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## Judicial Attributes

National Judicial College, Beijing, Conference - 30 October to 4 November 2005

### JUDICIAL ATTRIBUTES

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#### Appointment

Some of what I want to say about judicial attributes reflects my Australian experience in respects which will differ significantly from yours. Nevertheless, I suspect that we face common problems, even if they arise in different ways.

In Australia, governments give quite detailed attention to the appointment of officers to work in the public service. In one sense, and perhaps the sense you will appreciate better than I do, public service appointments to offices which enjoy significant independent power and have decision-making functions, will usually be by way of promotion from within the public service. Of course, it may be possible to bring in outsiders at a high level, but because the senior officer will be working in a closely defined position in the public service hierarchy, it is likely that, one way or another, the functions of the office will have been carefully identified, the qualities of the individual required to exercise those functions will have been given careful thought and a process will have been established to identify an appropriate person for the position. If necessary, the appointee may be provided with professional training.

Appointment to a court will inevitably differ from this general public service model in a number of respects. The most obvious is that even the lowliest judicial officer will be faced immediately on taking up his or her position with heavy responsibilities and will be vested with very significant authority. Furthermore, the lowest judicial officers are likely to have the least support when they start. For example, the magistrates who staff our Local Courts and deal with the bulk of cases in Australia are often sent to work in country areas, for a period, where they may have very limited access to colleagues doing similar work.

In New South Wales, as in most parts of Australia, judicial appointments are largely made from senior members of the practising legal profession. That is less true in some areas than others, but is more true now than it was in the past. For example, 20 or 30 years ago magistrates in New South Wales were generally appointed by way of promotion from legally qualified officers working in courts' administration. The Court of Appeal, on which I sit is entirely constituted by judges each of whom, before appointment as a judge, was a senior barrister who had spent most of his or her professional life arguing cases, especially in the superior courts.

This background gives rise to some curious results, in our judicial culture. First, it is assumed that barristers share qualities of judicial officers and therefore little time has been spent seeking to identify what makes a good judge and how those qualities should be identified in relation to potential appointees.

Indeed, the very process of appointment is poorly defined. In principle, judges are selected by the Minister of the Government responsible for the administration of justice, who is known as the Attorney-General. Although he or she is sometimes called the "first law officer", the Attorney rarely appears in court, or gives legal advice to the Government, but rather acts as a Minister responsible for policy-making for the Government in legal matters. The Attorney-General is frequently, but need not be, even by convention, a trained lawyer. Often he or she has been a politician for many years and, if a lawyer, may have spent little time as a practising lawyer and even that time may have been many years before. As a result, most Attorneys-General are out of touch with possible appointees to the courts. They rely, to varying degrees, on advice from leading members of the profession, or the Chief Judges of the various courts, in making appointments as vacancies become available.

That is not necessarily a bad process, because the judge who presides over a court will wish, so far as possible, to have confidence in the individuals appointed to the court, both in terms of their competence and character.

On the other hand, such informal arrangements have disadvantages. First, the process is somewhat haphazard, with the result that potential appointees may be overlooked. Secondly, there may be a bias towards that group of potential judges who are personally known to the Attorney-General or the Chief Judges, perhaps because they mix in the same circles, either socially or professionally. There is plenty of evidence based on sociological studies and management research which demonstrates that such informal and word-of-mouth processes discriminate against groups who are in some way "outside" the small clique of decision-makers. Traditionally, in our culture, women and individuals from ethnic minorities have been less likely to be appointed as judges than men from an Anglo-European background. This result is unfortunate, not merely because it is unfair to individuals who are overlooked, nor even because it may mean that the best people do not get appointed to the Bench, but also because blatant under-representation of particular social groups may undermine the confidence in which the courts are held by the community at large.

It is an irony that the courts have been quick to point out, under our Human Rights legislation, how these informal arrangements may work against women and minorities, but have failed to ensure that these lessons are applied in relation to the courts themselves.

There is some concerted effort being given by the Judicial Conference of Australia to changing this system. In particular jurisdictions, changes have already been effected. For example, when a new Chief Justice was appointed to the Supreme Court of Victoria recently, the appointment was preceded by a selection process which included advertising the position in newspapers circulating around the country.

