wisdom that shaped the rules and conventions that apply to us, even though we must also bear in mind that when circumstances change, rules and conventions should sometimes change.

These are things to bear in mind when we consider the accountability of the judiciary for the public funding that supports it and our collective responsibility in that respect.

The independence of the judiciary, both institutional and individual, is one of the fundamental principles on which our systems of justice and government are based. There is no need to expand on that point to this audience.

I summarise the position by saying that judicial independence is a constitutional imperative, an institutional imperative, a legal requirement, an expected personal attribute of each judge, and a community expectation.

Judicial independence is balanced by rules, originating in the common law, that make the judiciary and its individual members open to public scrutiny, and provide a form of accountability that is consistent with judicial independence. This is accountability in the sense of an obligation to provide an explanation for the exercise of legal authority over others.

Those rules are that a judge must sit in open court, must give reasons for a decision of substance and, in most cases, is subject to review by a higher court, these days by way of appeal. As well, by longstanding tradition and by law, the work of the judiciary is open to public scrutiny, comment and criticism.

These rules, and the public scrutiny that they permit, mean that the judiciary is accountable to the public collectively for the manner in which it administers justice. This is true accountability. It is a requirement to expose our processes to public scrutiny, to explain our decisions to the public, to submit to correction on appeal, and to submit to comment and criticism.

No judge worthy of the judicial office will resent or fear such accountability. To the contrary, we should welcome it, even when it is misused. The independence that we have could not survive without that accountability.

The judiciary can perform its function only if properly supported with public funds, appropriated by parliament at the request of the executive government. To function we must have premises, equipment and staff, and that requires public funds.

Whether the administrative support that we require is provided by a government department or, as in South Australia, by an independent statutory authority, the support of the judiciary requires a substantial commitment of public funds.

Because the administration of justice is an essential aspect of the functioning of the State, it is the responsibility of the executive government and parliament to ensure that the funds required for this purpose are made available.

It is appropriate that the expenditure of that money should be accounted for. The public is entitled to expect that someone will ensure that the funding is used for its intended purpose and that the money is spent sensibly.

For a long time public or government accounts and accounting operated on a model called the compliance and liquidity model. It is a model intended to ensure that funds are applied to the stated purpose and that there are sufficient funds to meet the anticipated expenses of the coming year.

Over the last 10 or 15 years we have seen a change in the model used for public accounting. The shift to accrual accounting aims to ensure that all costs of the relevant transaction or activity are recognised and are covered by revenue collected.

More significantly, the move to accrual accounting has been part of a move away from a focus on cash inputs to a focus on outputs from the public sector and on outcomes from those outputs. Performance measures are used which focus on outputs and outcomes. Funding is based not on the cash inputs that will be needed in the current year by the existing system or entity, but on the outputs and outcomes that will be provided by the system or entity.

It is not for the judiciary as an institution to criticise this change. An aim of the change is to achieve greater management efficiency, by enabling the government to allocate resources on a basis that reflects full accrual costs, and that is referable to the outputs and outcomes to be achieved. Rightly or wrongly it is thought that the private sector approach to accounting is appropriate to the public sector. It is thought that this will lead to greater efficiency and ensure that services are provided in a manner that focuses on and is more responsive to the needs of the customer or user.

Whatever we might think about the new approach, there are some realities that we should recognise. There is a move towards smaller government, at least at the level of rhetoric, and certainly towards a reduced tax burden, and so a smaller pool of public funds is available to be spent on government activities. We all need to ensure that the diminishing public funds are used as well as they can be. How best to achieve this is a serious issue. I merely record in passing the following observation about the new approach by two experts.[1] They said that they had found:

> "…a lack of rigour in the definition and measurement of outputs, a lack of clarity and measurability in the choice of outcomes, and an almost total lack of reflexive feedback performance measurement systems to provide vital feedback as to the impact of purchased outputs on policy driven incomes."

1 TM Carlin and J Guthric, "A Review of Australian and New Zealand Experiences with Accrual Output Based Budgeting", Third Biannual Conference of the International Public Management Network, 2000. Available url: <http://www.inpuma.net/research/papers/sydney/carlinguthrie.html>.

There is something else that we need to remember. As the same commentators observed:[2]

> "…accounting is a form of communication that both represents reality and constructs that reality through the discourse and images created. That is, accountants, in choosing what to account for and when and how to account for it, shape contextual factors (eg society), which in turn impact on the form of accounting chosen."

In other words, the new approach to public accounting shapes public attitudes. Presenting accounts in a particular form can generate the belief that what is being measured is reality, is relevant and is appropriate. We should not underestimate the force of this factor.

