

THE JUDGE

The Right Honourable Sir Robert Megarry*

For a visiting Englishman this is a rare occasion of privilege and delight. I yield to none in my admiration and affection for the Honourable Samuel Freedman, Chief Justice of Manitoba, a description that comes less readily to my lips than simply "Sam". But tomorrow night I shall have the opportunity of saying something about him, and this afternoon must be devoted to the subject upon which I have been bidden to lecture. The invitation came some nine months ago, and as I read the letter my immediate impulse was to send a very prompt acceptance. Then I read again the subject upon which I was to lecture. It was: "The judge in a democratic society in an era of change with the subordinate theme of the educative role of the judges and what is required with respect to the quality of the judge and what is required of judges in giving judgments". That was daunting; but my desire to join in honouring Sam soon overcame all my hesitations, and I sent my grateful acceptance. After all, if it came to the worst, I could just stand up and talk, and talk, and talk. For I am a lawyer, and as the doctors say in the U.S.A., you can always tell the state of a lawyer's health by looking at his mouth: if it's shut, he's dead.

At last I did what every Chancery lawyer does as of second nature, namely, construe the subject; and it then became less formidable. The precept "Divide and conquer", intended for other things, may with advantage be applied to the process of construction. We all know what a democratic society is, and that there have been many changes since the war. What, then, are the functions and position of judges in such a society? In particular, what qualities do they need; what is required of them in giving judgment; and what role should they play in education? As you can see, I have been set a theme with three variations.

Given five or six hours, I think that I could cover my subject reasonably well. You are a captive audience, and I am tempted. But firm words about duration have been uttered, and so, like all judges, I put aside temptation, and obey. In speaking, I shall ignore the many lawyers present, for little or nothing that I say will be new to them. I speak only to those who are not lawyers; and of necessity I omit much and concentrate on some salient features.

1. The functions and position of judges in a democratic (and changing) society

I shall not attempt to define democracy. Like an elephant, it is difficult to define but easy to recognise. For the present I shall say no more than that it is government through freely elected representatives of the people, with the will of the majority prevailing. The position of judges in a democracy is paradoxical; for the judiciary is an undemocratic institution which nevertheless is an essential part of democracy, and is indispensable for the maintenance of democracy. It is undemocratic because judges are appointed by some arm of the government of the day, and are not elected; because the appointment is for life (subject to a retiring age) and does not end on a change of government; and because the judicial function is both authoritarian and authoritative.

* The Vice-Chancellor, of the Supreme Court of England and Wales. This is a revised reconstruction from notes of the lecture delivered at the Convention Centre, Winnipeg, April 8, 1983. © 1983, R.E. Megarry.

There are, of course, jurisdictions in which judges are elected; but even in the U.S.A. I have recently detected little enthusiasm for this process. After all, the general public can hardly be expected to have any real idea whether or not a particular lawyer is likely to become a good judge. I say that a judge is authoritarian and authoritative because his duty is to decide what the law is, and to apply that law, with authority, to the case before him, however unpopular his decision will be with the public, the government or anyone else. Though appointed to the Bench by the government in power at the time, the judge owes no duty of gratitude to that government, as many a President of the United States has found to his dismay. The judge's duty is one of obedience to the law and to his judicial conscience. He must do not what he wants to do but what he ought to do. Even if the law seems to operate unfairly in the case before him, he must obey and apply it; for if the judges do not obey the law, who will? Of course, there are often cases in which a statute or a decision may fairly be interpreted in more ways than one, and then the judge can adopt the interpretation which produces the most just result; but to do this falls far short of any process of distorting the law for particular cases, and so encouraging a flood of other litigants, all hoping that the judge will "bend" an inconvenient law.

Perhaps I may turn to the past. Over 200 years ago, Mr. Justice Foster said that "a popular judge is an odious and pernicious character."¹ Lord Mansfield C.J., too, said: "I will not do that which my conscience tells me is wrong . . . to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels, all that falsehood and malice can invent, or the credulity of a deluded populace can swallow."² Today, as then, nobody who lacks fortitude should seek judicial office.

