THE "GOOD" JUDGE

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INTRODUCTION

The Meaning of "Good"

You will have noted that the title of this paper, "The 'Good' Judge", which was chosen by the organizers of this colloquium, not by me, has "Good" in quotation marks. I take this as a recognition that *good* has a range of meanings and that anyone addressing the subject (in this case, me) necessarily has a large measure of discretion in selecting what to say. As you can see from the table of contents I cut a narrow idiosyncratic swath through the subject.

One of the meanings of *very* good is "great" and this takes me to a story, that some of you may not have heard, of a dinner held in honour of a judge, who had just retired from the court, at which all the usual platitudinous praises of judges who have just retired were uttered. While driving home after the dinner with his wife, the retired judge asked her, in somewhat contented tones: "Tell me, how many truly great judges do you think we have had on the court?" She replied: "I really do not know the answer to that question but I *do* know this for sure. There is one less than you think there are."

Continuing with the range of meanings of good, I noted in my unabridged version of the Random House Dictionary that there are listed forty-one meanings, or senses, for the word. The first is "morally excellent; virtuous". While it is important that a judge be virtuous, I do not think that this sense is broad enough to cover, generally, a sensible meaning of the term "the good judge". We want more. It may be that the twenty-fifth meaning is the most relevant: "competent or skillful" but you might object that this sense, also, is too narrow.

I have concluded that no dictionary term or synonym will do. Clearly the title requires us to take a hard look at the attributes we expect a good judge to have and then broadly define the "good" judge in terms of a statement expressing these attributes.

There are, of course, many attributes that we would expect a good judge to have. Chief Judge Richard Posner, a U.S. Federal judge and well-known law professor, in a review of Gerald Gunther's biography of the undoubtedly great American judge Learned Hand (Learned Hand: "The Man and the Judge" (1994)), observed that "the obvious things" we look for in a candidate for a judgeship are "- intelligence, relevant experience, integrity, energy, maturity" (Book Review, 104 Yale L.J. 511 at 524 (1994).

Focusing directly on Learned Hand, Posner notes that he was insecure, timid and self-doubting. Because he was "very afraid of getting things wrong, he performed his

judicial tasks with a conscientiousness uncommon in a highly experienced judge, and this shows in the opinions – in the exceptionally scrupulous weighing of the contrary views that is so distinctive a characteristic of them, …" (p. 526). Those of you who may think that you are destined for judicial greatness because of your profound sense of insecurity should note that Posner makes it clear, however, that "being insecure is not a sufficient condition of being a great judge" (p. 527). In addition to being insecure, which was the spur to his hard work, Hand's writings displayed "a sensible and humane man, a skillful and conscientious legal analyst, the owner of a distinguished prose style … a mind keen, cultivated, curious, and well furnished." These were Learned Hand's add-ons.

Moving from the rarified air of some of the specific attributes of a famous judge, I turn to a simple statement of the general attributes of a good judge. I suggest that the good judge is a person who has a passion to do justice combined with the knowledge and skills necessary to give effect to this passion. The desired qualities of mind and heart, together with the requisite skills, will inform what the judge does, day in and day out, in the course of his or her judicial career.

While everything that I say in this paper will relate, in some way, to a passion to do justice or to the knowledge and skills necessary to give effect to this passion, I should say that one of my difficulties is coming up with something to say that is both new and useful. There has been so much written on the subject of what we should

reasonably expect from our judges that the citation of just the top layer of it would take several pages. Against this background I can cite Vice Chancellor R.E. Megarry's "Temptations of the Bench" (1978), 16 Alta. L. Rev. 406 as a *tour de force* on certain aspects of judging that *is* both new and useful. His asking of the question "Who is the most important person in the courtroom?" reflects a fresh approach to the topic and no one can improve on his answer to it: "It is the litigant who is going to lose".

In this vein I also refer to the excellent paper recently delivered by Justice James C. MacPherson of the Court of Appeal for Ontario to a seminar for newly appointed judges on the judicial qualities of Chief Justice Brian Dickson entitled "The Judicial Lessons From the Greatest Judge of the Twentieth Century." Justice MacPherson effectively uses the late Chief Justice as an illustrative example of many of the qualities of a great judge.

Having regard to the potentially limitless scope of the subject assigned to me, one rational basis for choosing, at least, one theme to address, is to have regard to the goals of the organization sponsoring this colloquium that assigned the subject to me, the Chief Justice of Ontario's Advisory Committee on Professionalism. This organization's purpose is to promote, among other matters, professionalism and civility in the practice of law. Do judges have a role in this endeavour? They do, in

two ways: by example and by precept. I shall pursue this theme under the heading of "Process".

I should say, still as part of my introduction, that I recognize that all judges are not called upon to perform the same functions. There are obvious distinctions between the role of a trial judge and an appellate judge and so, while the requirement of a passion to do justice is the same for both, there are some differences in the kinds of knowledge and skills required of each position. Also, in the present era trial judges perform functions in addition to those of traditional adjudication which, in the main, may involve case management, involvement in settlement processes, and "new style" adjudication of polycentric disputes and the like. See G.D. Watson et al, *The Civil Litigation Process - Cases and Materials*, 5th ed. (1999), pp. 151-281. In this paper, I confine what I say to the judge's traditional role in the adversary system.

What does a new judge bring to the job?

