

Interlocutory Reflections from an Interim Bench —

B H K Donovan QC offers some insights into the life of an Acting Justice of the Supreme Court.

The suddenness of transition from barrister to acting judge leaves one gasping; in my case literally, as I ran from my 9.30 private swearing-in ceremony to St James Road Court in order to start the 10.00 listed matter by 10.30. The swearing-in had an air of protection about it. St James Road Court did not, far from my colleagues on the thirteenth floor of the judicial bunker (it does actually look like that, although, of course, it is not in fact) in Queen's Square.

Much bustle and hurry back stage at the Court, then thud, thud, thud, the door is thrown open and instead of looking up to see the judge enter, I find myself moving across the bench area following my tipstaff to my seat and looking down, not up, to the well of the Court where the two black-clad gladiators are standing ready for combat.

It is a bit like opening night of theatre in my younger days, except for this one I have had no rehearsal. It is rather like "Here's your file, there's your Court, now off you go." This can be a daunting experience in any place. It is more daunting when you find yourself alone in a room miles away from brotherly or sisterly judicial help or support. You might not get any help anyway, but at least you can feel it is close by. In St James Road it feels like it is on the other side of the earth. Now I know how Sir Francis Forbes must have felt as he stepped from his ship into the colony.

It is time I explain the purpose of these reflections. They are personal. They probably do not reflect the thoughts or feelings of any other judge. In fact, as I look back, I am not even sure how far they reflect my own. But rarely do we get a glimpse of life "on the other side" and these jottings are just one person's ponderings upon this esoteric experience.

So here I am sitting in a court room 100 years old. It used to be the Banco Court. Generations of Chief Justices have sat here. I am sitting in the seat of Sir Frederick Jordan - well not literally, that chair has long gone and is replaced by one of plastic with grey wool; but metaphorically such is where I sit.

The towering figure of Sir Frederick Darley (of Lillianfels memory) glares down from the wall of chambers. The wall is lined with reproduction portraits of CJs but none glare as he does. He looks enormous. Indeed, when I turn to the next wall, he clearly was; for there hangs on that wall a photograph of Sir Frederick and his six judges of the Court and he, in the middle, sits high and, visually at least, dominates his peers. My estimate of his size is to be proven correct later when, at the swearing-in of Dowd J, I sit on the ceremonial bench wearing Sir Frederick's robes. Fortunately, I am in the chair nearest the door so I only have a little way to walk - stumble or trip - in those vast red robes which have been lent to me for the occasion. I do not fall and no one can see the size of the tent that surrounds me, for I am not a big person.

So on my first day I enter this imposing mausoleum of a court room at St James Road and I am taken aback by its size. I was admitted here as a solicitor 27 years ago and here I called

to the bar 20 years ago. I remember it as vast. Now it looks much smaller. I wonder how the crowds squeezed in although, perhaps, the crowds then were smaller too. Size or perception of size is a function of age, perhaps.

I sit. The matter is called. An industrial accident which after two days will settle, but I am not to know that. It is apparent that there are some problems with liability. Reports are tendered. No report, however, from any expert on safety is provided by the plaintiff. I smell danger. I am right. The defendant has one. The defendant has only served it a few days before. The plaintiff says if I admit it he will have to have an adjournment to answer it. But the accident is over 10 years ago. What do I do? The judicial oath and the desire to do justice weigh heavily. In this case I am not sure how I can do justice.

Yes, this desire really is a concern: how to do justice. It may be that the law is a means, the means, to do justice but suddenly I find justice is the end, in a way I did not expect. Like any experienced common lawyer, I look for the middle way. This will involve letting in part of the report, rejecting part (at

least for the moment), and reserving rights of tender and adjournment. Terror strikes. I have to give reasons - a mini judgment. Now I had prepared myself to have to do this, but not

15 minutes into the hearing on the first day. Meanwhile the plaintiff is trying to arrange for the expert who becomes available at 3.00 pm. The plaintiff's expert's report is then tendered. By this time the story is fairly clear. The report is based on a story of some variation with that presented in court. The expert, nevertheless, is able to rise to the occasion and provides oral opinion based on the story as it is given to me. The defendant seeks to have the balance of his report admitted and, as there is no longer any reason not to, I admit it.

Thus ends day one.

Next day, we settle down to a case that appears inevitably to be going to the finish. Half way through the afternoon the plaintiff's case suddenly ends. I had not expected it to finish at this point, but I am told all the evidence is in. Both counsel seek some time. As I leave the Court, I say to the tipstaff "Ah, a settlement is imminent" and just as suddenly, shortly after, we receive a message, the case is settled.

