

## JUDICIAL QUALITIES: ILLUSTRATIONS FROM PAST LIVES

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### INTRODUCTION

Judicial obituaries are neither penetrating studies nor full length biographies. They are, at best, brief biographical sketches. Nevertheless an examination of them can cast light on the qualities which are desirable in the exercise of the judicial functions. Judicial obituaries provide not only summaries of the public facts of lives, but glimpses of the uniqueness of individuals, and appraisals of character in memorable lives. This article seeks to examine what qualities have been admired in judges by distilling such traits from obituaries published in national newspapers in recent years. In the public mind judges inevitably tend to be defined by their more controversial decisions, and hence obituaries may focus on notorious cases rather than notable qualities. Nevertheless, a particular case may demonstrate the significant qualities possessed by an individual, and have come to define the individual's approach to their work. However, in the minds of legal practitioners, it is the qualities, personalities and working methods, rather than individual cases, that are significant.

Some comments about the source material for this article are important. The tenor and focus of judicial obituaries may vary considerably between different newspapers.<sup>1</sup> I have chosen to use obituaries from across a range of jurisdictions and for some obituary writers, particularly in the United States, judges may be judicial heroes because of their legal philosophy. However, for the purpose of this article, judicial philosophy is irrelevant; it is the generic judicial qualities which are at issue. Although few

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<sup>1</sup> Compare for example "Sir William Mars-Jones: Obituary", *The Times*, 11 January 1999 with "Against Secrets and Lies; Obituary: Sir William Mars-Jones", *The Guardian*, 12 January 1999.

obituaries are entirely complimentary, they usually tend not to be highly critical. Judges are of course flawed human beings, and simply because a judge is noted as having been admired for one quality does not mean that all the individual's qualities were admirable. He or she may have had significant flaws also. Obituaries are appraisals that represent "the first verdicts of history".<sup>2</sup> They are therefore unlikely to be completely thorough and objective, but will nevertheless attempt an assessment of a life. Obituaries are also prepared for an audience without specialist legal knowledge, but are expected to be of particular interest to those with such knowledge. Inevitably judges who preside in appeal courts or supreme courts attract more attention from obituary writers. Such limitations on the source material inevitably have an impact on the conclusions which may be drawn from it.

### I. INDEPENDENCE

Judicial independence is the constitutional doctrine that judges are independent of the executive and the legislature, and that decisions by judges should be impartial and not be subject to influence from the other branches of government or from private or political interests. However, in addition to being a constitutional doctrine, judicial independence is fundamentally a state of mind. Lord Ackner was described as "a fiercely independent judge, never afraid to speak his mind".<sup>3</sup> Judge Ioannou of the European Court of Justice was admired for his "real independence and impartiality of mind".<sup>4</sup>

Judicial independence is at its most visible in terms of independence from government, and particularly in instances where the State invokes national security considerations. Mr. Justice Mars-Jones' handling of the 1978 trial of Crispin Aubrey and Duncan Campbell, both journalists, and John Berry, an ex-soldier, for offences contrary to the Official Secrets Act

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<sup>2</sup> Starck, "Posthumous reflections: the obituary as the first verdict of history", [2004] *Journalism and History* 1.

<sup>3</sup> "Obituary of Lord Ackner, Law Lord whose ruling in the Spycatcher case strained relations with the press", *The Daily Telegraph*, 23 March 2006.

<sup>4</sup> "Obituary: Judge Krateros Ioannou", *The Independent*, 2 April 1999.

1911, has been viewed as demonstrating this quality. The prosecution resulted from a meeting of the three to discuss the subject of electronic surveillance and Berry's service in a GCHQ signals regiment in Cyprus. The proceedings were perceived as being desired by the Security Service so as to jail Duncan Campbell, who kept breaching D-notices. Towards the end of the prosecution evidence, Mr. Justice Mars-Jones announced he was "extremely unhappy" about this "oppressive prosecution", commenting that section 1 of the 1911 Act was designed for use against spies, and asking why was it being used against freedom of speech. The prosecutor responded that the proceedings had been authorised by the Attorney General. Mr. Justice Mars-Jones replied "[i]f the Attorney-General can authorise the prosecution, then he can unauthorise it", and the following day the Attorney General did just that. The defendants were subsequently convicted by the jury of offences under section 2 of the 1911 Act, and many were surprised by the sentences imposed by the judge: Aubrey and Campbell were given conditional discharges, and Barry received a short suspended sentence. Mars-Jones' conduct of the trial "has often been cited as an example of how judges can be trusted to protect fundamental liberties when press and Parliament fail to do so and as an important assertion of the judicial role as a check on state power". Indeed, his handling of it was said to both "exemplify and justify the independence of the judiciary".<sup>5</sup>

A notable US example of judicial independence was that of Judge John Sirica who, as Chief Judge of the Washington DC Federal Court, presided over the trial of the burglars who broke into the Democratic Party National Committee headquarters in the Watergate Hotel in Washington in 1972 on behalf of the Committee to Reelect the President.<sup>6</sup> Sirica granted a *subpoena duces tecum* directing President Nixon to produce to the special prosecutor, for use in criminal proceedings, tape recordings of conversations in the White House between the President and his

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<sup>5</sup> "Against Secrets and Lies; Obituary: Sir William Mars-Jones", *The Guardian*, 12 January 1999 and "Obituary: Sir William Mars-Jones", *The Independent*, 25 January 1999. A fuller account of the trial may be found in Robertson, *The Justice Game* (1999), ch. 5.

<sup>6</sup> "Obituary: Judge John Sirica", *The Independent*, 20 August 1992.

advisers. In directing the White House to produce the tapes, Sirica set himself on a constitutional collision course with the President, who tried to invoke executive privilege, arguing that the tapes were not subject to judicial scrutiny. In a historic ruling in *United States v. Nixon*,<sup>7</sup> the US Supreme Court upheld Sirica and affirmed the subpoena. The President complied, and the tapes revealed that Nixon had approved plans for the Watergate cover-up six days after the break-in.<sup>8</sup> Nixon promptly resigned from office. The Watergate case did substantial damage to the Republican Party, as the judge suspected it might. Despite Sirica's deep ties to the Republican Party (he was an elected party official who campaigned for Republican candidates in five national campaigns<sup>9</sup>), he believed that an independent judiciary, standing above politics, was the critical branch of government in the resolution of the Watergate crisis.

Judicial independence demonstrated by judges is sometimes, given the background of the judge, perceived by the legal profession as being "unexpected independence".<sup>10</sup> For example, it was said of Lord Ackner that, "in spite of his conservative outlook, he had no hesitation in reaching decisions unfavourable to a Conservative government".<sup>11</sup> However, perhaps the idea that independence is unexpected indicates more about the holder of the perception than the judge, since judicial independence merely reflects faithfulness to the judicial oath.

Judicial independence also requires judges to be independent of other judges. This is particularly so when judges sit on multi-judge appeal panels. Lord Hobhouse was described as "the ideal of the independent judge" in that he thought for himself and, having once arrived at his point of view, was not easily swayed by the views of others. His fellow judges, first in the Court of Appeal and then in the House of Lords, particularly

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<sup>7</sup> (1974) 418 U.S. 683.

<sup>8</sup> "John Sirica, Watergate Judge, Dies", *The Washington Post*, 15 August 1992.

<sup>9</sup> "Sirica, 88, Dies; Persistent Judge In Fall of Nixon", *The New York Times*, 15 August 1992.

<sup>10</sup> "Obituary: Lord Keith of Kinkel: Law lord who helped overturn the Tory ban on Spycatcher", *The Guardian*, 27 June 2002.

<sup>11</sup> "Obituary of Lord Ackner, Law Lord whose ruling in the Spycatcher case strained relations with the press", *The Daily Telegraph*, 23 March 2006.

valued him as a colleague; his independent viewpoint was one against which they could measure their own. His independent cast of mind meant that he was never afraid to dissent, even when doing so put him in a minority of one.<sup>12</sup>

## II. KNOWLEDGE

An essential judicial quality is a solid background of legal knowledge and its underlying principles. Judge McArdle was described as having “a thorough knowledge of the law”.<sup>13</sup> Mr. Justice Pain was admired for “his wide knowledge of law”.<sup>14</sup> Lord Mersey’s grasp of the principles of commercial law was said to be one factor which enabled him to dispose of his cases with rapidity.<sup>15</sup> Judge Ioannou of the European Court of Justice was known for his “deep learning”,<sup>16</sup> a description also used of Lord Denning<sup>17</sup> and which was said to have enabled the latter to skirt round “awkward precedents” with skill and ingenuity, and produce a result which accorded with morality and natural justice.<sup>18</sup> It has been said that a long-term test of quality for all judges is whether their judgments actually elucidate the area of law in issue, as opposed to merely deciding the case before them. Lord Hobhouse triumphantly passed this test. His judgments were described as profoundly informative, hinting at reserves of legal learning which few have ever matched: one knows a lot more law after reading a Hobhouse judgment than before.<sup>19</sup>

Rather than being known for the breadth of their knowledge of the law, some judges are known for their specialised knowledge of particular legal fields. Two examples demonstrate

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<sup>12</sup> “Obituary of Lord Hobhouse of Woodborough: Law Lord who having once thought through the issues for himself was not easily swayed by others’ views”, *The Daily Telegraph*, 22 March 2004.

<sup>13</sup> “Adept at spotting the ‘Chancer’”, *Irish Times*, 20 November 1999.

<sup>14</sup> “Obituary: Sir Peter Pain: Barrister and high court judge, he helped shape labour law”, *The Guardian*, 27 February 2003.

<sup>15</sup> “Obituary: Lord Mersey”, *The Times*, 4 September 1929.

<sup>16</sup> “Obituary: Judge Krateros Ioannou”, *The Independent*, 2 April 1999.

<sup>17</sup> “Obituaries: Lord Denning”, *The Independent*, 6 March 1999.

<sup>18</sup> “Obituaries: Lord Denning” (previous note).

<sup>19</sup> “Obituary: Lord Hobhouse of Woodborough”, *The Independent*, 25 March 2004.

this. Firstly, Sir Jack Jacob, Senior Queen's Bench Master in England and Wales, was known as the outstanding British exponent of civil court procedure during the twentieth century. His seminars on civil procedure, as visiting professor at University College London, were world famous.<sup>20</sup> He had a vast knowledge of the subject, infused with a powerful sense that the main purpose of procedure in the law is to promote justice.<sup>21</sup> Secondly, Mr. Justice Pumfrey had a particular expertise in intellectual property law. He was known throughout the world by the intellectual property community, was a regular speaker at the largest intellectual property conference, held annually at Fordham University, New York, and for some years taught patent law for a week at the prestigious Max Plank Institute in Munich. He was the first British judge to be made a member of the enlarged Board of Appeal of the European Patent Office in Munich.<sup>22</sup> This level of understanding was described as having drawbacks, as he was inclined occasionally to explore side issues that his wide knowledge had brought to mind, making cases take rather longer than had originally been expected, and his admirable, clear judgments sometimes went into details beyond the understanding of all save those thoroughly conversant with the science involved.<sup>23</sup>

The legal knowledge gained by judges has often resulted in contributions to academic and practitioner texts. Mr. Justice Megarry who was, in the estimation of his colleagues, "the most learned man on the bench", was the author of several books on property law, including, with Professor Wade, *The Law of Real Property*,<sup>24</sup> a standard text for generations of law students. He wrote countless other books and articles, and edited *Snell's Equity*.<sup>25</sup> Mr. Justice Vinelott was a leading authority on

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<sup>20</sup> "Obituary: Sir Jack Jacob: Lawyer who ushered England's civil courts into the present day", *The Guardian*, 1 January 2001.

