



'What you are doing is not good!'

Jethro's Advice to Judges

Remarks delivered to the Perth Hebrew Congregation

Law Week 2019

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'What you are doing is not good!': Jethro's Advice to Judges¹

It is a great privilege to be invited to speak tonight to the Perth Hebrew Congregation as part of Law Week 2019.

May I begin by acknowledging the Whadjuk people of the Noongyar nation, the traditional owners of the land on which we gather tonight, and pay my respects to their Elders past, present and emerging.

Before turning to my theme tonight, can I first identify my jumping-off point?

There has begun, in recent times, an important public discussion in relation to judicial stress and judicial wellbeing.

This discussion has recently found expression in both academic publications and the popular media,² much of which has been prompted by research being conducted by Carly Schrever, the Judicial Wellbeing Officer with the Judicial College of Victoria. It has also, of course, arisen in the tragic context of the suicide of two judicial officers in Victoria.

¹ I gratefully acknowledge, for their assistance with the Hebrew translations, Mr Marcus Solomon SC and Dr David Solomon.

² See e.g. Schrever, Australia's First Research Measuring Judicial Stress and Wellbeing: A Preview of the Findings (2018) 92, ALJ 859-862; Pelly, 'Stressed Out Judges Turn to Drink', Australian Financial Review, 7 May 2019 <https://www.afr.com/business/legal/stressed-out-judges-turn-to-the-drink-20190506-p51kly> (accessed 8 May 2019)

Ms Schrever's research builds upon a large body of Australian and international research in relation to rates of stress and depression within the legal profession, including, in this State, the Law Society of Western Australia's Report on Psychological Distress and Depression in the Legal Profession delivered in March 2011. These earlier reports, in relation to legal practitioners, revealed high levels of psychological distress and risk of depression in the law students and practising lawyers who were surveyed, when compared with Australian community norms.³

Ms Schrever's research has moved that focus to the judicial arm of government. A precis of Ms Schrever's results thus far were recently reported in the Australian Law Journal.

Ms Schrever observed in this context that judicial stress was once an 'unmentionable topic', a description she sourced to the Honourable Michael Kirby AC CMG, who delivered a paper on the topic in 1995 when President of the NSW Court of Appeal.⁴ Justice Kirby's address sought to 'break the silence' on a topic which might otherwise have remained shrouded in embarrassment or stigmatization.

Well, the silence has now well and truly been broken.

³ See N Kelk et al, *Courting the Blues: Attitudes Towards Depression in Australian Law Schools and Legal Practitioners* (Brain & Mind Research Institute, University of Sydney, (2009).

⁴ 'Judicial stress - An unmentionable topic' (1995) 13 Australian Bar Review 101

Ms Schrever's precis included the following results:

'First, on a validated and widely used measure of non-specific psychological distress, judicial officers reported elevated rates of moderate to high distress, compared to the general population and the barrister arm of the legal profession. But when we look at distress in the very high range, judicial officers rate considerably lower than the general population and all levels of the profession. Second, on a widely used screening tool for symptoms of mental health concerns, judicial officers reported symptoms of depression and anxiety at rates similar to the general population - a rate which is dramatically lower than that found for the wider legal profession. Taken together these findings suggest that, unlike the rest of the legal profession, there is not a widespread mental health problem among the Australian judiciary, but there is a stress problem.'

Ms Schrever concluded:

'It must be remembered, however, that the Australian judicial system is diverse and dynamic, and the pressures bearing upon the courts are constantly changing. While, longitudinal analysis is required to empirically determine the directional trend of judicial stress, the current research provides a sound basis for decisive intervention to support judicial wellbeing. Neither an individual nor a system can sustain elevated and increasing stress indefinitely, without showing signs of strain and impaired functioning. The quantitative finding that judicial officers experience elevated non-specific psychological distress, coupled with the qualitative suggestion that the sources and experience of judicial stress are on the rise, indicates a simmering occupational health and safety concern that demands attention. Judicial officers are the pinnacle of the legal profession, protectors of the rule of law, and the third arm of government, and as such their occupational wellbeing

and sustainability is a vital community concern. Fortunately, as noted in the opening, work is already underway within many Australian courts to discuss and address judicial stress, and movement is afoot to progress the additional research and analysis required to support these efforts.'

Against the backdrop of these findings and observations, I propose to reflect a little further *why* this work matters - not simply as an occupational health and safety concern, although it clearly is such a concern and a very important one at that. I thought I would pose a few ideas as to why it matters for everyone, and in particular for the administration of justice as a whole.

And without wishing, in any way, to downplay the Hon Michael Kirby's significant contribution to this issue and this discussion, may I venture to suggest that the stress of judicial work was identified as a real problem much earlier than in the pages of the Australian Bar Review in 1995. Indeed, at least a few thousand years earlier.

Which brings me to the title of my address tonight, 'What you are doing is not good!': Jethro's Advice to Judges. I refer of course to the difficulties faced by the first judge identified in the Torah, the Lawgiver himself, Moses.

