

# JUDGING – A CONTEXTUAL APPROACH

SENIOR MAGISTRATE DAVID HEILPERN\*

Judging is a lonely job in which a man is, as near as may be, an island entire.

Justice Abe Fortas, US Supreme Court 1965–68

## I INTRODUCTION

The temptation in addressing a topic such as ‘the art of judging’ is to write yet another treatise on relativism, the myth of objectivity and judicial activism. Perhaps one could begin with Cicero and Boethius’s art of discourse and the distinction between finding factual precepts and the judging of them. One could move then to Kant and ‘Logic’, from physiognomy to class determinants. There are two reasons for resisting this. Firstly, I have always suspected that no-one actually reads that material, except perhaps other judicial officers, sitting in chambers, seeking comfort in the struggles of their brothers and sisters in arriving at some resolution that accords with law, the evidence, and good conscience. Secondly, having sat on the bench now for 10 years, the art of judging is as much a mystery to me as it was when I started.

So instead, I propose to take a more apocryphal story-telling approach and relate experiences which explore the environment in which I work, my thoughts and feelings in particular circumstances, and the impact upon me as a person trying to do right to all manner of people without fear or favour, affection or ill will. I finish with an epiphany on the term ‘judging’.

There will of course be fewer footnotes in this process than the more academic approach, such being the usual method of determining whether a legal article is valid or just a rave, and for that I apologise in advance. However it seems more likely to be read, and thus part the judicial veil a little way, demystify the process, so that the reader can glimpse the context in which the judging in the Local Court

---

\* Senior Magistrate David Heilpern is the Head of Civil Law at the Downing Centre Local Court.

takes place. Before you read on I wish to apologise twice more. I regret the politically incorrect tone in each of these stories. I ask for forgiveness if the tension or humour that is uniquely court-oriented does not translate to the written word. You had to be there.

So, whilst the art of judging remains a mystery, the tools that are required include perspective, a stony face, quick wit, a knowledge of when you are being had and humility.

## II PERSPECTIVE

I was sitting in a small courtroom in remote New South Wales, having completed an inquest as coroner into the death of an 18 month old Aboriginal child. My findings were non-controversial, having concluded that the death was as a result of causes unknown and fell within the much maligned category of ‘sudden infant death syndrome’. My usual practice in such cases was to express sympathy for the family of the deceased child, and ask if there were any questions. Usually there were none, and that was my expectation as I glanced around at the loving family members, and in particular at the quietly sobbing young mother and her partner. To my surprise, the mother lifted her hand, like the school girl she looked, and clearly wanted to ask a question. ‘Sir, could I ask for a photo of my baby’. I revisited the photographs on the file. They were of the child *in situ* – with red and brown pooled blood beneath the skin of the lowest regions, bloated belly, lifeless eyes where once there had been mischief and imagination. I said ‘The photos, I am afraid, are very distressing and show your baby only after she died’. The mother looked at the ground for a moment, then stared at me with a mixture of shame and defiance, and said ‘Sir, we do not have any photos of my baby at all, because no-one in my family has a camera. I know the photos are horrible, but I need to have a memory of my child, I want to have her up on the wall in my room’.

And I dropped my gaze and felt such shame. How many photographs are there of my children – hundreds or thousands? And videos and tape recordings of their voices and their first step and first word. What better symbol of the difference between the haves and have nots could there be? So I took out the least graphic of the

photos, and came around from the bench, and handed it to her. She clutched it close to her chest and, bent with silent grief, left the courtroom. I imagined that photo, up on the wall of her bedroom, and went home and looked at my photo albums misty eyed.

### III STONY FACE

The prosecutor arrived at the far western court looking about 18 years old, and speaking with that particular plumb that only an exclusive private school can breed. ‘Been out west before?’ I asked. ‘The furthest west I have ever been is Glebe’ she replied. Mmm. The case was a nasty child-on-child sexual assault, tragically not uncommon in the west-of-Glebe rural areas where children seem to have children and a 30 year old grandmother is not a rarity. Just after morning tea, during the examination of her 14 year old witness, the following exchange occurred:

Prosecutor	What happened then?
Witness	I cracked a fat.
Prosecutor	(clearly not understanding) You what?
Witness	You know ..... a horn.
Prosecutor	(still utterly mystified) A horn?

