Justice Philip McMurdo

Swearing in as a Judge of Appeal

Banco Court

Tuesday, 24 November 2015, 9.15 am

Thank you, Madam Attorney, Mr Solicitor, Mr Diehm and Mr Fitzgerald for your generous remarks.

The late Chief Judge Shanahan used to say that swearing in ceremonies would be very much shorter if the speakers had to swear to tell the truth. But I am very grateful to have the encouragement and support of each of you and those whom you represent.

I am honoured by the attendance of members of other courts and tribunals and I am personally grateful for the attendance of each and every one of you here this morning. Many of you are old friends. Indeed, looking around the room, some of you are very old indeed. The attendance of every person at this ceremony is an important sign of respect and support for this great institution, which is the Supreme Court of Queensland.

As most of you will know, the Court of Appeal is served both by the judges of Appeal and the judges of the Trial Division. That combination, I believe, has been very important to the successful performance of the court. Appellate judging, like many types of judicial work, is a specialty. But the involvement of trial judges broadens the collective experience of an appeal court and avoids what might be perceived as a remoteness from the changing conditions and circumstances of criminal and civil litigation.

As I finish my term as a trial judge, I hope that you will allow me a few observations about trial work.

The first relates to the task of fact finding, which these days falls to the trial judge in nearly every civil case and to primary judges in sentencing and sometimes in criminal trials. The accepted wisdom has been that trial judges

have a special advantage in fact finding, not enjoyed by appeal courts, in the assessment of witnesses. When I commenced in practice, although not as often when I became a judge, it was common for trial judges to give, what former Chief Justice Gleeson once described as "reasons for judgment … replete with pointed references to the great advantage which the trial judge had in making the personal acquaintance of the witness" and employing what he described as "the Pinocchio theory, according to which dishonesty on the part of a witness manifests itself in a manner that does not appear on the record but is readily discernible by anyone physically present …".[1]

Of course the assessment of credibility is only part of the task. More commonly the problem with oral testimony is its reliability. Lord Justice Browne once observed that "the human capacity for honestly believing something which bears no relation to what really happened is unlimited."[2] And in a judgment in 2013, a judge of the commercial court in England said that he did not "believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony" and that "psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved."[3]

In general the process of fact finding by judges has become more realistic and intellectually defensible. It is more common for judges to assess the probabilities from more reliable sources and in particular, in commercial cases and much other civil litigation, the contemporaneous documents. As it happens the electronic age has greatly increased the availability of relevant and reliable documents. Email can be a dangerous means of communication but a very useful record.

This change in judicial fact finding has the potential to change the balance of responsibility between trial and appellate courts. Richard Posner has written that the traditional view that the trial judge was better placed to assess credibility than the appellate judge was at least, in part, because, as he put it,

---

1 A M Gleeson QC, 'Judging the Judges' (1979) 53(11) *Australian Law Journal* 338, 344.
2 Browne LJ, 'Judicial Reflections' (1982) *Current Legal Problems* 1, 5.
3 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16]-[17].

"appellate judges (indeed, all judges) usually are happy to hand off responsibility for deciding to another adjudicator."[4] As Lord Bingham wrote, a logical consequence which follows from the rejection of demeanour as a reliable indicator of truth is that an appellate court is often as well placed as the trial judge to decide the facts.[5] And, as another English judge has recently written, "this gives rise to an irony, if not a paradox, that the more reliable the technique of fact finding, the more it is susceptible to appellate review."[6]

The greater availability and use of contemporaneous documents has surely improved the accuracy of fact finding. But it comes at a considerable cost. The problem is that the proliferation of relevant documents, or at least potentially relevant documents, has been the greatest contributor to the increasing costs of civil litigation, certainly commercial litigation. Procedural rules about disclosure and claims for privilege have limited utility in cases where the task of sorting the wheat from the chaff has become so large, that it is often outsourced to places in other countries where it is undertaken, perhaps with the best of intentions, by people who are far too remote from a proper understanding of the litigation. The biggest challenge to commercial courts is in finding ways to identify the documents which really matter without the process placing financial and other burdens upon businesses which they are unable or unwilling to bear.

In short, the process of disclosure in commercial litigation has become, in general, more important, but at the same time too expensive. So there is a further irony, which is that as courts adopt more reliable techniques of fact finding, parties are deterred from litigating in them.

I believe that the answers can and will come from the collective experience and initiative of judges and practitioners. All should be assured that this trial court is in very good hands and is well served by those who practise in it.

Thank you again, for your attendance and your attention.

---

4 R A Posner, *Reflections on Judging* (Harvard University Press, 2013).

5 T Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2011) 12.

6 The Hon. Mr Justice N Mosytyn, 'The Craft of Judging and Legal Reasoning' (2015) 12(3) *The Judicial Review* 359, 367.