SEVEN RANDOM POINTS ABOUT JUDGING

The Hon Justice Robert Beech-Jones*

Thank you for your introduction. Congratulations on your appointments.

I am sure you all know what a privilege it is be appointed. While being a judge has its moments, some of which I will describe, I have just about always found it enjoyable. Our work is interesting. By community standards, we have good conditions of work. Most of the time we are treated with respect.

Last year, in giving the equivalent speech, my colleague Justice Jagot moved quickly from the peak of the Justice mountain into the valleys below and addressed the topic of writing judgments, something I will mention briefly.

I am going to stay in the valley of practical things under the topic "Seven Random Points about Judging". I apologise in advance if the points are obvious or if they get overtaken by the substantive sessions at the conference. To paraphrase the start of a summing up: please feel free to accept or reject these points; what weight you give them to is a matter for you and you alone, it is entirely a matter for you as judges.

1. Judges are Meant to Resolve Disputes, Not Create Them

I have always had a rough conception of civil hearings as a forum whereby the parties get it off their chest, get an answer (which they may or may not like) and then move on with their lives. I always felt some unease if a case I decided prompted some other separate case, especially against the lawyers, or some reputational damage for a litigant completely out of proportion to the case that I heard.[*]

This understanding translates into a couple of rules, or better yet, guidelines. One that was reiterated to me by many judges when I started was to never call a witness a liar unless you have to. You will be invited in numerous cases to find that a witness is a liar of some form or another, such as "a bald-faced liar", "a congenital liar", "a pathological liar", "a manipulative liar" and so forth. Even if you think the submission is right, can I suggest you resist going along with it unless you really have to. A finding by a senior judge that a party or a witness lied can be devastating for their reputation and them personally. Witnesses can be professionally and emotionally affected by the stigma. A judge who repeatedly and continually finds that witnesses are liars will discover that over time, their currency as a judge is devalued. Now, in some cases, such a finding cannot be avoided, especially if fraud or something like that is

* Justice of the High Court of Australia. This is an edited version of a speech delivered for the commencement of the National Judicial Orientation Program in Brisbane on 17 March 2024.

alleged. But in many cases, a finding that the evidence of witness X was unreliable in various respects and the evidence of witness Y is preferred is more than sufficient.

An analogous guideline is to confine ourselves to explaining why one party lost without destroying them. As an illustration, one judge commenced his reasons for dismissing a Family Provision Act claims as follows:

> "This is a claim by a 60-year-old son against the estate of his father. The contrast in the respective attributes and fortunes in life of father and son is marked. The father's story is one of survival, hardship and determination. The son's life, on the other hand, seems like a modern urban fiasco – for which no one else is to blame and certainly not his father."

The balance of the judgment detailed the plaintiff's shortcomings at length. His attempts at tertiary education were said to be characterised by "frequent changes of course from which he dropped out, one after another", his personal relationships were described as "chequered" and his aspirations for the future were said to have a "mildly delusional quality" about them. An entire section of the judgment is entitled "[a] father's disappointment". I think you get the flavour. This litigant did not just lose his case. According to the judge, he was a loser. I simply ask, was that really necessary to deal with his claims? A matter for you judges, entirely a matter for you.

Another related guideline is to avoid labelling the lawyers who appear before you as incompetent or negligent unless it is necessary. I find it hard to see the point of a judgment that reads: "I might have found for party Y, but their lawyers were hopeless and didn't run this other case which I, the Judge, have conceived of." This gives the judgment a provisional quality and leaves the losing litigant thinking they should have won. There may be very good reasons why that case wasn't run in a particular way, which the judge does not know about. Of course, there are some contexts where the judge must opine on the lawyer's performance, such as an application for a lawyer to bear costs. My point is to try and avoid a vent over your frustration about the legal representatives if you can. The venting needs to be left for kicking the cat, metaphorically of course.

