Conference on Judicial Reasoning: Art or Science?

Opening Address: Chief Justice Robert French

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There is a deeply entrenched interest in the common law world in how judges reason about and decide cases. This raises the question, what is so different about this class of decision-maker from any other. Are judges just a species of administrators who have given themselves lordly airs? Or is there something about the way in which they make their decisions which marks them off from legislators and executive officials?

The interest no doubt rests in part upon the durability of the judiciary and its separateness from other elements of government. There are, of course, chronic concerns about the costs and delays associated with litigation. They are concerns with a long history that stretches back over hundreds of years. They reflect the existence of inefficiencies which require ongoing attention. They also sometimes reflect a failure to appreciate the irreducibly labour intensive character of the work that judges do, the hearing, the careful sifting of documents and oral testimony and the writing of judgments. These concerns resurface from time to time in public discourse. In the last few days the operation of the judicial system in Australia has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry. Despite legitimate criticisms there is also, I think, a general recognition of the fundamental strengths of the judicial process at its best. They are: its role in maintaining the rule of law which is central to representative democracy, its

independence from political, sectoral or special interests and its aspirations to do justice according to law and to do it with openness, fairness and rationality.

It is an important aspect of Australia's representative democracy that the judicial process at all levels is not seen to pursue a partisan agenda. It requires of the judges fidelity to the rule of law. It means, as the judicial oath or affirmation requires, administration of justice according to law without fear or favour, affection or ill-will. It requires that interpretation and application of laws made by the parliament be done according to established and well understood rules and constraints. Where the common law or judge-made law is concerned, it requires recognition of boundaries beyond which incremental judicial law-making will not trespass.

Ongoing scrutiny of the working of the judicial system does not involve a denial of its strength and value to our society. The point was well, if a little floridly, made by Professor Karl Llewellyn in his famous 1930 Bramble Bush Lectures to law students at Columbia University. Speaking of the critical analysis of judicial decisions that he would offer in his lectures and in which his students would be expected to join, he said:

> So must we strip the courts; so must we test them. The stripping is a tribute. An institution we could not honor naked we should not dare to strip. You are to remember, too, the dignity and measure of a critic: they lie in that he sees the record whole; in that his judgment and his tone of judgment weigh the accomplishment against the difficulty, weigh partial flaws against the fulness of what has been done. Seen thus, judged as you would judge a man upon his life, law and the courts stand up.[1]

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1 *Llewllyn on Legal Realism* (1986) at 128-129.

Interest in and scrutiny of the judicial institution extends to the reasoning processes of the judges. That interest and scrutiny is expressed and undertaken in theorising at various levels of sophistication. It differs in its focus as between trial judges and intermediate and final appellate judges. There is the theorising of the advocate trying to predict how a trial or appeal will go before a particular judge or judges and which approach is most likely to engage his, her or their assent. In this context, judges are sometimes labelled by practitioners as plaintiffs' or defendants' judges, progressive or conservative, harsh or lenient. Such assessments have a certain crude practicality about them generally based upon perceptions of predispositions or characteristics of particular judges that are thought to have a bearing on the probability that a case will be decided one way or the other.

In the world of journalistic and political discourse there are further categorisations of judges. "Judicial Activists" and "Champions of Restraint" were terms coined by Arthur Schlesinger Jnr in an article about the Supreme Court of the United States in the January 1947 edition of Fortune magazine. He did not define the terms and the metaphor "Champions of Restraint" does not appear to have survived. But "judicial activists" as a category of judge has survived and flourished in thousands of academic articles along with its obverse, the well known "black letter lawyer". Both terms, I might say, lack precision and possibly any useful meaning at all.

There have been attempts to categorise the thoughtways of judges, particularly final appellate judges, with statistical tools under the rubric of psychometric analysis. In 1965 Glendon Schubert at the University of Hawaii undertook a study of ideologies of Supreme Court judges in the United States[2]. In 1969 he turned his attention to the

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[2] Schubert, *The Judicial Mind* (1965).

High Court of Australia[3]. He created an Opinion Difference Scale covering two periods in the Court's history, one from 1951-1958 and the other from 1958-1961. He classed the judges of the Court during those periods according to "ideological types". These depended upon their positions in a space defined by axes measuring collectivism and authoritarianism. Within this framework McTiernan, Williams and Webb JJ were called modern liberals; Dixon CJ and Windeyer JJ were classical conservatives; Menzies and Taylor JJ were classical liberals; Fullagar and Kitto JJ were modern conservatives. Professor Tony Blackshield scaled the High Court along similar lines over its entire history from 1903 to 1967. He recognised however the limited utility of these measures when he wrote in 1972:

> Truth is still elusive when [it] wears mathematical robes. Legal phenomena quantified are still legal phenomena, and as such always protean, always open to conflicting (and ultimately untestable) interpretations. When we interpret them, even within a quantitative frame, we are always engaging in argumentative as well as descriptive activity. Our objective is to *convince*, not to *prove*.[4]

There have been more narrowly focussed psychological studies of particular factors affecting judicial decision-making generally at the trial level and said to affect its quality. Judge Wistrich, who is giving the key note address today, has co-authored papers reporting the results of studies of the effects of "cognitive illusion" on

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3 Schubert, "The Dimensions of Decisional Response: Opinion and Voting Behaviour of the Australian High Court" in Grossman & Tanenhaus (eds), *Frontiers of Judicial Research* (1969) at 163-165.