It is not surprising that those who supervise the provision of public funding to the courts and to the judiciary would want to apply the same approach to public funding. To them we appear to be just another part of the public sector.

The courts are asked to record outputs, usually cases heard or matters disposed of. The identification of outcomes has proved elusive, and that is hardly surprising. A fair hearing according to law by an independent and impartial judge is a clear enough concept, but hardly a measurable outcome for accounting purposes, and yet that is the object of our trial process. How one would describe the object and outcome in relation to a matter that is settled or results in a plea of guilty, I am unsure.

A linked development is the proposal that the courts should collect and report performance indicators and then engage in benchmarking. Benchmarking involves developing performance standards which can then be used to compare the organisation and efficiency of a court with the benchmarked standard. The benchmark might reflect, for example, the standardised cost (on a full accrual basis) per matter disposed of in a given year, or the time taken to bring a matter from initiation to final disposition.[3] The purpose of benchmarks is to permit comparison between different courts, the comparison being an objective one. The proponents argue that this should lead to improved cost effectiveness, enhance external transparency and assist the internal management of the court.

There are some obvious problems with all this.

Dispositions seem to be a favoured measure. Anyone with an interest in court management knows the limited value of counting dispositions. If all dispositions are counted, there is little to be learned. In our court, dispositions include orders made for the admission of practitioners, actions disposed of by default, actions that settle, civil trials, criminal trials and guilty pleas. Any meaningful analysis of the work of our court must separate matters into a number of different categories. Once one does so, other problems emerge. We are a court of 14 judges. Broadly, half our judicial resources are used in a civil and civil appellate jurisdiction, and about half in the criminal and criminal appellate jurisdiction. If, in a given year, one judge of a notional seven judges allocated to the civil jurisdiction spends all of the year on one long

2 Ibid.

3 For an example of benchmarking in practice in the Family Court see S O'Ryan and T Lansdell, "Benchmarking and Productivity for the Judiciary" (2000) 10 *Journal of Judicial Administration* 25 at 28.

case, as can happen, that will significantly affect the number of dispositions in the category of civil trials. Cases are not homogenous units, but if we develop too many categories we do not end up with a useful abstraction.

Experience has shown that comparing the performance of different courts against a single benchmark is meaningless. It is of no relevance to compare the number of marriages dissolved by the Family Court and the average time from lodgement to disposition, with the number of criminal trials heard by the Supreme Court and the average time taken from lodgement to verdict.

There are other matters equally important in the efficient management of the resources of the court that are not susceptible to expression in the form of outputs or performance indicators. The quality of judgments is one, the perception of judicial independence is another. I am doing no more than touching on what we all know instinctively, the difficulty of devising clear and simple means of measuring the workload and output of a court.

There is another problem with the use of outputs and, as it happens, with benchmarks. I have already made the point that, in the administration of justice, there are relevant and important matters that cannot be reduced to measurable outputs and benchmarks. The danger of selecting certain matters as outputs to be recorded or as benchmarks, is that this can itself give rise to a distortion in behaviour. First, there is a tendency to assume that the matters that can be recorded are the important matters. This is a particular problem because the performance indicators generally proposed are mainly quantitative. Those that are proposed as qualitative measures focus on quality measured by client satisfaction. Secondly, there is a danger that the system, whatever it is, will observe that others are treating these matters as important and will itself begin to behave on that basis.

I can give a very simple illustration. In our court we have a benchmark or performance measure which states that we expect to dispose of a certain percentage of criminal trials within a certain period of time from their initiation. This is a performance measure that we ourselves developed and I regard it as an important measure of the court's performance. But I am conscious of the danger of focusing too much on this and of the danger of forgetting, at the end of the day, that it is the quality of the justice that is important, not just the time taken. While the efficient disposition of our criminal caseload is important, we must be careful not to allow the administration of justice to be dominated by targets that we ourselves have set, let alone targets that might be set by others.

In relation to outputs, performance indicators and benchmarking, we have a number of tasks. The first is to avoid wasting precious resources by collecting and reporting information that is of no use to anyone. This is a distortion in itself as resources are expended on activities outside the objectives of the organisation. We are presently wasting precious resources in this way, at the request of government. We have to explain that this is not part of a device to avoid appropriate scrutiny of our own efficiency.

