Blinking on the Bench: How judges decide cases
The Hon Andrew J. Wistrich
United States District Court, California USA
How do judges judge? Do they apply law to facts in a mechanical and deliberative way, as the formalists suggest they do, or do they rely on hunches and gut feelings, as the realists maintain? Debate has raged for decades, but researchers have offered little hard evidence in support of either model. Relying on empirical studies of judicial reasoning and decision making, this paper proposes an entirely new model of judging that provides a more accurate explanation of judicial behaviour. The model accounts for the tendency of the human brain to make automatic, snap judgments, which are surprisingly accurate, but which can also lead to erroneous decisions. Equipped with a better understanding of judging, the paper then proposes several reforms that should lead to more just and accurate outcomes.

Jurisprudence as Epistemology: Reasoning beyond reason in the law
Professor James Raymond
President, International Institute for Legal Writing & Reasoning, New York USA
Judicial reasoning is not and cannot be a science if we define science as the logical positivists do. In fact, the notion that it could be a science is somewhat dangerous in that it promotes illusions of objectivity and certitude that can result in intransigence and intolerance. This thesis is also placed in the context of remarks made by Stephen Hawking, who, in A Philosophy of Everything, trivializes the possibility of a philosophy of language. In response, this paper suggests that a philosophy of language is, or at least ought to be, the foundation of every intellectual inquiry, including science, mathematics, and jurisprudence. It distinguishes among various realms of discourse (mathematical, scientific, ordinary, and literary), each with its peculiar logic, scope, and limitations. Within this scheme, judicial reasoning falls outside the realm of science precisely because it addresses questions that science methodologically excludes.

Values, social context, social changes and judicial method
Judge George Thomson
National Judicial Institute Canada
The National Judicial Institute of Canada is responsible for the professional development of judges in Canada. A former judge in Ontario and a former Deputy Minister of Justice for Canada, George Thomson has been responsible for the development and delivery of many of the Institute’s innovative programs. These programs explore issues related to judicial independence, impartiality, discretion, decision-making and judicial process in the day-to-day work of judges. An understanding of social context issues (including gender, aboriginal peoples, race, age and disability) has become an accepted step towards judicial impartiality. This paper will look at the Institute’s experience with social context programs and the response of the judiciary to them.
Judicial Neurobiology, Markarian Synthesis and Emotion: How can the human brain make sentencing decisions?

Dr Hayley Bennett
Consultant clinical neuropsychologist, Prince of Wales Medical Research Institute & University of New South Wales

That emotion should play a role in legal decision-making has been seen as inimical to the rule of law. Recent neuroscience research, however, has demonstrated that emotion plays a key role in legal decision-making, in particular the criminal law where personal, social, and moral circumstances are considered. The High Court considered judicial decision-making in Markarian v The Queen. This paper will evaluate the decision-making processes proposed by the judges, and potential alternative approaches, in the light of what is possible neurobiologically. This will include an analysis of which of the approaches to sentencing are most consistent with rational decision-making, together with an assessment of the role of emotion.

Judicial Neurobiology - a judge’s perspective

Justice John Dowsett
Federal Court of Australia, Brisbane

Traditional legal theory suggests that judges should suppress any emotion they may have about the litigants and issues before them. Findings by neuroscientists now suggest that judging involves the human mind sorting and prioritising information at an unconscious level, a process reliant upon attaching emotional significance to information on the basis of the previous experience of the judge. Without this ranking system, the brain would become overloaded with indistinguishable information. What are the implications for the judiciary of these findings?

The Art and Performance of Judging

Associate Professor Greta Bird & Ms Nicole Rogers
School of Law and Justice, Southern Cross University NSW

This paper will consider judicial perceptions of judging, drawing upon a collection of essays by judges, retired judges and magistrates on ‘The Art of Judging’. In particular, it will highlight the extent to which judging is a value-laden process. The paper will investigate the extent to which dissent can be a form of playfulness which defies the ordered rigidity of legal formalism and creates an aporia for justice. We will pay particular attention to the questions arising from the relationship between the executive arm of government and the judiciary. We will ask whether the pressures on judges to be accountable to the ‘community’ pose dangers for judicial independence or if these ‘reforms’ make the judiciary more relevant in increasingly plural societies.

Unstated Values and Assumptions in Judicial Decisions

The Hon Richard Chisholm
formerly a Judge of the Family Court of Australia & Visiting Fellow, ANU College of Law

This paper explores the role of unstated values and assumptions in judicial decisions: ‘Decision-making in any circumstances is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker be only partly aware’. Tracking those choices and recognising the considerations which may influence them is a newly acknowledged and additional obligation. The paper draws on the author’s judicial and academic experience and will in part focus on a highly discretionary area, decisions about children. Does the rule that the child’s best interests must be the ‘paramount consideration’ do anything more than invite judges to apply their personal prejudices and preferences?
The Values of Internal Legal Culture and Judicial Values: The values for choosing judges and ‘values’ on the bench
Ms Katherine Lindsay
School of Law, University of Newcastle NSW

The legal academy is Australia’s has a sparse tradition of judicial biography, which has the capacity to contribute to the creation and maintenance of judicial reputation. This paper identifies those values as appropriate to judges which are espoused and upheld by internal legal culture: the judiciary, the practising profession and the legal academy. An exploration and understanding of these value systems can assist various groups in the better understanding of judging is the subject of this paper.