2. Writing Judgments

The single greatest concern for almost all judges is their number of outstanding judgments. You can easily trace a judge's mood by the number of outstanding judgments they have at any given time.

I have already referred to Justice Jagot's address on this topic last year, and I cannot recommend a read of her Honour's talk more highly. Amongst many good points is one standout message that permeates all good advice to judges: keep going forward, which in this context means just keep writing. Don't stop even to clean up.

I know you are going to have a session on judgment writing, but I am going to get in first with three supplementary comments to Justice Jagot's address.

The first is mostly applicable to trial judges. It reduces to the statement, "ex temp the small stuff". Generally, if you reserve every decision, especially every interlocutory decision, you will sink. If you think that there is something groundbreaking still to be written about a request for further particulars or security for costs, then good luck to you. Of course, there are exceptions - the novel question of law on a pleading point or the admissibility of critical tendency evidence - but for many interlocutory decisions, the better value for everyone, including you, is giving the parties the decision as soon as possible.

If you are anxious about ex temps, can I suggest that you start with a type of interlocutory judgment you expect you will give a lot and then sketch out a general template to be followed, such as: (i) what the motion is about; (ii) the nature of the proceedings; (iii) the background to the motion; (iv) the applicable rule and principle; (v) the parties' argument; and (vi) the application of the rule. If you don't have a jury and you need to adjourn for an hour or two after the argument before you hand it down, specify a time when you will come back that day and deliver the reasons. Go back to chambers, close the door and write down the missing bits from the template. These are the type of judgments that will not improve if you reserve them for longer. They will just stack up.

The second suggestion concerns final judgments after a contested hearing, which are complex issues that have lots of permutations as to the outcome. With these judgments, I found myself going over and over the structure of the judgment in my head, which would then become a block to starting writing. That was especially so if I did not really know what the answer was or where I was going when I started out.

If you're stumped, then I suggest you first start with a chronological set of facts. If you do that, you will identify the contested historical facts that you have to resolve, which will be the next part of your judgment. When you have got to that point, write a short summary of each party's case and, by that point, you are at the pointy bit. There are not that many legal problems that remain knotty after the facts are found. Often, when you have found the facts, a lot of the permutations that worried you simply fall away.

The third suggestion is to avoid jokes in judgments. I think it's generally a bad idea. It might seem funny to some, but the litigants, especially the losing side, are unlikely to see the humorous side of it. But these are matters for you as judges.

3. Vexatious Litigants

One of the most valuable sessions I did at this conference was a session on vexatious litigants. The session for this conference includes Andrew Ellis, who I have had before me as an expert forensic psychiatrist. When I did the course, this session was presented by Grant Lester, who did the most magnificent impression of a vexatious litigant that I have ever seen; it was spooky.

Since I did the course in 2012, the problem of vexatious litigants for courts has continued to grow. The problem was supercharged during COVID-19 by the rise of sovereign citizens. We often talk about this issue in terms of the strain on courts and that it is considerable. However, in civil cases, we should not lose sight of its impact on other litigants. For those litigants, being on the receiving end of vexatious suits can cause real distress and mental harm. I think courts have an obligation to be very firm with proceedings and litigants that are obviously specious, and that is something not always appreciated by some intermediate courts of appeal.

At the outset, it is important to distinguish between the vexatious or querulous on the one hand and litigants who are just unrepresented on the other hand. It might be covered in the session here, but trust me, you will get pretty good at spotting the difference. I will just offer two related tips for dealing with vexatious litigants for you to accept or reject.

First, do not engage in a dialogue with vexatious litigants. Instead, invite them to address the particular point and stay quiet. Firm but quiet. Our job is not to make vexatious litigants feel comfortable in court or think that we are providing them with a platform. They are entitled to a reasonable opportunity to be heard but no more than that. In terms of natural justice, simply stating at the outset, "why should your claim not be struck out because it does not plead a cause of action?", is often sufficient to bring their attention to the salient issue they should address. Some vexatious litigants draw energy from dialogue with judges, and in such cases nothing you say beyond stating once, "this is not a dialogue, please continue", will help.