The Book of Exodus provides us with account of Moses' daily work as a judge:

'Moses sat to judge the people, and the people stood about Moses from morning till evening. When Moses' father-in-law saw all that he was

doing for the people, he said, 'What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?' And Moses said to his father-in-law, 'Because the people come to me to inquire of God; when they have a dispute, they come to me and I decide between a man and his neighbours, and I make them know the statutes of God and his decisions.'

Moses' father-in-law said to him, 'What you are doing is not good. You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do. Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times; every great matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you. If you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace.'

So Moses gave heed to the voice of his father-in-law and did all that he had said. Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, of hundreds, of fifties, and of tens. And they judged the people at all times; hard cases they brought to Moses, but any small matter they decided themselves. Then Moses let his father-in-law depart, and he went his way to his own country.'

You might notice two things that are immediately apparent from this story (besides the anachronistic reference to judges being men, a matter I shall endeavour to rectify later).

The first is to notice Jethro's prescription of a hierarchy of judges as rulers of thousands, of hundreds, of fifties and of tens. So while, on the other side of the Hellespont, the Greeks may have been the first to establish the jury system (as told by Aeschylus in *The Eumenides*), Moses' father-in-law may well be the first person to have suggested the establishment of a judicial hierarchy.

The second point to notice is Jethro's emphasis on the need for adequate judicial resources. As Jethro comments 'the thing is too heavy for you; you are not able to perform it alone'. At its most basic level the word 'alone' in this context refers to the fact that the work is not work that can be carried out by only one person. This is no doubt true. There is an ever present need for more judges to keep up with the growth of litigation. Let this then be a Torahic admonition to executive governments everywhere to monitor and maintain the judicial resources necessary to serve the community.

But it is not these more obvious features of the story that I wish to draw out, nor this more obvious understanding of the word 'alone' (*l'vad*). I want to dig a little deeper.

You will recall that Jethro begins his speech to Moses with the expression 'What you are doing is not good'. The Hebrew from which the phrase 'not good' is translated are the words *lo tov*. What you are doing is *lo tov*.

What does exactly Jethro mean by this?

In what way is what Moses is doing 'not good' (*lo tov*). After all he is performing a public service to the people. Surely that is 'good' (*tov*).

Is Jethro saying that Moses will become physically and mentally exhausted and so be incapable of continuing to work? That he should rest, so as to be able to come back the next day to start judging again. That otherwise he will suffer burn out. As though Jethro were a kind of Midianite Occupational Health and Safety Officer.

Maybe. But I suspect that there is more to it than that.

As lawyers we all know that understanding a text requires consideration of context. So let's delve into a little context.

And one matter of context that might help us to understand what Jethro might really be getting at, is to ask: *who* is it that notices and provides the admonition to Moses? After all, surely anybody could have seen that Moses was standing about from morning until evening judging the people. His brother would have noticed it. His generals would have noticed it. The elders would have noticed it. The people coming to be judged would have noticed it. Yet none of these called him out and told him.

Rather, the person who calls him out is Jethro: his father-in-law.

This is emphasised by the context. In the passage immediately preceding this passage we are reminded that Jethro had just arrived at the camp from his home in Midian having heard about the things Moses had been doing. And Jethro has brought with him his daughter (and Moses' wife) Zipporah, and their two sons, Gershom and Eliezer.

And so we know that Jethro sees something that the other onlookers do not see. Jethro sees that while Moses is spending all of his time judging the people, he is not at home with his wife and children. So while Jethro's admonition is expressed in terms of concern for Moses and the people with him, can I suggest a sub-text to what Jethro is saying that is something like 'What you are doing is not good. You are neglecting your obligations to be with your family. You are not attending to the important human relationships in your life.'

'And that's not good for you, it's not good for them and, importantly, it's not good for justice. Because, if you want to be a good judge you have to attend to your human relationships. How are you going to resolve other people's disputes, and bring justice to their relationships, if you don't attend to your own relationships?'

So I suggest that Jethro's statement that what Moses is doing is not good (*lo tov*) is not just a statement about exhaustion, but about making clear the link between being a good judge and having a healthy human life away from work, where the judge attends to his or her important human relationships.

And just to drive this point home, there is an important etymological allusion in the phrase 'what you are doing is not good (*lo tov*)'. It is this: the expression *lo tov* appears only twice in the whole of the Torah. It appears in this passage and in the creation story at the beginning of Genesis, specifically when the Creator says 'It is *not good* that man (or a human) should be alone'. 'It is *not good* (*lo tov*) that a human should be alone'.

Nowhere else does the expression *lo tov* appear in the Torah. So we should pay close attention to it.

Also notice that the word 'alone' (*l'vad*) appears again in this passage. Just as Jethro said 'What you are doing is not good ... you are not able to perform it alone', the earlier passage says 'It is not good that [you] should be alone'. They are practically the same sentence.