One important function of a judge in a democracy is to protect minorities, however unpopular they may be with the community at large. Whatever his views, every citizen is entitled to the full protection of the law; and it is an important part of the judge's job to see that he gets it. No judge will court popularity, whether with the mob or the government. Instead, what a judge values and hopes to earn is the respect of his fellow judges and the rest of the legal profession. No judge can wish for a greater reward than to know that he is ending his judicial career with the deep respect, admiration and affection of the whole legal profession; and only a wholly exceptional judge can also earn the esteem of the public at large. For the place that Sam Freedman holds across Canada and beyond, one has only to look round this large and crowded hall today. In the lawyer's phrase, *res ipsa loquitur*: the thing speaks for itself.

2. The qualities needed by a judge

You will not expect me to discuss in comprehensive detail the qualities needed by a judge. Most of them are obvious, and time is limited. I have already mentioned fortitude, and we can progress further in the alphabet. Humanity and humility must be there. So must intelligence, intellect, interest and integrity, and the qualities of judgment and justice. Some might say that the judge should be free of the seven deadly sins and replete with the seven

1. See, *R. v. Shipley*, (1784), 4 Doug. K.B. 73 at 171.

2. *R. v. Wilkes* (1770), 4 Burr. 2527 at 2562 (K.B.). I have modified the punctuation a little.

saving virtues. For the few of you who may for the moment be unable to recollect all 14 of these qualities, I may perhaps say that a judge should be free from pride, covetousness, lust, anger, gluttony, envy and sloth, and endowed with faith, hope, charity, prudence, justice, fortitude and temperance. Judicially, not all the sins are of equal weight; I doubt whether gluttony is a serious disqualification. Sloth is another matter. Only a year or two ago a book about judges in the United States said that "the conventional wisdom is that the most common defect of judges is laziness."³ I found this a little surprising. Certainly as I look around me in England at judges sitting for some five hours a day five days a week throughout the legal year, with many evenings and week-ends having to be sacrificed to writing reserved judgments,⁴ I wonder a little.

Suppose, however, that there is a paragon of a lawyer, free from all seven sins and resplendent with all seven virtues. Even then, nobody could be sure that he would make a good judge; for there is much else besides. Judges do not have to be angels, but equally one may doubt whether angels would make good judges. Indeed, the great Mr. Justice Oliver Wendell Holmes once asserted that judges "need something of Mephistopheles". Take prejudices. Most people have prejudices of one kind or another, and I would expect most judges to be in like case. Judges are — and must be — human beings. The difference, I think, is that judges are human beings who have recognised what prejudices they have, and how far these stand out of line with the general body of judicial opinion, and have become accustomed to making allowances accordingly. Judges are indeed human beings, but they are extra-ordinary, in the original sense of that term: they are ordinary human beings whose lives have made them extra-ordinary, out of the ordinary course. Once appointed, a judge with the right qualities will be constantly aided by a strong and vigilant Bar and by his fellow judges. The crux of the matter is of ensuring the appointment of the right human beings as judges.

It is almost impossible to be certain whether a man or woman will make a good judge. Over the ages, there have been a number of instances of appointments which have not turned out well, and some that have exceeded all expectations. (It is, of course, axiomatic that there are no bad judges. There once were some bad judges, and doubtless one day there will be some more bad judges: but there are none today). Yet despite all unpredictabilities, there is much that can be done to reduce the risk of making bad appointments.

The process of appointment is crucial. It merits all the care and attention that can be lavished on it. The process, of course, varies from country to country. Political systems vary, and so do social conditions and the area and size of population in each country. I can speak only of England and Wales. There, the judiciary is small; and this adds to the importance of making good appointments. The High Court, the Court of Appeal and the House of Lords, added together, have not much over 100 judges. With a population of nearly 50 million, that gives just over two judges per million. In addition, there are some 350 circuit judges, or seven per million. On average, each year some six or seven appointments have to be made to maintain the number of High Court

3. Preble Stolz, *Judging Judges* (1982), at 116.

4. And, for some, administrative work as well.

Judges (at present nearly 80),⁵ and some 20 new circuit judges will be appointed. I shall concentrate on the appointment of High Court judges.

