

## National Judicial Orientation Programme

### National Judicial Orientation Programme Time Management - 22 October, 2002 Justice P.A.Bergin[1]

1 The topic - Lifestyle Part 1; Time Management - is a tantalising brief to inform you in what has been described as a "short formal presentation" of matters that may enhance the enjoyment not only of your work but also your lifestyle generally.

2 As "lifestyle" is your particular way of life and as I know only very few of you personally, it is somewhat difficult to fulfil the aim of providing you with tips to enhance your lifestyle generally. However my task is at least a little easier than my predecessors by reason of the recent publication "Guide to Judicial Conduct" by the AIJA for the Council of Chief Justices. I presume the Guide will be the subject of discussions during the Programme but on the topic of time management it is probable that it will be of assistance because you will be able to consult it as a ready reckoner when you are considering whether to pursue any particular activity in your new role as a judge.

3 I understand that you have been given, or will be given, a copy of the paper entitled "Common Themes in "Collected Wisdom" Surveys of Time Management for Judicial Officers" that contains most helpful "tips" on time management from very experienced judges, including my co-speaker. Those tips seem to say it all and you will no doubt take from them those that suit your personality and working methods best. I commend the paper to you.

4 In those circumstances I thought it appropriate to speak to you in more general terms and touch upon some matters that I hope may assist in the approach that you might adopt to managing your time in a way that brings you some enjoyment in your new role. After some general comments I will deal generally with judgment writing, and say something about court control and the appellate process.

5 In the early 1970s Macfarlan J of the New South Wales Supreme Court addressed the question "Should any, and if so, what action be taken to assist the newly-appointed judge?" His Honour suggested the question was "topsy-turvy" and that it really should have been "what can the new judge do to assist us?" His Honour said:

After all (the new judge) has for some years been well-placed to observe our foibles, to play gently and perhaps profitably, upon our vanity, ... would it not be most profitable to ask the new judge to tell us what we cannot or will not see but which has been all too obvious (to the new judge in the recent years in practice). I do not refer only to judicial weakness, loquacity, superciliousness, the tiresome jester, rudeness, and over-much assertiveness; I also refer to the practices and procedures of our courts which, unheard by us, but perceived by the Bar, so insidiously creak and groan.

6 Twenty years later it had been decided that much was to be done to assist the new judge and the Judicial Orientation Programme was launched. When Sir Anthony Mason addressed the Inaugural Judicial Orientation Programme in 1994 he commented upon how the courtroom takes on a very different perspective when seen from behind rather than in front of the bench. Sir Anthony said on that occasion that the most important message that he could convey was this:

We must recognise without any qualification that the courts belong to the people and that, as judicial officers, we are acting as delegates or agents of the people. It is our responsibility to treat all those who resort to the courts, whether as legal representatives, jurors, parties or witnesses, with courtesy and respect, unless circumstances dictate otherwise. Nothing less will suffice, for public confidence in the administration of justice depends upon it. Likewise, public confidence depends upon judicial officers expressing themselves with sensitivity so as to avoid giving offence.

7 The trial judge is the backbone of any court - without the trial judge there is no appellate court. One might be able to envisage a life without the appellate court - indeed some may dream of such a situation - but one is unable to envisage life without the trial judge. In the New South Wales Supreme Court trial judges sit from time to time at appellate level both in the Court of Appeal and the Court of Criminal Appeal. My comments today are from the perspective of the trial judge.

8 It seems to me that the health and integrity of the legal profession is directly related to the health and integrity of the independence of the judiciary and thus to the enjoyment of your judicial life. In the last decade much has been said about the disenchantment of lawyers, particularly young lawyers, with the practice of law. In a gloomy analysis at a conference in 1990[2] Sir Gerard Brennan said:

The business law practitioner who lacks or who has lost interest in the law is not likely to acquire or retain professional competence. Unless one can sustain an intellectual challenge in professional practice, one has lost the driving force which is essential to continuing satisfaction. Boredom follows, then either a shift of ambition to a new goal or a debilitating ennui.

9 These sentiments have been echoed by Sir Darryl Dawson in 1995[3] Justice Michael Kirby in 1996[4] and by Sir James Gobbo in 2000[5]. Reference was made to the book "The Lost Lawyer" (Harvard University Press 1993) in which

the author, AT Kronman referred to the crisis in the American legal profession and the danger of the law losing "its soul".

10 In the early 1990s the NSW Law Society established "Lawcare" to provide a 24 hour confidential service to lawyers suffering from stress from work, family or financial pressures, alcohol and other drug dependence or relationship breakdowns[6]. In May/June 2001 the NSW Bar Association established "Barcare" described as "a professional counselling service run by qualified professionals as a service" to the members of the NSW Bar Association. Although it is a confidential system, statistics show that as at 30 June 2002 the most common age bracket of those seeking assistance was 45-54 yrs and the most common types of problems were described as "overwork, financial and alcohol"[7].