### **Judicial training**

The traditional view in Australia is that, because judges are appointed from the ranks of experienced advocates, appearing in court on a daily basis, they would be entirely familiar with the process of judging. That view is counter-intuitive: someone who has spent his or her life presenting arguments on behalf of a client may need to have an acute appreciation of what arguments are likely to persuade a court and what are not, but it by no means follows that such a person will automatically assume the mantle of judicial wisdom when called upon to play the rather different role in adjudicating between competing claims. The underlying assumption is still made, even though the consequences have been softened in recent years. Thus, when I was appointed to the Court of Appeal earlier this year, I was listed to sit on my first case on the day of my swearing-in as a judge. On the other hand, I have recently spent a week undertaking a judicial training course for new judges, although some five months after I started as a judge and after I had probably sat on about 100 appeals.

My practical experience as a lawyer certainly allowed me to evaluate arguments and consider the correctness of judgments made by trial judges, without a great need for additional training. Similarly, I was aware of the different roles of judges and advocates in court and could, I hope, adjust my behaviour to the new role, largely by talking rather less than I had been accustomed to, and without being told that that was necessary.

On the other hand, other aspects of the work I was required to learn by trial and error. That process is continuing, a circumstance which may be inevitable, no matter what training one receives.

By way of example, our Court of Appeal generally sits with a bench of three judges. As the most recent appointment, I am generally the most junior judge on the bench. Sometimes, because of the workload, we sit with two judges of appeal and a trial judge or two judges of appeal and a retired judge who is acting as a judge of appeal on a temporary basis. However, even in those cases, I am still the most junior judge in terms of experience, even when not necessarily the most junior in status. I was quickly conscious of the fact that I had no real understanding of how a collegiate court worked. I knew the views of my more senior colleagues undoubtedly deserved respect, not only because they were senior to me in the judicial hierarchy, but also because their experience so greatly outweighed mine that I was forced to doubt my judgment if I disagreed with their views. What was one to do when, after a hearing, the judges met in a room behind the court to consider how the judgment should be written and what the proper result should be?

Somewhat to my surprise, I discovered that I was treated as a person entitled to form my own views, whether they agreed with the views of others or not. That, of course, did not mean that I was necessarily treated as an equal: if we were discussing a case involving an aspect of corporations law, with which I had little experience, the views of a colleague with greater experience in that area would obviously be taken more seriously by the third member of the Court who might be wavering.

Even when I came to understand these simple principles, uncertainty remained in other respects. For example, due to the pressure of work, there is an obvious advantage to everyone if a judgment can be delivered immediately the argument has finished. If one goes away to prepare a written judgment, that usually takes more time. If two members of the Court are ready to deliver oral judgments, should I say that I am not, especially when my uncertainty is as to the proper result? I asked the President of our Court, who made it clear that even if only one member of the Court is not ready to give a judgment, the Court's judgment will be reserved. I accept the principle, but I remain conscious of the fact that to exercise that right may lead to more work for my colleagues.

These examples may seem trivial to those of you who have sat on courts for many years and may seem a burden of riches to those of you who have to sit alone without the benefit of consultation with fellow judges as to how to decide a case. However, the day-to-day operation of the Court alerted me to attributes which one would wish to find in a good judge (especially one's colleagues) which I had not fully appreciated before my appointment.

### **Legal knowledge**

It may seem obvious that a good judge should be a good lawyer, in the sense of having a good knowledge of the law. But there is of course much more to it than that.

First, depending on the sort of cases one hears, it may be necessary to have a detailed knowledge of the law applying to many different areas. It is easy to be an expert in some areas; it is less easy to be expert across all areas. Lawyers who do a lot of criminal work very rarely do much corporate or commercial law. Lawyers who are expert in town planning and environmental law will probably not be expert at corporate and criminal law. Very few lawyers are expert in shipping law. Accordingly, one must be skilled in legal research methods and, hopefully, have available the necessary assistance and resources to do the research.

Secondly, although it is important that the law is sufficiently straightforward to be understandable by anyone in the community who needs to know what it is, for a judge, the law is infinitely complex. That is not necessarily because the rules are complex (though sometimes they are) but because the disputes which give rise to their application will differ, at least in some respects, from case to case. Our training is to identify similarities and keep a lookout for differences and then decide whether the differences are relevant or should produce a different result, from an earlier case. For a judge, the law is not an abstract set of rules and principles, so much as a process by which those rules and principles are applied to particular disputes.