First, it is most unusual for anyone to be appointed unless he or she has had at least twenty or twenty five years practice at the Bar. By that I mean practice as an advocate in the courts, and not merely work in chambers. Of course, a good advocate will not necessarily be a good judge. A judge must readily see both sides of a case, whereas an advocate may become too inveterate a partizan to make a good judge. But practice in the courts is important because it usually ensures that the advocate will be experienced on both sides in the fields in which he practises. Today he is for the prosecution, the landlord or the employer, while tomorrow he will be for the accused, the tenant or the employee. Practice in the courts is also important because it regularly subjects the lawyer to all the stresses of advocacy. He experiences the reverses of fortune that flow from a witness whose testimony falls far short of his proof of evidence, reverses which he has learnt to accept without giving any hint of his dismay; he has to stand up to his opponent, and sometimes the judge, and resolve when to persist and when to retreat; he has to do all that he can for his client and yet remain within the bounds of fair and honest advocacy; and he has to do dozens of other things within the daily rub of life in court, thinking and speaking and reasoning under pressure. One result of this process is that the lawyer's character develops and changes, nearly always for the better. Another result is that much about the advocate stands disclosed to the judges before whom he appears; the stresses of advocacy are wonderfully revealing.

That brings me to the second outstanding feature of judicial appointment in England. Each appointment is based on a wealth of first-hand professional information about those who are in the running. All High Court judges are appointed by the Queen on the advice of the Lord Chancellor. He is not a mere minister, but a practising judge as well, presiding over the House of Lords in its judicial capacity; the Cabinet does not come into the process of judicial appointment. There is no formal rule in the matter, but for many years the practice has been for the Lord Chancellor to summon to a meeting with him the four Heads of Divisions: the Lord Chief Justice, as head of the Queen's Bench Division and the Criminal Division of the Court of Appeal, the Master of the Rolls, as head of the Civil Division of the Court of Appeal, the President, as head of the Family Division, and the Vice-Chancellor, as head of the Chancery Division. At least two of these are likely to have a substantial personal knowledge of each candidate, mainly from his appearances in court, but also from being benchers of one of the Inns of Court. There will also be available many expressions of opinion by other judges, made from time to time, which help to build up a background of knowledge. The discussion is frank; and the sole criterion is who is the best person for the job. Politics, the old school tie, links of universities and clubs, friendships, and much else besides, all get left out of account. The whole atmosphere is professional.

Third, the appointment is made from a fairly small field. Taking round figures, the practising legal profession in England and Wales is rather over 45,000. Of this number, some 4,500 are practising barristers, and of them some 450 are practising Q.C.'s. Any appointment will almost certainly be

5. On average, there will also be two appointments to the Court of Appeal, and one to the House of Lords.

made from those 450; and they will all have become silks after a careful professional process somewhat similar to the process for the appointment of High Court judges. Of those silks, probably half will be either too old or too young and inexperienced. The normal age range for appointment is in the fifties, with a few appointed in the late forties and fewer in the early sixties. The field of choice is further narrowed by the nature of the vacancy. However distinguished, an Old Bailey silk, steeped in crime, would never be considered for a vacancy in the Chancery Division, nor would a learned equity silk be appointed to the Queen's Bench Division to spend his life on crime and charterparties. The process of appointment is much aided by the structured nature of the English legal system.