11 Some may think that the judiciary has been cocooned from this gloominess. However, let me just tell you of two senior judges combined musings about the rewards of judicial life:

The successful barrister at the end of the case, has the exhilaration of winning. A loss still brings commiseration amid the camaraderie of the floor. We have neither. We are hors de combat. Our judgment delivered, there is just a sense of emptiness, anticlimax.[8] All that then awaits, it seems, is appellate criticism or academic calumny.[9]

12 Gummow J was reported recently as having described the work of a judge of the High Court as "unremitting intellectual intensity"[10]. Justice Michael Kirby has written something akin to a mini series on Judicial Stress[11]. He has advocated meditation, yoga, religion, prayer and finding spiritual meaning and importance in work as a judge[12]. We have "Lawcare" and "Barcare". Is it time for "Judicare"?? Perhaps you might give some consideration to that question.

13 It seems to me that the concept of "time management" used to be referred to in less modern times as part of one's self-discipline. If you find that you are more disciplined if you run 5 kms in the morning before going to chambers then make sure you continue to do it. The same must be said for those who resort to yoga, meditation or prayer. Do not let your judicial work take away habits that support you - if you let them go - you will not receive anything in return.

14 You need to achieve a work pattern that enables the prompt delivery of your judgments. In this regard it is sobering to recall what the English Court of Appeal said four years ago[13]:

[112] A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive to the rule of law.

15 It is probable that a number of you will face the prospect of sitting in a longish case with a number of judgments reserved to which the case you are then hearing will be added. This can happen for a number of reasons including by dint of listing arrangements and a lack of settlements. If this situation is not controlled it can obviously lead to a less enjoyable judicial life - with probable adverse impact upon your lifestyle generally.

16 It will depend very much on your personality and the way you approach your work as to how you deal with the particular situation. Some take the FIFO (first in first out) approach while others take the MUF (most urgent first) approach. The latter approach suffers from the disadvantage that another judgment may be interrupted by the perceived urgent judgment leapfrogging it. Some instances of this situation may not be able to be avoided however this can at times lead to a longer than healthy period before which you return to the judgment you had embarked upon before the more urgent one intruded. This will have more problems if you have not written at least a first draft.

17 The further you are away from the trial the more difficult it is to retain the memory of it. Notwithstanding the availability of a transcript, memories of individuals and their presentation may not be able to be readily brought back to mind for accurate analysis. As the English Court of Appeal said in *Goose*:

[113] ... In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of 20 months (the trial judge) denied himself the opportunity of making this further check in any meaningful way.

18 You will no doubt settle into a pattern of judgment writing that is comfortable. If you have not achieved it already, I believe that you will reach a point at which you will experience a level of calmness. This is in such stark contrast to what some may believe to be the far more exciting emotional state in which you practiced at the Bar, or elsewhere, for so long. It may take time, however it seems to me to be an appropriate state for which to aim at least for judgment-writing.

19 In addition to the tips you will glean from the "Collected Wisdom" paper, I would like to give this single tip to assist with the achievement of the requisite self discipline and calmness required for an enjoyable judicial life - it is to WRITE EVERY DAY. It may be the jotting down of the nature of the case and the issues on the pleadings before

commencement of the trial that can be converted easily into part of the judgment if the trial proceeds. Such preparation in the written form is not wasted even if there is ultimately a settlement - it helps with the development of that self-discipline that is quite different from the self-discipline of the Bar.

20 Your aim is to keep control of the output and not let it reach the stage of over burdening you to the point where you sink into a feeling that you may just be losing control of it. Whatever it takes to avoid that feeling, or worse still that reality, must be done. It may be writing on weekends - it may mean writing in vacation. If this is what it takes, do not dwell on a feeling of being put upon which can so easily intrude when you have to write in the vacation. You will find that if it is necessary to do this to maintain (or in some instances regain) control it will, once the judgments are finished, facilitate a feeling of enormous wellbeing and calmness for which I have advocated. No amount of yoga/religion/music/sport or spiritual pursuit alone can match - simply doing it - writing it - publishing that judgment or those judgments. My tip to facilitate that is to WRITE EVERY DAY.

21 May I just say something about Court control. In a recent judgment of the High Court<sup>14</sup>, the facts of which I need not trouble you, Gleeson CJ said this at 1025:

[1] It sometimes happens, in the course of litigation, that counsel will start a hare. The response of the opposing counsel may be to pursue it. One of the duties of the trial judge is to control the proceedings, to exclude irrelevancy, and to maintain proper limits upon the extent to which the parties and their lawyers will be permitted to raise and investigate matters that are of only marginal significance.

...

[11] Trial judges have the power, and the duty to control the pursuit of irrelevancies, or collateral matters. But it is understandable that a judge may be cautious about cutting off a line of examination or cross-examination where no objection is taken. Counsel usually know more about their respective cases than the judge, and it is sometimes unfair to compel them to indicate where questions are heading.

22 Patience, caution and once again calmness are great assets for a trial judge. However there may be times when a different level of emotion is reached. That happened in the District Court of New South Wales in February 1991<sup>[5]</sup>. Counsel shouted at the trial judge and, it appears, the trial judge reciprocated. Counsel subsequently apologised. The trial judge cited counsel for contempt. The Court of Appeal had this to say:

Whilst there are duties of courtesy imposed upon legal representatives as a corollary of the privileges they enjoy as advocates, there is a correlative duty on judicial officers to listen patiently and carefully and to retain self control at all times. See *Coward v Stapleton* (1953) 90 CLR 573, 580. This does not reduce the judicial officer to a silent receptacle for anything which legal representatives choose to say. Far from it.