We need to identify sensible and useful measures of our own workload and output. As Chief Justice, I wish to know whether we are taking longer to dispose of criminal trials this year than last year and the year before. If we are, I need to find the reason and determine whether the reason is something that can and should be remedied, consistent with the requirement to do justice. I need to know whether the number of matters undisposed of, civil or criminal, is

increasing or decreasing, because this is an important indicator of whether we have too many or too few judges. The measurement of the workload and output of courts is in an undeveloped state, and much work needs to be done.

We need to explain clearly the lack of utility of inappropriate performance indicators, if they are proposed. We must not let the form of discourse shape the perception of reality. Dispositions are easy to count, and they are a popular means of measuring a court's performance. But if we allow the perception to grow that the number of dispositions per judge per year is necessarily a measure of the quality of justice, we will be preparing the way for damage to be done to the administration of justice. Likewise, if we surrender to the notion that only what can be measured is important and accept that because the quality of justice cannot be measured it can be quietly be put to one side, we are again preparing the way for damage to be done to the administration of justice.

In short, we need to report appropriate information with appropriate explanation and analysis of trends.

The current reporting needs to improve.[4] As an institution we need to get these messages across to a sceptical audience, while making it clear that we are doing everything sensible to ensure that justice is administered efficiently, that public funds are used intelligently and efficiently, and that we have no objection to being accountable by reference to criteria that are useful.

There is another and deeper issue, and it is of the utmost importance.

Underlying the moves to make courts accountable through output-based budgeting are two basic misconceptions.

- The first is that courts are a service provider.
- The second is that because the executive government controls the parliament, and administers public funds appropriated for the courts, the judiciary as an institution is accountable to the executive government for the administration of justice by reference to criteria chosen by the executive government.

The notion that courts are a service provider is a dangerous sort of half-truth. Court registries do provide a service of a kind to people who use them. And courts, their staff and the judiciary should be sensitive to the needs of the people who come to the courts, and who are affected by the administration of justice. But the application of the model of a service provider to the courts is inappropriate for the reasons suggested by Justice Drummond[5] and Chief Justice Spigelman:[6]

- the compulsive power of courts to command attendance and otherwise exercise judicial power
- the position of courts as one arm of government
- the determination of matters according to law
- the power of courts to make law.

4 See, for example, Productivity Commission, *Report on Government Services 2001*, 2001, Canberra AGPS, Chapter 9, Court Administration. Available url: <http://www.pc.gov.au/gsp/2001/index.html>.

5 "Towards a more compliant judiciary — Part II" (2001) 75 *Australian Law Journal* 356.

6 "Seen to be done: The principle of open justice — Part II" (2001) 74 *Australian Law Journal* 378.

The notion that the courts are accountable for the administration of justice by reference to criteria chosen by the executive government is fundamentally dangerous. The courts are an independent arm of government. Justice is not administered according to criteria set by the executive government. If it were, the courts would no longer be independent, but would be subservient to the executive government. It is fundamentally important that the courts resist the notion that criteria chosen by the executive government are the criteria by which the administration and quality of justice are to be determined. If anyone is to identify those criteria it must be the courts, although there is no reason why they should not do so in consultation with the executive government. We need to make it clear that when we insist upon these points we are not resisting appropriate scrutiny of the use of the public money committed to the administration of justice.

It is important to remember that the aim of benchmarks is to cause an organisation to align its behaviour and to match its philosophy with the benchmarks selected. The selection of benchmarks will usually reflect the selector's perception of the needs and interests of those who use or are affected by the outputs. In relation to the administration of justice, the selection of relevant benchmarks is, in effect, the determination of the way in which justice should be administered. This is not the function of the executive government.

On the other hand, nor should we select benchmarks for our performance in a manner that suggests that we expect the administration of justice to operate according to our own convenience. We must be conscious of the fact that, in administering justice, we serve the community. If benchmarks are developed, we should be prepared to listen to the views of others, including the executive government, as to the matters those benchmarks should reflect.

My purpose in raising these matters is to alert you to these significant developments and to encourage you to reflect on them. As I have said, it is important that as an institution we be responsive to the call for a proper accounting for our use of public money and, to the extent that we can account by reference to outputs, there is no reason why we should not do so. But we must be fully alive to the dangers that I have identified and we should not hesitate to point them out when it is appropriate to do so.

We must firmly resist any suggestion that the funding of the judiciary can be linked to outputs or benchmarks which are inappropriate, and we must firmly resist any suggestion that it is for the executive government to determine the criteria by reference to which the efficiency and quality of the administration of justice is to be determined.

Finally, I want to emphasise that what I have said is not a call to battle. In my own State there has not been any difficulty over these matters. My aim is to do no more than to bring the issues to your attention and to encourage you to reflect on them.

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