On the other hand, the field of choice for the High Court Bench is not constricted by the existence of silks who will refuse appointment to any court below the Court of Appeal. For many years now, all appointments to the Court of Appeal have been made by promotion from the High Court Bench. A few years in the High Court may do much to demonstrate the suitability (or unsuitability) of a judge for a seat in the Court of Appeal, and give a greater depth and understanding in the exercise of the appellate function. This practice has brought the possibility of an academic lawyer being appointed to the Bench no nearer, for it is a rare professor of law who has at his command all the details of evidence, practice and procedure that are essential for a trial judge. This means that even if one could detect an academic lawyer who would make an exceptionally good judge, he would not be appointed, for he would not have proved himself in practice in the courts. Whatever may be the position in other jurisdictions, I think that our view would be that such losses would be very rare and the risks of other systems would be too great: so we cling to our system. In a sentence, it may be described as a cautious, informed and concentrated professional search for the best person for the job, based on first-hand knowledge and made among well-seasoned advocates. We think that it serves us well.

3. The qualities required in giving judgment

To list the qualities required in giving judgment would outrun my ration of time. Many things are obvious. The ability to get it right, both on the facts and on the law, is in the forefront; and so is the triple requirement to listen (and not merely hear), to think, and to decide. I would also echo Mr. Justice Dickson in stressing the importance of principle, as distinct from merely reciting and analysing other decisions. Indeed, in moots for students in England there is a tendency towards prohibiting the citation of authorities, or at least severely curtailing it, and requiring the student-advocates to argue on principle.

I turn from the obvious to the neglected. Three points seem to me to deserve greater prominence than they normally receive. Let us look into a courtroom while a civil action is in progress. Who is the most important person in court? When I ask this question on visits to law schools, the usual answer is "The judge", with "counsel for the plaintiff" as the runner-up, since he has to open the case and set the scene. An answer that I once received was "The usher", though I was quite unable to discover the reason for this. My answer is unhesitating: like Sir George Jessel, the great Master of the Rolls of a century ago, "I may be wrong, but I have no doubts." For me, the most important

person in court is the litigant who is going to lose. When the end comes, is he going to feel that he has had a fair run and a full hearing? One of the most important duties of any court is to send away a defeated litigant who feels no justifiable sense of injustice in the operation of the judicial process. It is to him that the judgment of the court must primarily be addressed. Even if the reasoning does not convince him, it should demonstrate that his case was properly understood and his arguments duly considered. Of course, some litigants will never be satisfied with anything; but for over 20 years⁶ I have believed that a hypothetical creature who may be called "the Reasonable Defeated Litigant" does exist, and, indeed, preponderate. In bilingual jurisdictions, one logical application of this approach is for the judge to give judgment in the language of the loser; for he will want to know at once why he has lost, whereas the winner will at first be content simply to know that he has won.⁷

Second, there is the peril of short cuts. If three points arise in a case, and a decision on one point will make it unnecessary to decide the other two, it will often be right to save time and money by deciding that one point alone. But sometimes it will be wrong to do this. In one case that I had while at the Bar, my client was a self-reliant business man who had an option to renew his lease. Without taking advice, he sent a letter to his landlord's agent which later he contended had duly exercised the option. The landlord refused to renew the lease, and when the tenant insisted on suing for specific performance, the landlord put forward three defences. They were that the agent had not received the letter in time; that the agent was a mere rent collector who lacked authority to receive documents such as an exercise of an option; and that the letter was not worded so as to be capable of exercising an option or anything else. This last defence was painfully well-founded; the letter read as if it were a mere inquiry, and seemed to be devoid of any executive effect. The judge, Mr. Justice Danckwerts, could easily have taken the short cut of deciding the third point against the tenant, thereby making it unnecessary to hear evidence about the posting of the letter and the extent of the agent's authority. Instead, he sat patiently on the Bench, heard all the evidence, and then gave judgment. The letter, he said, had been received in time, and the agent had ample authority to receive it; but the letter was not worded so as to be capable of exercising the option, and so the tenant's claim failed.

The effect on the tenant was striking. He had been infuriated by the first two defences: the letter, he said, had obviously been received in time, and the agent had for long been exercising plenary powers on the landlord's behalf. But the judge had seen through the landlord's deplorable contentions on these points, and he (the tenant) had won on two out of the three points in the case. It was, of course, a pity about the wording of the letter, but he had to accept what the judge said about it after considering it with such great care. As you can see, the tenant was a man of strong feelings; but such men are just as much entitled to justice as anyone else, and probably they need it more. The tenant had heard his case put in full and considered in full; he had gone to court charged with explosives, but he had gone away defused. Justice in full may take time; but often it is time well spent.

