

NEW YORK'S COURT OF APPEALS: A PERSONAL PERSPECTIVE

Richard C. Wesley[†]

On December 4, 1996, Governor George E. Pataki announced that he would submit my name in nomination to the Senate for confirmation as the 104th Associate Judge of the Court of Appeals. My family came with me to Albany that day for the announcement. Following the news conference at the Capitol, we crossed State Street and visited Court of Appeals Hall at the invitation of Judge Joseph W. Bellacosa, the resident Judge.¹

When we entered the courtroom, my family suddenly realized the significance of our good fortune. The H.H. Richardson designed courtroom is a reflection of the majesty of the institution. From the intricately carved wooden wall panels to the portraits of former members of the Court, one immediately has the sense that this courtroom has been the epicenter of many significant legal developments in our national experience.

That visit was, for me, both inspiring and terrifying. Although I was excited about becoming a member of one of the premier state appellate courts, I was overwhelmed with a sense of the importance of the task ahead. In the weeks and months that have passed, I have come to view that courtroom as a close and trusted friend. I feel honored to have been chosen to sit as a Judge every time I come out through the heavy oak door behind the bench as the crier announces the beginning of each day's arguments.²

[†] Associate Judge, New York Court of Appeals. I would like to acknowledge the assistance of my two law clerks, Mark Davison and Michael Nolan in preparing this essay.

1. This was only my second visit to Court of Appeals Hall. Almost two years earlier, I visited the Court at the invitation of Chief Judge Kaye. I find it curious that despite all the years I had spent in Albany as a student, lawyer/legislative aide and Member of Assembly, I had never once entered Court of Appeals Hall.

2. In preparation for the celebration of our 150th anniversary, the Court issued a commemorative book entitled "*There shall be a Court of Appeals . . .*" [hereinafter 150TH ANNIVERSARY BOOK]. The book serves as an excellent source of information about the Court and its rich history. In preparing the book, our librarian, Frances Murray, came

I am intensely aware of the significance of my responsibilities as a member of the Court, but I am not alone. Everyone who works at Court of Appeals Hall—judges, lawyers and staff—has a strong sense that this is a unique and important place. It is my hope that this brief Article will give the reader a better view of the Court and how it does its work.

THE “WORK OF THE COURT”

For 150 years, the Court of Appeals has been the court of last resort in New York.³ The legal issues that are briefed and argued in the Court are, for the most part, substantially different from those of the mid-nineteenth century, but the core of the Court’s essence remains. Judges from widely diverse backgrounds from all over New York assemble in Albany for approximately 100 days a year to hear and fairly decide all Court matters.⁴

Although there are several avenues by which a case may come before us, the Court today is, for the most part, a certiorari court.⁵ The docket, which generally averages around 300 cases per year, is largely selected by the Court from over 1,500 civil and 3,000 criminal leave applications reviewed annually.

The civil applications are assigned on a rotating basis to one judge who issues a written report to the entire Court. The matter is then conferred by the Court. The application is granted when two judges vote for leave to appeal.⁶ Fewer than ten percent of the civil applications are

across a number of volumes of the Clerk’s Register, a daily notebook of events at the Court in the mid to late nineteenth century. A very interesting entry appears at page 62 of the 1875 Register:

At a meeting of the Bar held in the courtroom of the Court of Appeals, March 25, 1875. Resolved: That as a mark of respect to the Chief Justice and Associate Justices of the Court, and as indication of the veneration at all times due to Justice, the Crier of this [Court] be requested from this time forth to announce the entrance to the courtroom of the Chief Justice and his Associates; and that the members of the bar present rise and remain standing until the Judges are seated.
Geo. F. Comstock, Chairman, E.O. Perrin, Sec’y.

Court records reflect that Noah St. John had been appointed court crier on January 1, 1856, some nineteen years earlier. I wonder what did poor Mr. St. John and his successors do for nineteen years? Did no one stand up when the Court entered the courtroom?