... in circumstances of heat and emotion it is usually preferable to adjourn the proceedings, if only for a short time, to allow tempers to cool. What seems vitally important in the heat of shouted exchanges, may seem less important in the scheme of things after even a few minutes for reflection, in which a better sense of perspective can be achieved.

23 This approach was approved by the NSW Court of Appeal last year<sup>[16]</sup> in a case in which the Court went on to explain the purposes of the duties to listen patiently and carefully and to retain self control at all times. The purposes were said to be:

1. Patient and careful listening to the evidence will facilitate a clear understanding of the issues so that the judge will be in a better position to decide the case properly.
2. Compliance with such duties upholds the standing of the Court in the community as providing careful and impartial adjudication of disputes between litigants.
3. Failure to comply with such duties may fuel scepticism or suspicion of the Court system.<sup>[17]</sup>

24 It is the trial judge who is in the hot seat. It is rare that a similar level of heat is generated when there is a bench of three, five or seven. Heated exchanges can be distracting and have an adverse affect on the management of your time because you will spend time reflecting on them. If they occur, use whatever technique best suits you to take the heat out of the situation as soon as possible so that calmness can be restored to enable you to remain focused. This may include the adjournment of the proceedings for a period of time. The length of that adjournment will be best determined by you in the particular circumstances.

25 There is just one final short matter upon which I would like to comment. I promised I would return to the reference to appellate criticism. There are some who have suffered judgment-writing blocks caused by fear of appellate criticism. It is very important for a trial judge that the appellate process is kept in perspective otherwise one could become distracted by the criticism, with the consequent loss of the disciplined focus necessary for the prompt delivery of judgments.

26 I know of no legal history text or legal biography that makes a claim that any particular trial judge was never overturned on appeal. It is reasonably safe to predict that everyone who sits full time as a trial judge will be overturned. Yes, keep an eye on the appeals from your judgments - take in the wisdom of the appellate decision and then move on. Depending once again upon your personality, you may need to find comfortable (and necessarily confidential) ways in which to air your disappointment in being overturned - but do not fall into the trap of dwelling upon it. The next case is the important one, and then the next and the next and so on.

27 Remember you are the backbone of the Court - it is you who has to be strong and resilient. It is you who has to produce the judgment for which the parties so eagerly await and upon which the appellate courts focus. With so many interested in what you have to say - it helps a great deal if you are interested in what you have to say and if you enjoy trying to do what is just, fair and correct between the parties. May I emphasise "between the parties". You are not writing an essay on the law - you are deciding the particular case before you and applying the relevant legal principles. Those who are tempted to write essays have trouble delivering their judgments promptly. May I suggest you steer well clear of this temptation.

28 I believe that the aim for and achievement of self-discipline and calmness will make your judicial life and thus life generally more enjoyable. I wish each of you an enjoyable and fulfilling judicial career.

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- 1 Supreme Court of New South Wales.
- 2 3rd Conference Business Law Section Law Council of Australia; *Professional Orientation; Business or Law*;
- 3 29th Australian Legal Convention at Brisbane "The Legal Services Market".
- 4 An Honourable Profession The Inaugural Lawyers Lecture The Honourable Justice Michael Kirby AC CMG Sir James Ethic Centre 23 July 1996
- 5 Idealism under stress - Legal Practice in Victoria Sir James Gobbo Vol 74 No 11 Law Institute Journal 85
- 6 Chung "Coping with Stress as a Lawyer" (1997) Law Soc J 64.
- 7 The New South Wales Bar Association Annual Report 2002. pages 15-16.
- 8 Transition to the Bench (1997) 71 ALJ 294
- 9 Judicial Stress - An Update (1997) 71 ALJ 774 at 780
- 10 "Little appeal in justice strained by heavy migrant load" B Haslam The Australian 28 May 2001.
- 11 Judicial Stress (1995) 13 Aust Bar Review 101 at 113-114: Judicial Stress - An Update (1997) 71 ALJ 774; Judicial Stress - A Reply (1997) 71 ALJ 791:  
12 at 781
- 13 *Goose v Wilson Sandford & Co & Gerard Manion*, Court of Appeal, 13 February 1998, Peter Gibson, Brooke & Mummery LJJ - (See: The Times Law Reports, February 19,1998 at 85; (1998) Law Society Gazette 27).
- 14 *Goldsmith v Sandilands* (2002) 76 ALJR 1024
- 15 *Toner v Attorney General of New South Wales*, NSWCA, unreported, 19 November 1991, Kirby P, Clarke JA, Hope AJA.
- 16 *Damjanovic v Sharpe Hume & Co; Damjanovic v Yorke Agencies; Damjanovic v Rosier; Damjanovic v Spehar* [2001] NSWCA 407, unreported 23 November 2001, Mason P, Sheller JA and Rolfe AJA.
- 17 Pars [160]-[163].