4 Blackshield, "Quantitative Analysis: The High Court of Australia 1964-1969" Lawasia (1972) 1-66 at 62.

judges[5]. The cognitive illusions identified in Judge Wistrich's work and that of his colleagues are:

1. Anchoring – in which a numeric judgment is affected by prior exposure to an initial value affecting the decision-maker's frame of reference. The initial value may be a jurisdictional limit or an opening offer.

2. Framing – the framing of a supervised settlement decision may occur according to whether it is undertaken with an awareness of the plaintiff's possible gains or the defendant's possible losses. This may affect the quantum of the settlement decision.

3. Hindsight bias – overstating the predictability of past events.

4. Inverse fallacy – mixing up the probability of an hypothesis given the evidence with the probability of the evidence given the hypothesis.

5. Egocentric biases – judgments which reinforce the judge's ego. In the article co-authored by Judge Wistrich this was demonstrated by asking judges to estimate their own appeal reversal rates.

If we accept that these cognitive illusions exist, and it certainly seems plausible, it should also be recognised that the judicial system does contain safeguards to

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[5] Guthrie, Rachlinski, Wistrich, "Inside the Judicial Mind" (2001) 86 *Cornell Law Review* at 777-830; Rachlinski, Guthrie and Wistrich, "Inside the Bankruptcy Judge's Mind" (2006) 86 *Boston University Law Review* at 1227-1265.

mitigate their effects. The appellate process is one of these. Awareness of their existence through judicial education and professional development is another. Interestingly, Judge Wistrich and his colleagues tested a group of bankruptcy judges for the effects of the various factors set out above and other factors including the race of debtors. The tests were designed to determine whether specialisation had an impact on the quality of judicial decision-making. The answer was found to be "murky"[6].

A particular area of interest to the National Judicial College, in which education and professional development are seen as important, concerns the awareness of cultural differences in society. Cultural differences can form part of the factual context relevant to some classes of judicial decision.

One important kind of cultural awareness in Australian society relates to indigenous people. This has been recognised for many years by the Federal Government which has provided funding for national indigenous cultural awareness programs supervised by the Australian Institute of Judicial Administration. Recently that function has been taken over by the National Judicial College through its Indigenous Justice Committee.

Indigenous cultural difference is not the only area of cultural difference relevant to the work of the courts. The cultural background of immigrant groups may also be part of a context relevant to judicial making in particular cases.

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6 Rachlinski, Guthrie and Wistrich, op cit at 1256.

Awareness of cultural difference does not imply discriminatory application of the law. Rather it reduces the risk that through "pluralistic ignorance" judges unaware of the cultural context of particular facts or behaviours may fail to have regard to matters relevant to the exercise of their powers.

I accept that speaking of cultural difference at this level of generality is probably a little like speaking of motherhood. Culture is a complicated thing. As one writer has observed:

> Culture is not a static or easily isolated set of values or behaviours and may vary by education or class background.[7]

There is also the risk that inappropriately taking cultural differences into account will generate a backlash from groups and individuals who argue that consideration of such differences can lead to balkanisation of the law, violations of equality and individual rights and unfavourable outcomes for women and children in particular.

There are many theories about the things that influence the way judges reason at trial and appellate levels. There are things that may mislead them and things that they should know. There are also many theories of judicial behaviour. Judge Richard Posner, in a book published last year and entitled "How Judges Think", has identified nine descriptive theories of the basis of judicial action. These are designated respectively as: attitudinal, strategic, sociological, psychological, economic, organisational, pragmatic, phenomenological and legalist. They appear

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[7] Bauer, "Speaking of Culture: Immigrants in the American Legal System" in Moore (ed), *Immigrants in Courts* (1999) at 28.

principally related to appellate judges but may have some application to trial judges. In his book he makes the important point that all the theories are overstated or incomplete and missing from them is:

> a cogent, unified, realistic, and appropriately eclectic account of how judges actually arrive at their decisions in nonroutine cases: in short, a positive decision theory of judging.[8]

An all embracing theory is unlikely and we should be suspicious of such offerings. As somebody once said about theories of everything which are devised to explain the universe:

> There is more to everything than meets the eye.

The question for this conference and for trial and appellate judges generally is whether there is utility in thinking about how we think. Clearly my answer to that question is yes. To be able to stand back from what we do day-in day-out and reflect on how we do it, to understand the differences between us in the ways in which we do things and to identify the common elements that matter – these are steps to thinking about how to do things better.

The title of this conference is "Judicial Reasoning: Art or Science?" At first this may seem to oppose two mutually exclusive categories of activity. However they overlap and the overlap is clear when the relevant ordinary meanings of those terms are considered. "Art" is defined in this context as "skill as the result of knowledge

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[8] Posner, *How Judges Think* (2008) at 19.

and practice". "Science" is "knowledge or cognisance of something specified or implied", and "knowledge acquired by study: acquisition … or mastery of any department of learning". The art of judging in accordance with the dictionary definition of "art" involves the deployment of experience and skills some of them not consciously realised as they are exercised. The science of judging involves the ability to undertake the art of judging with an extended awareness of what it is that we do when we do it, and the things that influence our decision-making. The enhancement of our art by our science is the objective of this conference and one which I wholeheartedly commend.