6. See R.E. Megarry, *Lawyer and Litigant in England* (The Hamlyn Lectures for 1962) (1962), at 3.

7. See e.g., *Martin v. Kiesbeumpte, Newcastle Afdeling, en 'n Ander*, 1958(2) S.A. 649 at 650 (Prov. Div.)

Third, I wonder whether judges always give enough consideration to witnesses. I leave on one side litigants who give evidence, and those closely associated with them, and consider only independent witnesses. Those accustomed to the courts do not always appreciate what a searing experience it may be for a witness to give evidence. He may be attacked in cross-examination so as to show how stupid, forgetful, unreliable, careless or downright dishonest he is. He may be unmercifully criticised by counsel in his closing speech; yet there is nobody to defend him, he is not allowed to address the court in his own defence, and he cannot call witnesses to show that he spoke truth. True, counsel who called him to the witness box may sometimes say something to rehabilitate him; but he is counsel for the litigant, and not the witness, and he may decide that it would be tactically unsound to be zealous in the defence of the witness. That is bad enough; but then the judge, speaking with all the authority of the Bench, may utter his own words of condemnation. How far ought a judge to go when commenting on the evidence of a witness which he is rejecting?

In the past, some judges have used strong language about witnesses. Let me give a list of expressions that have been used, many in the last 30 years. "Liar, degenerate, besotted, abject, malicious, a parasite, a sponger, a fraud, a whiner, contemptible, depraved, corrupt, spineless, a hypocrite, a cheat, servile, grasping, unscrupulous, empty-headed, fawning, greedy, vain, a humbug." For all I know, every one of these terms was entirely apt. In criminal cases, of course, a judge will often need to give the jury some guidance ("You may well think, members of the jury, that Mr. X was a hypocrite . . ."). In civil cases, on the other hand, a judge will often be able to give safe reasons for his decisions without using any of these terms, simply saying that he cannot accept X's evidence, or that he prefers Y's evidence to that of X. After all, the judge's job is to decide the case between the two litigants, and not to conduct an inquisition, searching out flaws in the character of a witness. Surely the course of justice ought to include justice for witnesses. Justice for the parties sometimes makes it necessary and proper to condemn a witness, as where he has made an unjustified attack on one of the parties; but apart from cases such as that, there have been times when the judicial tongue has seemed less restrained than witnesses, doing their civic duty, have been entitled to expect.

4. The educative role of the judge

The educative role of the judge is not an easy subject. It could, I suppose, be divided into two categories, the optional and the obligatory. There are many things that a judge can do, if he wishes, that will contribute to education. He may, for example, be able to find time to teach, either regularly or episodically. He may visit law schools to judge moots or deliver luminous after-dinner speeches. He may yield to an urge to write or edit books, or to write articles, which will throw light on dark corners of the law. He may sit as a member of various committees, such as law reform committees, which will show how defective some part of the law has become and how improvements can be made. He may join discussion groups which do much the same thing, though rather less formally. There are many educational activities in which a judge may indulge, given the time and the inclination.

Throughout, however, there is one limitation that he will always respect, and that is that he should do nothing which might impair the judicial function. He will reject anything which might make him less able to carry out his judicial duties. He will not exhaust himself on extra-judicial activities, nor will he do anything which might lead to a justifiable objection to him hearing any cases on the ground that he had prejudged the issues or otherwise unfitted himself for his role of impartiality. He must be wary of unexpected traps, too. I once travelled thousands of miles to judge (*inter alia*) the final of a university mooting competition. When I arrived, I found myself confronted with a complicated practical problem on the operation of a *Romalpa*⁸ clause as the subject of the moot. I wondered a little at the choice of subject, but not until I had given judgment did I discover that a firm of local lawyers had provided a handsome prize for the competition in return for being allowed to set the problem to be mooted. I am happy to think that my delphic judgment must have convinced them that they would have done far better to adopt the normal course of getting an opinion from a distinguished commercial silk.

