



# *A Matter of Judgment*

Judicial decision-making and judgment writing



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Judicial decision-making and judgment writing

Editor:  
Ruth Sheard BA (Syd)

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## Foreword

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This publication collects a series of essays, most previously published, on the themes of judicial decision-making, judicial impartiality and judgment writing. These matters are interrelated and together reflect the core aspects of the judicial task.

The ultimate judicial value is impartiality. It is the essence of the function performed by the judiciary in the administration of justice. However, impartiality must not only exist, it must be manifest.

The common theme of the essays collected in this volume is the identification of how the process of judicial decision-making, in accordance with a 900-year-old common law tradition, leads to both the reality and the appearance of impartiality. Particular attention is paid to reconciling the centrality of impartiality with the fact that different judges bring to the judicial task a variety of perspectives and values.

The appearance of impartiality is ultimately displayed in the reasons for judgment. Reasons perform a number of functions to a number of audiences. Two are of overriding significance.

First, reasons explain to the parties why the judge has ruled as he or she has, and do so in a manner which is manifest to the parties and their advisors and to any appellate court. Secondly, reasons are public. They constitute the basic mechanism by which each judge is held accountable to the public for the decisions he or she has made. Though such reasons may need explication and consideration by lawyers, they are available to all, and, by reason of the internet more accessible than ever. The reasoning in judicial decisions is often the subject of comment not only by lawyers, but also by others.

Few governmental decision-makers are subject to an express obligation to explicate their reasons as a matter of routine and to do so in public. Performance of this obligation enhances public confidence in the administration of justice and promotes better decisions by judges.

This publication is directed to providing an educational resource for judicial officers. It is intended to promote high standards in judicial decision-making and to promote clarity in judgment writing. It is also intended to promote an understanding of the nature of the judicial process and, particularly, of the important role of judgment writing, amongst a wider public.

The Honourable JJ Spigelman AC  
*Chief Justice of New South Wales*

*2 June 2003*



## Editor's Note

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*A Matter of Judgment* explores some of the issues surrounding the important tasks of judicial decision-making and judgment writing. Judicial decision-making is at the core of the judicial function and there is great public interest in ensuring that decisions, once made, are communicated effectively. By ensuring that judicial decisions are open to scrutiny, the community is reassured that decisions are made in accordance with legal principles.

The decision-making role of judges has been controversial at times — do judges make law and, if so, what factors do they, and should they, consider? The authors writing on decision-making address some important aspects of this topic, including the nature of the judicial process, the role of impartiality in decision-making, the values and considerations that should govern judicial decision-making, and the way in which changing public perceptions have impacted on the judicial role. They also provide guidance on how judges can resolve the challenges inherent in decision-making.

Many of the authors make the point that judgments are not delivered in isolation — their function is to communicate to various audiences, ranging from the parties and appellate courts to the wider community. The articles on judgment writing thus aim to provide guidance to ensure that judgments clearly and effectively communicate both the decision and the process leading to the decision. Other questions addressed are when judicial officers should give unreserved judgments and how they should prepare for delivering a judgment, whether *ex tempore* or written.

I would like to acknowledge the work of all the authors and thank them for their contributions to this collection.

I expect that this is an area in which there will be continued debate and I trust that *A Matter of Judgment* will prove to be both a useful resource for judicial officers and a thought-provoking one.

Ruth Sheard  
*Editor*



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## Contributors

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**The Honourable Justice Rosalie Silberman Abella** has been a judge on the Ontario Court of Appeal since 1992. After graduating from the University of Toronto Law School in 1970, she practised civil and criminal litigation until, at the age of 29 she was appointed to the Ontario Family Court in 1976. She was a member of the Ontario Human Rights Commission, the Premier's Advisory Committee on Confederation, the Ontario Public Service Labour Relations Tribunal, the University of Toronto Academic Discipline Tribunal, the Canadian Judicial Council's Inquiry on Donald Marshall Jr, and Chaired the Ontario Labour Relations Board, the Ontario Law Reform Commission and the study on Access to Legal Services by the Disabled. She was sole Commissioner and author of the 1984 federal Royal Commission on Equality in Employment. She was a director of the Institute for Research on Public Policy, the International Commission of Jurists, and the Canadian Institute for the Administration of Justice. She has lectured widely in Canada and internationally, and been extensively involved in Canadian judicial education.

**The Honourable Justice Linda Dessau** has been a judge of the Family Court of Australia since 1995. Before that, she was a magistrate and coroner for 10 years. Justice Dessau has a keen interest in case management issues, having undertaken a Churchill Fellowship to consider ways to reduce cost and delay in criminal cases. She also pursues an interest in judicial education, as a member of the Board of the Australian Institute of Judicial Administration and on the faculty of the National Judicial Orientation Program teaching judgment writing, case management and mediation. Justice Dessau is on various boards, councils and committees relating to family law and outside organisations, ranging across education, opera, football and charities.

**Mr Mark Duckworth** is the Director of Government Branch in the Department of Premier and Cabinet, Victoria. He was Director of the Centre for Plain Legal Language at the University of Sydney in 1994–1995, and served in the New South Wales Cabinet Office from 1995–2001. He has an MA in history and an LLB from the University of Melbourne.

**Dr Elwyn Elms** LLB, Dip Crim (Syd); BA (Hons), PhD (Mac) practised as a solicitor of the Supreme Court of New South Wales, 1966–1979. He pursued further academic qualifications between 1979 and 1985, including spending 12 months in Paris researching his PhD thesis topic, "The Conseil d'Etat under the Third Republic, 1879 to 1914". He was a Local Court Magistrate 1985–1998 and Acting Magistrate 1998 to the present. At various times he was the Senior Civil Claims Magistrate, Chairman of the Victims Compensation Tribunal and Acting Deputy Coroner. He is the author and editor of two Butterworths' texts: *Local Courts Civil Procedure (NSW)* and *Motor and Traffic Law (NSW)*. He has also published a range of articles in various legal and historical journals.

**The Honourable Justice Michael Kirby AC CMG** was appointed to the High Court of Australia in February 1996. At the time of his appointment he was President of the New South Wales Court of Appeal, having been appointed to that office in September 1984. He was admitted to the New South Wales Bar in 1967. He was appointed a Deputy President of the Australian Conciliation and Arbitration Commission in 1975. He served as first Chairperson of the Australian Law Reform Commission from 1975 to 1984. In 1983 he became a judge of the Federal Court of Australia, serving on that Court until 1984. He has held numerous national and international positions including on the Board of CSIRO, as President of the Court of Appeal of Solomon Islands, as UN Special Representative in Cambodia and as President of the International Commission of Jurists.

**The Right Honourable Sir Frank Kitto AC KBE** was a Justice of the High Court of Australia from 1950 to 1970 and sat on the Privy Council in 1963. He was admitted to the NSW Bar in 1927 and appointed King's Counsel in 1942. After retiring from the High Court he served as the Chancellor of the University of New England until 1981 and he was the inaugural Chairman of the Australia Press Council from 1976 to 1982. Sir Frank Kitto died in 1994 aged 90.

**The Honourable Dennis Mahoney AO QC** holds the degrees BA, LLB (Hons 1, University Medal), Hon LLD (Sydney University). He practised at the New South Wales Bar 1948–1972 and was appointed Queen’s Counsel in 1960. He was Chairman of the Royal Commission on Landlord and Tenant Legislation (NSW) 1960–1961 and a Director of the Taxation Institute of Australia 1969–1972. In 1972 he was appointed a Judge of the Supreme Court of New South Wales and was a Judge of the Court of Appeal from 1974–1976. In 1996 he was President of the Court of Appeal and Acting Chief Justice of New South Wales. He was President of the Australian Section of the International Commission of Jurists 1973–1975, a Director of the Australian Opera 1973–1988, Co-Chairman of the Judges Sections of Lawasia 1980–1990, Chairman of the Australian Remuneration Tribunal 1982–1992 and Chairman of the Australian Institute of Judicial Administration 1987–1988. Since retirement he has been Visiting Professor of Law University of New South Wales 1998, Hearing Commissioner of the Human Rights and Equal Opportunity Commission 1998–2000, Commissioner of the Commission of Inquiry into the Death of Joseph Gilewica 2000 (Tasmania), and has engaged in mediation and other legal proceedings.

**The Honourable Sir Anthony Mason AC KBE** was a Justice of the High Court of Australia from 1972 to 1987 and Chief Justice from 1987 to 1995. Until recently he was Chancellor of the University of New South Wales, National Fellow at the Research School of Social Sciences at the Australian National University, a Judge of the Supreme Court of Fiji and President of the Solomon Islands Court of Appeal. In 1996–1997 he was Arthur Goodhart Professor in Legal Science at Cambridge University. In 1995 to 1998 he was Chairman of the National Library of Australia. Sir Anthony holds Honorary Doctorates from the Australian National University, and the Universities of Sydney, Melbourne, Monash, Griffith, Deakin and New South Wales. Sir Anthony practised at the New South Wales Bar 1951–1964 and was appointed a Queen’s Counsel in 1964. His former positions in Australia include Commonwealth Solicitor-General 1964–1969 and Justice of the New South Wales Court of Appeal 1969–1972. Sir Anthony has been a non-permanent Judge of the Hong Kong Court of Final Appeal since 1997. Since 2001 Sir Anthony has been Distinguished Visiting Fellow at the Faculty of Law, Australian National University. He has also been engaged in arbitration and mediation since his retirement from the High Court of Australia.

**The Honourable Justice Keith Mason AC** is the President of the Court of Appeal of New South Wales. He is also a part-time member of the Supreme Court of Fiji. He holds the degrees of BA LLB (Hons I) (Sydney University) and LLM (London University). He practised at the private Bar in New South Wales until 1985 when he was appointed Chairman of the New South Wales Law Reform Commission. In 1987 he became Solicitor General for New South Wales. He was appointed to the Court of Appeal in 1997. He is the co-author of *The Australian Law of Restitution* and has written many papers on issues of judicial method, and the interaction of law, religion and morality.

**The Right Honourable Madam Chief Justice Beverley McLachlin PC** is the Chief Justice of Canada. In 1964 she obtained an Honours Arts degree from the University of Alberta in Edmonton, majoring in philosophy. She went to the law school there, graduating in 1968 as a gold medallist. The same year, she received a Masters degree in philosophy. After articling and practising law in Edmonton from 1968 to 1971, Chief Justice McLachlin moved to Fort St John, British Columbia, where she was called to the British Columbia Bar. In 1972, she moved to Vancouver, where she practised law until the fall of 1975. From 1975 to 1981, Chief Justice McLachlin was Associate Professor at the Faculty of Law at the University of British Columbia. In 1981 she was named to the County Court of Vancouver, and shortly after to the Supreme Court of British Columbia. In 1986 she was moved to the British Columbia Court of Appeal, where she served until being named Chief Justice of the Supreme Court of British Columbia in 1988. On 17 April 1989, Chief Justice McLachlin was sworn in as the third woman to serve as a Justice of the Supreme Court of Canada. On 7 January 2000 she became Chief Justice of Canada.

**His Honour Judge Tom Wodak** is a Judge of the County Court of Victoria. He graduated in law from Melbourne University, and was admitted to practice in Victoria in 1966. In later years, he was admitted to practice in New South Wales, Western Australia, the Northern Territory and Tasmania, and occasionally appeared in those States or Territories. He practised as a solicitor from 1966 to 1974, and as a barrister from 1974 until his appointment to the bench in August 1994.

# The Nature of the Judicial Process and Judicial Decision-Making

The Honourable Sir Anthony Mason AC KBE

The true nature of the judicial process has been widely debated. This essay argues that the traditional view of the judicial process — that the law is “out there” awaiting discovery and declaration by judges — is too mechanistic. It fails to account for the elements of pragmatism, discretion and choice which are inherent in the judicial process. Judges are required to resolve questions of law. In the process they formulate principles of law, after taking account of relevant policy considerations and values. But what are the values and considerations that should govern judicial decision-making and how does a court ascertain these values? Judges are duty bound to identify and justify the standards, values and policy considerations on which they rely to ensure judicial accountability, openness and transparency.

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## Introduction

The object of this essay is to describe succinctly in all its breadth the true nature of the judicial process. To readers of this essay who are familiar with Justice Cardozo’s masterpiece *The Nature of the Judicial Process*,<sup>1</sup> published as long ago as 1921, my debt to the great American judge will be apparent.

The traditional view of the judicial process was that judges decided cases by finding the facts, ascertaining the law, and applying the law to the facts as found or admitted. The relevant principles of law were to be found in the statutes or in the previous decisions of the courts. If the relevant principles were not clearly established, they were simply awaiting discovery according to the declaratory theory of law. The judges were, of course, independent, judicial independence being a central pillar of our conception of the rule of law.

The theme of this essay is that the description of the judicial function just given is too mechanistic. The description fails to bring out the elements of pragmatism,<sup>2</sup> discretion and choice which are inherent in the judicial process. The law is not exclusively rule-based. Nor is it by any means well settled in all its aspects. Debatable questions of law arise from time to time, more frequently in appellate courts, and judges are required to resolve them as best they can. In the course of doing so, judges, subject to the doctrine of precedent, formulate principles of law, after taking account of relevant policy considerations or values and making necessary value judgments.

Discussion of the nature of the judicial function and judicial decision-making must take account not only of the various aspects of judicial decision-making but also of the purposes which the judgment serves. The judgment decides the case and informs the parties, their

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1 Yale University Press, New Haven.

2 Ibid, p 102 (“the juristic philosophy of the common law is at bottom the philosophy of pragmatism”).

legal representatives, the legal community and the public of the issues for determination and of the reasons for decision. One purpose of the judgment is to satisfy the parties to the dispute and the general public that justice has been done and seen to be done.<sup>3</sup>

Apart from any other reason, the requirements of natural justice oblige the judge to respond in the judgment to the arguments advanced by the parties. The judge's obligation to give reasons for the decision extends to all the reasons which lead to the decision. In an era of openness and transparency, it is imperative that the judgment exhibits fully the process of reasoning. The modern insistence on openness and transparency is entirely consistent with the traditional public nature of court proceedings.

Another factor which adds force to the necessity for full exhibition in the judgment of the reasoning process is the recognition of the importance of maintaining public confidence in the administration of justice. There is much to be said for the view that the courts are subject to greater critical scrutiny by the public than in earlier times. Whether this be so or not, less than full disclosure of the judicial reasoning process is likely to damage public confidence in the administration of justice.

It is against this background that I discuss the nature of the judicial function and judicial decision-making.

## The judicial function

The judicial function, like judicial power, is notoriously difficult to define in a way that is exclusive and exhaustive. Many of the common attributes of the exercise of judicial power do not necessarily signify that the power or function is judicial. The High Court's approach has been to look at a number of indicators — the subject matter of the determination, the way in which the determination is made, historical considerations, and the status and character of the body making the determination. After weighing these factors, the court decides whether the function is judicial or non-judicial.

In *Huddart Parker & Co Pty Ltd v Moorehead*,<sup>4</sup> Griffith CJ described the words "judicial power" in s 71 of the Australian Constitution as meaning:<sup>5</sup>

"the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects... The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

This description is silent about the nature of the judicial process.

At one time there was support for the view that the difference between the judicial function and the non-judicial function was to be found in the fact that the former involves the adjudication of existing rights and obligations, as distinct from the creation of new rights and obligations.<sup>6</sup> It is now accepted, however, that the judicial function extends to the creation by court order of new rights in favour of a party against another party to litigation, so long as the determination of those rights arises out of the application of the law as ascertained to the facts as found by the court. Family provision orders and Family Court orders provide examples. These orders are made by way of an exercise of judicial discretion based on principle or established criteria.<sup>7</sup>

3 *Grollo v Palmer* (1995) 184 CLR 348 at 394 per Gummow J.

4 (1909) 8 CLR 330.

5 *Ibid* at 337.

6 *Waterside Workers Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 442-443 per Griffith CJ.

7 See *Cominos v Cominos* (1972) 127 CLR 588 (where the court upheld the validity of s 86 of the *Matrimonial Causes Act 1959* (Cth) which empowered a court to make such settlements of property as it considered "just and equitable").

According to High Court authorities, if a statutory provision were to confer on a court a function which authorised it to act in an arbitrary way or to give effect to “its own idiosyncratic conceptions and modes of thought”, the function would not be an exercise of judicial power nor a function accurately described as judicial.<sup>8</sup> Hence the absence of a definable or ascertainable standard, the dependence of the outcome on the evaluation of considerations of policy (notably industrial policy) and the unfitness of the function as an exercise of judicial power are matters which would lead to the conclusion that the function is non-judicial.<sup>9</sup>

The statements mentioned in the preceding paragraph need elucidation. This is to be found in the remarks of Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”*.<sup>10</sup> His Honour said:

“Policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law; the policy considerations to which their Lordships paid regard in *Hedley Byrne*<sup>11</sup> are an instance of just such a process and to seek to conceal those considerations may be undesirable. That process should however result in some definition of rights and duties, which can then be applied to the case in hand, and to subsequent cases, with relative certainty. To apply generalized policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hand, is, in my view, to invite uncertainty and judicial diversity.”

Policy considerations also play an important part in “old” areas of the law. They may assist the court in deciding whether an existing principle of law is to be extended or qualified, or how it should be applied. Equally they may assist the court in deciding whether it should apply precedent and adhere to an existing principle of law.<sup>12</sup> Here again an important element in the judicial function is the formulation of principle by reference to underlying policies or values.<sup>13</sup> Defamation cases are examples. There, the courts formulate principles by reference to policy considerations, particularly protection of reputation as against freedom of expression.

It is only natural that courts, including the High Court, in determining whether a particular function is judicial or appropriate to be undertaken by a court, will have regard to the functions which have been undertaken by courts in the past and are being undertaken in the present. The judicial function and what it comprises are not static. In this respect, some courts have been endowed with functions seemingly more concerned with policy considerations than the traditional courts. These developments may have significance in ascertaining the scope of the judicial function and may indicate that the judicial function is not as narrow as the authorities on judicial power seem to suggest.

8 Ibid at 593.

9 See *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 289–291 per Dixon CJ; *R v Waterside Workers Federation of Australia* (1957) 100 CLR 312; *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368; *Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167 at 189.

10 (1976) 136 CLR 529 at 567.

11 [1964] AC 465.

12 See *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (where Kirby J, in dissent, considered that the principle in *Yerkey v Jones* (1939) 63 CLR 649 was an anachronism, did not appropriately reflect the position of married women and should not be followed, whereas the majority held, inter alia, that the policy considerations on which the principle was based were not relevantly displaced by changes in the role of women in society with the result that *Yerkey v Jones* should be applied).

13 See also *Victoria v Commonwealth* (“the Payroll Tax Case”) (1971) 122 CLR 353 at 396–397 (where Windeyer J explained the difference between the pre-*Engineers* and the *Engineers* interpretation of the Constitution by reference to the “realization that Australians were now one people and Australia one country and that national laws might meet national needs”).

## Fact-finding

The work of judges who sit at first instance differs from the work of appellate judges. The primary judge, whether sitting with a jury or not, is concerned with the reception of evidence and the problems of admissibility. If sitting alone, the primary judge must find the facts and apply the law to the facts as admitted or found. In doing so, the judge must make every effort to understand the case which each party is endeavouring to present. In other words, each case is to be approached with an open rather than a closed or destructive mind. In fact-finding, the judge discharges the traditional role of the juror. What is involved in primary fact-finding has been instructively discussed by Lord Pearce in *Onassis v Vergottis*,<sup>14</sup> and by Lord Bingham of Cornhill, England's Senior Law Lord.<sup>15</sup>

One element in the work of the primary judge is the application of relevant community standards. It was once the function of the jury to apply standards, for example, in determining whether there was a breach of the standard of reasonable care. The jury was entitled to bring to bear its knowledge of community standards when it determined that question. Now, in non-jury trials, it falls to the lot of the judge to do so. Likewise, in assessing the credibility of the testimony of a witness and in looking at the probabilities, the judge will draw on knowledge of community standards.

In *Bankstown Foundry Pty Ltd v Braistina*,<sup>16</sup> the High Court recognised that the standard of reasonable care had become rather higher by reason of external influences. It was accepted that the standard is influenced by “changing ideas of justice and increasing concern with safety in the community”.<sup>17</sup> It seems self-evident that, if the community sets greater store by safety than it did in the past, that change in community standards (or values) must be reflected in the legal standard of reasonable care. If the community, as well as setting greater store by safety, wants safety to cost less, a more difficult question arises. The court may then find it necessary to modify the standard.

## Ascertaining the law

Generally speaking, the primary judge ascertains the law to be applied in the form of principles stated in earlier decisions. The primary judge's role in ascertaining the law is confined by the force of precedent and *stare decisis*. From time to time, however, there arises a question of law which is not governed by earlier authority.

The appellate judge is much less concerned with the reception of evidence and reviews findings of fact as well as finds facts. The appellate judge is, of course, more frequently confronted with questions of law unresolved by earlier authority or earlier authority which binds the appellate court, and, even more so, the Justices of the High Court.

How then does the judge, wherever he or she sits in the court hierarchy, go about deciding a question of law which is not governed by authority? The first step is to identify the relevant body of rules and principles from the established corpus of authority. It may be possible to answer the question by applying a principle so identified or extending or modifying such a principle. Logical and analogical reasoning from past decisions and established rules or principles has always been a central element in judicial decision-making.

14 [1968] 2 Lloyd's Rep 403 at 431.

15 “The Judge as Juror” in *The Business of Judging: Selected Essays and Speeches*, 2000, Oxford University Press, Oxford, pp 6–10.

16 (1986) 160 CLR 301.

17 *Ibid* at 309 per Mason, Wilson and Dawson JJ; see also at 314 per Brennan and Deane JJ.

*Obiter dicta* may be persuasive, particularly if uttered by a judge of renown or of reputation in the relevant area of law. But *obiter dicta* should never be applied blindly. A judge should never abdicate responsibility for deciding a question of law by simply adopting the view of someone else. If the judge relies on *dicta* in support of his or her decision, it is because the judge, on thinking the question through, is persuaded that the *dicta* are soundly based.

Decisions in other common law jurisdictions now play a greater part in Australian decision-making. This is a consequence of the accessibility of overseas material. These decisions often throw light on a difficult question. Precedents of other common law jurisdictions are, however, useful in Australia only to the extent of the persuasiveness of the reasoning on which they are based.<sup>18</sup> By reason of historical and legal ties, we have always derived much benefit from consideration of English authorities. But today, as English courts stand outside our hierarchy of appeals, our courts cannot be bound by English authority.

It is important always to guard against the possibility that overseas authority has been influenced by some condition or circumstance which has no Australian counterpart. It may even be that a difference in judicial methodology may mean that overseas authority is less influential than it might otherwise be. In the absence of uniform judicial methodology, it is idle to suggest that there is a universal and uniform common law. The divergent approaches in various jurisdictions to the duty of care in economic loss and public authority cases illustrate the point.

Academic writings, Australian and overseas, also play a much larger part in Australian decision-making than they did in the past. Academic writings vary in quality. The modern judgment often cites academic articles as if they were a form of decoration, evidently to inform the reader that the judge has undertaken extensive research. Such citation is unnecessary. On the other hand, if a judge's thinking has been assisted by academic writing, the assistance should be acknowledged.

The judge is entitled, indeed bound, when occasion arises, to go beyond logical and analogical reasoning, and to examine and assess relevant policy considerations or values. Occasion to do so may arise not only in those cases where there is an absence of authority but also in cases where the correctness of earlier authority, particularly non-binding authority, is in question.

The judge must also have a close eye to the just, practical and convenient operation of the rule or principle which is formulated.<sup>19</sup> To that end, it may be necessary to make a choice, sometimes extremely difficult, between competing principles or competing versions of a principle. In making this choice, the judge will take account of relevant policy considerations and values, as well as consider how the competing propositions fit with the body of established law.<sup>20</sup>

That values do play a part in the judicial process is widely accepted. The point was made by Stephen J in *Onus v Alcoa of Australia Pty Ltd*,<sup>21</sup> when he said: "Courts necessarily reflect community values and beliefs." But, as noted earlier, Stephen J saw the role of policy considerations and values as shaping legal principle, not as applying directly to provide an answer to a legal question.

18 *Cook v Cook* (1986) 162 CLR 376.

19 M McHugh, "The Judicial Method" (1999) 73 *Australian Law Journal* 37 at 46.

20 *Ibid*; see also *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ.

21 (1981) 149 CLR 27 at 42; see also Lord Radcliffe, "Law and Order" in *Not in Feather Beds. Some Collected Papers*, 1968, Hamish Hamilton, London, p 215.

In *McFarlane v Tayside Health Board*,<sup>22</sup> Lord Steyn said:

“Judges’ sense of the moral answer to a question, or the justice of the case has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.”

A number of illustrations could be given of the influence of “values” in the shaping of legal principle. They include the discussion by Brennan J in *Mabo v Queensland (No 2)*<sup>23</sup> and *Dietrich v The Queen*<sup>24</sup> with which readers will be familiar. A third example is *R v L*<sup>25</sup> where the High Court held that old authorities did not establish that marriage involved the irrevocable consent of the wife to sexual intercourse with the husband. In that case, a majority of the court considered that, even if the proposition was established by authority, “the Court would be justified in refusing to accept a notion that is so out of keeping with the view that society now takes of the relationship between the parties to a marriage”.<sup>26</sup> The House of Lords, taking the view that the old authorities did establish the proposition, refused to follow them on the ground that the common law fiction of the wife’s implied consent was anachronistic and did not reflect the values of society.<sup>27</sup>

Another example is the recent decision of the High Court, *R v Carroll*.<sup>28</sup> The joint judgment of Gleeson CJ and Hayne J contains an instructive discussion of the competing policy considerations or values on which the double jeopardy rule is based. Those considerations or values informed the view which their Honours took of the relevant principle, resulting in the conclusion that the proceedings for perjury should have been stayed. A conviction for perjury would, in the circumstances, have controverted the earlier conviction for murder. Their Honours said:<sup>29</sup>

“Reference to the general propositions we have mentioned is important not because the answer to the issues now being considered can be found by deductive reasoning which takes any or all of them as a premise but because they are values to which the criminal law can be seen to give effect. They are values that may pull in different directions. They are, therefore, cases in which a balance must be struck between them.”

This was a case involving an “old” area of the law, not a “new” area of the law to which Stephen J referred in *The Dredge “Willemstad”*. Yet competing policy considerations were relevant to the judicial reasoning and had to be balanced.

The values with which Gleeson CJ and Hayne J were concerned were values which had been recognised in earlier judgments — the importance of finality in litigation, the imbalance of power between prosecution and accused, the serious consequences for the accused of disturbing the conviction, and prosecution as an instrument of oppression. But the courts are also concerned with values not hitherto recognised by law. That is the way in which these values become values recognised by law. A value hitherto unrecognised (the necessity for non-discriminatory treatment of Indigenous interests) was in question in *Mabo (No 2)*. This value was an influence upon the majority conclusion that the extinguishment of rights and interests, based on the concept of

22 [2000] 2 AC 59 at 82.

23 (1992) 175 CLR 1 at 42.

24 (1999) 177 CLR 292.

25 (1991) 174 CLR 379.

26 *Ibid* at 390.

27 *R v R* [1992] 1 AC 599.

28 (2002) 77 ALJR 157.

29 *Ibid* at [24].

*terra nullius*, was “justified by a policy which has no place in the contemporary law of Australia”.<sup>30</sup> Gummow J later offered another ground for the *Mabo* decision when he said that non-recognition of Indigenous title “rested upon past assumptions of historical fact now shown then to have been false”.<sup>31</sup>

Important questions have been raised about the ascertainment of values.<sup>32</sup> How does a court ascertain them? According to Justice Cardozo, the court ascertains relevant values “from experience and study and reflection; in brief, from life itself”.<sup>33</sup> In many instances, the community will be divided on questions of values. Values may vary across sub-communities. How then is a court to divine what is the majority view (if there is one) or to weigh discordant views? The existence of discordant views is obviously a reason for a court to proceed cautiously. In many cases, it may be appropriate to stand by existing authority and leave any change to the legislature. But there are cases such as *Mabo* and the rape in marriage cases where it is appropriate for the court to give effect to its view, as ultimate courts of appeal have done in such cases in Canada and England.

Much discussion of this issue has assumed that courts are looking for prevailing community values. Justice Cardozo preferred the expression “the accepted standards of right conduct”<sup>34</sup> or “the *mores* of the times”,<sup>35</sup> though he considered that the judge was not “powerless to raise the level of prevailing conduct”.<sup>36</sup> It is important, of course, to distinguish between community standards, for example reasonable care, which courts are required by law to apply, and the ascertainment of values for the purpose of articulating legal principle. In this context, courts are more concerned with enduring values than transient community values. Even values considered to be enduring are themselves capable of change, as history demonstrates.

A source of values which has become controversial is that found in international conventions ratified by Australia.<sup>37</sup> Conventions ratified by Australia have the endorsement of an elected government and they have created international obligations binding upon Australia. In looking to such a convention as a source of values, a court cannot give effect to the obligations so created, in the absence of implementing legislation. Even in using a convention as a source of values, a court should proceed with very considerable caution. Take the International Covenant on Civil and Political Rights. Many values enshrined in that convention are contentious in Australia and may not fit with the existing law.

## Legalism

The views I have expressed are, to some extent at least, opposed to the legalism which was taken as a feature of Australian jurisprudence, at least from the time of the *Engineers Case*<sup>38</sup> until the latter part of the twentieth century. This legalism, which is the variety with which this essay deals, was associated with Sir Owen Dixon and his view that the common law judicial process was centred upon “strict logic and high technique”.<sup>39</sup>

30 (1992) 175 CLR 1 at 46.

31 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 180.

32 J Doyle, “Implications of Judicial Decision-Making” in C Saunders (ed), *Courts of Final Jurisdictions — the Mason Court in Australia*, 1996, Federation Press, Sydney, p 96.

33 Op cit n 1, pp 113-114.

34 Ibid, p 112.

35 Ibid.

36 Ibid.

37 See *Minister for Immigration v Teob* (1995) 183 CLR 273; but now cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699.

38 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

39 Sir Owen Dixon, “Concerning Judicial Method” (1956) 39 *Australian Law Journal* 468 at 469.

But he acknowledged that to call it a high technique in 1956 would not be correct and that logic was not pursued very strictly.<sup>40</sup> Although he opposed a judge departing deliberately from a long accepted, settled principle, “in the name of justice or of social necessity or of social convenience”, he quoted the statement of Sir James Parke (later Lord Wensleydale) that the judge’s duty to apply rules of law applied “where they are not plainly unreasonable and inconvenient”.<sup>41</sup> Neither Sir James nor Sir Owen said that the duty extended to rules which were plainly unreasonable or inconvenient. The central thrust of Sir Owen’s oracular message was that judges should not depart from settled principle to give effect to their subjective opinions. What he meant by the reference to subjective opinions may be open to debate.<sup>42</sup>

A central element in legalism was the declaratory theory that the law was “out there”, awaiting discovery and declaration by the judges. This theory assumed that the one “right” answer to an unresolved question of law could be refined out of the existing body of principles and authority, apparently without having regard to social necessity or changed social conditions. This theory ignores the fact that in “new” areas of law, there is no available or an insufficient body of existing principle to provide a solution to the case in hand.<sup>43</sup> *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)*,<sup>44</sup> *Airedale NHS Trust v Bland*<sup>45</sup> and *Re A (Children) (Conjoined Twins: Surgical Separation)*<sup>46</sup> are examples of such cases. The theory also ignores the existence of leeways of judicial choice<sup>47</sup> and pays no attention to the way judges work. Judges do have regard to social necessity, policy considerations, practical considerations and the justice of a proposed rule. It cannot be credited that Sir Owen Dixon acted differently. His approach is subject to the criticism that it leads to an artificial form of judicial reasoning which conceals elements in the actual reasoning process. Because it conceals the underlying considerations on which the principle and the reasoning are based, there is the risk that at a later time courts will not perceive these considerations and that they may have changed.

Legalism had some apparent advantages which do not appear so attractive today:

- First, by basing the judicial function on doctrinal reasoning rather than policy and other factors, decision-making was a matter for legal experts and not to be understood or evaluated by lesser mortals.
- Secondly, as there was only one “right” result discernible from trawling through the corpus of principles and authority, other leeways of choice which exposed the decision to criticism were eliminated or reduced.
- Thirdly, legalism presented an account of the judicial function which differentiated it from the legislative function, thereby offering protection to the judge against the accusation that the judiciary was usurping the role of the legislature, an accusation based on a mistaken popular belief that judges do not make law. Lord Radcliffe, the highly regarded English judge, said:<sup>48</sup>

“We cannot run the risk of finding the archetypal image of the judge confused in men’s minds with the very different image of the legislator,”

40 Ibid at 472.

41 *Mirehouse v Rennell* (1833) 1 Cl & F 527 at 546; 6 ER 1015 at 1023.

42 See pages 10–11 below.

43 See Sir Gerard Brennan, “A Critique of Criticism” (1993) 19 *Monash University Law Review* 213.

44 (1992) 175 CLR 218.

45 [1993] 2 WLR 316.

46 [2001] 2 WLR 480.

47 As to leeways of judicial choice, see *Queensland v Commonwealth* (1977) 139 CLR 585 at 603 per Stephen J, 606 per Mason J.

48 “The Lawyer and his Times” in Radcliffe, op cit n 21, p 271.

and,<sup>49</sup>

“I think that the judges will serve the public interest better if they keep quiet about their legislative function.”

It is now generally acknowledged that this form of legalist approach to the judicial function cannot be supported. Lord Bingham has described it as having “little judicial support to-day”.<sup>50</sup> His Lordship, speaking of modern judges, went on to say:<sup>51</sup>

“They know from experience that the cases which come before them do not in the main turn on sections of statutes which are plain and unambiguous in their meaning. They know from experience... that the cases they have to decide involve points which are not the subject of previous decisions, or... conflicting decisions or raise questions of statutory interpretation which apparently involve general *lacunae* or ambiguities. They know, and the higher the Court the more right they are, that decisions involve issues of policy.”

In 1981, on his swearing-in as Chief Justice, Sir Harry Gibbs said:<sup>52</sup>

“It is the proper role of the courts to apply and develop the law in a way that will lead to decisions that are humane, practical and just, but it would... be destructive of the authority of the courts if they were to put social and political theories of their own in place of legal principle.”

Subsequently, upon his retirement as Chief Justice in 1998, Sir Gerard Brennan rejected the notion that the law was “an ever-expanding cosmos containing rules for the solution of the problems of every generation” and affirmed that English and Australian judges have changed the rules of law “in response to changing circumstances so as to avoid injustice”. Both these statements, particularly that of Sir Gerard Brennan, are a rejection of the narrow legalist (formalist) conception of judicial method.<sup>53</sup>

## Precedent

The obligation of a court to follow decisions of a higher court in the same hierarchy of courts (precedent) and, subject to a qualification to be mentioned, the obligation of a court to stand by its earlier decisions (*stare decisis*), have been central elements in the common law system. Precedent and *stare decisis* contribute to certainty, consistency and predictability in the law. *Stare decisis* had an additional dimension in the days when an appellate court was held to be unable to reconsider its earlier decisions. The High Court has asserted the power to reconsider its earlier decisions and this proposition applies to Australian appellate courts. Under a system of law which admits of exceptions to *stare decisis*, “there is no simple answer” to the question whether a court should overrule its earlier decision.<sup>54</sup> The question “is one of legal policy into which wider considerations enter than mere questions of substantive law”.<sup>55</sup>

A court is not bound to follow one of its decisions which it holds to be wrong. So much was acknowledged in the statement made by Sir James Parke, cited earlier in this essay.

49 Ibid, p 273.

50 “The Judge as Lawmaker” in Bingham, op cit n 15, p 28.

51 Ibid.

52 (1981) 148 CLR at xiii.

53 As is the judgment of Windeyer J in *Skelton v Collins* (1966) 115 CLR 94 at 134-136; see also *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633 per Mason J; but cf at 623 per Barwick CJ.

54 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co Ltd* (1974) 129 CLR 576 at 584 per Lord Diplock.

55 Ibid at 582.

That said, a court will not lightly depart from its earlier decisions. To do otherwise would undermine the authority of the court in the absence of compelling circumstances. As Gibbs J said in *Queensland v Commonwealth*:<sup>56</sup>

“It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a justice may give effect to his own opinions in preference to an earlier decision of the Court.”

The law laid down by judicial decision, even if erroneous, may work satisfactorily in practice. If it has given general satisfaction and caused no difficulties in practice, this is an important factor to be weighed against the more theoretical interests of legal science in deciding whether the court should change the law.<sup>57</sup>

There are many cases where change is better left to the legislature.<sup>58</sup> Four matters which have been held to justify a court having power to depart from its previous decisions to exercise that power are:

1. the earlier decision did not rest upon a principle carefully worked out in a significant succession of cases
2. the existence of a difference between the reasons of the judges constituting the majority in an earlier decision
3. the earlier decisions achieved no useful result but led to considerable inconvenience
4. the earlier decisions had not been acted on in a manner which militated against reconsideration.<sup>59</sup>

Departure from precedent in cases of statutory construction (and application) involves special considerations. The responsibility of the court is to give effect to the legislative intention as expressed in the statute. If the court is convinced that a previous interpretation is plainly erroneous, the court cannot allow the previous error to stand in the way of declaring the true legislative intent.<sup>60</sup>

On the other hand, *stare decisis* has special force in the case of decisions affecting property and commercial transactions. Parties entering into such transactions rely on an understanding of the current law. Likewise, a court is generally reluctant to depart from a previous decision on criminal law when the departure would expose a person to a criminal liability which did not exist under the law as it stood when the alleged offence took place.<sup>61</sup> A court will also be reluctant to overrule a decision when government has organised its financial affairs in reliance on that decision.<sup>62</sup> And a court will usually leave taxation decisions to be dealt with by the legislature because the legislature regularly amends revenue legislation.

If the legalist view of the judicial function were correct, then the scope for departure from precedent would be radically confined. On that view, the only legitimate basis for concluding that a proposition established by an earlier decision is wrong and should not be followed is that the proposition (worked out after trawling through the *corpus*

56 (1977) 139 CLR 585 at 599.

57 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co Ltd* (1974) 129 CLR 576 at 582.

58 See page 12 below.

59 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

60 *Ibid* at 439.

61 But cf *R v L* (1991) 174 CLR 379.

62 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

of case law) did not correctly represent or follow from that case law.<sup>63</sup> On the other hand, as noted earlier, it seems that a court would not be expected to apply an authority which is “plainly unreasonable or inconvenient”.

Yet, according to legalists, for later judges to say that a proposition affirmed by an earlier decision is wrong because it does not accord with the values of today’s society or because it would now be considered unjust by reference to enduring values as now recognised, would not be legitimate. The later judges would then be giving effect to their personal and subjective opinions, as opposed to judicial method, if they were to depart from authority for this reason, no matter how correct the reason might be.

So, if we take the rape in marriage case as an example and we assume that the House of Lords was right, and the High Court was wrong, in holding that the old authorities supported the proposition, then the court could not overrule the old authorities and would be bound to affirm them, leaving the legislatures to change the law. Yet Lord Evershed acknowledged many years ago that the House of Lords “on occasions must modify its previous pronouncements when they cease to conform with the social philosophy of the day”.<sup>64</sup>

It is difficult to imagine that any court of final appeal today would subscribe to such a restrictive approach to departure from precedent. If a court concludes, after consideration, that an earlier decision is wrong because it is based on values which cannot be supported or a wrong assessment of policy considerations, then it should not stand. The precedent itself is necessarily the product of some policy choice made in the past.

I repeat what I said on an earlier occasion:<sup>65</sup>

“Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes.”

It is no longer acceptable, if it ever was, for courts to affirm decisions which are unsound and unjust, and simply await legislative reform which may come later rather than sooner. The legislatures do not maintain an interest in, let alone a continuing supervision of, the operation of judge-made law. And legislative reform, if it occurs, may be confined to some but not all law areas in Australia and may not be uniform.

### Judicial law-making

Despite the restraining influence of the doctrine of precedent, no one would deny today that judges make law. They have been doing so for more than 800 years. The 40-odd volumes of Halsbury speak eloquently on that score. The law of trusts, equity, contract, tort and criminal law rest substantially on judge-made law. Judicial law-making is an incident of adjudication. In ascertaining the law to be applied to the case in hand, the judge formulates the applicable principle or articulates the interpretation (if a statutory provision is under consideration). By these means, the judge makes law in the course of determining the rights in suit.

63 Contrast *The Despina R* [1979] AC 685 (where the House of Lords adopted the rule that judgment for the loss suffered in a maritime collision occasioned by tort should be measured by the currency of loss rather than the sterling equivalent, overruling precedent to the contrary. The reason for doing so was the new rule more fairly reflected the loss).

64 *The Court of Appeal in England*, 1950, Athlone Press, London, p 18.

65 “The Australian Judiciary in the 1990s” (1994) 6(2) *The Sydney Papers* 111 at 114.

Just as our inability to craft a brightline definition of judicial power has created a difficulty in separating judicial power from executive power, so that same inability has created a like difficulty in distinguishing the law-making that judges may undertake legitimately and the law-making that judges should leave to the legislatures. The legalists drew a distinction between ascertaining the law as it is and stating the law as it ought to be with a view to separating the two functions. Unfortunately the distinction is simplistic. Ascertaining the law as it is does not always involve ascertainment of something that has a known existence, except in the sense in which legalists speak of the principle being notionally present and awaiting discovery in the corpus of precedent.

Not infrequently the courts, when stating the existing law, acknowledge that it may be thought by some to be unsatisfactory but that, if it is to be altered, it should be left to the legislature. *Breen v Williams*,<sup>66</sup> a decision on the patient's right (or lack of it) to access her doctor's notes relating to her condition, was just such a case. In *Breen v Williams*, the court was not persuaded the principle it applied was wrong, whereas in *Mabo (No 2)* the majority concluded that the old view was wrong.

In *Woolwich Equitable Building Society v Commissioners of Inland Revenue*,<sup>67</sup> Lord Goff of Chieveley acknowledged that he was never quite sure where to locate the boundary between legitimate judicial development of the law and legislation. His Lordship noted that, if the boundary were to be too firmly drawn, *Donoghue v Stevenson*, modern judicial review and *Mareva* injunctions would not have come about as they did.

When, in a given case, a court applies an existing principle of law and says that it will leave any alteration in that principle to the legislature, the court is making a value judgment that change is better left to the legislature.<sup>68</sup> There may be any one or more of a number of reasons for taking this view. The existing principle may be well settled. Change may trigger potentially difficult consequences that the court cannot deal with in the frame of a single case. Change may be contentious. Change may be better handled by the political process or by a law reform agency.<sup>69</sup> These are policy considerations.

Behind these more specific reasons, lie more general but no less important considerations. In the areas of law which are largely judge-made, legislatures do not keep the law under continuing review. Generally speaking, judge-made law does not ignite electoral interest. So legislative activity will be confined to a response to a perceived crisis. The recent attempt to reform tort law in consequence of insurance problems is an example. Absence of legislative initiatives in areas of judge-made law does not mean that the existing law is satisfactory or that the legislatures consider it to be satisfactory.<sup>70</sup>

On the other hand, change brought about by judicial decision may excite criticism that the judges are usurping the role of the legislature. This criticism may have the potential to damage public confidence in the court system. The criticism often stems from a misunderstanding of the judicial function. But it is a factor to which attention must be given. Just how one identifies a community consensus in relation to matters of this kind remains obscure, yet the Privy Council considered that the High Court was in a better position to ascertain that consensus than the Privy Council in the days when an appeal lay to the Privy Council.<sup>71</sup>

66 (1996) 186 CLR 71.