Thirdly, it is the job of lawyers who appear in our courts to know the relevant principles of law and explain to the judge how they should be applied in the particular circumstances. It is important that the judge is as good a lawyer as the advocates appearing the court. Otherwise, a clever advocate may be able to persuade a judge to reach a decision which may not be correct. Accordingly, a judge must not only be a good lawyer, he or she must be good enough to deal with the best lawyers who appear in his or her court.

### **Deciding the facts**

Here, much depends upon court procedure. I understand that here you may be required to decide the facts on the papers prepared by the parties. We almost never adopt that approach because we think it important to have oral evidence taken from witnesses. Some of our judges think it is important to see the witness in order to tell whether they are telling the truth and whether they seem to be responsible and reliable people. In some cases that can indeed be important. However, what is of greater importance is that, whether the evidence is in the form of a transcript of questions and answers, or is evidence which is listened to as it is given, the witness is required to comment on the other side's evidence. In other words, we would think it very hard to choose between two different versions of a particular event, such as a motor vehicle accident unless the discrepancies had, in each case, been

put to the other witness. Sometimes, of course, that process provides no assistance; nevertheless, it often allows the plaintiff's witness to explain why she could not have been mistaken as to the place at which the accident took place because she was, on the day in question, walking between two particular shops. If it is put to the defendant's witness that the accident took place where the plaintiff's witness said, rather than where he said, he may agree that that is possible because he had no particular reason to remember the exact place until he was asked to think about it some weeks later. Accordingly, this process may help the judge decide which witness is correct and thus to determine a critical fact.

I said that some judges believe it is important to see or hear a witness giving evidence in order to assess whether they are truthful or not. Sometimes that helps, but sometimes it does not. A witness may appear nervous or hesitant in the witness box because she is lying, or because it is a most unusual experience and she feels very uncomfortable about being in a court at all. Some judges think they are well able to judge these things, whilst others do not. Ultimately, it is all a matter of human experience and psychological insight.

In our system, if the judge is simply left at a loss as to which party is correct, the case will go against the party which had the burden of proof. Usually, in civil trials, it is the plaintiff who has to prove his case if he says he has been wronged. If the judge is simply unsure whether the accident occurred as the plaintiff says, or as the defendant says, but accepts that the defendant was not negligent if it occurred as she said, then the plaintiff will fail. In criminal cases, this point is even more clearly made. The prosecution must prove the guilt of the accused beyond reasonable doubt. If the proof does not reach that high standard, the accused must be acquitted. In some civil trials, fraud is alleged. Although proof in such a case will not mean that the defendant goes to prison, but merely has to pay damages, we nevertheless say that a judge should not be satisfied that there has been fraud merely by saying that that is more likely than not: we ask a judge to be "comfortably satisfied" before making such a finding. Again if the judge is left in a state of uncertainty, the plaintiff must fail. In truth it may have happened as the plaintiff said, but if the judge cannot be satisfied that it is so, the plaintiff's loss is the legally correct result.

Fact-finding can be a very frustrating process, because in many situations, one party is right and the other is wrong, but the court simply has no mechanism of determining with certainty where the truth lies. However, other cases do not fall into that category because they require evaluation of questions of degree. For example, whether a person has exercised reasonable care in driving a car or operating a piece of machinery will not be readily decided simply by knowing exactly what occurred.

It is clear that in such cases, experience of common social or workplace situations will be as important as deciding whose description of an event is closer to the truth.