It is relevant to our subject to ask what a newly appointed judge brings to the job at the time of his or her appointment. In addition to his or her legal training and experience, there is also the more pervasive component of his or her life experiences. These are the elements that, together with important accretions that are acquired by on-the-job judicial experience, will be brought to bear on the hearing and decision of cases. With this in mind, I think it is important for a judge to be keenly aware of his

or her inherent limitations and, at the same time, systematically to lay in some capital in the form of legal knowledge.

Fact-finding limitations

The judge's inherent limitations flow from his or her personal life experiences. They will not be the same of those of others yet they are the lens through which the judge will, unwittingly, view the evidence called in a case. This is particularly important in the realm of fact-finding - what the judge considers to be the "probable" facts based on either the assessment of credibility of witnesses or the drawing of the right inference from circumstantial evidence. This consideration illustrates a basic strength of trial by jury. The individual life experiences of the jurors are pooled in the rendering of their verdict. So, the judge sitting alone has to be aware of this limitation and develop a healthy open-mindedness with respect to the factual possibilities in a case. [1] The Canadian Judicial Council's *Commentaries on Judicial Conduct* (1991) makes the point nicely:

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[1] Gilbert K. Chesterton, in *The Twelve Men*, in comparing judges to juries, strongly expresses the view that experience on the Bench is not a fact-finding assets for a judge:

> "Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilisation has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policemen and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a ballet hitherto unvisited."

The good judge should be determined never to "get used to it."

> " There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet …
>
> [T]he wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

The right attitude is nicely captured by an observation of Justice Felix Frankfurter on the approach of our old friend Judge Learned Hand: "I believe it was Artemus Ward who said 'It is better not to know so many things than to know so many things that ain't so' Learned Hand knows what he does not know." (Frankfurter, "Judge Learned Hand" (1947) 60 Harv. L. Rev. 325 at 327). Frankfurter's observations were concerned with Judge Hand's appreciation of his limitations as a law expounder but they are equally applicable to the pitfalls of "know-it-all" fact-finding.

Acquiring Legal Knowledge

What I have just covered is concerned with a judge's fact-finding limitations. What about the limitations on the legal knowledge of a judge?

With respect to legal knowledge, a judge is no different from a practicing lawyer in this respect: he or she cannot be on top of, that is, be a specialist in, all areas of the law. Accordingly in many cases the judge will be heavily dependent on the

authorities cited by counsel. If the judge is comfortable in deciding the case on the basis of these authorities, then all well and good. If he or she is not comfortable then further research must be done before the reasons for judgment can be completed.

I am not, however, talking about this kind of legal knowledge. What I am concerned with is the law on those subjects which are of a frequently recurring nature, what may be thought to be bread and butter subjects. With respect to these, judges should become experts in the sense that they know, or have at their finger tips, the current authoritative statements. These statements, and I will give some examples, may not provide instant answers in cases of difficulty, but they are the necessary starting points of the process of reasoning that will result in the right answer. Not to know these authorities can cause an unnecessary waste of time during argument and, after the judge has had some experience on the bench, is not really excusable.

Judges should get on top of these subjects in an organized way, with, I suggest, the use of subject matter binders with tabs for subtopics, in either hard copy or electronic form. The purpose is to lay up valuable capital that the judge may draw upon every day. What are these subjects of a recurring nature?

I begin with the subject of civil procedure, a bread and butter subject for judges if ever there was one. Unlike the case with respect to every other field of law, there is no case that comes before a judge, in whatever form (*e.g.* motion, case conference, application, trial, reference, or appeal etc.) that is not governed in some aspect by

procedural law if, in fact, it does not turn on a procedural issue. Accordingly, familiarization with the *Rules of Civil Procedure*, and staying on top of the case law on recurring issues in civil procedure, such as motions for summary judgment, is important. A judge should be a specialist in civil procedure, at least as proficient in it as experienced counsel are. This will enable the judge to confidently resolve procedural issues that are always arising with reasonable dispatch and accuracy. (These observations are equally applicable to criminal procedure and to familiarity with the law on frequently recurring evidentiary issues.)

Another subject that judges should be on top of are the basic principles relating to the interpretation of legislation and contracts. In saying this I am not overlooking that these subjects have their esoteric reaches. What I am focusing on is a knowledge of the current authoritative statements of the law on the purpose and principles of interpretation, including the law relating to the extent to which a judge can look at extrinsic materials. These issues are coming up all the time. Without having pinned down the current authoritative, or what are said to be authoritative, statements, a lot of time may be wasted on tangential lines of thought. Knowledge of the basic principles of interpretation will also give the judge a feeling for the cases, and there are many, that are not realistically resolved by the application of a rule or principle of interpretation but more directly by the practical demands of the case as seen in the

light of the purpose of the law in question. (See Morden, "The Partnership of Bench and Bar" (1982) 16 L. Soc'y Gaz. 46 at 89-96).

A stock-in-trade item for appellate judges is knowing the scope of their court's jurisdiction. For example, in the Court of Appeal for Ontario this involves the judges being familiar with the law on the dividing line between Court of Appeal and Divisional Court jurisdictions provided for in ss. 6 (1)(b) and 19 (1)(a) of the *Courts of Justice Act* R.S.O. 1990, c. C.43 and the distinction between final and interlocutory orders. Once again, familiarity with the law does not necessarily mean that all issues will be instantly resolved (although many of them will be) but that the reasoning process will start from a solid base. Appellate judges should be *the* experts on the scope of their court's jurisdiction.