67 [1993] AC 70 at 173.

68 See, for example, *Craig v South Australia* (1995) 184 CLR 163.

69 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633 per Mason J.

70 See Lord Radcliffe, "Law and Order", op cit n 21, pp 215-216.

71 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co Ltd* (1974) 129 CLR 576.

## The courts, public opinion and public confidence in the court system

The traditional view was that the courts took no account of public opinion. It was for the courts to apply the law, however unpopular that might prove to be. Although this proposition is true today, it needs to be seen in a wider context.

The rule of law in our community depends upon the existence of public confidence in the administration of justice. Both the rule of law and public confidence in the court system are closely associated with judicial independence.

In earlier times the common law of contempt protected courts and judges from criticisms which would impair public confidence in the courts and judicial independence. The test was whether the publication had a tendency to influence the result of pending litigation and, if so, whether it would be likely to influence the result. These days, due partly to the importance of freedom of expression, courts are reluctant to exercise the contempt power. And the present federal Attorney-General has made it clear that he does not see that it is his responsibility to defend the judiciary. The courts are therefore vulnerable to strong criticism from the media and politicians. Government criticism of the Federal Court's decisions in migration decisions was a notable example. Other decisions which excited criticism were *Mabo No 2*, *Dietrich v The Queen*<sup>72</sup> and *Wik Peoples v Queensland*,<sup>73</sup> as were sentencing decisions in other courts, which have been casualties in law and order campaigns conducted by politicians and the media.

Strong criticisms of this kind present dangers for judicial independence. What is the purpose of the criticism? Is it simply to express legitimate criticism of the decisions? Is it the sending of a political message to the electorate? Or is it to send a message to the judges? We do not know the answer in particular cases. But we do know that the criticisms may affect public confidence in the administration of justice, a matter that has been recognised by the High Court as an important value or policy consideration of which the court has taken account from time to time.<sup>74</sup> So how is a court to respond? The response must depend upon the circumstances of the particular case.

Although the courts do not take account of public opinion in relation to the outcome of a particular case, in imposing sentences for criminal offences they do seek to take account of the community sense of gravity of the class of offence which has been committed. In *R v Secretary of State for the Home Department, Ex parte Venables and Thompson*,<sup>75</sup> the Home Secretary, in determining the penal element in the child murderers' sentences, had regard to "the public concern about this case...evidenced by...petitions and ...correspondence". The House of Lords held this was a breach of natural justice. Lord Goff of Chieveley and Lord Steyn drew a distinction between public concern of a more general nature (the prevalence of particular types of offence and the need that those who commit such offences should be punished) and particular clamour that a particular offender should be singled out for punishment.<sup>76</sup>

As sentencing is an area in which judges come under constant criticism from politicians, the media and commentators, mainly for being "soft on crime", continuing public confidence in the system seems to require that the courts take some account of community attitudes. Lord Bingham stated that when differences of opinion arise on

72 (1992) 163 CLR 500.

73 (1996) 187 CLR 1.

74 See, for example, *Jago v District Court (NSW)* (1989) 168 CLR 23; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

75 [1998] AC 407.

76 *Ibid* at 491. Lord Lloyd disagreed with this view, saying that genuine public concern over a particular case was relevant, while Lord Browne-Wilkinson doubted that the distinction was a viable one.

issues of sentencing between judges and “an identifiable body of public opinion”, the judges are bound to consider who is right. Spigelman CJ expressed his agreement with this statement.<sup>77</sup> A significant disparity between public opinion and judicial sentencing will eventually throw into doubt the perceived legitimacy of the legal system.

There are a number of imponderables here. What is a significant body of public opinion? How is it to be ascertained? And how are the views of the public on sentencing to be ascertained? Are the judges to accept statements on the issue made by the responsible Minister or the Premier? These are all questions which are directly related to public confidence in the administration of justice, the relationship between the judiciary and other branches of government and judicial independence. However one looks at them, the questions suggest, as does the law-making function of the judges, that the boundary between law and politics is not quite so clear cut as it has been represented to be.

A similar situation arises in relation to the assessment of awards for non-pecuniary damages in personal injury cases. Lord Woolf MR in *Heil v Rankin*<sup>78</sup> said that the compensation “must not be out of accord with what society as a whole would perceive as being reasonable”. Here again, as with other standards and values, the judge is expected to voice what society perceives to be reasonable.

The importance of public confidence in the administration of justice makes it all the more important that courts should be concerned to render decisions that are both legally sound and just, and that judges should identify and justify the standards, values and policy considerations on which they rely. The requirements of accountability, openness and transparency reinforce the necessity for this approach.

This in turn calls for closer attention to the means by which judges inform themselves of these matters. The problems are discussed but not solved by Lizzie Barnes in “Adjudication and Public Opinion”.<sup>79</sup>

Lord Steyn made the traditional distinction between the subjective view of the judge and what the judge reasonably believes the “ordinary citizen” would regard as right.<sup>80</sup> If the distinction is observed, there will be cases where, because the community is divided, it may be difficult to identify an appropriate standard or value.

## Conclusion

The fact that the public or a significant section of it may believe that judges do not or should not make law lends some support to the notion, discussed by Lord Radcliffe, that we should be cautious. On the other hand, the duty of the judge is to reveal fully the reasons for the decision. That duty is a legal duty which is reinforced by the modern emphasis on judicial accountability, transparency and openness. In the long run, full exhibition of the process of reasoning that leads to a judicial decision is likely to promote public confidence in the system, even if it does reveal steps and value judgments which are debatable and may be criticised. Likewise, full exhibition of the reasoning may lead to judgments that are comprehensible because they relate doctrine to its underlying foundations rather than simply discuss complex doctrinal issues without reference to those foundations.

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77 *R v Jurisic* (1998) 45 NSWLR 209 at 222–223.

78 [2001] QB 272 at 294.

79 (2002) 118 *Law Quarterly Review* 600; see also the essay by Justice Rosalie Abella in this collection, “Decision-Making, Public Opinion and Concepts of Rights”, at page 59.

80 See page 6 above.

# Judicial Impartiality: The Impossible Quest?

The Right Honourable Beverley McLachlin PC  
Chief Justice of Canada

Impartiality is seen as an essential component of judicial decision-making. Yet, as human beings, can judges be truly impartial? This essay argues that impartiality — the ability to judge a case fairly — is not the same thing as neutrality — the absence of all preconceptions and personal preferences. It outlines various guides that judges can use to aid their impartial decision-making and suggests that the practice of conscious objectivity enables judges to eliminate inappropriate preconceptions. It concludes that it is only by embracing their humanity that judges can achieve judicial impartiality.

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## The paradox of judging?

I begin with two propositions.

The first proposition is that judges must be impartial. Like the blindfolded figure of *Justitia*, judges must approach their task with absolute neutrality and objectivity. Cool reason, uncontaminated by personal commitments, biases and preconceptions, is essential to fair adjudication of the cases that come before them.

The second proposition is that judges are human beings. As human beings, they do not approach the task of adjudication blindfolded. They arrive at the bench already shaped by their experiences and by the perspectives of the communities that they come from, and they possess convictions and prejudices, just like everyone else.<sup>1</sup> Lord MacMillan emphasised the importance of acknowledging these “attributes of our common humanity” when he wrote:<sup>2</sup>

“...impartiality is not easy of attainment. For a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done.”

Similarly, the great American judge Jerome Frank wrote:<sup>3</sup>

“Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.”

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1 *In re JP Linaban, Inc*, 138 F 2d 650 (1943-2nd Cir), at 651 per Frank J.

2 Lord MacMillan, *Law and Other Things*, 1938, Cambridge University Press, Cambridge, pp 217-218.

3 *In re JP Linaban Inc*, 138 F 2d 650 (1943-2nd Cir), at 652-653 (reference omitted).

These two propositions lead to a paradox. Judges must be impartial. But they are inescapably human, possessed of the loyalties and passions, the convictions and pre-conceptions that are the gifts and afflictions of humanity.<sup>4</sup> In this essay, I shall explore the apparent paradox between the need for judicial impartiality and the humanity of judges. I shall suggest that the paradox is more apparent than real. It is only through recognising and embracing their humanity that judges can achieve true impartiality.

I shall begin by examining what judges do in arriving at their decisions,<sup>5</sup> to illustrate that subjective influences are present at all stages of the judicial decision-making process. I shall then turn to the question of how judges can nevertheless attempt to resolve the difficult issues they face in an impartial manner. I shall argue that judges must not deny their subjectivity. Rather, they must acknowledge it. Only when they accept their human subjectivity will they be in a position to understand how they can achieve the kind of impartiality that the task of judging demands.

### What judges do

Dean Roscoe Pound identified four stages in judicial decision-making:

1. ascertaining the facts
2. finding the law
3. interpreting the legal materials selected
4. applying the resulting legal precept to the cause.<sup>6</sup>

These four stages reflect the basic mental operations that enter into a judgment. They are not sharply distinct from each other, but rather overlap. The facts of a case assist the judge in finding, interpreting and applying the law. Likewise, the characterisation of a matter as falling within a given field of law and the identification of the applicable rule help the judge to identify the facts relevant to the disposition of the case.

At each of these stages of judicial decision-making, impartiality is essential. Yet, at every stage, the possibility exists that the judge's experience and values may influence the outcome. Whom the judge chooses to believe and how the judge selects, defines and applies the relevant legal rules are inevitably affected by the judge's own experience and beliefs.

The obvious fact that judges are human may have seemed less problematic when judges were viewed as discovering the law rather than making it. For years, the declaratory theory of law held sway among lawyers and judges in the common law world. Judges, it was said, did not make law but simply discovered it. Their judgments declared the law as it had always existed. Since judges only declared pre-existing law, their own experiences and values did not enter into the decision-making process or the resulting judgment. The personality of the judge became identified with the office itself;<sup>7</sup> he (for "she" had not yet been appointed to the bench) became a personification of the law.<sup>8</sup>

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4 Not all judges have recognised this. Apparently, upon learning that Lord Selborne LC proposed to begin an address with the words "We, Your Majesty's judges, conscious as we are of our manifold defects", Sir George Jessel MR objected, saying "I am not conscious of manifold defects, and if I were I should not be fit to sit on the bench".

5 I recognise that there is a considerable body of scholarly literature on the nature of legal reasoning and the judicial role, most of which I will not be able to engage with in the short space of this essay. My remarks are intended to be no more than a brief, and admittedly incomplete, overview of some of the issues that arise in connection with this topic.

6 R Pound, "The Theory of Judicial Decision" (1923) 36 *Harvard Law Review* 940 at 947.

7 Y-M Morissette, "Figure actuelle du juge dans la cité" (1990) 30 *Revue de Droit (Sherbrooke)* 1 at 5.

8 M Kirby, "Judging: Reflections on the Moment of Decision", reprinted in this collection, p 43 at p 57.

In the first half of the twentieth century, this vision of the judicial role was challenged. The legal realists argued that judges make law both in explicating the common law and in interpreting legislation. They also asserted that the judge's experiences, values and ideas were just as important to judging as his or her legal education.<sup>9</sup>

The true nature of judging seems to me to lie somewhere between the myths of the declaratory theory and the model that sees judicial decision-making as the idiosyncratic application of personal preferences. While judges "make law", they do so only in a small proportion of the cases they decide. Judges do not make law in every case, or indeed in very many. The existing rules provide the answers for the vast majority of cases that come before the courts. Judges are also constrained by the cases that come before them and are called on to "legislate" only interstitially,<sup>10</sup> to fill gaps in the law<sup>11</sup> and to make rules where a rule there must be.<sup>12</sup> Moreover, in the limited number of cases where judges "make law", they operate within the constraint of principles. Although, subjective forces inevitably exert influence, the judge's decision must be rational and supported by reasons; it cannot be arbitrary.<sup>13</sup>

This said, the judicial role of fact-finding and fact-weighting, combined with the need to resolve legal uncertainties when they arise, raises in stark terms the question of whether human judges can indeed be impartial. The bromides of judicial rectitude and neutrality do not obviate the hard question: how can judges, as human beings, be impartial?

The answer, I will suggest, lies in two processes, both well known to experienced judges. The first process is reference to various guides that direct the judge in correctly identifying and defining legal norms. The second process is the practice of conscious objectivity.

### Guides for judicial decision-making

Let me turn first to four sources of guidance for judges when they face difficult questions for which there is no single clear and correct answer:

- historical context
- current context
- recognised methods of logical reasoning
- an appeal to one's sense of what is just.

One important source of guidance for judges is *historical context*, that is, how the law on a certain issue has historically developed. Judges faced with uncertainty in the law must make a decision. Usually, two or more solutions are possible. The starting point for judges, in choosing between alternative solutions in hard cases, is an understanding of the historical evolution of the law in the area in question. How has the particular problem developed? Which of the proposed solutions best respects the history of the law on the general subject?

9 See, for instance, R Pound, "Law in Books and Law in Action" and "The Call for a Realistic Jurisprudence", and Karl N Llewellyn, "A Realistic Jurisprudence — The Next Step" and "Some Realism About Realism — Responding to Dean Pound", all reprinted in W Fisher III, MJ Horowitz and TA Reed (eds), *American Legal Realism*, 1993, Oxford University Press, Oxford.

10 *Southern Pac Co v Jensen*, 244 US 205 (1917), at 221 per Holmes J dissenting.

11 In the views of some scholars, however, there are very few gaps to be filled: see Professor R Dworkin, "On Gaps in the Law", in P Amselek and N MacCormick (eds), *Controversies about Law's Ontology*, 1991, Edinburgh University Press, Edinburgh, p 84.

12 Y-M Morissette, "Deux ou trois choses que je sais d'elle (la rationalité juridique)" (2000) 45 *McGill Law Journal* 591 at 598.

13 MDA Freeman, *Lloyd's Introduction to Jurisprudence*, 6th ed, 1994, Sweet & Maxwell, London, p 1257.

A second source of guidance is the *current context*, namely, the social or economic reality in which the decision is being made. Judging does not simply involve the application of abstract principles. A judge's decision impacts directly and indirectly on peoples' lives and on the economic, social and constitutional development of the nation. It follows that a good judge must consider not only the past law, but also the ways in which choosing this or that alternative will play out in the real world. In analysing the current context, a judge relies on expert evidence, experience and common sense.

A third source of guidance for judges is provided by *recognised methods of reasoning*, such as deduction and induction. Deductive reasoning helps judges to decide how to apply a general rule in a particular case. Inductive reasoning may assist judges in identifying the appropriate general rule. Often inductive and deductive reasoning are used together. Past cases and hypothetical situations are analysed inductively to test how far a certain norm extends, or ought to extend; the judge then reasons deductively to apply that norm to the case at hand. Reasoning by analogy is an indispensable part of both inductive and deductive reasoning. The comparison of like and unlike permits judges to determine the extent of similarity and dissimilarity between cases for the purpose of induction, and helps the judge to determine whether a case is a particular instance of a general rule.

Finally, the judge facing a difficult problem is often guided by his or her *sense of fairness or justice*. I refer here not to justice as a general virtue of character, involving a concern with the common good — or what Aristotle identified as “general justice”.<sup>14</sup> Rather, I have in mind something closer to Aristotle's concept of “special justice”, which is more narrowly focused on the fair and equal treatment of citizens in a just political order. According to Aristotle, “special justice” has two components. It involves, firstly, a concern with the fairness of distributions of benefits and burdens — or what we now call “distributive justice”. And it involves, secondly, a concern with the rectification of rights-violations — or what we now call “corrective justice”. Both of these components of special justice are of assistance to judges facing difficult cases. Through their experience, both legal and non-legal, judges come to have a sense of what justice requires in a particular case, and they look to this to guide their interpretation and application of particular legal rules.

### **Influence of subjective elements**

The four guides of historical context, current context, methods of logical reasoning and a sense of justice provide invaluable assistance to the judge facing *lacunae* in the law. Yet — and this returns me to the theme of this essay — they do not ensure that the judge has reasoned in a manner that is free from partiality and bias. This is because each of the four guides leaves room for the judge's decision to be influenced by certain subjective elements. These four guides do not function like Turing machines, turning out a ready-made answer when provided with certain input. Rather, they require the judge to use his or her own judgment at certain crucial stages. And so they open the possibility that the judge will be influenced by subjective preferences or biases in an unacceptable way.

The first guide, *historical context*, may seem to leave little room for the judge's subjective preferences. Competent legal scholars, one might think, should be able to agree on the historic evolution of a particular area of the law. Yet the matter is not so simple. Often, the judge faced with uncertainty in the law will discover that the historical direction of the

<sup>14</sup> See Aristotle, *Nicomachean Ethics*, Book V, Ch III, 1129b15–1130a15 (for general justice) and 1130a15–1130b5 and 1130b30–1131a10 (for special justice).

law is not clear; indeed, it is this lack of clarity that often produces the uncertainty. The cases may conflict. Some judges may have followed one line of authority, while others may have taken other paths. The judge seeking direction must evaluate the different approaches prior judges have taken, and must ultimately find reasons for preferring one over the other or develop a solution that combines elements of both. In doing this, the judge comes face to face with his or her subjectivity. Instincts, predilections and biases may affect the approach the judge takes, and may make a difference to the conclusions the judge ultimately reaches.

The second guide, *current context*, also leaves room for the judge to be influenced by certain subjective elements. Indeed, the current context can arguably function as a guide only to the extent that the judge looks to personal knowledge and experience of human nature. In assessing expert evidence and the testimony of witnesses, for instance, judges must make decisions about credibility and draw inferences from the evidence they accept — and they cannot do this without drawing on their general knowledge of human behaviour. For instance, the shared knowledge that a normal person intends the natural consequences of his or her actions allows judges and jurors to infer the existence of certain mental states from proof of an accused's actions.<sup>15</sup> This is merely common sense. Likewise, in instructing jurors on the notion of reasonable doubt, we describe it as a standard “based on reason and common sense”.<sup>16</sup> Common sense and experience are also indispensable in the judicial fact-finding process. As Paccioco and Struesser write, “...the trier of fact is entitled to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact”.<sup>17</sup> And it is essential for judges to apply common sense and human experience when assessing the effects a decision might have on the parties, on other legal rules and, more generally, on the reputation of our system of justice. Yet if a judge is not careful, his or her common sense analysis may be guided by personal preferences and prejudice, rather than impartial views.

Nor can the third guide — the *recognised methods of logical reasoning* — prevent the judge from reasoning in a manner that is prejudicial or partial. Despite the privileged position that logical argument assumes in judicial reasoning, it too leaves room for the influence of subjective elements. It may have been true in Shakespeare's time that, at least in the formal schools of thought, “Reason and love [kept] little company together”.<sup>18</sup> But today, scholars in many fields argue that reason is not a faculty separate from the emotions, and they emphasise that even the most abstract exercises of reasoning are responsive to our emotions.<sup>19</sup> The psychologist Bruno Bettelheim put this most poignantly when he wrote: “The daring heart must invade reason with its own living warmth ... Our hearts must know the world of reason, and reason must be guided by an informed heart.”<sup>20</sup> This is no less true in the legal domain than it is in everyday life. Amongst judges, “[t]he reasoning process cannot be isolated and set to work in an emotional vacuum”.<sup>21</sup> And indeed, many judges have recognised this. Lord Radcliffe emphasised the interpenetration of reason and the emotions when he wrote:<sup>22</sup>

15 See *R v Robinson* [1996] 1 SCR 683; *R v Seymour* [1996] 2 SCR 252.

16 *R v Lifchus* [1997] 3 SCR 320 at [39].

17 DM Paccioco and L Struesser, *The Law of Evidence*, 3rd ed, 2002, Irwin Law, Toronto, p 423.

18 Shakespeare, *A Midsummer Night's Dream*, Act III, scene i.

19 See, for example, J Nedelsky, “Embodied Diversity and Challenges to Law” (1997) 42 *McGill Law Journal* 91 at 101-103.

20 B Bettelheim, *The Informed Heart: Autonomy in a Mass Age*, 1973, c 1960, Avon Press, New York.

21 BL Shientag, “The Virtue of Impartiality” in JR Winters (ed), *Handbook for Judges: An Anthology of Inspirational and Educational Writings for Members of the Judiciary*, 1975, American Judicature Society, p 59.

22 Lord Radcliffe, Introduction to Radcliffe, *Not in Feather Beds*, 1968, H Hamilton, London, p xvi, quoted in Kirby, *op cit* n 8, p 57.

“There was a time...when I believed that a man possessed a separate intellectual or logical power, his reasoning faculty, independent of his other powers or his dispositions, and that it was his highest duty as a man to accord pre-eminence to that power...That belief has not persisted with me. It seems to me that thinking is a function of the whole of one’s personality, with all the interplay of emotions and experiences that in time claim and receive recognition from one’s reason; so that reason either becomes a term so comprehensive that it embraces everything that conditions one’s thought, or else remains an isolated analytic or deductive faculty which does not in practice determine by any means all one’s opinions or views.”

Justice Michael Kirby of the High Court of Australia expressed a similar view when he wrote:<sup>23</sup>

“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 may be only partly aware.”

Reasoning by analogy, in particular, is not a value-free exercise.<sup>24</sup> A determination is required as to the requisite degree of similarity that justifies treating different cases as instances of the same rule. There is, however, no fixed rule that logically supplies this determination.<sup>25</sup> Judges must rely on other sources of knowledge, such as shared knowledge or expert opinion, in deciding whether the similarity between two or more matters is greater than the difference.<sup>26</sup>

So it seems clear that the judge using the tools of legal reasoning is not engaging in a purely abstract analytical exercise, into which no subjective elements can enter. The tools of logical deduction, induction and analogy engage the entirety of the judge’s faculties, including his or her values, beliefs and preconceptions.

This leaves the fourth of the guides I mentioned above, the *judge’s sense of justice*. We should not underestimate the degree of social consensus that can often be found on whether a particular outcome is “just” or “fair”. Nevertheless, the fact remains that in complex situations where conflicting values are involved, what is just may be far from clear. One’s view of justice may vary depending on the weight one assigns to different factors. And the weight one assigns to different factors often depends, at least in part, on one’s own values, and on which other individuals’ or groups’ perspectives one is acquainted with.

We thus arrive at this conclusion. Judges deciding facts and difficult issues of law can find assistance in the recognised guides to resolving the problem before them. They should look at the historical context of the law. They should look at the current context of the problem and how a particular solution will impact on the lives of men, women and children, and the collective well-being of the community, the nation and the global community. They should ensure that their reasoning processes are valid, and they must end by asking themselves whether the decision they propose to make is just and fair. But while these steps will ensure that all aspects of the problem are considered, they do not guarantee freedom from subjectivity. To attain true impartiality, the judge must look further.

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23 Kirby, *op cit* n 8, p 58.

24 M McHugh, “The Law-making Function of the Judicial Process” (1988) 62 *Australian Law Journal* 15 at 17.

25 EH Levi, *An Introduction to Legal Reasoning*, 1949, University of Chicago Press, Chicago, p 3.

26 *Ibid*, pp 5-6.

## The practice of conscious objectivity

In my view, it is only by deliberately setting out to practise what I call “conscious objectivity” that the judge can ensure that he or she has minimised the dangers of unrecognised prejudice and bias. The practice of conscious objectivity requires us to recognise certain truths and to adopt certain attitudes. I shall now discuss what some of these attitudes seem to me to involve.

We must, firstly, recognise that judges, like all human beings, possess personal preferences and predispositions which have the potential to skew the judging process and create injustice. Our review of the tools of legal reasoning and their use in the process of judging has shown us that certain subjective influences — including general beliefs about the world and about human nature, a wide range of emotions, and a sense of justice — are an inescapable part of judicial decision-making. Along with the need for judges to rely upon these subjective elements comes the risk that certain *unacceptable* subjective elements, such as prejudices and biases, will enter into the decision-making process. Judges are not social or political eunuchs.<sup>27</sup> They are individuals with their own identities, cultural backgrounds, gender, race, religion, sexual orientation and political beliefs. All these inform the judge’s experiences and the way the judge sees the world; and all of these open the possibility that the judge’s reasoning or decision will be based on an illicit consideration. As Justice Frank noted:<sup>28</sup>

“We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices...every judge...unavoidably has many idiosyncratic ‘learnings of the mind,’ uniquely personal prejudices, which may interfere with his fairness at trial.”

Or as Lord MacMillan stated:<sup>29</sup>

“[A judge] must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of argument.”

Does the fact that all legal minds are subject to innate susceptibilities and prejudices, or the fact that the four guides to legal reasoning each leave room for subjective elements, imply that judicial impartiality is impossible? I think not. It may suggest that neutrality, or the absence of any subjective element, is impossible. But in my view, we need to distinguish *neutrality* from *impartiality*.<sup>30</sup> Impartiality does not, like neutrality, require judges to rise above all values and perspectives. Rather, it requires judges to try, as far as they can, to open themselves to *all* perspectives.

This distinction between neutrality and impartiality is a crucial one, and so is worth exploring in some detail. “Neutrality”, in the sense that I am concerned with, requires the absence of all preconceptions and personal preferences. It can best be understood in terms of the metaphor of the blank slate — the *tabula rasa*. “Impartiality”, by contrast, describes the ability to raise above the flurry of conflicting views, and to judge a matter fairly, taking into account all of the perspectives engaged. Neutrality requires an empty mind. But impartiality requires an open mind, which is different. Impartiality lies not in

27 JAG Griffith, *The Politics of the Judiciary*, 1977, Manchester University Press, Manchester, pp 187–190; see also B Wilson, “Will Women Judges Really Make a Difference” (1990) 28 *Osgoode Hall Law Journal* 507 at 509.

28 *In re JP Linaban Inc*, 138 F 2d 650 (1943–2nd Cir), at 651–652.

29 MacMillan, op cit n 2, p 218.

30 See *R v S (RD)* [1997] 3 SCR 484 per L’Heureux-Dubé J and McLachlin J, for a detailed discussion of the difference between neutrality and impartiality.

the absence of preconceptions and opinions but in the capacity to entertain and act on a number of different points of view.<sup>31</sup> And this capacity, far from requiring a mind that is a *tabula rasa*, in fact demands a mind that is vigorously engaged with particular perspectives and capable of imagining itself into a variety of other perspectives.

This conception of impartiality differs strongly, both in the metaphors it employs and in the processes of reasoning it envisions, from a view of impartiality commonly discussed in philosophical circles — namely, the view developed by Thomas Nagel.<sup>32</sup> Nagel sees impartiality as being achieved through a process of stepping back from one's own motives to occupy an impersonal point of view — as he puts it, a “view of the world from nowhere within it”. While the impartial judge must step back from her own motives, she cannot escape engagement with particular perspectives within the world. To adjudicate impartially is to adjudicate using reasons and principles that all of the parties could accept as fair, from *within* their different perspectives. This requires, not a detachment from the reasons or values that appear to us from particular perspectives, but an ability to imagine them all, in their full particularity.

Given that judges are human beings, and that, as I have argued, their human subjectivity infuses all steps of the judging process, neutrality is not a viable ideal for judges. Judges can never be neutral. They cannot hope to erase the particular amalgam of experience, learning and judgment that defines them as human beings. Indeed, we would not want them to do so if they could. For as we have seen, it is precisely this amalgam of experience, learning and judgment that fits them for the task of adjudicating disputes in a manner that is fair and wise.

Judges can, however, be impartial. For impartiality does not require that we adopt a “view from nowhere”. On the contrary, it relies on our close connection with the community in which we judge and its core values. It requires us to cultivate detachment only in the sense that we must try always to increase our awareness of our own preconceptions, and to see that our minds are open to other perspectives and amenable to persuasion.

I have now suggested that the first step in the practice of conscious objectivity is to recognise that one brings certain predispositions to a case and cannot hope to approach the case with an “empty mind”. Judges must reject the ideal of neutrality and embrace the different ideal of impartiality.

The next step in the practice of conscious objectivity is to identify the particular predispositions that may prevent one from achieving impartiality. Many of a judge's predispositions are valuable — for instance, predispositions to fairness, equality, and protection of the weak and vulnerable. These are recognised by the law and hence should be retained. As Justice Scalia pointed out in *Liteky v US*, some types of bias are useful.<sup>33</sup>

“Not all unfavorable disposition toward an individual (or his case) is properly described by [the] terms [bias or prejudice]. One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess (for example, a

31 *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, 1990, pp 26-27 <[http://www.cjc-ccm.gc.ca/english/inquiry\\_reports.htm](http://www.cjc-ccm.gc.ca/english/inquiry_reports.htm)>.

32 See T Nagel, *The View From Nowhere*, 1986, Oxford University Press, New York; and T Nagel, *Equality and Partiality*, 1991, Oxford University Press, New York.

33 *Liteky v US*, 114 S Ct 1147 (1994), at 1155; see also M Omatsu, “The Fiction of Judicial Impartiality” (1997) 9 *Canadian Journal of Women and the Law* 1 at 6.

criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts)."

Hence, while the judge must ensure that inappropriate preconceptions are removed from the process, the judge need not — and indeed, should not — bracket these with the many legitimate preconceptions that will help in deciding the case. As was stated in *R v S (RD)*:<sup>34</sup>

"[it is]...inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence."

Values and principles entrenched in our legal system, such as equality or the presumption of innocence, do not prevent a judge from being impartial. A "bias against bias",<sup>35</sup> for example, is not a judicial bane but a boon. Predispositions that reflect the rule of law and justice are not wrongful or inappropriate; indeed, they assist the judge in applying the law impartially.

On the other hand, preconceptions that run counter to the law and fair legal process must be rejected. Judges, despite their efforts, may harbour unidentified biases against people of particular races, classes or genders. They may have unwittingly bought into generalisations that people of a certain class, race or gender are likely to act in a certain way — what we call stereotypes. Or they may have accepted views about the way the world, and hence the law, should evolve — views that may not be compelled by or reflected in the law. These preconceptions find no place in good judging. Eliminating them is not easy. Indeed, it is perhaps the greatest difficulty judges face.

I have suggested that the practice of conscious objectivity requires:

- recognising that one does not bring a neutral, empty mind to the process of judging
- identifying one's preconceptions
- attempting to eliminate illegitimate preconceptions from one's reasoning.

These goals are easily stated. Their actual attainment, however, is much more difficult. It requires constant attention to the processes involved in rendering a particular factual or legal conclusion. And it requires that the judge cultivate certain attitudes and dispositions — in particular, introspectiveness, openness, empathy, and a healthy and serene mind. I will deal briefly with each of these attitudes.

### Introspectiveness

The first attitude that the judge must cultivate is introspectiveness. A judge must be willing to take moral stock of herself.<sup>36</sup> As Justice Frank put it:<sup>37</sup>

"The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect ... The concealment of the human element in the judicial process allows

<sup>34</sup> [1997] 3 SCR 484 at [29].

<sup>35</sup> L Hand, *The Spirit of Liberty*, 1952, Alfred A Knopf, New York, p 218.

<sup>36</sup> A Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 *Harvard Law Review* 16 at 56.

<sup>37</sup> *In re JP Linaban, Inc*, 138 F 2d 650 (1943-2nd Cir), at 652-653.

that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny prevent the operation of this class of biases.”

Similarly, Chief Justice Barak of the Supreme Court of Israel writes that a judge “must be capable of looking at himself from the outside. He must be capable of analyzing, criticizing and controlling himself.”<sup>38</sup> The purpose of introspection is to obtain a clearer understanding of the individual judge’s mental and ethical susceptibilities.

Introspection involves an assessment of the judge’s own values, beliefs and ideas in relation to those expressed in the legal system. Where there is convergence between the judge’s values, beliefs and ideas, and the law’s values, there is no risk of partiality. On the other hand, where there is divergence, the judge must make a conscious effort to see that personal values do not lead unjustly to the favouring of a particular party or position. The judge must accept that the price of judicial office is that the law must supersede personal loyalties.

### Openness

The second attitude the good judge must possess is openness. The judge’s mind must be open and receptive to ideas and arguments that may compete with the judge’s personal preconceptions. This willingness to receive and act upon new and different ideas, arguments and views lies at the heart of true impartiality.<sup>39</sup> Impartiality implies an appreciation and understanding of the different attitudes and viewpoints of the parties to a controversy.<sup>40</sup> Litigants can have no absolute expectation that their perspective will be determinative. But they have an unqualified right to a judge who will truly *bear* them and who is willing to be convinced by views different from his or her own. Professor Nedelsky describes the openness at the heart of impartial judging as requiring an “enlargement of the mind”.<sup>41</sup>

“What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an ‘enlargement of mind’. We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective, whether through fear, anger or ignorance. It is the capacity for ‘enlargement of mind’ that makes autonomous, impartial judgment possible.”

### Empathy

A disposition to openness or “enlargement of mind” is linked to the third attitude necessary to good judging — empathy. Empathy emphasises the common humanity of us all — judges, litigants, witnesses and all other participants in the justice system. It is the ability to see the world from the perspective of others and become engaged in their experience.<sup>42</sup> Empathy recognises the legitimacy of diverse experiences and viewpoints. Justice Bertha Wilson wrote that judges must, or at least earnestly attempt to, “enter into

38 Barak, op cit n 36 at 56.

39 Canadian Judicial Council, *Commentaries on Judicial Conduct*, 1991, Yvon Blais, Cowansville, Quebec, p 12; *Report to the Canadian Judicial Council*, op cit n 31, pp 26-27.

40 Shientag, op cit n 21, pp 57-58.

41 Nedelsky, op cit n 19 at 107.

42 KL Karst, “Judging and Belonging” (1988) 61 *Southern California Law Review* 1957 at 1966.

the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge".<sup>43</sup> The judge, by an act of imagination, should systematically attempt to imagine how each of the contenders sees the situation. This is critical to impartiality and openness.

Empathy does not require one to adopt a particular cause. It simply allows the judge to truly hear the parties who appear before him or her. Empathy of this sort sustains rather than defeats impartiality:<sup>44</sup>

“The same empathy that permits the judge to imagine that parties’ experiences and thoughts and feelings also underlies his or her capacity for principled detachment — that is, a capacity for the only kind of objectivity we can properly expect. Empathy and objectivity are two names for a disposition that is essential to the successful practice of the judicial art.”

### A healthy and serene mind

The final prerequisite for the practice of conscious objectivity is a healthy and balanced mind. The tired judge, the sick judge or the distressed judge may be unable to summon the energy required for the introspective and open processes of mind I have been discussing. The overwrought mind may seize prematurely on the “obvious” solution, and the stressed psyche may not perceive inappropriate attitudes and preconceptions.

Keeping a healthy mind and positive attitude is not always easy for the modern judge. Today’s judges face extraordinary pressures. Physiological and psychological stress are part of the job. The work is demanding, both intellectually and emotionally. Judges deal with the most difficult human situations and the most intractable social problems, and the consequences of an incorrect or unjust decision can be enormous. Moreover, there is usually a great deal of work. Judges today face tremendous case loads.<sup>45</sup> Judges routinely bring work home for the evenings and weekends. This in turn puts pressure on their private and family lives.

The isolation and loneliness of judicial office is yet another problem.<sup>46</sup> The modern judge is more involved in the community than was once the case. Yet, judicial life inevitably increases isolation. The judge emerges from congratulatory appointment celebrations to discover that the phone no longer rings. Valued relationships become less intimate; some may end. Even long-term friends seem deferential and distant. Conversations are mutually self-censored and communication becomes more difficult. Of course the judge has judicial colleagues. But heavy case loads may leave little time for meaningful exchange.

High profile cases, where a judge is subject to intense public scrutiny, intensify these problems. The difficult task of judging becomes ever more so when one’s every twitch or blink is under the eye of the press and the public. Open courtrooms and public scrutiny are essential to ensuring that justice is not only done but is also manifestly and undoubtedly seen to be done. Criticism of judicial decisions and judicial conduct is appropriate in a healthy democracy. But the fact remains that commentary can be inaccurate, unfair, personal and hurtful. The judge cannot reply or set the record straight, but must suffer in silence. None of this is easy.

<sup>43</sup> Wilson, op cit n 27 at 521.

<sup>44</sup> Karst, op cit n 42 at 1966.

<sup>45</sup> IM Zimmerman, “Isolation in the Judicial Career” (2000) 36(4) *Court Review* 4; see also Kirby, op cit n 8, pp 55–56.

<sup>46</sup> Ibid.

Finally, there is the “aftermath” — the cumulative effect on the psyche of dealing day in and day out with the petty tragedies that mar the world. Judges live the reality of the cases they judge — the pain of family breakdown, child abuse and violence. The experiences may haunt, sometimes for years, and their cumulative effect may make it hard to see the bright side of life. Judges cannot give free reign to their emotions. But nor should they bottle them up and ignore them. Too often that is the path to breakdown.

To combat the stresses of judging and maintain the serenity essential to good judging, judges must acknowledge that they are human beings, first and foremost. They must learn to recognise the signs of overwork and stress and deal with them before they affect the impartiality of their decisions. They must adopt practices that assist in dealing with the pressures of heavy workload, isolation, intense public scrutiny, and disturbing and difficult cases,<sup>47</sup> and learn to use these experiences in their quest to become better judges.

## Conclusion

Judges are fortunate. They enjoy the enormous privilege of helping people and serving justice. Their work is challenging and fulfilling. And each day on the bench brings before them humanity in all its diversity and richness. But every judge should remember that the judged are not the only human element in the process. The judge too is human. The judge must not turn a blind eye to his or her humanity. On the contrary, good judges acknowledge their humanity and embrace it. Being human does not prevent judges from being impartial. Rather, it is the precondition of impartiality.

I want to end with a true story, which illustrates just this. The story is told by the neurologist and writer Dr Oliver Sacks. It concerns a judge who found himself completely bereft of emotional responses as a result of brain damage inflicted by shell fragments. In the words of Dr Sacks:<sup>48</sup>

“It might be thought that the absence of emotion, and of the biases that go with it, would have rendered him more impartial — indeed, uniquely qualified — as a judge. But he himself, with great insight, resigned from the bench, saying that he could no longer enter sympathetically into the motives of anyone concerned, and that since justice involved feeling and not merely thinking, he felt that his injury totally disqualified him.”

This judge recognised what seems to me to be the deepest truth: that the humanity of judges is what makes good judging possible.

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47 See Zimmerman, op cit n 45 at 6; and C Schmitz, “Judges in Distress, Psychologist Finds in Survey”, *The Lawyers Weekly*, 23 August 2002, pp 1-2.

48 OW Sacks, “An Anthropologist On Mars”, in *An Anthropologist On Mars*, 1995, Picador, London, p 274.

# Unconscious Judicial Prejudice<sup>†</sup>

The Honourable Justice Keith Mason AC  
President, New South Wales Court of Appeal

Unconscious prejudices, whether inherited, learnt or acquired, can influence judicial decision-making and conflict with the duty of judicial officers to be neutral and impartial. This essay explores how bias, prejudice and cognitive illusions interact with the judicial duties of neutrality and impartiality. It proposes two solutions for unconscious prejudice. The first involves judges recognising the nature and extent of any predispositions they have. The second entails creating a more representative judiciary to ensure that different voices contribute to judicial debate.

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## Introduction

*“We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”<sup>1</sup>*

At a recent service to mark the opening of the law term in Sydney the choir sang an extract from Psalm 19 that included the verse: “Who can know his own unwitting sins?”

I leave to others the theology of unwitting sin. In the law, we all know that good intentions are not always enough to avoid liability. Even well-intentioned judges can slip up on occasions, except perhaps if they are members of an ultimate court of appeal.

My paper addresses unconscious prejudice, which can affect how judges act and think generally. It can also be the source of specific error. A major part of the problem is its very invisibility.

As judges, our sworn duty is to administer justice according to law, not private whim. We are guardians of a tradition that is not of our own making and we err if we see the law in our own image.

Nearly all of the time, the judicial task is to ascertain relevant legal principles and to apply them to the controversy at hand. These principles supply the substance of the law to be applied and the procedure by which it is to be administered. The insights of the Realist school, tinges of pride as a “fresh” insight is perceived, and the ever-present temptations of postmodernism do not free the judge from the obligation to apply the given corpus of legal principles.<sup>2</sup> Even when performing the exceptional task of determining the law in a “new” area, the judge is severely restrained by the judicial method.

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<sup>†</sup> This is a revised version of a paper published in (2001) 75 *Australian Law Journal* 676.

<sup>1</sup> BN Cardozo, *The Nature of the Judicial Process*, 1921, Yale University Press, New Haven, p 13.

<sup>2</sup> Cf Kitto J’s reference to “the waters of the common law — in which, after all, we have no more than riparian rights”: *Rootes v Shelton* (1967) 116 CLR 383 at 387.

Sitting in public and producing reasons for judgment help ensure that a judge remains faithful to the task. Appellate review and majority rule within appellate courts promote conformity. Mistakes in determining legal rules will still occur, but they are usually the product of oversight, not wilful blindness.

In all of these ways the judicial system strives for a “government of laws, not of men”. But it is men and women enjoying judicial independence who administer justice, not automata or computers.

Mr Justice Frankfurter once wrote that a judge:<sup>3</sup>

“must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.”

Significantly for my theme, Frankfurter added:

“But it is true that reason cannot control the subconscious influence of feelings of which it is unaware.”

### **Judicial impartiality and neutrality**

Judicial neutrality is a central tenet of the rule of law. Judges are sworn to administer the law without fear, favour, affection or ill will. The right to a fair hearing by an impartial tribunal is a fundamental right guaranteed by numerous Conventions and most Constitutions. Neutrality and impartiality also serve utilitarian goals, because they promote accuracy of decision-making and reduce enforcement costs through greater public acceptance of decisions. Public confidence depends upon the impartial administration of justice.

“Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal.”<sup>4</sup>

The essence of adversarial procedure was identified by Lon Fuller as participation in the decision-making process by the presentation of reasoned proofs by partisans before a neutral umpire.<sup>5</sup> Many legal principles encourage judicial neutrality. The two branches of the rules of natural justice are prime examples. So too are the law of contempt, many exclusionary rules of evidence, rules against judges descending into the arena, and the judicial duties to sit in public and give reasons.

Where there is proven bias or even the appearance of bias, a judicial decision will be set aside. Subject to waiver or necessity, decisions made by judges in circumstances where a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question will be set aside.<sup>6</sup>

This is all familiar territory. My task goes further, because the duties of neutrality and impartiality are concerned with more than avoiding the appearance of bias or even

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3 *Public Utilities Commission of the District of Columbia v Pollak* 343 US 451, 466 (1952).

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

5 L Fuller, “The Forms and Limits of Adjudication” (1978) 92 *Harvard Law Review* 353.

6 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].

the risk of actual bias being found. They are also ethical duties and they go beyond compliance with external yardsticks like the rules of evidence, procedural fairness and the like, however much those yardsticks promote impartiality.