3. N.Y. CONST., art. VI, § 2 (1846).

4. The Court held sessions in Rochester, Buffalo, Syracuse, New York City and Albany in 1847. 150TH ANNIVERSARY BOOK, *supra* note 2, at 8. In June of 1883, the Court held a term in Saratoga Springs. *Id.* at 16. Both the Third and Fourth Departments of the Appellate Division have held sessions in alternate locations. I have not suggested to the Court that we “go out on the road,” although the thought intrigues me.

5. N.Y. CONST., art. VI, § 3.

6. N.Y. C.P.L.R. 5602 (McKinney 1995).

granted.⁷

In determining whether to grant leave, the Court looks very carefully at a number of certiorari factors: (1) is the issue preserved; (2) is there a disagreement among the Departments of the Appellate Division on this issue; (3) does the issue have significant statewide implications for others similarly situated; (4) is the case "cluttered" with other issues which may prevent resolution of the primary law issue; (5) is the issue heavily fact-dependent; and (6) are there jurisdictional difficulties. A motion report reviews these considerations, discusses the procedural posture of the appeal and does a careful analysis of the record. When the motion is conferenced, each judge expresses his or her view on the application. Occasionally, a colleague may communicate a view on the motion prior to conference in a memo to the Court; however, there are no private discussions among judges about motions prior to conference.

This may seem odd to some, but it is a *sine qua non* of how the Court works; each judge is expected to weigh the merits of the application on their own and then bring their views to the conference for the benefit of the others.⁸ The judges listen carefully to the views of their colleagues; no one interrupts. Occasionally, the motion is put over for the next day's conference so that each judge can revisit the report and reflect on the decision. Ultimately, a consensus emerges; the motion is decided.

This careful screening process effectively and fairly separates the wheat from the chaff. Each leave application is given close scrutiny by every judge. Each is aware that large dockets can create extensive delays. Indeed, for much of the Court's early existence, it was unable to keep current in its work. As a result, the Legislature and several constitutional conventions sought to remedy the delays with a number of techniques all of which proved to be ineffective and, at times, even more problematic.⁹ Thus, the Court constantly seeks to balance its re-

7. Although the percentage is lower than one might expect, many civil appeals come to us as a matter of right (e.g., substantial constitutional question, N.Y. C.P.L.R. 5601(b), appeal based on two justice dissent at Appellate Division, N.Y. C.P.L.R. 5601(a)), while others come by leave of the Appellate Divisions, *see* 1996 Annual Report of the Clerk of Court of Appeals, appendix 3, 11-12.

8. Because I am the junior judge, I am always asked to speak first. I have a very distinct recollection of my first conference. The Chief Judge called the calendar of motions and turned to me for my response on the first motion. The process is somewhat similar to that used in the Fourth Department where I served prior the Court of Appeals. Nonetheless, my mouth was dry and my palms very sweaty. Fortunately, my colleagues were most understanding and I survived.

9. *See* FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-

sponsibility to resolve important legal issues while maintaining a manageable and current civil docket.

Criminal leave applications are handled in a different manner. Each judge is assigned a proportionate number of leave applications for his or her sole review and decision. Leave can be granted solely on the determination of the judge assigned to the application.¹⁰ Occasionally, the judge will conduct a conference with counsel to review the merits of the application. If leave is granted, the judge issues a short internal memo to colleagues announcing the case and identifying the central issues of the appeal. Occasionally, another judge will have a similar issue in a case and the two (or more) appeals will be "boxed" for argument on the same day.

Judge Hugh Jones once referred to motion practice and leave review as "the work of the Court."¹¹ He noted that he found this aspect of his tenure at the Court of Appeals to be the most difficult to master. I readily concur. The mathematics are quite simple: 1,500 motion reports and approximately 425 criminal leave applications per judge in addition to motions to reargue, to grant amicus curiae and other miscellaneous motions. It is easy to see that much of each judge's time is spent reviewing cases that won't come before the Court.

