NOTES ON JUDGING

NJCA CONFERENCE 2023

JUSTICE JAYNE JAGOT

Good evening. I extend my congratulations, no doubt belatedly, to the new or not so new judges at this conference on your appointment.

Let me say immediately, as judges, we enjoy a special privilege. We get to decide and apply the law. We get to make decisions which resolve people's legal rights, duties, and liabilities according to law. It is important work and we make an important contribution to Australian society.

That's enough of that. I want to return to the practical aspects of judicial decision-making, a context in which I feel most comfortable. I recall attending this conference, I believe, in 2006. No matter the court to which you have been appointed, nor your background in the law, I think you will get value from this conference. The aim of this conference is simple - to help you be a "good judge".

What is a good judge? We can answer that question from multiple perspectives. Different perspectives will involve different points of emphasis. But no matter what the perspective, there are some key characteristics. I'm going to impose my own hierarchy of importance on these characteristics from the perspective of judicial-decision-making. From that perspective:

- A good judge is fair.
- A good judge listens - or at least listens more than they talk.
- A good judge is civil.
- A good judge makes decisions which are timely.
- A good judge's decisions are more often right than wrong.

It might seem strange that I put getting the right answer last in my hierarchy and that, even coming in last, I put the required characteristic in qualified terms of more often right than wrong. But I have thought about this a lot over the years, and I think that is the right place in the hierarchy and the best way to describe the required characteristic.

I'm going to leave fairness, listening and civility for others to discuss throughout the conference. My focus is going to be making decisions and making them in a timely manner. Before I get to that topic, I will say a little more about decisions being more often right than wrong. I think that putting this last requirement in its proper context assists judges in discharging their basic judicial function. Judges are decision-makers, no more and no less. They make decisions of a particular kind, judicial decisions, which have a particular character - determining people's legal rights, duties and liabilities according to law - and which must be the product of a certain decision-making process - one which is fair and open - but one way or another judges decide. If you don't want to make decisions, particularly tough decisions, you may want to re-think what you are doing. Equally importantly, if you don't want to explain your decisions in reasoned judgments, your judicial career will involve heartache.

If your basic job is to make decisions - day in and day out - no matter how hard you try, you are going to get some of those decisions wrong. It is best just to accept that immediately. At some time, every one of us has or will get it wrong. And I don't mean that we will reach a decision about which reasonable minds might differ. I mean plain wrong. A judge who has never been wrong is just a judge who hasn't made enough decisions or enough tough decisions. And we should also accept this - we can be wrong whether or not we are overturned on appeal. In addition to being wrong, we can be told we are wrong or wrong enough by an appellate court. Being wrong is just what happens in any human system. And in our system, of judicial hierarchy, it's the final appellate decision which counts. But all decisions, first instance or final, are human decisions, subject to the reality of human error.

Why does this matter? It matters because if you think it is the end of the world as you know it ever to be wrong or told you're wrong, you can wind up either not being able to make a decision at all or not being able to make timely decisions. No-one enjoys being told they are wrong. But we do have to accept that being wrong or told you're wrong is inherent within our system. And we all need to find a way to move past this and be able to keep making decisions that are timely. Now, you may say, that's ok for me, you can no longer be overturned or, at least, very rarely only. Not so - and as recent events show I left the Federal Court with a long tail of difficult decisions. Anyway, I've been a trial judge and an intermediate appellate judge, so I've paid my dues.

Of course, try your best at all times but accept immediately that sometimes you are going to be wrong. From that acceptance, find a way to move past being told you're wrong. I found humour and deflection best, but whatever works to enable you to move beyond it and make the next decision in a timely way (as long as it does not impinge on anyone's else's enjoyment of life) is fine.

We now come to the core of the judicial function - making decisions. I am a firm believer in the principle that justice delayed is justice denied. To me there is little point in issuing a purportedly perfect judicial decision well after the match is over, the lights in the stadium have gone off, and everyone has gone home. An untimely judicial decision is deeply imperfect. Irrespective of its content, it is flawed and unjust. It may be legally right, but it is also, always, judicially wrong.

Timeliness of decision-making does not mean that you decide every case immediately, urgently, or even quickly if speed is measured in days, weeks, or even months. Timeliness is about adapting your decision-making to the needs of the case with which you are dealing.

This brings me to the topic of thinking about what the case you are dealing with needs. This bit does get easier with judicial experience. But consciously focusing on what is needed to resolve what you are dealing with is always a good start. My experience is not in high volume courts dealing with multiple matters per hour or day. My experience is in first instance and intermediate appellate courts where nearly every judicial decision is expected to be accompanied by reasons, written or oral.

In this context, thinking about what the case you are dealing with needs, involves various levels.

First, does the resolution require reasons at all if it is merely procedural or interlocutory? If an issue is merely procedural or interlocutory, and no appeal or leave to appeal seems on the cards, do not hesitate to suggest to the parties that reasons may not be required or that you think your reasons are clear enough from the transcript.

