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TITLE: The Judicial Burden: An Address to the Judges of the County Court of Victoria
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1. Introduction

The modern judge is required to display a number of characteristics. She or he is expected to be:

- Independent
- Accountable
- Efficient
- Skilled at management
- Decisive
- A quick and lateral thinker

The modern judge is expected, these days, by the profession to be pleasant, patient and welcoming. The latter expectations arise in a context where, save for the criminal jurisdiction where there is really no choice, solicitors, counsel and litigants, if they find a court user friendly they will support it and seek to litigate within it. On the other hand, if they regard a court as old-fashioned, austere, unwelcoming, non-user friendly and non-voguish, they will take their litigation elsewhere. They look at jurisdictional options by way of statutory portals[1]. At the same time as these expectations exist there are other demands and impositions upon judges. I will state the obvious ones:

- The ever burgeoning workload
- The pressure of writing the judgment
- The pressure of correctly ruling on legal issues (not only the pressure of ruling, but ruling under pressure)
- The pressure of correctly charging a jury
- Coping with the ever-present spectre of appellate review and correction
- The loneliness of the judicial decision maker
- The ever-constant strain on judicial health

It is, therefore, worthwhile exploring the characteristics and expectations described to see where that will lead.

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1 For example, s.52 of the *Trade Practices Act*.

2. Independence

Not so very long ago, Chief Justice Beverley McLachlin, Chief Justice of the Supreme Court of Canada discussed the topic of "Judicial Independence".[2] After exploring how fortunate the Canadian people were to enjoy an independent judiciary whereas in other places governments have difficulty understanding judicial independence, much less implementing it[3], the judge postulated the question as to why it was that the Canadians (I interpolate similar to we Australians) achieved judicial independence. She postulated three reasons: first, good fortune as inheritors of the British justice system; secondly, the Canadian Constitution; and thirdly, and relevantly for present purposes, "the vigilance of lawyers and judges in preserving and promoting judicial independence"[4]. Chief Justice McLachlin went on to say:

> "Judicial independence, as its history attests, has not been won by fiat or by accident. It has been won by the vigilance and courage of lawyers and judges over the centuries. And it is by that same vigilance and courage that it is sustained. As former Chief Justice Dickson once explained:
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> > 'The tradition of law which we share is a living thing, built by lawyers and judges imbued with a love of individual freedom and a dedication to justice for all, according to law. The legal doctrines that we have inherited constitute not the bare bones of a dead tradition but a vital body of living experience. It is only where the law is interpreted by an independent judiciary with vision, a sense of purpose, and a profound sensitivity to society's values, that the rule of law, and therefore the citizen's rights and freedoms, are safe'."[5]

Chief Justice McLachlin concluded:

> "Modern threats to judicial independence, like the old, demand a courageous, steadfast response. When all is said and done, the last bastion - the final refuge - of Judicial Independence is the conscience of each and every judge and lawyer. We, the Bar and the Bench, are the guardians of our legal system and the rule of law."[6]

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2 Remarks of the Rt. Hon. Beverley McLachlin, P.C., "Judicial Independence", May 11, 2001, the Fourth Worldwide Common Law Judiciary Conference, Vancouver, British Columbia, Canada.

3 Ibid, p.2.

4 Ibid, p.3.

5 Ibid, p.5.

6 Ibid, p.6.

Now this powerful inspiring language fills us with great pride (we all, momentarily, are a few centimetres taller). We stand filled with inspiration and visualise ourselves sitting on our benches dispensing justice to the masses.

However, it remains momentary. How do the noble and inspiring statements of Chief Justice McLachlin apply to us on the 46th sitting day of a wearing building case when the parties are immersed in deep struggle over extension of time claims and delay costs? When junior and inexperienced defence counsel persist in taking every single objection in the eighth week of a drug trafficking trial? When counsel for the third party in a tedious sale of business dispute persists with pedantic pleading points? When an accused in person persists in difficult, painful and repetitive cross-examination of an alleged victim in a sexual memory case?

The answer probably lies in the oath we all take, that is, to decide cases without fear favour or affection. Even those words, inspiring as they are at the moment of being sworn in and becoming a member of a court prompt focus as to what they really mean and where they take the individual.

I suggest it has a lot to do with public confidence. Chief Justice Gleeson of the High Court said[7]

> "Judges, individually and collectively attach great importance to maintaining the confidence of the public … Public confidence is invoked as a guiding principle in relation to the conduct of judges, on and off the bench, and in relation to the institutional conduct of courts. And it is a value that plays a part in the development of legal principle. … The general acceptance of judicial decisions, by citizens and by governments, which is essential for the peace, welfare and good government of the community, rests, not upon coercion but upon public confidence."

Chief Justice Gleeson then postulated the question as to what discussion as to "public confidence" actually means or involves. He asked, "How do we know what will sustain it; or what will diminish it?" His Honour said:

> "In truth, we are talking about something that exists at various levels. We are not just talking about public opinion, and its short term response to events and issues. Like any occupational group, judges want to be well regarded by the rest of the community; they are pleased if their work is valued; they are concerned by criticism that is fair; and they are offended by criticism that is unfair. But confidence goes deeper than that. It goes beyond public reaction to legal issues, that from time to

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7 Gleeson, M., "Public Confidence in the Judiciary", speech delivered at the Judicial Conference of Australia, Launceston, 27 April 2002.