In 1997 controversy erupted in Canada over remarks by Justices L'Heureux-Dubé and McLachlin in *R v S (RD)*<sup>7</sup> where they distinguished judicial impartiality and judicial neutrality.<sup>8</sup> A Youth Court judge in Nova Scotia had acquitted a (black) youth on charges of assaulting a (white) police officer. The judge (Corinne Sparks) was the only black judge in Nova Scotia. In her *ex tempore* reasons acquitting the accused and in response to the prosecution's submission "why would he lie?", the judge observed that "police officers have been known to [mislead the court] in the past" and that "certainly police officers do overreact, particularly when they are dealing with non-white groups". The question whether she should have disqualified herself was debated all the way up to the Supreme Court of Canada.

Three dissenting justices in the Supreme Court (Lamer CJ, Sopinka and Major JJ) concluded that the judge's comments had stereotyped all police officers as liars and racists, and had applied the stereotype to the officer in the present case. They held that this was impermissible propensity reasoning that was not based on evidence relating it to the officer in question. It was reasoning about police officers that was "no more legitimate than the stereotyping of women, children or minorities".<sup>9</sup>

However, the majority in the Supreme Court rejected the claim of reasonable apprehension of bias. But their reasons diverged sharply. Two members of the majority (Cory J, with whom Iacobucci J agreed) thought the remarks unfortunate and very close to the line, but concluded that they did not give rise to a reasonable apprehension of bias when read in context. The five judges already referred to (the three in dissent and two of the majority) agreed that Judge Sparks' "life experience" was not a substitute for evidence in the matter at hand, that is, determining the veracity of the particular police officer allegedly assaulted.

By contrast, L'Heureux-Dubé and McLachlin JJ (with whom Gonthier J and La Forest J agreed) saw nothing wrong with the trial judge's approach to her task. In explaining their reasons, they distinguished between judicial impartiality and judicial neutrality. They said that "while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality".

The test for reasonable apprehension of bias recognised

"as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence".<sup>10</sup>

These four justices said that the hypothetical reasonable bystander would recognise and understand that:

"triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in

<sup>7</sup> [1997] 3 SCR 484; (1997) 151 DLR 4th 193.

<sup>8</sup> See DA Ipp, "Judicial Impartiality and Judicial Neutrality: Is There a Difference?" (2000) 19 *Australian Bar Review* 212; RF Devlin and D Pothier, "Redressing the Imbalance: Rethinking the Judicial Role After *R v RDS* (2000) 31 *Ottawa Law Review* 1.

<sup>9</sup> *R v S (RD)* [1997] 3 SCR 484 at 499; (1997) 151 DLR 4th 193 at 205.

<sup>10</sup> *Ibid* at 501; 206-207.

the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.”

Unlike some commentators,<sup>11</sup> my impression is that the opposing views expressed in *S (RD)* are not that far apart and that the differences are partly semantic. The furore that the case created was the product of its facts and would not have occurred if the trial judge’s suppositions had related to a less sensitive area. The real points of disagreement seem to lie in:

1. the application of the doctrine of judicial notice to racism and police conduct in Canadian society
2. the impropriety of trial judges deciding credibility issues by reference to generalisations about how classes of people behave.<sup>12</sup>

As I read the joint judgment of L’Heureux-Dubé and McLachlin JJ, judicial neutrality and judicial impartiality were distinguished because neutrality was seen as a human impossibility. Be that as it may, six of the justices in *S (RD)*<sup>13</sup> endorsed the following statement of the Canadian Judicial Council:<sup>14</sup>

“the need for neutrality of attitude and expression...does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.”

Much more controversial was the extra-judicial suggestion of L’Heureux-Dubé J that:<sup>15</sup>

“Judges should not aspire to neutrality. When judges have the opportunity to recognize inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so.”

I believe that such an *aspiration* becomes debatable if it is taken outside of a context, like Canada, where broad equality rights are constitutionally entrenched.<sup>16</sup> It is one thing to recognise human differences in outlook, experience and vulnerability and to apply such perception in the neutral application of legal rules. It is another to see the judicial function as directly concerned with reversing inequalities except when there is a clear pre-existing mandate. Judges must do right to all manner of people. Nevertheless, fresh

11 See Ipp, *op cit* n 8.

12 Compared with the propriety of appellate courts formulating and reformulating legal principles based upon conclusions about the way groups of people are likely to behave: cf *McKinney v The Queen* (1991) 171 CLR 468, *Garcia v National Australia Bank Ltd* (1998) CLR 395 and cases re corroboration of sexual complainants.

13 La Forest, L’Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.

14 *Commentaries on Judicial Conduct*, 1991, Les Editions Yvon Blais Inc, Quebec, p 12.

15 C L’Heureux-Dubé, “Reflections on Judicial Independence, Impartiality and the Foundations of Equality” in *Centre for the Independence of Judges and Lawyers Yearbook No 7*, 1999, p 106.

16 *Canadian Charter of Rights and Freedoms*, s 15. This linkage was recognised by the learned judge at 95 and 101 of her article and it appears to have been the springboard for her remarks.

insights may reveal or confirm the unintended discrimination of facially neutral legal principles. The judge who shuts his or her eyes to such revelation may merit criticism for failing to give effect to higher legal principles posited upon true equality.

Even the most rule-bound judge or the most strict and complete legalist decides cases in context. The common law may develop but incrementally, but it does respond to the felt needs of society of the day and the informed perceptions of the judiciary, acting collegially through appellate processes.

I suggest that the real tension within the judgments in *S (RD)* relates to the application of the doctrine of judicial notice. Prejudice or its appearance can occur in fact-finding as well as the determination of legal principles. But in neither field does it walk out self-announced. Judges may nevertheless disclose general attitudes, sometimes intentionally sometimes unintentionally. With fact-finding, predispositions may appear in stated or unstated suppositions that influence the judge at the point of decision in relation to classes of witnesses (for example, police, plaintiffs from a particular ethnic background, children, sexual complainants or persons accused of crime). Such suppositions may relate to the credibility of classes of witnesses (as in *S (RD)*), but they can affect other factual decisions. Thus, attitudes about the value of domestic work or the likelihood of women remaining in the workforce may have a significant impact in damages assessment, sometimes unawares.

Usually, general suppositions about classes of people are themselves based upon underlying attitudes, not necessarily incontestable or inaccurate propositions. As in all areas, disclosure of the full reasoning process is an essential prerequisite to testing and refining what lies beneath. Holding general suppositions is a badge of humanity. It does not necessarily betoken prejudice, unless those views are universally proscribed. Bias exists or appears only when the judicial mind is or appears incapable of alteration.<sup>17</sup>

*Sun v Minister for Immigration and Ethnic Affairs*<sup>18</sup> was a rare case in which actual bias was inferred. Actual bias was inferred from repeated error and *Wednesbury* unreasonableness. The case involved the Australian Refugee Review Tribunal. It is relevant to my topic that one of the majority in the Full Federal Court of Australia (North J) described the actual bias as unintended. He said:<sup>19</sup>

“A decision-maker may not be open to persuasion and, at the same time, not recognise that limitation. Indeed, a characteristic of prejudice is the lack of recognition by the holder. Some judges, including myself, who have in recent years attended gender and race awareness programmes, have been struck by the unrecognised nature of the baggage which we carry on such issues. Decisions made upon assumptions or prejudgments concerning race or gender have been made by many well-meaning judges, unaware of the assumptions or preconceptions which, in fact, governed their decision-making. Thus, actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision-maker believes, and says, that they have not prejudged a case.”

If, as happened recently in Australia, a female Aboriginal magistrate gives voice and effect to her attitudes about police behaviour or systemic violence to women we tend to sit up and take notice. The media will usually ensure publicity and there will be no lack of critical commentators. Conversely, a white male judge who betrays an unacceptable

<sup>17</sup> *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (Mason J).

<sup>18</sup> (1997) 81 FCR 71. “Actual bias” as distinct from the appearance of bias was the statutory ground of review under s 476(1)(f) of the *Migration Act* 1958 (Cth).

<sup>19</sup> *Ibid* at 135.

attitude about female sexual complainants can expect to be taken to task by a different section of the public also feeding off the publicity of judicial proceedings. It will be no answer in the court of *public* opinion that both judicial officers were expressing attitudes of perhaps sizeable sub-groups of the public or applying traditional legal principles (including the principles of judicial notice) or that their bruising remarks were an unintentional slip in an *ex tempore* judgment.

However, in the court of *judicial* opinion it is important that we should recognise that the same forces are at work in each situation (regardless of our approval or disapproval of the suppositions revealed in the remarks of the two judicial officers). We must recognise this before the debate descends into the particular contexts and before personal sympathy or antipathy for a particular judicial officer clouds the reasoned debate about what is involved.

Inherited, learnt or acquired attitudes of particular judicial officers may be deeply influential in the mundane tasks of the judicial life even if they only reveal themselves on spectacular occasions.

### What is bias or prejudice?

Mr Justice McReynolds of the United States Supreme Court was a noted misogynist and anti-Semite, even by the standards of his day. He was described by his own Chief Justice as “fuller of prejudice than any man I have ever known”.<sup>20</sup> Once McReynolds J wrote in a judgment:<sup>21</sup>

“Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place.”

Prejudice does not usually come so neatly packaged. Usually it lies somewhat beneath the surface.

Some definitions of bias are unhelpful because they are too bland. I would include those that state that the subject must come to the adjudication with an independent mind that lacks inclination or bias towards one side or other in the dispute.<sup>22</sup> Others tend to be circular because they speak of unfairly regarding one side or the other with favour or disfavour.<sup>23</sup> Of course, I recognise that it is hard to avoid such approaches to such an open-ended topic.

Prejudice connotes improper influence, usually of an insidious kind. In Scalia J’s words,<sup>24</sup> it connotes:

“...a favourable or unfavourable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess...or because it is excessive in degree.”

Scalia J added that one would not say that world opinion was biased against Adolf Hitler.

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20 B Schwartz, *A History of the Supreme Court*, 1993, Oxford University Press, New York, p 214.

21 *Berger v United States* 255 US 22, 43 (1921).

22 Eg *Franklin v Minister of Town & Country Planning* [1948] AC 87 at 103 per Lord Thankerton.

23 *Eg R v Gough* [1993] AC 646 at 670 per Lord Goff.

24 *Liteky v United States* 510 US 540, 550 (1994); see also *Re the Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (“*Epeabaka*”) (2001) 206 CLR 128 at 155 [79]–[80] per Kirby J.

But what would be said of a judge at Hitler's hypothetical trial if that person had suffered directly at the hands of his genocidal policies? Or what of the judge trying a charge of child murder whose own child had been the victim of such a crime? Most of us would perceive that such judges would have real difficulties in objectivity, going beyond the appearance of bias. We would feel uneasy about a verdict rendered by such a judge, especially if his or her history only came to light later.

Sometimes prejudice may be idiosyncratic or individual in this sense, like the prejudice of the man who became the first judge of divorce in New South Wales, John Hargrave. Earlier in his life he had been a foundation judge of the District Court of New South Wales. According to Chief Justice Sir Alfred Stephen, Hargrave's judgeship had been "disastrous for women suitors" because he habitually decided against them. This misogynistic disability was apparently due to Hargrave's inability to forgive his wife for having committed him to a lunatic asylum in the mid 1850s.<sup>25</sup>

Other "prejudices" like racism or sexism may be widely shared. For that reason, they may go unchallenged during their heyday. Yet times and fashions change.

We have all encountered judges who did not transgress the boundaries of apprehended bias, but who appeared to display generalised dispositions for or against classes of litigants: women, black persons, immigrants, workers, employers, police, government bodies, etc. There may even be judges of this ilk on the bench today. If we disapprove of a judge's particular leanings, we focus on the types of *litigant* (dis)favoured and we may use words such as "biased", "prejudiced", "sympathetic for/against". If we approve of a judge's leanings, we tend to focus on the *issues* involved and we describe the judge as "understanding" or "appreciating" particular values.

Judges' tendencies to show generalised dispositions are likely to be chatted about rather than made the subject of formal complaint or appellate challenge. Most of us would feel equipped to characterise judges of our acquaintance as having a particular profile in categories of case, although we would feel awkward about raising it in the judge's presence. Discussion is almost invariably about persons not present in time or place. Naturally we find it easier to detect prejudices in others than in ourselves.

In *Doctor Grenville v The College of Physicians*,<sup>26</sup> Holt CJ (CJKB 1689-1710) gave a number of reasons for not following a dictum of Lord Coke (CJCP 1606-1613) in *Doctor Bonham's Case*.<sup>27</sup> One of them was,

"besides, he seems to have been under some transport, because Doctor Bonham was a graduate of Cambridge, his own mother university."

One is reminded of Megarry's account of the meeting of judges to consider a draft address to Queen Victoria on the occasion of the opening of the Royal Courts of Justice in 1882. The address contained the phrase "Your Majesty's Judges are deeply sensible of their own many shortcomings...". Jessel MR strongly objected, saying "I am not conscious of 'many shortcomings', and if I were I should not be fit to sit on the bench". Bowen LJ suggested that the address record, instead, that the judges were "deeply sensible of the shortcomings of each other".<sup>28</sup>

25 See the entry for Hargrave, John Fletcher (1815-1885) in *Australian Dictionary of Biography*, vol 4, Melbourne University Press, Melbourne.

26 (1796) 12 Mod 386 at 389; 88 ER 1398 at 1400. For another example, see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 733-734.

27 (1610) 8 Co Rep 107; 77 ER 638.

28 See RE Megarry, *Miscellany at Law*, 1955, Stevens & Sons, London, pp 8-9. The address survived in its original form: see (1882) 8 App Cas 1 at 3.

(I shall later contend that this capacity to view others more critically than ourselves is itself an unconscious prejudice.)

I suggest that we have to be extremely careful with attributing prejudice to classes of people that are based upon externalities like age, race, gender and schooling. In this as in other areas, appearances may be important, but they can be deceptive as a gauge of an individual judge's attitudes. Indeed, focusing on such externalities can itself betray the prejudices of the viewer as well as place improper pressure on the object to abandon true neutrality and impartiality. Some of the debate about the presumed attitude of female judges betrays these fallacies. We need to expose, debate and contest generalised attitudes so as to appreciate their proper influence upon judicial decision-making, and to remind all judges of the need to stand outside themselves and to question their own certainties.

The notion that the judiciary should itself be "representative" of the society that it serves is a comparatively modern idea. But even within the last century there have been different phases of its particular application. Yesterday's concerns were about Roman Catholic/Protestant balance. Today gender and racial issues are at the forefront.

I shall return to the issue of a more representative judiciary. However, I believe that we need to ensure that representativeness does not undermine our commitment to judicial impartiality. The spheres are quite distinct. We are equally affronted by the accused who demanded an all male jury<sup>29</sup> and the litigant who sought to have an all male bench of the Full Federal Court disqualified on the basis of apprehension of bias stemming solely from their gender.<sup>30</sup> The applicants (who were each male) confused impartiality and representativeness.

I agree with Cory J in *S (RD)* where he said:<sup>31</sup>

"the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial."

The English Court of Appeal spoke to similar effect in *Locabail (UK) Ltd v Bayfield Properties Ltd* when they said:<sup>32</sup>

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial

29 *R v A Judge of the District Court and Shelley; Ex parte Attorney General* [1991] Qd R 170.

30 *Lincoln v Kerr* (1995) 57 FCR 284.

31 [1997] 3 SCR 484 at 532; (1997) 151 DLR 4th 193 at 231.

32 [2000] QB 451 at 480.

decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers...

### Personal and ideological association

The decision in *Pinochet (No 2)*<sup>33</sup> was a stark reminder that a judge's open commitment to a noble cause may undermine the decision as much as pecuniary interest in the outcome. In the first *Pinochet* case,<sup>34</sup> Amnesty International had been given leave to intervene. One of the Law Lords was a Director and Chairperson of Amnesty International Charity Ltd, a related body whose chief function was to allocate funding to a third body, Amnesty International Ltd. The last-mentioned body had published research about human rights violations in Chile. Lord Hoffmann was not a member of Amnesty International, but his failure to disclose the link he had or to recuse led to the setting aside of the first appeal decision. Lord Browne-Wilkinson held:<sup>35</sup>

“If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ's famous dictum is to be observed: it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’.”

Recently, the High Court of Australia has equated the rules of disqualification whether based upon “personal, social, financial or ideological” association.<sup>36</sup>

We like to deal with tangibles, even the tangible of appearances. Thus, in *Pinochet (No 2)*, the Law Lords concentrated upon the offices held by Lord Hoffman and the inter-relationship of the various Amnesty organisations. In the end, it was the appearance of closeness to an intervening party in the proceedings that led to the overturning of *Pinochet (No 1)*, accompanied with the conventional acquittal of the judge of any actual bias.

But what if another Law Lord held no office in Amnesty International but was passionately committed to human rights in the cone of Southern America? In what circumstances, if any, should he or she recuse? Or disclose? And what should be disclosed in such circumstances?

The warning in *Pinochet (No 2)* is clear. According to Lord Hutton, for a judge to hold a “strong commitment to some cause or belief [may] shake public confidence in the administration of justice as much as a shareholding”.<sup>37</sup> In *Hoekstra v HM Advocate (No 2)*<sup>38</sup> the Scottish High Court of Justiciary set aside an earlier decision of that Court, differently constituted, which had refused to quash a conviction challenged on the ground of breach of article 8 of the *European Convention on Human Rights* (ECHR). The chairman of the earlier panel had given a press interview shortly after his retirement in

<sup>33</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

<sup>34</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61.

<sup>35</sup> *Pinochet (No 2)* at 135.

<sup>36</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [2], 396 [182].

<sup>37</sup> [2000] 1 AC 119 at 145.

<sup>38</sup> 2000 SLT 605.

which he said that the Canadian *Charter of Rights and Freedoms* — which in turn had been based on the European Convention — would provide “a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers”.

*Timmins v Gormley*<sup>39</sup> was one of a group of post-*Pinochet* cases decided by the English Court of Appeal. The Court (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC) set aside the judgment of a recorder in a personal injuries case because of the trenchancy of expression in a handful of learned articles he had written for legal journals about personal injury law.<sup>40</sup> The three eminent judges acknowledged that there is nothing inappropriate in a judge holding firm views as to unacceptable practices of insurers, and that the views expressed were shared by other experienced commentators. Nevertheless, the issue was posed and answered as follows:<sup>41</sup>

“We have...to ask, taking a broad common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we.”

This exposes the judge who speaks or writes extra-judicially, or who participates in areas of community life giving involvement in “controversial” issues, to accusations of bias. There is ongoing debate whether this means that judges should adopt the silence and withdrawal of the trappist.<sup>42</sup> But to dwell on that topic is to risk moving away from the matter at hand. Even trappists can have prejudices. Merely because a judge has not exposed his or her “prejudices” in speech or writing would not make it proper for them to infect the reasoning (expressed or unexpressed) in a judgment.

For understandable reasons, the law is concerned about the appearance of partiality. But its actuality is equally pernicious. Indeed, there is a constant danger that we are tempted to think that appearances alone matter. It follows that the judge who lacks the disposition to “approach the issues...otherwise than with an impartial and unprejudiced mind”<sup>43</sup> should no more sit than the judge who wears his or her heart on the sleeve.

One justification offered by Lord Kilmuir for the rule bearing his name about judges not giving public talks was that “so long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable”. This is almost a direct take from the Book of Proverbs where it is written:<sup>44</sup>

“Even a fool, when he holdeth his peace, is counted wise: *and* he that shutteth his lips *is esteemed* a man of understanding.”

Stupidity or pig-headedness can sometimes be more dangerous if it is hidden. It is hardly surprising that the Kilmuir Rules have been formally discarded in the United Kingdom.

39 [2000] QB 451.

40 Ibid at 491–497.

41 Ibid at 496.

42 For contrasting stances, see JB Thomas, *Judicial Ethics in Australia*, 2nd ed, 1997, LBC Information Services, Sydney, Ch 7, and the papers (including my own) given at the 2001 Colloquium of the *Judicial Conference of Australia* on 9 April 2001. See also *Epeabaka* (2001) 206 CLR 128 at 133 [12] per Gleeson CJ, McHugh, Gummow and Hayne JJ. While I defended the right of judges to speak extra-judicially I emphasised that there are some “no go” areas and that it behoves the judges to formulate them. The Chief Justices of Australia issued a *Guide to Judicial Conduct*, 2002, Australian Institute of Judicial Administration, Melbourne, which embarks on this task.

43 *Re JRL; Ex parte C JL* (1986) 161 CLR 342 at 352 per Mason J.

44 Proverbs 17:28 (King James Version of the Bible).

Cases involving human rights, the environment and other controversial issues are likely to increase. What will be the role of a judge who has strong views on such matters? Is there to be a different rule for trial judges, thereby precluding a judge with strong views about police corruption, etc from sitting in particular cases, while appellate judges are free to formulate legal principles on such bases — at least if they do not publish trenchant views outside judgments? That cannot be right. I believe that the same principles apply in both cases and that diversity of views is to be welcomed not hidden. We must all strive to expose our true reasoning processes. If we do, then even the unconventional attitude based upon an atypical judicial pre-history is free to compete in the market place of judicial ideas with the (perhaps) unconventional ideas of the “typical” male, middle-aged judge.

### Heuristic illusions

Thus far I have concentrated upon attitudinal prejudices. These are more detectable, at least in others. In recent decades the “cognitive revolution” in psychology has focused attention upon the way decision-making takes place across a range of disciplines. The study of “cognitive heuristics” has revealed shortcuts or judgmental rules of thumb that we use to simplify complex and uncertain tasks. Some heuristics are demonstrably valid in some circumstances, but in many circumstances they lead to systematic error or bias. The term “cognitive illusion” is often used to describe these inferential shortcomings. Psychological studies document illusions such as:

- hindsight illusion, which often leads people to overestimate what could have been anticipated by others and to view what actually happened as inevitable before it happened
- overconfidence concerning one’s own judgments and predictions — research has also shown that relatively difficult tasks tend to yield overconfidence more often than relatively easy tasks and that high levels of confidence are usually associated with high levels of overconfidence
- false-consensus bias, whereby we view our own behaviour and responses as typical and appropriate while alternatives are odd and inappropriate
- framing bias, in which the manner in which a decision is framed can significantly affect its outcome (“is custody to be *awarded* to parent A?” compared with “is parent A to *lose* the child?”).<sup>45</sup>

In a 1995 paper, “Cognitive Heuristics and Law: An Interdisciplinary Approach to Better Judicial Decision-Making”,<sup>46</sup> Leeanne Sharp calls for wide study of the impact of cognitive heuristics upon the decision-making processes of trial and appellate judges. She argues that law theory has largely ignored “the black box of judicial decision-making”.

Whether or not this is true of legal theory, it is true of judges themselves. Due mainly to our own ignorance in matters psychological (probably itself an unconscious prejudice) we have kept well away from recognising the impact of cognitive illusions. Perhaps we are busy enough dealing with the non-cognitive mistakes we observe in others and occasionally admit in ourselves.

<sup>45</sup> The foregoing “introduction” to cognitive heuristics is based primarily upon my reading of this paper and the one cited in the next footnote: see also M Kirby, “Judging: Reflections on the Moment of Decision”, reprinted in this collection, p 43.

<sup>46</sup> (1995) 20 *Bulletin of the Australian Society of Legal Philosophy* 71.

In the May 2001 edition of the *Cornell Law Review* there is a fascinating article with the provocative title “Inside the Judicial Mind”.<sup>47</sup> It publishes the results of a study of 167 United States federal magistrate judges who responded to randomly distributed differing versions of a questionnaire. The different versions were designed to assess the influence of five common cognitive illusions on judicial decision-making. They were anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases. These illusions are well documented in the psychological literature on judgment and choice. The study concludes that those cognitive illusions affect judges in their moments of decision-making. Indeed the authors claim to identify a “fundamental source of systematic judicial error: ...the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations”.<sup>48</sup>

To give the flavour of the article let me explain the experiment that demonstrated that judges apply the heuristic of anchoring, just like the populace generally. This phenomenon drives the marketing industry. When people make numerical estimates (for example, the fair market value of a house), they commonly rely on the initial value available to them (notably the list price).

The judges were presented with a standard personal injury damages assessment. One group was simply asked to assess compensatory damages. The other group (randomly selected) were asked first to rule on a motion to dismiss summarily because the claim fell below the jurisdictional minimum of \$75,000 and then, if it did not, to assess. The factual scenario involved a claim worth well over \$75,000. The hypothesis to be tested was whether the \$75,000 figure would serve as an anchor, resulting in lower damage awards from those judges who first ruled on the motion. The survey revealed that ruling on the motion had a large effect on the damage awards. The 66 judges in the no anchor group awarded the plaintiff an average of \$1,249,000 while the 50 judges in the anchor group awarded an average of \$882,000. The difference between the two groups was statistically significant. Among many possibilities, this aspect of the study suggests that damages caps and sentencing guidelines can be important.

Another cognitive heuristic is labelled the availability heuristic: human beings tend to give undue weight in decision-making to more easily remembered facts and images. Richard Posner recently cited this heuristic as a warning to judges favouring parties they literally see — those present in the courtroom — to the detriment of those whom they do not see. He suggests that the availability heuristic leads judges to favour convicted criminals pleading for lighter sentences in contrast to their usually absent victims. This leads him to endorse victim impact statements and to urge judges to keep in mind the interests of those who do not appear.<sup>49</sup> Lawyers who ensure that a catastrophically injured plaintiff is seen by the judge even if unable to testify are showing awareness (perhaps unconsciously) of the availability heuristic.

If we were to treat these psychological insights about cognitive illusions seriously, judges might gain fresh understanding about the way we formulate and apply principles of reasonable foreseeability, causation, their ambivalent attitude to expert witnesses who contradict the judge’s own hunches, and the judicial grasp of what is in the “public interest”.

47 C Guthrie, JJ Rachlinski and AJ Wistrich, “Inside the Judicial Mind” (2001) 86 *Cornell Law Review* 777.

48 *Ibid* at 780.

49 RA Posner, *Frontiers of Legal Theory*, 2001, Harvard University Press, Cambridge, especially pp 245–246, 256–257.

### Compensatory bias?

Sometimes a judge discovers that a former client is to be called as a witness. Often this will require disclosure with a view to obtaining a waiver from the party whose interest may be thought adverse to the expected evidence of the witness. In my view, the question “Do you have any difficulty if I continue to sit?” should be addressed to both parties. That is because there will be situations where the hypothetical fair-minded lay observer would perceive that some clients will attract hostility as much as affection.

Could there be a wider reason for ensuring that the party thought likely to be favoured by the testimony is also given the opportunity to object?

There have been occasions when a party has sought to have a judge disqualified for “overcompensation” in the sense that there was a risk that the judge might have leant over too far in the opposite direction to avoid the actuality or appearance of prejudice in a particular direction. On my researches, these applications have received short shrift, which is unsurprising when one examines the particular contexts or the ambivalent way in which the submission had been put.<sup>50</sup>

A spectacular case in which the notion of compensatory bias was recognised by the United States Supreme Court was *Bracy v Gramley*.<sup>51</sup> An Illinois judge had been convicted of taking bribes from criminal defendants to fix their cases. A defendant who did not offer a bribe and was convicted on a capital charge sought *habeas corpus* based on an allegation of bias. His complaint was that the corrupt judge was biased against those who did not bribe him, if only to cover his tracks by avoiding being seen as uniformly and suspiciously “soft” on criminal defendants. The Supreme Court granted an order for discovery in aid of the *habeas corpus* application.

Recognition of the possibility of compensatory bias was only part of the court’s reasoning in the American case. And the unusual facts preclude drawing too much from the decision. But there may be a wider lesson to be learnt. Sometimes the pressure to avoid the reality or appearance of prejudice in a particular direction may cause the scales to be weighed in the opposite direction. I believe that we have perceived this phenomenon in our judicial and other lives.

If overcompensation is a form of unconscious judicial prejudice it is different to other such prejudices, because it responds to that which is known, albeit in an unknown way. The *Penguin Dictionary of Psychology* defines “overcompensation” to mean:

“Reaction in excess of the necessary amount, to allow for a tendency in himself in a certain direction, of which the subject has knowledge; also attempt to make up for a known defect, the attempt being determined sometimes by the unconscious.”

### What is to be done about unconscious judicial prejudice?

I have no idea what can be done about unconscious compensatory bias. But I shall try to draw the threads together by boldly suggesting two responses to the general question of unconscious judicial prejudice. The question at hand is one that affects us all at different times and to varying degrees: how best to be true to our judicial oath and to aspire to impartiality in deed as well as in appearance and word.

50 See *Sankey v Whitlam* [1977] 1 NSWLR 333 at 358; *Munro v Australian & New Zealand Banking Group Ltd* (unreported, 29 June 1993, Federal Court of Australia, Ryan J); *Ashton v Prentice* [1999] FCA 671.

51 520 US 899 (1997).

## 1. “Come clean and get real”

The solution for unconscious prejudice is certainly not conscious prejudice. Nevertheless, recognition of the nature and extent of predispositions in all their forms is a good start. Whatever is meant by a strict and complete legalism, we should not kid ourselves into thinking that we attain it day in and day out.

Many predispositions are natural, sound and helpful. Others may unwittingly divert or hinder us. Acknowledging their existence is the first step towards debating and justifying them where appropriate.

The call to “come clean and get real” was made recently by Professor Ronald Dworkin in a speech “Must our judges be philosophers? *Can* they be philosophers?”<sup>52</sup> Dworkin argues persuasively that judges and their observers fool themselves by denying that (appellate) decision-making frequently involves philosophical choices. We shrink from recognising this because of our profound ignorance on the topic as well as the assumption that our intuitive reactions are right and will be easily recognised as such by those who read our judgments. These and other heuristic illusions help us get on with the task of deciding cases and rescue us from a debilitating state of indecision.

How are we to respond? We cannot deny the force of ideas. Nor can we shut our ears to the lessons of other disciplines. They require us to acknowledge the impact of the many “prejudices” that affect our decision-making, both consciously and unconsciously. In this context, I would adopt Dworkin’s peroration with amendment:

“I can summarize my advice to my profession, and particularly to its judges, in two phrases with I hope a modern force: *Come Clean* and *Get Real*. Come clean about the role that [unconscious prejudices] actually play both in the grand design and in the exquisite details of our legal structure. Get real about the hard work that it takes to redeem the promise of those concepts.”

## 2. A more representative judiciary, but for the right reasons

We are indebted to feminist discourse and the responses to it for a sustained and continuing debate about the importance of a more representative judiciary. Vigorous defence and rebuttal of this proposition have brought insights that can be adapted outside gender “representation”.<sup>53</sup>

There are two categories of arguments advanced in favour of appointing more women judges, one focusing upon the public perception of the judiciary and the other on substantive law-making. This duality reflects the discussion about impartiality, neutrality and bias. The public perception arguments are important in their own right, but they are not relevant to the present topic.

On the substantive side, some of the arguments advanced for and against the proposition involve crude stereotyping and gross caricatures. Sometimes the same distorted advocacy is used by supporters and opponents of a “more representative” judiciary. I would include within such arguments or caricatures propositions such as:

- “If the judiciary is going to be more representative of women/black people/religious minorities, etc why not include the criminal classes or the intellectually disabled?”

52 New York Council for the Humanities Scholar of the Year Lecture (2000), available url: <<http://www.nyhumanities.org/soylecture2000.html>>.

53 The literature is vast and I do not pretend to have read it. My windows to this debate have been S Cooney, “Gender and Judicial Selection: Should There be More Women on the Courts?” (1993) 19 *Melbourne University Law Review* 20; P O’Shane, “Launch of the Australian Feminist Law Journal” (1994) 2 *Australian Feminist Law Journal* 3; R Graycar, “The Gender of Judgments: Some Reflections on ‘Bias’” (1998) 32 *University of British Columbia Law Review*; G Henry, “*Pinochet*: In Search of the Perfect Judge” (1999) 21 *Sydney Law Review* 667.

- The injustices of the past are sufficient reason to change the present.
- Judges are likely to espouse the views of their class/gender and should feel guilty if they do not.

These sorts of arguments should be exposed and discarded, so as to clear the way for a sharper joinder of issue.

Shorn of excrescences and misrepresentations, the argument proceeds along the following broad lines. Consciously or unconsciously, judges frequently give effect to views and attitudes which are products of their individual life experiences. There is broad consensus that this is both inevitable and defensible, subject to a genuine commitment to strive for neutrality and impartiality, according to the tenets of the judicial oath. The insights of the realist school will continue to reflect the reality of judicial method and the common law.

I believe that it is a fact and not a stereotype that a fair proportion of women tend to perceive human relationships differently and to use alternative cognitive processes to a fair proportion of men.<sup>54</sup> The reasons for these differences are many and debatable, but the differences are real and are believed to be real by some men and by many women. A more representative judiciary will make it more likely that appropriate “different voices” are heard in the marketplace of judicial ideas. Like all voices, they must bow to the hierarchies of statute law, reasoned decision-making, appellate review and (within appellate courts) majority rule.

Feminist studies in recent decades have revealed the (largely unconscious) male biases and prejudices that have informed many legal rules and aspects of judicial method. Those biases are not necessarily wrong, any more than countervailing “feminist” responses to problems are necessarily right. Nevertheless, the legal system will be better informed, more acceptable and juster in its outcomes if the body of its principal guardians has a fair infusion of people who *may* share some less conventional ideas.

## Conclusion

At ancient Delphi the oracle spoke to Apollo’s chosen intermediary. Originally a male monster (the python), she had evolved in later mythology into a wise, middle-aged woman. Nevertheless, her disjointed babblings were recorded by attendant (male) priests who rendered them into ambiguous verse which was in turn open to endless interpretations.

At each stage of revelation and determination (ancient and modern), there are great opportunities for unconscious prejudices to intrude. Hence the warning inscribed in the temple at Delphi: Know Thyself.

The warning is as apt for the modern judge as for the gullible visitor to ancient Delphi. It cautions against superstition and prejudice in all its forms. But, like this paper, it is not terribly helpful in showing what to do about them.

<sup>54</sup> The development of this idea is frequently sourced to C Gilligan, *In a Different Voice: Psychological Theory and Women’s Development*, 1982, Harvard University Press, Cambridge. I do not claim that it has universal support, even in feminist circles.



# Judging: Reflections on the Moment of Decision<sup>†</sup>

The Honourable Justice Michael Kirby AC CMG  
Justice of the High Court of Australia

Judicial decision-making is an important and complex function. This essay addresses the question of how judges resolve the challenge of decision-making. It discusses the processes of reasoning that judges use and explores some considerations which may influence the decision-making process, with a focus on the considerations of legal realism, physiological stresses and psychological forces. It promotes the need for greater candour about the process in which the judge is actually engaged so that those affected by the exercise of power are informed about how the decision-making function is actually discharged.

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## Judging in a changing world

*“Frequently enough one thinks one has the answer;  
but on sitting down, it will not write.”*

G La Forest

For professional decision-makers who have to make important and complex decisions every day of their lives, it is astonishing that judges have written so little about the moment of decision, and the process through which their minds go to reach, and resolve, the challenge of that moment.

There are reasons for this reticence. Probably the most important is that, until a decade or so ago, the declaratory theory of judicial decision-making encouraged the view that the personal input of judges into the decision was minimal. Their role in construing the Constitution or a statute was simply that of a vector declaring the intention of the Parliament that made that law. Similarly, in finding the common law to govern a case, the judge was doing no more than applying logical reasoning to previous judicial authority. The result was in no way the invention of the judge. The decision grew, with a compelling logic, out of earlier holdings. By the use of the high technique of judicial decision-making, the new principle would emerge with efficient inexorability. Questions of judicial inclination, studies of economic and social data and reference to physiology or psychology were not only irrelevant; they were misleading and possibly improper.

A similarly convenient and mechanical theory controlled decision-making on the facts. For the better part of the history of the common law, factual decisions were made by the jury. Because the jury was “as inscrutable as the Sphinx”,<sup>1</sup> their processes of reasoning and

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<sup>†</sup> This is an updated version of a paper presented at the Fifth National Conference on Reasoning and Decision-Making, 4 December 1998, Wagga Wagga. It was first published in (1999) 18 *Australian Bar Review* 4, Butterworths, Sydney.

<sup>1</sup> *Ward v James* [1966] 1 QB 273 at 301 (CA); cf *Mackenzie v The Queen* (1996) 190 CLR 348 at 365.

decision-making were not known. They could not be interrogated by the judge for their reasons.<sup>2</sup> Investigation of the reasoning to their decisions was, for the most part, forbidden by law.<sup>3</sup> Only lately have scientists begun to investigate jury reasoning and decision-making in an empirical way. There is now a growing appreciation that generational factors, affecting receptiveness to long intervals of oral presentation of evidence and argument, may influence the decisions reached at the end of a jury trial.<sup>4</sup>

The foregoing features of reasoning and decision-making in courts have come under criticism in recent times. The view that the judge, construing the Constitution or an Act of Parliament (or other legislative instrument), merely has to look long and hard enough to find the intention of the relevant Parliament, has given way to an increasing awareness that talk of intention is liable to be misleading; that the process of construing ambiguous language is a complex one; and that the search is really one for the preferable, or more consistent, meaning that achieves the purpose of the law derived from the text and structure of the instrument stating it.<sup>5</sup> In many cases, particularly of legal instruments written in the English language, there is inescapable ambiguity. Somebody has to cut the Gordian knot. In our form of society, that somebody is ultimately, usually, a judge. Sometimes there is no clear, perfect and unarguable resolution of the ambiguity. The judge must simply offer the preferred result with reasons to explain why it, rather than alternatives, has been preferred.

The demise of the declaratory theory of the judicial function<sup>6</sup> has been accompanied by greater candour about the process in which the judge is actually engaged. For this candour, we are indebted to a number of great judges of the twentieth century, most of them from the United States. It was Benjamin Cardozo, first a judge and chief judge of the New York Court of Appeals and later a Justice of the Supreme Court of the United States, who helped to break the spell of the mechanical conception of the judicial function in that country. In his famous book *The Nature of the Judicial Process*<sup>7</sup> he wrote of how troubled he had been in his search for legal certainty “to find how trackless was the ocean on which I had embarked”. It was only as time went by, and he reflected on what he was actually doing, that he came to accept a kind of chaos theory in the law. It was the theory of the inevitability of uncertainty.<sup>8</sup> He said:<sup>9</sup>

“I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire and new principles are born.”

There have been great judicial teachers in the United Kingdom and Australia who have elaborated the inescapability of judicial choice in many decisions concerned with what the law is. In the United Kingdom, Lord Reid, one of the great judges of the twentieth

2 *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 57 ALJR 825 at 826; *Newbury v Bristol Tramways and Carriage Co Ltd* (1912) 107 LT 801 at 804; cf ER Sutherland, “Verdicts ‘General and Special’” (1920) 29 *Yale Law Journal* 253 at 262.

3 *R v Wooller* (1817) 6 M & S 366; *Boston v WS Bagsbaw and Sons* [1966] 1 WLR 1135 at 1137; *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 204–205. See also, eg, *Jury Act 1977* (NSW), s 68A(3).

4 MD Kirby, “Delivering Justice in a Democracy III — The Jury of the Future” (1998) 17 *Australian Bar Review* 113 at 120 ff.

5 *Bropbo v Western Australia* (1990) 171 CLR 1 at 20; *Kingston v Ke prose Pty Ltd* (1987) 11 NSWLR 404 at 421–424; *Fotbergill v Monarch Airlines Ltd* [1981] AC 251 at 272–273, 275, 280, 291.

6 MH McHugh, “The Law-Making Function of the Judicial Process” (1988) 62 *Australian Law Journal* 15 at 16; MH McHugh, “The Judicial Method” (1999) 73 *Australian Law Journal* 37.

7 1921, Yale University Press, New Haven, p 166.

8 W Rehnquist, “Remarks on the Process of Judging” (1992) 49 *Washington and Lee Law Review* 263 at 265.

9 Op cit n 7, pp 166–167.

century, gave the declaratory theory the kiss of death when he mocked it as a “fairytale”.<sup>10</sup> Australian judges have similarly explained the unavoidability of choice.<sup>11</sup> There is no doubt that this honesty is upsetting to some members of society. Many good citizens think that the Constitution is clear, that every Act of Parliament has but one meaning and that the common law must also be clear, otherwise judges are effectively imposing retrospective legal obligations on people which were not clearly expressed and known when the conduct complained of occurred. Sometimes, the frustration that results from judicial candour and explanations about the realities of the task, lead to attacks on judges and charges of judicial activism.<sup>12</sup> Judges themselves acknowledge a “basic contradiction in a judge’s role, especially in the appellate courts”.<sup>13</sup> Another great United States judge, Learned Hand, explained it thus:<sup>14</sup>

“...he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time.”

The problem of the past fifty years, as the declaratory theory has crumbled away as the explanation of depersonalised judicial reasoning and decision-making, is the lack of any agreement about what should take its place. No one (least of all the judges) suggests that a judge, in deciding the law, is a completely free agent, able to follow his or her whim, imposing this or that construction of the Constitution or the Acts of Parliament or this or that vision of the content of the common law. Such a view of the judicial role would be opposed to the conception of a judge as a person obliged to apply the law which pre-exists, as distinct from inventing it as he or she goes along. A judge who simply made up the substantive and procedural law, according to the dictates of vague feelings about morality, justice, fairness, social equity or the like, would not be a judge. We can leave such notions of the judicial role to the fictional witch doctors sitting under palm trees, the perfumed courts of the Moghuls, or the Committee of Public Safety in revolutionary France. Modern societies thirst for something more predictable, called the rule of law. Judges must somehow perform their functions of choice in harmony with a much more modest notion of creativity yet with an honest appreciation that sometimes creativity is inescapable and therefore legitimate.

In the realm of fact-finding, things have changed too. Outside serious criminal trials, trial by jury has all but disappeared in modern Australia. Accordingly, judges must make decisions on factual conflicts. They must give reasons for their decisions.<sup>15</sup> Those reasons must be effective explanations of how they have arrived at their conclusions.<sup>16</sup> This change has drawn fresh attention to the processes of judicial reasoning and decision-making.

In the past, there was a great deal of confidence about the capacity of a judge (or any other formal decision-maker) to tell the truth from the appearance of a witness and the witness’s demeanour when giving evidence. There is a line of legal authority in Australia which reinforces this view of judicial gifts in resolving conflicting factual assertions.<sup>17</sup>

10 “Judges as Law-Makers” (1972) 12 *Journal of Public Teachers of Law* 22; cf MD Kirby, *The Judges*, Boyer Lectures, 1983, Australian Broadcasting Corporation, Sydney, p 58.

11 See, eg, MH McHugh, “The Law-Making Function of the Judicial Process”, op cit n 6 at 16. For a Canadian illustration, see G La Forest, “Some Impressions on Judging” (1986) 35 *University of New Brunswick Law Journal* 145 at 150.

12 MD Kirby, “Judicial Activism” (1997) 12 *University of Western Australia Law Review* 1; MD Kirby, “Attacks on Judges — A Universal Phenomenon” (1998) 72 *Australian Law Journal* 599; RB Ginsburg, “Judicial Independence” (1998) 72 *Australian Law Journal* 611.

13 Rehnquist, op cit n 8 at 265; cf G La Forest, op cit n 11 at 150.

14 L Hand, “Mr Justice Cardozo” in *The Spirit of Liberty*, 1952, Knopf, New York, p 99.

15 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388; *Soulezmez v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (CA).

