LEGAL INFORMATION

How Judges Decide Cases – Reading, Writing and Analysing Judgments, 2nd edition

By Andrew Goodman, Wildy, Simmonds & Hill Publishing, 2018

REVIEWED BY **GARRY WILLIAMS**

When I was eight years old I had to stay home from school for a week because of an ear infection.

As I had an irresponsible parent (and only one at that), I was allowed to watch daytime television, which in those days consisted largely of soap operas like *The Days of Our Lives* and *The Young and the Restless*. But there was another show I watched that week. It was called *Crown Court*.

Crown Court was produced by Granada TV for the ITV Network in the UK and ran from 1972 to 1984.

The concept of the show was that it depicted an entire court case taking place in the Crown Court of the fictional town of Fulchester. Each case progressed over three episodes with the prosecution or plaintiff's case presented in the first two episodes and the defence and result in the third.

An interesting aspect of the show was that if there was a jury for the case it was made up of members of the public who were eligible for actual jury service. The "verdict" would then be delivered as if in a real court case without the actors portraying the accused, barristers or judge knowing the outcome in advance. This often required the writers to produce two endings for the show, each reflecting the potential outcome reached by the jury.

Years later when I was deciding what to do when I went to university, I am quite sure that my memories of the show influenced my choice to study law.

Now you may be wondering, what all this has to do with a book called *How Judges Decide Cases*.

Well, another aspect of *Crown Court* that caught my notice was that when the case portrayed did not involve a criminal charge, the judge would give a short judgment immediately at the conclusion of the barristers' closing addresses and usually without the aid of any notes (or, at least, he or she would appear to do so). Back then I thought that this would be much too hard to do in real life and that this must just have been a bit of dramatic licence enabling the scriptwriters to move the action on for the purposes of the show. Surely, in reality, a judge would take time to reflect and carefully consider a case before deciding the litigants' fates?

It wasn't until I was older that I realised that sometimes judges give judgment immediately and sometimes they reserve their decisions.

And it wasn't until I was older still that I realised that the writing of judgments is really a highly individual exercise governed by very few absolute rules.

In fact, remarkably little has been written about the nuts and bolts of writing judgments or, for that matter, how one should go about analysing them.

This is why Mr Goodman's work *How Judges Decide Cases* is so valuable.

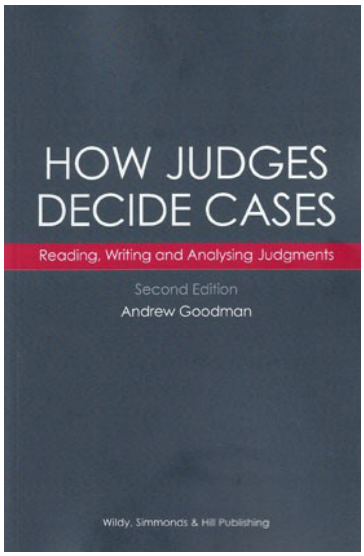
It looks at how cases are decided and judgments are written (or should be written) and as Lord Faulks QC says in the foreword to the work, it:

> "... admirably takes apart the engine of a judgment. It gives advice on how to write one. It analyses what processes are used consciously or unconsciously in arriving at a decision, and explains the various levels at which a judgment can be read. There is a particularly valuable insight in how to decide whether a judgment should be the subject of an appeal."

How Judges Decide Cases is not an expensive work; it only costs £45. It is only 234 pages long and is divided into eight sections.

Section 1 is entitled *How Judges Decide Cases* and deals with such topics as the mechanics of fact finding, how judges really approach questions of weight and how impression actually influences a judge when deciding factual conflicts.