Closely related to this is knowing the authorities on the standards of appellate review relating to the various kinds of errors which are submitted as a ground of appeal. These include appeals based on errors of fact, of law, of mixed fact and law, [2] errors in the exercise of a discretion, [3] errors in the decision of a judge on damages, [4] errors in the decision of a jury on liability, [5] etc. It is in this area that a judge can profit himself or herself by doing some concentrated study on how to identify a question of

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[2] Issues based on submitted errors of fact, of law, and of mixed fact and law are all discussed extensively in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[3] See *Silver v. Silver* (1985), 54 O.R. (2d) 591 (C.A.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77; and *Reza v. Canada*, [1994] 2 S.C.R. 394 at 404. The scope of a particular discretion is determined by its legal setting. Accordingly, the wider the area of discretion, the narrower the scope of appellate review – and *vice versa*. This was the basis of my reasons in *Schreiber v. Attorney General (Canada)* (2001), 57 O.R. (3d) 316 (C.A.) at 327-330.

law as opposed to a question of fact. It may seem paradoxical that issues turning on such basic legal concepts should continue to give rise to so much argument. It is within the judge's bailiwick to know the jurisprudential and case law territory that gives rise to this argument. [6]

Similarly, those judges who hear applications for judicial review should be familiar with the standards relating to judicial review of administrative action. These can often be trickier than the standards of appellate review and judges who hear applications for judicial review should, at the least, be familiar with the text of the statements which could be applicable. [7] They are the unavoidable starting point for the really hard analysis which precedes their application in the case at hand.

There is no more constant aspect of judicial responsibility than the giving of reasons for judgment. This is not an area of law, of course, but, rather, a matter of skill. It will just not do for a judge to take the view that some people are naturally better at expressing themselves in writing than others and, if he or she is not so good in this field, that is just the way things are. Each judge, whether trial or appellate, must work consciously to reach a level at which his or her reasons for decision can be followed with as little difficulty as possible on the part of the reader. This is a skill that can and

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4 See *Woelk v. Halvorson*, [1980] 2 S.C.R. 430.

5 *Vancouver-Fraser Park District v. Olmstead*, [1975] 2 S.C.R. 831.

6 Helpful analyses can be found in Mureinik, "The Application of Rules: Law or Fact?" (1982), 98 L.Q.R. 587 and Endicott, "Questions of Law" (1998), 114 L.Q.R. 292. For a probing analysis of questions of mixed fact and law in relation to the allocation of functions between judge and jury see *Lotus Development Corporation v. Borland International Inc.*, 788 F. Supp. 78 (D. Mass. 1st Circ. 1992).

must be learned and, when it is, it should take a judge no more time to prepare well-organized, coherent reasons than opaque incoherent ones. I am speaking, of course, of the middle ground of reasons for judgment, not those that may be properly be given in a brief endorsement or those in unusually difficult cases that involve new legal territory. The latter kind of reasons necessarily require more time.

PROCESS AND SUBSTANTIVE JUSTICE

Process

I should say a word about what I mean by "process". I mean, to refer to a dictionary definition, "a particular method of doing something". As such, it is part of procedure, but I do not use this word because I wish to distinguish what I shall discuss from the "law" of civil procedure which is found in black letter form in the *Courts of Justice Act*, the *Rules of Civil Procedure*, and in case law. What I shall discuss is an aspect of a judge's manner in the conduct of a proceeding, the process to which he or she adheres, quite apart from the application of the black letter law.

Just as written procedural law is essential to doing substantive justice (See Morden, "An Overview of the Rules of Civil Procedure" (1984) 5 Advocates' Q. 257 at 264-5) so is process. I shall expand on this.

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[7] The standards of review are: correctness, reasonableness, and patent unreasonableness. Lebel J. critically reviews the law in this area in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 79.

The commentary to rule 4.01 (1) of the Law Society's *Rules of Professional Conduct* contains the following sentence: "Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected." This expressly states the important linkage between dignity, decorum, and courtesy and the doing of substantive justice.

The point is also made in the reasons of Rosenberg J.A. for the Court of Appeal for Ontario in *R v. Felderhof*, [2003] O.J. No. 4819 in relation to what he repeatedly referred to as "the civility issue" in that case.

> [84] It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter this way in a 2001 address to the Call to the Bar: "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work." Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. As Kara Anne Nagorney said in her article, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815, at 816-17, "Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. … Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.

Felderhof also makes clear that it is the judge who has the ultimate responsibility to see that the values of decorum and courtesy are maintained. How does he or she do this? I suggest by the familiar duo of precept (which includes by order, direction and admonishment) and example.

Process by Judicial Example

Of the two, the better method is, if feasible, that of example. While the *Rules of Professional Conduct* refer only to the lawyer's duty of courtesy and respect for the judge (rule 4.01 (1)), the Advocates' Society's *Principles of Civility for Advocates* show that this is a two-way street. They provide:

> " 62. Judges are entitled to expect Counsel will treat the Court with candour, fairness and courtesy.
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> 69. Counsel are entitled to expect Judges to treat everyone before the Courts with appropriate courtesy."

