

The Role of the Judge: Umpire in a Contest, Seeker of the Truth or Something in Between?

Singapore Panel on Judicial Ethics and Dilemmas on the Bench: Opening Remarks

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1. The topic of judicial ethics is one which has been comparatively little studied and discussed in academic and judicial circles in the United Kingdom, at least until recently. Of course, the odd case, normally to do with judicial recusal, arose from time to time, but it tended to be dealt with on a one-off basis. However, in a world which is increasingly concerned with openness, regulation and propriety, an increasing concern about the topic is inevitable. Thus, the number of cases concerned with judicial bias (almost always apparent rather than actual bias, I am glad to say) has increased in the past twenty years in the UK¹. And it is quite right that judges should consider and discuss judicial ethics, and that they should do so not merely among themselves, but with legal and other academics and also with practitioners. One of the most important functions of a judge is to ensure that individuals are dealt with properly by the state, and we judges should therefore be prepared, indeed eager, for the judiciary to be held at least to the same high standards as, and I would suggest higher standards than, the executive.
2. So I welcome this seminar, congratulate the Chief Justice on arranging it, and am delighted to take part in it. In this, my initial contribution, I will concentrate on the nature of the judge's function in a common law system, and discuss some of the ethical issues which can be said to be inherent in that function, while avoiding topics which are specifically to be dealt with by the other panel members².

¹ See eg *Pullar v United Kingdom* (1996) 22 EHRR 391, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, *Lawal v Northern Spirit* [2003] UKHL 35, [2003] ICR 856, *Howell v Lees Millais* [2007] EWCA Civ 720, *AWG Group v Morrison* [2006] EWCA Civ 6, [2006] 1 WLR 1163 and *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ 556

² (i) Ethical dilemmas when dealing with litigants in person, (ii) Whether engagement with social media is compatible with ethical judicial behaviour, and (iii) The usefulness of codes of conduct if they cannot be enforced

3. The traditional role of a common law judge is very much that of umpire in a contest, not the seeker after truth. As Lord Wilberforce put it in the 1983 House of Lords *Air Canada* case in 1983³,

“In a contest purely between one litigant and another, ... the task of the court is to do, and be seen to be doing, justice between the parties There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and the law, justice will have been fairly done”.

4. Another former Law Lord, Lord Devlin made the same point in a talk in 1970⁴:
“Provided that he has been given a fair trial and that the judge has been seen to be careful and impartial, a plaintiff who has been wrongly disbelieved, painful though it may be, ought not to feel that he has been the victim of injustice”. A former Lord Chancellor, Viscount Kilmuir put the point very pithily in a 1960 article⁵, when he wrote “justice comes before truth”.
5. This approach is emblematic of the common law system, sometimes characterised as accusatorial, with two (or sometimes more than two) parties battling it out like two football teams or two tennis players, and the judge acting as a disinterested, detached referee or umpire, only getting involved for two purposes – (i) in order to resolve procedural disputes before or during the trial, and (ii) in order to decide who wins on the basis of an assessment of the evidence which has been adduced and the legal arguments which have been advanced. In criminal cases, the civilian system is very different, with the judge, as a *juge d’instruction*, in many ways leading the investigation, and therefore being much more of a searcher after truth, a sort of independent player as much as a

³ *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438

⁴ Lord Devlin, *Who is at Fault When Injustice Occurs?* in *What’s Wrong with the Law?* ed M Zander (BBC 1970)

⁵ [1960] LQR 41,43

referee or umpire. And even in civil cases, the civilian judge applies a code, which in an idealistic way is meant to provide the right answer, rather than following and developing judge-made law as in the common law system.

6. In this connection, I have been interested and (I must admit) gratified to learn that the common law accusatorial system has been gaining ground internationally. Over the past year, I have learned⁶ that three Latin American countries, Mexico, Colombia and Peru, are moving from the inquisitorial to the accusatorial system. I understand that this is said to be justified, at least in part, by the perceived advantage of having a judge who is uninvolved, and is therefore is seen to be impartial. Indeed, since 1988, Italy has been embarking, somewhat hesitantly, on a move away from the inquisitorial system to the accusatorial system⁷.