What comes out clearly in this section is that while most judges adopt the approach of first seeking out agreed facts as an anchor or base from which to build up a picture of what they can safely find is the more likely thing to have happened when forced to choose between conflicting events, many judges do admit (at least privately) to a fairly strong intuitive approach – they will fit the facts to a gut feeling of whether someone is lying, or of where the justice of the case rests. The reluctance of judges to admit to the use of such an intuitive approach is possibly best captured in the following passage from Sir John Donaldson's paper entitled *Judicial Techniques in Arbitration and Litigation* (1988) which is referenced in the work:



> "It was always said of Lord Denning that he claimed to decide intuitively what should be the outcome of a case and then to go on to analyse the law in such a way as to justify his intuitive decision. Of course he was wrong to say that. Quite wrong. Most of us do exactly that, but we would not dream of saying so."

This section of the work also sets out a checklist that Lord Bingham is said to have used for judicial fact finding. It is enlightening and is to be recommended. It can be summarised as follows:

a Identify any common ground between the parties;

b Resolve the issues of primary fact:

- **(i)** Consider the unchallenged material;
- **(ii)** Weigh the force of contemporary documents, particularly those coming into existence prior to the dispute emerging, or any matters independent of human recollection.

c Consider what happened against the background of independent material; against the same background consider what could not have happened.

d Consider what must have happened irrespective of whether one or both parties say it did not.

e Weigh dispassionately the merits of the opposing arguments.

The material relating to unconscious bias in this part of the work is also fascinating. It is now well-known that our thought processes involve the use of cognitive "short cuts" to decision-making, known as intuitive heuristics.

Daniel Kahnman received a Nobel Prize for his work in this area and his internationally best-selling work *Thinking Fast and Slow* which relates to the use of intuitive heuristics in the context of human judgment and decision-making under uncertainty is discussed in some detail. This is because the use of such cognitive "shortcuts" often leads to very wrong conclusions being drawn. Put simply, the brain uses such shortcuts to speed up decision-making and unconscious biases are a by-product. There are, of course, times when this sort of quick decision-making is useful (eg, when we are faced with danger); however, it is not a good way to make decisions when dealing with difficult questions where the outcome may have a serious impact on people's lives.

Mr Goodman points out that judges would do well to familiarise themselves with Kahnman's work in order to be able to recognise and mitigate the effects of such unconscious biases.

Section 2 relates to *Appellate Judgments* and strongly suggests that, in the UK at least, in the vast majority of cases an appellate court will have formed a preliminary view prior to the hearing. In other words, it appears that the occasions when appellate judges in that jurisdiction have an open mind on an issue to the extent that prior to the hearing they genuinely don't know *their* answer to a particular problem are rare.

Mr Goodman suggests that this usually renders an appeal hearing "an exercise in the reality testing of a pre-existing view".

Section 3 – *Writing Judgments, Decisions and Awards* – is the part of the work which offers practical guidance as to how to produce a judgment that is cogent, well-reasoned and, most importantly, will satisfy even the loser that he or she has been given a fair, albeit disappointing, decision.

The most important part of this section is the abridgement of Lord Neuberger's paper entitled *First Instance Judgments: Some Suggestions* set out by Mr Goodman. It contains indispensable guidance on this aspect of judge-craft.

Sections 4 and 5 are entitled *Reading Judgments* and *The Use of Language in Judgments* respectively. They are focused on techniques for identifying the words, sentences or propositions in a judgment that really matter for the purposes of analysing it with a view to an appeal.

Sections 6 and 7 are the most interesting parts of the work for an advocate as they relate to the topic of *Analysing Judgments*.

Section 6 focuses on deconstructing a judgment by having regard to the judge's reasoning and legal logic. Section 7 outlines suggested techniques for criticising a judgment.

These topics stress that in order to persuade an appellate tribunal that the judge below was wrong, it is necessary for the advocate to clearly understand why the judge was wrong, be able to demonstrate that fact with clarity, and withstand a rigorous testing of that contention.

It is the material in section 7 that I found the most useful. This was because it explained very clearly the mechanics of fairly criticising a judgment. In essence, Mr Goodman's thesis is that there are principally four ways in which a judgment can be adversely but fairly criticised, namely that the:

(i) *Judge was uninformed*
Here the judge lacked some piece of knowledge that was relevant to the problem he or she was trying to solve. To fairly criticise the judgment on this basis you must be able to state the missing piece of knowledge or information (whether factual or legal), show its relevance and show how the conclusion reached would have been different.