(I have been asked why the judge's duty of courtesy is qualified by "appropriate" and that of the lawyer is not and have not yet been able to come up with a satisfactory answer.)

This is suggestive of how the judge may, by example, maintain dignity, decorum and courtesy. The Honourable J.O. Wilson's *A Book for Judges* (1980) (written at the request of the Canadian Judicial Council) stresses this:

> " … The requirement of courtesy in a courtroom, must be observed by the judge, by counsel and by litigants and witnesses …

> Example remains the best teacher and a judge who is moderate, disciplined and courteous in his intercourse with advocates, litigants and witnesses is far less likely to be exposed to any immoderate conduct on their part." (pp. 39-40)

Simon Rifkind, an American lawyer, in a speech delivered some time after he had retired as a federal trial judge, stated in lyrical terms how a judge's bearing and courtesy can go a long way to controlling the nature of a hearing. He said:

> " The courtroom, sooner or later, becomes the image of the judge. It will rise or fall to the level of the judge who presides over it… No one can doubt that to sit in the presence of a truly great judge is one of the great and moving experiences of a lifetime." (*New Yorker*, May 23, 1983, at p. 63)

Finally, Lord MacMillan, a judicial member of the House of Lords (1930-39 and 1941-47), has said:

> " *Courtesy and patience* must be more difficult virtues to practise on the Bench than might be imagined, seeing how many otherwise admirable judges have failed to exhibit them; *yet they are essential if our courts are to enjoy public confidence.*" (*Law and Other Things*, (1937), pp. 218-19; emphasis added)

The judge's conduct should be marked by open-mindedness and courtesy. A common example of the absence of open-mindedness is a judge's statement at or near the beginning of a hearing of his or her conclusion on the case that is flatly contrary to the position of one of the parties. One reason for such conduct may be the judge's desire to show the parties that he or she has read the material and is on top of the case already, even before receiving oral submissions. Another reason may be the judge's

desire to bring a hearing to a quick conclusion. Neither reason is, of course, defensible. Some judges might attempt to justify this type of conduct on the ground of efficiency – that time should not be wasted on cases or points that are doomed to fail. There might be a germ of truth in this but the process is all wrong.

A party is entitled, at the least, to open his or her case without judicial interruption except for clarification. Otherwise, the impression is created that the judge has decided the case without the benefit of submissions.

The foregoing, of course, does not mean that the judge must sit silently, inscrutable as the face of a sphinx. Once counsel has, at least, completed stating what his or her point is, a judge concerned with its validity can and should intervene, not with a blunt statement that counsel is wrong or that the judge flatly disagrees, but with a statement by the judge of what he or she finds troubling with the submission coupled with a request that counsel assist the judge on the point. This helps counsel focus on the matter of concern to the court without announcing to counsel that he or she has hit a brick wall.

This was the approach of Mr. Justice Arthur Martin, who sat on the Court of Appeal for Ontario from 1973 to 1988. It was well known that Arthur Martin had an encyclopaedic knowledge of the criminal law and an almost unequalled experience as counsel in criminal trials and appeals. If anyone was in a position to be "efficient" in the conduct of a hearing by stating his opinion at the beginning of the argument it was

Arthur Martin - but, of course, he never did this. He showed respect for all counsel, experienced and inexperienced. He made it clear that he was genuinely interested in what they had to say. He brought out the best in them. His interventions took the form of gentle steering in the direction of what he considered to be the germane issues. This led to orderly hearings in which the losing counsel or litigant never had any cause to think that he or she had not had been treated fairly.

Here is another example. It was related to me by the former Chief Justice of the High Court, the Honourable James C. McRuer, with respect to a case that he had tried as counsel before Mr. Justice Orde in the High Court of Justice in the 1930's. I set forth a description of the case which I gave on an earlier occasion:

> " Mr. McRuer, as counsel following a hard-fought and difficult trial before Mr. Justice Orde which took place in the 1930's and which his client lost, discussed the matter of an appeal with him. The client contemplated the question and then said something very much to this effect: 'I am not inclined to appeal. If that man [referring to the trial judge] thinks I'm in the wrong, then, regardless of what I thought at the outset, I think I probably am.' It takes little imagination to picture the sense of fairness and courteous attention which must have pervaded the atmosphere of that trial." (Morden, "The Partnership of Bench and Bar" (1982) 16 L. Soc'y Gaz. 46 at 60)

Then there is the flowery, yet instructive, description by Justice Oliver Wendell Holmes of William Crowninshield Endicott who sat as a justice in the Massachusetts Supreme Judicial Court from 1873 to 1882:

> "When next I saw him it was upon the bench, and again he excited my admiration … I remember thinking at the time, as I still think, that he represented in the superlative degree my notion of a proper bearing and conduct of a judge. Distinguished in person … he sat without a thought of self, without even the unconscious pride or aloofness which seemed, nay, was, his right, serenely absorbed in the problems of the matter in hand, impersonal, yet human, the living image of justice, weighing as if the elements in the balance were dead matter, but discerning and collecting those elements by the help of a noble and tender heart." (*Occasional Speeches* (Cambridge: Belknap Press, 1962) at p. 128)

Process by Judicial Precept

In the immediately preceding part of this paper I said that the better method for a judge to maintain order was by example, "if feasible". Sometimes it is not feasible and so I move now to the judge's precept in the conduct of a proceeding. Here I shall confine my remarks to a judge's policing of the interface between a lawyer's duty to represent his or her client zealously and his or her duty to act with civility.