End of day two. I am beginning to relax and enjoy this. I have learnt a few things already. It is important to have a purpose on the bench. True it is that I cannot guide the case, but I must know where it appears to be going. I must be prepared to be flexible in order to achieve justice. The rules are available to help to this end, but there are, and will be, times when I have to take a long term approach. I learnt this from the tender of the defendant's expert report which created some difficulties yesterday re the rules. I also have to push to have the case go on and continue. I have now learnt this.

I am also becoming aware of the physical problems of

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sitting; problems such as legs. My legs need exercise. I will have to organise a leg exercise régime. They are starting to feel quite weak if I do not exercise them. The thought occurs to me that these sitting conditions may even be in breach of the *Occupational Health and Safety Act*. Next, I notice over the following weeks that I am continually turned to the right in the direction of the witness box. If one moves around from court room to court room this is not so much of a problem, but if you are in one court room all the time the effect on the upper body gradually increases. So neck and torso exercises are required.

I have learnt another trick. I have always been impressed when a judge repeats the last answer or the last words of it when others miss hearing the answer. I am able to do this. But I also find I can do it even if I have not been fully listening to it (or perhaps even not listening at all?). Somehow these words are still available in my subconscious, so I can repeat them immediately if called on to do so - I could not, of course, do this five minutes later.

I undergo some changes of attitude. I started my time with a strong belief that I should have respect and, indeed, reverence for all who come before me. I keep this. But my sense of justice and public duty increases. I become aware that whatever problems arise, there must be a way to find a solution which will do justice. And I find there is. I am surprised how often a technical problem will resolve itself if I keep my eye on the main issues and ensure the case simply keeps going.

The sense of public duty comes home most strongly while I am duty judge. Part of this role required me to issue, where appropriate, warrants under the *Listening Devices Act*. I issued one warrant to allow use of a device where a young woman was being held hostage. Other judges had issued warrants before. It just so happened that it was while my warrant was in force that the young woman was rescued by police and I felt some sense of satisfaction and felt that in a very, very small way I may have helped in her release.

By Friday of the first week I have settled into a long brain damage case which will require a few adjournments during my tenure and which is finalised at 4.30 pm on my last Friday. During the first week my sense of humour has progressed. I recall Lord Denning's warning: in your first year never say anything during the hearing and never reserve. I resolve to abide by the latter but am unable to restrain myself from the former. The Friday of the first week is my birthday. I wonder to myself, do my judicial powers extend to having counselling 'Happy Birthday', but I dispel such thoughts from mind. They sing it to me in chambers at morning tea in any event, without any exercise of judicial, or other, powers.

In the second week I am presented with a medical negligence claim. One counsel says it involves an extension of *Rogers v Whitaker*. I think to myself, you may think that, but you will be hard pressed to have a junior acting judge extend what the High Court has laid down. His opponent, however, suggests it might be on the cutting edge. Some people might agree. I will not comment further as it is on appeal. By Friday it is time for judgment. It is a most difficult case and I have worried greatly over it during the week. By Friday, however, I know the answer - or at least I believe I know my answer. I know it may not be correct, but it is my

view. Before judgment I suggest to counsel that if I was down there (at the bar table) looking at me up here, I would not want me to decide this case. But they ignore my advice.

So at 12.45 pm on Friday I haul the file, the exhibits and the transcript from the far ends of the bench where they have been scattered during the hearing and launch into my first *ex tempore* judgment. I know it is going to take some hours. I am very worried I will get lost and have to adjourn and reserve and start again. The beginning is very tentative - and very slow. Lunch time - time for me to worry have I done the right thing in launching straight into it. Well, too late to go back now - at least unless disaster overtakes me. Two o'clock and off I go again. I have the order of the judgment in my mind and on a single sheet of paper in front of me with headings, subheadings and points. But that has all to be filled in from 4 days of transcript and bundles of exhibits. "Daunting", I think to myself. "Fools rush in", I think to myself. But I have to continue.

The Friday afternoon drags on. I become painfully aware of my own voice. I sneak a look at the Court Reporter from time to time to see how she is dealing with what is, to me, becoming a long and tedious exercise; the goal of which now is simply to get to the end. At 4.45 pm I have finished liability. I wearily adjourn the Court and say I will finish damages on Monday.

I am unpleasantly aware that I have been the centre of attention. Solicitors making notes of my words, assessing them as if they were gems - to be pocketed with relief if they favour them, to throw back those which are adverse as if they were flawed. It has all been painfully slow. And one party writing down notes. No doubt, ready for an appeal - if not to the Court of Appeal, then to the Judicial Commission. And it's only my first decision.