At this point the courtroom broke into mirth, starting with snickers and then erupting into laughter. I determined that hilarity in the middle of a child sex matter did not fit within magisterial discretion and announced that ‘we will now take morning tea’. I got to the door of the court room, and remembered, alas, that we had just returned from morning tea. I burst out laughing when I got to my chambers, and had the clerk of the court seek out Miss Well-to-do and explain what the terms above actually meant. He returned with bad news: ‘I told her, and she got her books, put them in her bag, put the bag in the car, and drove off. Back to Sydney, I reckon’. Needless to say, the case was adjourned.

#### IV A QUICK WIT (1)

Sadly, the levels of domestic violence in far western New South Wales are tragically high, and defended hearings are rare. Generally, if the victim turns up to court a plea of guilty will be entered. If she doesn't, the prosecution will fall on their sword. One week in a nameless dusty hot town a white fellow had been charged with seriously assaulting the mother of his Aboriginal girlfriend. He was from a well off city family, and had arranged for a family friend (who I will refer to as 'Stuff QC') to represent him. Somehow the well worn phrases and affectations of the higher commercial appellate jurisdictions did not translate well into the local court beyond the black stump. He was cross-examining the alleged victim, an older Aboriginal woman with creases so deep in her face that you could hide a coin in them:

QC        Well I put it to you, that my client did not spit at you, punch you to the ground and kick you to the head and body on several distinct occasions?

Witness   Well I put it to you, that you've got your head shoved so far up your arse that you can't see daylight!

QC        (Turning to me, appalled) Your Honour! I would request that you direct the witness to answer the question.

Me        I rather think she just did Mr Stuff.

#### V A QUICK WIT (2)

I had just refused bail to an angry middle aged man, accused of brutally attacking his wife. She had given evidence on his behalf, and the prosecution had strenuously opposed bail. As I said the words 'bail refused' the police began to lead him from the dock. He yelled at me 'fat cunt!' There was stony silence in the court, waiting to see what I would do at this frightful slur. 'Put him back in the dock' I directed. He was duly locked back in. I asked 'Did you call me fat?'

## VI KNOWING WHEN YOU'VE BEEN HAD

A man sat in the dock about to be sentenced for his umpteenth charge of 'drive whilst disqualified'. He was unrepresented. He was weeping. He knew he would have to go back to prison:

Sir, please, I know I have to go back, but please just let me out for a few days. Just a few days. My wife is here and she is pregnant again. I missed the birth of my first child because I was inside, she is due now with number two and I just want to be at the birth of my child ....

His monologue was interrupted by a mournful wail as his wife stood up, balancing herself on the chair in front, and gasped as her waters broke. Buckets. I decided that discretion was the better part of valour, and left the bench whilst an ambulance was summoned to take her to hospital. When I returned to court, the prospective father was still in the dock, now desperately begging for bail to be with his wife. I looked around the court and wondered what parent could not grant this indulgence. I looked at the prosecutor who shrugged and smiled in that peculiar way that prosecutors have. It roughly means 'if you want to give him bail then do so but I can tell he won't stick to the conditions and you are just being had. Again.' I shrugged and smiled back which roughly translated means 'you're probably right, but we both know I am a bit of a soft touch'. I spoke to the prisoner:

You are granted strict bail for a period of three days. You will return to court on Friday. If you do not, you know that a warrant will issue, and when you return to court on the next occasion, under arrest, you will also face a charge of failing to appear. That charge also carries a prison term, and you will end up serving far longer in custody if you do not return.

He thanked me *ad nauseam* and left the court at a run for the hospital.

That Friday he returned. With his doctor, his wife, and his new born son in his arms, as well as the other children of various ages. I looked down at this very picture of family bliss, and particularly at the father/defendant/habitual-offender/prisoner/disqualified-driver:

Your Worshipfulness, I just wanted to thank you so much for letting me go to the birth of my son. It was the most wonderful experience of my life. I really think that I would have died if I had to sit in the cell, knowing that my wife was giving birth just around the corner. Your holiness, I just wanted to know that I asked the clerk of the court here what your first name was. We have decided, in honour of you, to name our little boy child David.