<sup>21</sup> "Obituary: Sir Jack Jacob", *The Independent*, 12 January 2001.

<sup>22</sup> "Sir Nicholas Pumfrey: An appeal court judge for only two months, his expertise lay in intellectual property", *The Guardian*, 5 January 2008.

<sup>23</sup> "Sir Nicholas Pumfrey; Judge with expertise in patent law", *The Independent*, 9 January 2008.

<sup>24</sup> Megarry and Wade, *The Law of Real Property* (1957).

<sup>25</sup> "Obituary of Sir Robert Megarry: Judge who became Vice-Chancellor of the Chancery Division after scraping a Third", *The Daily Telegraph*, 17 October

company and trust law, and the author of numerous essays and articles on revenue and administrative law.<sup>26</sup> Judge Brian Galpin updated the *Manual of International Law*<sup>27</sup> and *Maxwell's Interpretation of Statutes*.<sup>28</sup> He also contributed to editions of *Halsbury's Laws of England*.<sup>29</sup> Sir Robert Jennings, President of the International Court of Justice, published, with Sir Arthur Watts, their magisterial edition of *Oppenheim's International Law*.<sup>30</sup> During his career as a Crown Court judge, Sir Richard May, subsequently a judge at the International Criminal Tribunal for the Former Yugoslavia, edited books and authored many articles on rules of evidence and criminal procedure. Although he had no background in international law, his expertise was such that he edited *International Criminal Evidence*.<sup>31</sup>

Law continually evolves by reason of new statutes and new judicial decisions. Hence it is crucial that judges have an ability to acquire knowledge. This quality has been commented on in a number of judicial obituaries. Dame Ann Ebsworth was said to be “fascinated by every aspect of the law”,<sup>32</sup> and Mr. Justice Higgins

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2006. See for example, Megarry (ed.), *Snell: The Principles of Equity*, 23<sup>rd</sup> ed. (1947).

<sup>26</sup> “Obituary of Sir John Vinelott: Cerebrally gifted High Court judge who, as a student, witnessed a famous philosophical duel”, *The Daily Telegraph*, 15 June 2006.

<sup>27</sup> Galpin, *Manual of International Law* (1950).

<sup>28</sup> Granville Sharp and Galvin, *Maxwell: The Interpretation of Statutes*, 10th ed. (1953)

<sup>29</sup> “Obituary of His Honour Brian Galpin: Circuit judge whose expertise in statutes and ancient instruments was not matched in his motoring”, *The Daily Telegraph*, 9 August 2006. See, for example, Galpin (ed.), *Halsbury's Laws of England*, 4<sup>th</sup> ed. (1973-1987).

<sup>30</sup> “Obituary of Sir Robert Jennings Cambridge lawyer whose powerful intellect made him an ideal President of the International Court of Justice”, *The Daily Telegraph*, 13 August 2004. Jennings and Watts (eds.), *Oppenheim's International Law* 9<sup>th</sup> ed. (1992).

<sup>31</sup> “Obituary of Sir Richard May: Crown Court judge who was later appointed to preside over the trial of the former Yugoslav president Slobodan Milosevic”, *The Daily Telegraph*, 2 July 2004. See, for example, May and Wierda (eds.), *International Criminal Evidence*, 4<sup>th</sup> ed. (2003).

<sup>32</sup> “Obituary: Dame Ann Ebsworth: Pioneering woman lawyer who scaled the heights of the judiciary”, *The Guardian*, 12 April 2002.

demonstrated a “great hunger for knowledge”.<sup>33</sup> Judge Hayes, a Canadian judge, was noted for “his enthusiasm for law”, and enjoyed using online databases to obtain more recent legal precedents than counsel had provided him with, and thereby show he was more up to date in his legal knowledge than they were.<sup>34</sup>

While legal knowledge is an essential quality in a judge, judicial knowledge is often not confined to that sphere alone. Lord Mersey’s grasp of both the principles of commercial law and of how business was carried on enabled him to dispose of his cases with rapidity.<sup>35</sup> Mr. Justice Hart was described as an intellectual whose mind ranged well outside the confines of the law particularly in the realms of poetry, literature and the visual arts.<sup>36</sup> Lord Justice Ormrod qualified in medicine during the Second World War after his call to the Bar, and he was elected a Fellow of the Royal College of Physicians when a High Court judge.<sup>37</sup> Lord Bridge’s interest in subjects outside the law lasted well into later life, and he completed a mathematics degree in retirement. Bridge reasoned: “I had a mathematician daughter and I’d not done any maths since I was 14, so when I retired I thought I ought to keep my mind working on something”.<sup>38</sup>

Mr. Justice Davies believed in the need for judges to read at least 50 books a year which were not connected with the law.<sup>39</sup>

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<sup>33</sup> “Obituary: Mr. Justice Higgins; Justice without fear or favour”, *The Guardian*, 7 September 1993.

<sup>34</sup> “Obituary: Frederick Clair Hayes Judge served for 33 years”, *The Globe and Mail* (Canada), 26 October 1994.

<sup>35</sup> “Obituary – Lord Mersey”, *The Times*, 4 September 1929.

<sup>36</sup> “Sir Michael Hart; ‘Subversive’ Chancery judge”, *The Independent*, 2 March 2007.

<sup>37</sup> “Obituary: Sir Roger Ormrod”, *The Independent*, 15 January 1992.

<sup>38</sup> “Lord Bridge of Harwich; Judge with wide interests and quick intelligence who presided over the trial of the Birmingham Six”, *The Independent*, 28 November 2007.

<sup>39</sup> “Obituary of Sir Michael Davies: Judge in defamation cases, including those involving Elton John, Koo Stark and Sonia Sutcliffe”, *The Daily Telegraph*, 9 September 2006.

### III. INTELLECTUAL ABILITY

Knowledge, however, needs to be combined with intellectual ability for the effective discharge of judicial functions, and judicial obituaries highlight a number of different facets of intellectual ability. Firstly, there is the ability to master a mass of often complex material. Lord Hobhouse was known invariably to be “on top of the material” that was before him in a case.<sup>40</sup> Lord Roskill was said to have found his niche as a trial judge sitting in the commercial court, exhibiting an astonishing ability to absorb a mass of evidential detail, promptly organising it,<sup>41</sup> and to be gifted with an astonishing memory.<sup>42</sup>

Secondly, there is the ability to analyse information and recognise the important issues. Lord Oliver was described as possessing “a razor-sharp analytical mind”.<sup>43</sup> Lord Denning was described as having “a penetrating mind”<sup>44</sup> and a “powerful legal intellect”.<sup>45</sup> Lord Cameron was “fully equipped to cut through the sophistry of any lawyer appearing before him”.<sup>46</sup> Judge Wilson of the Supreme Court of Canada was said by one of her colleagues to be able to “peel the onion as well as anyone I have ever known in terms of analyzing issues”.<sup>47</sup> Lord Donaldson was quick to bring barristers before him to the point.<sup>48</sup> He liked argument to be short and to the point, and he “had little stomach for over-

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<sup>40</sup> “Obituary of Lord Hobhouse of Woodborough: Law Lord who having once thought through the issues for himself was not easily swayed by others’ views”, *The Daily Telegraph*, 22 March 2004.

<sup>41</sup> “Obituary: Lord Roskill of Newtown: Trials of Intellect”, *The Guardian*, 7 October 1996.

<sup>42</sup> “Obituary: Lord Roskill”, *The Independent*, 10 October 1996.

<sup>43</sup> “Lord Oliver of Aylmerton, ‘Spycatcher’ appeal judge”, *The Independent*, 31 October 2007.

<sup>44</sup> “Lord Denning of Whitechurch: A Benchmark of British Justice”, *The Guardian*, 6 March 1999.

<sup>45</sup> “Obituaries: Lord Denning”, *The Independent*, 6 March 1999.

<sup>46</sup> “Wise Counsel in Scotland; Obituary: Lord Cameron”, *The Guardian*, 6 June 1996.

<sup>47</sup> “The first female judge to ascend to the Supreme Court dies at 83”, *The Globe and Mail*, 1 May 2007.

<sup>48</sup> “Obituary: Lord Donaldson of Lymington”, *The Independent*, 3 September 2005.

refinement or verbosity”.<sup>49</sup> Lord Cross was ever speedy to appreciate the real question at issue and to reach his solution.<sup>50</sup> Judge Inskip possessed that marvellous lucidity of thought that took him, in every forum, straight to the point.<sup>51</sup> The advocate waiting to learn which judge was going to hear his case knew that, if it turned out to be Lord Hobhouse, every aspect would be subject to the most searching examination. He would often come into court and ask a question that was not only the right one, but also identified the issue that had hitherto been overlooked by both parties.<sup>52</sup> Mr. Justice Latey had an instinct for the real issue in a case, not just as analysed by the advocate, but as felt by the litigants and, if a case required analysis of legal principle, his conclusions generally stood unimproved by subsequent appellate review.<sup>53</sup> Of Judge Greene on the US District Court for the District of Columbia it was said that “[w]hen you went into the Greene court, you knew he was the smartest person in the room”.<sup>54</sup> Not all judges of course wear their intellect on their sleeves. Lord Stott had an acute legal mind partly hidden behind a somewhat bluff, no-nonsense and gently mocking manner.<sup>55</sup>

The downside of intellectual gifting may sometimes also be present. It was said of Lord Scarman that some noted a degree of intellectual snobbery. One QC recalled that, once, when he failed to comprehend the word “dendritic”, Scarman interrupted, “When I was at school we were properly educated. ‘Dendritic’ comes from the Greek word ‘dendron’, meaning ‘tree’”.<sup>56</sup> Of Lord Bridge it was said his quickness of mind sometimes caused him to be short with less gifted advocates.<sup>57</sup> Lord Justice Kay expected

<sup>49</sup> “Obituary: Lord Donaldson of Lynton, Judge who Modernised Court of Appeal”, *The Independent*, 3 September 2005.

<sup>50</sup> “Obituary: Lord Cross of Chelsea”, *The Independent*, 17 August 1989.

<sup>51</sup> “Obituary: Judge Hampden Inskip”, *The Independent*, 19 October 1991.

<sup>52</sup> “Obituary: Lord Hobhouse of Woodborough”, *The Independent*, 25 March 2004.

<sup>53</sup> “Obituary: Sir John Latey”, *The Independent*, 15 May 1999.

<sup>54</sup> “Harold H. Greene, Judge Who Oversaw the Breakup of the AT&T Colossus, Dies at 76”, *The New York Times*, 30 January 2000.

<sup>55</sup> “Obituary: Lord Stott”, *The Independent*, 24 April 1999.