### **Dealing with litigants**

The working life of a judge is devoted to resolving disputes between individuals and corporations, or individuals and the Government or even corporations and the Government. Sometimes, people in business or in government can behave irrationally and foolishly and can become emotionally involved in litigation in a way which makes disputes difficult to resolve. Sometimes people in government can be difficult to deal with, perhaps because they think that judges are simply another arm of the government and therefore should find for the government in the case of a dispute. (This will be more common in your system than ours.) Nevertheless, the most difficult litigants are usually those who are involved in personal disputes with members of their families, with neighbours or with strangers. Courts run most efficiently when cases are presented by lawyers, but that is largely because the job of explaining the law and the role of the court, and controlling the court process, is undertaken by the lawyer representing a client. Where people represent themselves in court, the judge must take over that role. The way in which the judge undertakes that task is different from the way a lawyer deals with a client in his or her private office. Nevertheless, the experience of practice as a lawyer is extremely useful background for a judge. On the other hand, the situation in court is not the same as that of the lawyer. For example, the lawyer can explain that a judge is unlikely to provide a particular remedy and explain the reasons; in the lawyer's office, the client can express anger, frustration, irritation and the lawyer can help to work through those feelings. In court, that process is public and much more difficult. Further, with other cases waiting to be heard, there may not be time to explain everything in detail and patiently. There are ways in which I think judges need the skills of a police officer. A police officer has a baton and can use it to subdue unruly people. Nevertheless, the police do their job best when they do not use the baton. However, the personal skills which must be called into play are varied and not

easily taught. Much the same may be said about judges exercising control of their courtrooms. A polite, calm and even-handed manner must be attempted at all times.

### **Enforcing orders**

The job of a judge is made much easier if he or she knows that any order which is made will be enforceable, because there are mechanisms to do that. If somebody is convicted and sent to prison, there are police officers and jailors who give effect to the conviction and sentence. If somebody is ordered to pay money, there are sheriff's officers who can seize property or take other steps if the debtor is recalcitrant. The administration of justice is greatly diminished if those enforcement mechanisms are not effective. Furthermore, it affects the way a judge resolves cases, because the judge will always be wondering whether the proper application of the law should be modified to achieve a result which is likely to be obeyed, rather than one which goes further, but is likely to be ignored. Of course the judge is not responsible for the administration of justice; I merely mention this as an example of a circumstance which must be borne in mind. The best that the judge can do is be aware of such external influences and think about whether they should be ignored or recognised in particular circumstances.

### **Is the work interesting?**

At home, we hear from time to time of judges who retired early because they were "bored", or of barristers who did not want to take appointment to a court because they were concerned that they would become bored. For our lawyers, I sometimes think that being "bored" is really code for saying that they believe they could earn more money in private practice and would like the extra money, in place of any status which may come from being a judge. In other cases, I think it merely refers to the nature of the job, which involves a degree of patience, and an ability to reduce one's thinking to written form reasonably quickly, clearly and precisely. Some people struggle to write clear judgments and do not enjoy the exercise. They would prefer a life where they are arguing cases before a court, rather than writing the judgment at the end of the case.

Nevertheless, I think some judges do actually get bored with the work.

I think there are several answers to this problem, although I have not spent long enough as a judge to be sure how it will affect me in years to come.

First, many judges have told me that the trick is to keep up-to-date and not let long delays arise between the completion of the hearing and delivering judgment. If you have a transcript of the hearing, you will not depend entirely on memory, but if you don't, then memory will be essential, together with whatever notes you have taken during the hearing, which, in my case, are always inadequate. Even if you have a transcript of the hearing, if you have to go back and reread it, that takes more time. Delay is therefore inefficient and tends to be self-perpetuating. The result is, if not boredom, a sense of frustration.

Secondly, as I have said, the application of the law is infinitely complex because the circumstances of different cases will always vary. Boredom may indicate a loss of interest in that perception of the law and its application.

Thirdly, boredom may simply reveal a loss of interest in the affairs of people. That suggests boredom with life, as much as boredom with work as a judge.

Being a good judge requires a level of insight into one's own thought processes and, I suspect, requires a process of self-monitoring of one's emotional responses. Sometimes one needs professional help in this respect. A key sign of a developing problem is, I think, a weakening of one's sense of responsibility for the work one is doing.

In conclusion may I say that, from my own experience, judging is difficult work. From listening to our colleagues and reading their judgments, I am sure we could tell our colleagues how to improve their work. That means that they could give us similar insights. As with all intellectual, sporting or commercial activities, we as individuals can continually improve our performance. A willingness to pursue improved performance should keep the work interesting and hopefully enjoyable. That is more

likely to happen when we recognise the difficulties, frustrations and constraints under which we work.

END NOTE

1. A Justice of Appeal of the Supreme Court of New South Wales, Sydney, Australia.