16 Cf *Fleming v The Queen* (1999) 197 CLR 250 at 260, [22].

17 *Abalos v Australian Postal Commission* (1990) 171 CLR 167. See also *Jones v Hyde* (1989) 63 ALJR 349; *Devries v Australian National Railways Commission* (1993) 177 CLR 472. See discussion in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 326, [85]; 160 ALR 588 at 614.

To some extent, this opinion of judicial talent, not given to every person, rests upon the desirability of avoiding unnecessary appeals and retrials. But once again the illusion about judicial insights has been shattered. Empirical evidence casts serious doubt on the capacity of any human being to tell truth from falsehood from the observations of a witness giving testimony in the artificial and stressful circumstances of a courtroom.<sup>18</sup> Appearances can sometimes be affected by cultural factors.<sup>19</sup> Considerations such as these have tended to undermine the judicial conviction that, with appointment, comes a capacity to discern truth from falsehood. Appellate courts encourage judges to search for truth in the contemporary materials, objective and indisputable facts and the logic of the evidence, rather than basing conclusions on responses to witnesses which may be erroneous and completely unfair.<sup>20</sup>

So, this is the world in which an Australian judge of today operates. Things settled for a long time are now coming under fresh examination. Of course, some lament the destruction of the props which added to the confidence of the judges and the certainty of their decisions. Some mourn the passing of the theory of legislative intention and want to restore, in constitutional cases at least, a search for the original intent of the founders.<sup>21</sup> Others, keen to remove unpredictable factors, insist on minimising the role of judicial creativity and invention. They emphasise detachment, scepticism about judicial power and self restraint.<sup>22</sup> Still others adhere to a belief in special judicial skills in determining veracity.<sup>23</sup>

No doubt all of these old theories had practical advantages. They saved the inquisitive mind from the trouble of worrying unduly about the imponderable problems of linguistic interpretation, analogical reasoning and evidentiary elucidation. But in our legal system, truth and science usually, eventually, triumph over fiction and tradition. That is why it is useful, at this stage of the evolution of the judicial process, to turn back to the moment of reasoning and decision-making. What is it that, at that moment, causes the judicial decision-maker to accept this interpretation of the Constitution or statute and reject that? To push forward and embrace a new and applicable principle of the common law or to hold back and leave it to Parliament? To accept this witness's testimony on a ground less flimsy than mere appearance of credibility? These are not illegitimate questions. The grant of power, including constitutional power, to decision-makers who hold judicial office, ought to be conditional upon the exercise of that power in a way which the people governed by it understand and generally accept. To keep in the dark those affected by the exercise of power, and to disguise from them the true processes engaged in, is the way of autocracy, which fears sharing the truth with the people. My thesis is that judicial candour, although initially, perhaps, unsettling to those who hanker for fairytales, is more appropriate to our times. In any case, some of the issues raised by a reflection on judicial reasoning and decision-making are puzzling to judges themselves. Hence, perhaps, the lack of many authentic explanations and expositions about how the functions are actually discharged.

18 *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 (CA), citing L Re, "Oral versus Written Evidence: The Myth of the 'Impressive Witness'" (1983) 57 *Australian Law Journal* 679; OG Wellborn, "Demeanour" (1991) 76 *Cornell Law Review* 1075; J Ellard, "A Note on Lying and its Detection" (1996) 2 *The Judicial Review* 303.

19 RP Kerans, *Standards of Review Employed by Appellate Courts*, 1994, Juriliber, Edmonton, pp 87-88.

20 See, eg, *Gray v Motor Accidents Commission* (1999) 196 CLR 1 at 36-37, [105]; *State Rail Authority of New South Wales v Earblime Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at [64], [93], [139]; *Chambers v Jobling* (1986) 7 NSWLR 1 at 8-9; *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

21 A Scalia, "The Role of a Constitutional Court in a Democratic Society" (1995) 2 *The Judicial Review* 141. See also, G Craven, "Original Intent and the Australian Constitution: Coming Soon to a Court Near You?" (1990) 1 *Public Law Review* 166; D Dawson, "Intention and the Constitution: Whose Intent?" (1990) 6 *Australian Bar Review* 93.

22 H Shanks, *The Art and Craft of Judging: The Decisions of Judge Learned Hand*, 1968, Macmillan, New York, p 20; L Hand, "Thomas Walter Swan" in *The Spirit of Liberty*, op cit n 14, p 165, and L Hand, "The Contribution of an Independent Judiciary to Civilization" in *The Spirit of Liberty*, op cit n 14, p 121.

23 See, eg, *Jones v Hyde* (1989) 63 ALJR 349.

## The problem

I have now sketched the background. But what is the problem? I must leave elucidation of fact-finding to a judicial officer who is daily engaged in reasoning and decision-making at first instance. That is where witnesses and other original evidence are seen. It is a rare day indeed that a witness is seen by an appellate court.<sup>24</sup> It virtually never happens in the High Court because of the preponderance of its appellate role.<sup>25</sup>

Appellate reasoning and decision-making do not, of course, ignore the facts. Most appeals which come to the High Court involve factual disputes. But generally, these are in the minor key or can be disposed of by reference to the findings of fact made by the trial judge or, within their authority, by the intermediate appellate courts. For the High Court, the issues for decision in appeals tend to be those of elucidating the meaning of the Australian Constitution or of federal, State or Territory statutes, or the content of a common law principle said to be unclear.

The issues of constitutional and statutory interpretation are distinct, although extremely interesting and important, given the dominance which statute law now enjoys in the expression of the law. The approach of different judges to the problem of statutory construction would be a subject worthy of separate study. Where I differ from other judges in giving meaning to the Constitution<sup>26</sup> or to a statute,<sup>27</sup> I am obliged to ask myself and clarify in my reasons the point of distinction, and why it is sufficient to lead to a differing conclusion. In a number of cases, I believe that I have been influenced by a more whole-hearted acceptance of the so-called purposive approach to statutory construction<sup>28</sup> than other judges feel able to embrace. Formerly, the judiciary of common law countries tended to take a narrower, more verbal, approach to the meaning of words in an Act of Parliament, confining the interpretation of statutory language to the exact words which Parliament had used. Judges would explain that it was their function to give effect to the law as stated by Parliament and not a law rewritten by judges to achieve what Parliament obviously expected to achieve. Over the past 30 years, starting in England<sup>29</sup> and more recently accepted in Australia,<sup>30</sup> courts have inclined away from this narrower approach. The change may, in part, arise from:

- the belated recognition of the proper role of parliamentary law-making, following the extension of the electorate
- an acceptance of the superior legitimacy of parliamentary law, no longer to be viewed as an unwanted intrusion upon the principles of the common law declared by the judges
- an endeavour to avoid the verbose, complex, detailed and unintelligible legislation enacted by Parliament in an attempt to prevent judicial frustration of its purposes.

24 In New South Wales, charges of contempt were, in certain circumstances, required to be heard and determined by the Court of Appeal: see *Young v Registrar, CA [No 3]* (1993) 32 NSWLR 262 at 280.

25 Cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Mickelberg v The Queen* (1989) 167 CLR 259; *Gipp v The Queen* (1998) 194 CLR 106 at 125, [56].

26 See, eg, *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 399–401, [132].

27 Recent cases include *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 146–148; *Sheaban v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 463–464; *Cannane v J Cannane Pty Ltd (in liq)* (1998) 72 ALJR 794 at 811–812; *Commissioner of Taxation v Murry* (1998) 193 CLR 605; *Marks v GIO Australia Holdings Ltd* (1999) 196 CLR 494 at 537–538, [123]–[124].

28 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424. See also Sir Anthony Mason's comments on the creative elements in interpretation and the need to exercise these in a principled, orderly way: swearing in as Chief Justice (1987) 162 CLR ix at x.

29 *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272–273; cf Lord Diplock, "The Courts as Legislators" in B Harvey (ed), *The Lawyer and Justice*, 1978, Sweet and Maxwell, London, p 274.

30 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423–425 (CA).

It is wrong to stereotype judges as being purposivists or literalists. But somewhere on that spectrum, most judges would, in my experience, tend to show a fair degree of consistency. One can suggest that each case depends upon its own unique facts, found in the language and structure of the document under scrutiny. One can disclaim an attitudinal philosophy. One can seek to discern different approaches, depending upon whether the statute in question concerns criminal offences, tax liability, compensation benefits or otherwise. But analysing my own differing, sometimes dissenting, views on issues of statutory construction, I feel that there must be an explanation at a higher level of reasoning.

Doubtless in some cases I have just been wrong. At least, that is what the majority has held. But in other cases, where there is a genuine difference of view on the meaning of the words taken in their context, I suspect that the difference may, at least occasionally, be explained by reference to the more insistent demand that I feel to ascertain, and give effect to, the legislative purpose, as I see it, in the language under consideration. If one dug more deeply into why this should be so, it could perhaps be explained by a view, ultimately of political philosophy, concerning conceptions of the kind of polity which our federal and State<sup>31</sup> constitutions create. All Australian judges would claim a fidelity to Parliament's purpose, contesting only the ascertainment and definition of that purpose, which is the objective of statutory construction. But I suspect that different judges have different inclinations to ascertain and give effect to that purpose where the Act departs from traditional approaches of the common law<sup>32</sup> or contains a phrase which may suggest an impediment to the achievement of what is otherwise the apparent objective at which the legislation has been targeted.<sup>33</sup>

The more common problem for judicial reasoning and decision-making arises in the appellate courts, in the area where judges have a wider scope for their opinions. I refer to the statement of the principles of equity and of the common law. This is where, over a judicial life, one sees the most powerful differences of view between those who would push forward, abandon or re-express a rule stated in earlier times and those who would adhere to the old rule, passing the buck to Parliament if it wishes to effect a change; yet well knowing that, in most cases, Parliament will not have the time or inclination to rise to the occasion.

Statements of restraint are penned by great judges from the wisdom of their experience. Thus, Judge Learned Hand, who never sat on the United States Supreme Court but spent a long career in the federal courts of that country, was one of the foremost expositors of caution. He dissented from an attempt of his colleagues to anticipate developments of the law in the Supreme Court of the United States, writing:<sup>34</sup>

“[It is not] desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.”

He constantly urged detachment so that the judge would decide the case without passion and always “as though it weren't your fight”:<sup>35</sup>

31 See, eg, *Egan v Willis* (1999) 73 ALJR 75. Cf *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 (CA). For an example of a difference of view about legislative construction, see *Clutba Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 96–98 per Gleeson CJ; 103–105, 114–116 per Kirby P.

32 See, eg, the discussion of common law analogies in *Marks v GIO Australia Holdings Ltd* (1999) 196 CLR 494 at [150]–[151].

33 See discussion in *Cramer v Davies* (1997) 72 ALJR 146 at 149.

34 *Specter Motor Services Inc v Walsb* (1944) 139 F 2d 809 at 823 (2nd cir).

35 Shanks, op cit n 22, p 20.

“There are those who insist that detachment is an illusion; that our conclusions, even when their bases are sifted, always reveal a passionate foundation. Even so, though they be throughout the creatures of past emotional experience, it does not follow that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crises, as any other bias.”<sup>36</sup>

For Learned Hand, the price of the judiciary’s continued power was a strong “self-denying ordinance”.<sup>37</sup>

In Australia, we have had notable advocates for judicial restraint. Foremost among them, in my youth, were Chief Justice Dixon and Justice Kitto. In more recent years, Justice (later Chief Justice) Brennan argued eloquently for restraint in his dissenting reasons in *Dietrich v The Queen*.<sup>38</sup>

*Dietrich* was a case which effectively reversed an earlier decision of the High Court of Australia.<sup>39</sup> *Dietrich* held that courts have a power to stay criminal proceedings which would result in an unfair trial because an indigent accused, charged with a serious offence, was, through no fault, unable to obtain legal representation, and would otherwise be forced to trial without a lawyer. Justice Brennan was unconvinced that the court should re-express the common law.<sup>40</sup>

“The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values... Most significantly, there are limits inherent in the very technique by which the courts develop the common law... In this case, the legitimacy and the scope of the judicial function of changing the common law call for consideration. There is no common law entitlement to legal aid. Should there be? How can such an entitlement be enforced? Who is to pay for it? The issues to be considered go beyond the question of an entitlement to legal aid; they touch the legitimacy of judicial legislation.”

A similar problem had arisen a short time earlier when I was President of the New South Wales Court of Appeal. The case was *Halabi v Westpac Banking Corporation*.<sup>41</sup> The issue was whether the common law felony-tort rule (whereby a civil action based on a felony is automatically stayed until conviction, acquittal, or the establishment of a reasonable excuse for not instituting criminal proceedings) was superseded by the inherent jurisdiction of the Supreme Court to stay civil proceedings based on felonious conduct where to do so, on a proper evaluation of all relevant considerations, would prevent abuse of process and achieve justice between the parties. It was my view that the Court of Appeal could declare a rule or principle of the common law as obsolete. It could do so where the legal reasons for the rule and the social conditions upon which it depended had changed so fundamentally that it was no longer apt to maintain the rule. However, the majority of the Court of Appeal (Samuels and McHugh JJ) found that the court had no power to refuse to apply such a settled rule of the common law. The majority views were not dissimilar to those expressed by Justice Brennan in *Dietrich*.

36 “Thomas Walter Swan”, op cit n 22, p 165.

37 “The Contribution of an Independent Judiciary to Civilization”, op cit n 22, p 121.

38 (1992) 177 CLR 292.

39 *McInnis v The Queen* (1979) 143 CLR 575 (Murphy J dissenting).

40 (1992) 177 CLR 292 at 320–321.

41 (1989) 17 NSWLR 26.

I tried to explain the contrary view, which sustained my reasoning and decision, in these terms:<sup>42</sup>

“There is no suggestion that the judicial function of developing the common law is confined to the High Court of Australia. That court is not a part of the legislative branch of government, as the House of Lords is. Like all other Australian courts, it is independent of the legislature. Indeed it is constitutionally separate from it. Since special leave is required for all appellate jurisdictions of Australia to the High Court, only a small fraction of cases are now reviewed there. None are reviewed as of right. It would be cause of disjointed development of the common law in Australia if it could be refined and restated only in the High Court. Obviously, some matters long entrenched will be left by courts such as this to that court, sometimes with a suggestion of the need for judicial development... If the authority of a binding decision of the High Court stands in the way, this court has no warrant to reformulate the law. It must conform to the holdings of the High Court... But if, as here, there is no such binding rule and if this court considers that an earlier stated rule of the common law is obsolete... it is open to the court to say so. It will stay its hand if legal principle, the state of authority and considerations of policy suggest that the change should be left to Parliament, properly advised... [I]n this field of the law where the court is concerned with superintending the integrity of legal process commenced in the Supreme Court, and where there is an entirely appropriate alternative principle of the law which can be invoked to achieve that end, the court may, in my opinion, restate the common law as I have proposed. No legislative enquiry is necessary for it to do so.”

You will observe here much common ground between the judges who would develop the law and those who would not:

- an acknowledgment of the primacy of parliamentary law
- an acceptance of the need to consider the consequences of a particular decision
- an appreciation that there are limits to judicial creativity.

My own decision was affected by perceptions of the obligations of candour, of re-fashioning principles on a higher plane, and of the special legitimacy of the judiciary to do so in areas of procedural law.<sup>43</sup>

“...the more candid course to take is to acknowledge that the rule is no longer part of the law. It has now been replaced by a general judicial discretion which is more flexible and sensitive to the facts of the particular case. In this way the common law has frequently developed to a higher stage of a more general principle. This is, in fact, the way of our system. When the higher principle is established, earlier historical efforts, pointing generally in the same direction, can be cut away by the judges just as surely as they were first made. They can be removed unless, in the meantime, the rule in question has taken on such an authority that it is impervious to, or inappropriate for, later judicial clearances... This is not a case of altering the substantive law. What is invoked is a matter of procedure. This is precisely the kind of rule which judges may clarify, elaborate, change, refine and abolish to serve the differing needs of the administration of justice... Far from altering the substance of the law, the recognition that the felony-tort rule is now obsolete

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<sup>42</sup> Ibid at 40-41.

<sup>43</sup> Ibid at 39.

involves a simplification of the law. It removes a now artificial category whose origins, justification and elaboration can be left to legal historians. It does so without encumbering the common law with new, unhistorical and artificial ‘modifications’, lately ‘discovered’.”

Just to prove that it is wrong to attempt to stereotype judges into categories, such as conservatives and activists, creationists and applicators, I commend a reading of the decision of the High Court in *Mabo v Queensland (No 2)*<sup>44</sup> where Justice Brennan, in a bold opinion, reversed 150 years of settled understanding of Australian land law in respect of the title to land of Australia’s Indigenous peoples.<sup>45</sup> It was this decision, obviously with enormous financial, economic, even political implications, that set in train the legal events by which native title rights of Aboriginals and Torres Strait Islanders have been recognised in Australia. Only Justice Dawson dissented in that case.

Or take more recently the decision of the High Court in *Northern Sandblasting Pty Ltd v Harris*.<sup>46</sup> That was a case where a young girl was profoundly injured when she was electrocuted on touching a garden tap which was electrically active. The landlord to her parents had previously engaged a licensed electrician to repair any electrical defects. The law forbade the landlord personally from itself interfering in electrical wiring. The traditional rules of the common law were that a landlord was not liable to a tenant, or a tenant’s child, in such circumstances. By the common law, landlords enjoyed a large measure of legal immunity.<sup>47</sup> One of the questions which arose in the case was whether the law should move in one leap from immunity to the imposition of a special duty so as, in effect, to render the landlord liable for the electrical fault and so that the landlord could not escape liability because it had left the electrical repair to a licensed electrician. Most members of the court<sup>48</sup> held that the landlord was not liable for breach of a non-delegable duty of care. But Chief Justice Brennan<sup>49</sup> found that the landlord was liable for failing to have the qualified electrician inspect the switch boxes before the tenants and their child went into occupation of the premises. A majority amongst the justices was thus built to uphold the judgment below in favour of the injured girl.

Naturally, a case such as that elicits great sympathy for a profoundly injured child and her family. However, I did not feel entitled to push the boundaries of legal liability forward.<sup>50</sup>

“It is true that, occasionally, the common law takes bold steps when ‘layers of sentiment which may have accumulated’ need to be overcome. However, normally, it moves forward by modest steps relying upon analogous reasoning. Although views may differ on the point, I would not regard the expansion of the law on non-delegable duties by the creation of a new category of landlord and tenant to be an incremental step. Against the background of the previous, long held understanding of the scope of the duties owed by landlords to their tenants at common law, and the wide diversity of landlord and tenant relationships that would be affected, such a step would not be within the limits of permissible judicial law making. To advance from immunity to strict liability within so short a time and without warning would ordinarily require the sanction of legislation.”

44 (1992) 175 CLR 1.

45 The authorities are collected in *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141; cf *Wik Peoples v Queensland* (1996) 187 CLR 1 at 205.

46 (1997) 188 CLR 313.

47 *Cavalier v Pope* [1906] AC 428.

48 Brennan CJ, Dawson, Gaudron, Gummow and Kirby JJ; Toohey and McHugh JJ disagreeing on this point.

49 Gaudron J agreeing.

50 (1997) 188 CLR 313 at 400.

In my reasons I gave a further explanation:<sup>51</sup>

“...such consequences would clearly include the potential costs of imposing new duties of inspection; of withdrawing some low cost accommodation from the market; and of obtaining liability insurance to meet the relatively rare case that the insurance of a qualified contractor, engaged by the landlord, proved insufficient for the peculiar risk in a particular case.”

My purpose here is not to re-argue *Halabi* or *Sandblasting*, or to enter the lists over *Dietrich*, *Mabo*, or any other case. By convention, judicial opinions stand or fall on the reasons which judges give to support the orders they propose. Today, those reasons are much more detailed than they were 100 years ago. At that time the judge operated under a mesmeric illusion that he was largely a mechanic of the law, giving effect to an inevitable conclusion laid down by clear authority. We are now working in a more sophisticated age where no one doubts that legal principle and legal policy legitimately influence decisions on the law in particular cases.<sup>52</sup> Even a judge such as William Rehnquist, Chief Justice of the United States, often classified as a legal conservative, accepts the power of legal realism and the absurdity of the notion that judges simply find the law and have no influence on its content.<sup>53</sup> But once this point is passed, we are truly upon an untracked ocean of decision-making, just as Cardozo recognised.<sup>54</sup> Then the problem for the judge is avoiding the shoals and the rocks of too much invention whilst escaping the stagnant doldrums of too little principled development. Unless the ocean is truly trackless, and the judge (especially of the ultimate court) set free to go where he or she will, our conception of the rule of law requires that there be lighthouses and maps and compasses and other established equipment, to make sure that the ship does not founder, but reaches its proper destination.

This is the background against which I now address the issue which I have chosen. It is one upon which I have puzzled many times when writing an opinion. Impression, you see, is not enough. Instinct, hunch and feelings must be kept in tight rein. Why is it that, after hearing a case, one can leave oral argument in the courtroom with an impression that this side or that must succeed, yet ultimately come to a conclusion that the opposite result must flow? There is no universal answer to this question. In Australia, the reason is rarely, if ever, that the judge reaches one conclusion but the opinion is written by a clerk, with a different life's experience, inclinations, philosophy, call it what you will.<sup>55</sup> Because in Australia judges, with very few exceptions, still write all their own opinions and reach their own conclusions, for good or ill, the opinion published is that of the appointed decision-maker, who has read the papers, heard or seen the evidence and the argument, and proceeded to reach a conclusion.

The reasons for a change of mind may be many and varied. Often, they will involve discovering facts given in evidence or found by the trial judge, which had not earlier been noticed and which compel a different conclusion from that earlier provisionally arrived at. Sometimes, it will be the discovery of a statute or a legal decision which is either clear and meets the point in issue or which is not sufficiently unclear or inapplicable as to warrant an endeavour to distinguish it or avoid the compulsion of its authority or

51 Ibid at 402.

52 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252 per Deane J.

53 Op cit n 8 at 263.

54 Op cit n 7, p 166.

55 Cf P Wald, "Some Real-Life Observations About Judging" (1992) 26 *Indiana Law Review* 173 at 177, where the function of law clerks in the District Court of Columbia Circuit is described. For a controversial insider's account, see E Lazarus, *Closed Chambers*, 1998, Times Books, New York. Contrast P Jamieson, "Of Judges, Judgments and Judicial Assistants" (1998) 17 *Civil Justice Quarterly* 395, where the practices in England, Australia and Canada are described.

logic. Sometimes, it will merely be the result of adding up, in the privacy of the judge's own mind, the factors which favour one party over another. Sometimes, it will be the power of expression of the reasons of the judge below, or of reasons of a colleague, which demand the allegiance of one's own judicial opinion.<sup>56</sup>

There is very little research on the process of judicial reasoning and decision-making that goes beyond the analysis of the formal reasons once published. Judges are reticent because bound by convention to leave their inner thought to the words written in their published opinions. Yet it is impossible to give all of one's reasons in the manageable space available for published reports. The time of the judges does not permit it. The law publishers would be most upset by even lengthier reasons. Practitioners and law students already complain of the burdens under which they labour. Ultimately, published reasons can only be an outline of the main factors which have led to the judge's conclusion. In the next part, I will explore the considerations that may influence the process of decision-making but which are rarely, if ever, referred to in published reasons.

## Legal realism revisited

### Of breakfast and other basic things

As we move away from the view that the decision of a judge, whether on facts or law, is preordained by logic, and face the fact that this highly important decision-maker has choices to make, where do we draw the line? Where do we rule out choice-affecting factors by reference to the supposed gift of judges to shake off every extraneous influence, to expel all immaterial attitudes and prejudices and to make the decision by reference only to the evidence proved and the applicable law?

In the heyday of the declaratory theory, law lecturers tried to shock students of my generation with the proposition of the legal realists that a decision might be influenced by what the judge had for breakfast. Obviously, the same startling lesson was given to Chief Justice Rehnquist:<sup>57</sup>

“The advent of the legal realists school disabused us of that notion [that judges simply found the law necessary to decide a particular case]. Few would now argue against the proposition that judging involves creating law, at least to some extent. But if it does, what provides the source of the judge's creative inspiration? Legal realists — so-called because they were said to believe that what a judge had for breakfast made more difference in how he would decide a case than what he knew about the existing precedents — were at pains to point out that a judge's background might have as much to do with the way he went about deciding a case as would his legal education. And I suppose that the large measure of truth that adheres in this view is generally accepted today. Judges, whether at the trial or appellate level, are not fungible. Each one of us brings to the bench a mind imprinted with previous experience, and that experience undoubtedly influences, to a certain extent, how we go about the process of deciding cases.”

56 Cf MD Kirby, “Ten Rules of Appellate Advocacy” (1995) 69 *Australian Law Journal* 964 at 966 fn 11, where reference is made to the author's change of mind in a particular case.

57 Op cit n 8 at 263–264. On the influence of temporary mood on decision-making, see JP Forgas, “Sad and Guilty? Affective Influences on the Explanation of Conflict in Close Relationships” (1994) 66 *Journal of Personality and Social Psychology* at 56; JP Forgas, “On Being Happy and Mistaken: Mood Effects on the Fundamental Attribution Error” (1998) 75 *Journal of Personality and Social Psychology* 318; JP Forgas, “Affect and Social Judgments: An Introductory Review” in JP Forgas (ed), *Emotion and Social Judgments*, 1991, Pergamon Press, Oxford, pp 3, 18 ff.

One obvious influence in an appellate court are the opinions of one's colleagues. Lenin taught that the person who wrote the minutes of an organisation would end up running it. The judge who produces his or her draft opinion first can often influence, profoundly, undecided colleagues. But does the influence of judicial colleagues go beyond that? Generally, judges do not breach the walls that exist around their court relationships. In Australia, in my experience, such relationships extend from the strained to the civil and correct to the warm and friendly. But it has not always been so.<sup>58</sup> In the United States, Chief Judge Richard Posner talks of his experience:<sup>59</sup>

“[Judges] rarely level with the public — and not always with themselves — concerning the seamier side of the judicial process. This is the side that includes the unprincipled compromises and petty jealousies and rivalries that accompany collegial decision-making and indolence and apathy that life tenure can induce.”

It seems that Posner's experience is not unique in the United States. Judge Patricia Wald describes her experience:<sup>60</sup>

“Real friendships are rare on the court. Heartfelt differences of philosophy and ideology militate against them. Powerful egos often impede them, even among philosophical allies. Judges are like monks without the unifying bonds of a common faith. They are consigned to one another's company for life. They cannot speak about their work outside the walls of the monastery. Lingering resentment and hostilities may be kept under wraps — and a bottle of Mylanta at hand — to preserve the image of the court that is impartial and neutral enough to decide other people's disputes.”

In such a hothouse, the influences of colleagues on the process of decision-making may not always be rational, objective, principled. Realising this risk should enliven the self-awareness of the judge to endeavour to put such unworthy considerations out of mind, should ever they present themselves. It would take expertise which I do not have to say whether such mental gymnastics are truly possible in a middle-aged human being. Certainly, the judge who is aware of such considerations is much more likely to avoid the influence of them than the judge who is ignorant of such forces or adamantly denies their existence.

Legal realists may have gone too far in suggesting that judicial decision-making could be influenced differentially by the judicial breakfast. But the value of their insights over the twentieth century was to require judges, particularly of the common law tradition, to face up to the fact that they make choices and therefore must be alert to the need for differentiation between the considerations which may permissibly affect the choice and those which are irrelevant, prejudiced and otherwise inadmissible. This change in the conception of judicial decision-making itself adds new stresses to the judicial life — such as what policy factors to take into account in a particular decision, what sources may be used to derive those factors and whether they should be acknowledged in writing an opinion.

Take the consideration of insurance. Legal authority says that it is generally irrelevant to the liability of the insured.<sup>61</sup> Yet who can seriously doubt that the expansion of the scope of the tort of negligence in the fields of employment and motor vehicle compensation has been influenced profoundly by the unmentioned fact (as judges would

58 See C Lloyd, “Not with Peace but with a Sword — the High Court under J G Latham” (1987) 11 *Adelaide Law Review* 175.

59 *The Problems of Jurisprudence*, 1990, Harvard University Press, Cambridge, pp 458, 490.

60 Op cit n 55 at 179.

61 *Davie v New Merton Board Mills Ltd* [1959] AC 604 at 627; cf *Morey v Woodfield* [1963] 3 All ER 533n.

well know) that any verdict awarded will commonly be picked up not by an ordinary citizen but by an insurer, possibly a compulsory statutory insurer.<sup>62</sup> Lately, there have been indications of greater candour about the influence of insurance upon particular legal developments.<sup>63</sup> Yet the orthodox rule requires the rather difficult feat of mind of completely ignoring the existence of insurance and deciding the case upon assumptions almost certainly known to be false. Some unquestioning jurists are untroubled by such dilemmas. Problems are presented, and stresses introduced, when the judge's conscience and sense of honesty require the revelation of influences beyond established legal authority, which help to shape the decision.

### Physiological stresses

It is increasingly appreciated (despite some judicial denials)<sup>64</sup> that judges, especially trial judges, “occupy one of the more stressful jobs in contemporary society”.<sup>65</sup> This is because they must constantly make decisions which cannot be delegated, must do so in public and often in dramatic circumstances, are subject to appellate review and criticism and are obliged to discharge their functions with “impeccable honesty, resolute even-handedness, conspicuous humanity and a high degree of judicial wisdom”.<sup>66</sup> Stress is a physiological phenomenon. It is a fact of life. All animals experience presence of stress. No species is more prone to it than human beings.<sup>67</sup> According to experts on the subject, it is a fundamental biological law that animal organisms submitted to stress will respond with a reaction of either fight or flight.<sup>68</sup> Many judges of the past responded to stress by denial — which is a kind of flight. The physiological forces continued to effect their bodies and thinking processes for, despite their offices, they could not escape the physiological forces which stress releases.

Judges facing ever-increasing case loads and, generally, no way to deflect them, are placed under enormous physiological pressures to get decisions completed as quickly as possible, so that more and new decisions can be tackled. The most common complaint of the legal profession about judges in the United States is of delay in handing down opinions.<sup>69</sup> It may be the same in Australia. Yet most judges, out of necessity, learn quickly that pain is diminished by tackling decisions as soon as possible. It is only increased by delay. Reassuringly, Lord Justice Ormrod of the English Court of Appeal observed:<sup>70</sup>

“Most judges are, I think, surprised at first to find how much less difficult it is in practice to make decisions on fact than it appeared to be from the bar. My old pupil master, Lord Pearce, assured me when I was first appointed, that, in his experience, every case would decide itself, if one gave it enough time! Sooner or later something would emerge that would make the decision quite obvious. To my surprise, because I received his advice rather sceptically, it proved to be true. This is just as well because, if it were otherwise, the burden on the judges would be insupportable.”

62 Discussed in *Cotogno v Lamb [No 3]* (1986) 5 NSWLR 559 and *Lamb v Cotogno* (1987) 164 CLR 1. See also *Gray v Motor Accidents Commission* (1999) 196 CLR 1 at 12-13, 25-26, 47, [32], [37], [80]-[83], [131]. See also J Stapleton, “Duty of Care Factors: a Selection from the Judicial Menu” in P Cane and J Stapleton (eds), *The Law of Obligations*, 1998, Clarendon Press, Oxford, pp 65, 92.

63 See eg *Kars v Kars* (1996) 187 CLR 354 at 378; cf *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

64 JB Thomas, “Get Up Off the Ground” (1997) 71 *Australian Law Journal* 785.

65 A Watson, “Some Psychological Aspects of the Trial Judge’s Decision-Making” (1988) 39 *Mercer Law Review* 937 at 938.

66 Ibid.

67 Ibid at 940; cf T Ellis and C Showalter, “Work-Related Stress in American Trial Judges” (1994) 22 *Bulletin of the American Academy of Psychiatry and the Law* 71.

68 W Cannon, *The Wisdom of the Body*, 1939, Norton, New York; S Rado, *Adaptational Psychodynamics*, 1969, J Aronson, Northvale, pp 25-47.

69 Watson, op cit n 65 at 946-947.

70 “Judges and the Process of Judging” in *Jubilee Lectures*, University of Birmingham, 1981, pp 187-188, cited Watson, op cit n 65 at 947.

This candid insight into the thinking of two experienced and distinguished English judges suggests the importance of intuition — what might be called old-fashioned judgment. We should not be too surprised that this plays a part, for it is simply the application to a particular case of the accumulated experience of professional life. Yet intuition may itself be the product of unrecognised psychological forces, cultural assumptions and social attitudes. Working under the pressure of constant decision-making, the average judge does not have a great deal of time to pause and clarify, in his or her mind, the myriad of influences which are at work. What will be known is that, unless the list is cleared and the cases promptly disposed of, physiological forces of stress will create enormous discomfort and disturbance which the judge realises it would be better to avoid. Most judicial officers do not enjoy the luxury of selecting most of their cases, hearing the majority of them well argued and enjoying a time for reflection and decision. The average magistrate in Australia must get through a crushing workload, disposing of each case in a matter of minutes. Rarely will there be time for lengthy cogitation.

### Psychological forces

One of the leading judges of the realist school in the United States was Judge Jerome Frank. In his book *Law and the Modern Mind*,<sup>71</sup> he suggested that the process of judicial reasoning and decision-making was founded on a central myth in the law. This, in turn, was derived from the eternal quest of human beings for certainty. Being a realist, Frank attributed this myth to a universal fantasy of childhood in which infants attribute omniscience and omnipotence to their parents. He believed that much law-making was derived from this fantasy and that human beings had a great reluctance to accept the truth: that life is filled with uncertainty.<sup>72</sup>

Frank, the realist, attributed much of the intellectual activity of judges to rationalisation.<sup>73</sup> I lack the expertise to engage with him in his diagnosis or to update his theories of psychology. But there would seem to be little doubt that, however much a judge might try to escape psychological forces, their dynamics can be important in the process of reasoning and decision-making. Advocates understand this. They regularly seek to play on the intellectual and emotional susceptibilities of the judges before whom they appear.<sup>74</sup>

Psychological studies of law students in the United States have discovered that they display certain attributes in greater abundance than the average citizen.<sup>75</sup> They have more aggressiveness, but also more concern about orderliness and social altruism than the average fellow citizen. Because, in Australia, all judges are lawyers, it would be safe to say that, if the same features were found in the average class of Australian law students, the same tendencies would ultimately find their way into the judges. There seems no good reason to assume that Australian lawyers would be different, in this regard, from their equivalents in the United States. The features of a desire for orderliness and a concern about social altruism appear somewhat antithetical. Perhaps in them we see, already at law school, the forces of conservatism and dynamism that are the abiding characteristics of the common law system itself. Resolving those competing forces is a constant challenge for judges, particularly when faced with novel legal and factual

71 1930, cited Rehnquist, *op cit* n 8 at 267 ff.

72 *Ibid*, pp 3, 13.

73 *Ibid*, pp 30, 31; cf Watson, *op cit* n 65 at 938.

74 Watson, *op cit* n 65 at 938; cf JJ Rachlinski, "A Positive Psychological Theory of Judging in Hindsight" (1998) 65 *University of Chicago Law Review* 571.

75 J Bartlett, "The First Year Class of the Saskatchewan College of Law" (1974) 39 *Saskatchewan Law Review* 137; A Diamond, "Psychological Problems of Law Students" in S Gillers (ed), *Looking at Law School* (1976), cited Watson, *op cit* n 65 at 939.

problems. Doing so, the judge will seek to display, and to feel, confidence. Psychological experts who tell the judge that this is an illusion<sup>76</sup> receive an answer from experienced judges in the terms which Sir Roger Ormrod offered:<sup>77</sup>

“From time to time it happens that a man who has been a most successful advocate is raised to the bench, only to find himself a prey to doubts and anxiety, wondering what actually happened and whether ‘he has got it right’. I comforted myself and reduced my anxiety to bearable limits, by reflecting that, while I might have my doubts about what actually happened, I was confident that the conclusion I have reached was the right one on the evidence put before me. If one cannot achieve this degree of confidence, nervous breakdown is almost inevitable.”

Lord Radcliffe suggested that the process was rather more complex:<sup>78</sup>

“There was a time...when I believed that a man possessed a separate intellectual or logical power, his reasoning faculty, independent of his other powers or his dispositions, and that it was his highest duty as a man to accord pre-eminence to that power...That belief has not persisted with me. It seems to me that thinking is a function of the whole of one’s personality, with all the interplay of emotions and experiences that in time claim and receive recognition from one’s reason; so that reason either becomes a term so comprehensive that it embraces everything that conditions one’s thought, or else remains an isolated analytic or deductive faculty which does not in practice determine by any means all one’s opinions or views.”

For every jurist, like Radcliffe, brought ultimately to the realisation of the complex forces working on his mind, and every one, like Frank, urging judges to express their values and preferences more openly, others propound the wisdom of the traditional view of reticence, silence and the depersonalisation of decision-making. Certainly, this is the approach which prevails in most civil law countries, where judicial decisions are much less discursive, dissent is impermissible, policy is banished from public revelation and decisions are written in a dogmatic style as if the conclusion stated was the only one which the law permitted. In a sense, the declaratory theory which formerly held sway was a common law reflection of this aspiration for certainty and predictability of the law:<sup>79</sup>

“By tradition, and often by temperament as well, judges usually choose to remain as close to invisible as possible. Many of them believe that their role precludes acknowledgment of their own humanity. To them, a judge is a personification of law, and thus an instrument. He decides by code or statute or precedent, by an accumulation of weight on one side of the scale or the other, in [which] his own character, values, experiences and prejudices are sublimely irrelevant.”

Is this self-delusion? Most experts in psychology would say that it is. If honesty is the hallmark of a judicial life, the ancient injunction of the Temple of Delphi, “know thyself”, is supremely important for the judicial decision-maker. I agree with Andrew Watson’s conclusion:<sup>80</sup>

76 Watson, *op cit* n 65 at 946.

77 *Op cit* n 70, pp 187-188.

78 Introduction to Radcliffe, *Not in Feather Beds*, 1968, H Hamilton, London, p xvi.

79 D Watson, *Judges*, 1974, p 17.

80 *Op cit* n 65 at 958.

“At the very least, judges should work conscientiously to become intuitively and then cogitatively, sensitive to the kinds of issues that cause them emotional conflict with all of its potential for stress... Then, and only then, can judges face the multitude of contradictory and contesting values encountered in judicial deliberations and retain those values within reach of cognition and rational resolution.”

## Conclusion

I have reached the final point of this analysis. 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 may be only partly aware.

The most important decisions in society are commonly taken by those who head large corporations, thereby shaping the media we receive and influencing public opinion and attitudes. The decisions of leading politicians and senior officials, of political staffers, party apparatchiks and their advertising advisers are probably next in importance. Further down the hierarchy of significant decisions are those of the courts. Yet important they are, not only for the parties and their lawyers who come before them, but also for the standards which are set by them for society, and the rules that are laid down for the future. Sometimes they are absolutely vital.

In these circumstances, it is surprising that so little has been written about the moment of judicial decision. Sometimes the decision may emerge, with pure logic, from the application of clear and settled legal principles to simple and uncontested facts. But the problem for judges is that often the applicable principle, if any, is not clear. The Act of Parliament is unclear. The facts are disputed and uncertain. Choices must be made.

Tracking those choices and recognising the considerations which may influence them is a newly-acknowledged and additional obligation which judges, especially of appellate courts — and particularly of ultimate courts — must accept. Inescapably, their written reasons can reveal only part of the journey to the moment of decision.<sup>81</sup> But should we dig deeper, or will doing so merely cast doubt on the certainty and objectivity of the law which Jerome Frank said is a deeply-felt, but child-like, human need? Such empirical studies as have been attempted are said to produce “a sobering splash in the face with cold reality”.<sup>82</sup> When the declaratory theory of the judicial function was overthrown, it left us, the judges of the new age, with many uncertainties. Those uncertainties will not disappear merely because we turn our backs on them.

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81 *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 per Lord Hoffmann; *Aktiebolaget Hässle & Anor v Alpbapbarm Pty Ltd* (2002) 77 ALJR 398 at 416, [90], 417, [97].

82 GC Sisk et al, “Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning” (1998) 73 *New York University Law Review* 1377 at 1498. This article reports on a study of the introduction of the *Sentencing Reform Act* and Sentencing Guidelines in hundreds of United States District Courts. The study involved an “unprecedented empirical study of judicial reasoning in action”.

# Decision-Making, Public Opinion and Concepts of Rights<sup>†</sup>

The Honourable Justice Rosalie Silberman Abella  
Justice, Court of Appeal for Ontario

Judicial controversies in Canada, particularly in the area of rights protection under the Charter of Rights and Freedoms, have led to attacks on the legitimacy of judicial decisions. This essay discusses judicial decision-making in the context of public opinion and highlights the relationships between public perceptions and the judicial role. It examines how public opinion about the judicial role is formed, with an emphasis on the role of the media, and discusses why this can create dissonance. It suggests that courts must be unafraid of engaging in controversial issues.

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In 1929, overturning the Supreme Court of Canada's decision that "Persons" in the constitution excluded women, Lord Sankey, on behalf of the Privy Council, directed the court to interpret the Canadian constitution as a "living tree capable of growth and expansion", and in a "large and liberal" not a "narrow and technical" way.<sup>1</sup> The Supreme Court of Canada has, in recent years, taken this direction very seriously in its interpretation of the Canadian *Charter of Rights and Freedoms* and has, as a result reminded us of Isaiah Berlin's aphorism that there is no pearl without some irritation in the oyster, since there is no doubt that this large and liberal interpretation has produced some large and illiberal irritation. To understand why, we need to examine the context in which public opinion about the judicial role is formulated.

## How does the public form its opinions?

The first foray I took into the public opinion aspect of my assigned topic was, as it often is for me, through outside reading. I have consistently found that for someone like me who comes from and lives such a privileged life, it is not always easy to know what the real world looks and feels like to others. The expression "Fish don't know that water is wet" comes to mind. So it is from books that I have learned much about the human condition and experience, and that knowledge has, I like to think, helped me to understand the world better than I would have had I judged it based on my own relatively protected experiences.

I started my exploration of public opinion with three plays — *Faust*, *The Visit* and *Enemy of the People*. *Faust*, ultimately the most positive of the three, was nonetheless discouraging because it reminded me how easily one's principled opinions can be traded for the possibility of success. *The Visit*, an extraordinary Swiss play written in 1956 by

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<sup>†</sup> This paper, "Public Opinion, the Courts and Rights", was presented as the Keynote Address at the Federal Court Judges' Seminar, 5 September 2002, Montebello, Quebec.

<sup>1</sup> *Edwards v Attorney-General of Canada* [1930] AC 124.

Friedrich Dürrenmatt, was about how the entire population of an impoverished European village changed its opinion and agreed, in exchange for the promise of prosperity, to kill its most popular citizen. And Ibsen's *Enemy of the People* showed how a community could change its mind about, and turn on, its respected doctor because his revelations about the safety of their newest tourist attraction would destroy their economic prospects.

Finally, I read *Master of the Senate*, the third volume of Robert Caro's magnificent biography of President Lyndon Johnson, and saw how easily public opinion can be manipulated and exploited for political ends.

The themes in these books were universal and probably axiomatic, but the moral lessons about how the public forms its opinions were, in the end, too stark and cynical. So I decided to concentrate on the positive aspects of public opinion, starting with the obvious: we in the justice system should not be surprised by, and cannot ignore, the public's opinions about how their rights are dealt with by the courts.