<sup>56</sup> “Obituary: Lord Scarman; Judge who Led the Brixton Riots Inquiry”, *The Independent*, 10 December 2004.

<sup>57</sup> “Obituary: Lord Bridge of Harwich”, *The Times*, 26 November 2007.

others to be as much on top of their case as he was, and he did not gladly, or silently, suffer incompetence.<sup>58</sup>

Another facet of intellectual ability is the ability to be innovative. Lord Wilberforce was ready to innovate, albeit only within limits.<sup>59</sup> He was prepared to accept advances in the law once he agreed that the change was realistic and rooted in principle.<sup>60</sup> Lord Cameron had an “ingenious and very open mind”.<sup>61</sup> Judge McCarthy had a consistently inquisitive mind with a ready acceptance of new ideas, and a capacity dispassionately to examine them.<sup>62</sup> Lord Justice Ormrod had a restless intelligence and a pragmatic approach to the problems before him. Intellectually he was a radical with a strong social conscience which was made the more sensitive by his outside interests.<sup>63</sup> Lord Donaldson displayed in his judgments an ability to seek out the less obvious solutions.<sup>64</sup>

An important aspect of intellectual ability is intellectual integrity. Lord Salmon was said to possess this.<sup>65</sup> Lord Justice Kay was noted for the combination of a powerful intellect and absolute integrity.<sup>66</sup> On the bench he was firm and never one to let bad points go by, yet he was intellectually entirely fair.<sup>67</sup> Sir Robert Jennings managed, through his combination of intellectual honesty and principled common sense, to find solutions that were robust, carefully argued as a matter of law and

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<sup>58</sup> “Obituary: Sir John Kay; Unstuffy Lord Justice of Appeal”, *The Independent*, 22 July 2004.

<sup>59</sup> “Obituary: Lord Wilberforce”, *The Independent*, 19 February 2003.

<sup>60</sup> “Obituary: Lord Wilberforce: Civilised and balanced judge, cautious but acceptant of change”, *The Guardian*, 19 February 2003.

<sup>61</sup> “Wise Counsel in Scotland; Obituary: Lord Cameron”, *The Guardian*, 6 June 1996.

<sup>62</sup> “Obituary: Judge Niall McCarthy”, *The Independent*, 6 November 1992.

<sup>63</sup> “Obituary: Sir Roger Ormrod”, *The Independent*, 15 January 1992.

<sup>64</sup> “Obituary: Lord Donaldson of Lymington”, *The Independent*, 3 September 2005.

<sup>65</sup> “Obituary: Lord Salmon”, *The Independent*, 14 November 1991.

<sup>66</sup> “Obituary of Sir Robert Jennings, Cambridge lawyer whose powerful intellect made him an ideal President of the International Court of Justice”, *The Daily Telegraph*, 13 August 2004.

<sup>67</sup> “Obituary of Sir John Kay: Compelling advocate and wise judge who presided at the appeals of Jeremy Bamber, Sally Clark and Ruth Ellis”, *The Daily Telegraph*, 7 July 2004.

had an air of unavoidable rightness about them. His gift was and always had been, to make his analysis of a problem seem obvious.<sup>68</sup>

Judges possessing exceptional intellectual ability may utilise it in extra-judicial writings. During his years as a judge, Lord Devlin found time to think and write that he had lacked as a barrister. *Trial by Jury*,<sup>69</sup> *The Enforcement of Morals*<sup>70</sup> and his collected essays, *The Judge*,<sup>71</sup> show the delight he took in writing, as well as truths about the nature of law, justice and morality which will remain timeless.<sup>72</sup> Judge Manfred Lachs believed in advancing his ideas – liberalism, sensitivity, moderation – through every avenue. Aside from his heavy work on the International Court of Justice, Lachs produced academic work of the highest quality. He authored books on war crimes, the Indochina agreements, the Polish-German frontier, and the Law of Outer Space. He gave the General Course on Public International Law at the Hague Academy. His book, *The Teacher in International Law*,<sup>73</sup> had a remarkable impact, dazzling all who read it with its erudition, historical knowledge and contemporary insight.<sup>74</sup>

Not all members of the judiciary are described, as Lord Oliver was, of having “an alpha-plus intellect”.<sup>75</sup> Sometimes a judge’s obituary may describe him as “not overly cerebral”.<sup>76</sup> However, even where a judge’s intellectual gifts are not being entirely celebrated, there is usually a recognition of ability. It was said of Lord Mersey that “if he did not possess the higher

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<sup>68</sup> “Obituary: Sir Robert Jennings; Pragmatic President of the International Court Of Justice”, *The Independent*, 11 August 2004.

<sup>69</sup> Devlin, *Trial by Jury* (1956).

<sup>70</sup> Devlin, *The Enforcement of Morals* (1965).

<sup>71</sup> Devlin, *The Judge* (1979).

<sup>72</sup> “Obituary: Lord Devlin”, *The Independent*, 22 August 1992.

<sup>73</sup> Lachs, *The Teacher in International Law* (1982).

<sup>74</sup> “Obituary: Judge Manfred Lachs”, *The Independent*, 16 February 1993.

<sup>75</sup> “Obituary of Lord Oliver of Aylmerton: Appeal court judge whose wide knowledge and light touch were brought to bear on the Spycatcher trial and the workings of Chancery”, *The Daily Telegraph*, 23 October 2007.

<sup>76</sup> “Obituary of Sir James Hunt, High Court judge who found for Michael Douglas and Catherine Zeta-Jones in their battle with Hello!”, *The Daily Telegraph*, 13 November 2006.

intellectual gifts or imagination that go to make up the lawyers whose names are carried down the ages, he was exceedingly quick and clever”.<sup>77</sup> Not everyone perceives the judicial need for intellectual ability in the same way. Some lawyers were scornful of Judge Sirica’s qualifications, obtained by putting himself through Georgetown Law School in the 1920s, between careers as a waiter and briefly, as a professional boxer. According to one obituarist, Sirica’s response when accused of not being “an intellectual judge” was:

If it means writing books and that kind of thing, then I’m not. But a great intellectual doesn’t make a great trial judge. A man who’s been a trial judge is a better judge of human nature than Professor X of Harvard, who has probably never been in the well of a courtroom. I have been a prosecutor, a defence lawyer, a counsel to a very important investigation on the Hill. I’m a realist, as opposed to a theorist.<sup>78</sup>

#### IV. DECISION-MAKING

Since judges are essentially employed as decision makers, it is perhaps otiose to observe that judges have been admired for being “decisive”.<sup>79</sup> However, when courts in most jurisdictions can be said to have need for faster disposal of business, it is clear that this is a desirable quality. Nevertheless there are potential drawbacks associated with it. Although Lord Justice Ormrod was admired for his “speed of decision”, it was also recognised that he could be impatient with prolixity, or where the facts of the case clearly allowed only one answer.<sup>80</sup>

Of course not all decisions will be easy to make. Justice Blackmun of the US Supreme Court acquired a reputation early in his tenure as a slow writer who took a long time to make up his mind. His obituarist noted that Blackmun conceded that he had disregarded, at his peril, a piece of advice that Justice Black gave him when he first arrived at the Court. He quoted Justice

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<sup>77</sup> “Obituary – Lord Mersey”, *The Times*, 4 September 1929.

<sup>78</sup> “Maximum John; Obituary: Judge John Sirica”, *The Guardian*, 25 August 1992.

<sup>79</sup> “Obituary: Sir Joseph Cantley”, *The Independent*, 9 January 1993.

<sup>80</sup> “Obituary: Sir Roger Ormrod”, *The Independent*, 15 January 1992.

Black as telling him: “Harry, never display agony in public, in an opinion. Never say that this is an agonizing, difficult decision. Always write it as though it’s clear as crystal”. In the interview, Justice Blackmun said: “I probably agonize over cases more than I should and more than most of my colleagues do. I always have done that, and it’s something I haven’t been able to get over. But at the same time, once a decision has been made, I don’t lose any sleep over it”.<sup>81</sup>

Not all judges have the luxury of reflecting at length on each decision. Judge Sirica’s obituarist records him as commenting: “Appeals court judges don’t have to shoot from the hip. They have the leisure to think, to decide. We have to make decisions in a split second, whether to sustain or overrule an objection”.<sup>82</sup> Although the statement suffers a little from hyperbole, the thrust of it is undoubtedly correct.

### V. JUDGMENT

Judgment is the capacity to draw sound conclusions from the material presented. It reflects not the process of decision making, but rather the outcome of the process. Obituarists often comment on the quality of judgment which a judge possessed. Nonetheless it is not an easy judicial quality to critique. Far easier simply to recount facts and describe involvement in notable cases. It was said of Lord Justice Balcombe that there was “universal respect for his sound judgment”,<sup>83</sup> and of Judge Rolv Ryssdal, President of the European Court of Human Rights, that “above all he displayed the balance and good sense which mark out the best judges”.<sup>84</sup> Lord Lane said of Lord Justice Lawton: “[i]f Fred has ever made a mistake I have yet to come across it. He has, in the

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<sup>81</sup> “Justice Blackmun, Author of Abortion Right, Dies”, *The New York Times*, 5 March 1999.

<sup>82</sup> “Sirica, 88, Dies; Persistent Judge In Fall of Nixon”, *The New York Times*, 15 August 1992.

<sup>83</sup> “Obituary: Sir John Balcombe: Brilliant judge who brought wisdom to matters of death and divorce”, *The Guardian*, 4 July 2000.

<sup>84</sup> “Obituary: Judge Rolv Ryssdal”, *The Independent*, 3 March 3, 1998.

words of the Collect for Whit Sunday, ‘a right judgment in all things’”<sup>85</sup>.

Lord Justice Watkins was viewed rather as a safe pair of hands with sound judgment than as a great intellectual or law maker.<sup>86</sup> Although he was not regarded as a profound lawyer, he had a sound grasp of principle and excellent judgment, as well as judicial temperament.<sup>87</sup>

Mrs. Justice Bracewell was admired for her commonsense and thoughtful approach.<sup>88</sup> Mr. Justice Pain was described as having a high degree of common sense.<sup>89</sup> Judge Sleeman gained a reputation for his sensible, down-to-earth judgments.<sup>90</sup> Of Lord Wilberforce it was said that “he believed in common sense in the application of established principle, he looked carefully at the facts of each case, and he was not dazzled by theoretical and conceptual arguments”.<sup>91</sup> Lord Bridge was said to have shown a real concern for civil liberties.<sup>92</sup> Judge Kingham was said to have

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<sup>85</sup> “Obituary: Lord Justice Lawton: Judge whose landmark ruling allowed the defence to screen potential jurors for prejudice in the Kray trial”, *The Guardian*, 5 February 2001.

<sup>86</sup> “Obituary of Sir Tasker Watkins, VC, Judge who as a wartime officer led his company in a bayonet charge through cornfields raked by enemy gunfire”, *The Daily Telegraph*, 10 September 2007.

<sup>87</sup> “Sir Tasker Watkins, VC, Genial war hero who rose to eminence in the judiciary as a Lord Justice of Appeal and Deputy Chief Justice of England”, *The Times*, 10 September 2007.