It is not uncommon for some vexatious litigants to start asking questions of the judge and making applications for adjournments and the like. No matter how hard it is, resist engaging. If an adjournment application is made, simply tell the litigant to say what they want to say about the adjournment and the substantive application, stay quiet and then deal with them together on their merits.

Second, impose a time limit for their submissions during which you try and stay quiet to let them speak.

4. Keep the Trial Moving

I understand you will have a session about the criminal trial from hell. When I did this session, it was led by John McKechnie, a very experienced former Judge from Western Australia. His mantra for that session stayed with me for both criminal trials and civil hearings, which was "keep the trial moving". It was the best advice I have ever received as a Judge. If the participants in a trial get the impression that time is unlimited, then it will never end.

Setting the tone for a trial is crucial. If you can, give your rulings straight away. If you can't ex temp them, try ruling with reasons to come later. If you need to deliver your reasons orally during the trial, do it before 10:00am or when the jury has morning tea or have gone home for the day.

With some trials, counsel develop a habit of raising point after point that they say requires the jury to leave the court, causing the jury to go in and out of the courtroom all the time. It must drive the jury mad, and with some courtrooms it can take forever because the jury room is far away. If this goes on, start having these arguments on counsel's time rather than the jury's time. To address this, I would sometimes appoint 3:00pm on a Friday afternoon or even later for everything to be done in the absence of the jury and send the jury home, rather than have them cooling their heels in the jury room for 50 minutes just to hear a question.

Another thing in terms of timing that I have noticed over time is that some prosecutors have stopped stacking up the witnesses outside the court. This meant that when defence counsel undertook a short, efficient cross-examination, we would get to 12:30pm to be told that there were no more witnesses for the day, so everyone would go home. I know it's a hassle for people to hang around a courtroom waiting to give evidence, but you preside over trials of serious charges such as murder, sexual assault and drug trafficking, and that inconvenience has to give way to the interests of justice. Generally, I would prefer to give counsel a half-day to prepare their address than waste half a day twice a week because we had run out of witnesses.

This brings me to an important statistic and a possible relaxation of the McKechnie mantra. That statistic is that 80% of material errors in a criminal trial occur in the last 20% of the trial, that is, during the addresses and the summing up. Actually, I completely made that statistic up, but I think it's about right.

Time and time again in the New South Wales Court of Criminal Appeal, I saw errors occur because the trial judge did not get help from counsel early enough about the things they needed to keep the addresses on track and deliver a proper summing up. There may been a fuzziness about how the Crown put their case. Was it joint criminal enterprise or extended joint

criminal enterprise? If so, what was the predicate crime? What were the overt acts of the conspiracy? What limb of lack of consent did the Crown rely on?

The earlier you can pin down the Crown as to how precisely it puts it case and then nut out the elements to go to the jury, the better. This is where time made up in the first half of the trial can help; that time can be better utilised at the business end of the trial. If counsel ran the first half of the trial efficiently, let them start addresses an hour later. If you need to, start your summing up an hour later to nail down the difficult direction.

5. Getting Rolled on Appeal

In December 2017, I started hearing a class action. The hearing continued for another year. I spent six months full-time and another two months part-time writing the judgment, which was around 2,500 pages in length. I found three defendants liable. Following that, I spent around 12 weeks spread across a year hearing and writing on the follow-up issues of contribution and damages. Just as I finished one of those judgments, the two-week hearing of an appeal brought by one of the defendants from my principal judgment commenced in the New South Wales Court of Appeal. The rumour mill was reporting during the hearing that my judgment was toast. The judgment on the appeal was handed down a few months later. When I got to the fifth page, which was still only a summary of the numerous legal and factual errors that it said I had made, I stopped. I have never read the rest.