### Concepts of rights

What are "rights" and why, despite being central to civilised societies, do they — and the judges who enforce them — so easily attract controversy and elude consensus?

Let me start with a metaphor whose meaning may be paraphrased as follows: "I may not know what rights are, but I know them when I see them." The play *Art*, by Yasmina Reza, is about three close male friends and what happens to their relationship when one of them, Serge, spends \$200,000 on a painting. The painting is white, with fine white diagonal lines. Serge's oldest friend Marc is astonished by the purchase. He sees nothing of merit in it, and is offended by Serge's devotion to what seems to him to be a ridiculous purchase. The third friend, Yvan, does not understand the painting but neither does he mind it, thereby annoying Marc. The relationship between the three men unwinds over the meaning and worth of the painting, and each of them stakes their pride to their point of view. They are simply unable to persuade each other of the value of their respective opinions.

On the tensest evening in the course of this dispute, Yvan's hysteria over his pending wedding distracts Serge and Marc from their animosity towards each other and unites them in laughter at Yvan's hyperbolic conduct. The tension is broken when Serge suddenly throws Marc a blue felt pen and invites him to draw on the painting. Marc cautiously approaches the painting, and slowly draws a little skier with a woolly hat along one of the diagonal white lines. Yvan is stunned, Serge and Marc survey the painting calmly, then decide to go for dinner.

Serge's act in permitting Marc to deface the painting proved to Marc that Serge considered their friendship to be more important than the painting. Together, they wash the skier off the painting and then, as the play ends, Marc stands in front of the picture, willing to see its significance in a completely different way now that he has a new understanding and is no longer threatened by it. Here are his closing words as he stares at the white canvas:

"Under the white clouds, the snow is falling.  
You can't see the white clouds, or the snow.  
Or the cold, or the white glow of the earth.  
A solitary man glides downhill on his skis.  
The snow is falling.  
It falls until the man disappears back into the landscape.  
My friend Serge, who's one of my oldest friends,  
Has bought a painting.

It's a canvas about five foot by four.  
It represents a man who moves across a space  
And disappears.”

The white canvas is rights. Different people see different things in them and approach them in different ways: some with devoted passion, some with passionate antipathy, and some with benign curiosity. But everyone believes in them and they hang proudly in our democratic gallery. But because people are not always sure what the rights picture should look like, they sometimes take out their frustration and confusion on the artists — the judges — leading to conflicting public opinion and controversy.

### Controversy and public opinion

Is controversy such a bad thing? Most Canadians would probably think so at first blush. Mackenzie King, who helped develop Canada's allergy to controversy, was described by Frank Scott in the poem “W.L.M.K.” as follows:

“He blunted us.  
  
We had no shape  
Because he never took sides,  
And no sides  
Because he never allowed them to take shape.  
  
He skilfully avoided what was wrong  
Without saying what was right,  
And never let his on the one hand  
Know what his on the other hand was doing.”

If argument or debate is crucial to our national — or personal — intellectual development, and I believe it is, controversy, properly appreciated, can be an excellent teacher. Through controversy we can learn not only the views of others, but our own. It is a way to discover, in public, who we are, what we think, and what we believe in. Returning to our gallery metaphor for a moment, Robert Fulford, in his excellent essay on controversy recently published by Massey College, showed how much Canada learned about culture from the controversy surrounding the National Gallery's 1990 acquisition of Barnett Newman's painting *Voice of Fire*. The painting had been on loan from Newman's widow for the opening show in the new National Gallery in 1988. Two years later, the gallery bought it for \$1,760,000, creating a furore over such an expenditure for what looked like a bunch of simple stripes.

Much of the criticism came from people who had not actually seen the painting, but were nonetheless magnetised by its cost. But whether their opinions were valid did not, for Fulford, alter the fact that their utility lay in the debate they generated, a debate that illuminated the National Gallery, Barnett Newman and cultural policy in Canada. In other words, controversy can be healthy if it constructively directs our attention to important matters.

I think the same can be said about many judicial controversies, namely, that it is increasingly the case that through controversy, we judges are revealed to the public and the public's opinion is revealed to us, and that controversy can sometimes constructively direct our mutual attention to important matters. But this does not mean that public opinion offers unalloyed illumination for judicial guidance.

Society is horizontal and it is vertical, and it is practically impossible to know at which point a consensus emerges. In Edith Wharton's *The Age of Innocence*, the van der Luydens and Mrs Manson Mingott were the custodians and interpreters of social norms

in old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable. Part of the task, in fact, may be to reach a conclusion *despite* the perceived, prevailing public opinions. When we speak of an independent judiciary, we are talking about a judiciary free from precisely this kind of influence.

Until we know who the public is and how it forms opinions, courts deciding cases are entitled to regard public opinion as largely the responsibility of the legislature. Whatever evidentiary tool the legislatures use to gauge public acceptance, judges use a totally different measurement of relevance because the object of their task is totally different. In framing its opinions, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said of judges.

### **The media's influence**

Moreover, we need to remember where the public gets most of the information upon which it bases its opinions about most things, including courts. I suspect that information comes not from reading law reports, but from the media.

Therein lies the key to public opinion about the courts: the media. And that observation obliges us to try to understand what the media is, how it functions, and what the conceptual links are between it and courts, so that we can better appreciate what I see as being the most profound influence on public opinion about courts and rights.

In many ways, the media and the courts perform analogous functions. We both watch the public; we both judge it; and we both attract criticism when our observations or judgments offend someone's alternate perspective. We are both expected to be fair, impartial, and independent of the persons we are observing or judging. We are both accepted as being central to a properly functioning democracy, and we are both, from time to time, resented for this centrality.

But there are also fundamental differences. The courts operate according to known legal standards and principles, and can be judged accordingly; the media, which regrettably under reaches by treating itself as a trade rather than a profession, operates according to no overriding governing code and cannot as easily therefore be held to account. The courts watch only those aspects of the public brought to them for review by a litigant; the media is free to take its flashlight anywhere. Courts judge only those disputes before them; the media judges anything and anyone it wants. Judges, ever since the Magna Carta, have been truly independent, and can only be removed from office for manifest breaches of public confidence; the independence of journalists, on the other hand, is frequently circumscribed by the philosophies or economies of their owners. Fairness and impartiality for courts means hearing both sides with an open mind; for the media being fair frequently means getting as many of the facts as you can given the allotted deadline.

Although both the media and the court are institutional cameras taking snapshots of the public at various stages of its evolution, the media is by far the more influential and powerful of the two, because its camera is bigger, has more equipment and, above all, because it gets to decide which pictures it wants to take.

This is the source of the media's power and it is a power people in my generation have seen flourish. I was born the year after the Second World War ended. The next fifty years contained, in my mind, the most dramatic constellation of economic, social, political and legal transformations ever to be found in a single half century, most of which I learned about from the media. It is no accident, in my view, that these reformations occurred when they did. The five previous decades had started with waves of immigration and the universality of industrialisation, then moved through the two world wars which sandwiched the Dionysian hedonism of the 1920s and the Apollian despair of the 1930s. Most immediately and profoundly, the year before I was born an atomic bomb exploded and the genocidal nightmare of the Holocaust ended.

The pressure these events put on our understanding of human nature and needs eventually pushed us against most of our existing institutions and social alignments, and bent them into new shapes. Once we recovered from the unforgivable years we had allotted to Joseph McCarthy's venom and once we satiated our post-war recuperative indulgence with our taste for banality and conformity in the 1950s, we finally put the pieces of the previous half-century together and started our "Howl" in the 1960s.

What happened next were insistent demands from women, minorities, disabled persons, children, workers, gays, environmentalists, consumers, nationalists and aboriginal people, to name a few. Not that any of these issues were new — North American history was replete with episodic requests for social revisionism from these groups. But by and large, the pre-war efforts on behalf of those on the margin who wanted in, never engaged enough of the public's attention to find its way into the enthusiasm of elected officials and, therefore, into legislated change.

The difference in my generation was that the public's conscience *was* alerted and what made the difference, in my opinion, was the media. Never having experienced the heyday of yellow journalism for whom the 3 R's, according to one columnist, were Rape, Rot and Ruin, I grew up in an era when for me journalism meant the Pentagon Papers, Watergate, *This Hour Has 7 Days* and *The Journal*. To many of us, the media seemed compassionate, fearless and ready to lend its influence to the forces for change who were unhappy with the way the status quo had distributed society's amenities.

And here the media merged seamlessly with the courts. It should come as no surprise to learn that many of the barriers to social entry sought by those pressing their noses to the system's windows were legal ones. One by one, with assistance from the media, they came down.

Can there be any doubt that as the chief *informer* to the public, the media also plays a role as chief *former* of that public's opinions. Because the media decides what the public will know, the media acts as the gatekeeper of public policy, agendas and ideas. It decides what to bring to light and how to light it.

With daily, monthly or yearly reinforcement about how a particular issue, part of the world or person is portrayed, most of us will, in the absence of evidence to the contrary, come to accept the media's perception as reality.

### **Changes in public perceptions**

But, in the last decade of the last century, the media's perception of reality changed dramatically from the reform-minded reality it generated in the 1970s and early 1980s. As a result, public opinion has been reformulated, making the adjudication of rights by courts inevitably controversial, as the "new" public opinion clashed with a judiciary by now comfortably propelled into and ensconced in assertive rights protection.

In its coverage in the 1970s of cases like *Murdoch v Murdoch*<sup>2</sup> and *Morgentaler v The Queen*,<sup>3</sup> which galvanised the Canadian women’s movement, the media clearly played a leading if not primary role in changing public attitudes and the law. Progressive judges rhetorically flourished accordingly. In 1978 in *Rathwell v Rathwell*,<sup>4</sup> for example, Brian Dickson said, to the applause of the media:

“The need for certainty in matrimonial disputes is unquestionable, but it is a certainty of legal principle hedging in a judicial discretion capable of redressing injustice and relieving oppression.”

One can only wonder how controversial a line like that would be today.

In what ways has public opinion shifted to cause it to treat with apprehensive suspicion what it had embraced only ten years earlier? The following are five examples of public perceptions which, I would argue, have resulted largely from what the public has gleaned from the media in the past several years, causing judicial decisions frequently to land clumsily on formerly sturdy terrain.

### 1. A backlash against tolerance

Each of us has had the opportunity to watch the triumph of this generation’s dramatic human rights movement on behalf of women, minorities, persons with disabilities, aboriginal people, and persons with linguistic and sexual preferences different from those of the majority. This human rights parade transformed Canada into a richly textured society in which differences were acknowledged, accommodated and respected. But our transformation of the mainstream from intolerantly homogeneous into generously diverse has caused a backlash in people who believe that they have a right to freedom *from* tolerance. The following exchange from an old episode of *The Simpsons* contains a more benign expression of this feeling. Marge Simpson, after three children and many years as a homemaker, has decided to join the police force, and has just chased her husband’s poker-playing buddies out of their home for gambling.

Homer: Marge, you chased away all my poker buddies!

Marge: I didn’t mean to.

Homer: Oh, you’ve become such a cop. And not that long ago you were so much more to me: you were a cleaner of pots, a sewer of buttons, an unclogger of hairy clogs.

Marge: I’m still all those things, only now I’m cleaning up the city, sewing together the social fabric, and unplugging the clogs of our legal system.

Homer: You’re cooking what for dinner?”

But the more serious reflections of the backlash’s resistance are found in the deployment of verbal missiles aimed at stopping change. The phrases “reverse discrimination”, “political correctness” and “merit principle”, along with the latest “F” word — “feminism” — are routinely used as scare tactics to alert the unsuspecting public to the inequities of equity. There are unquestionably extreme examples on the edges of equality battles to which we can all point as unworthy of the struggle, but these extremes are not the real story. The real story is that:

- before “feminism” became the scariest word in the English language, it changed the enrolment of women in law schools from one to fifty percent

2 [1975] 1 SCR 423.

3 [1976] 1 SCR 616.

4 [1978] 2 SCR 436.

- before “political correctness” became the Darth Vader of Free Speech, it introduced legal aid clinics, courses on poverty law, aboriginal law and disability law, and turned the exclusionary “his” into the inclusive “theirs”
- before “reverse discrimination” became the mortal enemy of the hegemonic rights of white, able-bodied, unilingual, heterosexual, Judeo-Christian men, it was reversing discrimination on behalf of everyone else.

As for the merit principle, I believe in it passionately. Can we honestly say that is what we have had up until now? I am convinced that a true merit system would have resulted in far fewer qualified minorities, and left persons with disabilities, aboriginal people and women out of the running.

## 2. The pursuit of mediocrity

It sometimes takes me aback to see how cerebrally-challenged the real world can be. All too often the search for visionary ideas is less welcome than the search for practical relevance, and the dissemination of enlightenment less welcome than the pursuit of mediocrity. When our cultural icons like Margaret Atwood, Charles Taylor and Michel Tremblay share public adulation with Beavis and Butthead; when the majority of the media in English Canada, until very recently, portray the range of acceptable ideologies as running the gamut from the cautiously conservative A to the very conservative B; when most Canadians need no more than the fingers they have, to count this country’s intellectual heroes, then we have to pause and wonder whether we are creating the perception that superficial is better than thoughtful, and that right is better than anything.

## 3. Misunderstanding of the role of judges

Which brings me to the *Charter of Rights and Freedoms*. For me, one of the most frustrating consequences of the “dumbing down” or anti-intellectualism of much of our public discourse, is how it has characterised this majestic addition to our constitution as a towering jurisprudential Babel of legislative trespass and unaccountable legislating. As an amateur historian, I confess to massive incomprehension at how this state of public misunderstanding could come to pass. I have absolutely no difficulty understanding why a particular decision can upset people. Some of my best friends’ decisions have upset people. But disagreeing with a result is very different from attacking the legitimacy of the result by blaming it on an “agenda”.

Independent judges in a democracy interpret law, including laws like the *Charter*, passed by elected representatives. Sometimes in interpreting law, judges break new legal ground, that is, they make law. Common law judges are supposed to make law. That is what common law is — judge-made law. They made law when they said in *Christie v York Corporation*<sup>5</sup> in 1939 that freedom of commerce at the Montreal Forum meant a proprietor could refuse to serve drinks to a black person; and they made it in *Roncarelli v Duplessis*<sup>6</sup> in 1959 when they said that a liquor licence could not be refused to a proprietor because he was a Jehovah’s Witness. They made it in 1973 when they said that a wife’s non-financial contributions to property in her husband’s name is part of what she is supposed to do as a wife without any compensation;<sup>7</sup> and they made it in 1978 when they changed their minds and said that if a wife made a non-financial contribution to a property in her husband’s name, she was entitled to a share in it.<sup>8</sup> All

5 [1940] SCR 139.

6 [1959] SCR 121.

7 *Murdoch v Murdoch* [1975] 1 SCR 423.

8 *Rathwell v Rathwell* [1978] 2 SCR 436.

those dramatic decision were made before we had a *Charter*, and not one of the judges who decided them was ever accused of unduly making law or of having an “agenda”. So what has changed is not what judges do, but how what they do is described by people who dislike their decisions.

It is of course fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. But neutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society’s values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. We must be prepared, when the situation warrants, to experience what Herbert Spencer called *The Tragedy of the Murder of a Beautiful Theory by a Gang of Brutal Facts*. In other words, there is a critical difference between an open mind and an empty one.

#### 4. Marginalisation of the disadvantaged

When I was in first year Arts at the University of Toronto, everyone told me to take a Philosophy course with Professor Marcus Long. In the very first class, he asked: “If a tree falls in the middle of a forest and no one hears it, does it still make noise?” I turned to my best friend Sharon and said “I’m outta here”.

Now that I am older and do not have the answers to everything the way I thought I did when I was 18, I realise what a wonderfully instructive metaphor Marcus Long’s question is. If you do not hear about something, you do not know about it, and if you do not know about it, then it probably does not exist for you. If we do not hear about homelessness or disadvantage or discrimination, there is no noise. And if there is no noise, there is no need to do something about it. But if we do not do anything about it, the noise could well metastasise into searing cries we will be unable to ignore and possibly unable to assuage.

What does this mean? It means that if the information we get concentrates less on social injustice and more on social Darwinism, we risk losing our focus and our balance. There was a time not too long ago when looking over your shoulder to see whom we were leaving behind was mainstream public policy, and we marginalised those who were indifferent to the fact that people were being arbitrarily disadvantaged. More recently, the roles were reversed. The new mainstream, in the name of the future grandchildren of the financially successful, appeared to be preoccupied with cutting budgets that would have helped the grandchildren of everyone else, pushing generosity to the margins.

#### 5. Fear of change

And finally, change may be inevitable and even a healthy sign of a mature society, but it can also, understandably, be turbulent. And I cannot think of any generation that has experienced more change than this one, especially in law. And changes in law mean changes in expectations, often in midstream, understandably causing confusion and frustration. Consider, for example, the legal revolutions in one area — family law — since I graduated from law school in 1970, and the public’s dizziness becomes perfectly explicable.

We went from separate property and declaring that on marriage the husband and wife became one legal person — the husband, to equal property, then to pensions as property. We went from *dum casta* clauses requiring chastity of former wives to preserve their support payments to clean-break theories giving divorced wives support for three to five years, no matter how long the marriage, to make themselves financially independent, and finally to compensating wives through support for their contribution

to the relationship. We went from women upon marriage having to quit the paid labour force, to the overwhelming majority of mothers being in the paid labour force. We went from no divorce, to over one-third of Canadian families divorcing. We went from pre-marital virgins to accessible birth control to the sexual revolution to surrogacy and reproductive technology. We gave spousal rights to unmarried couples and legitimised their children, then gave those same rights to couples of the same sex.

No wonder so many people fear reform. One person's reform, after all, may be another person's upheaval. But based on effective advocacy, Law Reform Commission and Royal Commission Reports, international law and jurisprudence, academic writing, media reports and articles, parliamentary debates, and collegial influence, courts have often willingly acknowledged that the law's stability does not necessarily argue for its stagnation.

### The Charter and public opinion

Where does all this take us? Squarely into the headwinds of public opinion. But if, as I have attempted to show, the public's opinion of what courts do is based on limited or even misleading information, it is a fragile moral tutor. Courts therefore are not only entitled, they are obliged to take the long view and, in the responsible performance of their duties to the public, to be unafraid of engaging the controversial issues of the moment.

And so, back to the *Charter*, the ultimate Canadian rights generator, and its relationship with public opinion.

Our constitutional entrenchment of the *Charter* was designed to both represent and create shared, unifying national values of compassion, generosity and tolerance. It is the mirror in which we see our rights reflected and obliges us to ask "Are we the fairest of them all?" But it is also true that if Isaiah Berlin was right that there is no pearl without some irritation, the *Charter* is by now a whole necklace.

I think it is fair to say that prior to the *Charter*, and based in no small measure on the unspectacular judicial response to the 1960 Bill of Rights, those who felt that legislatures were better protectors of rights than courts had a solid evidentiary foundation for their views. During the patriation debates,<sup>9</sup> when Allan Blakeney, the New Democratic Party Premier of Saskatchewan, joined forces with the Conservative Premier of Manitoba, Sterling Lyon, to try to prevent the entrenchment of a *Charter* and preserve parliamentary supremacy, he asked, not without justification, whether going to court to litigate is "as effective as a right to lobby for a change in the law". His was a fear less of judicial activism and more of judicial inactivism.

Then along came the *Charter's* entrenchment and the serendipitous presence on the Canadian Supreme Court of Brian Dickson and Bertha Wilson, the Fred and Ginger of the *Charter*, who choreographed some dazzling new routines and consistently brought the house down. In that first decade, when the *Charter* was young and almost universally adored in English Canada, it seemed that it would deliver on every nation-building promise that had inspired it. It was the noble risk that had paid off.

In the second decade, however, when the *Charter* was in its teens, parts of the nation started to rebel. Almost imperceptibly at first, when the *Charter* became an adolescent, public pride in its grasp seemed to turn into strident fear over its reach. That is when we got the panic attacks about the fate of democracy. What had always been seen as a complementary relationship between the legislature and the judiciary, was recast as a competitive one.

<sup>9</sup> Regarding *The Constitution Act 1982*.

And to what end? To stop the flow of rights streaming from the courts. But the criticisms would prove to be a finger in the dike. They could stop neither the flow nor the people along the shore cheering the progressive currents.

And here is the irony of where we find ourselves today. We spent the last decade listening to a chorus moaning over the fate of a majority whose legislatively endorsed wishes could theoretically be superseded by those of judges, only to learn in poll after poll that an overwhelming majority of that majority is happy, proud and grateful to live in a country that puts its views in perspective rather than in cruise control; prefers to see judicial rights protection as a reflection of judicial integrity or independence rather than of judicial trespass or activism; and understands that the plea for judicial deference may be nothing more than a prescription for judicial rigor mortis.

## Conclusion

This generation's judicial receptivity to rights protection has been vigorous — sometimes in accordance with, sometimes ahead of, and sometimes despite public opinion. By adding so much to the public's arsenal of rights, however, judges have undoubtedly also added to public expectations that more needs will be treated as rights and not merely as aspirations. Globalisation, technology, diversity and deficits, the foundational quartet conducting public policy before terrorism got to the podium, are not about to leave the rights stage anytime soon. And it will not be long before they spawn a deluge of repercussive rights demands, primarily about access — to health, to education, to physical and economic security, to privacy and, of course, to justice itself.

And those demands in turn will lead, as now, to people who criticise the courts for doing too much and the legislature for doing too little to stop them. But as we grow more comfortable, as we should, with the inevitability of the controversies and the criticism, the more both the courts and the legislature will comfortably do what they are supposed to do without looking over their shoulders, confident in the knowledge that the rights business is booming and that there is more than enough to go around. We will never stop the debates over the role and qualifications of judges or the muscularity of their remedies. Nor should we even try.

The independent and impartial enforcement of rights is a mark of a secure and mature democracy, as are the controversies surrounding them. Rights are works in progress, but at least there is progress, thanks in large measure to courts who, to paraphrase Mackenzie King, recognise that judges are necessarily servants of the public, but not necessarily servants of its opinions; or, to put it another way, public opinion if necessary, but not necessarily public opinion.

Having spent most of this paper arguing for the court's right to be free from the shackles of public opinion, I want to close by stressing how important the public's opinion is, because public opinion is a crucial component of a flourishing democracy, or, more accurately, because a well-informed, reasonably-educated public is a crucial component of a flourishing democracy.

In the end, we are each limited by what we do not know and we are each limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to judge fairly. A worthy goal for judges and public alike...

# Why Write Judgments?<sup>†</sup>

The Right Honourable Sir Frank Kitto AC KBE

First delivered in 1973, this essay has become a standard reference work for judicial officers seeking guidance on judgment writing. The essay includes a discussion of the purposes for which judgments are delivered and highlights some of the features of good judgments. The central premise of the essay is that as the delivery of reasons is part of the open administration of justice, judgments are better delivered in writing. The process of writing encourages reflection and discipline in the writer, and is more likely to result in a judgment that openly reveals the judge's reasoning.

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A long time ago — at least it seems a long time ago — “in my salad days, when I was green in judgment”, I imagined, or rather hoped, that given time one could get into the way of writing judgments and that the way would prove easier as the years went by. It was not so. The years proved only that there was no way of writing judgments; no way, that is, that one could make one's own as a painter may find the palette that suits him best. I hated, but hating did not abandon, the convenient practice of beginning each task with the tedious formula that shows the task itself to be yet another turn of a ponderous treadmill: “This is an appeal from a judgment of the Supreme Court of X in a running down case”, or some similar dispirited and dispiriting form of introduction.

In an after-dinner speech in Perth, a member of the Bar once urged the High Court to put more colour into its written work. (I think he regarded its spoken work as colourful enough.) He wanted the *Commonwealth Law Reports* to be brightened by judgments beginning with elan and proceeding with breathless zest, holding the reader entranced to the end, when the dismissal of the appeal (I seem to remember that he favoured dismissal, being in the running for appointment to the Supreme Court) would come as a satisfying and dramatic denouement:

“In the dead of night, on All Hallows Eve, on a lonely road illumined by the wan light of a dying moon and winding serpent-like through the trees that stood as ghostly sentinels soon to become silent witnesses of stark and bloody tragedy.... Therefore this appeal should be dismissed with contempt as well as with costs.”

The speaker used more witty words than these, but I have forgotten what they were.

There was food for thought in the suggestion. Certainly its adoption might cheer a little the lives of such students (if any) as might happen to turn from the writings of academic critics of judgments to the judgments themselves, and it might bring back the days when

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<sup>†</sup> A paper presented in 1973 to a Convention of Judges of the High Court of Australia and the Supreme Courts of the States and Territories. First published in (1992) 66 *Australian Law Journal* 787.

newspapers, devoted as always to the service of the sacred and inalienable right of the public to know, published accurate law reports. As I say, it was the Court's written work that was in question and when you come to think of it most if not all of the celebrated examples of judicial *jeux d'esprit* were, or may fairly be suspected of having been, prepared laboriously with the pen, whether before or after delivery of judgment. Even Sir Frederick Jordan's description of a picnic episode as "alfresco adultery" came out on paper, you will remember. Still I hesitate to say that the main virtue in writing judgments is that thereby you may add to "the gaiety of nations" or "the public stock of harmless pleasure". Convincing justification for all the vast and exhausting expenditure of judicial energy in writing judgments must be sought, albeit reluctantly, elsewhere. The question must necessarily be whether the purposes for which reasons for judgment are delivered are more likely to be well served in writing or by the spoken word.

What, then, are those purposes? In the end, I think, the search for them will bring us back to a consideration of those same students and that same public to whom I have referred, provided of course that I am permitted to interpret "students" to include everyone who seeks to equip himself with a knowledge of what the courts are treating as the law and are likely to go on treating as the law for the time being at least. That is a wide interpretation, but its intention is to allow for the simple fact that even one who reaches the Bench remains a student until, willingly or unwillingly, he emerges from the tunnel of judicial tribulation into fresher and clearer light and, emulating the great Lord Blackburn with a carefree "Damn the law",<sup>1</sup> turns as Pollock said that Blackburn did to reading French novels, or to some other form of liberated activity.

Obviously a purpose in delivering reasons is to satisfy a desire, which the parties to the case may be assumed to possess, that they may be told not only whether to rejoice or to be sad, but also how it was that the Judge reached his ultimate conclusion. Unless, however, they are interested to learn how to govern their conduct in future, in which event I would include them in the category of students, their concern about the reasons for their victory or defeat is, I suspect, limited, and their understanding of the reasons given, if they read them, is likely to be more limited still.

Their professional and "bush" advisers who led them to litigate or failed to deter them from so doing, or who helped them or hindered them in the fight itself, may read the judgment either with self-congratulation or with scorn for judicial ineptitude; but it is not the office of reasons for judgment to minister to the ego of these people. Where an appeal lies or may lie the judgment is of course important to advisers for the help it may give in assessing the possibility and prospects of an appeal; and the conscientious Judge, that is every Judge, will wish to be, as Lord Diplock would say, vulnerable because he has given his reasons.<sup>2</sup> He will wish to be vulnerable, partly from sheer honesty and partly because of the comfort it will give him to reflect that if he has gone wrong the damage is not irreparable. Consequently, a purpose he will be serving by a fully considered judgment is to make clear for an appeal court what it will need to do in respect of his view of the facts and any exercise of his discretion, and what it will need to declare to be the law, if it is to overturn his decision. It may even be that his statement of the law will be news to the appeal Judges, and if so they will naturally be grateful. I put aside the theoretical possibility that a Judge may regard the framing of his judgment as an exercise in precluding a successful appeal: I put it aside because I understand that such judicial infamy went out some time ago.

1 *Holmes-Pollock Letters*, ii, p 306.

2 See *Broome v Cassell* [1972] 2 WLR 645 at 716.

In some cases, as we all know, a judgment serves an incidental but not unimportant purpose by exposing a defect in the law such as an anomaly or a clear injustice in its operation, or an impropriety in its administration, and I suggest that it is well within the proper scope of the Judge's function to bring the matter forcefully to the attention of the public and of the relevant Parliament or the appropriate organ of the Executive Government. True, it is common experience that Parliaments are slow to react to judicial suggestions for reform, even if they react to them at all. True it is also that administrators include many who resent having their conduct questioned, and bitterly resent having it publicly disapproved. But a Judge will not be deterred by the likely ineffectiveness of his protests or by the scowls of those who are found to have used their authority wrongly. He remembers that a court no less than a chamber of Parliament is, if I may use HAL Fisher's expression, a place "in which hidden things [can] be brought to light and shameful things exposed in their shamefulness".<sup>3</sup> I firmly believe that judicial indignation in a proper case is not only permissible but required by the Judge's position in the social structure. Beyond question, calm detachment in thinking and moderation in expression are essential to the Judge's task. In these respects the demands of his office are high indeed. But a careful, balanced, not overstated exposure of a situation of law or fact may properly, I maintain, be made in forceful words, in biting words if need be, with the purpose of bringing the demands of a healthy social conscience to the attention of a Parliament or a government.

Where praise or blame of individuals would go beyond this purpose the case is altogether different. It must be a rare judicial hearing that gives the Judge a complete insight into the historical and psychological factors that have entered into the determination of a given piece of human conduct. It is hard enough for any of us to know himself. Adverse criticism of a person, even trenchant criticism, is sometimes required in a judgment, and praise may likewise be proper; but it seems to me that strict relevance to the matters to be determined is the only touchstone by which the propriety of either is to be assessed. Sir John Latham used to carry this to the point of saying that a judgment should not express belief or disbelief of a witness, but only acceptance or rejection of his evidence, either on specific matters or generally in the case. And as for praise, I remember Mr Justice Long Innes telling me that after adopting in a draft judgment a definition of "education" suggested in one of Professor Walter Murdoch's Essays, he had gone on to describe the author as possessing one of the clearest minds in Australia but had struck out the description because he thought a judgment was not the place for it. I have always felt a little sorry about this because the tribute was so well deserved, but I think the Judge was right all the same. The point I am seeking to make is that, as I see the matter, commendation or condemnation of individuals has a place in a judgment if, but only if, it advances the argument by which the Judge reaches his conclusion.

The cardinal point about the delivery of judgments stands out, I think, in a passage you find in the 1832 Report of the Commissioners on Ecclesiastical Courts which Lord Shaw of Dunfermline quoted in *Scott v Scott*:<sup>4</sup>

"The judgment of the Court is then pronounced upon the law and facts of the case, and in discharging this very responsible duty, the judge publicly, in open court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or advertent to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged."

<sup>3</sup> *A History of Europe*, p 1031.

<sup>4</sup> [1913] AC 417 at 473.

“Publicly, in open court.” Those are the important words. Of course, no proposition in this area of discussion is without exceptions, as *Scott v Scott* itself acknowledges; but in general the point that explains all that we are here concerned to note, and the observance of which in practice has consequences of which we may go on to remind ourselves, is that the delivery of reasons is part and parcel of the open administration of justice. It is not enough that the hearing of a case has been in public. The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance. Jeremy Bentham put the matter in a nutshell (and kept it there, as I must add with deference to Lord Macnaghten) when he wrote, in a passage which Lord Shaw quoted in *Scott v Scott*<sup>5</sup> and which might well serve as a text for the whole of this paper:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial.”

And of course he is never so much on trial as when he is delivering judgment. That is why he is right to repeat to himself the advice, sound enough as far as it went, which that “tedious old fool”, the Lord Chamberlain Polonius, gave his son: “Take each man’s censure, but reserve thy judgment.” Every Judge worthy of the name recognises that he must take each man’s censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all. But many a Judge well worthy of the name needs, I suggest, to tell himself more often than he does that he ought to reserve his judgment. It is true that a real need for urgency often compels the acceptance of the disadvantages that lie in a speedy decision and an impromptu statement of reasons, but too often the temptation to be rid of the case, or to get through the list, or (dare I mention it?) to be thought an inheritor of the mantle of a Jessel or a Harvey thrusts aside the warning finger of caution; and the judicial task, worthy at all times of performance at the best standard the Judge can reach, is performed poorly in consequence. The Judge’s office is to that extent brought low. I would urge that wisdom, the caution that experience constantly teaches, a proper sense of responsibility and a due modesty in the estimation of one’s own capacities join to insist that judgment be reserved in every case, at least in the higher courts, where decision hangs upon a balanced assessment of evidence or upon a thoughtful application of legal principles. Surely the maturer in judgment a Judge becomes the more receptive he should be to the imperious urging of a still, small voice whispering “Reserve thy judgment!”. To do so will mean delay, but while in some cases there is truth in the maxim that justice delayed is justice denied, in many it is true that hurried justice is not justice at all, in many more that it is not justice done sufficiently, and in still more that it is not justice done manifestly. I recall that on a famous occasion, Sir Owen Dixon, answering a request for urgency made by the then Attorney-General of the Commonwealth, said: “It is more important that this case be decided rightly than that it be decided soon.” Less neatly but with equal truth it may be said that in the great majority of cases it is more important that the purposes of an open statement of reasons should be well and fully achieved than that the parties and the Judge should have a quick end to their current preoccupation. Quickness of

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5 Ibid at 477.

decision is no substitute for thoroughness in consideration and the utmost care in the formulation of reasons. You may say that these things may be overdone. Of course they may. You get your easy cases, your obvious cases, though they are not as frequent as a self-confident Judge is apt to enjoy telling himself. I am suggesting no rigid rule, but a general truth. My proposition is that wisdom lies in keeping in general to the course of carefulness, though recognising cases when they arise which require finality urgently.

If Laertes had been a Judge and the pontificating Polonius had known as much about judging as he wanted his son to think he knew about life, he might have added: “and for Heaven’s sake put it in writing.” But he was far too superficial a thinker for that. He was much more likely to have seized upon a popular modern song to add to his string of platitudes (if Shakespeare had heard of it in time): “Fools give their reasons; wise men never try.” And then he would have received the support of no less a Judge than Lord Mansfield, cynically witty as it was and wholly deplorable as it would be in the mouth of anyone without a sense of humour: “Give your decisions, never your reasons; your decisions may be right, your reasons are sure to be wrong.”

Then by all means take each man’s censure, but why, even if you must give your reasons, undertake the labour, often the gruelling labour, of writing out your reasons, when to do so is only to give more and more ground for criticism and to ensure that the censure you will have to take will be enduring — for the proof of your ignorance and your errors of apprehension, your lack of sagacity and your unsoundness of discretion will be preserved for the censorious eyes of today and many tomorrows? Why — here is the worst of it — why record for your own regretting the story of your failure to reach the standard you hoped for when first you took your seat? It would be different if what Dryden said were true: “Tis a vanity common to all writers, to overvalue their own productions”, for then the armour of vanity would be your sufficient protection. But the proposition is too absolute. Some Judges there have been, as we all know, who would be hard put to it to overvalue their productions, for on balance, at least, they attained to excellence; but not a few, though able to say honestly to themselves at the end of their work that they have done their best, can say it only as a regretful admission, without the common overtone of self-praise for having tried. If such a one, laying down his pen, should say in Pilate’s words: “*Quod scripsi scripsi*”, it must be in a spirit Pilate never knew. Omar understood: “nor all thy Piety nor Wit Shall lure it back to cancel half a Line, Nor all thy Tears wash out a Word of it.”

But while the Judge is at his work, considerations of despair have no place in his thinking. The question, the only worthy question, where circumstances do not positively require an immediate judgment, must surely be: Will an oral judgment serve the proper purposes of a judgment as well as a written one would do? for, if the answer should be “No”, as I believe it should be in nearly every case of any importance, the Judge dare not refuse the burden which that answer involves for him, the burden of considering and reconsidering the case with a mind kept receptive to any reason for change until the very moment of ultimate decision, the burden of working out in writing with the greatest pains his reasoning and his conclusions. I say “working out” because what the Judge promises himself by reserving his judgment, even if the formula that he uses is that he will put his reasons in writing (as if they were already finally fixed in his mind), is to go over the case again as he writes, knowing from experience that the very exercise of writing ensures more careful thinking and rethinking, gives greater opportunity for detecting hidden fallacies, and reduces the chance that some relevant point has been missed or glossed over in the argument. He will not refuse that burden, for he has to live with himself afterwards, and how can he, with a quiet mind, if his offering on the altar of his high office has been less worthy than he could have made it?

Having said this, I need hardly add specifically that the superiority of a written over an oral judgment lies not only or mainly in the greater opportunity that writing offers of achieving felicity of expression. This of course it does, and I would say at once that it seems to me an important fact worthy of constant remembrance that every piece of distinguished writing in a judgment tends to enhance the prestige of the Judge's court and to enhance the prestige of the law. Anyone who doubts this will find convincing examples in the judgments of Sir Wilfred Fullagar. He, of course, was a classical scholar; and one as steeped as he was in classical texts and the art of translation would naturally write English with precision and elegance. Indeed, I believe that part at least of the reason why an ability and a concern to express oneself in clear and graceful English are becoming alarmingly rarer even in the universities is to be found in the modern neglect of the study of Latin. But however this may be, I am sure of two things: one is that a demonstration of that ability and that concern still commands and will always command respect; and the other is that it is not in *ex tempore* judgments that the best examples are usually found. All too often a transcription of an oral judgment (I am thinking of one or two ill-advised attempts of my own, but not only of them) reads as if "the same was written with a thumbnail dipped in tar"; and the reputation of the judiciary for accurate perception, for clear thinking, and for thoroughness of craftsmanship is darkened accordingly.

The main justification for believing that written reasons serve so much better than oral reasons the purposes for which judgment is reserved is, I suggest, that all the travail of making the necessary preparations for the task, knuckling down to the sheer toil of it, enduring the soul-searing tedium of it, going over the first draft, the seventh draft if need be, and making all the necessary corrections and improvements with the crossings out, the balloons and the marginal scribbings that provide the test of a good associate — all these add up to discipline; and an adjudication that is not disciplined cannot but be more or less of a travesty, however facile its language, however impressive the voice that pronounces it. Perhaps the most common case of an insufficiently disciplined judgment is one which recites the facts — in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-lover but not one possessing the lawyer's love of relevance, and those that are not even interesting but just happen to be there — which identifies the question to be decided, and then, without carefully worked out steps of reasoning but "with a blinding flash of light" (as has been said), produces the answer with all the assurance of a divine revelation. It may sound magnificent; but it is a failure, for a want in the Judge of enough self-discipline.

The discipline has necessarily to be self-imposed. It does not come easily to some of us, as I know all too well. After one has listened to a long argument, the temptation is great to assume that one is in command of all the material; and too often the assumption is wrong. The only corrective is to settle down to write so as to show that you really are in command of the material. We all know that if a case turns upon evidence one of the great advantages of preparing a written judgment is that a quiet re-reading of the evidence by oneself almost always yields some reward, even if only in the matter of perspective. Moreover, one's notes of the argument, if they consist of more than a doodle or two, get a chance of performing their function by ensuring that the reservation of judgment has not been for the purpose with which Sir Owen Dixon once taunted Sir Hayden Starke. Starke had said he would put a case away and let it simmer. Dixon replied: "You mean put it away until you have forgotten the difficulties."

In a case where there is law to be decided a question arises upon which I know that opinions have differed. Not a few of the English Judges of today and of yesterday, as well no doubt as some of our own, seem to have considered that where all parties are represented by counsel the court is justified in relying upon counsel to draw attention

to all the authorities that need to be considered, and that accordingly the Judge is not called upon to do independent research of his own. This is a view that encourages the delivery of judgments off the cuff. I hope you will join me in stoutly rejecting it, for it implies a limited conception of the Judge's function as being to decide between competing arguments. That may be true of a judge of a debating society — there is no lack of even-handedness about it — but it is, I suggest, untrue of a Judge in a court of law. He is the trusted representative of a society whose chosen way of life is the way of the law, in the sense that the society depends for its cohesion upon the cement of the law so that any erosion of the law tends to social disintegration and the loss of that liberty for which law is essential. It follows that a controversy before a court is not a competition in debate, or any sort of game, but is society's method of applying its law. The Judge's responsibility, therefore, is not to be defined as a duty to decide fairly, but as a duty to decide correctly if he can. Sometimes there is no difference: the Judge applies his own ideas of fairness because the relevant law directs him to do so; but in the ordinary run of cases, and especially when he is deciding a point of law, to weigh and compare fairly the opposing arguments is not the whole of what he has to do. The whole is to do justice according to law, that is to say according to the best understanding of the law that he can bring to the decision of the case. Nothing must stand in the way of that: not a desire to get on with the next case (does that sound familiar?), and certainly not a desire for some well-earned leisure. It is always possible that helpful authorities or other aids to decision have been missed in the argument through accident, laziness or inefficient research; and the experience of all of us, I imagine, confirms that in very many cases the possibility is not only theoretical. Its existence is enough to impose an imperative obligation on the Judge to do all he can to guard against it, even if that means that he must plod once more his weary way through the digests and their supplements, including the lists of cases judicially considered, and sometimes the law periodicals, English, American, Australian... where does it end? It is indeed a weary way — until he makes a find, and then he has his reward.

What I have just been saying suggests inevitably another aspect of the self-discipline that the Judge is so much more likely to achieve if he takes the time for reflection that writing his judgment allows. It consists in keeping steadily in mind that he is commissioned to apply the law as it is from time to time and not something that he thinks should be the law but knows is not. I hasten to add, lest I be misunderstood, that I would certainly include in the proper function of the Judge the right and duty to give effect as existing law to such developments of the case law as principles already enunciated by the courts imply or justify by reason of their inherent capacity for extension by logical processes, including in those processes not only inference and deduction but also analogy where analogy is sound. I am inclined to think that if you put it in some such way as that — limiting judicial development of the law to development by applied logic from *within* principles already established, and therefore excluding as impermissible purported developments (they really ought to be called alterations) fastened onto existing law by the Judge who thinks that his God-given understanding of justice tells him infallibly what the law ought to be and that he needs no other justification for asserting that that is what the law is — you may find a reconciliation between the old-fashioned, over-terse proposition that the Judge applies the law and does not make it and the proposition, nearer the truth but still not exact, that the Judge has a law-making function. The reconciliation perhaps is that our legal system includes a rule that principles judicially evolved contain within themselves "their fair logical result" as Dicey called it,<sup>6</sup> that is to say all that may fairly and logically be taken from them, by way of extending the evolutionary process that produced them, to deal with new factual situations; so that the Judge does not usurp the role of the

<sup>6</sup> *Law and Opinion in England*, p 364.

legislator when he takes part in that process, but does usurp it when he superimposes upon the already-declared law a new proposition which he gets from outside it. In the latter case the criticism of his action is not so much that he suffers from a difficulty in distinguishing between the deity and himself in the understanding of abstract justice as that he perverts the law. No Judge is entitled to do that, however strongly his ideas of justice may make him wish that he could. I take this to be elementary. It is rejected by some very able people, but so are the Ten Commandments.

Of those who have failed in this respect — I think “failed” is the right word — one has publicly and in print described his approach to a case in a way which I think I paraphrase fairly by saying that he starts by considering what he ought to regard as a just result to be reached and then searches assiduously for some judicial statement or precedent that he can use as a peg upon which to hang a judgment producing that result. To undertake a written judgment in order to go through these acrobatics I would contend is to caricature grossly the judicial process. I make no criticism of the first step so long as the purpose in considering what is just is to ensure that one is sceptical of any step in reasoning that offends the ordinary concepts of justice, for after all the common law and the law of equity alike in their development took constant account of the standards of fairness and reasonableness that prevail in ordinary life, and any result that seems to offend against those standards must be sufficiently suspect to demand critical scrutiny of the mental process that produced them. But the second step is surely indefensible. To form at the outset a determination to reach what is thought to be fair result and to reach it by hook or by crook seems to me unworthy and disgraceful. A scientist would scorn it; how much more should a Judge.