<sup>88</sup> “Obituary of Mrs. Justice Bracewell, High Court judge who was widely admired for her commonsense approach to controversial family cases”, *The Daily Telegraph*, 15 January 2007.

<sup>89</sup> “Obituary: Sir Peter Pain: Barrister and high court judge, he helped shape labour law”, *The Guardian*, 27 February 2003.

<sup>90</sup> “Obituary of His Honour Colin Sleeman: Circuit judge who cut his teeth as a lawyer at the trials of Japanese war criminals”, *The Daily Telegraph*, 30 June 2006.

<sup>91</sup> “Obituary: Lord Wilberforce: Civilised and balanced judge, cautious but acceptant of change”, *The Guardian*, 19 February 2003.

<sup>92</sup> “Lord Bridge of Harwich – Law lord and judge who attracted criticism and controversy over his handling of the Birmingham Six trial”, *The Guardian*, 28 November 2007.

had a strong sense of social justice.<sup>93</sup> Judge O’Leary had a concern for the poor in society.<sup>94</sup>

Judgment involves being able to assess people correctly. Mr. Justice Sachs was a great judge of character.<sup>95</sup> Judge McArdle “had the ability to recognise the ‘chancers’”, and distinguish between them and “genuine people”.<sup>96</sup> Lord Justice Kay had common sense, a deep understanding of humanity and its weaknesses, and an unfailing instinct for what was fair and just.<sup>97</sup>

## VI. IN TOUCH WITH SOCIETY

Judges are sometimes criticised for being “out of touch with real life”.<sup>98</sup> It is therefore unsurprising that being in touch with society is a judicial quality which is sometimes admired in judicial obituaries. Being in touch is important because it provides a greater understanding of the facts of a case and the implications of any particular ruling. Lord Wilberforce, who often spoke of the role of the judiciary in society and the need for judges to become much more outward-looking and much more concerned with social needs and social imperatives, was described as having an “ability to move with the times”.<sup>99</sup> Judge Shindler was described as having a “contemporary mind”.<sup>100</sup> Lords Scarman and Denning were both noted for their clear awareness of how judges appeared to the man in the street, but it was Scarman’s apparent willingness to move in the outside world that distinguished him from other judges. It was no surprise

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<sup>93</sup> “Obituary: Judge James Kingham”, *The Independent*, 27 February 1995.

<sup>94</sup> “Former FG activist who was elevated to the High Court”, *Irish Times*, 6 January 2007.

<sup>95</sup> “Obituary: Sir Michael Sachs: First solicitor on high court bench”, *The Guardian*, 2 October 2003.

<sup>96</sup> “Adept at spotting the ‘Chancer’”, *Irish Times*, 20 November 1999.

<sup>97</sup> “Obituary: Sir John Kay; Unstuffy Lord Justice of Appeal”, *The Independent*, 22 July 2004.

<sup>98</sup> Speech by Lord Phillips, Lord Chief Justice of England and Wales, Lord Mayor’s Dinner For Judges, Mansion House, London, 18 July 2006. Available at [www.judiciary.gov.uk/publications\\_media/speeches/2006/sp180706.htm](http://www.judiciary.gov.uk/publications_media/speeches/2006/sp180706.htm).

<sup>99</sup> “Lord Wilberforce: Civilised and balanced judge, cautious but acceptant of change”, *The Guardian*, 19 February 2003.

<sup>100</sup> “Obituary: George Shindler”, *The Guardian*, 27 December 1994.

when he was chosen to head future commissions of inquiry into social and public disorder: the 1974 Red Lion Square riot, and the 1997 Grunwick dispute.<sup>101</sup>

Judges may have particular experience which allows them to be in touch with particular aspects of the court business listed before them. Lord Wilberforce had a genuine sympathy for and understanding of administrators who unexpectedly found themselves before the courts in civil litigation. His wartime experience included “some very valuable time in Whitehall”, and he once claimed that by contrast with most of his judicial colleagues he had “a little understanding of the ways in which government works from the inside”.<sup>102</sup>

Being in touch is not, of course, the same as holding fashionable views. Some of Lord Simon’s views came to be seen in the 1960s as rather out of date. In 1965, for example, he lent his support to a scheme to prohibit divorce for couples with children under 16, adding that the sums released by reducing the divorce rate could be spent on education and marriage guidance. These proposals were greeted by howls of execration from those urging easier divorce. One MP described them as “extraordinarily naïve”, and seeming to come “out of another century”.<sup>103</sup> Nevertheless, though he was conservative when it came to family law, he was otherwise liberal on social issues. Described as an avowed feminist, Lord Simon thought divorced women, particularly those no longer young, received a rough deal. He helped provide them with the right to a share of their ex-husbands’ pensions.<sup>104</sup>

The issue of whether a judge is in touch with society or not inevitably leads to droll anecdotes being available to obituarists. Mr. Justice Talbot’s obituary noted that, in a hearing at

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<sup>101</sup> “Lord Scarman, Law Lord of liberal views who won admiration as a reformer and chairman of public inquiries”, *The Daily Telegraph*, 10 December 2004.

<sup>102</sup> “Lord Wilberforce: Civilised and balanced judge, cautious but acceptant of change”, *The Guardian*, 19 February 2003.

<sup>103</sup> “Obituary of Lord Simon of Glaisdale: Judge whose belief in the traditional family unit underpinned his opposition to easier divorce”, *The Daily Telegraph*, 8 May 2006.

<sup>104</sup> “Lord Simon of Glaisdale: Leading divorce judge and former minister who gave much to the legal life of the Lords”, *The Guardian*, 8 May 2006.

Winchester Crown Court in 1978, in a dispute over fees arising from a transfer deal between Manchester United and Bournemouth football clubs, counsel had kindly explained to the judge that a “striker” is a goal scorer. “I know”, replied the judge, “I watch Match of the Day”.<sup>105</sup>

## VII. HUMOUR

Humour has many functions. It may be little more than ostentation. It may stem from embarrassment, or be intended to defuse a tense situation. Judicial obituaries often portray humour as being a legitimate expression of humanity and individuality.<sup>106</sup> Judge Babington was said to have earned respect and affection for the combination of shrewdness, humour and humanity he brought to the cases which he heard.<sup>107</sup> Judge Elam was described as “a humane judge with a sense of humour”.<sup>108</sup> Judge Cantley was said to have demonstrated himself to be a “good humoured – almost chuckling – judge”.<sup>109</sup> Of Lord Oliver it was noted that, while much judicial wit finds apparent appreciation only among professionals, his was rooted in a generous sense of humour and a proper sense of the absurd.<sup>110</sup>

It may be observed that, where obituarists comment on judicial humour, it is more often in connection with trial judges rather than appellate judges. This may be because the former are more frequently in contact with members of the public, whereas the latter deal more regularly with a small group of professionals. Judge Baker heard a case alleging impersonation of a police

<sup>105</sup> “Sir Hilary Talbot, Judge who came down heavily on jury nobblers”, *The Daily Telegraph*, 23 June 2004

<sup>106</sup> “Judicial Humour”, Mason, J., Law Graduation Address – Sydney University, 20 May 2005. Available online at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_mason](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason).

<sup>107</sup> “Obituary of Anthony Babington, Barrister who prevailed over war wounds to become a stipendiary magistrate, circuit judge and prolific author”, *The Daily Telegraph*, 25 May 2004.

<sup>108</sup> “Obituary: Judge Henry Elam”, *The Independent*, 28 August 1993.

<sup>109</sup> “Genuine Judge; Obituary: Joe Cantley”, *The Guardian*, 13 January 1993.

<sup>110</sup> “Obituary of Lord Oliver of Aylmerton: Appeal court judge whose wide knowledge and light touch were brought to bear on the Spycatcher trial and the workings of Chancery”, *The Daily Telegraph*, 23 October 2007.

officer by Huddersfield eccentric Jake Mangelwurzel, who appeared in court in a full jester's outfit, complete with bells on his hat. After 15 minutes without a comment on his appearance, Mangelwurzel was driven to say to the judge: "Your Honour, I thought you might be wondering why I am dressed like this". "No", said the judge with his usual composure. "It's because I'm the town clown of Huddersfield", Mangelwurzel insisted on telling him. "Think no more about it Mr. Mangelwurzel, look what they made me wear", was the judge's reply.<sup>111</sup>

Humour may be employed functionally. Judge Blennerhassett had an impish, mischievous sense of humour which he used to devastating effect to prick the pompous and to undermine what appeared to him to be absurd arguments.<sup>112</sup>

The danger with the judicial use of humour in court is, of course, that it is so easy to offend. Not one to flinch from the prospect of igniting saloon-bar controversy down the years, Mr. Justice Rougier was said to have handed out warnings and advice from the bench with the occasional hint of tongue in judicial cheek. His obituary described him as an "outspoken and colourful High Court judge", a description which may be understood as not entirely complementary.<sup>113</sup> In contrast, Mr. Justice McNeill was described as a modest man with a great sense of humour, always controlled and kindly in court.<sup>114</sup> Mr. Justice Cantley was said to have had a charming wit and a happy choice of language, never using that wit at the expense of a defendant or a witness.<sup>115</sup>

### VIII. Demeanour

How a judge conducts himself or herself has an impact on other people's court experience. Judicial demeanor is important

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<sup>111</sup> "Judge Geoffrey Baker QC", *The Yorkshire Post*, 4 August 2007.

<sup>112</sup> "Obituary: His Honour Francis Blennerhassett", *The Independent*, 28 July 1993.

<sup>113</sup> "Obituary of Sir Richard Rougier: Son of the romantic novelist Georgette Heyer who became a controversial and outspoken High Court judge", *The Daily Telegraph*, 27 October 2007.

<sup>114</sup> "Obituary of Mr. Justice McNeill", *The Guardian*, 27 February 1990.

<sup>115</sup> "Obituary: Sir Joseph Cantley", *The Independent*, 9 January 1993.

because it affects the atmosphere and dynamics in the courtroom. It was said of Lord Emslie that few judges can have had a greater presence. His judicial manner was impeccable, and his courtesy and patience towards counsel was habitual. Undue levity or informality in court was, however, not appreciated, and only a fleeting twitch of his moustache would reveal that he was amused by something.<sup>116</sup> Mr. Justice Higgins' demeanour in court was described as more often benevolent, a twinkle in his eye, the lips hinting at a smile, modest and unassuming.<sup>117</sup> Lord Roskill's haughty manner, exemplified by the shape of his mouth, the tone of speech and the tilt of his head, could not conceal the warmth and friendliness towards his fellow human beings, particularly those of the younger generation.<sup>118</sup> Lord Brandon had a somewhat austere and meticulous attitude in court,<sup>119</sup> and Judge Edelstein had a robust judicial style.<sup>120</sup> Lord Bridge could be sometimes abrasive, but never eccentric.<sup>121</sup> Lord Lane was described as tolerant of mistakes and kind to junior barristers.<sup>122</sup> Judge Grant was said to be unflappable in court.<sup>123</sup> Mr. Justice Mars-Jones had the ability to conduct proceedings in a dignified manner without ever becoming stuffy.<sup>124</sup>

One of the most common qualities observed in judges is courtesy. Mr. Justice Latey demonstrated courtesy and a complete

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<sup>116</sup> "Obituary: Lord Emslie; Former Head of the Scottish Judiciary", *The Independent*, 2 December 2002.