7. As a (largely)⁸ common law judge and a former common law practitioner, it seems to me that, unattractive as the Wilberforce/Devlin/Kilmuir approach may appear when a fair trial produces a “wrong” result, it must be the right attitude to adopt to the trial process. It would be impossible to fashion a justice system which never produces a wrong result. And the idea that any judicial decision which could conceivably be wrong should be capable of being reconsidered at the suit of the losing party only has to be stated to be rejected. It brings home the point that access to justice, which is one of the most important features of the rule of law, does not merely involve giving litigants proper access to the court (normally through a trial), but it also requires that (subject to appeals and exceptional cases) the trial bring the dispute to an end. Certainty is a very important ingredient in the rule of law, and finality is an important aspect of certainty.

8. Having said that, the trial process involves human beings, and human beings (which for the avoidance of doubt include judges) are fallible, whether they are devising or applying

⁶ Discussions with judges of the Supreme Courts of those jurisdictions

⁷ See eg Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, (2004) 52 (2) Am J Comp Law, 489

⁸ I suppose that, when sitting on Scottish appeals in the Supreme Court or on Mauritian appeals in the Privy Council, I may not be a common law judge (although the Scots are very good at claiming the best of the common law and avoiding most of the rest)

the principles pursuant to which trials are conducted. All fair-minded judges know that they will sometimes believe a liar and disbelieve an honest person, and that they will sometimes go wrong on an issue of law. Quite apart from this, any trial must be conducted in accordance with defined principles, each of which is, or at least should be, justified on the ground that it supports the rule of law, but it is inevitable that, in some cases, a particular principle will work against getting the right answer – eg the exclusion of “without prejudice” negotiations, the restrictions on hearsay evidence.

9. Traditionally at any rate, the common law accepts this notion, and, consistently with it, a common law judge is a detached umpire. He or she lets the parties and their lawyers prepare and present their cases, raising such arguments and adducing such evidence as they see fit. Before the end of the trial, judges only interfere when one party raises a legal objection to what the other party is doing (or not doing). And, after the trial, judges then give a decision resolving issues of fact and law according to their assessment of the evidence and the arguments.

10. The common law notion of a judge being an impassive non-playing umpire may be thought by some to have taken a bit of a hit with the introduction in England and Wales of the Civil Procedure Rules⁹, which require a relatively pro-active approach from judges, through imposing case management duties on the judge. However, on analysis, it appears to me that this pro-activity may make the judge something of a manager as well as an umpire during the preliminary, interlocutory stages, but it does not really impinge on the judge’s paramount function of determining the substantive issues of law and fact which divide the parties – ie the trial judge’s duties. The judicial pro-activity mandated by the CPR applies to procedural issues leading up to the trial, and principally relates to reducing delays and minimising costs (aims, it must be admitted, which are not always achieved).

11. Thus, in one of the leading recent books on English Civil Justice¹⁰, reference is made with approval to Lord Wilberforce’s observations in *Air Canada*, on the basis that they

⁹ see eg CPR Parts 3, 4, 26 and 29

¹⁰ John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (2014), pp 138-139

still represent the law. As the author, John Sorabji, points out, the well-established rule that a judge cannot obtain evidence independently of the parties or even require the parties to produce evidence (save, of course, on the application of a party)¹¹, is still the law.

12. However, the effect of Sorabji's analysis is that the philosophy behind the Woolf reforms, which led to the CPR, appears to mean that civil judges in England are now less, rather than more, of seekers after truth than they were. Whereas, before the CPR, the aim of the civil justice system was to provide "substantive justice" or "justice on the merits"¹², the CPR aims to achieve "proportionate justice"¹³. This is achieved in three main ways. First, more pro-active judicial case-management; secondly, failure to comply with directions carries a greater risk of being debarred from presenting one's case; thirdly, the time and money devoted to any particular case is far more likely to be rationed than before. As Sorabji says¹⁴, the Woolf reforms failed in a number of important respects, but the philosophy behind them is still alive and well, and it lies behind the subsequent Jackson reforms.