I have been speaking of the discipline that a written judgment is more likely than an oral judgment to ensure. I hope I shall be forgiven in such a context for indulging a personal hate against the judgment that purports to be written but in fact is a transcription of an oration delivered to a stenographer or a dictaphone. I know dictation saves time and that practice in it reduces its deficiencies, but all too often the saving of time is at the expense of conciseness, of directness and of exactness, and the greatest of these is exactness. Francis Bacon may not be very “in” at the present time but he knew a thing or two: “Reading maketh a full man; conference a ready man and writing an exact man.” I do not mean to say that a dictated judgment is necessarily and always prolix, fluffy and meandering; but the more difficult and involved the case the greater is the need for the opposite qualities while at the same time the greater is the likelihood of failing to achieve them if the discipline of the careful manuscript is forgone. I know the transcription may be used only as a draft and its shortcomings mitigated by the pen, but the final product usually betrays its origin and suffers from it. I simply do not believe in the sufficiency of long experience in public speaking or a natural readiness with words. I do not say they cannot be equal to an occasion, but I do say that even for one who possesses them the laborious use of the pen from the beginning is in general immeasurably better than the easy use of the dictaphone for securing the purposes that the culminating judicial act of delivering judgment ought to serve.

The menace of prolixity, irrelevant wandering and imprecision is terribly real. They make for both misapprehension and non-apprehension, creating boredom and distraction from the points that matter. This is obvious enough in the literary productions of other people but hardly so obvious to us in our own. Mr Justice Holmes, you remember, agreed with Carducci that a man who takes half a page to say what can be said in a sentence will be damned; and Sir Frederick Pollock, the editor of innumerable judgments, was devoutly thankful that the Lord in his wisdom had made blue pencils. But inexactness, of the three cardinal sins I have mentioned the most deserving of damnation, cannot be cured by the blue pencil. It is a fault that besets us all and we can do no more than reduce its

incidence to a minimum. The law is not an exact science, but a Judge is required by the nature of his office to be scientifically exact at the point of judgment so far as carefulness in the choice of words can make him. There have been some, I must reluctantly admit, who have consciously preferred inexactness. I recall one, long since gone, who often set himself to say little and to say it ambiguously, so as to leave himself, as he used to say, room to turn. To many this will seem contemptible. Unintentional inexactness is of course a different matter, but it is just as bad in its results and harder for the author to detect and eradicate unless the discipline of writing be accepted.

If, then, you ask: why write your judgment by hand from the beginning, I answer: because thereby you do a better job; because thereby you serve better the purposes for which reasons for judgment are given. (For those who look for high precedent it may be found, for you will recall that according to the only extant report the judgment delivered against Belshazzar, dramatically brief and to the point even if it did need a specialist to interpret it, was written by hand — on a wall. Mr Haddock, I suppose, might have written it on a cow, just to show that the virtues of writing were the things that mattered.) There is an expression somewhere in the writings of EM Forster that goes rather far but it brings out a point nevertheless: “How do I know what I think till I see what I say?” What we think that we think on the spur of the moment often undergoes a remarkable change when we go through the discipline of putting it down on paper and looking at it. Only after much refining and reforming in the process of writing are our first vociferations likely to yield the crystals of our final thoughts, propositions freed from the impurities of our innate prejudices and from the distortions and the fuzziness around the edges that are the too-frequent products of our emotions, our sympathies, our dislikes and our predilections. We cannot all hope to write with the commanding and colourful style of a Simonds, or with the limpid simplicity and classical clarity that conceals profundity, as Fullagar so often did — a profundity with which he was never satisfied until he was able to say to himself: “*acu rem tetigisti*” — but what we can do is to remind ourselves constantly that “a man’s reach should exceed his grasp” or he is not a Judge but a clerk.

You see, my meandering — even in writing it can occur — has reached the topic of profundity, a quality to be aimed at in all judgments though one which only the great, and not many of them, have much chance of displaying save by the toil of conscientious writing. There are of course degrees of profundity, and I know all too well that with an ordinary sort of mind it is no use hoping to be a second Dixon, diving swiftly and unerringly to the very bottom of a complex problem and coming up just as surely with the right answer sparkling with evidence of vast knowledge and deep understanding. But this paper is about what the ordinary Judge may reasonably try to achieve and therefore is obliged to try to achieve. It is reasonable, it is necessary, to fear superficiality, and to be content with nothing short of reaching the heart of each problem, which only the intense concentration of the earnest writer gives the best chance of doing. Once more the resulting delay is undoubtedly a consideration; but I contend that in most cases the delay is by far the lesser evil. Of course the judgment should be written, as far as possible (may I repeat the delicious old expression?) “with all deliberate speed”. Mr Justice Holmes recalled that the fact that a decision was written at once had been regarded as evidence of inadequate consideration, whereas if a man kept a case six months it was supposed to be decided “on great consideration”. “Such humbugs prevail!” he said; and then he added: “It seems to me that intensity is the only thing. A day’s impact is better than a month of dead pull.” Intensity is indeed the thing; and only in the throes of putting ideas down on paper, altering what has been written, altering it a dozen times if need be, putting it away until the mind has recovered its freshness, even tearing it up and starting again, can most of us hope to get, in a difficult case, the fruits of the requisite intensity of penetrating thought, the best we can do in the direction of profundity.

I come to the really difficult question whether and when a member of a multiple court is justified in simply concurring in a judgment written by a colleague. Opinions differ about this, and I shall express my views with no intention of being dogmatic. Indeed I do not think a categorical answer ought to be attempted. All I have said about the advantages of writing a judgment tends in favour of the conclusion that a Judge should set out his own reasons. In general I firmly believe that he should. Having had a little experience of the Privy Council system which, modified though it has been in recent years, yet puts a definite brake on the writing of separate judgments, my belief is that a court should not submit to any such brake, but rather should regard as in the normal course that every Judge should do his own work. A real urgency may of course compel assent to another's judgment, and even a wider exception than that must be allowed. Sometimes, after a Judge has made all the preparation he would make for writing his own judgment he sees a judgment prepared by a colleague and is convinced that he could not express his own ideas any better or perhaps as well or that the purposes of judgment will be best served if what has been written by one receives the greater authority of a joint pronouncement. I remember a case of great importance in which both Sir Wilfred Fullagar and I were well on with the writing of separate judgments when we received a draft from Sir Owen Dixon and promptly tore up our own because his was so much better than ours were likely to be. Sir Owen himself once said to me that he had never agreed in another's judgment without having some cause to regret it afterwards; but he went on agreeing in the judgments of others on occasions, and the advantage of certainty in the law was aided by his doing so.

I say certainty in the law because that seems to me to be the one great benefit of a joint judgment. I put aside as unworthy of attention the advantage that busy or lazy practitioners and (with apologies) Judges may rejoice to find in having only one judgment to read, but there are two other considerations that I must concede. One is that with several judgments reaching the same ultimate conclusion there is often uncertainty as to whether differences of expression or emphasis indicate differences of substance; and the other is that where differences of substance exist it is not always easy for the student or a lower court to know which view is likely to prevail in future. It is all very well, if I may say so, for Lord Reid to say in *Broome v Cassell*<sup>7</sup> that

“where there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it”.

I can only say, with unfeigned respect for his Lordship, that I do not think everyone has found it so. Yet I come back to the conviction that, on balance, the writing of individual judgments tends to produce the better work.

You will have noticed what difficulties arose in the case I have just mentioned from the concurrence in an earlier case of several members of the House of Lords, including Lord Reid, in a speech prepared by Lord Devlin. Once again I must respectfully refer critically to a proposition of Lord Reid's. Lord Reid, speaking of a view expressed in Lord Devlin's speech, a view with which he ultimately disagreed notwithstanding his expressed concurrence with the speech at the time it was delivered, said:<sup>8</sup>

“That view did not form an essential step in his argument. Concurrence with the speech of a colleague does not mean acceptance of every word which he has said.”

7 [1972] 2 WLR 645 at 681.

8 Ibid at 683.

Perhaps not: but how much more helpful it would be if the concurring Judge wrote his own judgment, not necessarily a completely self-contained judgment but at least one which made it clear how far his concurrence was intended to go. I think many will gladly accept an earlier passage in Lord Reid's speech<sup>9</sup> where he said:

“I and my colleagues made a mistake in simply concurring with Lord Devlin's speech. With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law.”

And many will apply these words to other tribunals as well as the House of Lords. The trouble that is likely to be found with a single judgment goes deeper than that to which the Lord Chancellor referred when he said in the same case<sup>10</sup> that the result may be an unduly fundamental approach to the actual language used, and that “phrases which were clearly only illustrative or descriptive can be treated in isolation from their context as being definitive or exhaustive”. This is not difficult to accept, because the word “clearly” is there; but when the word has to be omitted I doubt whether everyone will exonerate the concurring Judges as readily as Lord Reid would seem to do from all the responsibility for misunderstandings on the part of “those who wish to apply the decision in other cases” or even “those who wish to criticise it”. Of these folk his Lordship said:

“They do not seem to realise that it is not the function of...judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles, and much that they say is intended to be illustrative or explanatory and not definitive.”

I venture respectfully to offer two comments upon that: first, that if a Judge is not intending to frame definitions or lay down hard and fast rules, care in the writing of his judgment should ensure that he does not appear to be doing so; and, secondly, that a Judge who is considering whether to concur in another's judgment would do a service to those who will seek his meaning in his words if he refrains from concurring without adequate express qualification, unless he really does intend to adopt every word of his colleague's for himself.

To argue from all this that one should always write a judgment for oneself would be, I realise, to counsel perfection in one direction at the expense of due attention to important considerations pointing the other way. I would urge no more than that the course of individually, exactingly, intensely, putting in writing what the Judge believes ought to be said has such immense advantages that it should be followed in every case unless the reasons for departing from it, when doubtfully considered, are felt to preponderate convincingly.

I have almost finished, but I should like to add that it seems to me specially important that an earlier decision should not be overturned except after the careful self-questioning which the writing of a reserved judgment makes possible. It will be conceded, I imagine, that generally speaking for any society it is vastly more advantageous that the law should be settled than that the decisions of the courts should be brought “into the same class as a restricted railroad ticket, good for this day and train only”.<sup>11</sup> Yet there is always the temptation to allow an exception in one's own favour. The necessary check has to come from within; no one else can help very much, not even by so tart an observation as was heard in one of our courts half a century ago: “Apparently it is true that a living

<sup>9</sup> Ibid at 681.

<sup>10</sup> Ibid at 666.

<sup>11</sup> *Smith v Allwright* (1944) 321 US 649 at 669.

dog is better than a dead lion!" Even in constitutional matters, which are special because correction by legislation is so difficult to achieve and in which largely for that reason the Australian system resembles the American in amounting to "government by lawsuit", the danger to be feared is the danger of non-government by lawsuit, each lawsuit after a new appointment to the Bench being no better than a new plunge of the hand into a lucky dip. It would be out of place to discuss here the whole topic of *stare decisis*. All I would add upon the subject now is that over-confidence in one's own rightness, the besetting sin of most of us but of some more than others, calls for every dampening influence; and if modesty will not suffice for the purpose perhaps it may be reinforced by the reflection that he who takes the overruling sword must be prepared to perish with that sword. If he writes his judgment he will have time for this truth to dawn upon him.

It remains to say that we must look straight in the face the fact that in spite of all our care and all our toil our judgments are not likely to make our names in history. If we are read by posterity at all it will be only by the posterity of the near future. The reward of judicial work is not, except for the great, any degree of lasting fame; and you will agree, I am sure, that it ought not to be even a question in the Judge's mind, as he laboriously does his job, whether anyone will give him the praise that Portia won: "A Daniel come to judgment!" But if he is worthy of the robes he wears, the manner and method of his coming to judgment matter to him supremely. By them he passes judgment upon himself. Accepting the discipline of the study desk, he has no wish to look beyond what Conrad called "the prosaic severity of the daily task... whose only reward is the perfect love of the work";<sup>12</sup> and, like Maitland,<sup>13</sup> without explaining why other grapes are sour he can say that what grapes he has are sweet.

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12 *Lord Jim*, Blackwood, Pocket edition, p 8.

13 *Letters of FW Maitland*, Fifoot, Selden Society, p 323.

# Ex Tempore Judgments

Dr Elwyn Elms<sup>†</sup>

During the last decade, two judges of the NSW Court of Appeal who have each since been elevated to the High Court, have counselled judicial officers generally to adopt a practice of giving unreserved judgments on a routine basis, or at least wherever possible. This essay seeks to explore whether this ideal is one which is capable of achievement and analyses the dilemma facing judicial officers when confronted with that most difficult of all ex tempore decisions: whether or not to give an unreserved judgment. Along the way, the paper contains some practical advice as to how to prepare for, and how and under what circumstances to deliver, an ex tempore judgment.

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There was once an experienced judge who, on a hot summer's day, was engaged in the hearing of a case exceptional only for its lack of interest. Counsel for the plaintiff was addressing the court at length citing a great many authorities, including the well-known principle enunciated by the House of Lords in *The Overseers of the Parish of Criggleswick v The Mudbank-super-Mare Docks and Harbour Board Trustees and Others*. It was late in the day, the judge lost his attention and momentarily closed his eyes, convinced that counsel would not have finished his address by the time the court was due to rise for the afternoon.

At 4 pm counsel's droning suddenly ceased, and the judge looked up only to see counsel for the *defendant* resuming his seat. The judge realised that he had missed the latter's address entirely, and everyone appeared to be waiting on him to adjourn or to make some similar jurisprudentially significant pronouncement. Undismayed, he assumed a look of lively intelligence, and said that as he had formed a clear opinion, no useful purpose would be served by his reserving his judgment. He admitted that during the course of the excellent arguments which had been addressed to him, his opinion had wavered. But, after all, the real question to be decided was whether the principle so clearly stated by the House of Lords in *The Overseers of the Parish of Criggleswick v The Mudbank-super-Mare Docks and Harbour Board Trustees and Others* applied to the facts of the case before him. On the whole, and despite the forceful observations made by counsel for the defendant to which he had paid the closest attention, he thought it did. It was therefore unnecessary that he should discuss a variety of other issues, which, because of the view he took, were now rendered irrelevant. There would accordingly be a verdict for the plaintiff with costs, but as the case was one of great public interest, he granted a stay on the usual terms.

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<sup>†</sup> I would like to thank Ms Ruth Sheard, editor, from the Judicial Commission for providing me with many of the authorities to which reference has been made in this paper.

The judgment was the subject of an appeal. However, it was affirmed in both the Court of Appeal and the House of Lords, the Lord Chancellor being moved to comment in the House on the admirably succinct manner in which an experienced judge had dealt with a complicated and difficult problem.<sup>1</sup>

The story illustrates the best and the worst features of the *ex tempore* judgment. Among the best, for all the wrong reasons, are clarity and succinctness, brevity and the ability to get straight to the point. Among the worst are indolence, allowing one's attention to wander, not following the arguments presented on both sides, not making notes, and worst of all, giving an immediate judgment for no better apparent reason than to dispense with the case. Yet, whatever the experienced judge's motives may have been, in the context of an increasing logjam of cases and reserved judgments, these days all judicial officers are under increasing pressure to deliver their judgments expeditiously, and wherever possible *ex tempore*.

### Judicial approaches to *ex tempore* judgments

Judicial approaches to the giving of *ex tempore* judgments have changed over the last thirty years or so. This evolution has coincided with the decline of the jury as the ultimate arbiter of fact in many proceedings and the substitution of judicial officers to fulfil this role. In conjunction with this ongoing trend, a number of authorities have emphasised the obligation of judicial officers to give reasons when determining cases, in order that the parties might know the basis upon which their case has been decided and to facilitate the determination of the relevant issues should there be an appeal.<sup>2</sup>

Whatever the reasons may be, thirty years ago Sir Frank Kitto, speaking essentially to an audience of the higher echelons of the judiciary, could wax lyrical over the benefits of the handwritten reserved judgment as a discipline, the "knuckling down to the sheer toil of it, enduring the soul-searing tedium of it, going over the first draft, the seventh draft if need be, and making all the necessary corrections and improvements with the crossings out, the balloons and the marginal scribblings".<sup>3</sup> In his view, "an adjudication that is not disciplined cannot but be more or less of a travesty, however facile its language, however impressive the voice that pronounces it".<sup>4</sup>

And later in the same article:<sup>5</sup>

"What we think that we think on the spur of the moment often undergoes a remarkable change when we go through the discipline of putting it down on paper and looking at it. Only after much refining and reforming in the process of writing are our first vociferations likely to yield the crystals of our final thoughts, propositions freed from the impurity of our innate prejudices and from the distortions and the fuzziness around the edges that are the too-frequent products of our emotions, our sympathies, our dislikes and our predilections."

As a result, all judicial officers should listen to the imperious urging of a still, small voice whispering "Reserve thy judgment!"

1 The case appears in *Forensic Fables* by O, 1985, Butterworths, London, being a complete reprint of the 1961 edition, at p 23 under the heading "The Judge who closed his eyes". I have made some cosmetic changes to the language.

2 Cases in point include *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 385-386 per Mahoney JA; *Soulezis v Dedley (Holdings) Pty Ltd* (1987) 10 NSWLR 247

3 Sir Frank Kitto, "Why Write Judgments?", reprinted in this collection, p 69 at p 74.

4 *Ibid.*

5 *Ibid.*, p 77.

With no disrespect intended, these words were uttered in a more leisured age when judicial officers in all jurisdictions had more time at their disposal to devote to contemplation and refinement of their decisions. Twenty and thirty years down the track, with a vastly increased workload in all courts, and problems associated with delay in hearing matters compounded by a further delay in the handing down of judgments, the emphasis has changed. The harbingers of this change were two senior judges of the NSW Court of Appeal, each of whom has been elevated to the High Court since making his comments, metamorphoses which are perhaps no more than coincidental.

In 1991, Justice Michael Kirby, then President of the NSW Court of Appeal, commented:<sup>6</sup>

“In a perfect world, one might reserve decisions of any complexity in order to have time to reflect upon difficult issues of fact and law. But the backlog of reserved judgments increases. And in the background are the waiting litigants, the vigilant lawyers and the angry editorialists reflecting increasing impatience with judicial delay. These forces contribute to the pressure which exists today. *It obliges all judicial officers, wherever possible, immediately after argument is concluded, not to reserve. But to provide reasons on the run.*” (Emphasis added)

Some ten years later, the NSW Court of Appeal was considering an appeal involving a trial judge’s delay of almost twelve months in handing down a reserved judgment.<sup>7</sup> In this case, there were issues concerning the respective credibilities of the plaintiff and the defendant. The trial judge said that she preferred the evidence of the defendant and his witnesses, but the Court of Appeal held that, since there was an inversely proportional relationship between the parties in point of creditworthiness, she had failed to sufficiently analyse the evidence and say why. The dual aspects of delay and the failure to give adequate reasons were inextricably linked.

So far as the delay in handing down judgment was concerned, the court was generally quite sympathetic to the judge’s plight, referring to factors such as the fact that many cases were not brought promptly to trial, some had to be adjourned in mid-stream, addresses were often perfunctory, leaving the court to make what it could of complex documentary material, judges were obliged to make their own notes of the evidence, proceedings were often interrupted by the interposition of other matters, and the pressure to hear cases meant that even the hour or two after a case finishes could not be devoted to considering the case while it was fresh in the memory, but must be used in the early stages of the next trial. According to one of the Appeal Judges, Stein JA, himself formerly a Judge of the District Court, the solution was for the court to provide “more time for reflection and the writing of reserved judgments...in appropriate cases”.<sup>8</sup> But Heydon JA, had a different solution to the problem of delay in handing down judgments and that was for judges to adopt a routine practice of delivering unreserved judgments.<sup>9</sup>

It was, he said, a technique with which famous names were associated. There was Sir William Page Wood VC, who favoured the delivery of unreserved judgments, because he found writing “extremely injurious to (his) health”. As a result his judgments were said

6 Justice Michael Kirby, “Reasons on the Run” (1991) 3(5) *Judicial Officers Bulletin* 1–3. Substantially the same article appears under the same title in (1995) 25(2) *University of Western Australia Law Review* 213.

7 *Hadid v Redpath* [2001] NSWCA 416.

8 *Ibid* at [1].

9 *Ibid* at [45] per Heydon JA (with whom Grove J agreed). The citations which follow are extracted from His Honour’s judgment from between [46] and [49]. The passages in quotation marks appear in His Honour’s judgment as citations from the *Dictionary of National Biography*.

to be occasionally “ill-arranged and fragmentary”. A generation later Sir George Jessel, followed the same practice. “Never while at the rolls court did he reserve judgment — not even in the great Epping Forest case (*Commissioner of Sewers v Glasse*) in 1874 [19 Eq 134]), where the arguments lasted 23 days and the evidence filled several folio volumes — and only twice, and then only at the request of his colleagues in the court of appeal”. When solicitor general, he was reputed once to have said “I may be wrong, but I never have any doubts”. A generation later still, Hamilton J (Viscount Sumner) followed the same practice in the Kings Bench Division from 1909 to 1912.

And in the 1960s, Roskill J at the conclusion of a five-day trial ending on 21 December 1966, the last day of term, delivered a judgment dealing with complex facts and difficult questions of law immediately, his opening words being: “were it not that it is now rather later than the eleventh hour on the eve of the Christmas vacation, I should have preferred to put my judgment in this case into writing in view of its importance to the parties and the number of difficult points to which it gives rise, but having regard to the admirable arguments to which I have listened on both sides and to the conclusions which I have reached, I propose to give my judgment at once, notwithstanding the obvious attendant disadvantages of so doing”. Do I not detect an echo from a *judex* of sorts quoted earlier in this paper? No, the resemblance is purely coincidental, because according to Lord Denning MR even counsel for the losing party described Roskill J’s judgment as a *tour de force*. But then again so did the Lord Chancellor in *Criggleswick!*

In any event, we have now reached the stage where, from the caution administered in the 1970s to listen to that still, small voice whispering “Reserve thy judgment”, judicial officers are now being virtually enjoined or at least strongly advised by higher authority to “adopt a routine practice of delivering unreserved judgments”, if not in all cases, but at least “wherever possible”. Not only that but the practices of famous names from the past are cited to sanction the practice. The question is, therefore, whether the advice of Justices Kirby and Heydon is capable of achievement and, if so, under what circumstances? And what benefits are there in giving an immediate judgment and do they outweigh the obvious pitfalls?

Of course, in at least one area, their Honours’ curial and extra-curial advice had long since been achieved at the time they spoke. The magistrates of this State, who now deal with some 97% of all court work in New South Wales to finality, have routinely delivered *ex tempore* judgments since the foundation of the colony, and the increasing complexity and enlargement of their jurisdiction has not inhibited their capacity to do so. The Local Court is at the coal-face of justice in this State and its affairs would rapidly grind to a halt if the majority of its decisions were to be reserved. Over the years, those who attend the Local Court have come to anticipate that they will receive a speedy resolution to the problem at hand after a necessarily succinct résumé of the facts and the applicable law; although not necessarily so in those instances where the onus of proof is more finely balanced and where the only avenue of appeal is on the basis of an error of law. Nor should it be forgotten that the words of Kirby and Heydon JJ were of general import, being directed to all judicial officers in the State and certainly not just to magistrates.

### **The dilemma as to when to deliver an *ex tempore* judgment**

By virtue of the very nature of the work which they do, judicial officers deal with an enormous variety of matters. Some last only a few hours in hearing time, others consume many days or weeks or even months. The issues in some matters are relatively straightforward. In others there are intricate and involved factual and legal matters to resolve. The short matter can often be more difficult to decide than one lasting considerably longer in point of time. Sometimes, the parties will hand up agreed facts

and issues, leaving you to decide one simple and straightforward issue, which turns out to be anything but simple and straightforward. On some occasions you will see the issues clearly and be ready to deliver your ex tempore judgment as soon as the case is complete, only to be turned around by something counsel says in his or her address. And there are always those cases where you have confidently embarked on your ex tempore judgment, only to have second thoughts about it while you are in the process of delivery, in which case the only real option is to abandon your predetermined course to allow time for further reflection, notwithstanding any embarrassment which this may occasion in the short term.<sup>10</sup>

Another factor in these days of case load management is the use of witness statements. In many cases, it is not uncommon to have a vast bulk of documentary material tendered at the commencement of the case, and at various strategic times thereafter. The time for absorbing the evidence as the witness gives it *viva voce* is truncated. Accordingly, when the time arrives for giving judgment, much of this material may still be swimming around in one's head. It has not been able to gel. If the case proceeds for more than a day, there is at least the opportunity for reading or re-reading this material in one's own time.

I have recently spent some time sitting in the Local Court's Small Claims Division, which is intended to provide litigants with a "fast, cheap, informal but final resolution of their disputes"<sup>11</sup> where amounts of \$10,000 or less are involved. Witness statements are generally filed with the court beforehand and can be read before the case commences. In other cases, for one reason or another they have either not been filed or linked up with the papers, and one must absorb them on the spot. At the Downing Centre, ten such matters are listed each day and the complexity of some cases bears no relationship to the amount of money involved. Yet a decision is generally anticipated on the spot, immediately following the reading of sometimes lengthy witness statements and hearing submissions from the parties or their legal representatives. Generally, no oral evidence is given. The process involves limited time for reflection and there are always those cases where one just has to reserve. In other words, the fact that a matter may be dealt with in the Local Court — and in the Small Claims Division at that — does not necessarily mean that it is stereotyped for an ex tempore decision. On the other hand, in the higher courts, reasons of urgency and other considerations in a complex case often command an immediate decision, or a judgment given soon after the case concludes. The *Patrick*<sup>12</sup> litigation in the Federal Court a few years ago was a case in point.

The question is, how can one make "a routine habit" of anything, let alone of giving an ex tempore judgment, amidst this infinite variety of circumstances? One of the most difficult decisions a judicial officer will ever be required to make is whether or not to reserve, and this is at least one decision which does have to be made ex tempore. Your opinions may have swayed back and forth during the currency of the case, and even the more so during counsel's submissions. However, you take the view that you are seized of the matter, the issues are fresh in your mind, reserving may mean delay in the context of other judgments already reserved which have priority, and you feel that the time to strike is now — perhaps after a moment or two for reflection.

Whether you have made the wrong or right decision may not become immediately apparent. That I made the wrong decision, or thought that I may have done so, has sometimes dawned upon me after walking down the corridor to my chambers after

10 Cf Justice Michael Kirby, "Ex Tempore Judgments — Reasons on the Run" (1995) 25(2) *University of Western Australia Law Review* 213 at 228.

11 Attorney General's Second Reading Speech, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 22 November 1990.

12 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478.

adjourning for the day. Only then has the realisation dawned about some aspect which I did not cover or did not place sufficient emphasis upon in my judgment. There have even been occasions when I have managed to convince myself that I should have found for the other party.

This soul searching is not unnatural, but for one's own piece of mind, it is best and more fruitfully indulged in before a rash precipitate plunge into an unreserved judgment. The difficulties in giving an immediate judgment in most cases are obvious:<sup>13</sup>

“The intense concentration called for in seeking to understand every nuance of the case as it happens — the desire then to marginalise and discount the irrelevant — the need to remember earlier aspects and balance them against later ones — the insistent pressure of the next case waiting to be heard.... The faults of expression typical of unreserved judgments are often said on appeal to manifest errors of thought.”

On the other hand, yet another addition to one's own personal cellar of reserved judgments may well see it submerged behind those others waiting their turn in the queue, and the sea of never ending cases still to be heard, never forgetting that a judge is also a human being who has his or her own family and personal responsibilities to work into their list of priorities somewhere. The facts and nuances of the case fade from one's mind, and the task of resurrecting them becomes correspondingly more difficult with the passage of time. If the delay is extended, inferences can be drawn that the judge has forgotten large parts of the facts and evidence in the case, and that he or she has no clear recollection or impression of the demeanour of the witnesses of fact or their credibility when the time eventually arrives to deliver judgment.<sup>14</sup>

It should not be supposed that in his counsel to “reserve thy judgment”, Sir Frank Kitto had overlooked the aspect of delay. He recognised that to reserve would mean delay,<sup>15</sup>

“but while in some cases there is truth in the maxim that justice delayed is justice denied, in many it is true that hurried justice is not justice at all, in many more that it is not justice done sufficiently, and in still more that it is not justice done manifestly. I recall that on a famous occasion, Sir Owen Dixon, answering a request for urgency made by the then Attorney-General of the Commonwealth, said: ‘It is more important that this case be decided rightly than that it be decided soon.’ Less neatly but with equal truth it may be said that in the great majority of cases it is more important that the purposes of an open statement of reasons should be well and fully achieved than that the parties and the Judge should have a quick end to their current preoccupation. Quickness of decision is no substitute for thoroughness in consideration and the utmost care in the formulation of reasons. You may say that these things may be overdone. Of course they may. You get your easy cases, your obvious cases, though they are not as frequent as a self-confident Judge is apt to enjoy telling himself. I am suggesting no rigid rule, but a general truth. My proposition is that wisdom lies in keeping to the course of carefulness, though recognising cases when they arise which require finality urgently.”

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13 *Hadid v Redpath* [2001] NSWCA 416 at [50] per Heydon JA.

14 *Ibid*: see the cases referred to at [29] of Heydon JA's judgment.

15 Kitto, *op cit* n 3, pp 72-73.

## Resolving the conundrum

How then to resolve this conundrum between carefulness and discipline on the one hand, and the avoidance of delay on the other, in an age of an increasing case load imposed on all judicial officers? To my mind the answer lies not necessarily in developing a routine habit of delivering reasons on the run, a practice which can lead to the undesirable features we witnessed at the hands of our so-called experienced judge at the outset of this paper. No more does it lie in routinely or even frequently reserving one's judgment, a practice which if attended by lack of preparation when the case is heard and thereafter delay, can mean that one's memory of the case soon becomes little more than something like a faded snapshot. The answer lies in approaching each case, no matter what its complexities, idiosyncrasies and length, *as if one were* intending to deliver an unreserved judgment at its conclusion.

This involves active preparation for that eventuality as the case progresses. For those cases which lend themselves to a judgment immediately upon the conclusion of the addresses, the process can take place almost intuitively with the benefit of some years of experience. I usually take voluminous notes of the evidence and appropriately underline, circle or otherwise mark those portions which seem to me to be of some significance. As I turn the pages over face down, I leave those pages with these markings face up, so that they and their markings are readily accessible. The Court of Appeal has pointed out on a number of occasions that a lengthy regurgitation of the evidence with little or no attempt to distinguish the relevant from the irrelevant is undesirable. However, it is of assistance to be able to quote directly the evidence of a witness regarding this or that issue, and that is why I like to keep those notations I have made of those portions of their evidence which appear to me to be significant before me.

For preference, one's notes should be legible and none too cryptic. I must confess that I have frequently found myself in the position of Mr Guppy, the solicitor in *Bleak House*<sup>16</sup> who had gone to the trouble of making a note of the things he wished to say at an important interview. When the time came to consult his notes, he experienced certain difficulties of interpretation:

“Now — I — ... The fact is, that I put down a head or two here of the order of the points I thought of touching upon, and they're written short, and I can't quite make out what they mean'... He murmurs, growing warm and red, and holding the slip of paper now close to his eyes, now a long way off, 'C.S. What's C.S. for? Oh! "E.S.!" (*Esther Summerson*)" Oh, I know! Yes, to be sure!' and comes back enlightened.”

When I first read this passage I was indeed relieved to see that this sort of thing happened to someone other than myself, and as long ago as the 1850s! It highlights the importance of making one's notes capable of being read and understood if they are to be of any use at all. Otherwise, if you are expounding *ex tempore* and *viva voce*, the pinnacle of embarrassment is apt to arrive when you are staring at a note which you can't read and have to stop your otherwise learned dissertation in mid sentence or skirt around the point.

As the case proceeds, I usually also make a note of the issues as they emerge so that I do not overlook them. When I was first appointed to the bench and was wondering how to approach the subject of delivering an *ex tempore* judgment — “in my salad days, when I was green in judgment”, as Sir Frank Kitto expressed it<sup>17</sup> — an experienced magistrate advised me to make a note of the issues raised by counsel in their addresses, and to make

<sup>16</sup> Charles Dickens, originally published 1852-1853, Chapter 29.

<sup>17</sup> *Op cit* n 3, p 69.

a particular point of mentioning those, distinguishing the relevant from the irrelevant when appropriate, since these were the facts and issues they considered important. I found this good advice over the years. It generally saved forgetting a point which the parties themselves considered of significance.

In the case which progresses from day to day or is otherwise interrupted, the conscientious judicial officer will also not only make notes of the proceedings as they progress, but will sit down at the end of the day to review the day's proceedings, to make notes of his or her assessment of the witnesses, what has been proved, what remains to be proved, what aspects should be kept in mind, and so on. "It not only prepares you for the resumption of proceedings but forces you to evaluate what has transpired and tends to fix the evidence and the impressions created by witnesses better in one's mind."<sup>18</sup> For shorter cases, the morning tea and lunch breaks provide the same opportunity.

I have also found it helpful to commence writing a judgment at the earliest opportunity — as soon as something starts to gel. It may need to be changed from time to time, and even from day to day, but in these days of word processors and computers, that task is not too difficult. If the case is interrupted for any length of time because it is adjourned part heard, these preliminary steps to the ultimate judgment, be it given *ex tempore* or after some consideration, become even more critical. If the case is simply put away in a drawer or on the shelf "to simmer" for some months, you will probably have little recall of the evidence or the witnesses, and your notes may not necessarily help, particularly in the case of witnesses if you have not recorded your impressions of them at or shortly after their tenure in the witness box. The sheer task of getting it all back into one's head again becomes an ordeal in itself. Far better to start from a position when it is all fresh in the mind. Obviously, in this process of continual writing up, constant revision is necessary. It does not mean that any issue or the case as a whole has been prejudged, because the case is constantly evolving. Your draft judgment is a work in progress, and any conclusions are at best preliminary. The advantage of this process of writing up virtually from day one, is that, as Sir Frank Kitto said, it focuses the mind. Albeit unconsciously, the evidence is being analysed as you go along.

Hopefully, if all goes well, by the time the case is approaching its zenith, you *may be* in a position to deliver an unreserved judgment at the end of it, or at least be in a position to do so soon thereafter. If this is not possible — possibly because of some point counsel has made in their addresses, or because of something else which has occurred to you, or because you have still not made up your mind on certain points — you should be in a position to give judgment shortly thereafter — the next day or within a day or a few days or weeks. The problem of delay will have evaporated or been significantly diminished. The hard work having been done during the currency of the case, it is of no real consequence if the decision is given a few days or even a few weeks later, and the litigants and their representatives will probably think more of you, and more important, the justice system, for it. As a matter of interest, Heydon JA's leading judgment in *Hadid v Redpath* was given seven days following the hearing. For the sake of completeness, I should add that these days, many courts have in place case management guidelines which include a period within which judgment should be given after the hearing. In civil matters in the Local Court, the period is 28 days.

Even in those cases where I may have prepared something of a judgment before the conclusion of the hearing, if some evidence is taken and submissions are heard on the final day, I never start reading as soon as the addresses are complete, even when nothing which has transpired on that day has changed my mind. To do so will give the

18 Arthur Riedel, "Judicial Decision Making — Ex Tempore Judgments and Judgment Writing", Residential Orientation Week for Magistrates, 1 May 1990.

unfavourable impression to both the litigants and their legal advisers that you had made up your mind before hearing all the evidence or the submissions, and that you were not open to argument. In such circumstances, I frequently adjourn the proceedings until later in the day or another day, depending on the circumstances, and give judgment then. And there are always those occasions when something counsel has said may have raised other issues in your mind for further consideration, requiring something else to be incorporated in your judgment or sections of it to be recast, or your prima facie conclusions to be called into question. It is the immediate reading of the judgment, obviously prepared before the conclusion of the case, which creates the bad impression, and it is one which I remember experiencing myself in the court room when I was a solicitor. These considerations are clearly not a factor for the judgment which is delivered truly *ex tempore* and off the cuff as soon as the hearing of the case has concluded, even though the evidence may well have lasted more than one day.

### The format of an *ex tempore* judgment

In delivering an *ex tempore* judgment, you will need to have in mind a preconceived plan as to the format of such a judgment. No doubt, over the years, each of us has developed our own way of approaching this problem, and no doubt also each judicial officer's plan will vary from time to time to suit the idiosyncracies of the instant case. Nevertheless, it does help to have a structured process in the back of one's mind in order to ensure that the salient features of the case have been covered. As Kirby P (as he then was) said, this basic structure is ordinarily syllogistic. "The relevant facts are found. The applicable rule of law is stated. The conclusion results from the application of the law, so stated, to the facts, so found."<sup>19</sup> Justice MJR Clarke, then a judge of the NSW Court of Appeal, expressed himself in similar terms in a paper delivered to the Compensation Court Annual Conference in 1996: "The problem to be solved must be identified, the conflicting approaches spelt out, the relevant evidence which is accepted be identified, the conflict analysed and the problem solved."<sup>20</sup>

There will generally be a brief introduction concerning the nature of the case you are dealing with, followed by a statement of the relevant issues. The findings of fact need not be set out in pedestrian detail. They can be confined to the barest outline.<sup>21</sup> As Justice Clarke said in the address just referred to:<sup>22</sup>

"Setting out in summary form all the evidence in the case is neither helpful nor does it advance a listener's understanding of the reasons why A, rather than B, succeeds in the case... What I have always sought to do is isolate the factual issues — sometimes they may also be the ultimate issues — and, taking each in turn, analyse the evidence supporting, for instance, the applicant's contention, then the evidence to the contrary, after which I would give reasons for preferring one version to the other. As a very high proportion of cases are resolved by the factual findings these conclusions often lead, almost automatically, to the result."

In appropriate cases, the onus of proof, demeanour and credit will also be the subject of comment. In a free-flowing judgment delivered *ex tempore*, my experience is that one does not always adhere rigidly to the stereotype. You may, for example, commence your judgment with the last point made by counsel in his or her address. Nevertheless, it is always necessary to keep the basic syllogistic structure at the back of your mind in order to avoid overlooking some vital ingredient.

<sup>19</sup> Op cit n 6 at 2.

<sup>20</sup> MJR Clarke, "Ex Tempore Judgments" (1996) 3 *The Judicial Review* 31.

<sup>21</sup> Kirby, op cit n 6 at 2.

<sup>22</sup> Clarke, op cit n 20 at 35.

### The dilemma continues

This syllogistic process now demands that I should state my conclusions. The judicial advice proffered individually by Kirby and Heydon JJ in differing circumstances a decade apart was in each case strongly and cogently expressed. Kirby P said: “It obliges all judicial officers, wherever possible, immediately after argument is concluded, not to reserve. But to provide reasons on the run.”<sup>23</sup> The onus is expressed in terms of obligation, qualified by the indeterminate safeguard “wherever possible”.

Kirby J also recognised that judicial officers are an empire of individualists and that:<sup>24</sup>

“to lay down general rules, whether about *ex tempore* reasons or most other topics affecting them, amounts to a presumption. Individuals have different ways of expressing themselves. Some have great gifts of oral communication and will reflect them in *ex tempore* reasons. Some who had great gifts of advocacy may not have that special talent which is necessary for the delivery of tight and convincing *ex tempore* reasons for a judicial decision. An accurate recall of the precise detail of relevant evidence and a clear perception of applicable principles of law afford the best foundation for proceeding to an *ex tempore* judgment which is at once accurate and compelling.”

In other words, a concession that whilst the unreserved judgment may be the preferred mode of expression for some, others may choose to express themselves with greater felicity in writing.

Heydon JA tendered his judicial advice from the bench. His comments were made obliquely and not in terms of obligation: “one way of avoiding the dangers associated with delay is to adopt a routine practice of delivering unreserved judgments.”<sup>25</sup> And that “if it is not possible for District Court judges to be given more time in which to write reserved judgments, the dilemma facing members of the court will continue to exist”.<sup>26</sup>

And so the dilemma goes on and no doubt it will continue to do so for so long as there are limited numbers of judicial officers to hear an increasing workload of cases. The fact is that there is no solution. In my view, it is simply not possible for conscientious judicial officers to adopt a routine practice of delivering unreserved judgments or reasons on the run. But it is possible for all of us to place ourselves in a better position to do so more frequently than perhaps we do now, by devoting more time and preparation for this eventuality during the currency of each case we are hearing. If this occurs, the perceived proportional relationship between the reserving of judgment and delay will have been diminished, if not extinguished entirely.

We are all conversant with the aphorism “Live each day as if it were your last and one day you’re sure to be right”. I say, “Approach each case on the bench as if you are going to deliver an *ex tempore* judgment”. I can assure you that your mortality will not be in any way compromised, and you will also have fewer reserved judgments, which in the somewhat circumscribed world we occupy as judicial officers is akin to having the best of both worlds.

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23 Kirby, *op cit* n 6 at 1.

24 *Ibid* at 2.

25 *Hadid v Redpath* [2001] NSWCA 416 at [45].

26 *Ibid* at [52].

# Clarity and the Rule of Law: The Role of Plain Judicial Language<sup>†</sup>

Mark Duckworth

Criticisms of legal English are not new — both Sir Thomas More and Francis Bacon wrote that law should be more understandable. However, why does the way judges communicate matter? Along with statutes, judgments are the source of our law, and the use of plain language is important for access to the law. This essay argues that the way in which judges and the courts communicate today is a reflection of the historical development of judgments and that it is no longer appropriate. Instead, the principles of plain language should be applied to the writing of judgments to ensure effective communication. The essay defines what plain legal language is and discusses how it relates to judgment writing.

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## Introduction

*Absence of clarity is destructive of the rule of law.*  
Lord Diplock<sup>1</sup>

This paper is about how judges and the courts communicate. In the last 30 years there has been considerable debate throughout the English speaking world about how legal documents are written. This debate has concentrated on legislation and private legal documents such as mortgages or insurance contracts. There has been little attention to the way judgments are written and whether the ideas behind plain language can be applied to them.

In this paper I look at this issue. I have put it in the context of the history of legal language and the writing of judgments. It is important to do this because in order to change legal language, we must understand why the language of the law has developed in the way it has. It is also important to understand how the current form and role of the judgment developed. Against this background I attempt to assess whether the public demands for lawyers to write more plainly can be made of judges, and if so in what way.

Why does the way lawyers communicate matter? The reason is that words are the tools of lawyers. The whole legal process turns on their use. Statutes, judgments, contracts and wills all define and create legal rights and duties for individuals.

Lawyers do not just talk to themselves. Every day, the public comes into contact with legal documents, whether they are parking a car, applying for a credit card or taking

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<sup>†</sup> This is an edited version of a paper originally published in (1994) 2 *The Judicial Review* 69.

<sup>1</sup> *Merkur Island Shipping Corp'n v Laughton* [1983] 2 AC 570 at 612.

out a loan or a mortgage. Parliament makes laws, judges hand down decisions that affect both individuals and classes of people. Local governments pass local laws, and tribunals make decisions that have an impact on a wide range of people. All these processes create documents which make or reveal the law. But despite the importance of these legal writings, so few of them are understood. As one leading commentator has said:<sup>2</sup>

“It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend.”