<sup>117</sup> "Obituary: Mr. Justice Higgins; Justice without fear or favour", *The Guardian*, 7 September 1993.

<sup>118</sup> "Obituary: Lord Roskill of Newtown: Trials of Intellect", *The Guardian*, 7 October 1996.

<sup>119</sup> "Obituary: Lord Brandon of Oakbrook", *The Independent*, 29 March 1999.

<sup>120</sup> "Obituary: David Edelstein: Judge who tackled the Teamsters", *The Guardian*, 30 August 2000.

<sup>121</sup> "Obituary of Lord Bridge of Harwich: Judge at the ill-fated trial of the Birmingham Six who later disagreed with fellow Law Lords over Spycatcher", *The Daily Telegraph*, 26 November 2007.

<sup>122</sup> "Obituary of Lord Lane Lord Chief Justice, whose many successes were overshadowed by the case of the Birmingham Six", *The Daily Telegraph*, 24 August 2005.

<sup>123</sup> "Campbell Grant, 95, highly regarded judge Member of Ontario Supreme Court, was unflappable", *The Toronto Star*, 6 November 1997.

<sup>124</sup> "Against secrets and lies; Obituary: Sir William Mars-Jones", *The Guardian*, 12 January 1999.

absence of judicial self-importance, which humanised all the proceedings in his court.<sup>125</sup> Sir James Miskin, Recorder of London, was said to be “courteous, witty, kind and helpful to advocates”.<sup>126</sup> Lord Jauncey was said to have an unfailingly courteous and patient manner.<sup>127</sup> Lord Scarman had effortless charm and courtesy.<sup>128</sup> Lord Fraser’s courtesy and open-mindedness often proved a comfort to hard pressed counsel who had the feeling, perhaps, that they were battling against strongly-held opinions amongst his colleagues in the Appellate Committee.<sup>129</sup> Chief Justice Agranat of the Supreme Court of Israel was highly courteous, never allowing any tension to ruffle him, and neither arrogant nor patronising.<sup>130</sup>

Judge McKinnon “had no trace of the pomposity which sometimes affects judges”.<sup>131</sup> Mr. Justice Vinelott was totally un pompous as a judge, and was often accompanied into court by his springer spaniel. He once adjourned proceedings to his home when he had hurt his back, presiding in pyjamas from his bed.<sup>132</sup> Mr. Justice Hart, according to his obituarist, “wholly lacked the common judicial attributes of pomposity and self importance, as well as the third one, usually accompanying the first two these days, of craven political correctness”. Indeed, a judicial colleague who shared lodgings with him on the Western Circuit admirably described his approach to current orthodoxies as “deeply subversive”.<sup>133</sup> Accessibility was said to be the keynote of Lord Roskill’s personality both on and off the bench. He was often to

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<sup>125</sup> “Obituary: Sir John Latey”, *The Independent*, 15 May 1999.

<sup>126</sup> “Obituary: Sir James Miskin”, *The Independent*, 20 December 1993.

<sup>127</sup> “Lord Jauncey of Tullichettle: Law Lord of quiet dignity, noted for his unfailingly courteous and patient manner in court”, *The Independent*, 23 July 2007.

<sup>128</sup> “Lord Scarman: Law Lord of liberal views who won admiration as a reformer and chairman of public inquiries”, *The Daily Telegraph*, 10 December 2004.

<sup>129</sup> “Obituary of Lord Fraser of Tullybelton: A fine Scots man of law”, *The Guardian*, 21 February 1989.

<sup>130</sup> “Obituary: Shimon Agranat”, *The Independent*, 18 August 1992.

<sup>131</sup> “Obituary of Judge McKinnon: Frank, fair and flighted”, *The Guardian*, 23 November 1988.

<sup>132</sup> “Sir John Vinelott”, *The Times*, 22 June 2006.

<sup>133</sup> “Sir Michael Hart; ‘Subversive’ Chancery judge”, *The Independent*, 2 March 2007.

be found between his flat in the Middle Temple and the Law Courts, carrying on a wide-ranging and uninhibited conversation. The same lack of pomposity and grandeur marked his activities with the young.<sup>134</sup>

### IX. FAIRNESS

Unsurprisingly, the critical judicial quality of fairness is frequently referred to in judicial obituaries. References to the fairness of judges include references to “an innate sense of fair play”;<sup>135</sup> a “devotion to the principles of fairness”;<sup>136</sup> “meticulously fair”;<sup>137</sup> “uncompromising” in fairness;<sup>138</sup> renowned for “an anxiety not only to be fair but to be seen to be fair”;<sup>139</sup> and “an unfailing instinct for what was fair and just”.<sup>140</sup> However some obituarists go further, and examine particular aspects of judicial fairness.

A hearing must result in what the parties wish to say on the matter before the court being genuinely considered. One aspect of fairness is therefore that the parties are listened to. Master Glass was described as “a good listener”.<sup>141</sup> Judge Caswell of the Ontario Superior Court was described as “a good listener” to both witnesses and to counsel.<sup>142</sup> Lawyers said those who appeared before Judge Trotter always felt when they left court that their client had had a fair hearing, even though the decision may have

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<sup>134</sup> “Obituary: Lord Roskill”, *The Independent*, 10 October 1996.

<sup>135</sup> “Obituary: Sir John May: Judge who Believed in Fair Play”, *The Guardian*, 20 January 1997.

<sup>136</sup> “Liberal judge for a Bill of Rights: Obituary of Lord Salmon”, *The Guardian*, 15 November 1991.

<sup>137</sup> “Counsel of the Valleys; Obituary: Lord Edmund-Davies”, *The Guardian*, 31 December 1992.

<sup>138</sup> “Obituary: Sir Patrick Russell: Sturdy master among Manchester lawyers”, *The Guardian*, 9 November 2002.

<sup>139</sup> “Obituary: Sir John Compton Miller”, *The Independent*, 6 November 1992.

<sup>140</sup> “Obituary: Sir John Kay; Unstuffy Lord Justice of Appeal”, *The Independent*, 22 July 2004.

<sup>141</sup> “A quiet manner, but passionate advocate of a just society”, *Irish Times*, 15 October 2005.

<sup>142</sup> “Judge known for innovative court rulings; Ontario Superior Court judge who died in a tragic skiing accident presided over numerous high-profile cases”, *The Globe and Mail*, 7 March 2003.

gone against their client.<sup>143</sup> Those who recognise that listening is an important judicial quality will often, like Lord Lane, be firmly committed to the belief that barristers should not be unduly interrupted by judges. His obituarist noted that in 1989, allowing an appeal by a woman jailed for refusing to give evidence against her former boyfriend, Lord Lane criticised Judge Pickles for his constant interruptions at the trial and for failing to listen to counsel.<sup>144</sup> Yet there are limits. Lord Donaldson's tendency to interrupt barristers if he detected waffle was not always to the liking of counsel. But he reasoned that "to allow the unarguable to be argued is unfair to others waiting to have their cases heard".<sup>145</sup> Listening without interruption is not an easy quality to develop, not least because of pressures to conclude business with speed and efficiency. However many do. Judge Gray was said to have "displayed a willingness to suffer even the most tiresome of advocates". This quality meant that, even though he was dealing with highly emotive matters involving children, very few left his court with a sense of grievance or that they had been unfairly treated.<sup>146</sup>

However, listening is not in itself sufficient as an expression of the quality of fairness. It must be a listening accompanied by an openness to be persuaded. Sir Jocelyn Bodilly, Chief Justice of the Western Pacific, demonstrated that, even though judges may be imbued with a degree of formality borne out of the legal setting in which they operate, an outward formality may mask "an unexpectedly open mind".<sup>147</sup>

Fairness also necessitates that the processes of the law operate fairly. In South Africa, the Amnesty Committee of the Truth and Reconciliation Commission decided to work closely

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<sup>143</sup> "Judge James B. Trotter was MPP for 12 years", *The Toronto Star*, 2 June 1989.

<sup>144</sup> "Obituary of Lord Lane, Lord Chief Justice whose many successes were overshadowed by the case of the Birmingham Six", *The Daily Telegraph*, 24 August 2005.

<sup>145</sup> "Obituary of Lord Donaldson of Lynton Master of the Rolls who had run the Industrial Relations Tribunal and presided in the Maguire case", *The Daily Telegraph*, 2 September 2005.

<sup>146</sup> "Obituary: Roger Gray", *The Independent*, 30 October 1992.

<sup>147</sup> "Obituary: Sir Jocelyn Bodilly: Beyond the Blue Horizon", *The Guardian*, 5 June 1997.

and calmly within the framework of the law and legal procedures. Going from case to case, they resisted urging by Thabo Mbeki to grant amnesty speedily. Increasingly frail and ill, it was this scrupulous attention to the process of the law that Judge Hassen Mall bequeathed to his tormented country.<sup>148</sup> Correspondingly, judges will often display a dislike of unfairness. Mr. Justice Latey could be scathingly critical of tactics that violated his sense of fairness, and could be trenchant in upholding rights threatened by abuse.<sup>149</sup> At any attempt at unfair advocacy, Lord Fraser's strong disapproval would shine through his courtesy in a way that quickly brought all but the most insensitive to move to some better point, if counsel had one.<sup>150</sup>

At its heart, however the terms are defined, fairness is related to justice. Mrs. Justice Ebsworth cared deeply about the law, but even more deeply about justice.<sup>151</sup> Lord Cameron was described as having a powerful, subjective sense of justice, and this was manifested in his willingness during his thirty years on the bench to allow commonsense to transcend some of the finer points of law.<sup>152</sup> Lord Denning was described as having a passion for justice,<sup>153</sup> and it has been said that Denning's passion for justice often led him into the realms of controversy, especially on the issue of whether it was the function of the courts to change, rather than to interpret, the law.<sup>154</sup>

## X. COMMUNICATION SKILLS

Communication in a legal context primarily concerns language. The use of words is therefore important to judges. Lord Justice Mann's obituarist referred to "his usual mastery of

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<sup>148</sup> "Obituary: Judge Hassen Mall", *The Independent*, 31 August 2000.

<sup>149</sup> "Obituary: Sir John Latey", *The Independent*, 15 May 1999.

<sup>150</sup> "Obituary of Lord Fraser of Tullybelton: A fine Scots man of law", *The Guardian*, 21 February 1989.

<sup>151</sup> "Obituary: Dame Ann Ebsworth: Pioneering woman lawyer who scaled the heights of the judiciary" *The Guardian*, 12 April 2002.

<sup>152</sup> "Wise Counsel in Scotland; Obituary: Lord Cameron", *The Guardian*, 6 June 1996.

<sup>153</sup> "Obituaries: Lord Denning", *The Independent*, 6 March 1999.