DECISIONS, DECISIONS, DECISIONS

Although motion practice and leave review present pressing, important and constant components of a judge's workload at the Court of Appeals, it is not the focal point of the institution. The opinions of the Court serve as the guideposts and corpus of the Court's jurisprudential efforts both past and present. The Court of Appeals has long led the way in our nation as one of the premier common law courts.¹² Every law student studying torts is familiar with the evolution of products liability law from Judge Ruggles' decision in 1852 in *Thomas v. Winchester*¹³ to Judge Cardozo's early articulation of a tort claim for dan-

1932, at 89-144 (1985); see also 150TH ANNIVERSARY BOOK, *supra* note 2 at 49; N.Y. CONST., art. VI, § 7.

10. N.Y. CRIM. PROC. LAW §§ 450.90, 460.20 (McKinney 1994).

11. Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 35th Annual Benjamin N. Cardozo Lecture, Nov. 28, 1979, reprinted in 34 RECORD 543, 559 (1979).

12. Professor Stewart Sterk (a former law clerk to the late Chief Judge Charles D. Breitel) has written a thorough review of our common law jurisprudence. See Stewart E. Sterk, *The New York Court of Appeals: 150 Years of Leading Decisions*, in 150TH ANNIVERSARY BOOK, *supra* note 2, at 50. [Editor's note: Prof. Sterk's article is reprinted in this special issue of the *Syracuse Law Review* at page 1391.]

13. 6 N.Y. 397 (1852).

gerous products in *MacPherson v. Buick Motor Co.* in 1916¹⁴ to Judge Jones' declaration in 1973 of liability for defective products which cause injury to non-users in *Codling v. Paglia*¹⁵ to Judge Wachtler's adoption of a market share theory of liability against DES manufacturers in *Hymowitz v. Eli Lilly & Co.*¹⁶ As a result of our common law process, we are one of the few institutions in our society that rely upon the efforts and wisdom of our predecessors to resolve a problem currently before us. Our prior jurisprudence serves as a backdrop for examination and resolution of the legal problem at hand.

For example, during our June term I drew the assignment to report the case of *Buckley v. National Freight*.¹⁷ In *Buckley*, we were called upon to determine the effect that an impaired spouse's settlement of her personal injury claim had upon a loss of consortium claim of the other spouse when the two claims could have been joined. In my preparation of the case, I was drawn to the words of Judge Kenneth Keating in his opinion in *Millington v. Southeastern Elevator Co.* where the Court first recognized a common law claim for loss of consortium by a wife.¹⁸ I was struck by the coincidence that Judge Keating was born only seven miles from my home in Livingston County and that he once had been a partner in the firm where I first worked after law school. We never met, yet his opinion served as a starting point for me in resolving the legal issue presented in *Buckley*. On a daily basis, the diligence and intelligence of my predecessors continue to give me and my Court guidance.

How was it that *Buckley* fell to me? Over 20 years ago, Chief Judge Charles D. Breitell instituted a case assignment system that requires each judge to be prepared on every case in advance of oral argument and that guarantees the random assignment of cases to judges. We review briefs and records at home chambers one term in advance. Each case is prepared by the judge and his or her law clerks, but it is never discussed with the other judges of the Court until after oral argument and assignment of the case to a reporting judge. Following oral

14. 217 N.Y. 382, 111 N.E. 1050 (1916).

15. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

16. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989), *cert. denied*, 493 U.S. 944 (1989).

17. 90 N.Y.2d 210, 681 N.E.2d 1287, 659 N.Y.S.2d 841 (1997).

18. 22 N.Y.2d 498, 239 N.E.2d 987, 293 N.Y.S.2d 305 (1968). At the time *Millington* was decided, men already had a consortium claim under New York law. The case in many ways seems almost "ancient" in its discussion of the relationship between a husband and a wife—it signifies how much our society has changed in the last forty years.

argument, the judges retire to a small conference room just off the robing room behind the bench. There the Clerk of the Court awaits us along with a number of index cards each bearing the name of a case that was argued that day; each card is placed face down on a table. In descending seniority, each judge selects a case card. The next morning (generally at 10:00 a.m.), the Court conferences the previous day's cases with the reporting judge (the lucky card drawer) speaking first. Each judge is then expected to state his or her view on the case beginning with the most junior judge. If the reporting judge carries the Court, he or she will write the majority decision. The dissent, if there is one, falls to the first dissenting judge seated to the right of the reporting judge at our round conference table. If the reporting judge does not carry the Court, that judge may write a dissent, and the majority opinion is assigned again by the "rule of right."¹⁹

I must admit that I was skeptical of this procedure prior to coming to the Court. It was substantially different from my experience in the appellate division. After a little more than a year, my skepticism is gone. The assignment process keeps us all on our toes and prevents anyone from being a specialist in any one area of the law.

