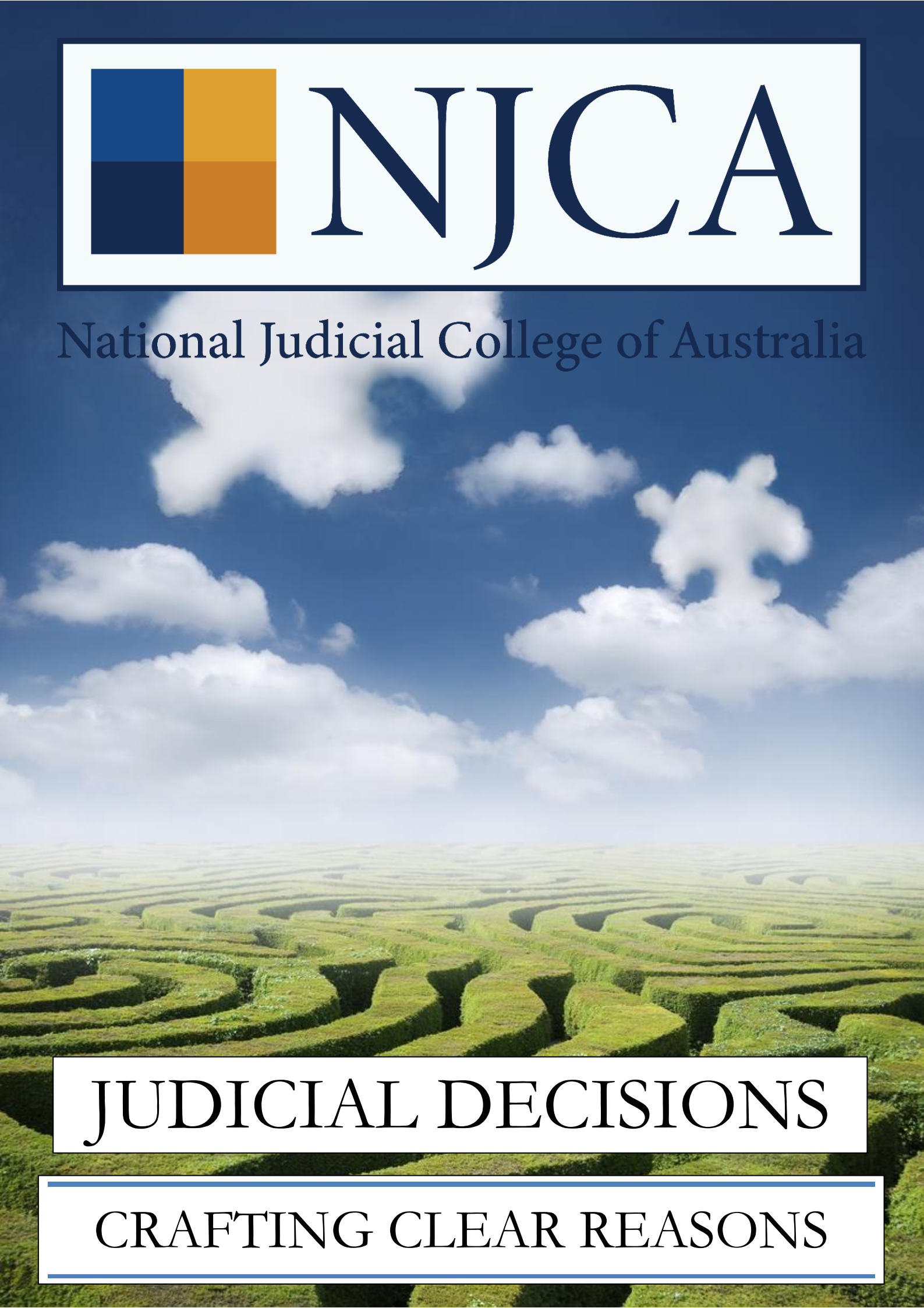

NJCA

National Judicial College of Australia

JUDICIAL DECISIONS

CRAFTING CLEAR REASONS

Judicial decisions

Crafting clear reasons

Published by:
The National Judicial College of Australia
PO Box 8102 ANU A.C.T. 2601
www.njca.com.au

National Library of Australia
Cataloguing-in-Publication entry:

Judicial Decisions – Crafting Clear Reasons
Compiler: National Judicial College of Australia
ISBN: 9780980544800
1. Judicial process-Australia, 2. Legal composition, 3, Writing
Dewey Number: 347.94

Printed August 2008
Editor: Ginger Briggs
Cover: Katherine Alexander, Scarlet Design

Contents

Introduction

The Honourable Chief Justice Murray Gleeson AC

Chief Justice of Australia

The ultimate judicial responsibility of deciding cases justly and according to law, and the obligation to state the reasons for decision, are closely related. In our system of justice, decisions at first instance are made by two different procedures. Most decisions are made by a professional judicial officer, sitting alone, who is required by law to give reasons. The acceptability of the decision, to the parties and the public, is based upon the reputation for competence and integrity of the decision-maker and the cogency of the reasons for the decision. Some decisions are made by juries, who pronounce an inscrutable verdict. The acceptability of their decisions is based upon the integrity of the trial process, the accuracy of the legal instructions given to the jury by a presiding judge, and the collective wisdom and experience of a group of representatives of the community. It is the former procedure that is the subject of this publication.