<sup>154</sup> "Lord Denning", *The Times*, 22 June 2006.

words”.<sup>155</sup> Lord Gardiner was admired for being economical in his use of language to explain matters.<sup>156</sup> One barrister appearing before Dame Ebsworth remembers offering a tentative “I think”, only to be told, “In my court, you don’t think. You know or you don’t know”.<sup>157</sup> This should not be perceived as pedantry. Lord Wilberforce, who brought clarity of thought and lucidity of expression to many challenging areas of the law, disliked battles about terminology, believing them to distract rather than illuminate, indicating in a leading case that the word “nullity” brought with it “the difficult distinction between what is void and what is voidable, and I certainly do not wish to recognise that the distinction exists or to analyse it if it does”.<sup>158</sup> Inevitably there are individual styles in the use of language. Lord Lane had a much more unconventional use of language than most judges of his vintage. For example, he liked the 19th-century American slang word “hornswoggle”, meaning to cheat and deceive and used it for judges who gave meandering and long-winded summings-up which baffled juries.<sup>159</sup>

#### A. Oral skills

Judicial obituaries reveal different aspects of oral communication skill. Lord Justice Cumming-Bruce was said to have had the ability to summon up a “vivid turn of phrase”.<sup>160</sup> Lord Justice Watkins was described as having “an impeccable command of spoken English”.<sup>161</sup> Mr. Justice Davies, when

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<sup>155</sup> “Obituary: Sir Michael Mann: Appealing qualities”, *The Guardian*, 1 July 1998.

<sup>156</sup> “Obituary of Lord Gardiner of Kittisford: A great reforming Lord Chancellor”, *The Guardian*, 10 January 1990.

<sup>157</sup> “Obituary: Dame Ann Ebsworth: Pioneering woman lawyer who scaled the heights of the judiciary”, *The Guardian*, 12 April 2002.

<sup>158</sup> “Obituary: Lord Wilberforce: Civilised and balanced judge, cautious but acceptant of change”, *The Guardian*, 19 February 2003.

<sup>159</sup> “Obituary: Lord Lane; Lord Chief Justice, Criticised for Dismissing the Appeal of the Birmingham Six”, *The Independent*, 25 August 2005.

<sup>160</sup> “Obituary: Sir Roualeyn Cumming-Bruce: Intuitive and sympathetic judge promoted to the appeal court despite a drink-driving conviction”, *The Guardian*, 15 June 2000.

<sup>161</sup> “Sir Tasker Watkins VC; Victoria Cross holder who became a distinguished judge and Welsh Rugby Union president”, *The Independent*, 10 September 2007.

summing up, tried to boil down the issues to what he believed were the basics, using simple, albeit perhaps not always appropriate, analogies. A notable example was in the libel proceedings brought by the former *Sunday Times* editor Andrew Neil against Peregrine Worsthorne following a leading article in the *Sunday Telegraph*, where the judge compared the case to a head-on collision between two large steam locomotives.<sup>162</sup>

Lord Ackner's penchant for plain speaking was admired. At the trial of a teacher accused of assault for breaking a pupil's jaw, the pupil had taken an LSD tablet, and had spent the morning break screaming obscenities at the teacher before kicking him in the stomach. Ackner asked the jury in his summing up:

Have we really reached the stage in this country when an insolent and bolshie pupil has to be treated with all the courtesies of visiting royalty? You may think we live in very strange times. Whatever may be the views of some of our most advanced, way-out theoreticians, the law does not require a teacher to have the patience of a saint.<sup>163</sup>

Plain speaking is not the preserve of only one jurisdiction. In the US Supreme Court, when Justice Rehnquist complained that a prisoner's appeals had cost too much taxpayers' money, Justice Marshall snapped: "[i]t would have been cheaper to shoot him after he was arrested, wouldn't it?".<sup>164</sup> Outspokenness may give rise to unfortunate comments which attract media attention. Judge Vowden made newspaper headlines when he told a defendant accused of receiving stolen goods at a football ground: "[i]t's bad enough to have to go and watch Bristol City without having things stolen".<sup>165</sup>

Lord Emslie who, at the Bar, had had the priceless ability to address the court or a jury without the aid of notes, put this aptitude to good use when, as a judge, he came to deliver

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<sup>162</sup> "Obituary of Sir Michael Davies: Judge in defamation cases, including those involving Elton John, Koo Stark and Sonia Sutcliffe", *The Daily Telegraph*, 9 September 2006.

<sup>163</sup> "Obituary of Lord Ackner, Law Lord whose ruling in the Spycatcher case strained relations with the press", *The Daily Telegraph*, 23 March 2006.

<sup>164</sup> "Obituary: Thurgood Marshall", *The Independent*, 26 January 1993.

<sup>165</sup> "Obituary: Judge Desmond Vowden", *The Independent*, 31 July 1990.

extempore judgments.<sup>166</sup> Lord Roskill could deliver accurately and persuasively a complicated judgment, orally and extempore.<sup>167</sup> It was said that in an action involving the ostensible authority of a company director, he delivered an off-the-cuff judgment covering fifteen pages of the law reports in length which the Court of Appeal praised as “a tour de force”.<sup>168</sup>

Clarity of speech is important. Lord Justice Russell was said to have disliked prolixity from the bench.<sup>169</sup> Sir Jocelyn Bodilly was prone to deliver unstuffy findings in plain language full of wisdom.<sup>170</sup> Clarity is particularly evident in judicial interactions with juries. Lord Devlin had an easy rapport with the juries in his cases. His ability to set out dense and technical legal argument in simple terms that could be quite easily understood was increasingly known and respected outside the legal profession.<sup>171</sup> Lord Fraser could provide lucid, concise summaries of the law and evidence in his charges to juries (scrupulously avoiding any indication of his own views on matters properly within the jury’s province).<sup>172</sup> In terms of speaking style, Lord Lane’s concise and clear judgments, were delivered “with all the rhythm and panache of a classical orator”.<sup>173</sup>

Judicial communication skills will also be evidenced in a judge’s interactions with counsel. Lord Maxwell had a self-deprecatory mode of speech which he unconsciously cultivated. Counsel knew that an intervention prefaced by the words: “I may be awfully stupid, but ...” would be the forerunner of a deadly

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<sup>166</sup> “Obituary: Lord Emslie; Former Head of the Scottish Judiciary”, *The Independent*, 2 December 2002.

<sup>167</sup> “Obituary: Lord Roskill”, *The Independent*, 10 October 1996.

<sup>168</sup> “Obituary: Lord Roskill of Newtown: Trials of Intellect”, *The Guardian*, 7 October 1996.

<sup>169</sup> “Obituary: Sir Patrick Russell: Sturdy master among Manchester lawyers”, *The Guardian*, 9 November 2002.

<sup>170</sup> “Obituary: Sir Jocelyn Bodilly: Beyond the Blue Horizon”, *The Guardian*, 5 June 1997.

<sup>171</sup> “Obituary: Lord Devlin”, *The Independent*, 22 August 1992.

<sup>172</sup> “Obituary of Lord Fraser of Tullybelton: A fine Scots man of law”, *The Guardian*, 21 February 1989.

<sup>173</sup> “Obituary of Lord Lane Lord Chief Justice, whose many successes were overshadowed by the case of the Birmingham Six”, *The Daily Telegraph*, 24 August 2005.

question going right to the heart of the case.<sup>174</sup> Lord Salmon's obituarist noted that his shyness "could conceal a sharp tongue and a delightful, some might say wicked, wit ... though a model of judicial patience, he could deflate the verbose advocate in a single sentence: 'I may need to be told the same point twice but please not a third or fourth time'".<sup>175</sup> Members of the public will usually be dealt with more gently than professionals. For example, Lord Taylor was said never to be sarcastic at the expense of litigants and defendants.<sup>176</sup>

### B. Written skills

Judicial obituaries have also commented on the skill of judges to communicate in writing. Obituarists have described their subjects' written judgments as "pellucid";<sup>177</sup> "elegantly written";<sup>178</sup> "meticulously prepared, precise and thorough";<sup>179</sup> "models of clarity, logic and decisiveness";<sup>180</sup> "invariably expressed in lapidary prose";<sup>181</sup> "lucid and carefully reasoned ... powerful expositions of the law";<sup>182</sup> and "a model of clarity and simplicity".<sup>183</sup>

Inevitably there are different styles of writing, for example a more formal style as contrasted with a more conversational style. The style adopted by a particular judge will be influenced by a number of factors, such as whether the judge considers that his principal audience is the general public or legal professionals, and by the intellectualism or literary elegance which is sought.

<sup>174</sup> "Obituary: Lord Maxwell", *The Independent*, 5 January 1994.

<sup>175</sup> "Obituary: Lord Salmon", *The Independent*, 14 November 1991.

<sup>176</sup> "Obituary: Lord Taylor of Gosforth: Justice in all Fairness", *The Guardian*, 30 April 1997.

<sup>177</sup> "Obituary: Lord Lane of St Ippollitts", *The Guardian*, 23 August 2005.

<sup>178</sup> "Liberal judge for a Bill of Rights: Obituary of Lord Salmon", *The Guardian*, 15 November 1991.

<sup>179</sup> "Obituary: Sir Michael Mann: Appealing qualities", *The Guardian*, 1 July 1998.

<sup>180</sup> "Obituary: Sir Patrick Russell: Sturdy master among Manchester lawyers", *The Guardian*, 9 November 2002.

<sup>181</sup> "Sir Michael Hart; 'Subversive' Chancery judge", *The Independent*, 2 March 2007.

<sup>182</sup> "Sir John Vinelott", *The Times*, 22 June 2006.

<sup>183</sup> "Obituary: Lord Emslie; Former Head of the Scottish Judiciary", *The Independent*, 2 December 2002.

As with any other form of authorship, judgment styles vary between different individuals. Lord Roskill was said to write lengthy judgments, the more notable for their occasional literary allusions and historical recitation.<sup>184</sup> Lord Simon's "erudition was palpable in the measured prose of his judgments, which were replete with apt illustrations from works both classical and modern".<sup>185</sup> Mr. Justice Megarry's judgments were described as displaying his talents as writer and scholar, and still raising a smile by their epigrammatic wit and apt turns of phrase. He relished the opportunity to examine difficult or unexplored areas of the law even if these were not always crucial to the decision in the case.<sup>186</sup> Lord Devlin's classical education was said to shine through his lucid prose. Not only could he cut through a Gordian knot, he knew what the expression meant and was able to carry his learning lightly.<sup>187</sup> Invariably, Devlin's judgments were beautifully written, often possessing an almost painful honesty and openness in explaining just what he was doing.<sup>188</sup> Lord Fraser's judgments were described as always accurate in every detail, and dealing fully with all the arguments put to him and couched in very natural, elegant style, without pompousness or jargon.<sup>189</sup> Mr. Justice McCarthy's legal conclusions were noted to be invariably concise, and delivered with an articulate certainty and sometimes passionate force. His special distinction was in presenting the law not as cold abstracted logic, but an instrument with real human consequences.<sup>190</sup> Justice Blackmun charged his writing with an unusual degree of emotion which was at its most poignant when he wrote about society's victims. "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying,

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<sup>184</sup> "Obituary: Lord Roskill of Newtown: Trials of Intellect", *The Guardian*, 7 October 1996.

<sup>185</sup> "Lord Simon of Glaisdale – Conservative Solicitor General who resigned to become a judge - and eventually a Law Lord", *The Independent*, 9 May 2006.