Did I send him to prison anyway, despite having named his son after me? Actually no, but not for that reason. The attending doctor at the birth became aware of the defendant's plight, and noticed that he seemed to have an untreated brain injury. He did some preliminary tests which showed that he had severe cognitive limitations related to medium term memory loss. He could remember beyond five years ago quite well, the last six months very well, but had a great deal of trouble recalling the periods in between. The doctor suggested some further investigations. I continued bail, and the defendant has not re-offended since. And each year, in March, I receive a letter and a photo of my namesake, little David. He is now at primary school, and doing particularly well at sport. He has, surprisingly, not started driving yet.

## VII HUMILITY

I was sitting in a court in western New South Wales when I had to sentence a young Aboriginal man who had been involved in an armed robbery at a bank. He was 17 years of age, and had just been released from a juvenile detention centre when he committed the offence. Clearly, he was going to have to be incarcerated yet again. One of the joys of sitting in the country for a period of time is that you get to know some of the local families, if for no other reason than that they so regularly appear before you. This particular young man I had known firstly as a presence in court as others of his clan had been sentenced, and I had sentenced him myself previously. It was clear that he would be spending most of his life in the care of the state, unless he died or found god before then.

His lawyer from the Aboriginal Legal Service sought to be excused from the sentencing process, saying that he could not in good conscience follow his client's instructions. And thus he spoke for himself: 'Sir, I know that I have to go away again, but I am asking you to send me to Bathurst gaol rather than back to "juvi". I want to go to the "big house".' 'Why' I asked, thinking that the motives cannot be good. After all, detention centres for juveniles have far more intensive rehabilitation in the fields of education, drug and alcohol abuse and anger management. 'Sir, my grandfather is in Bathurst serving a life sentence, and I have only met him once before and I wanted to get to know him. Also, my dad is in Bathurst doing seven years for rape, and I haven't seen him in a long time. I thought I could get a cell with them.'

I was overwhelmed with a sense of desperation. What have we done to these people that only 200 years ago there were no courts to admonish, no prisons to lock up, no banks to rob, no grog to drink, no police to arrest. For 20,000 years or more, ten times the time since Christ was born, these people had created a society at one with this fragile, beautiful dry land, and here we were, locking up generations of them. What sort of system had I become a part of that saw a boy asking to be imprisoned like a man, so that he could have some contact with paternal influence? Surely there must be a better way.

## VIII JUDGING

It is in this context that those at the coal face of the justice system seek to judge the Indigenous, the rude, the mentally ill, the inexperienced and the overwhelmingly sad. And yet it is in this context that I have learnt that the crux to undertaking my task is to draw a key distinction between two aspects of the verb 'to judge'.

The first is to fulfil my oath of office, to apply the law without fear or favour, affection or ill will. To determine authoritatively facts and apply the law according to the statutes and precedents that bind me. The second kind of judging is to attempt to place some sort of objective or subjective value on the behaviour and worth of the sentient beings who come before me – to form an opinion. This seems to be a simple distinction, but of course the functions,

consciously or otherwise, overlap at times. It is this second kind of judging that I seek to avoid. For who am I to judge them really – me with my salary and car and Bondi penthouse and middle class upbringing and higher degrees.

A clear distinction needs to be drawn – yes I may take your children from you and place them in care, because applying the law, I conclude that they are at unacceptable risk of harm. But this does not mean I have judged you as a ‘bad’ parent or ‘hopeless’ human being. I am sending you to prison for bashing your wife again because that is the law of the land, but that does not mean that there is nothing of value about you. I did not believe your evidence and I must award damages against you for breach of contract, but I am sure that you love your children just as much as I do, and indeed you may well be a better father than I.

I have two pieces of paper stuck to the front of my bench book that I carry into court each day. The first says ‘remember to breathe’. This is designed to ensure that I remain calm and do not disgrace my office by losing my cool when confronted by ignorant smug, lawyers. The second says ‘to judge is not to judge’. This is to remind me that to apply the law and impose penalty does not require me to pass a value judgement on those before me.