Explaining the reasons for a decision is an essential part of the justification of an exercise of judicial power. It is also an indispensable aid to appellate review. The availability of such review is also an element in the legitimacy of the process. Furthermore, giving reasons is designed to assist in reaching a just result. It promotes good decision making.

Expressing reasons for a judicial decision is a skill, and it is wrong to assume that it comes naturally to any qualified lawyer. It is not purely mechanical. Individual methods and styles vary. Even so, there are techniques that can be followed, and lessons that can be learned from colleagues.

The National Judicial College of Australia has recognised the importance of assisting judicial officers, especially those who are newly appointed, to acquire this skill. One way of giving assistance is by collecting and publishing advice from experienced judges and magistrates across the range of Australian jurisdictions. This work brings together, in a interesting and readable form, the views of such people. Their perspectives differ; their ideas are not all the same; yet there is a high level of consistency in the problems they identify and the practical solutions they suggest.

Whether reasons for decision are given orally or in writing, their capacity to justify an exercise of judicial authority depends upon their internal strength, and upon the clarity with which they are expressed. They are meant to explain — to the parties, to their lawyers, to an appellate court, and to the public — why a certain decision has been made. Whether the explanation is plausible or implausible, convincing or unconvincing, it should at least be reasonably clear. The contributors to this work have some valuable advice to give about satisfying that basic requirement.

Fact-finding is an essential part of the work of a trial court. This, in turn, requires an appreciation and formulation of the issues to be decided. It is interesting to see that many of the contributors have proposed an organisation of reasons that, in effect, compels the decision-maker to identify the issues before setting about the task of finding the facts. This is very good advice.

It is also interesting that a number of the contributors have identified the problems associated with getting into the task of composing a judgment and with bringing it to an end. These are practical problems, and what is said about them reflects experience and common sense.

Giving reasons for judgment is an essential part of the judicial function. Sometimes it is intellectually stimulating; sometimes it is not. In either case, doing it well, and to one's own satisfaction, ought to be one of the rewards that the job has to offer.

The National Judicial College, and all the contributors, are to be congratulated on this work, which will be of practical help to many judicial officers and will add to the quality of Australian justice.

Preface

The Honourable Justice Linda Dessau and His Honour Judge Tom Wodak

Since 2002, Australian judicial officers have benefited from a number of excellent judgment writing courses offered across the country. Based on well established programs in Canada, the United States and New Zealand, these practical courses offer judges and magistrates the opportunity to hone their skills in composing decisions, whether oral or written, and to reflect on ways to deliver clear and concise reasons for judgments.

At the end of these courses, participants often comment that they have learned from each-other as well as from the faculty of writers and experienced judges. Given that we work alone when it comes to preparing and delivering our decisions, it is not surprising that many of us find comfort and inspiration in discovering our colleagues' approach to this pressing, challenging — but sometimes exhilarating — task.

Against this backdrop, we were delighted that the National Judicial College of Australia shared our enthusiasm to produce an anthology of judgment writing tips, prepared by judicial officers for judicial officers, and inspired by the National Judicial Institute of Canada publication, *The most important thing is to begin: The art and craft of timely judgment writing*.

We have invited heads of jurisdiction around Australia to nominate judicial officers to explain how they go about the task of constructing their judgments. The result is this collection.

We are grateful for the support of the council of the NJCA, the leadership of the Honourable Chief Justice John Doyle AC (its chair at the time), and the indefatigable work of the CEO, John McGinness.

We extend special thanks to writer and editor Ginger Briggs, who has brought the same skill, thoroughness, charm and deft touch to her editing of this publication as she brings to the many judgment writing courses of which she is a popular faculty member.

Our highest praise and gratitude is reserved for the judicial officers who have bravely and generously shared their advice with others. If it is not enough to be prepared to go into print about what is mostly a private task, they have used their scarce time to write about how to write, when — ironically — they are already overborne by too much writing!

We hope you enjoy it… yes, *enjoy* it. These offerings are informative, but also entertaining, individual, and enjoyable.