<sup>186</sup> "Sir Robert Megarry; Long-lived judge of profound learning and epigrammatic wit", *The Independent*, 26 October 2006.

<sup>187</sup> "High Priest of the Law; Obituary: Lord Devlin", *The Guardian*, 11 August 1992.

<sup>188</sup> "High Priest of the Law; Obituary: Lord Devlin" (previous note).

<sup>189</sup> "Obituary of Lord Fraser of Tullybelton: A fine Scots man of law", *The Guardian*, 21 February 1989.

<sup>190</sup> "Obituary: Judge Niall McCarthy", *The Independent*, 5 October 1992.

cowardly, and intemperate father ...” he exclaimed in an opinion dissenting from the majority’s view that a state had no constitutional duty to protect a child from brutality at the hands of his father. His critics accused him of substituting sentimentality for legal reasoning.<sup>191</sup>

Differences in style result in different judicial voices. Of all judicial writing styles, the most recognisable is that of Lord Denning. Denning’s literary style, in fact, is perhaps his most underrated achievement. His judgments in case after case performed the feat, achieved by no other judge, of speaking directly and compellingly to ordinary people in simple, well-constructed, lucid and accessible prose. Concepts which lawyers had struggled to articulate, clashes of doctrine which seemed insoluble, emerged in his judgments as crystalline statements of principle. In a 1974 judgment which ranks among the great passages of English judicial prose, he avoided both grudging acquiescence and overt welcome, by using as an image the forces of nature which an island people had traditionally coped with: “[t]he treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back”.<sup>192</sup>

Denning believed that citizens would not be disposed to obey the law unless they were convinced that it was, on the whole, just and justly applied. To convince, it was necessary to explain, and he was renowned for his clarity of expression: simple words and short sentences. His style was lively and entertaining and he was a storyteller. Simplicity and clarity of language made the law more accessible to the layman. He saw the danger of treating logic as the only basis for law.<sup>193</sup>

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<sup>191</sup> “Justice Blackmun Dies, Leaving Rights Legacy; *Roe v. Wade* Was Court Benchmark”, *The Washington Post*, 5 March 1999 and “Justice Blackmun, Author of Abortion Right, Dies”, *The New York Times*, 5 March 1999.

<sup>192</sup> “Lord Denning of Whitechurch: A Benchmark of British Justice”, *The Guardian*, 6 March 1999.

<sup>193</sup> “Obituaries: Lord Denning”, *The Independent*, 6 March 1999.

### XI. COURTROOM MANAGEMENT

Judges are often admired for their ability to manage their courtrooms. Trial judges may have a greater task in this regard than appellate judges, before whom those present are principally professional lawyers, and the setting is generally less likely to have a volatile atmosphere. Of Judge Hughes it was said that, such was the strength of his benign personality, he rarely needed to make overt shows of his natural authority, and the atmosphere of his court was invariably relaxed and business-like.<sup>194</sup> Judge Greene was known as an organized judge who combined a gentle manner with firm control over his courtroom.<sup>195</sup> Judge Brodrick was good-humoured, calm and effortlessly in command of his court.<sup>196</sup> Lord Justice Magnus of the Zambian Court of Appeal dealt with all problems with a degree of unflappability, kindness and firmness.<sup>197</sup> Mr. Justice Cantley was described as tantrum-free, indeed, almost at times too relaxed as a judge, though discipline reigned in his court.<sup>198</sup> Courtroom management is of course an ability required at all judicial levels. Lord Fraser was said to have had a firmness which gave him full control of the proceedings before him, without any need to expressly exert his authority. His commanding charm sufficed.<sup>199</sup>

Inevitably, there are cases where the judicial courtroom management skills which are required are considerable, such as Sir Richard May's skills during the trial of Slobodan Milosevic at the International Criminal Tribunal for the former Yugoslavia. May had a steady, purposeful, no-nonsense approach. His main concern was to keep the trial going as smoothly as possible, in the face of Milosevic's repeated moves to sidetrack it, and he did his best to impose control on the proceedings. He used a combination of persistence, strong discipline, a wry sense of humour and, when required, the ultimate sanction of switching Milosevic's

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<sup>194</sup> "Obituary: Judge Billy Hughes", *The Independent*, 16 May 1990.

<sup>195</sup> "Judge presided over breakup of AT&T", *The Globe and Mail*, 1 February 2000.

<sup>196</sup> "Obituary: Judge Norman Brodrick", *The Independent*, 15 July 1992.

<sup>197</sup> "Obituary: Samuel Magnus", *The Independent*, 17 March 1992.

<sup>198</sup> "Genuine Judge; Obituary: Joe Cantley", *The Guardian*, 13 January 1993.

<sup>199</sup> "Obituary of Lord Fraser of Tullybelton: A fine Scots man of law", *The Guardian*, 21 February 1989.

microphone off, in a largely successful effort to keep the trial on track. While he was firm with Milosevic, May also gave the accused considerable leeway to participate in the trial. Under May's guidance, Milosevic was repeatedly turned away from political speech-making to engage in legal issues and the cross-examination of witnesses. When Milosevic overstepped the acceptable boundaries of cross-examination by badgering witnesses, May stopped him.<sup>200</sup> May's efficiency and common-sense, and his firmness with time-wasting, quickly won him the admiration of his colleagues, and his unwavering attention to evidential rules helped to establish the court's reputation for fairness. May's laconic no-nonsense manner was the perfect antidote to Milosevic's histrionics, and his attempts to bully and browbeat the tribunal. When the former president angrily demanded, "Can I speak or are you going to turn my microphone off like last time?", May calmly replied: "Mr. Milosevic, if you follow the rules then you will be able to speak".<sup>201</sup>

Another notable example of courtroom management skills was demonstrated by Judge Mulvey of the Connecticut Superior Court, who presided calmly over the emotionally charged murder trials of several Black Panthers in the early 1970s. In his most famous ruling, Judge Mulvey dismissed murder and kidnapping charges against Bobby Seale, the Black Panther national chairman, after the jury could not reach a verdict. Judge Mulvey defused much of the tension during the trials, rarely showing emotion and being patient with periodic outbursts. He maintained his calm throughout, although he did scowl periodically, such as when Seale testified that political assassination was a tactic of the CIA and not the Black Panthers.<sup>202</sup>

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<sup>200</sup> "Obituary: Sir Richard May; Star Judge of the International Criminal Tribunal for the Former Yugoslavia", *The Independent*, 3 July 2004.

<sup>201</sup> "Obituary of Sir Richard May: Crown Court judge who was later appointed to preside over the trial of the former Yugoslav president Slobodan Milosevic", *The Daily Telegraph*, 2 July 2004.

<sup>202</sup> "Jurist a study in calm at Black Panther trials; Bobby Seale's testimony that assassination was a CIA tactic elicited a rare scowl", *The Globe and Mail*, 2 March 2000.

## XII. RELATIONSHIPS WITH OTHER JUDGES

The ability of judges to maintain good relationships with their fellow judges is also noted by obituarists. Lord Mackenzie-Stuart's good-humoured readiness, not simply to accept that other judges saw things from a different point of view, but to learn why they did so, earned him the trust and respect of his colleagues, and led to his election as President of the European Court of Justice, an office he neither sought nor wanted.<sup>203</sup> Mr. Justice Pumfrey would freely give his advice and help to his fellow judges.<sup>204</sup> Judge Greene was extraordinarily diligent, often volunteering to relieve the caseload of fellow judges.<sup>205</sup> Judge McCarthy was intensely loyal and immensely energetic as a colleague, prepared to take on any burden which might be allotted to him in the work of a collegiate court.<sup>206</sup>

A judge's ability to build relationships with judicial colleagues is particularly important in appellate judges. A notable example of this quality was found in Justice Brennan of the US Supreme Court, who repeatedly achieved results that defied prediction, putting together unlikely coalitions of justices when there appeared little room for common ground between them. He was an excellent negotiator, who treated his ideological opponents with respect, and who never forgot that adversaries of the moment could prove to be allies in the next battle.<sup>207</sup> Even as he found himself increasingly on the losing side in the 1980s, he remained on good terms with his fellow justices. Chief Justice Rehnquist wrote of him: "Brennan brought to the work of the court a personal warmth and friendliness which prevented disagreements about the law from marring the good personal relations among the justices".<sup>208</sup>

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<sup>203</sup> "Obituary: Lord Mackenzie-Stuart", *The Independent*, 10 April 2000.

<sup>204</sup> "Sir Nicholas Pumfrey; Judge with expertise in patent law", *The Independent*, 9 January 2008

<sup>205</sup> "Harold H. Greene, Judge Who Oversaw the Breakup of the AT&T Colossus, Dies at 76", *The New York Times*, 30 January 2000.

<sup>206</sup> "Obituary: Judge Niall McCarthy", *The Independent*, 6 November 1992.

<sup>207</sup> "William Brennan, 91, Dies; Gave Court Liberal Vision", *The New York Times*, 25 July 1997.

<sup>208</sup> "Justice Brennan, Voice of Court's Social Revolution, Dies", *The Washington Post*, 25 July 1997

He achieved these results through his extraordinary ability to argue his case with his colleagues, and to bring at least four of them round to his view. His closest friend on the court, Justice Marshall, once remarked that: “[t]here’s nobody here who can persuade you the way Brennan can when he sits down to talk to you and show you where you’re wrong”.<sup>209</sup>

Relationships between appeal judges may not always run smoothly. Judge Wilson, the first woman to sit on the Canadian Supreme Court, had a sharp sense of humour and the former Chief Justice recalled: “[w]hen debates got a little rough, when people’s tempers got a hold of them, she would divert us all from what was going on and we’d all laugh”.<sup>210</sup>

### XIII. COMPASSION AND SENSITIVITY

Although parties engaged in any form of litigation seek justice, they usually wish this administered with compassion and sensitivity. It is unsurprising therefore that obituarists comment on these virtues in the context of judicial lives. Mr. Justice Pain was “kind and understanding to anyone before him”.<sup>211</sup> Lord Roskill was strict in the punishment of crimes of violence but “understanding and compassionate toward those who did not constitute a menace to society”.<sup>212</sup> Judge Argyle was someone who took a genuine interest in the welfare of those defendants whom he believed needed help, and he would work throughout his lunchtime trying to find work for young people.<sup>213</sup> Mr. Justice Eastham had a “down-to-earth manner and his understanding of human frailty made him a skilled and compassionate judge ideal for family work”.<sup>214</sup> Lord Justice Balcombe had a sympathetic

<sup>209</sup> “Obituary: William Brennan: Liberator of the Press”, *The Guardian*, 26 July 1997.

<sup>210</sup> “First female high court judge ‘was a good soldier’ who ‘knew the law’; Bertha Wilson’s ‘innovative thinking’ helped shape the lives of Canadians on such social issues as abortion, mandatory retirement and battered women’s syndrome”, *The Ottawa Citizen*, 1 May 2007.

<sup>211</sup> “Obituary: Sir Peter Pain: Barrister and high court judge, he helped shape labour law”, *The Guardian*, 27 February 2003.

<sup>212</sup> “Obituary: Lord Roskill”, *The Independent*, 10 October 1996.

<sup>213</sup> “Obituary: Judge Michael Argyle”, *The Independent*, 7 January 1999.