> time, become newsworthy. Sentencing has been such an issue in recent years."

More often than not, discussions about judicial independence and public confidence shift very quickly into debates about separation of powers and the tensions between the executive and the judiciary.

Any judge who has had dealings with the modern bureaucracy will comprehend immediately my use of the expression "tension".

3. *Accountability*

This leads me on from independence to the next characteristic, accountability.

Modern government operates on the Harvard Business School principles of executive management practices. Courts have become a business item in a departmental budget. The days of a head of jurisdiction receiving a courtesy visit from the Attorney-General and the head advising of the need for a new judge to meet an increased number of cases and to overcome backlogs are gone. In order to acquire judicial resources heads of jurisdiction are these days required to provide a business case. The dispensation of justice has become, seemingly, a business. As one commentator observed:

> "Agencies are now told that they must 'manage with less', engage in 'risk management' and 'cost recovery'; they will be subject to an 'efficiency dividend'. The overall notion is sometimes called 'managerialism' but, whatever the name, it all comes back to the same thing - that there is less money to go around and management practices must be adapted accordingly. Some of these practices are seen as applicable to the management of the judicial arm of government. Most notable is an expectation of the recovery of the cost from persons who make use of a government service and a requirement that judicial services be provided more efficiently and effectively - which is a euphemism for more cheaply."[8]

This approach or attitude is reflected not only in the provision of funds to courts but, also, to the shrinking of legal aid funds, appeals costs fund allocations but most importantly, the primary judicial resource, that is, judges themselves. We are constantly pressed to be more efficient and to apply more case management. It seems to be forgotten, often, that we are engaged in the "business of justice", that is, applying the rule of law and protecting citizens' rights.

At the same time, judges preside in the very different social context to the judges who decided many of the legal principles that constitute the rule of law.

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[8] Pearce, D., "Executive Versus Judiciary", (1991) 2 PLR 179, 180.

Society has changed and there has been a commensurate change in the expectations of society of judges.

4. *Judges in Modern Society*

Again, Chief Justice McLachlin of the Supreme Court of Canada has considered the role of judges in modern society and the changes that they must face. She observed:

> "The nature of the questions they decide, and the public expectation that they will decide them fairly and well, place new demands on judges. It no longer suffices to be a competent legal scholar and a fair arbiter. To perform their modern role well, judges must be sensitive to a broad range of social concerns. They must possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions. The ivory tower no longer suffices as the residence of choice for judges. The new role of judges in social policy also demands new efforts of objectivity. Often the judge will have strong personal views on questions which a judge is asked to decide … But the task of judging is not accomplished simply by plugging one's personal views into the legal equation. The judge must strive for objectivity. This requires an act of imagination. And it requires an attitude of 'active humility', which enables the judge to set aside preconceptions and prejudices and look at the issue afresh in light of the evidence and submissions. The judge must seek to see and appreciate the point of view of each of the protagonists. She must struggle to enunciate the values and issues. Then she must attempt to strike the balance between the conflicting values which most closely conforms to justice as society, taken as a whole, sees it. It is impossible to eliminate the judge's personal views. But by a conscious act of considering the other side of the matter, the judge can attain a level of detachment which enables him or her to make decisions which are in the broader interests of society. In the end, the judge can know no other master than the law, in its most objective sense."[9]

Judges sometimes find themselves, seemingly, attacked on all fronts. The media attacks the leniency of the sentence in a difficult case. The victims of crime are given a voice that so often is amplified and circulated in a way such

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[9] McLachlin, B., "The Role of Judges in Modern Society", The Fourth Worldwide Common Law Judiciary Conference, Vancouver, British Columbia, Canada, 5 May 2001.

that the judge is disadvantaged. Appellate courts in the cool, measured calmness of the appellate context clinically analyse the work of the trial judge below in a way that can be akin to the use of a scalpel without an anaesthetic. All this happens at a time when government continues to press for greater output, fewer delays. Government, applying that Harvard Business School approach requires measurement of caseload, accountability for caseload and, most importantly, measured throughput and output. How does one say that a judge who has a large case management load processing hundreds of proceedings on a directions basis is more productive than the judge who hears the three month long criminal trial or commercial trial?

I would suggest that there has been a disregard for the real value of the judicial worth. However, I would suggest that there is a relatively simple conceptual solution. A judge is in, by and large, the best position to assess the seriousness, complexity and other demands of a particular proceeding, whether it be criminal or civil. It seems to me that a score card or value assessment could readily be devised where points or a value are attributed to pre-identified factors, again, seriousness, complexity and so forth. In this way judges can demonstrate to government and those preoccupied with management principles that judge work is a valuable commodity, the value of which can be assessed, but, in a way different from business.