Her Honour Magistrate Teresa Anderson

Magistrates Court of South Australia

The new magistrate and the lengthy trial

When I was approached to write an article on judgment writing, I wondered what a recent Magistrates Court appointee could contribute when her skills in this area were still a work in progress. As I contemplated further, I realised that my thoughts might be of value because, having presided over a number of lengthy Magistrates Court trials, I can still remember how the task of writing the judgment became more difficult and certainly more time consuming as a result of the way in which I processed the evidence.

Writing a judgment after a long trial in the Magistrates Court presents unique challenges. The magistrate is unlikely to have running transcript, or indeed any transcript. The evidence may not have been heard continuously, and there may be limited out of court time in which to write. Against this background, the magistrate may be dealing with multiple counts on a complaint, which may relate to regulatory offences and involve complicated statutory provisions. Being organised, both while hearing the evidence and when writing the judgment, becomes critical.

Having learnt from my mistakes, I offer the following tips.

Identify the legal and factual issues early

If you are able to, research the law relating to the charge before the trial starts, so that you know the ingredients of the offence and are aware of any relevant statutory provisions. Also try to identify what is in dispute. Whilst defence counsel is not obliged to give you such an indication in advance, an enquiry after the prosecutor has opened will often result in this information being provided, as it was in all likelihood disclosed at the pre-trial conference. Such preparation in advance means that when listening to the evidence, you can focus your attention on the critical issues.

Key themes

- ☞ Research the law and identify what is in dispute before the trial.
- ☞ Structure your judgment before you start writing.
- ☞ Write the whole judgment in one sitting.

"With a magistrate's workload, time will not permit you to re-edit time and time again. If you are satisfied that the judgment captures adequately what you are trying to say, publish it and let it go. There is more work waiting for you, and another decision to make."

Take good notes

Because you may not have a transcript, taking accurate notes of what the witnesses say is critical. This often means witnesses and lawyers have to be slowed down. If you need to check your notes, or if you want to quote certain passages of evidence, I find it easier to replay the audiotape at the end of the day and update my notes then. Alternatively, getting your clerk to type back only the portions of the evidence that you really need may avoid a lengthy delay in the provision of a transcript. Highlighting (with a marker pen, or even a line or asterisk) particularly important passages of evidence in your notes will also help when you return to write your judgment. Also make a note of your impressions of each witness. If you are writing your judgment some time later, you may not remember how the witness presented.

Ask counsel to provide copies of documentary exhibits

This allows you to follow the evidence as it is given. You can also highlight or annotate your copy.

Make notes of issues as the trial progresses

At the end of each day, note:

- anything significant about a witness's evidence
- any conflicts between witnesses
- any issues that have arisen
- any thoughts you have about those issues.

If you work on the case as the evidence is heard, the task of writing the judgment at the end of the case is easier. In an appropriate case, it may also be useful to summarise the evidence of the witnesses as you go along, while the evidence and the critical aspects of examination in chief and cross-examination are fresh in your mind.

As the trial may be adjourned, making such notes means you do not have to begin all over again when you resume. The notes will also become a blueprint for matters that you may have to consider and cover in your judgment.

The tyranny of time

The sooner you write the judgment, the easier it is to write and the less time it will take. If you leave it too long, you may have to reread all the evidence and begin again with the organisation of your thoughts.

It is very inefficient and frustrating to write a difficult judgment in a piecemeal fashion. Try to organise your court commitments so that you can work on it for a day or days rather than for an hour or so here and there. If need be, speak to your colleagues or the managing magistrate about your need for some out of court time to tackle your judgment. I have always found my colleagues to be supportive when such an occasion arises; after all, you are likely to return the favour at some time. If this is not possible, write in topics and try to complete a section of work before your court

commitments tear you away. For instance, if you have limited time, you could work on issues of law, leaving discussion and analysis of the evidence until you have more uninterrupted time.

Organise before you start

Know how you are going to structure your judgment before you start writing. Not every judgment you write will be structured in the same way. A decision that turns on issues of credit and reliability of witnesses may require you to compare and contrast the evidence of each witness in detail. In another case, the decision may turn on whether certain elements of the offence have been proven beyond reasonable doubt, and so your judgment may deal with the evidence as it relates to each ingredient. Know what directions or issues of law you may have to work into your judgment, and consider where you are going to deal with them.

Use headings

Headings help the reader process the decision. They also help you write it. They assist you to organise your thoughts and deal with the evidence in a logical way.

A judgment structure

I generally structure my judgments this way:

The charges

↓

The ingredients of the offence (if necessary)

↓

A concise summary of the prosecution and defence cases, highlighting the real issues to be determined

↓

The facts not in dispute

↓

Disputed issues and further findings of related facts

↓

The application of the facts to the law.

Considering facts not in dispute helps you concentrate your attention on what is in dispute. After recording undisputed matters, you can then deal with the disputed matters under topic headings. Discuss and analyse each witness's evidence relevant to that issue. It is more efficient to do this by issue rather than by dealing with each witness's entire evidence. Your attention will then be focussed on what you really need to determine to decide the case.