<sup>214</sup> “Obituary: Sir Michael Eastham”, *The Independent*, 13 March 1993.

approach to problems arising from divorce and its effects on children, and he rapidly gained the admiration of all those who practised in that field.<sup>215</sup> Chief Justice Hamilton never allowed his position to deprive him of his “deep-seated sympathy for human frailty”.<sup>216</sup> Sir Richard May’s compassion for victims and their relatives provided them with a helpful and supportive environment within the adversarial process at the International Criminal Tribunal for the Former Yugoslavia. In several cases it was his warm, even gentle, approach towards the victims that made it possible for them finish their witness testimonies in respect of crimes against humanity and genocide.<sup>217</sup>

Mr. Justice Megarry used to ask students the question who the most important person in court was. After the usual responses citing the judge, senior counsel and so on, he would assert instead that the most important person was the losing litigant. It was vital both that the litigant should know exactly why he had lost, and that the judge should be sensitive to the emotional impact of his decision.<sup>218</sup>

Judicial sensitivity has also been demonstrated when judges have been asked to conduct public inquiries. During the Brixton Riots inquiry in 1981, Lord Scarman’s tall, stooping figure appeared regularly on television screens, his face moved by concern and sympathy as he talked to residents. Scarman’s obvious concern and sensitivity won him the confidence of Brixton’s black community.<sup>219</sup>

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<sup>215</sup> “Obituary: Sir John Balcombe: Brilliant judge who brought wisdom to matters of death and divorce”, *The Guardian*, 4 July 2000.

<sup>216</sup> “Chief Justice who presided over beef tribunal and whose inquiry led to the resignation of two judges”, *Irish Times*, 2 December 2000.

<sup>217</sup> “Obituary: Sir Richard May; Star Judge of the International Criminal Tribunal for the Former Yugoslavia”, *The Independent*, 3 July 2004.

<sup>218</sup> “Sir Robert Megarry; Long-lived judge of profound learning and epigrammatic wit”, *The Independent*, 26 October 2006.

<sup>219</sup> “Lord Scarman, Law Lord of liberal views, who won admiration as a reformer and chairman of public inquiries”, *The Daily Telegraph*, 10 December 2004.

#### XIV. EFFICIENCY

As with other forms of work, judicial work needs to be done efficiently with regard to management of time and other resources. While the quality of efficiency will therefore be expected from all who hold judicial office, it has been particularly noted in respect of Chief Justices and others whose roles include wider administrative responsibilities in the judicial system.

Lord Donaldson had a brisk, modern, no-flannel approach to judicial work. It was largely due to his energy and appetite for business that the Commercial Court flourished and expanded as never before. If counsel appeared to ask for a case to be heard expeditiously, he was apt to respond: "I'm free this afternoon, what about you?". Asked to reduce scandalous delays in the Queen's Bench Divisional Court, Donaldson cleared the list within a few months. His judicial colleagues sat with him for a week or two at a time, unable to stand the pace for any longer. On becoming Master of the Rolls, Lord Donaldson introduced much-overdue reforms in the administration of the Court of Appeal. Unlike many judges, he enjoyed administration, and was restless in his search for administrative efficiency. It was he who introduced the handing down of reserved judgments, which up to then had been read aloud at a high cost in time and tedium.<sup>220</sup> His innovations also included skeleton arguments in appeal cases. His brisk and confident courtroom manner annoyed some barristers who thought him too quick on the uptake, but his demeanour stemmed from a deeply-felt commitment to sweep away delays in the justice system.

Chief Justice Burger of the US Supreme Court left his imprint in the area of judicial administration. It was said of him that he redefined the nature of his office. He concentrated his energy not simply on exploring the subtleties of constitutional doctrine, but on reforming the mechanics of American justice. More than any of his predecessors, he invested the prestige of the Chief Justiceship in efforts to make the American judicial system function more efficiently. An array of institutions was created under his aegis, including the National Center for State Courts,

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<sup>220</sup> "Obituary: Lord Donaldson of Lynton; Judge who Modernised Court of Appeal", *The Independent*, 3 September 2005.

the Institute for Court Management and the National Institute of Corrections. The common purpose of those organizations was to improve the education and training of participants in nearly all phases of the judicial process. He believed that judges could be helped to be more efficient if professional management techniques were imported to the courts.<sup>221</sup>

### **XV. COURAGE**

Judicial courage may be required in a number of circumstances: the courage to face possible unpopularity; the courage to tackle difficult issues rather than avoid them. Judges must be fearless in their resolve to make decisions according to the law, the evidence and good conscience, regardless of potential disapproval from any quarter. In a number of jurisdictions, judges have demonstrated courage in seeking to maintain the rule of law in the face of opposition. When judges live in turbulent times, it may be that one of the most admirable qualities is the moral and professional courage to promote the rule of law. Lord Dunpark was very conscious of his personal responsibility to do what he believed to be right in the circumstances of the case before him, whatever the reaction of the others might be. His attitude was robustly expressed after his retirement in response to criticism of his sentences: “[y]ou can’t go through life worrying what other people think of you”.<sup>222</sup> Judge H.R. Khanna came to be revered in the legal history of modern India, for a single ruling defending the rule of law and confirming habeas corpus in a case brought against the government by citizens jailed during a state of emergency. His obituarist noted that shortly before delivering his notable dissent, he confided to his sister: “I have prepared my judgment which is going to cost me the chief justiceship of India”. This proved prescient, and he was passed over for that post nine months later.<sup>223</sup> Courage in the face of attacks on judicial

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<sup>221</sup> “Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years”, *The New York Times*, 26 June 1995.

<sup>222</sup> “Obituary: Lord Dunpark”, *The Independent*, 26 September 1991.

<sup>223</sup> “H.R. Khanna: Scrupulous Indian judge who defended the constitutional rule of law”, *The Times*, 17 April 2008.

reputation is sometimes required. Lord Roskill was presented with the poisoned chalice of chairmanship of the commission instructed to choose between possible sites for a Third London Airport. Its 1971 recommendation, that the best site was Cublington in Bedfordshire, was strongly opposed by local interests. Roskill was unfairly abused, but carried that abuse with equanimity. He stoically declined to answer back, and allowed the report of the commission to speak for itself.<sup>224</sup> Attacks on judicial reputation can also arise for more sinister reasons. Judge Falcone, the Italian anti-mafia magistrate, was the subject of reputational attacks as a tactic adopted by the Mafia. False rumours, picked up by newspapers, suggested that Falcone was trying only to advance his own career by exaggerating the danger represented by the Mafia. This had an effect on his career, and he was passed over for two positions because of the rumours. When a bomb was discovered outside his summer house, his opponents hinted that he had planted the explosives himself. Falcone complained to a colleague: “Cosa Nostra always acts like this. First they slander their victim, then they eliminate him”. But the soft-spoken, almost shy magistrate never wanted to be considered a hero. He insisted that he was just doing his job. As a magistrate and as a Sicilian he considered it his duty to fight the Mafia.<sup>225</sup>

If an individual is courageous, that quality is likely to affect all areas of his life. Lord Justice Watkins won the Victoria Cross during the Second World War, in an incident about which he was reticent in public. The official citation makes it clear with what extraordinary bravery he had displayed. Lieutenant Watkins was ordered to attack enemy positions which lay across open cornfields where booby-traps had been set. As dusk fell, his company came under fire, and many lives were lost in the first few minutes of the engagement. The only officer left, Watkins placed himself at the head of his men and, under short-range bombardment, charged two enemy posts, killing and wounding the occupants with his Sten gun. As he pushed on towards an anti-tank gun emplacement, his weapon jammed, so he hurled it at an enemy combatant and, before his opponent had time to recover,

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<sup>224</sup> “Obituary: Lord Roskill”, *The Independent*, 10 October 1996.

<sup>225</sup> “Obituary: Giovanni Falcone”, *The Independent*, 25 May 1992.

shot him with his revolver. The company, now with only 30 men left, was counter-attacked by about fifty of the enemy, against whom Watkins led a bayonet charge. Orders for the battalion to withdraw were not received, and they found themselves surrounded, cut off from their comrades, short of ammunition and in failing light. The lieutenant decided to rejoin his battalion by passing around the enemy's flank through which he had advanced an hour before. As they made their way back across the same cornfields they were challenged by an enemy position. Ordering his men to scatter, Watkins charged the post with a Bren gun, silenced it, and then led the remnants of his company back to battalion headquarters. He had managed to save the lives of half his men. Although Lord Justice Watkins' obituaries focused on this display of courage, it was likely to have been a quality which also affected his judicial work.<sup>226</sup>

No description of judicial courage should fail to mention that of the federal judges in the Deep South of the United States who implemented the Supreme Court's desegregation rulings in *Brown v. Board of Education*.<sup>227</sup> These included judges Frank Johnston, John Minor Wisdom, Elbert Tuttle, John Brown, J. Skelly Wright and Richard Rives. Judge Johnson's first major ruling was to join a decision that struck down the Montgomery bus-segregation law as unconstitutional, following Rosa Parks' refusal to give up her seat. Subsequently, he issued another historic order that allowed Martin Luther King Jr. to lead a march from Selma to Montgomery to protest the denial of black voting rights. Such judicial decisions made him, in the words of the Ku Klux Klan, "the most hated man in Alabama". For the best part of two decades, from the early 1960s to the late 1970s, Johnson was under constant protection by federal marshals. Not only was he socially ostracised; there were countless death threats, and twice crosses were burnt on his lawn. On another occasion his mother's house was firebombed by white supremacists, in the mistaken assumption he lived there himself.<sup>228</sup> John Minor Wisdom was

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<sup>226</sup> "Sir Tasker Watkins VC; Victoria Cross holder who became a distinguished judge and Welsh Rugby Union President", *The Independent*, 10 September 2007.

<sup>227</sup> 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

<sup>228</sup> "Obituary: Frank M. Johnson Jnr.", *The Independent*, 30 July 1999.

also responsible for a number of momentous decisions, including the 1962 ruling that James Meredith, a black student, must be admitted to the University of Mississippi. Such decisions were made in the face of entrenched resistance: boxes of hate mail; threatening phone calls; two of his dogs were poisoned; and rattlesnakes were thrown into his garden. When, in 1996, Judge Wisdom was honoured by the American Bar Association with its highest award, the citation noted that he was a moral and intellectual leader on a court that made heroic decisions despite strong pressures from regional political leaders of the times, often risking personal harm.<sup>229</sup>

### CONCLUSION

Obituaries are not critical biography, and therefore possess limitations. Biographies have a much greater scope to place an individual's qualities in the context of a whole life, explaining perhaps why and how those attributes developed. Obituaries are, by comparison, snapshots of a life. Nevertheless a range of such snapshots, when examined together, are useful for identifying common features. In this instance, the source material demonstrates the qualities that others have found admirable in the lives of former eminent members of the judiciary. They are qualities which can be aspired to by those currently engaged in serving as judges.

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<sup>229</sup> "Obituary: John Minor Wisdom", *The Independent*, 4 June 1999 and "John Minor Wisdom; A courageous white judge, his rulings helped American blacks", *The Guardian*, 19 May 1999.