LIFE AT COURT OF APPEALS HALL

I am often asked about my relationship with my colleagues at the Court of Appeals. There seems to be a perception that judges who disagree on a given legal issue must somehow carry that over into their personal relationships. Nothing could be further from the truth. Working at the Court during session is extremely demanding. The hours are very long; there is much to do. The quality of the work of the Court is dependent on the efforts of each judge. As a result, each of us realizes that differences of opinion cannot become impediments to the Court's work.

In addition, we toil in an institution founded on fairness—fairness in dealing with appeals and with each other. No member of the Court has a greater vote than any other. Each is entitled to speak his or her mind and is given ample opportunity to do so. Issues of law are dis-

19. I am not the first to reveal how we assign our cases. See, Judith S. Kaye, *The Importance of State Courts: A Snapshot of the New York Court of Appeals*, ANN. SURV. AM. L., xii n.4 (1994) (I would only add that the method of assigning dissenting opinions has changed since that article); see also Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381, 2390-92 (1997). For a view of how the Court worked during Cardozo's tenure, see RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO* 122-23 (1997).

cussed on the merits; there are no *ad hominem* attacks. Each of us is called upon to test the strengths and weaknesses of the other's position. While the result may not always be unanimous, the differences are carefully defined and principled. The experience leaves one with a deep appreciation for the process and for the other members of the Court, but this is not something new.

When Chief Judge Cardozo left the Court to sit on the United States Supreme Court in 1932, Judge Pound noted:

Only your associates can know the tender relations which have existed among us; the industry with which you have examined and considered every case that has come before us; the diligence with which you have risen before it was yet dawn and have burned the midnight lamp to satisfy yourself that no cause was being neglected. At times your patience may have been tried by the perplexities of counsel and of your associates, but nothing has ever moved you to an unkind or hasty word.²⁰

In November of 1881, Chief Judge Charles Folger left the Court to become Secretary of the Treasury under President Chester Arthur. In response to a tribute from his colleagues, he wrote:

But the dearest of my recollections of the Court of Appeals will be of the harmony of intercourse, the uniform courtesy, the mutual confidence, the unvarying respect for one another, the cordial appreciation, the brotherly love, that held us in happy, personal and official relations. When I reflect on all these things, I wonder almost to sobbing, that I could have been led to give up the place of formal Head of such a Court, the nominal Chief of such a body of Judges.²¹

One hundred fifteen years later, on December 17, 1996 (13 days after my family and I visited Court of Appeals Hall), Judge Richard Simons in his parting words to the Court said:

Ecclesiastes also says a man should rejoice in his work. I have. Nothing could equal the challenges and rewards of judicial office or the opportunity to associate with the extraordinary people who work in the New York courts. I cannot remember a time when I did not enjoy my work or take pleasure in the company of those I worked with.

My last 14 years have been served on this great Court. Those of us who work here experience first hand its remarkable traditions and accomplishments. We recognize the Court is a symbol—it repre-

20. 258 N.Y. v, vi (1932).

21. 84 N.Y. iii (1881).

sents something. Indeed, what the Court stands for may be more important than what it decides.²²

Judge Simons was right. The Court is a symbol. It represents the commitment of New Yorkers from diverse racial, ethnic, religious, cultural and political backgrounds to one simple overriding principle—Justice. Justice for all who come before the courts of this state. That commitment draws each Judge to the other and binds us in what we do and what this great Court has done for now over 150 years.

22. 89 N.Y.2d ix, x (1996).