

Ever Wondered How Judges' Judge?

By Mr. Justice T. M. McEwan

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Several times a month throughout the school year the Justice Education Society organizes informal sessions at the downtown courthouse which give students a chance to question judges of the Supreme Court about what they do. Often, it is a chance to talk to a judge they have just observed in the courtroom. The judges hope that these exchanges are instructive to the students; they find, in turn, that the sessions are instructive to them.

Recently, a number of these sessions were recorded and transcribed. While the answers given by each judge to questions of a more specific or personal nature (eg "how did you get to be a judge?") vary greatly, certain themes recur in relation to questions of a more general nature.

The students ask, for example, what cases are the most challenging to decide. They almost always ask how a judge remains unbiased. They ask how a judge applies a law with which he or she may disagree, and how much judges' emotional reactions influence their decision making. They wonder about the effect of public criticism, and they almost always ask what judges think of juries. They ask if we ever get overturned on appeal, and whether we ever wish we could go back and decide something differently. Usually, toward the end of a session, they ask whether we think we have a good system of justice.

Inasmuch as trial judges work alone and the nature of that work is to find the facts in particular cases and to apply the law to those facts, there is little scope (and less call!) for philosophical rumination in their judgments. The precedential value of a case is limited to what is necessary to decide it and there is little reason to go further. Beyond that limit judges do not engage in public comment on their decisions, or on matters they may be called upon to decide.

This means that there is very little opportunity for the public to hear what motivates judges, from judges themselves. The answers given by the judges to students offers a modest, but revealing sample.

I summarize a number of interesting answers by saying that on the questions relating to bias and emotional engagement, the judges' responses are all variations on the theme that judges hold an office that obliges them to apply the law correctly, and that that preoccupation significantly overrides questions of sympathy or favour. Where there is discretion to be fair, it is an opportunity to ensure that the law fulfils its purposes, not a chance to exercise a personal preference. This is not to say that judges are unmoved by what they hear and see, but that they adhere to a discipline that renders personal favour and emotional involvement less of a problem than one might expect, although they do recognize that they must be vigilant about the occasions when they detect such feelings in themselves.

The same discipline informs the answers to questions about applying laws with which a judge may disagree. There is a clear deference to the legislative branches of government. The judges add, however, that in most areas of the law the court has sufficient discretion to ensure that in any given case the law meets the ends of justice.

Students often seem surprised that, in general, judges do not describe high profile or complicated criminal trials as their most challenging or disturbing. The most frequent answer judges give to that question is that child custody cases where one parent intends to move a long distance from the other are the most challenging. In such situations, the court is called upon, not to sort events that have happened in the past, but to take responsibility for a young person's future.

That said, judges do not, in general, second guess themselves. In this regard the role of appellate courts is sometimes misunderstood. Students anticipate that the trial courts resent being overturned (and the question is sometimes an occasion for a little humour), but they seem surprised to learn that the existence of such courts actually enables trial judges to decide and move on, comfortable in the knowledge that the parties have the opportunity to have the decision reviewed..

The judges all acknowledge that openness and public scrutiny are essential to a functional court system, and that criticism is part of the process. They say they do not mind criticism but they do not like to be misinterpreted or misrepresented.

All of the judges are positive about the criminal jury system, for a number of reasons. It is regarded as an important means by which the community remains in touch with the law. The task of expressing the law for the jury in intelligible terms helps to keep it grounded in the experience of the community. The requirement that twelve people must agree unanimously that a case has been proved beyond a reasonable doubt is seen as a tremendous safeguard of a fair trial.

Lastly, on the question of whether the system of justice can be improved, I quote an answer given by Chief Justice Bauman:

“I think we have to improve the ability of ordinary citizens to gain access to justice in BC....We [can] also improve the public's confidence in the justice system. We have to do a better job of telling the people what we do and why we do it, and engender in them a sense that the judges are doing that work in the courts....”

Judges all agree that there is much to be done, but I hope that this brief piece conveys some sense of what we actually do, and how we go about it.