As you know, there has been a lot said in the last few years in this country, and also in the United States, on the decline in civility in the practice of law and that something should be done about it. In fact, this thinking was an important impetus behind the founding of the Chief Justice of Ontario's Advisory Committee on Professionalism. The movement apparently began in the United States in the 1970's led by the Chief Justice of the United States, Warren Burger. It has been thought that the growing

commercialization of the practice of law, and also the impact of the media, are contributing factors in the decline in civility.

R v. Felderhof, to which I have referred, deals helpfully and extensively with the trial judge's responsibility to maintain a proper level of civility in the proceedings before him or her. It made it clear that a trial judge's failure to discharge this responsibility may cause him or her to lose jurisdiction "in circumstances falling short of actual or reasonable apprehension of bias where the failure of the trial judge to intervene would prevent a fair trial [para. 99]".

I turn now to a different aspect of the interface between zeal and civility.

Munroe Freedman, a prominent American law professor and co-author of Freedman and Smith, *Understanding Lawyers' Ethics*, 2nd ed. (2002), thinks that the civility movement has gone too far. He and his co-author say that "the end result is the subordination of zealous representation to vague and sometimes unethical notions of civility" (p. 121). He notes that the supporters of civility creeds or guidelines insist that they are simply to exhort lawyers to behave with civility and that they are not intended to be enforced - but notes that judges have enforced principles of civility with sanctions (p. 122).

He gives as an example the remarks of a federal district judge:

> " At an ABA Conference Judge Schwartzer illustrated professionalism by recalling that, when he was a young lawyer, his research revealed that his client could win a case because the lawyer on the other side had missed a statute of limitations. When he reported the good news to the partner in charge of the case, however, the older lawyer sternly admonished the neophyte that 'we don't practice law like that in this office'. That is, the firm would not rely on the statute on its client's behalf because it would embarrass the lawyers on the other side to do so. The judge concluded the anecdote with the approving comment: 'that made a great impression on me'." (p. 123)

This is ridiculous. As a matter of fact, this particular case is precisely covered in a commentary to the Law Society of Upper Canada rule 4.01(1) as an example:

> The lawyer should never waive or abandon a client's legal rights, for example, an available defence under a statute of limitations without the client's informed consent.

Freedman and Smith give another example. I will not go into all the details of the case but merely note that it involved a case under Missouri procedure in which the defendant's lawyer negligently failed to serve and file an answer (a statement of defence). At the appropriate time, the plaintiff's lawyer moved for default judgment, which was granted. The plaintiff had instructed his lawyer not to tell the defendant's lawyer about the default until after the 30 days had run (which, under the governing procedure would make the default "final") and the lawyer obeyed his client's instructions, as, according to Freedman and Smith, he was ethically required to do.

The court could have vacated the judgment, of course, but declined to do so on the ground that the defendant's lawyer had been negligent. Nevertheless, the Missouri Supreme Court castigated the plaintiff's lawyer who was identified by name for his

lack of professionalism in giving his client the lawful benefit of the default. The opinions make it clear that the judges expected the lawyer to place courtesy to his "brother lawyer" over the rights of his client. One opinion refers to ethical rules like zealous representation as jargon that should not supercede courtesy and consideration to opposing counsel.

Freedman and Smith observe (at p. 125) that there are two ironies in these opinions.

> " One is that the judges expected the plaintiff's lawyer to give the defendant greater rights than the court itself was willing to give. The second is that the judges had no problem with the lawyers enforcing the default against an unrepresented defendant; it was only when a 'brother lawyer' entered the picture that counsel's conduct became shocking, dishonourable and unprofessional."

This sort of case raises issues that, I think, can be difficult. To what extent should judges "enforce" what they conceive to be professional obligations of a lawyer in a manner that is inconsistent with his or her client's rights? The question arises most commonly, perhaps, in relation to requests for adjournments and motions to set aside default judgments.

I think that the American cases to which Freedman and Smith refer go too far. If a lawyer is reasonably attempting to protect a legal interest of his or her client it is not for a judge to tell the lawyer that it is uncivil to proceed that way. The key word is "reasonably" and I suggest that it takes its colour from what the practice of the court has been with respect to the issue in question, for example, granting adjournments

(see *Khimji v. Dhanani*, [2004] O.J. No. 320 (C.A.) for, possibly, the latest decision in this area) or setting aside a default judgment (see *Chitel v. Rothbart* (1988), 29 C.P.C. (2d) 136 (Ont. C.A.). If, for example, a lawyer unreasonably opposes the setting aside of a default having regard to the facts of the case and the law not only will he or she lose the motion but also may face an adverse costs order. This would not be because the lawyer was "uncivil" but, rather, because he or she asserted a position that could not reasonably succeed.

Substantive Justice

Reasons for decision

I turn now to the "good" judge's duty to do substantive justice after conducting a courteous and efficient hearing. By substantive justice I mean the giving of a judgment that is based on the application of the correct law to the facts that are rightly found. The aspect of this that I wish to discuss is the reasons given for the judgment and, more particularly, how the reasons express the principle on which the case turned, the legal basis of the decision.