And 'alone' (*l'vad*) clearly in this second context is not just talking about numbers: as if it said 'It is not good that there should be only one of you'. It is clearly saying that it is not good for you to be without relationship; human relationships that enable you to know and understand the world around you.

So, what I want to suggest is that Jethro's advice to Moses isn't just that, in order to be a good judge (to be able to deliver justice), there need to be more of you. Rather it is something more profound, that this business of judging, and delivering justice, isn't something you can do as an isolated individual but is

something that requires you to be a person immersed in ordinary human relationships.

So much of judging (or lawyering for that matter) involves qualitative value judgments. In every area of the law we find them: 'has the defendant exercised reasonable care', 'did the accused use reasonable force', 'what would a reasonable businessperson understand the contract to mean', 'is the sentence fair and just' etc. These are not simply questions of logic, as if the application of a syllogism (or an algorithm or calculus) could produce the right answer. They are normative and evaluative questions that involve a lot of 'ought' as well as a lot of what 'is'.

Consider this observation from Chief Justice Gleeson in *New South Wales v Fahy*, concerning whether a defendant's conduct in a negligence case was 'reasonable':⁵

'This has since been referred to, somewhat unfortunately, as a 'calculus'. What is involved is a judgment about reasonableness, and reasonableness is not amenable to exact calculation. The metaphor of balancing, or weighing competing considerations, is commonly and appropriately used to describe a process of judgment, but the things that are being weighed are not always commensurate. ... [T]here are cases in which an unduly mathematical approach to the exercise can lead to an unreasonable result.'

⁵ *New South Wales v Fahy* (2007) 232 CLR 486 at [6].

Similarly, Oliver Wendell Holmes, the great American jurist, began his famous lectures on the common law observing that 'The life of the law has not been logic: it has been experience'.⁶

If experience is the life of the law, then our appreciation of what is reasonable, fair and just, will come as much, if not more so, from our human relationships as it does from books. Our own human relationships, both as judges and lawyers, are the raw material from which we fashion our understanding of these essential but elusive qualities. And so they need as much attention as the books do, if we are to be able judge wisely and justly.

This is what I want to suggest Jethro was really getting at: 'What you are doing is not good for justice. Go home, Moses. Spend some time with your wife and sons, and with your friends. It is there that you are going to gain the understanding of ordinary human experience that will enable you to be a good judge and to bring peace to the people. You'll be better for it. And so will justice.'

Let me give one final example of this idea, this time providing some gender balance. It is an example from two of the great Hebrew prophets of our own age, the American filmmakers Joel and Ethan Coen.

The Coen Brothers' 1996 film *Fargo* tells the story of Marge Gunderson, a small town police chief from Brainerd Minnesota, who is investigating a double homicide (some 'malfeasance' as she describes it). Marge's investigation leads

⁶ Holmes, The Common Law, Little Brown & Co (1881), page 1.

her into a dark world of extortion, kidnapping, greed, betrayal, brutality and murder, in which she ultimately prevails, bringing (at least the remaining) offenders to justice.

Marge is a modern day Moses figure. She is the archetype of the good law woman. She is strong, wise, courageous, unfailingly courteous, compassionate and just. She is, to use the Hebrew, a *tzadeket*: a righteous one.

And, throughout the film, in a beautifully subtle way, the Coen Brothers, point us towards the source of Marge's righteousness.

The action of the film takes place over the course of only a few days. Amidst all the violence and mayhem that is depicted, each day opens and closes with a scene with Marge at home, usually in bed, with her husband Norm, a fairly non-descript man, who paints ducks for a living. We come to understand that it is her life away from the law that gives Marge the strength, the wisdom and the 'uprightness' to be able to fulfil her important and serious public duties. It's when she returns 'to Norm' that she finds the raw material to be able to carry out those public functions.

That is, she returns 'to norm'; her normal life. The ordinary human relationships in which she works out what it is to be wise, just and reasonable. Or, as we might put it, what is 'normative'.

It is the same with modern day judges. Not only for their own wellbeing but for the good of justice, it is necessary for them to return to the norm of ordinary human relationships as the raw material for discerning what is wise, just and reasonable. This is the deeper implication of the recent focus on judicial wellness, a realisation that it is not simply an additional extra - a means of ensuring judges are occupationally fit – but rather an essential part of what it is to be a judge.

Of course, for Marge it is a particular 'Norm' but her particular human relationship doesn't exhaust the kinds of human relationships that provide that raw material. Those human relationships will be different for everybody; but whatever they are, they are essential to the wellbeing of the judge and of the health of the justice system as a whole.

Fargo ends with an image of Marge and Norm in bed. One of the last things Marge says to Norm is 'Heck Norm, you know we're doing pretty good'. 'We're doing pretty good', or, to round off the Hebrew '*tov lanu*'.

And so we have our choice:

Jethro, 'What you are doing is not good (*lo tov*)' or Marge, 'We're doing pretty good (*tov lanu*)'?

The interests of justice depend upon it.

Thank you for your time.