Disparities in Sentencing Decisions: Evidence of unconscious influences
Associate Professor Jane Goodman-Delahunty
School of Psychology, University NSW
Professor Siegfried Sporer
University of Giessen, Germany

The paper will apply theoretical insights from social psychological research to the sentencing phase of the criminal justice process to advance understanding of the psychology of sentencing. Are judges susceptible to the appearance of the parties, such as an attractive victim, or a baby-faced defendant? What is the influence of characterological unattractiveness in a defendant? A criterion for inclusion in this paper was that the factors studies had to exert an unconscious influence on the decision maker. This review summarizes findings from empirical studies of observed disparities in sentencing decisions, drawing on archival data, observational studies, field research and experimental investigations of simulated sentencing decisions. Four distinct sources of potential bias are outlined: (a) characteristics of the judge, (b) the offender, (c) the victim and (d) contextual case facts. The paper examines the influence of traditional extra-legal factors, such as race and gender, as well as less traditional factors, such as the judge’s attitudes and sentencing philosophy, mortality salience (terror management), and the unintended consequences of a defendant’s actions. Finally, the magnitude of the influence of these factors is discussed.

Judicial Reasoning and the ‘Just World Delusion’:
Using the psychology of justice to evaluate legal judgments
Dr Julia Davis
Associate Professor in Law, University of South Australia

Our intuitive and deeply embedded human desire to see the world as just (and therefore as secure, controllable and morally balanced) is so strong that if we observe an injustice that we are unable easily to remedy, we can be led to eliminate the threat to our ‘deluded belief’ by reconstruing apparently unjust events so that they appear to be ‘just’. When people are unable to cope with these events by employing rational tactics they often resort unconsciously to three ‘non-rational’ strategies that allow them to ‘reinterpret the ‘injustice’ so that in fact, it disappears’. These tactics allow people to believe that the person has in some way deserved their fate, including: reinterpreting the outcome of an event; reinterpreting the ‘cause’ of an event; and reinterpreting the character of the person. Research provides us with a powerful analytical tool that can assist us not only to construct more convincing arguments in legal cases but can also help us to evaluate legal judgments and identify the occasions where the strategies born of the just world delusion may have unconsciously been used by advocates or judges.
Reasoning by Analogy in the Law
Professor John Farrar
Emeritus Professor, Bond University Queensland

Reasoning by analogy is fundamental to common law method and yet until recently has received relatively little analysis except as part of the doctrine of precedent. This paper analyses the nature of analogy in general, its relationship to logic and its place in reasoning with cases, statutes and codes. It then reviews some theoretical discussions of analogy and the link between reasoning by analogy and justificatory reasoning, ending with an analysis of justification in terms of principle, policy and considerations of fairness underlying the doctrine of precedent. The analysis of justification provides some insights into what are ‘material’ resemblances for the purposes of reasoning by analogy in the law. This paper also reviews recent US publications on this topic.

Scientific Evidence: A need for caution in decision making
Mr Jonathan Beach QC
Victorian Bar

Too often the imperfections or uncertainties in general scientific method are overlooked. Accordingly, on occasion, judges may attribute greater weight and precision to scientific evidence than is warranted. There is little appreciation of, inter alia, the following complexities:

(a) The concept of Kuhnian paradigms and/or the evolutionary nature of any scientific theory, and corresponding uncertainty at any one time for the validity of any one theory, no matter the degree of confidence expressed in the theory by the particular expert;

(b) Associated with (a), the seduction of, but flaws in, consensus science;

(c) The attempts by some scientists to mathematize nature (ie, posit a mathematical law to explain an apparent regularity) or a particular subject matter to give a greater air of verisimilitude to their theories or conclusions than is warranted;

(d) Associated with (c), judges’ tendencies to give greater but undue weight to, and misplaced confidence in, quantitative science over qualitative science;

(e) The blurring of the distinction between theoretical and applied science with little critical evaluation of theory as opposed to critical evaluation of particular applied methods in the individual case;

(f) An appreciation that some science is more an art than a precise science. The Longford Royal Commission provides a good case study in the areas of metallurgy, fracture mechanics and process chemistry;

(g) A failure to appreciate the theory-laden nature of observation;

(h) A failure to appreciate that many scientific objects are instrumental models rather than posited or used as real world objects;

(i) Serious deficiencies in statistical and probabilistic analysis, although this is well known (at least intuitively) to most trial judges.