The Supreme Court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869 has comprehensively and helpfully reviewed the law on the *duty* of a judge (in that case it was a trial judge) to give reasons. It held that, in the circumstances of that case, the trial judge had erred in law in not giving reasons that amounted to reasons. The

accused had been convicted of possession of property obtained by the commission of an offence. The trial judge's reasons were as follows:

> Having considered all the testimony in this case, and reminding myself of the burden of Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.

The court held that these were not reasons. It made the following observations.

> [28] ….The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.
>
> [32] The more problematic situation is where the trial judge renders a decision and gives either no reasons or, as in this case, "generic" reasons that could apply with equal facility to almost any criminal case. The complaint is not that the reasoning is defective but that it is unknown or unclear. …

R. v. Sheppard was concerned with the law relating to the minimum content of reasons that will pass muster. What I am concerned with in these remarks is not what the law *requires* but with a higher standard dictated by judicial professionalism – with how reasons are expressed, and specifically, as I have said, with that part of them that sets forth the rule or principle on which the decision is based.

The writing process is related to substantive justice

I should stress that the decision that is ultimately delivered and, hence, whether substantive justice is done, is intimately tied to the writing process. As I have said elsewhere (Book review of *Decisions, Decisions … A Handbook for Judicial Writing* by Justices Louise Mailhot and James Carnwath (1998) (11 National Judicial Institute Bulletin, at pp. 3-4), I do not agree with those legal realists (or, more recently, members of the critical legal studies movement) who think that judicial decisions are exclusively the product of the judges' initial intuitive reaction to a case or, worse, of pure policy considerations, and that the reasons which are given are predetermined by the decision itself - nothing more than an after-the-event rationalization. I readily acknowledge that in many cases, including those of substantial complexity, a judge may, at the beginning of the process, have a particular "decision" in mind. This is often a necessary initial organizing technique. This will, in fact, be *the* decision if, following a thorough and dispassionate consideration of the relevant legal authorities and facts, it is confirmed to be the right decision.

It sometimes happens, however, that when the authorities and the facts are carefully considered, the intended decision "won't write". What is said or intended to be said will not hang together as a statement justifying the result. [8] In these cases the intuitive

[8] The following passages in a good book by an experienced judge bear on this point:
"All of this means that at this stage I am in an uncomfortable state of imbalance, sometimes pursuing an approach with enthusiasm until I run into or recall a fact or a legal principle that blocks the road like an overturned trailer truck. … Ahead lie other steps – the humbling experience of seeing excisions, additions, word substitutions, possibly even quite different approaches, and, once in a great while, the hard-come-by realization that my whole theory and proposed result are wrong. Coffin, *The Ways of a Judge* (1980)

conclusion, which serves as an initial framework for writing, will be jettisoned and a different one, which fits better with the facts of the case and the fabric of the law, then becomes the decision. The decision and the writing process are not divorced. Each impinges on the other, in a back and forth process, as the judge goes about his or her work. Accordingly, I emphasize the necessary causal connections between (1) substantive justice in a case; (2) the reasons for decision in that case; and (3) the writing process that results in these reasons.

The expression of the principle on which the case turns

I shall now deal with that aspect of reasons for judgment which is the expression of the rule or principle on which the case turns. If one had to choose the part of reasons for judgment that is the most important it would have to be the statement of the legal principle that dictates the result. It is of particular importance to the losing party and to those who are required to consider the reasons as a precedent. I accept that in many cases, particularly in the trial courts, there is no doubt about the governing legal principle and how it is formulated. In these cases, generally, the fighting ground is the facts. But where the law that governs the case is in contention the court's formulation of that law is highly important.

The most obvious attribute that the governing principle should have (as should the other parts of the reasons) is clarity. As Benjamin Cardozo said with respect to the

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at pp. 157 and 160-161. Cf. the somewhat exaggerated analogy to the process of invention described by Thomas Edison. "I have not

writing of reasons for judgment, "the sovereign virtue for the judge is clearness". [9] There should be no mystery surrounding the statement of the law on which the case turned. Accepting clarity as a general condition of good reasons I turn now to three particular features relating to the governing principle: (1) its generality; (2) its workability; and (3) whether it amounts to a textbook rather than the resolution of a case.

i *The generality of the principle*

Law is a system of propositions of varying degrees of generality. It is the generality inherent in a legal rule that gives law its objective rational characteristic. Complete absence of generality in the "rule" applied to decide a case gives the administration of justice a subjective and arbitrary appearance. Indeed, it would not be a rule. If this were the practice, law truly would be unsystematic or, to quote from Tennyson's *Aylmer's Field*, "[t]hat codeless myriad of precedent, [t]hat wilderness of single instances."

The degree of generality of the propositions upon which a decision is grounded is a constant concern in judgment writing. The tension is between, on the one hand, a basis so narrow that the decision looks like a purely *ad hoc* result with virtually no place in the fabric of the law, i.e., with an arbitrary appearance and, on the other hand,

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failed. I have just found 10,000 ways that won't work."

[9] "Law and Literature" in *The Selected Writings of Benjamin Nathan Cardozo* 947) at 341.

a basis so wide that it will inevitably cause nothing but trouble in future cases. What I recommend here, of course, is moderation – a sensible middle ground – one that shows that the justification is reasoned but is not too greedy in its occupation of space in the legal firmament.