It is, however, a judge's obligatory role as an educator that I think is far more important, for it reaches far beyond the legal profession. A judge who carries out his judicial duties as well as he is able must of necessity educate all who see and hear him. This education is carried out in two main ways, namely, by the way in which he conducts the hearings, and by the judgments that he delivers. I can do no more than give some examples under each head.

The first essential in any hearing is that the judge should not only hear each side with an open mind, but also make it plain to all that he is doing this. Of course, he may, and should, ask questions which test the strength of any links in the chain of reasoning which seem to be weak; but that is very different from letting it appear that he has shut his mind to further argument. Those who have been accustomed to disputes and arguments outside the courts (and not least on television) which are conducted without the aid of an impartial arbiter who will listen to all that is put forward must be made aware of the advantages of having an impartial judge who will see that each side has a full and fair hearing. The weaker a litigant's case, the more the judge must strive to see that all that can be said in his favour has been brought out, before deciding against him.

A particular instance where the judge can hardly fail to educate all present in the process of justice is where one of the parties is unrepresented, and conducts his case in person. Litigants in person vary, of course. Some are highly skilled; but the great majority of them impose a heavy burden on the judge. They tend to be muddled, incoherent and irrelevant. Often they have complaints against so many — the police, the government, government agencies, neighbours, their relations and many others — and they have a remarkable persistence in pressing their complaints. Somehow the judge has to wean the litigant from his complaints against the world, and concentrate his aim on the claim against the other party to the litigation; and this has to be done without allowing the litigant to feel that the judge is against him, and without allowing the other side to feel that the judge is taking the side of the litigant in person.

8. See, *Aluminium Industrie Vassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 W.L.R. 676 (C.A.).

What is needed, of course, is to provide the litigant in person with some help before he comes into court. That someone need not be a lawyer, though of course it helps if he is. It is much easier for someone to get the real facts and contentions out of the litigant while sitting at a table with him than it is for a judge to do this in the artificial conditions and constraints of a courtroom. Furthermore, it may be possible to get the person advising the litigant to come with him to court and help him there, not, of course, by conducting the case for him, but by quietly giving him advice, prompting him, and taking notes. Such advisers are known as *McKenzie* advisers, from the case in which their activities were approved.⁹ Nothing can be more welcome to a judge than to know that something has been done to put the matter properly before the court.

Another possibility, where it is the plaintiff who is in person and the defendant who has counsel, is to ask the defendant's counsel to assist the court at the outset by explaining briefly what is in issue, before calling on the plaintiff to open his case. If both litigants are in person, it may be necessary to adjourn the case and arrange for court officials or others to explain to the parties such things as the burden of proof and how to obtain subpoenas. If the litigant refuses all forms of help (and some are very proud and independent), the judge simply has to do his best. At least he can help the litigant by inviting him to remain seated while addressing the court; for many find it easier to think and speak coherently when they are close to their notes and other papers, and are less exposed to the public gaze than when standing. A friendly expression on the face of the judge does not come amiss, either. Anything is welcome if it reduces the extent to which the judge has to intervene in order to discover what the litigant's case is, and to head him off the irrelevant.

The way in which a judge conducts such a hearing, and in particular the way in which he attempts to see that a difficult litigant in person receives a fair hearing on what his real case is, should be truly educational to all who see it. But they will be few. In delivering judgment a judge, through the media, may reach a far wider audience. Judgments are one of the glories of the common law world. The decision of a jury is dumb; the result is there, but no reasons. Indeed, it has been said that if juries had to give reasons for their verdicts, trial by jury would not last another five years. The decision of a judge, on the other hand, is eloquent; the whole process of reasoning is set out for all to see. We have not adopted the formal and stylised type of judgment to found in some civil law countries, with little more than brief recitals and the result ("Considering A, considering B", and so on). There is no fixed pattern. The judge may be his idiosyncratic self in the language that he uses, though he will always set out the facts as he finds them and the law that he has applied in reaching his conclusion. In the judgment, the loser will not only see that his contentions have been heard and understood but also see why they have been rejected. However much the loser disagrees, justice according to law is seen to be done; and, of course, it is much easier to appeal from a reasoned judgment of a judge than from the inscrutable verdict of a jury.