Again, it seems to me that it lies with the judges to devise a method or formula of attributing a value to their judicial worth.

5. *Jurisdiction*

This of itself is not enough. As I indicated at the outset there are other expectations that are imposed upon judges. We are expected to be "user friendly" and, save for the criminal clientele, we risk competition from other jurisdictions. In some respects this is a mistake, that is, for judges to fall into the trap of being competitive about their work and their court. Goodness alone knows that we all have more than enough work to do. The matter looms as something quite topical between the County Court and the Supreme Court. The government has announced the intended increase of the Magistrates' Court jurisdiction to $100,000 in civil matters. At present, the civil jurisdiction of the County Court is limited to a monetary limit of $200,000 save for personal injury cases where the jurisdiction is unlimited. There is of course the practice note issued by the former Chief Justice proposing that personal injury claims exceeding $300,000 ought be issued in the Supreme Court. There are, too, the statutory limitations that arise with WorkCover and TAC matters.

Putting all that to one side, there is the fundamental issue given the change in the value of the jurisdictional dollar as to whether there should be a change reflected in the jurisdictions of the County Court and the Supreme Court. There are some who would argue that jurisdiction should be wholly

concurrent. There are some who would argue that the monetary limit should be revisited and increased but only in a limited way. Yet again, there are others who would seek to impose a jurisdictional limit on personal injury claims in the County Court. I doubt there is any issue that the Supreme Court of Victoria as the superior jurisdiction in the State should hear the most complex and difficult civil and criminal trials. It should be the court that delivers the seminal judgments, the primary rulings and sets the framework for other jurisdictions. I say that without intending to convey any arrogance. Because of the position of the Supreme Court in the judicial hierarchy that should be beyond debate. The real question is how to ensure that the most serious, complex and difficult trials are heard in the Supreme Court and, at the same time, that the citizen has forum choice but, moreso, is able to have confidence in the judiciary that will decide the dispute between citizens or the Crown and the citizen.

These are issues we must consider carefully and, I suggest, in partnership between the two jurisdictions. For my part I do not see the question of jurisdiction as a matter of competition, rather, it is a matter of identifying the appropriate forum for the determination of the particular proceeding.

6. *Complexity*

I have explored a number of issues, independence, accountability, and the other various demands on judges. But there is an additional monster that the judge must encounter frequently. It is the monster of the modern legislature which is a monster that is huge, difficult and complex and of Tolkien proportions.

Justice Hayne of the High Court faced the monster not that long after his appointment to the Court[10]:

> "While we may blame computers for many things, we cannot blame them for one other very important change that has happened in the last 25 years of this century. The volume and complexity of legislation passed by legislatures in this country … and the volume and complexity of common law developed in this country has increased markedly. Fifteen years ago at the centenary dinner of the Victorian Bar I suggested that the ten commandments are only 295 words long and cover the whole field of life. In the *Crimes Act* of this State alone the legislators then took more than 90,000 to cover only part of the field. … No longer can one say to a jury 'the accused took the horse, surely you do not need to leave the jury box to do your duty?' First, one must give the jury a Domican warning, a Fauré

10 Hayne, K.M., "Australian Law in the Twentieth Century", speech delivered at the Judicial Conference of Australia, Melbourne, 13 November 1999.

> warning, and take three days to recite an imperfect history of the week of evidence and argument that has preceded it."

His Honour observed, I suggest with much dryness, that the law has become much more complicated.

Why then I ask, do it? Why be a judge? The truth about judicial life seems to have been a well kept secret. In many quarters, the difficulty and severity of judicial life was not truly revealed from the inner sanctum of the judicial chamber. Rather, a waspish, stiff, tough approach was taken. But it seems to me there is a cultural change occurring. Maybe, there is a feminising of the courts that is coming to the fore. Judges now speak out about their workload, they complain to the head of jurisdiction, they command pastoral care from that head and, frankly, they deserve it. At the end of the day, we do it not because we love it. We do it out of a fundamental sense of duty.

Perhaps, once again, I might turn to Chief Justice McLachlin who, in her closing remarks on the subject of the role of judges in modern society, said:

> "Judging is not what it used to be. Judges are more important now; judges are more criticised. And judges face more difficult tasks than they have ever faced before. If judges are to meet these challenges they must be educated, competent and engaged. They must be prepared to work hard. But all this will be to little avail if one quality which has always been required of a judge, independence, is forgotten. In discharging its new role, the modern judiciary must fall back on the source of strength it has drawn upon over the centuries - its institutional and individual independence. It is this independence, coupled with integrity and a commitment to service to society through impartial decision-making, that has made the judiciary the important institution it is and that will preserve it into the future. And on the broader political plane, it is this independence that guarantees respect for human rights and the rule of law in the countries that we as judges serve, and hence the advancement of all our peoples. The task facing the modern judge is not an easy one. But it is one of critical importance. If we fail, the rule of law will fail. It is as simple as that."[11]

In closing, may I say that although the judicial burden is heavy (and sometimes almost unbearable) judges should be as they have always been - strong, courageous and bold.

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[11] Ibid, p.7-8.