### The modern plain English movement

The modern “plain English” movement began in the United States of America in the 1970s as part of the consumer movement. As a result of this, the first document produced in what was called “plain English” appeared. The symbolic moment for the birth of the movement was 1974. In that year, the Nationwide Mutual Insurance Company simplified two of its insurance policies. In the same year, a Plain English Campaign was founded in Britain.

In 1975 Citibank issued a plain English promissory note. This led to a number of United States statutes that required plain English in consumer contracts. In 1978 President Carter produced an executive order that all federal regulations should be “as simple and clear as possible”.<sup>3</sup>

Australia was not far behind. In 1976, NRMA Insurance published its first plain English policy. Other insurance companies followed. Then there was a move to reform legislative drafting. Parliamentary Counsel in New South Wales, Queensland, Victoria and the Commonwealth adopted plain language policies.

### Role of the courts

The spread of plain language has been given significant help by a number of judicial decisions. Some of these in New South Wales were made under the *Contracts Review Act* 1980 (NSW). No case has held that a contract is unenforceable simply because it is difficult to understand. But this was one fact the Supreme Court has taken into account when deciding if a contract was unjust. In *Bridge Wholesale Acceptance (Australia) v GVS Associates Pty Ltd*<sup>4</sup> Waddell CJ in Eq, commenting on a guarantee, said that it is:

“...not unusual in that no attempt has been made to express its provisions in plain English and each of its operative provisions consists of one long sentence. It is closely printed. The significance of a number of its provisions would be unintelligible to a lay person.”

A powerful condemnation came in *Houlaban's Case*<sup>5</sup> in the ACT Supreme Court. Higgins J refused to enforce a bank guarantee and stated:

“I am satisfied...that none of the persons present had any real knowledge of the nature and effect of the guarantee document that was then being executed. It was even impossible for counsel appearing in the case to construe even the first clause when asked.

2 F Bennion, *Statute Law*, 2nd ed, 1983, Oyez Longman, London, p 8.

3 For a summary of the course of the movement in the United States see J Kimble, “Plain English: A Charter for Clear Writing” (1992) 9 *Thomas M Cooley Law Review* 2.

4 (1991) ASC 56-105.

5 *Houlaban & Houlaban v ANZ Banking Group* (1992) 110 FLR 259 at 262-263; see also the comment by Young J in *Goldsbrough v Ford Credit Aust Ltd* (1989) ASC 58,583.

### Judicial writing

Despite activity in other areas of the law, it is only recently that judicial writing has been given much attention. Comments in 1993 by the then Chief Justice of the High Court, Sir Anthony Mason, show that he is aware of this too. He said:<sup>6</sup>

“Unfortunately, judgments do not speak in a language or style that people readily understand...The judgment is so encrusted with discussion of precedent that it tends to be forbidding. The lesson to be learned is that, if we want people to understand what we are doing, then we should write in a way that may make it possible for them to do so.”

Much of what Sir Anthony said was in response to the reforms proposed to the legal system and the media scrutiny of the judiciary. He said that:<sup>7</sup>

“...judges are in a better position than anyone else to give an account of what they are doing and enhance media and public understanding of the role of the courts. Greater communication by the judges will, I hope, lead to a better understanding of what the courts are doing and more informed debate about proposals for change which affect the Judiciary.”

These comments show that the issues to do with access to the law and accountability which drove the plain language movement have reached the judiciary. In this context I now turn to a discussion of what plain language is and how it differs from the traditional way lawyers write.

### What is plain legal language?

There are a lot of myths about legal language and plain language. These myths have often created a conflict between those who propose plain language and those who defend the traditional style. Among these myths are that:

- plain language involves the uncritical application of a formula
- plain language is “babytalk”
- plain language is boring and prevents the writer’s own style shining through
- plain language is not precise, while traditional legal English is
- certain legal words and phrases have been tested over centuries and must be used otherwise the courts may find problems with the document.

All these myths have been debunked many times. Essentially they reveal a complete lack of understanding about what plain language involves.

### The plain language approach

Plain language is a user driven approach to writing and designing documents. It is concerned with efficient and effective communication. Plain language is more than just words, it is about organising ideas so that they make sense to the reader, and physically designing documents to make them clear and easy to use. There is no formula. It is an approach, not a set of unbreakable rules. Above all, it puts the reader first.

The term “plain language” has itself become a term of art. I prefer to talk of “effective communication”. Writing plainly is not a mechanical task. Successful communication depends on how the receivers interpret and use the information. This is as important as how the writer composed the message.

6 “Opening Address New South Wales Supreme Court Judges Conference” (1993) 1 *The Judicial Review* 185 at 186–187.

7 “The Australian Judiciary in the 1990s” (1994) 6(2) *The Sydney Papers* 111.

Certainly there are techniques that tend to make writing easier to understand, including:

- prefer the active voice
- avoid turning verbs into nouns (nominalisation)
- keep sentences short
- use appropriate headings
- use type size and type styles that help the reader.

Another feature of the plain language process is the use of testing. This works well with, for example, insurance documents. These are documents of general use and it is easy to pre-test them with a representative group of people. The role of testing of judicial language raises particular problems I deal with later.

### The myth of great legal writing

With plain language, the author asks at every stage — “Who is my audience and would it be able to understand what I am writing?” Plain language uses the English language to the full. It is not a stunted form of expression. It may be that a legal document in plain language does not have the richness of James Joyce. But neither does the traditional style.

The principle of efficient communication is paramount. If a judge must alter his or her style to achieve this, then I suggest the interests of justice have a higher priority than the demands of an individual’s style. How many judges in the English speaking world are remembered for their literary style? The answer is very few. Some lawyers, such as Sir Henry Maine, are renowned for their literary style. But the law reports are not filled with pages of great prose.<sup>8</sup> What great prose there is, such as that by Justice Holmes or Lord Denning, is also very clear.

### The myth of precision

The greatest myth is that traditional legal language is more precise than plain language. It is now 40 years since David Mellinkoff exploded the “myth of precision” in his book *The Language of the Law*.<sup>9</sup> “Lawyers” he wrote:

“...spend more time talking about being precise than others similarly addicted to words...listening to these discussions about precision and contrasting their own concern with the indifference of the street, law students and lawyers come to the effortless conclusion that with so much interest in precision, there must be a lot of it around.”

Mellinkoff explains how the language of the law is in fact wordy, unclear, pompous and dull. He goes through the history of many legal terms that are often revered as “terms of art” and are often quite unsettled. In the quest for complete precision, many lawyers achieve the opposite. They create documents of such complexity that the meaning becomes uncertain. No language is an exact tool. Words are constantly evolving and meanings change. By trying to create a world of perfect certainty, a world of archaic obscurity results.

This does not mean that plain language has no regard for certainty, rather that precision and intelligibility do not contradict each other. The proponents of plain language believe that if you write a document that is intelligible to your client or to a non-lawyer who must use it, then you are writing something that a judge will also understand. And despite the

<sup>8</sup> See S Stark, “Why Judges Have Nothing to Tell Lawyers About Writing” (1990) 1 *The Scribes Journal of Legal Writing* 25.

<sup>9</sup> 1963, Little Brown and Co, Boston, p 293.

fears of lawyers, most judges love it. When reading through thousands of documents a week, a judge much prefers to read one that is straightforward than one which meanders to its point as so many traditional legal documents do.<sup>10</sup>

### The origins of legal English

In the reign of Henry VI, Chief Justice Fortescue made the telling point that:<sup>11</sup>

“...we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember the reason.”

Anyone trying to untangle legal language must understand at least part of its history. Change is often slow. In a legal system such as ours, based on precedent, change is often exceptionally slow. Sometimes the reasons for why things are have been forgotten.

What the history of legal language tells us is that the “language of the law” is a “customary language” used by lawyers. Swift satirised the peculiarities of legal language in 1726. In *Gulliver’s Travels*<sup>12</sup> Gulliver explains the language of the law to the Houyhnhnms in this way:

“It is likewise to be observed that this society has a peculiar Cant and Jargon of their own, that no other mortal can understand and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong; so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or to a stranger three hundred miles off.”

With its mixture of Norman French, Latin and an old Anglo-Saxon love of repetition and alliteration, the language of the law became a dialect all of its own. Legal language has had its “own historical development which has paralleled, but has often been independent of, the historical development of the rest of the English language”.<sup>13</sup> David Mellinkoff has characterised the chief features of the language of the law as:

- frequent use of common words with uncommon meanings
- frequent use of Old English and Middle English words once in common use, but now rare
- frequent use of Latin words and phrases
- use of Old French and Anglo-Norman words which have not been taken into the general vocabulary
- use of terms of art
- use of Argot
- frequent use of formal words
- deliberate use of words and expressions with flexible meanings
- attempts at extreme precision of expression.<sup>14</sup>

10 A survey was carried out of judges and lawyers in Michigan in the United States, which found that a majority did not like documents written in traditional legal language. J Kimble and S Harrington, “Survey: Plain English Wins Every Which Way” in *Second Draft*, Newsletter of the Legal Writing Institute (1987) vol 3, no 2, p 4.

11 Mellinkoff, op cit n 9, p 11.

12 LA Landa (ed), *Gulliver’s Travels and Other Writings*, 1976, Oxford University Press, London, p 202.

13 VR Charrow, *Linguistic Theory and the Study of Legal and Bureaucratic Language*, Document Design Project, October 1981, American Institutes for Research, Washington DC, p 16.

14 Mellinkoff, op cit n 9, p 11.

All texts must be processed in order for us to understand what they mean. Legal texts are written according to their own rules, in their own language and are then processed by another set of rules. As one writer has said of legislation:<sup>15</sup>

“for reasons partly historical and partly due to the way...[drafters carry out their] task, they cannot be understood as they stand. Not even the experienced practitioner can comprehend the text without help. For the citizen they are a closed book.”

### Why legalese persists

Very few lawyers are taught how to write legal documents. It is something they are meant to pick up on the way. But what are their models? As students they read judgments, statutes and textbooks. The style is then reinforced by working with the impenetrable precedents churned out from law firms' word processors.

These are not a good basis for developing a clear style. In fact, they do the reverse. By copying the way old documents are written, young lawyers perpetuate the peculiarities of legal English. The use of jargon among occupational groups is common. But the language of the law goes beyond jargon. It takes law students years to master it. Once they have mastered it many are unwilling or unable to abandon it. Lawyers also often write in legalese because it is so difficult to unlearn that which has been so arduously learnt. They are often unable to give up the language because they do not know how they can, even if they wanted to. This means that legalese persists as a separate dialect with words, expressions and sentence structures that obscure rather than reveal.

When lawyers write, they often do so for themselves. They forget who their reader is or they have only one of their many readers in mind. The language of the law has not placed a high priority on communication. This is where the issue of plain language becomes important.

### The first challenges to the traditional style

While the “plain English” movement is relatively recent, criticisms of legal English have been made for centuries. Both Sir Thomas More and Francis Bacon had the idea that law should be more understandable. More wrote in his *Utopia* (1516) that it is:<sup>16</sup>

“an unreasonable thing to oblige men to obey a body of laws...so dark as not to be read and understood by every one of the subjects.”

Bacon wrote a proposal for a digest. He did not want to change the law but make it clear. He wrote:<sup>17</sup>

“What I shall express is not to the matter of the laws, but to the manner of their registry, expression and tradition; so that it giveth them rather new light than any new nature.”

The person who criticised legal English most vehemently was Jeremy Bentham. Like More and Bacon he wanted laws to be written in a book. The reason he wanted this was because judge-made law was uncertain and difficult to find. This was not because it was badly written by the judges — indeed judges wrote little of it at all. The reason was that

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15 Bennion, op cit n 2, p 2.

16 Cited by Mellinkoff, op cit n 9, p 141.

17 “Proposal for a Digest” in *Works* (ed Montagu), 1827, vol 5, pp 337-361.

authorised versions of judges' decisions are a comparatively recent creation. A person who wanted to know the law was sent through a variety of reports whose veracity depended on the reporter.

Bentham's influence on the changes in nineteenth century law was immense. Whether people were his disciples or not, it was impossible to escape the reach of his ideas. Lord Brougham stated that "the age of law reform and the age of Jeremy Bentham are one and the same".<sup>18</sup> One of the reforms Bentham was keen to bring about was to change the way laws were written and presented. For Bentham two ideas were linked: codification and clarity of expression. He introduced the word "codification" into the English language.<sup>19</sup>

Bentham condemned in violent and often graphic terms the way English statutes were written. He held the view that the need for "precision" was an excuse for lawyers to justify the way they used language:<sup>20</sup>

"For this redundancy — for the accumulation of excrementitious matter in all its various shapes, in all its various forms...for all the pestilential effects that cannot but be produced by this so enormous load of literary garbage, the plea commonly pleaded [is]...that it is necessary to *precision*."

Bentham was concerned with more than just style. He wished to see an end to the "shapeless shape of *common*, alias unwritten law". These sentiments became widespread in the nineteenth century. Tennyson expressed them in verse:<sup>21</sup>

"Mastering the lawless science of our law,  
That codeless myriad of precedent,  
That wilderness of single instances,  
Through which a few, by wit or fortune led,  
May beat a pathway out to wealth and fame."

Bentham put forward many of his ideas in the book *General View of a Complete Code of Laws*. In this he wrote how the code:<sup>22</sup>

"would not require schools for its explanation. It would not require casuists to unravel its subtleties. It would speak a language familiar to everybody; each one might consult it as his need. It would be distinguished from all other books by its greater simplicity and clearness."

For Bentham the idea of "plain judicial language" would have been a nonsense, since however clearly a judge may write, the judgment still remained inaccessible. He rejected the role the common law gave to judges. Sir Owen Dixon commented with distaste on:<sup>23</sup>

"The rise in the early nineteenth century of Benthamite principles...that the function of evolving law ought not to be conceded to the judiciary."

While Bentham wanted to limit the role of judges in law-making, other reformers worked at creating the system of law reporting we have today. They were doing so for reasons very similar to those Bentham had for proposing codes to replace the common law. It is to the development of the modern judgment that I now turn.

18 WS Holdsworth, *A History of English Law*, vol XIII, 1952, Methuen, London, p 42.

19 Sir Courtenay Ilbert, *Legislative Methods and Forms*, 1901, Oxford, p 122.

20 "Nomography" in *Works* (ed Bowring), William Tait Edinburgh, 1938-43, vol III, p 260.

21 "Aymer's Field" line 435 in *The Poems of Tennyson* (ed C Ricks), 1969, Longmans, London, p 1172.

22 "View of a Complete Code of Laws" in *Works* (ed Bowring), William Tait Edinburgh, 1838-43, vol III, p 209.

23 "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 471.

## The origin of modern judgments

The process of delivering a judgment was described in 1832 in this way:<sup>24</sup>

“The judgment of the court is...pronounced upon the law and the facts of the case, and in discharging this very responsible duty, the judge publicly, in open court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or advertng to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between parties becomes adjudged.”

It remains very much the same today. The major change is that now many more judgments are written and we have an authorised system of law reporting.

The whole topic of judicial language would not exist without the reforms to law reporting that occurred in the nineteenth century. The problem was set out in a report of 1849 on the Law Report System:<sup>25</sup>

“The law laid down by our tribunals is in no respect officially promulgated. A statute creating the most trifling alteration in legal procedure is ushered in the most formal manner possible; a judicial exposition of one of the leading principles of our common law, materially affecting the future administration of justice, the rights of property, or the liberty of the subject, may take place without notice and without anticipation, amidst an inattentive crowd, whilst the voice of the judge who delivered it may not reach any one beyond the parties immediately interested in the case which gives rise to it.”

Judges delivered judgments but did not, until comparatively recently, write them. Law Reporting was, as Lord Devlin said, “a private venture... When a judgment was delivered extempore... the reporter was the only channel through which it could reach the legal public.”<sup>26</sup> The reporters were barristers. Originally they made reports for their own use. Then they began to publish them commercially. In the eighteenth century some of the reports were “authorised” which meant that judges gave reporters access to the manuscripts of their judgments and corrected their reports.<sup>27</sup> The chaotic nature of reporting led to demands for reform. Finally in 1866 the first Law Reports appeared, published by the Council of Law Reporting.<sup>28</sup> The method of law reporting in both Britain and Australia has remained essentially the same since.

## Can the principles of plain language be applied to writing judgments?

Lord Devlin has said that the “unreported judge makes no law”.<sup>29</sup> The nineteenth century reforms meant that there was an authoritative source for judgments. As a result of this more and more judgements are written rather than oral and are accessible whether they are reported or not.

Is a judgment different from a statute, a mortgage, an insurance contract or a will? Should plain language principles be applied to judgments in the same way?

At one level a judgment is simply an act of communication. Therefore the message the judge conveys should be done in the most effective way possible. But judgments are

24 Quoted by Lord Shaw in *Scott v Scott* [1913] AC 417 at 473.

25 Reproduced in WTS Daniel, *The History and Origin of the Law Reports*, 1884, William Clowes, London, p 5.

26 *The Judge*, 1979, Oxford University Press, p 180.

27 WS Holdsworth, *A History of English Law*, vol XV, Methuen, London, p 249.

28 *Ibid*, p 254.

29 Devlin, *op cit* n 26, p 180.

different from statutes or contracts. A statute is the “creation and promulgation of a general rule of conduct without reference to particular cases”.<sup>30</sup> A contract sets up a legal relationship between the parties whether it is in standard form, like a mortgage, or created for a specific purpose. A judgment declares the resolution of a dispute. Its audience is at once narrow and wide. It may be that it affects only the parties, or it could have major national significance. In both cases there is a role for using plain language principles. A number of judges do so already.

Plain judicial language would involve a change of approach for some judges. It would mean adopting a structure and a style that was aimed at getting the message across most effectively. The dangers of not doing so became very clear during the controversy over the High Court of Australia’s *Mabo v Queensland (No 2)*<sup>31</sup> decision. Here was a decision of immense national importance, widely read by people with no experience in unravelling legal documents. The judgments were written in such a complex way that they almost begged to be misinterpreted. Would the *Mabo* decision have been subject to such wild misunderstanding — like the view that suburban backyards were under threat — if the judgments had been written in plain language in the first place? Maybe the answer is yes. However, clearer judgments would have made the task of rebutting the misinterpretations much easier.

The changes that could be introduced are not difficult or particularly revolutionary. The Law Reports were arranged and written in a way that has changed very little. If you open the Appeal Cases of 1890 they look only slightly different from the *Commonwealth Law Reports* of today. In the same way that the format of legislation can be (and is being) changed to meet modern demands, so the style of written judgments can alter.

Along with statutes, judgments are the source of our law. The use of plain language is now being accepted as important for access to the law. The next stage must be greater emphasis on plain judicial language. Certainly there are some difficulties in using the whole plain language process. It would, for instance, be difficult to test the clarity of each judgment. But it would be possible to test a new design for judgments — to find out how they should be arranged, structured and designed in a way that helps all readers gain access to their content.

### What makes a good judgment?

Currently the actual structure of judgments is often difficult to work out. Each judge covers the facts, the law and the reasons for the decision in his or her own way and order. There are a great variety of ways to write a judgment. Not all judgments can be alike, so difference will always remain. But for the reader, this multitude of ways can make the law quite obscure. The Canadian jurist Robert Dick has identified some of the different types of bad judgments. These are:<sup>32</sup>

1. The “circular” judgment. “The judge skirts around the point without establishing it until the last few lines of the reasons.”
2. The judgment in which “quotations from case after case are set out without analysing the *ratio*.”
3. The “loaded” judgment in which “the judge sets out the facts and applies the law, but mentions no cases until reaching the end.”

30 DC Pearce, *Statutory Interpretation*, 3rd ed, 1988, Butterworths, Sydney, p 1.

31 (1992) 175 CLR 1 at 203.

32 RC Dick QC, *Legal Drafting*, 2nd ed, 1985, Carswell, Toronto, p 198.

One significant judicial figure was a strong advocate of plain language: Lord Denning. He created a new format and structure for judgments. He explained how:<sup>33</sup>

“At one time judges used to deliver a long judgment covering many pages without a break. I was, I think, the first to introduce a new system. I divided each judgment into separate parts: first the facts; second the law. I divided each of those parts into separate headings. I gave each heading a separate title. By doing so, the reader was able to go at once to the heading in which he was interested: and then to the passage material to him.”

This is a very logical approach to take. Lord Denning was a great supporter of the *Plain English Campaign*. He made other recommendations as well for writing clearly. These are all consistent with the principles of plain language and include:<sup>34</sup>

- think all the time of people who are listening to you
- don't use long words
- only use “terms of art” when they are well known in the profession
- don't use overlong sentences
- use plain, simple words and sentences
- split up the text: “A massive, unbroken page of print is ugly to the eye and repulsive to the mind.”

Judges do not have to adopt Lord Denning's style to write plainly. However, his approach and techniques are one way of writing plain judicial language. It shows that it can be done. Certainly judges would communicate more effectively if these recommendations were followed.<sup>35</sup>

### Oral judgments

If plain language has a role in written judgments, does it have one in oral judgments? Sir Frank Kitto was quite scathing of the quality of oral judgments. He stated that:<sup>36</sup>

“...the very exercise of writing ensures more careful thinking... I need hardly add specifically that the superiority of a written over an oral judgment lies not only or mainly in the greater opportunity that writing offers of achieving felicity of expression... All too often a transcription of an oral judgment... reads as if ‘the same was written with a thumbnail dipped in tar’.”

However, as Kenneth Gee QC (a former District Court Judge) pointed out, the higher courts:<sup>37</sup>

“...have not always faced the constant pressure for expedition that deprives us of the luxury of reserving our judgments.”

Plain language has a role in these judgments as well. The very immediacy of them, with the parties waiting expectantly on every word, makes clarity of expression very important. The same types of techniques can be used in oral judgments as in written ones, such as using direct language, uncomplicated sentence structure, and short sentences. The clear organisation of ideas is the key. Gee suggests the order should be:<sup>38</sup>

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33 *The Closing Chapter*, 1983, Butterworths, London, p 64.

34 *Ibid*, pp 57-65.

35 Similar recommendations are found in articles written by two United States lawyers: CG Douglas III, “How to Write a Concise Opinion” (1983) 22(2) *The Judges Journal* 4; DW Stevenson, “Writing Effective Opinions” (1975) 59 *Judicature* 134.

36 “Why Write Judgments?”, reprinted in this collection, p 69 at pp 73-74.

37 “The Judicial Decision Making Process and Extempore Judgments” (1993) 1(2) *The Judicial Review* 112.

38 *Ibid* at 127.

- nature of the case
- real issues litigated
- review of the evidence and findings of fact
- if the law has been debated, the conclusion of this as it may be a ground of appeal.

Gee is of the view that while the judgment should be “clear and precise” it may need to be couched in legal language for reasons of precision.<sup>39</sup> With respect to him, I believe that this is not the case. The arcane language of the law can be avoided if judges and magistrates remember that the parties sitting in front of them may have no legal training. Sometimes technical expressions must be used, but they should be explained if necessary. Once again, the issue is “know your audience”. If the audience is simply two barristers, a great deal of knowledge can be assumed. But if the parties are present, hanging on every word, the barristers should not have to take up more time after the decision is given explaining what the judge has just said. If a barrister can explain the law to his or her client in a comprehensible way, the judge or magistrate can too.

### Jury instructions

Apart from a judgment, the way a judge sums up for the jury is the most important act of judicial communication. What the content of these pronouncements should be is a matter of dispute. Lord Devlin outlined the two approaches. In one, which he called the “novel and bold” method the jury’s function is:<sup>40</sup>

“...with some help from the judge, to package the facts and to stick on the package the correct legal label, black or white according to the contents, as directed by the judge. They are not to be told, even as a matter of interest, why it is to be a black label rather than a white label.”

The second approach was outlined by Lord Keith who stated that:<sup>41</sup>

“It is the function of the jury, not only to find the facts and to draw inferences from the facts, but in modern practice also to apply the law, as they are directed upon it, to the facts as they find them.”

This is Lord Devlin’s preferred approach. His view was that a modern jury:<sup>42</sup>

“...is not likely to be dumbfounded by statements of the law on particular topics; one of the worthwhile by-products of the jury system is that the criminal law has to be such as can be understood by the average citizen; if it were to confuse the modern jury, there would be something wrong with the law.”

Is Lord Devlin’s confidence that jury instructions are understood justified? The main research that has been done on this has been in the United States, where jurors can be approached after trials to comment on what went on. One major study found:<sup>43</sup>

“That most jurors conscientiously try to follow their instructions but that most instructions cannot be understood by most jurors.”

39 Ibid.

40 Devlin, *op cit* n 26, p 147.

41 *Stonehouse v DPP* [1978] AC 55 at 94.

42 Devlin, *op cit* n 26, p 147.

43 WW Steele Jr and EG Thornburg, “Jury Instructions: A Persistent Failure to Communicate” (1988) 67 *North Carolina Law Review* 77.

The problem that exists for jury instruction is similar to that for oral judgments. However, Steele and Thornburg have suggested a number of changes to make jury instructions more intelligible. Some of their suggestions are only applicable to the United States, but others have wider relevance. These include:<sup>44</sup>

1. “Changes in the law would create incentives for lawyers to worry as much about comprehensibility as they do about technical correctness. These changes might take the form of rules of evidence and procedure allowing lawyers to prove that jurors misunderstood the instructions and making such misunderstanding grounds for reversal.”
2. “Juror comprehension could be improved if each juror were given a copy of the instructions to take into the jury room.”
3. “The development and use of comprehensible ‘pattern instructions’.”

All of these suggestions are designed to promote effective communication. Given the importance of a judge’s summing up for the jury, this is an area in which plain language has a role.

## Conclusion

The style of law report that exists today is essentially a nineteenth century creation. It comes from a very important reform that led to authorised reports and meant the decisions of judges were written down and became more accessible. But what was a solution to a nineteenth century problem is no longer the most appropriate way for today.

The issue is very similar to the proposals to change the style and design of statutes. The system of legislative drafting is also essentially a nineteenth century response to incomprehensible statutes. The design was revolutionary at the time. New processes, such as the corporations law simplification project and reports at federal and State level, show that changes are occurring.

The main impetus for this is the desire for access to the law. This is the belief that every citizen has a right to be able to find out the law that affects him or her. The demand that statutes be written for a wider audience than just members of parliament and judges has been accepted and change is now occurring. Judges are now facing similar demands. As the other major source of our law, it is becoming more and more important that judgments be accessible. It may be difficult to write all statutes or judgments in a way that is accessible to everyone. However, some reform is possible.

The possible changes go further than judgments. Other court documents should be examined as well. Good communication by the courts is now essential, no longer just an option. Sir Anthony Mason was aware of this when he wrote that if the courts “want people to understand what we are doing, then we should write in a way that makes it possible for them to do so.”<sup>45</sup> Plain judicial language is the next stage. It should not be seen as a threat. Plain judicial language is something that would benefit both the courts and the rest of the community at the same time.

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<sup>44</sup> Ibid at 108-109.

<sup>45</sup> Op cit n 6 at 187.

# Judgment Writing: Form and Function

The Honourable Dennis Mahoney AO QC

A judgment is both a public act and an act of communication. As such, the writing of judgments is one of the most important tasks which a judge must perform and it is also one of the most burdensome. This essay provides some practical observations as to how judgments should be made and written. It divides the judgment into five parts — the questions to be determined, the law, the facts, the conclusions, and the orders — and provides guidance on how to determine and write each of these parts. It concludes with some questions about the future path of judgments and whether existing practices require reconsideration.

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I have been invited to contribute to this monograph which relates to one of the more important tasks in which judicial officers are involved — the making and the writing of judgments. What I shall say is measured by the other essays which are included in this collection and, accordingly, I am able to limit to the dimensions of an article what other-wise would require a treatise.

The decision of the editors to focus on decision-making and judgment writing is a wise one. The writing of judgments is one of the most important and, I believe, one of the most burdensome of the tasks which a judge must now perform. My experience is that, as a broad estimate, the time taken to write a judgment is on average some 150 per cent as long as the time taken to hear a case at first instance. (My experience is mainly in appellate work but my inquiries of trial judges suggest that this estimate is broadly applicable at first instance.)

The importance of the task, and perhaps its burden, is evidenced by the long and continuous attention which has been given to what is involved in the making and writing of a judgment, and how it is to be done. Twenty-five years ago it was one of the most popular topics at the (United States of America) National Judicial College at the University of Nevada at Reno. Twenty years ago, when the Institute of Judicial Administration commenced its operations, we held a meeting of some forty judges to obtain suggestions as to the topics with which the Institute should deal. The topic which received the second largest number of votes was “The Writing of Judgments”.

Sir Frank Kitto wrote on the topic in 1973,<sup>1</sup> and many have written on it since. The Judicial Commission of New South Wales has prompted meetings and writings on the topic from time to time. Some of the published writings and judicial observations are referred to in a recent article by Professor Enid Campbell, “Reasons for Judgment: Some

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1 “Why Write Judgments?”, reprinted in this collection, p 69.

Consumer Perspectives”.<sup>2</sup> And there is even a suggestion that the making and writing of judgments may be analysed in Freudian terms.<sup>3</sup>

To deal with this topic fully would, as I have suggested, require a treatise. I am relieved of the obligation to be, or to appear to be, exhaustive. Others have been invited to write on aspects of the topic. I am therefore able to confine what I say to what, I believe, are the practical aspects of it. Accordingly, I shall first summarise some of the observations which have been put forward as to how judgments should be made and written. I shall then question whether the existing practices require reconsideration.

### **How a judgment should be written and why**

The full treatment of this topic would include a discussion of judgments made and given *ex tempore*. It is in the public interest desirable that, if it be appropriate, judgments be given *ex tempore* rather than reserved and reduced to formal writing. The circumstances in which *ex tempore* judgments can be given and the proclivity of courts to give them vary widely. In my own experience in the Court of Appeal of New South Wales, *ex tempore* judgments comprised at times some fifty percent of the judgments given, at other times ten percent of them. What is required in the proper preparation for the giving of an *ex tempore* judgment warrants detailed examination. But the limits of my topic place the analysis of this aspect of the matter in the province of others.<sup>4</sup> What I say is directed in principle to judgments which are reserved and prepared in written form.

I shall in what I say venture suggestions as to how judgments may be made and written. I do this with appropriate deference. It would be wrong to suggest that, within appropriate limits, judgment writing should not involve the personal initiatives or even intuitions of the individual judge. The form of a judgment is as diverse as the preferences of the person writing it; one would not wish it otherwise. It has been said that, in writing a judgment, a judge must decide whether his first duty is to his personal place in history or to the institution and what it requires of him. This, I think, poses too stark a dichotomy. But it is important for a judge to look to what a judgment must be and must do, as well as to what he desires it to be: one must look to the nature and function of the judgment as well as to the felicities of it.

I do not mean by this that the judge must make everything grey or reduce his judgment to the blandness of a bill of lading. He may see his role as involving the clarification or development of the law. He may desire to edify those who read his judgment. And he may desire to instruct such of the law students of the day (or even the lawyers) as may chance to read it. These are all proper objectives in the writing of a judgment. But, in the end, the judge must ensure that his judgment is complete as a public act and that as an act of communication with the parties it discharges his judicial obligations.

The form of a judgment will be determined — at least it will be affected — by what it seeks to do. Conceptually, a judgment involves two things:

- the public act of the judge in creating the rights and obligations as between the parties
- the reasons which the judge gives for that public act.

I shall use the term “making and writing judgments” to comprehend both of these, though it is of course relevant for a judge to have in mind that what he or she does has at least these two distinct functions.

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2 (2003) 77 *Australian Law Journal* 62.

3 Foo Chek Teck, “A Freudian Analysis of a Judgment” (2003) February *Singapore Law Society Gazette*.

4 See the essay in this collection by Dr Elwyn Elms, “Ex Tempore Judgments”, at p 81.

A judgment of its nature involves at least three things:

- it is a public act or instrument
- it is an act of communication
- it is an exercise of professional skill.

Each of these is relevant in deciding the form which, in a particular case, the judgment should take.

#### **A judgment is a public act or instrument**

A judgment is an act by which rights are created and obligations are imposed. Therefore it has consequences of importance to the parties. Accordingly, the formal parts of it must be right: it must be right in the orders that it makes and the reasons that it gives for them. It must be right insofar as it provides for sums to be paid, times of payment, interest to be paid, other things to be done and the costs to be awarded.

#### **A judgment is an act of communication**

Essentially a judgment tells the parties what the judge has done and why. Therefore, it must tell the parties all they need to know — to understand what has been done; to exercise the rights given to them by the judgment; to do what is necessary consequent on the judgment; and to appeal against it. Accordingly, the fact that the judgment is not merely to state these matters but also to communicate them will affect its form. This in turn requires consideration of how best the judgment is to be framed in order to communicate these things.

In principle, the judgment communicates these things to the parties and those who are acting for them. The parties (particularly the unsuccessful parties) are to be brought to understand what the judge has done to or for them. If litigation is not to be the occasion of creating further, rather than resolving existing, abrasion, it is necessary that the unsuccessful party should at least understand these things and the judge will frame his or her judgment accordingly.

But the judge will also have in mind the need, in particular cases, to communicate with others: judges and lawyers generally, and those who are members of the relevant appellate court more particularly. What will best communicate to a party may not be appropriate to ensure that an appellate court does not see unintended meanings or omissions in what the judge has written. And judgments framed in the sometimes technical terms necessary to prevent misunderstanding by judges, lawyers and appellate courts may not be fully comprehensible to the parties and those who have an interest in the outcome of their litigation.

And it is, of course, not illegitimate for a judge, in writing what he does, to have regard to others, for example, academic lawyers, students and even, perhaps, members of the media. If a judgment is to be seen as a means of communication with the media or members of the general public, it may be necessary for the judge to take into account the extent to which judgments framed in popular terms affect the credibility of those close to the judicial sphere. (One remembers the comment: To the media he is a great judge; to the academics he is a great judge; but to the judges, is he a great judge?)

#### **A judgment is an exercise in professional skill**

I mean by this that, in the end, a judgment is an instrument whose function is to assist in the efficient, effective, timely and, of course, just administration of the law. The pleasures of legal analysis and the felicities of language are permissible in a judgment to the

extent that they do not detract from this. Accordingly, a judgment is, above all, to be so framed that it will not lead unnecessarily to the prolongation of the litigation. For this reason it may be of assistance to a judge to have a “checklist” of what should and should not be found in a judgment.

### **A suggested checklist**

A judgment may conveniently be divided into five parts:

- (a) a statement of the questions to be determined
- (b) the law
- (c) the facts
- (d) the conclusions
- (e) the orders to be made.

#### **(a) The questions to be determined**

Resolving what questions are to be determined by the judge is, I believe, one of the most important steps affecting the writing of a judgment. It is necessary to understand (and to state) what it is that is to be decided. That is obvious: but, I believe, the fact warrants stating. Stating the question to be determined helps to focus the judicial mind upon what it is doing; and it enables the litigant who reads the judgment to understand correctly what the judge has done.

The formulation of the questions to be determined should be initiated — though not necessarily concluded — as early in the proceeding as possible. Sometimes, though not often in the context of the present narrative pleading, the precise form of the question is settled by the pleadings. However, usually it is necessary to take positive steps to formulate what it is that the parties have chosen to contest. This may have collateral benefits. Once the parties are clear in their minds as to what the essential question is, they may shorten or even settle the proceeding. Accordingly, they should be encouraged, whether at a preliminary conference or otherwise, to decide what the issue is. If the questions can be formulated in this way, it will help with the selection of the evidence that is required and will exclude the evidence that is not required. And, in the end, if a judgment must be written, the formulation of the questions will help focus the judicial mind upon the precise matter which must be determined.

There is no simple and universal rule as to how this may be done: no blazing insights can be offered. But some things can be said.

My own experience was that, in almost every case, there were one or two questions the answer to which decided the case. My experience, based on statistics kept by me over a year and more in the Equity Division of the Supreme Court of New South Wales, was that once the facts were clear, questions of law seldom decided the case. In eight cases out of ten, deciding the facts decided the case. And, in deciding facts, I found that ordinarily one or possibly two questions of fact were central: the decision of these determined the case. The experience of judges differs: this is inevitable. But I believe that experience generally supports what I have said.

In many cases, the formulation of the relevant question will pose no problems: the form of the question will be obvious. But in all cases it will, I think, be useful to have the parties agree upon what the question is. They should be asked what are the particular questions to be decided and agreement should be sought from them as to the terms of those questions. This may, of course, be done at a preliminary conference (if there be one) or (more often) at a convenient time during the hearing.

When it is clear that the essential question is one of law, the procedure will ordinarily be simple. If a question arises from a statute, the question should be stated in the terms of the statute. If it comes from general law, it should, I believe, be stated in a form which is sufficient for the purposes of the case but no more: an elaborate and detailed examination of the law is not, for this purpose, necessary. It has been said that, if it is not necessary to decide a question, it is necessary (or at least prudent) not to decide the question.

If the essential question is one of fact, more care will be necessary. It will be necessary to extract the question from the factual material. In formulating a question in this way, it is, I believe, wise not to attempt to formulate it, at the outset, too tightly or rigidly: a flexible formulation will serve and will be more likely to attract agreement from counsel.

In order to achieve agreement on the questions to be determined, the judge may say: "I see the general question to be decided to be... And this, I think, can be dissected into the following questions... May I take it that all the parties are agreed that these are the questions?" By a dialogue initiated in this way, the question to be determined can usually be agreed. If it is not definitively agreed, at least the area of dispute will be reduced.

It is, in my opinion, important that what is done in this regard be recorded both in the transcript and the judgment. The parties should be protected against misunderstanding and it should be made clear to them that the record is taken for their protection. Recording the dialogue and the questions formulated will protect both the parties and the judge against misunderstanding, by the parties or by appeal courts. (Misunderstanding cannot always be prevented. In *Manufacturers Mutual Insurance Limited v John H Boardman Insurance Brokers Pty Limited*,<sup>5</sup> the New South Wales Court of Appeal had the agreement of the parties to the question to be determined and that question was recorded in the transcript. The Court of Appeal decided that question. Unfortunately, recollections proved defective and leave to appeal was sought and granted upon the basis that the question decided had not been argued at the hearing. This error was subsequently recorded by the reporter.<sup>6</sup> Perhaps this error would have been avoided if, as I have suggested, the agreed form of the question had been recorded not merely in the transcript but more obviously in the judgment of the Court of Appeal.)

It may be that the question of fact to be determined should not be attempted in final form at too early a stage: the final formulation of the determinative question of fact should not be attempted until towards the end of the hearing at first instance. To attempt to do it too early may pre-empt the conduct of one party's case and, in any event, subsequent evidence may — and often will — show the question formulated to have been wrong.

In formulating the question, the judge will no doubt employ the assistance which can be derived from counsel. It is, I think, dangerous to attempt to impose the judge's formulation of the determinative question upon counsel. The form of that question should be drawn out by dialogue with counsel for each side. Unless counsel are involved in formulating the question, they are not committed to the form of it. And dialogue with counsel is important. There is practical wisdom in the aphorism: "How do I know what I think until I hear what I say?"

A judge should, in formulating the question to be determined, be conscious of the need of amendment. Experience shows that a case may proceed in a manner not foreseen by those who have agreed to the particular form of the question. It may become necessary to

5 (1994) 179 CLR 650.

6 See (1994) 179 CLR Addendum at xiii.

see the question as other than that which previously was seen. Experienced counsel will prudently be unwilling to agree in advance to the formulation of a question if they are not confident that, in such an eventuality, the judge will allow a different formulation.

**(b) The law**

The judgment should refer to the principles of law relevant to the determination of the dispute. If this is not done, then on an appeal it may be argued that the judge did not know what the principles of law were or, indeed, did not know what he was deciding.

Sometimes the statement of the principles of law will be involved in, or overlapped by, the formulation of the question to be decided. But it may go beyond it. What will be necessary in stating the principle of law will, of course, depend on the particular case.

Each judge will adopt his or her own procedure for formulating the principles of law but a procedure similar to that for formulating the question to be determined is often useful. Thus, the principles of law may not be in dispute. If the parties are agreed on this the judge may say so in the judgment. Thus, for example, the judge may say: "The parties are not in dispute as to the principles of law in question. What is to be determined is whether, as a matter of fact..."

However, in most cases, it will be prudent to state shortly three things:

- how the case comes before the judge
- the legislation or the general principle of fact or area of law in the context of which the dispute arises
- the particular provisions or principles of law by reference to which the dispute is to be determined.

It is wise always to state "the jurisdictional law". By this I mean the law by reason of which the court has jurisdiction to decide the matter coming before it. This is of particular importance in the case of a specialised court, but it is also of importance in a Supreme Court where the proceeding comes to the court as the result of a particular statute.

A convenient formula for stating the jurisdictional law may be something to the following effect:

"This case comes before the court in the following way: The plaintiff made an application for a licence under section \_\_\_ of the \_\_\_\_\_ Act 20\_\_\_. The application was refused by the commission. The plaintiff is aggrieved by the decision of the commission and has appealed to this court under section \_\_\_ of the \_\_\_\_\_ Act 20\_\_\_. The matter comes before me as part of the jurisdiction of this court under section \_\_\_ of the \_\_\_\_\_ Act."

It is I believe wise to state the general area of the law or of the legislation by reference to which the question for decision has arisen. This may of course have been done in stating the jurisdictional law. But it is relevant that the principles to be applied be put in context: it is wise for a judge to state the basis on which the question for decision arises so that those who read the judgment can understand how the issue has arisen and how the judge, in writing the judgment, has come to formulate it as he or she has done.

If the decision turns upon questions of law, it is necessary that the judge formulate the particular propositions or principles of law upon which the decision is to turn. Care must of course be taken to formulate these principles correctly. If they are wrongly formulated, the decision may be appealable, as on an error of law.

Views differ as to the extent to which it is necessary to refine the formulation of the particular principle of law or to vouch the correctness of it by reference to or analysis of decided cases or other writings. In this regard the judge may, of course, exercise his or her own preference. In a particular case, a broad statement of the law may be adopted, upon the basis that a more precisely and correctly defined principle will not affect the decision of the particular case. The judge who attempts to define the principle further than is necessary for the purpose may invite appeal on error of law. Again, there may be wisdom in the statement that if it is not necessary to decide a question it is necessary not to decide it.

Views may also differ as to the extent to which a judgment is improved by the statement and analysis of decided cases or by reference to academic writings. What is done may be affected by, for example, the audience with which the judge feels, in the circumstances, it is appropriate to communicate. If the decision of the particular case will be affected by a particular and more precise formulation of the principle of law, it may be appropriate for the judge to formulate that principle at length and to vouch its correctness by reference to such authority. It is legitimate for a judge, even where such is not necessary, to record in the judgment his own investigation of the matter in order to assist or edify those who, in the area, may come after him. What is the appropriate approach is, as I have said, for the judge to determine. And he may be conscious of what, in another context, Hilaire Belloc referred to as the appearance of having gathered “footnotes by contract” and, on the other hand, of the possibility that, by citation of authorities at length, he may give credibility to material which would not otherwise have credibility.