In this ‘technological’ age, judicial reasoning should reflect greater sophistication of the limitations in scientific evidence and method and perhaps a greater scepticism of the certitude of the scientific witness. Moreover, this scepticism needs to be superimposed over, and is an addition to, satisfaction of the generic principles for expert evidence summarized in ‘Makita’.
An Explicit Representation of Judicial Reasoning to Enhance Transparency and Consistency Without Sacrificing Discretion: How to have your cake and eat it too

Mr Andrew Stranieri
Centre for Informatics and Applied Optimisation, University of Ballarat Victoria

This paper advances the notion that a Court that makes its judicial reasoning explicit in an abstract model can provide greater transparency and clarity about its reasoning. The clarity and transparency comes without the need to reduce complex reasoning to rigid guidelines devoid of discretion. A judicial reasoning model is an explicit representation of reasoning that encapsulates all relevant claims, evidence, statutes and principles pertinent to a field of law so that any judgment can be instantiated in the model. The case for an explicit representation of judicial reasoning within the jurisdiction of a Court, is made with examples of reasoning models in family law and refugee law over a fifteen year period. Benefits of this approach for the integration of information technology into the legal process in ways that enhance justice are described.

A Judge’s Perspective on Computer Assisted Judging

Justice Brian Preston
Chief Judge, Land and Environment Court NSW

This paper reviews a recently established sentencing database aimed at achieving consistency and transparency in sentencing for offences. It goes beyond previous developments in allowing judges to include subjective factors in researching previous sentences and allows judge to drill down to locate actual sentencing remarks in previous cases. This paper will explain how such a database encourages better decision making by forcing structure into judicial thinking.

Conceptual Acquisition and Judicial Thinking

Dr Tony Connolly
ANU College of Law, The Australian National University

This paper will examine how judges learn and cope with new ideas, scientific data being the most challenging.

Administrative Details

The conference commences at 9am Saturday 7 February and ends at 3pm Sunday 8 February 2009

The venue is the Finkel Theatre, John Curtin School of Medical Research, Garran Road, Australian National University, Canberra.

The Conference is a joint presentation of the National Judicial College of Australia, the Australian National University and the Australian Academy of Forensic Science.

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Please register by 30 January 2009 (to get the earlybird rate register by 19 December 2008)

Title ______________________________________________________________
First name __________________________________________________________
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Preferred name for badge (if different from above) ________________________
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Special dietary requirements ___________________________________________

A. REGISTRATION FEES* (includes lunches, morning/afternoon teas)
☐ $200  Earlybird individual rate (pay by 19 December 2008)
☐ $250  Individual rate
☐ $100  Full-time student rate                           Student number ______________________________

B. CONFERENCE DINNER Saturday, 7 February (optional)
☐ $90  Conference dinner
☐ $90  Accompanying guest name
   Guest special dietary requirements: ______________________________________________

TOTAL (A & B) $ ____________________________

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CANCELLATION: An administration fee of $50 may be charged for cancellations received before 30 January 2009. No refunds will be made after this date but a substitute delegate is welcome.

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ACCOMMODATION OPTIONS

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University House (5 minute walk to Finkel Theatre ANU)
Corner of Balmain Cres & Liversidge St
The Australian National University Campus
T: 02 6125 5211
F: 02 6125 5252
E: accommodation.unihouse@anu.edu.au
This is the closest accommodation option to the conference venue, but needs to be booked well in advance.

Diamant Hotel (15 minute walk to Finkel Theatre ANU)
15 Edinburgh Avenue, Canberra
T: 02 6175 2222
F: 02 6175 2233
E: info.can@diamant.com.au
W: http://www.diamant.com.au

Rydges Lakeside Canberra (15 minute walk to Finkel Theatre ANU)
London Circuit, Canberra City, ACT 2600
T: 1300 857 922 or 02 6247 6244
F: 02 6257 3071

Pacific International Apartments—Capital Tower (20 minute walk to Finkel Theatre ANU)
2 Marcus Clarke Street Canberra City 2601 ACT
T: 02 6276 3444
F: 02 6247 0759
E: apartments.canberra@pacificinhotels.com
W: http://www.pacificinhotels.com/canberra/capital.aspx

Crowne Plaza Canberra (20 minute walk to Finkel Theatre ANU)
1 Binara Street Canberra City 2601 ACT
T: 02 62478999
F: +02 62473706
E: res@crowneplazacanberra.com.au

Waldorf Apartments Canberra (15 minute walk to Finkel Theatre ANU)
2 Akuna Street Canberra City 2601 ACT
T: 1800 188 388 or 2 6229 1234
F: 02 6229 1235
E: canberra@waldorf.com.au

See also http://www.wotif.com/hotels/australia-canberra-hotels.html

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See http://accom.anu.edu.au/UAS/1049.html