13. Nonetheless, as I have mentioned, at least when it comes to the trial, the role of the judge in England and Wales remains substantially as it ever was under the common law. But the notion that the judge can be equated to a referee or umpire in a sporting event can be misleading. Sports rules can be less than straightforward (eg the offside rule in football or the LBW rule in cricket), but they almost always involve judging conceptually simple facts, and applying relatively simple rules. And the issues which a referee or umpire in the sports world are mostly relatively simple – for instance, did the ball cross the line, was a foul committed? On the other hand, at least in some cases, the pressure can be greater, because, for instance, the umpire may be unsighted, and, even more importantly, the decision has to be made immediately, and often under great pressure from the players and the crowd – except that now, in many sports, reference may be had to camera recordings.

¹¹ *Re Enoch and Zaretsky, Bock & Co's Arbitration* [1910] 1 KB 327

¹² Sorabji, *op cit*, pp 56-74

¹³ *ibid*, pp 101-106 and *passim*

¹⁴ *ibid*, pp201-204

14. By contrast, although judges normally have the luxury of being able to take time for their decisions, they are routinely called on to make decisions which involve difficult resolutions of factual disputes, value judgments and balancing exercises, and an analysis and resolution of legal issues, all of which can call for an assimilation and assessment of complex facts, and complex legal arguments.
15. So far as facts are concerned, even in a very simple factual dispute, it can be very difficult to know whom to believe. Indeed, in some ways, it is particularly difficult to resolve evidential differences when there are no contemporary documents and only one issue of fact on which the parties differ. On the other hand, in complex cases, resolving issues can be particularly difficult partly because it is very rare indeed that one finds that any party's evidence is wholly reliable, partly because there is normally a mass, even a morass, of oral and documentary evidence.
16. But there is a significant ethical dimension to the fact-finding exercise as well. We are all subject to conscious and subconscious biases, and such biases will inevitably influence our assessment of evidence and, in particular, of witnesses. Early on in my judicial career, I was listening to an oldish man who was giving evidence which was inherently unconvincing, and I noticed that I was trying to justify or explain away his inconsistencies and evasions to myself. I pulled myself up and tried to examine why I was doing this, and then I realised that, through his physical and vocal mannerisms, he reminded me of my father who had recently died, and that this caused me to want to believe him.
17. This is but one example, and a rather simple example, of bias, and it is nothing to be ashamed of. Indeed, we judges should all be as aware as we can be of our biases or, if you prefer, prejudices. I say "all" with confidence, because one cannot be a functional human being without having preconceived ideas and notions. The important thing is that judges are as aware as they can be of any biases or prejudices they suffer from, and that they acknowledge and take into account those biases and prejudices when evaluating witnesses and their evidence. Nobody is going to know all their prejudices and nobody is

going to be able to allow in a perfect way for all the prejudices they know about. But that is no excuse for not trying to assess and allow for them. The fact that we cannot get the answer right every time is no excuse for not doing our best to get the right answer.

18. When it comes to issues of law, there is sometimes a strong temptation to “bend” the law, or even simply to cheat, if strict application of the cases or statute appears to lead to what appears to be an unmeritorious result in the particular case to be decided. In a sense, this can be seen as an ethical dilemma, especially when the law seems to produce a result which would appear to a non-lawyer to verge on the immoral. As a matter of principle, a judge should plainly resist the temptation to misapply the law in such a case. Not only would it be contrary to the judicial duty, indeed the judicial oath. It would also often be contrary to the interest of the very party whom the judge is trying to help: the other party would successfully appeal and the party who the judge is seeking to help would not only lose, but would have to pay two lots of costs.

19. In that connection, there is also the wider point that common law judges are not simply deciding the case before them. Their decisions represent part of the law of the land, at least unless and until they are reversed. So, when deciding a point of law, a judge should remember all the potential future litigants going to see their lawyers for advice. The need for certainty and clarity in the interests of many potential future litigants can be said with force to be more important than the need for a merits-based result in the particular case before the judge.

20. Of course, I must emphasise that this analysis risks over-simplifying things. The common law does not stand still, and, in some cases where application of the law appears to produce an unmeritorious result, it is possible for a judge to develop the law so as to produce the meritorious result. But before a judge takes such a course, he must admit to himself and explain in his judgment that he is developing the law, and how and why he is doing it. Otherwise, he is not acting in accordance with his duty. A judge has to be, and has to be seen to be, intellectually honest.