(ii) *Judge was misinformed*
Here the judge has asserted that which is not the case, that is, the judge made findings or assertions contrary to fact. The judgment proposes as true or more probable that which is in fact false or less probable; it is based on a claim to have knowledge the judge does not possess.

(iii) *Judge's approach was illogical in the sense that the reasoning was not cogent*
Here the judge has committed a fallacy in reasoning. Mr Goodman says: "This problem generally stems from two sources. Either the judge has fallen into the trap of *non sequitur*, where what is drawn as a conclusion simply does not follow from the reasons offered, or that of inconsistency, where two things he has tried to say

are incompatible."

(iv) *Judge's analysis of either the facts or the law was not complete*

The basis of this critique is to say the judge has not solved all the problems he or she started with; *or* has not made use of all the available material; *or* did not see all the ramifications and implications; *or* has failed to make all the distinctions relevant to his task.

It struck me that structuring a critique of a judgment using this method is a relatively simply but ingenious way to identify those findings in a judgment that can be the subject of complaint on appeal.

Section 8 is about *Using Law Reports*. It is a very short section and is, to be honest, the part I found least useful. In essence, it contains the prudent warning that headnotes are editorialised material and therefore cannot always be relied upon as accurate or as capturing all the truly important points in a judgment. The solution proffered to these potential pitfalls is the obvious one: read a judgment carefully before consulting or relying on its headnote.

How Judges Decide Cases has been meticulously researched – Mr Goodman interviewed judges at every level, from deputy district judges to justices of the United Kingdom Supreme Court. The list of judges thanked in the preface amounts to a veritable *Who's Who* of the UK judiciary and includes Lords Neuberger, Bingham and Sumption.

Newly appointed judges and arbitrators will find *How Judges Decide Cases* to be invaluable, while experienced practitioners will find it indispensable as a guide to the deconstruction of judgments for the purpose of appeal.

Incidentally, I tried to find an episode of *Crown Court* recently to see whether it was as good as I remember. It was quite hard to track down but eventually I found some old episodes on *YouTube*. It has dated quite a bit and the production values aren't a patch on those of *Downton Abbey*, but it's still reasonably enthralling. But courtroom dramas always are, aren't they?

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International Indigenous Rights in Aotearoa New Zealand

Edited by Andrew Erueti

REVIEWED BY **DR MARIA A POZZA** AND **MIAANA WALDEN**

This is a unique contribution of informative and critical essays on the effects of the United Nations Declaration on the Rights of Indigenous Peoples in this country. Comprising 232 pages, including the table of contents, index and a copy of the Declaration (as an appendix), the book provides an overview of the challenges of enforcing indigenous rights by relying on international mechanisms within domestic frameworks. The authors place the Declaration at the heart of various issues affecting Aotearoa, such as the Treaty of Waitangi and its policies as well as settlements, regulation of mining activities and the status of Māori children.

Essays are presented in a concise manner and cover a wide range of topics, which are essentially divided into three sections. The first section lays down the framework of the issues raised by the Declaration concentrating on the matrix between international indigenous rights and human rights laws. The second section considers the consequences of the Declaration for specific areas of indigenous rights in Aotearoa paying particular attention to the Treaty of Waitangi and interpretative issues within our domestic framework. And the final section outlines the activities by various international institutions and provides an overview of the developments at the international legal-level.

The book concludes that while measures have been slowly adopted in Aotearoa, more needs to be done in order to better align with the Declaration towards greater recognition and protection of indigenous rights here.

Andrew Erueti provides a unique mixed-model interpretative approach when dealing with issues concerning the Declaration, in chapter one. Mr Erueti's model deviates from the orthodox view that the rights contained in the Declaration are considered to be