Second, if reasons of some kind are required, what kind of reasons will suffice? I would think that nearly all procedural disputes can be properly resolved by giving what I describe as short form oral reasons. These are reasons which you give orally on the spot (if possible) or after a short adjournment. They are given in a propositional form. By this I mean for such cases it will often be sufficient to identify the issue and how you resolved it and then explain why you did so in a series of dot point form propositions and conclusions as required. When I did this, I would inform the parties that they could access the transcript of my oral reasons including my oral judgment. I would not spend any time on formally publishing those oral reasons. I basically used to do this for every procedural decision involving no point of principle.

Third, for the tedium of discovery disputes or any procedural dispute involving a series of issues I would usually take an issue-by-issue approach. But first I would see if the parties

could identify issues that were representative of a class of issues, and I would ask if they could choose their best representatives of each issue. I would then resolve them issue by issue and ask the parties to apply the rulings to other issues in the same class. This technique served me particularly well for objections to evidence. In all my time as a judge, only once has an evidentiary ruling I made ever really mattered to an outcome and an appeal.

Fourth, if more than short form oral reasons are required, the question to ask is, can they still be delivered orally today, tomorrow or the next day without being added to my reserved judgments list? In that event, I would make some notes about the topics I had to cover in the reasons, numbered in order, and also make heavy use of matching numbered yellow stickies on hard copies of documents. For this purpose, I always found hard copies better than soft copies because I could manipulate them more quickly, but that is just a matter of personal preference. The point is to develop a system that will work for you. My system was to list out on a page or two the topics in order from 1 to 10 or 20 or whatever. I would then put a yellow sticker on the documents in location of the relevant topic using the same numbering system. In my oral reasons I would work through my topics and my documents using the stickies as my guide. If there was no issue of principle involved, I again would inform the parties that they could access the transcript of my oral reasons including my oral judgment. I only bothered to publish my reasons in a refined form if there was any issue of principle involved which I thought might help another judge to resolve the same or a similar issue.

Fifth, if I had to reserve a decision to prepare written reasons - and for matters of substance I almost always did - I worked out techniques that allowed me to give the timeliest decisions I could.

My main hearing techniques included these:

- I would make and highlight notes of important words or phrases used that I knew were sufficiently unusual to allow me to do a keyword search in a transcript late and find the submission or evidence I was looking for;
- I would note and highlight what seemed like the important evidence as it emerged;
- If feasible, I would note on documents where there had been important cross-examination about the document and who gave the evidence so I knew to deal with the oral evidence when dealing with that document; and
- During submissions I would note and highlight important evidentiary and case references.

I should say now that I have tried all methods of judgment production - dictating, handwriting, and typing, in all possible combinations. For years now, I have typed my own judgments. I basically type with two fingers but that has proved good enough for me. My main writing techniques included these (and they have not changed much since my most recent appointment):

- I did not re-read the transcript before writing - I just started writing;
- I never tried for a snappy opening paragraph - I just started writing;
- I sometimes could and would identify the issues immediately, but sometimes felt I could not do so - whichever it was, I just started writing;
- If I did not know where to start - I hoped for the best and just started writing;
- If any of the written submissions were good, I would make heavy use of them;
- If none of the written submissions were good, I would largely put them aside and only pick them up again at the end to make sure I had covered everything;
- If the judgment was going to be medium or long, I would always divide to conquer - I would write issue-by-issue not necessarily knowing where it was all going to lead;

- I would write from memory as much as possible;
- I would try, but often fail, to control my re-drafting urge along the way on the basis that it was more important to get to the end of a draft than have a better draft;
- To assist in controlling the re-drafting urge along the way, I would make notes in the draft of what I had to fix up or address rather than going back and fixing the draft up or addressing the missing issue - again on the basis that it was more important to to the end of a draft than have a better draft;
- I would review the transcript and submissions at the end to make sure all points had been covered;
- If there was time, I would always put the draft aside for a day or two before doing a final read and amend; and
- I would always do a final read and amend on a hard copy rather than on screen - you see things in hard copies you can miss on the screen.

I generally try to avoid giving any advice that might be seen as impinging on how an individual judge wishes to write judgments. I'm going to permit myself one exception tonight. On occasions, attempts at humour have crept into a few of my draft judgments. I have consistently tried to resist any urge to retain these, by pressing the delete button on re-reading. We cannot help but be who we are, even in our judgments, but we fool ourselves if we think anyone but a few lawyers read our judgments and even they do not read them for pleasure. It is not our function to amuse and be witty in a judgment. No matter the degree of wit, ultimately, the law is and should be a serious business. There may be a very rare case in which a judicial display of wit does not involve demeaning anyone else or the business of the law. But I have never had such a case since 2006. And if any attempt at humour has remained in any of my judgments, with hindsight, I would consider it a mistake.

If we all keep in mind that, as judges, we need to be fair, to listen more than we talk, to be civil, to make timely decisions, and to be more often right than wrong, but that our judgments do not need to be perfect and that sometimes we will be wrong but that is just how the system works and we have to move on and keep judging, then I do not think we can go too far wrong.

Best wishes to you all.

Jayne Jagot