21. Indeed, given that, as I mentioned at the outset, common law trials are constrained by rules when it comes to arriving at the truth, it is all the more important that judges are, and are seen to be, as fair and as unbiased as they can be. To non-lawyers, and even to many lawyers, taking part in a trial is a somewhat intimidating and artificial experience, and although the rules which govern the trial process are aimed at achieving justice generally, they inevitably can appear to work unfairly in a particular case. So it is all the more important that the person ultimately responsible for running the trial and determining its outcome is, and is seen to be, scrupulously fair – or at least as scrupulously fair as possible.
22. That brings me to a very thorny issue – judicial proactivity during the trial. Although judges are meant to be relatively passive referees, there is no doubt that they can ask questions of witnesses and rise points with the parties. The tricky question is how much interference is acceptable. In the 1950s, an English High Court Judge¹⁵ resigned after he was heavily criticised for a second time by the Court of Appeal for interrupting counsel during cross-examination too much and for too long. Yet, there is no doubt that a judge can ask questions, and that can be for all sorts of reasons. Because the appropriateness of a judge raising a question or questions is such a fact-sensitive and discretionary matter, it is probably not helpful to give many examples. However, I think my most frequent reason for raising a question with a witness was that I thought that there was a loose end in the evidence which ought to be cleared up. Of course, in some exceptional cases, a judge positively should, ask questions of a witness - eg if the judge did not understand what the witness meant or if the judge thinks that there has been a misunderstanding between cross-examiner and witness.
23. But a judge must be very careful to avoid taking over, or appearing to take over, a cross-examination. It is not a judge's function to conduct the trial or any part of it. And such a course is fraught with dangers. An issue may have been avoided by both sides for good substantive or tactical reasons of which the judge is unaware. And if the judge appears to be batting for one party there is a real risk of justice not being seen to be done – especially if that party eventually wins. And, if a judge does a lot of questioning of one

¹⁵ Hallett J. See *Jones v National Coal Board* [1957] 2 QB 55

party's witnesses, there is a real danger that the judge's mind will become biased because he or she has been thinking about the case through the prism of one party's case.

24. When it comes to points of law, it appears to me that, if a judge thinks that an argument, which has not been raised, could be raised, the right thing to do is normally to raise it, shortly and neutrally, as soon as possible with the parties. It should not be raised on the basis that it is the obvious answer to the whole case and the parties are idiots for not having seen it. That attitude smacks strongly of the judicial mind having been made up – and it carries the risk of judicial humiliation if the point turns out to be bad. Sometimes, however, it may be better to keep quiet – eg if it is pretty plain that, in order to enable the advocates to deal with the point, the hearing would have to be unacceptably adjourned. Again, a judge must be very careful of being prejudiced in favour of a point just because he raised it and the parties missed it.

25. Let me end with an ethical problem which sometimes has to be faced by an appellate judge. In the common law system, most appeals are heard by more than one judge (often three judges for a first appeal and five for a second appeal). Again unlike most civilian courts with more than one judge, each common law appellate judge is normally entitled to give his or her own judgment. As I have said before, a civilian multi-judge court behaves like a single court, which happens to have more than one judge, trying one case, whereas a common law multi-judge court behaves like several judges all of whom happen to be hearing the same case in the same court. Of course, there are exceptions. The European Court of Human Rights permits dissenting and concurring judgments, and they are frequently very valuable, and the Criminal Division of the Court of Appeal in England and Wales conventionally only gives a single judgment.

26. However, the ethical issue which can arise for common law appellate judges is whether they are obliged to dissent even in a case where they do not feel very strongly and where they feel that a dissent will be of no value in practice. Some judges feel that they would not be true to their judicial oath if they did not record a dissent in such a case. Other judges feel that their collegiate function entitles, indeed may in some cases oblige them, to go along with the majority even if they disagree. I do not think that there is a correct

answer to this dilemma: each judge is there to make up his or her own mind, and I think that that includes making up one's mind as to whether one can properly concur.

27. And at this point I can make up my own mind that I should properly end. Thank you very much.

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