I am against undue generalization, i.e., justifying a decision on a wider basis than is reasonably necessary, because experience shows time and time again that virtually all generalizations are short-lived. They are inherently weak. As Justice Oliver Wendell Holmes once said: "To philosophize is to generalize, but to generalize is to omit". [10]

I hazard a suggestion on how to cope with the problem when moving into an unfamiliar area of law, for example, one opened up by a recent statutory provision. The temptation may be to illuminate it now in such a way that no future court will have any trouble with it. The way for the future will have been completely mapped for it. This temptation has to be resisted.

The advisable approach, I suggest, is to lay down a relatively narrow proposition that is responsive to the facts of the case and the meaning of the provision as the judge reads it and to make it clear that it is not intended to be a final statement of the full or exclusive meaning of the provision. It is an openly tentative statement, not in the sense that the judge does not intend it to be a precedent, but in the sense that the judge

[10] Quoted by Cardozo in "Law and Literature", op.cit., at p. 341. In the same vein, Holmes also said: "I always say the chief end of man is to form general propositions – adding that no proposition is worth a damn". Holmes-Pollock Letters (1942) Vol. II, p. 13.

is saying that the provision means *at least* "this" in circumstances of a case such as this, but that he or she is not foreclosing any future developments in the direction of a wider interpretation – should experience justify such conclusion.

I followed this approach in *Re Victoria Wood Development Corporation Inc. v. Jan Davies Ltd. et al* (1979), 25 O.R. (2d) 774 (C.A.). The issue in this case was whether a developer had standing to appeal to the Ontario Municipal Board from a decision of a committee of adjustment. This depended upon whether the developer was a "person who has an interest in the matter" within the meaning of the *Planning Act*, R.S.O. 1970, c. 349, s. 42(13). The first set of reasons, in the Court of Appeal, given orally, simply stated that on the facts the developer was not a person who had an interest in the matter. I thought, with respect, that this amounted to no reasoned justification at all. I said:

> I agree with this result. In disposing of the issue arising on this appeal, it is neither necessary nor desirable to formulate an exhaustive or complete definition of the expression "person who has an interest in the matter". It is sufficient to say that I do not consider that the factors upon which the respondent relies bring it within what is covered by this expression. I am of the view that for the respondent in this case to claim to be a "person having an interest in the matter", it would be necessary for it to establish some geographic proximity to the subject lands. While this test of interest is relative, I am satisfied that it is not met in this case (p. 776).

The desire may be to give clean, quotable, legal propositions that resolve a wide area of future cases. The motive is to be helpful but, probably, something else as well: to be a much-quoted benefactor. The only trouble is that this thinking is based on a faulty understanding of the nature of law and little imagination respecting fact patterns that the proposition could, unintentionally, cover. It does not work. [11]

ii. ***Avoid stating an unworkable rule; the perfect is the enemy of the good***

Related to the foregoing criticism of premature and unnecessary generalization, is a notion that can be summed up with the statement that the perfect is the enemy of the good – avoiding the laying down of unworkable rules. Judges should not lay down theoretically correct but practically unworkable rules. In the *United States v. Luna*, 525 F. 2d 4 (1975) the United States Court of Appeals for the Sixth Circuit was concerned with the test to be applied to suppress wire tap evidence – which involved the bases on which wire tap orders could properly be impeached. The court decided that an order may be impeached on the grounds of (1) knowing use of a false statement by the affiant with intent to deceive the court; (2) reckless assertion of a false statement essential to the establishment of probable cause. At p. 6 the court said:

> Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient for two reasons. …

[11] Like M. Jourdain in Molière's *Le Bourgeois Gentilhomme*, who had been speaking prose without knowing it, it looks like I have been a "judicial minimalist" all these years without knowing it. See Sunstein, *One Case at a Time – Judicial Minimalism on the Supreme Court* (Cambridge, Ma.: Harvard Univ. Press, 1999).

> Negligent misrepresentations are theoretically deterrable, *but no workable test* suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further. We therefore conclude that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. [Emphasis added]

The same point is made by McLachlin J. in the Supreme Court of Canada in relation to s. 11(b) of the *Charter* (trial within a reasonable time) in *R. v. Morin*, [1992] 1 S.C.R. 771 at 810:

> [W]e must remind ourselves that the best test will be relatively easy to apply; otherwise stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay.

On the other side of the line, there are many critics of the workability of the Supreme Court of Canada's three standards of judicial review of administrative action: correctness, reasonableness, and patent unreasonableness. In this regard I refer to Lebel J.'s concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 79 in which he addresses "the conflicted relationship between correctness and patent unreasonableness" and, also, the "nebulous" distinction between "patent unreasonableness and reasonableness *simpliciter*". The current law on this subject is, I think, a good example of an unrealistic striving for perfection.

I might also refer to the Supreme Court of Canada's test for the granting of summary judgment in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1993] 3 S.C.R. 423 at 434-35. The court introduced two factors for the court to consider, sequentially, that are not stated in the governing rule (rule 20.04(2)) using words that indicate that there is a legal burden to the responding party to "*establish* his claim as being one with a real chance of success" (emphasis added). I suggest that the governing rule is clear and needs no glossing. It provides, simply, that while there is an evidential burden on the responding party the legal burden rests on the moving party and never shifts. See *High Tech Group, Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 at 104-5 (C.A.).