Getting rolled on appeal can be annoying for some judges, very upsetting for others, and cause some judges to become catatonic while others are utterly indifferent.

Although it is hard as trial judges to see it this way, getting rolled on appeal is a fact of life as a judge, and we need to accept that it will happen and that almost always it is not a reflection on the judge at first instance. The tone and substance of cases can change dramatically on appeal. I have already mentioned the difficulties that can arise in criminal trials, and, in fact, jury verdicts are often set aside on points that were never raised at the trial. Some cases are hard, some law is fuzzy and sometimes people just see it differently to how you do. As hard as it was for me to accept, appellate courts must afford just according to law; affording justice to the poor old trial judge is not part of the equation.

There are a number of coping mechanisms, including some gallows humour and, in my case, denial. One of the worst things to do is to let the fear of being overturned cause you to stop writing or dictate how your write. If I hear a judge has a lengthy career and has never been overturned, then I am suspicious because it may be that the judge is trying to write appeal-proof judgments or not write any judgments at all, or it may well be that the appeal process in that jurisdiction is dysfunctional.

6. Beware of Secondary Trauma

I once heard a murder trial where the accused was an 18-year-old boy who slashed his girlfriend's throat. He then went out to the nature strip and stabbed his own throat, rendering himself a quadriplegic. The trial was as horrible as you can imagine. The girl's traumatised family were in court, as were the accused's parents who were caring for him.

I actually had a number of ghastlier trials, but in retrospect, I recognise that this particular trial really got to me. The psychiatric evidence at the trial traced the accused's descent from a well-balanced teenager to the state he was in when he killed his girlfriend and then his time in jail as a quadriplegic. I think the trial just reinforced my parental anxiety about all the things that can go wrong in a young person's life. I didn't speak to anyone about that trial then or since. I should have.

In the program, you will have a session on wellness and maintaining your psychological health. You will see sessions like that at a lot of judicial conferences as there is an increased recognition of the effect of workloads and the content of judges' work and the toll they can take. To the unreconstructed amongst us, you might think, "well, my colleagues at the Bar and I saw everything bad about humanity and we all worked hard, so I don't need this when I am a judge".

The point of my story is sometimes, you never know which case will affect you. You don't know the effect of the cumulation of cases. When you say your colleagues at the Bar saw it all, that does not mean that they coped well. Alcohol and bad moods are a common response, but that is not coping. If something is getting to you, talking through the issue and, if necessary, seeing someone about it is a reflection of your strength as a judge because all good judges have self-insight.

7. Press and the Penguin

This point mostly arises in crime, but it covers all areas. During your careers, many of you will experience a blasting from your beloved local tabloid or broadsheet. My first encounter was a front-page castigation which reported that I had released a man from jail who was charged with terrorism offences to let him stay overnight at his place of worship. The headline on the front page was "YOU MOSQUE BE KIDDING".

In fact, the man was not "released". He had been on bail for months, the application was only to vary his bail and it was barely opposed, and he was charged with recruiting foreign fighters. I got worked up about this and had the Court write to the newspaper. Six days later, a three-line correction in small print was published on page 40 just before the racing guide. I still have a copy. I think I was the only person that read it.

Open justice means media coverage, media coverage sometimes means critical media coverage and critical media coverage sometimes means unfair and inaccurate coverage.

This is a large topic. There are things that can be done about some press coverage that crosses the line, and that's very much where the Australian Judicial Officers Association comes in. However, most of the time, the best course is to let the dogs bark while the caravan rolls in.

The best analogy I can come up with is the scene in Happy Feet when the icy wind blows into the Antarctic and each penguin must take their turn on the outside of the huddle to absorb the cold blast. You will have your time on the edge of the huddle, but I hope it's not too icy and that it's mercifully short.

I finished on some serious points, but let's face it, your work is serious. It's also interesting, challenging and meaningful.

Congratulations, best of luck and enjoy baby judges.