As with the formulation of questions for decision it may be useful to consider achieving agreement as to the principles of law to be recorded in the judgment. It has been said that in many cases, perhaps most cases, the law and the relevant principles will not be seriously in dispute. As I have said, in my own experience at trial level, I found that, once the facts were clear, it was only in about two cases in ten that the statement of the relevant law posed difficulty. Time will be profitably spent if, at the appropriate time — at the commencement of the case or at the end of the evidence — the judge ascertains whether and to what extent the parties are in difference as to what the principles are. An inquiry of the form to which I have referred in relation to the formulation of the question to be decided and a consequent discussion will often result in an agreed formula or at least minimise the area of difference between the parties. If this is done, it should be recorded in the judgment.

Insofar as the parties are not in agreement, a judge should indicate, with the requisite precision, what he or she sees to be the principles to be applied in determining the issue. It will often be useful to state the opposing contentions: “The plaintiff submits that the relevant principle is...; the defendant submits that it is...” The judge may, at the appropriate time during the hearing or argument, formulate these principles and then say to the parties something to the effect: “As I understand the argument, the plaintiff submits that the relevant principle is...; the defendant that it is... Do I understand the matter correctly in this regard?” If the judge is able to achieve an agreement, total or partial, it should be recorded, and the area of dispute and suggested error on appeal will be avoided.

### (c) The facts

It is necessary, or at least prudent, that the judgment set out a statement of the relevant facts so as to indicate the context in which the matter has been determined. Views and preferences differ as to the extent to which it is necessary to record the facts which have been established by the evidence. The recording of facts in this regard can be, and perhaps often is, one of the most tedious and burdensome parts of judgment writing. It

is therefore relevant for consideration to be given as to what in principle is appropriate or necessary — and perhaps guidance should be given by appellate courts. *Prima facie* it might be thought that a statement of the facts will be sufficient if it indicates the context of the dispute, so that the principle chosen for decision can be understood, and if it communicates to the parties involved that the judge appreciated the nature of their dispute. However, at times it may be prudent for the judgment to record not merely the substance of the factual context but the details of the evidence which has been placed before the court. It has sometimes been said that this is prudent because an appellate court may otherwise infer that that which has not been recorded has been overlooked or not taken into account. And, of course, the facts which are part of the essential reasoning process of the judge's decision should be indicated, determined and recorded.

If the complexity of the facts so warrants, it may be of assistance if the judge seeks from the respective counsel a chronological statement of the facts as that counsel will submit them to be. This may assist the judge, focus the attention of the parties, and shorten what ultimately is said in address.

Reference has been made in judicial writing and court rules to the chronological statement of facts. *Prima facie* there is considerable merit in the statement of facts in this way. It may be that, in some cases, the factual material requires division into two or more categories: in such cases a chronological statement may confuse rather than clarify. But *prima facie* the chronological statement of material assists in the understanding of what is decided.

There will often be no relevant difference between the parties as to what the facts are: the difference will be only as to the law or, more frequently, as to the conclusions to be drawn from the facts and the law. If this is so, the judgment should record that fact. In such a case, the judgment may shortly state the facts as agreed and record them to have been agreed or at least not in dispute.

Where the facts are in dispute, the problem is more difficult. It is the duty of a judge to decide clearly those facts which are in dispute and which are required for the decision of the proceeding. In a normal case, a simple and effective procedure is to say — “The facts as I find them to be are as follows...” — and then to proceed to narrate, in chronological order, the relevant facts, taking care that in the area of dispute the judge states any disputed facts clearly and as part of the narrative. Again it is frequently useful, at an appropriate time after the evidence is concluded, to seek the agreement of counsel as to what are, in substance, the facts in dispute. Where appropriate the agreement arrived at between the parties in this regard should be recorded.

It is necessary for a judge, in stating his findings in relation to disputed facts, to record how he decided between the competing versions of them.<sup>7</sup> There is now no simple rule for deciding how far a judge must go when stating the reasons why or the steps of the argument by which he has arrived at his conclusion as to the disputed fact. In earlier times reference was made to the matter in *Soulemezas v Dudley (Holdings) Pty Limited*.<sup>8</sup> Reference may now be made to the more recent authorities, some of which are referred to in the article by Professor Enid Campbell.<sup>9</sup>

7 See generally *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission of New South Wales v Tamar Pastoral Co Pty Limited* [1983] 3 NSWLR 378; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 657 at 666-667 per Gibbs CJ, where the principles were early considered.

8 (1987) 10 NSWLR 247 at 268-274 and the cases there referred to; *Palmer v Clarke* (1989) 19 NSWLR 158 at 170.

9 Op cit n 2.

In some cases it will not be necessary to spell out how the judge arrived at the conclusion: the matter will be reasonably plain from the statement of the facts. In some cases it will not be possible to do more than say: "In the context of this dispute, I think that X is more probable than Y." An elaborate argument does not require an elaborate answer.

In some cases where the matter is more complex it may be sufficient for the judge to say: "The plaintiff's submission is that I should decide that... The defendant's submission is that I should decide that what happened was... In my opinion, the correct conclusion is that what happened was... In coming to this conclusion I have borne in mind the whole of the evidence but I have found particular significance in this regard in..."

In making findings of fact, care should be taken as to the particular formulae of words used. Experience shows that a less than precise use of words can lead to wrong inferences as to what has been decided and why. Appeals may result from the use of imprecise verbiage.

A frequent difficulty arises from the use of the word "can". Judgments sometimes say something to the effect: "On this evidence I do not think that I can find that the plaintiff did..." It should be borne in mind that there is a distinction between what, on the evidence, "can" be found and what "should" be found. When a judge is considering what, on the evidence, "can" be found, this should involve looking at what it is possible to find, that is, what it is possible to infer from the evidence. When the judge is considering what he "should" find, he will be conscious that there may be several findings or inferences that "can" as a matter of possibility be made and he will attempt to decide which, in all the circumstances, he should make. If the judge says "can" where he means "should" this will invite the litigant to say that in his decision he was saying that it was "not possible" to find a particular way, when all that he meant to say was "I do not think that I should" find that way.

In more literary works, communication may be achieved by the use of metaphors or analogies. In some cases, an onomatopoeic process is of assistance or at least felicitous. A judge will consider whether, in the context of the precision required by a judgment, metaphors and the like may be misleading rather than of assistance. Plain English can be a reality check. In this regard, the examples which appear in the conventional Plain English exercises and in some more recent New South Wales legislation may be of assistance.<sup>10</sup> The emphasis upon simple language is not new. In St Paul's letter to the Corinthians he said: "Except you utter by the tongue words easy to understand, how shall it be known what is spoken?"<sup>11</sup>

A judge who has to reject the evidence of one witness and accept the evidence of another, should say so in plain terms. An appellate court which reviews the judgment will take note of the advantage which the judge had in seeing the witnesses and ordinarily it will assume, unless it is indicated to the contrary, that in coming to the conclusion as to the evidence the judge has been influenced by the way in which he or she saw it given. However it is unwise to say — indeed in most cases a judge should not say — that a particular witness is "not telling the truth" or to use observations such as "He is one step removed from being an honest man". Ordinarily it will be sufficient for the judge to say words to the effect: "Where there is a difference between the evidence of X and Y, I prefer the evidence of X." If the truth is somewhere in between, the judge should simply state what he or she finds the facts to be. In most cases, differences between witnesses arise from errors of recollection or the like.<sup>12</sup>

10 See the examples and the discussion in my remarks: "A Judge's Attitudes to Plain English" (1996) 34(6) *New South Wales Law Society Journal* 52-55.

11 First letter to the Corinthians, chapter 14, verse 9.

12 See, for example, *Smith v New South Wales Bar Association* (1992) 176 CLR 256; *Bannister v Walton* (1993) 30 NSWLR 699 at 723 et seq.

Matters such as those to which I have referred are of assistance to the extent to which, in the particular case, they assist in the statement of the facts and the findings clearly and with precision. In a judgment, accuracy is not a virtue; it is a duty. Accordingly, precision rather than elegance is the hallmark of a good judgment.

#### (d) The conclusions

The judge's conclusion is, of course, the heart of the judgment. The examination of how a conclusion is arrived at is, perhaps, the most interesting part of the analysis of judgment writing. But the parameters limiting what I am to do in this essay exclude a detailed analysis of what is involved in this regard. However, I believe that a judge will be assisted in what he or she has to do in the process of judging if he or she is conscious of what is involved in this part of the judicial process.

At least two things are involved:

- the process by which the conclusion is arrived at
- the statement in the judgment of that process and the conclusion arrived at.

The understanding of the process by which a conclusion has been arrived at may be and often is of importance. In other areas — for example, science — significant attention has been given to the nature of the process by which conclusions are arrived at: Karl Popper and others have examined at length what is involved. The process has, I believe, received less than full analysis in the legal context. I shall confine what I say to conclusions of fact: the process involved in the formulation of legal principles has been examined by others.<sup>13</sup>

It will I think assist a judge in arriving at a correct conclusion if he or she is conscious of what is involved in the drawing of the relevant factual conclusion. The psychological processes involved may be of different kinds, depending on the case involved. (I use the term “psychological” loosely.) It is sufficient to identify three of them:

- the syllogistic process
- the inferential process
- the intuitive process.

It is often assumed that the judicial reasoning to a legal conclusion follows a conventional syllogistic process. Sometimes it does. Thus the judge may reason: “The evidence shows that the murderer has blood of type X; the accused did not have blood type X; therefore the accused did not commit the murder.” On this form of reasoning, the conclusion is compelled by the premises and, accordingly, may be arrived at with confidence. But frequently, perhaps normally, the psychological process involved is not of this kind.

More frequently, I believe, the process involved is one of inference from established facts. Oversimplified it will be of the form: “Because facts A, B and C exist or existed, I infer that fact X existed/exists/will exist.” Thus, the judge may say: “Because facts . . . existed, I infer that the witness consented to the sexual congress in question.” In such a case the facts do not compel the conclusion. What is involved is an empirical or normative inference or judgment by the judge based upon human experience of what the nature of the world is and of the process by which one fact leads to another. The trial judge will conclude that, in the given factual (sexual) context, that is the way people act. To adapt the words of Dixon J in the *Briginshaw*<sup>14</sup> litigation, the drawing of such an infer-

<sup>13</sup> Eg by J Stone, *Legal System and Lawyers Reasoning*, 1996, Maitland Publications, Sydney, chapters 6–8.

<sup>14</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

ence is based on common experience. If this be the process involved in arriving at the conclusion, the possibility of error is of course greater.

Sometimes the psychological process by which the conclusion is arrived at is more intuitive than reasoned. Thus the process by which a judge comes to the conclusion that a witness is to be believed may sometimes be, in part or in whole, of this nature. It is I think important that this be recognised. A judge may, in stating his or her conclusion and in justifying it, rationalise what has been done by stating his or her reasoning in syllogistic or inferential form. But if this is done (and it is of course permissible to support or audit in such a way a conclusion already arrived at by another process), it is I think important that he or she realise that what is being done is in truth the supporting or auditing of a conclusion which, as a matter of psychological process, was in fact arrived at in a different and intuitive way. And this may be of significance in deciding, for example, what can and should, at the appellate level, be required of a trial judge in stating in the judgment the reasoning process which he or she has followed.

A judgment should include a proper statement of the conclusions which have been formed and the reasons for forming them. This, in more recent times, was re-emphasised in *Pettitt v Dunkley*<sup>15</sup> and subsequent decisions. This does not, I think, mean that the judge must detail every step in his reasoning to the inference that he has drawn. But he must provide a fair statement of his conclusions and insofar as it is necessary the process by which he has arrived at them.

In this regard, the nature of the process involved can be of significance. As I have indicated, in some cases at least, the recording of facts A, B and C will not alone explain or require the conclusion X; to adapt the observations of Karl Popper in another context, the process by which the conclusion is drawn may be more psychological or intuitive than logical. It is, I think, to be recognised that in some cases a judge's conclusion that X existed may be the result of a process partaking more of intuition than of Aristotelian logic.<sup>16</sup> In some cases the judge may simply be able to say: "I have arrived at conclusion X" and then have set about identifying the facts (A, B and C) which are consistent or not inconsistent with that inference. Or the judge may say: "Given that A, B and C existed, my 'human experience' is such that I infer with the appropriate degree of probability that X existed."

If the process of drawing conclusions partakes, in a particular case, of matters such as these, then it is necessary to consider how and to what extent it is rational to insist that a judgment is to state the reasons by which the particular conclusions have been arrived at. And this in turn raises the question whether the judge can say no more than: "If A, B and C existed, I can do no more than say that I am satisfied that X also existed."

However these matters be, in formulating the inferences or conclusions to be drawn, a judge will take care to ensure precision of language. A source of error is sometimes found in stating the decision-making process involved in discretion cases. In deciding what the conclusion should be or the manner in which a discretion should be exercised, a judge is required to take into account all the relevant facts and not to take into account irrelevant facts. Not infrequently, it is found that the judge has detailed some of the significant facts and then said: "Taking into account these facts I find... I therefore conclude..." The complaint is then made that the judgment is wrong in law because the judge took into account only "these" facts and not the whole of the factual evidence. Bearing in mind that a judge must take into account all of the relevant facts and none of

15 [1971] 1 NSWLR 376.

16 See *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 226 et seq.

the irrelevant facts, it is appropriate that, if a judge is to use phrases of this kind, what is said is something to the effect of: "I have taken into account all of the evidence and I find...and my conclusions are..." If a judge wishes to refer to particular evidence, it will help to avoid misapprehension if the judge indicates what he or she has done: "I have had in mind the whole of the evidence. I think that in relation to the present questions, evidence which is of particular importance is... I have borne this in particular in mind in finding...and concluding..."

Differences have arisen between individual judges as to the length of the reasons to be given or the conclusions to be stated. In one case, humorously, a judge said: "Give no reasons; let the Court of Appeal find them out for themselves." Burger CJ of the Supreme Court of the United States of America remarked that most judges are in favour of shorter judgments, but in other judges' cases. I prefer the observation made by Sir Frank Kitto in the article to which I have referred. He said that reasons make a judge's judgment all the more vulnerable: but a judge will, in this respect, wish to be vulnerable, partly from sheer honesty and partly because of the comfort that it will give him to reflect that, if he has gone wrong, the damage is not irrecoverable. This is, I believe, a touchstone which may be applied in deciding, in the end, what is to be said.

#### **(e) Orders to be made**

At the end of the judgment or otherwise, the orders to be made must be stated. There will frequently be no difficulty in determining the form of the orders; sometimes there will be.

A judge may, at the end of the argument, seek the assistance of the parties as to the orders to be made. If the decision is to be reserved, the judge may say: "It appears to me that if I find for the plaintiff, the order I should make is...; if I find for the defendant, the order should be... Are the parties in agreement that this is correct?"

If there is a particular difficulty in this regard, the judge may properly ask the parties to formulate in advance what they submit are the appropriate orders to be made. In some cases he may take the course of announcing his findings and deferring the making of formal orders so that the parties may make submissions as to what, in view of the findings, the orders should be. In this case the parties will "bring in short minutes of orders".

This involves the parties in additional cost. It may frequently be useful to make an order such as:

"I award the plaintiff the following damages... I give judgment for it for ...dollars. I direct the judgment be not entered for 14 days from today's date. The parties may during that time apply to the court to vary the judgment to correct errors of calculation or errors of a similar kind. If the parties are agreed that such an order has to be made, it may be dealt with by a chamber order. Otherwise, the judgment will take effect and may be entered at the end of that time."

However this be, the orders to be made should, except in special cases, bring the litigation to an end. A judge will have in mind when the order is made that what he then does will essentially constitute the end of his function and therefore the order itself should be, as far as possible, self-executing and self-contained.

## General observations

A general examination of judgment making and writing, at least an examination of the present kind, would be deficient if it did not, at least, raise questions. Judgment writing takes much, perhaps too much, public and private time and resources to be accepted without examination as a necessary part of the judicial system. In countries which do not follow the common law system, judgments are written but they are different: they are not merely different but, I suspect, shorter and less burdensome. And in some common law jurisdictions, procedures have been devised for reducing the length and the burden of them. What is done in this regard in the federal courts and in some State courts in the United States of America warrants consideration.

It is therefore, I believe, relevant to ask some questions:

- What, in fact, are the time and other pressures imposed upon judges by the present requirements as to judgment writing? What is the time that judgment writing requires, how is that time to be spent, and what procedures are to be adopted to save time and other pressures?
- This leads in turn to the pragmatic question: What parts of judgments are in fact read and to what extent are detailed judgments required by their nature as a public act (recording public rights) or as an act of communication to those involved?
- In what cases do the purposes for which judgments are written require that they be written at length?
- If judgments are to be written, is it necessary that they be written in the form and to the extent which is now customary?
- How far is the form of judgment writing now adopted affected or determined by the attitude of appellate courts to primary judges' judgments? Is too much required of the primary judge? Do appellate courts draw unwarranted inferences from, for example, the fact that a matter has (or has not) been referred to as to whether it has been taken into account, properly weighed, "overlooked" or the like? What credit should or do appellate courts give to judges of fact in the drawing of the conclusions of fact and to the nature of the processes involved?

It may be that a process of the optional giving of judgment/reasons and other practical processes warrants consideration. My experience has been that there is a tension between the perfect judgment and the time available to prepare (and revise) it. And, as it has been said, the perfect drives out the good. In the end, the essence of judgment making and writing lies in the careful consideration of the evidence and the drawing of the proper conclusions. Insofar as the requirements conventionally involved in judgment writing take time from these essential functions, it is proper to consider the utility of them.

Whatever be said or done in relation to the making and writing of judgments, a judgment is one of the principal means by which society comes to know what law is and what judges do. In the end those outside the law will ask: the judgment may show that the judge is clever but does it show that he or she is wise? And those within the law will be happy if they have a commendation of their peers such as was given by one of the members of the Judicial Committee of the House of Lords: "I am more than content to adopt that judgment and only wish it were my own."<sup>17</sup>

<sup>17</sup> *R v Maxwell* [1978] 1 WLR 1350 at 1359 per Lord Edmund Davies.



# Seven Steps to Clearer Judgment Writing

The Honourable Justice Linda Dessau, Family Court of Australia  
His Honour Judge Tom Wodak, County Court of Victoria

Judgment writing is a skill that can be learned, practised, improved and refined. A well-structured judgment enhances clarity and conciseness, and helps ensure that the reasoning process is complete. But how do judicial officers decide what to include and how best to express it? In this essay the authors provide a useful guide to judgment writing by breaking the task into seven distinct steps. These seven steps provide a framework for the content and structure of clear and transparent judgments.

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## Introduction

*“Writing is easy. All you do is look at the blank page until the drops of blood form on your forehead.”*

Red Smith

Judges must give reasons.<sup>1</sup> This essay, however, is not about the whys and wherefores of that basic premise. It is about the reason-giving process itself, in particular in written form. Judgment writing is more an art than a science. It can be learned, practised, improved and refined, and many judges welcome the opportunity to hone their writing skills. Judgments are, after all, the product of their judicial endeavour. They are available to be read, considered and analysed, into the future as well as immediately.

There is every motivation for judges to communicate well. Firstly, the parties to litigation need to understand the result and the reasons for it. Transparency is essential to our system of law and the public’s confidence in it. Secondly, clear, well-written decisions are integral to the common law and the development of precedent through case law.

There are many articles and books about judgment writing.<sup>2</sup> We shall not attempt to repeat them, but rather to encapsulate their essential points and distil them into a pragmatic guide to clearer writing.<sup>3</sup> Our seven steps traverse the two main components of clear judgment writing — the structure and the content. At the outset, we emphasise the significance of structure: a well-structured judgment enhances clarity and conciseness, and helps ensure that the reasoning process is complete.

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1 *Pettit v Dunkley* [1971] 1 NSWLR 376 at 382 per Asprey JA.

2 See, for example, Sir Frank Kitto, “Why Write Judgments”, reprinted in this collection, p 69; L Mailhot and JD Carnwarth, *Decisions, Decisions — A Handbook for Judicial Writing*, 1998, Les Editions Yvon Blais Inc, Canada; Professor E Berry, *Writing Reasons — A Handbook for Judges*, 1998, E-M Press, Quebec; Justice M Kirby, “On the Writing of Judgments” (1990) 64 *Australian Law Journal* 691; Professor E Campbell, “Reasons for Judgment: Some Consumer Perspectives” (2003) 77 *Australian Law Journal* 62; Professor E Campbell and Professor HP Lee, *The Australian Judiciary*, 2001, Cambridge University Press, Melbourne.

3 We do not profess to rank among the country’s best legal writers. But we have been fortunate enough to attend extended judgment writing courses and workshops, in the course of which we have been exposed to excellent teaching, and imbued with enthusiasm to pursue the quest, not necessarily for more brilliant judgments, but for clearer, more comprehensible writing.

Just like a well-written short story or play, a judgment requires an introduction, a middle and an end. Lord Denning described the structure as follows:<sup>4</sup>

“I try to make my judgments live...I start my judgment, as it were, with a prologue — as the chorus does in one of Shakespeare’s plays — to introduce the story. Then I go from act to act as Shakespeare does — each with its scenes drawn from real-life...I finish with a conclusion — an epilogue — again as the chorus does in Shakespeare. In it I gather the threads together and give the result...”

This is more than structure for structure’s sake. It provides the architectural framework of a judgment, to ensure that the issues are clearly stated, the relevant facts and law are appropriately analysed and a conclusion is reached that clearly reveals the reasoning process. The judgment should flow logically and in an organised manner from the introduction to the conclusion.

### **Step 1 Start before the beginning**

The judgment writing process starts well before the end of the case, and well before a pen is put to paper or a dictaphone raised. In fact, it should start before the case begins. A great deal depends on the preparation for the case, which includes reading court documents (pleadings, affidavits, witness statements, the depositions, presentments or indictments) to identify the contested issues. It may also involve consideration of the legal principles or evidentiary rules that are likely to arise in the course of the hearing. All of this assists the judge to understand the issues, even before the trial begins.

In many courts, written outlines of argument, openings, chronologies, statements of agreed facts, flowcharts or other documents must be filed before the trial begins. These also assist the judge’s preparation. With a sound grasp of the case, the judge can then ensure that counsel opens with a focus and direction that will ultimately help form the judgment. Good advocates will generally do that of their own accord, striving to present the material sufficiently cogently, coherently and concisely to provide at least the cornerstones of a judgment favourable to their case.

In practical terms, a simple request that each party articulate the live issues (which frequently change, even from recently filed case outlines) can in itself achieve a great deal. Above all, it helps bring definition to the case both for counsel and judge. The issues, once clearly stated, provide the reference points for the hearing, for rulings on relevance and admissibility of evidence, for note-taking and, ultimately, for the judgment itself.

The judge’s note-taking method is an integral part of judgment writing. It is particularly important in fact-rich cases, in order to marshal voluminous or complex material. The ideal methodology is personal, even idiosyncratic, but we offer the following hints. Each issue as outlined by counsel can be identified, perhaps set out on a separate notepad page. During the hearing, the relevant parts of the evidence, references and cross-references in transcript or notes, as well as any observations, can be gathered together there. Judges then have at their fingertips most of the material required to write about and make findings about particular issues. In this regard, it may also be helpful to use topic headings, preferably in a contrasting colour, in the course of noting the evidence. Judges who use electronic transcript and software such as *Transcript Analyser* or *Brief Analyser*, may make such notations electronically. These headings or notes provide considerable assistance in navigating the evidence when writing the judgment.

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<sup>4</sup> Lord Denning, *The Family Story*, 1991, Butterworths, London, pp 207–208.

Of course a judgment cannot be concluded until the case has been heard in its entirety. However, that does not preclude a judge from working on a draft judgment during the hearing, in particular, much of the background, including any relevant chronology, can be prepared. This will help a judge recall the material if, for any reason, a case is adjourned part-heard or the judgment needs to be reserved for delivery at a later time.

## Step 2 Use the first page

According to one expert,<sup>5</sup> the first page of a judgment is “prime real estate” and in a well-constructed judgment, “the front page says it all”. It is important to emphasise that the sound and clear construction of the first page is as much for the judge as for the reader. It sets the foundation and maps the course of the judgment.

The beginning of the judgment should be concise and uncluttered by unnecessary detail, such as the recitation of pleadings, legislation or case law. Try to set the scene simply and clearly, as a prelude to any further or complex description or analysis of the case. Set out succinctly the issues for determination. The reader should not have to sift through the judgment to find them. The judgment should readily disclose where it is heading and any relevant background.

As an essential ingredient of good communication, the start of a judgment should be interesting. The conventional opening to the effect: “This is an application pursuant to s 23A of the *Limitation of Actions Act* 1958 for an order that...” is neither interesting, nor the most effective way to inform the reader of what is to follow. It has always been shunned by some, most notably Denning LJ. In his famous “bluebell time in Kent” judgment,<sup>6</sup> for example, Lord Denning skilfully described what the case was about in just three introductory paragraphs. He set the scene — the facts founding the claim, the nature of the claim and the issue for the court to resolve:

“It happened on April 19, 1964. It was bluebell time in Kent. Mr and Mrs Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr Hinz, was at the back of the Dormobile making the tea. Mrs Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr Hinz and the children. Mr Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs Hinz, hearing the crash, turning round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs Hinz by reason of the loss of her husband has been found by the judge to be some

<sup>5</sup> Professor James Raymond, former Professor of Rhetoric at the University of Alabama.

<sup>6</sup> *Hinz v Berry* [1970] 2 QB 40 at 42.

£15,000; but there remains the question of the damages payable to her for nervous shock — the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.”

Not all legal writers have the stature, the skill or the ability of Denning LJ. Certainly, to copy him is not necessarily a good idea. But one can learn from gifted writers and emulate the finer points of their judgment structure.

If old habits are hard to break, or “writer’s block” sets in, a practical tip is to start the judgment as if talking to a colleague in chambers, or an intelligent but non-legal neighbour.

### **Step 3 Deal with the history and the facts**

Judgments have traditionally begun with a description of the litigation to date, including a recitation of the pleadings. This makes for heavy reading and should not be included unless it is essential to an understanding of the issues to be decided. When describing how he avoided all reference to pleadings and orders, Denning LJ described them as “mere lawyer’s stuff”.<sup>7</sup>

Sometimes it will be necessary to recite a history of the litigation or a narrative of the facts, but mostly it will not. Overall, it is liberating for the judge as well as the reader to move away from a laborious recounting of every step in the litigation and the facts from A to Z. Only the facts or the history relevant to what is to be decided should be included. This is a particular challenge in cases where, for example, there is a complex history of litigation or a “cradle to the grave” factual scenario, as commonly encountered in family law or contested will cases.

Although it is rarely necessary to include the details of interlocutory proceedings, there are exceptions. For example, a vigorous contest about discovery may be relevant when there is an allegation of concealment of assets and a related dispute as to documentary proof of their existence or whereabouts, or where credit generally is in issue. The simple and reliable rule is that if nothing ultimately turns upon it, it should be left out.

The facts may be discussed in at least three parts of the judgment:

1. in the introduction, to identify issues or to add context or colour
2. as part of a brief general narrative, early in the judgment, to establish time, place or order of events
3. in deciding the issues of fact or law, including credibility.

Care must be exercised when dealing with facts, to include no more than are necessary. A narrative of facts, some relevant and some not, is likely to distract and confuse the reader. Although it is tempting for a judge to demonstrate mastery of voluminous material by including the detail, a sound grasp is best demonstrated by distilling the facts to those necessary to resolve the dispute and explain the reasoning.

Complex facts can be difficult to handle in a concise and balanced way. The clearest example is in a family law case involving a myriad of allegations and counter-allegations, spanning a lengthy period. These cases are rarely confined to discrete transactions or events, typical of a contractual dispute or a personal injuries claim. They highlight the importance of the start of the judgment. Provided the direction of the judgment is clear and “the front page” sets the scene, only those facts pertaining to live issues need be addressed.

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<sup>7</sup> Denning, *op cit* n 4.

By way of illustration, in a case as to the division of matrimonial property, a history of property transactions throughout the marriage may be set out in the parties' material. Generally it should not form part of the reasons for judgment. But if the case involves a tracing exercise, in order to track moneys or assets claimed by one to be concealed by the other, it is clearly germane and should be included. Even then, those parts of the history which are agreed can be dealt with succinctly.

**For example:** "The parties agree that between 1981 and 1993 they bought and sold three homes. They further agree that the proceeds of each sale were used towards the purchase of the next home."

Findings on the disputed facts can then be made. There is no need to labour the process by reciting every aspect of the evidence. It is sufficient simply to summarise the area of dispute and to make a finding. Naturally that finding must be supported by reasons. The knack is to give sufficient reasons to clearly and briefly explain the decision. There is no need for the reasons to incorporate "an extended intellectual dissertation upon the chain of reasoning".<sup>8</sup>

The credibility of the parties or witnesses is often an important part of the fact-finding process. Views differ as to where findings of credit should be made. According to some, they should be set out early in the judgment. Others include them when dealing with particular disputes. Largely, it will depend on the case. Where a party's credit is integral to the major areas of dispute, and there is a clear view as to his or her credit overall, then it may be convenient to note the findings early in the reasons for judgment. Where, on the other hand, credit is relevant to some disputed facts but not others, or where a witness has been apparently honest in some respects but not others, it may be more convenient to deal with credit as and when it arises in relation to a particular issue.

In making a finding on credit, it is sufficient to indicate a preference for one body of evidence over another and to explain the preference. (For example, because of the consistency of the evidence, the existence of corroboration or support by other evidence, a logical appeal, or because it was given in a reasonable manner.) It is usually unnecessary or undesirable to find that a witness was untruthful. It is suggested that a finding of dishonesty should be made only where the circumstances warrant it, for example, where there is an allegation of fraud or where there has been blatant dishonesty on matters critical rather than peripheral to resolution of the dispute.

There is a distinction between a rejection of the evidence of a witness and a finding that a witness has deliberately lied. In *Smith v NSW Bar Association*,<sup>9</sup> Brennan, Dawson, Toohey and Gaudron JJ pointed out that something additional to rejection of particular evidence is needed in order to establish deliberate lies. Deane J discussed some of the factors which lead to difficulty for a judge in determining whether a witness has deliberately lied:<sup>10</sup>

"Unless it be truly necessary for the purpose of disposing of the particular case, however, a specific finding that a party or witness has deliberately given false evidence should ordinarily not be made. Ordinarily, a party or other witness will not be concerned or entitled to set out to establish that, if his or her oral evidence is ultimately found to be mistaken, the mistake was an honest one. As a consequence, material which serves only to establish that a party or other witness subjectively believes that his or her evidence is correct is likely to be inadmissible in the proceedings in which the evidence is given."

<sup>8</sup> *Athens v Randwick City Council* [2002] NSWCA 83.

<sup>9</sup> (1992) 176 CLR 256 at 268; see also Kirby J in *State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588 at 617-618.

<sup>10</sup> *Smith v NSW Bar Association* (1992) 176 CLR 256 at 271.

## Step 4 Set out the law

It is essential for the judge to identify and set out the legal principles applied in arriving at the decision. There is generally no need for a lengthy dissertation in a first instance judgment, although there will be occasions in superior trial courts when judgments should contain more expansive statements of law. Appellate courts, most of the time, discuss the law in greater depth than is called for in first instance judgments. In *The Australian Judiciary*, Professor Campbell and Professor Lee write of ongoing concern about the length and prolixity of judgments.<sup>11</sup>

In an address to judges of the Supreme Court of New South Wales, Justice Mahoney, President of the New South Wales Court of Appeal, said:<sup>12</sup>

“Judgments should refer shortly to the principles of law relevant to the determination of the question in dispute. If you do not remember to do this, then on appeal it may be argued that you did not know what the principles of law were or, indeed, that you did not know what you were deciding.

Sometimes the formulation of the question of law will be involved in, or overlapped by, the formulation of the question to be decided. But it may go beyond it. What will be necessary in formulating the question of law will, of course, depend on the particular case.”

When citing from a decided case, the passage of the judgment should be chosen carefully and frugally. Only so much of it as expresses the proposition in question should be quoted. Ideally, that may amount to no more than one or two sentences, rather than a paragraph, or several paragraphs. Of course, there are times when citing a longer part of a judgment may be necessary.

Often, a legal principle can be stated by paraphrasing, rather than by direct quotation. This approach makes judgments easier to read. The authority for the proposition of law should be given, either immediately before or immediately after the proposition, or as a footnote or endnote. The manner of citing authorities for legal principles is a choice made by the judgment writer, and may depend on whether the judge’s court has adopted particular judgment writing guidelines or protocols.

To illustrate how a lengthy part of a previous judgment can be summarised, consider the following authority, as to the test to be applied in determining whether a discovered document is subject to a claim of legal professional privilege. Gleeson CJ, Gaudron and Gummow JJ said in a joint judgment:<sup>13</sup>

- “58. At first sight, sole purpose appears to be a bright-line test, easily understood and capable of ready application. Many disputes as to its application could be resolved simply by examining the documents in question... If the only way to avoid the apparently extreme consequences of the sole purpose test is to say that it should not be taken literally, then it loses its supposed virtue of clarity.
59. One of the considerations prompting rejection of the pre-existing test was that it was unduly protective of written communications within corporations and bureaucracies. The sole purpose test goes to the other extreme...
60. A dominant purpose test was sufficient to defeat the claims for privilege in *Grant v Downs*, and *Waugh*. The reason why Barwick CJ, the House

<sup>11</sup> Campbell and Lee, *op cit* n 2, p 230.

<sup>12</sup> Justice Mahoney, “The Writing of a Judgment”, Supreme Court Annual Conference, 23 June 1995.

<sup>13</sup> *Eso Australia Resources Ltd v The Commissioner of Taxation* (1999) 201 CLR 49 at [58]-[61] (references omitted).

of Lords, and the New Zealand Court of Appeal preferred that test was that they were unable to accept, as either necessary or desirable, the apparent absoluteness and rigidity of a sole purpose test. If the only way to avoid that absoluteness and rigidity is to water down the sole purpose test so that, in its practical application, it becomes more like the dominant purpose test, then it should be abandoned. Either the test is too strict, or it lacks the clarity which the respondent claims for it.

61. It would be possible to seek to formulate a new test, such as that adopted by Jacobs J in *Grant v Downs*, or Deane J in *Waterford*, in a further attempt to adjust the necessary balance of competing policies. To do so, however, would produce only confusion. As a practical matter, the choice presently confronting this Court is between sole purpose and dominant purpose. The dominant purpose test should be preferred. It strikes a just balance, it suffices to rule out claims of the kind considered in *Grant v Downs* and *Waugh*, and it brings the common law of Australia into conformity with other common law jurisdictions.”

In deciding a claim of legal professional privilege, that judgment could be paraphrased as follows:

“In *Esso Australia Resources Limited v The Commissioner of Taxation*, the High Court, by a majority, adopted the dominant purpose test. In their joint judgment, Gleeson CJ, Gaudron and Gummow JJ discussed the sole purpose test, established in *Grant v Downs*, and the manner in which it had been applied, and concluded:

‘As a practical matter, the choice presently confronting this Court is between sole purpose and dominant purpose. The dominant purpose test should be preferred.’<sup>14</sup>

Of course, it would be necessary to describe the dominant purpose test, and then to apply it to the disputed document or documents in the instant case.

## Step 5 State the conclusion

As the beginning of the judgment introduces the subject matter, the conclusion should resolve each of the issues identified at the start. The ending should contain no new material, whether factual or legal, which has not previously been discussed.

Some judges choose to announce the result at the start of the judgment. Others, perhaps the majority, announce their decision at the end. There is no “correct” view. Traditionally, the decision is given at the end, thereby providing a logical flow to the judgment. Those who favour stating the decision at the beginning, justify doing so to ease the tension for those with an interest in the outcome of the case. They also acknowledge that most readers turn to the last page first in any event.

Whether to maintain the conventional approach or to declare the outcome at the start is a matter of personal preference. Ultimately the choice may be influenced by the type of case. For example, when sentencing a prisoner or deciding a dispute concerning the residence of children, revealing the decision immediately may be more humane, especially if the reasons for that pronouncement are lengthy and may take some time.

How the decision is reached must be evident. This is accomplished by adopting a transparent reasoning process, dealing with both the relevant facts and law. Whatever

<sup>14</sup> Ibid at [61].

has influenced the decision should be stated in sufficient detail to thoroughly explain it. Some writers have described the task of the judge as being one of persuasion.<sup>15</sup> Arguably, the real obligation is to explain, publicly, how a decision has been reached, rather than to persuade the reader.<sup>16</sup>

After completing the decision, the proposed orders and relief granted should be stated.

## Step 6 Choose an appropriate style

### Use plain language

Judgments should be easy to read. The use of plain, everyday language helps to achieve this. Unless there is a need for it, technical language and legal jargon should be avoided. This does not require judges to resort to an artificial, simplistic writing style, but rather to use normal and sensible words and phrases. Consider the following example:

**Original:** “The argument as applied to the instant case is, in essence, that prior to and at the time of the rezoning application the nature of the project was clearly understood to be a condominium development.”

**Plain language rewrite:** “Counsel argues in this case that both before and at the time of the rezoning application the project was clearly understood to be a condominium development.”

### Develop a style with which you are comfortable

Judges develop their own techniques for writing judgments. Justice Mailhot of the Quebec Court of Appeal and Judge Carnwath of the Ontario Court of Justice observed:<sup>17</sup>

“One does not learn how to write well by simply reading textbooks. Only repeated practice of writing, together with an awareness of the importance of effective communication, can lead to favourable results.”

Each judge has an individual manner of expression. Judgments should be expressed in a language and style which suits the decision-maker. As has already been observed, there are many admirers of the language and style of Lord Denning. Few could, with any success, or it is suggested should, attempt to write in his distinctive way. It is generally better for judges to write in their own style rather than mimicking another's, which does not come naturally and is bound not to read naturally either.

It is sometimes suggested that style should not be confused with substance and, that in writing judgments, it is substance rather than style which is important. This infers a conflict between style and substance. That this is not so is cogently argued by Edward Berry, the distinguished Canadian Professor of English and author, who has taught judgment writing to several generations of North American judges.<sup>18</sup>

When choosing a writing style, the judge should always be conscious of the effect of the judgment and particular findings on those who are concerned with it. Care should be taken to avoid injection of personal views, by adhering to the purpose of the judgment. This consideration may temper an inclination to humour, irony, trenchant criticism, anger or morality, although there are occasions when humour or the expression of moral value may be appropriate.<sup>19</sup>

15 See references in n 2.

16 See, for example, Gibbs J in *Russell v Russell* (1976) 134 CLR 495 at 520.

17 Mailhot and Carnwath, op cit n 2, p 3.

18 Berry, op cit n 2, pp 75–76.

19 Kirby, op cit n 2, pp 111–125.

### Simplify paragraph and sentence structure and composition

In composing judgments, careful thought should be given to both paragraph and sentence structure and composition. For example:

**Original:** “In this situation, I am of the opinion that the evidence that Mr Harris has given is somewhat inconclusive.”

**Alternative:** “Mr Harris’ evidence is inconclusive.”

In addition to using plain language, employing shorter sentences, wherever practicable, is helpful. When long sentences cannot be avoided, they should be preceded and followed by shorter sentences, as variety in sentence composition retains the reader’s interest and facilitates the flow of the judgment.

Paragraphs can also vary in length, from as short as one sentence, to many sentences. It is often effective to begin and end each paragraph with a transitional sentence, providing a link to the preceding and following paragraphs.

### Use paragraph numbers, headings and subheadings

It is increasingly common to see numbered paragraphs in judgments, and for headings and subheadings to be used. Whether this is done is really a matter of preference for the judge or court. One positive consequence of numbered paragraphs is that it greatly assists in directing attention to a portion of a judgment. Using headings and subheadings is also helpful to those seeking to find a particular part of a judgment. It may also assist the judge by providing a checklist to ensure that all matters needing attention have been dealt with.

### Use active rather than passive voice

For easier reading, employ the active, rather than the passive voice. This creates a more direct impact. Two simple examples illustrate this proposition.

#### Example 1

*Passive voice:* “He was acquitted by the jury”.

*Active voice:* “The jury acquitted him”.

#### Example 2

*Passive voice:* “It was reported by the engineer that the bridge was structurally sound and safe”.

*Active voice:* “The engineer said that the bridge was structurally sound and safe.”

### Avoid Latin expressions and legalese

Although a judgment is a legal decision, resorting to formal language, including Latin phrases or expressions, should be avoided, unless there is a good reason to use such language or phrases. Some Latin expressions have become part of everyday language and their use cannot be avoided, for example, *subpoena*, *quorum* and *affidavit*. Other expressions, such as *viva voce*, *inter alia* or *nunc pro tunc* can readily be substituted with expressions such as “oral”, “among others” and “immediately”.

Consistent with the aim of using plain language, expressions such as “the said”, “hereinabove mentioned” or “it is therefore ordered, adjudged and decreed” should not be used. There are suitable substitutes for such words and phrases. By writing clearly and concisely, the subject matter being discussed should be apparent, without resort to these expressions.

### **Avoid redundancy**

It is tempting to explain the reasons for a decision by reference to the complicated nature of the proceeding or the issues to be resolved. Such rumination in a judgment increases its length, but does little to improve its quality. There is no purpose in saying, for example:

“After reviewing all of the evidence, and weighing carefully the competing arguments advanced by the parties, I have decided that...”

Judges must carefully consider the evidence and the competing submissions made on behalf of the parties. There is no need to say that this has been done. Whether there has been a proper or sufficient scrutiny of the evidence, and whether the arguments advanced, especially by the losing party, have been sufficiently considered should be apparent to the reader from the contents of the judgment.

### **Step 7 Edit the judgment**

It is commonly said that there is no such thing as good writing, there is only good rewriting. Preparing a draft judgment is hard work. But the hardest work begins when the draft judgment is finished. Good editing ensures that a judgment is lucid, thorough, coherent, concise and has transparent reasoning. It identifies flaws, such as the use of discriminatory language. Editing is a manifold task that should include:

- using a checklist of topics or issues to ensure that the judgment embraces all that it should and that all issues are resolved
- checking names, dates, figures and other data for accuracy
- eliminating repetition
- excluding irrelevant findings of fact
- pruning lengthy quotations of law, passages of transcript, or extracts from affidavits or documents tendered in evidence
- removing and replacing Latin expressions, jargon or outmoded expressions
- eliminating explanations of the obvious
- using the active voice rather than the passive voice, wherever possible
- simplifying lengthy, complex sentences and adopting short sentences, where appropriate
- checking the use of punctuation to avoid ambiguity and facilitate comprehension
- scrutinising the length and content of paragraphs.

Of course, time is a factor in determining how much editing is possible. But even when a decision must be delivered urgently, some editing is still required, especially to ensure that the decision covers all the issues raised for determination. Where there is no immediate pressure of time (other than the imperative to deliver a decision as expeditiously as practicable), a more thorough revision should be undertaken. The more a judgment is edited or revised, the better it will be, within reason.

### **Conclusion**

For most judges, preparing judgments is the most demanding, challenging and even stressful part of judicial life. Paradoxically, it can also be the most creative and rewarding. The hints we have offered do not purport to provide a recipe for easy or fast judgment writing. But with the clarity that flows from sound structure and style, the writing process is likely to be more streamlined and judgments are likely to be shorter. For time-poor judges, with the pressure of case upon case, it is an attractive spin-off that judgments which are easier to read are likely to be easier to write.

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