The extent of a judge's audience, however, depends on the media; and this poses a real problem. Gone are the spacious Victorian days in which the

9. *McKenzie v. McKenzie*, [1971] P. 33 (C.A.). Somewhat surprisingly, the trial judge had excluded the adviser; but the Court of Appeal put matters right.

newspapers reported legal proceedings at great length. Today, brevity and selectivity are in the saddle. The media face a difficult problem. Their function is to inform, to interest, to entertain, and, if possible, to make a profit. Most law is thought by most people to be dull, complicated and long-winded. The media have to select and compress, so that a day's hearing, or a two hours' judgment, may be given three paragraphs on paper and 30 seconds on the air. It is, of course, a commonplace that a profound distorting effect may be produced by the omission of a single fact. Anyone could take an accurate summary of a perfectly reasonable judgment and convert it into a monster of injustice by altering nothing but leaving out essential facts. It is indeed remarkable that reports in the media do not give a wrong impression far more often than they do.

Then there is the readiness of the public to form a great certitude that a decision is wrong simply on the basis of two or three paragraphs in a newspaper, oblivious of the fact that the judge had before him the fruits of an entire day's hearing and not merely a minute's worth of reading material. Often this emerges when the press reports two convictions on the same day in different courts for much the same offences, with one defendant receiving a sentence of two years and the other being put on probation. The prompt public conclusion is that one sentence was "savage" and the other "grossly inadequate", and that both of the judges were obviously wrong. Of course, there are some disparities in sentencing which are indeed open to criticism; but in most cases there are ample explanations. One defendant is an intelligent man with a long criminal record, while the other is first offender of limited intelligence who has committed the offence under the influence and pressure of an older man who is hardened in crime. Where pressure on space, and the greater newsworthiness of the details of the crime, lead to details of the defendants being edited out of the reports, the effect on the public is obvious.

What can be done? It is idle to attack the media, with their constraints of time and space. So often room for an accurate report has been found only by sub-editing it into a misleading brevity. I do not think that the judges concerned should attempt to put matters right by, for instance, writing letters to the papers or appearing on television; for inevitably this would provoke controversy, and risk an impairment of the judicial function. Yet there is a real need for some means of providing swift and concise corrections and explanations. Despite the suspicions that some entertain about public relations officers, a case can be made for the appointment of some official of this kind who could provide pre-publication guidance on the meaning and effect of new decisions, and palatable corrections when errors or misunderstandings have crept in. At least there should be some attempt to avoid what ought to be educative being instead a source of misapprehension and confusion.

The rule in *Good's Case* now applies, and requires me to stop; for "Needless verbosity is the mother of difficulty",¹⁰ and I realise that only I stand between you and coffee. But first I must remind you of one splendid Canadian case. Over a century ago, Mr. Justice Johnstone of Nova Scotia sat

10. *Good's Case* (1627). Poph. 211 at 212. *per cur.*

with four other judges to hear an appeal from his own decision, a process that was possible in those days. Two of his brethren thought his decision right and the other two thought it wrong, so that the decision lay with him; and he gave judgment reversing himself. On a further appeal, the Judicial Committee of the Privy Council held that his first thoughts had been better than his second; his judgment at first instance had been ‘right in its reasoning and sound in its conclusion’.¹¹ Mr. Justice Johnstone’s demonstration of judicial humility and open-mindedness is not unique; and if that sort of process still existed, I cannot help feeling that one judge who would have relished playing his part in it to the full would have been the Honourable Samuel Freedman, Chief Justice of Manitoba.

11. *McLean v. McKay* (1873). L.R. 5 P.C. 327 at 330 (J.C.)