On the subject of formulating a workable rule as the basis for decision, I also refer to my reasons in *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (C.A.), a case concerned with whether an order setting aside a default judgment on conditions was interlocutory even though the effect of the order would be final if the conditions were not met. At p. 116 I said:

> As a matter of policy it may seem that some of these orders, which, analytically, are interlocutory, might be appropriately treated as final – but, if this were to be done, where would the line be drawn and how could the definition of what is final be expressed so that it could be applied with some degree of predictability or confidence? …
>
> As I have indicated, jurisdictional rules should be as clear as possible and an application should not be beset with

> factual disputes which themselves may be protracted and difficult to resolve.

iii *Avoid writing a textbook rather than deciding a case*

Related to the point respecting generality in the framing of propositions, is the temptation to state the law in a particular area fully and comprehensively. This too, usually comes a cropper before the ink on a judgment is dry. For example, I give you the observations of Professor H.W.R. Wade, an eminent authority in administrative law in England, on a decision of the House of Lords in a judicial review case, *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 1 W.L.R. 1174.

> That case is … replete with systematic restatements, almost as formal as Euclidean propositions, of the principles of judicial review of the acts of public authorities… [T]he House of Lords seems to be seizing every opportunity to reformulate primary rules as comprehensively as possible. Comprehensive expositions of a whole branch of the law are not always easy to make within the framework of a particular case, and it is best if they leave the door open for later adjustments ((1985), 101 Law Q. Rev. 153 at 153).

I think you have to start with the basic proposition that courts exist for the purpose of deciding disputes. The legitimacy of the law they make is based on this. The law, if it is being framed, is being framed for the purpose of deciding a case. If more is framed than is required then it seems to me that there is good argument that the court is not engaged in a legitimate function. Also, there is increased scope for error because some of the "rules" are not being "tested" by their application to particular

facts to resolve a dispute. I should, however, refer to the contrary view of Justice Dickson in "The Role and Function of Judges" (1980) 14 L. Soc'y Gaz. 138 at 190-91:

> … There are so many unanswered questions in the law. The number of cases coming before the Court are few in number. They come because they raise a point or points of general public importance. It seems to me legitimate to seek to resolve the issues which may be properly be said to arise out of the litigation. There may be reason, as I indicated yesterday, why some issues must be left unresolved but, generally speaking, I think it is wrong to leave uncertainties, to be debated later, perhaps for years. That is costly in time and money. [The reasons given, at p. 167, for leaving some issues unresolved are : (1) no argument by counsel; (2) no consensus on the court; and (3) the case is not the best vehicle.]

The kind of thinking that can result in more being stated in a judgment than is necessary is set forth in the good book by an experienced judge that I earlier referred to in a footnote in relation to the bearing of the writing process on substantive results. The judge is referring to the stage at which he has just completed his extensive research on the issues to be resolved:

> " I begin to gain the confidence that on this small issue and at this precise time I know more of the subject than any other person. I shall soon forget, pass on the next case, and begin all over as an amateur. But for this moment I am an expert." (Coffin, *The Ways of a Judge* (1980), at p. 158)

A good example of the shortcomings of judges attempting to make comprehensive detailed restatements of the law is afforded by the judgment of Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.). It was intended to be a comprehensive reform of the law relating to the granting of interlocutory injunctions, repealing the "strong *prima facie* case" approach in favour of the "serious issue to be tried plus balance of convenience" approach. In an obituary by P.V. Baker in (1986) 102 Law Q. Rev. 1 it was noted that Lord Diplock "saw the common law as a maze not a motorway … which awaited his rigorous intellectual analysis to make it intelligible and adapted for further life." With respect to *American Cyanamid,* Mr. Baker said at p. 1:

> Occasionally the results were lacking in practical wisdom; the decision in *American Cyanamid* in which he delivered the single speech has not been easy to assimilate but this was exceptional.

Almost as soon as *American Cyanamid* was released judges and commentators were indicating great difficulty in applying it. See, *e.g. Fellowes & Son v. Fisher*, [1975] 3 W.L.R. 184 (C.A.); Note, 91 Law Q. Rev. 168 (1975); *Athletes Foot Marketing Assoc. Inc. v. Cobra Sports Ltd.*, [1980] R.P.C. 343; *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.); and *C-Cure Chemical Co. v. Olympia & York Developments Ltd.* (1983), 33 C.P.C. 192 (Div. Ct.). Indeed, in *N.W.L. Ltd. v. Woods*, [1979] 3 All E.R. 614 at

625 Lord Diplock himself qualified the effect of what he had said in *American Cyanamid.*

The source of the difficulty was that Lord Diplock, in applying his rigorous intellectual powers to straighten out the law, claimed too much for his analysis. He said (at p. 406 B-C) that his analysis was to apply to all motions for interlocutory injunctions. Experience showed that it did not make sense in some cases.

CONCLUSION

In the opening paragraph of this paper I said that its title necessarily conferred on me a large measure of discretion in selecting what to say. This explains the hodge-podge nature of the topics covered.

The only broad organizing features have been: (1) the judge's passion to do justice and the knowledge and skills necessary to give effect to this passion; and (2) a consideration of aspects of judges doing procedural and substantive justice, with some emphasis on the importance of civility in the process. No doubt others would likely have dealt with different topics and, at a different time and on another occasion I, myself, might well have approached this assignment quite differently.

John W. Morden

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