Nevertheless, as I lay down my voice I realise with relief that it is over. I have got through it and I can enjoy my weekend. I don't. But I think I can. I don't because I end up making notes of other matters I want to put in my revised judgment. Then I wonder how much I can add in the revision - or change - not the conclusion, but the way I got to it.

I thank the Court Reporter who stayed so late to let me finish and leave.

On Monday I finish the damages.

The next case will settle but I don't yet know this. I look down as I enter to see three silks and three juniors. This I find a little intimidating. Worse, there are only two parties but the defendant has two insurers, one for the nominal defendant and one for a driver (whose condition was such that if there is a verdict only against her then the plaintiff may get nothing). The plaintiff is a paraplegic. I note that one of the insurers has only just come into the matter - this part of the case has, indeed, only just been assigned to it by the Motor Accidents Authority. An application for adjournment has been made to the duty judge the day before and been refused with a note that any further application is to go back to that judge. Meanwhile, I have to decide whether there are to be two sets of representation for the defendant.

The parties ask for time. And more time. And more time. I recall judges who force cases on. I am uncertain. I

receive messages that progress is being made. I give yet more time. I worry about "waste of court time" and what if it doesn't settle. It does; half way through the afternoon.

I found sitting as a judge much more interesting and exciting than I expected. I had always been wary of the hours of sitting and the tedium that could occur, especially in the afternoon session. I was surprised. Of course, it may not last if one was sitting continually, but it was surprising nonetheless.

I was also surprised to find how many difficult questions of law I had to deal with. I had to consider a stated case from a magistrate which involved the boundaries of the duty of care and foreseeability as well as a problem of proof. The stated case procedure is a very clumsy procedure and many have criticised it. This one had plenty of problems - not least of which was that in the case as framed the plaintiff could have affirmative answers to his questions, but this still left a question on at least one other issue. The defendant also had a further issue which was not in the stated case and which he wanted ventilated.

There were technical problems in getting to these other issues, but I hope we (and I mean the counsel as well as myself) found some appropriate solutions. They required some mental agility. And I broke Lord Denning's rule. I did reserve.

Another taxing problem involved an order sought in relation to a search warrant and legal professional privilege. This made me ponder upon the sole purpose test and the question of whose purpose - if anyone's. Could it be some abstract purpose of the document or must it be the purpose of a person; one would think the creator of the document. But I was faced with a situation where A stood over B and forced B to copy out a document which A then unilaterally delivered to the solicitor for C. The solicitor had no connection with the document until it arrived in his mail box. Was it A's document or B's document? A's purpose or B's purpose? You will have to read the next exciting instalment of the story in the judgment or even in the Court of Appeal to know the answer.

The whole experience was filled with such philosophical niceties but most were more complex to explain than the above so I will not bore you further.

Let me note some temptations:

1. To know the arbitration amount when there is an appeal from an arbitrator.
2. To know which party is insured.

To be curious in these is, of course, heresy but it is also human. I was able to resist the first quite easily in one case but not the second in another for counsel called on a subpoena to the insurance company thereby making it clear which party was insured. I am pleased to say this had no effect on my conclusion because by that time I had come to tentative conclusions in one direction anyway, which I adhered to. In one case the former temptation arose when a diary was tendered which in fact had the amount of the arbitration in it. But I judiciously handed it back and suggested it be checked for this. The offending part was then covered over to remain

concealed from curious judicial eyes.

The CJs wig. On the wall of St James Road are the pictures of previous CJs. The latest is that of our present CJ. I gazed each day on this picture upon entering the chambers. What was a minor blemish - a crooked wig, albeit only slightly crooked - became a major irritation. Imagine posterity gazing over our CJ in an imperfect state, a flawed vision. This would never do. One day, while speaking to the great one by telephone, I asked him to do me a favour and get a new picture with a straight wig. His response was, "Why are you sitting looking at pictures instead of reading transcript?." To this acerbic reply to my innocent request, I had no response. Wounded, I listened as he went on to explain that there was now another portrait but in my pain I heard little of this. Seriously, however, I must thank him and all my (temporary) colleagues for their support.

I learnt a great deal from the experience. I recall a very senior silk years ago saying to me that in your written submissions you should write the judge's judgment. This is not so - or at least not always so. One Court of Appeal Judge during my time on the bench said to me that one thing you realise is that counsel does not write our judgments. He also said he felt that every silk should be required to spend a period of time as a judge at

the start of their appointment. It is without doubt a most valuable experience, even for the brief period during which I sat. Not least was the experience of sitting in my chambers at lunch on my last day, listening on the radio to the finale of Wagner's *Twilight of the Gods* and Brunhilde's *Imolation* scene as I pondered the Notice of Appeal against my first decision. And over me crept the thought: *Twilight of a Judge (Acting)*. □

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