Edit, review then let go

Judicial independence does not mean that you cannot ask an experienced colleague to review your judgment. A fresh pair of eyes may pick up errors that your eyes did not see, and suggestions for improvement may lead to better expression of thought.

With a magistrate's workload, time will not permit you to re-edit time and time again. If you are satisfied that the judgment captures adequately what you are trying to say, publish it and let it go. There is more work waiting for you, and another decision to make.

His Honour Magistrate Michael Barnes

Coroners Court of Queensland

Writing inquest findings

Inquest findings differ from other judgments in ways that fundamentally affect how they are written and what they contain.

The readers of inquest findings have widely differing interests. They include bereaved spouses and strangers unintentionally caught up in the fatal events, trade unions and industry representatives with an ongoing interest in workplace safety, and researchers who never met the dead person or saw the death scene.

Inquest findings are not self executing — they bind no other court or tribunal and do not determine rights or obligations. Their impact is largely defined by the force of their words.

Their scope is determined more by the coroner than the parties. Findings must be made in relation to how, when, where and what caused the person to die. The evidence adduced to prove these issues, and the extent to which the circumstances of death are used as an opportunity to explore issues of public health and safety and the prevention of other deaths, are matters within the coroner's discretion.

Key themes

- Remember your readers have widely differing interests.
- Balance sensitivity to the family with the needs of professionals.
- Deliver findings quickly.

"A coroner should also avoid overly emotive language. The deep grieving of relatives will rarely be assuaged by hyperbole; the unnecessary reference to 'tragedy' or 'calamity' to describe a common domestic or industrial accident risks diluting the trenchancy of other descriptors."

Because coroners are not bound by the rules of evidence, much of the evidence upon which they base their findings is already known before the inquest begins and will not be tested further by that part of the investigation. Often, the majority of witnesses and even independent experts will not give oral evidence. Instead, they will tender their statements and reports. The drafting of findings can begin before the inquest does.

As I attempt to explain in this paper, each of these factors can influence the form and substance of coronial findings.

Speaking to different audiences

Many documents are composed to convey information to people who have differing familiarity with the subject matter and varying connection with the events described. Rarely, however, are those interests as divergent as the audiences of coronial findings. Finding the right voice to speak to so many dissimilar users is a challenge.

Family members have a very personal interest in finding out exactly how their loved one died, but it is important that the process doesn't further traumatise them. The approach referred to as therapeutic jurisprudence — which focuses on the non-legal consequences or impacts of legal procedures — is apposite. Coroners should avoid graphic descriptions of injuries and suffering, unless strictly necessary. However, research has consistently demonstrated that coroners should resist the inclination to shelter relatives from information that others assume will distress them. The person seeking information about the death of a loved one is the best judge of what they should have access to. However, that doesn't mean that the horrifying details should be spelled out in published findings. I frequently engage coronial counsellors to mediate the release of particularly distressing information to family members. With their expert assistance, even the viewing of death scene photographs can be managed.

Conversely, to realise the preventive potential of coronial investigations, clinicians and medical researchers seeking to determine the mechanism of death may need to be precisely informed of symptoms and reactions of the dying patient. These competing interests need to be balanced.

Family members will understandably wish their dead relative to be seen as an individual. Using the dead person's name, perhaps the first name alone in the case of children, is much better than referring to him or her as "the deceased". However, a coroner should also avoid overly emotive language. The deep grieving of relatives will rarely be assuaged by hyperbole; the unnecessary reference to "tragedy" or "calamity" to describe a common domestic or industrial accident risks diluting the trenchancy of other descriptors.

The life before death

Coronial investigators frequently include in their reports intricate details of the events that occurred in the minutes or hours before a person's death, but almost nothing about his or her life. A coronial finding is likely to be the deceased's last official record. It should contain a balanced description of his or her life, rather than a catalogue of crimes and diseases obtained from criminal histories and hospital charts. I do not suggest a biography, but I usually include a section headed "social history" in which I describe the deceased's education, employment history and family circumstances. In my view, this contextualises the findings. On occasions, the personal history also gives insight into how the dead person came to be in the situation that led to his or her death.

The force of the words

All judicial officers should strive to convey their decisions in language both compelling and elegant. However, "I sentence the prisoner to ten years imprisonment" or "I award the plaintiff a further $85,000 in exemplary damages" has impact no matter how clumsily it is expressed. Not so with coronial findings, which are not binding on anyone other than the Registrar of Births, Deaths and Marriages. Therefore, it is essential to construct coronial findings well if they are to satisfy the family of the deceased that the death has been rigourously investigated, and convince policy makers or regulatory agencies to implement the coroner's recommendations.

Writing about sudden and unnatural death should give coroners a head start in the reader interest stakes compared with, say, a judgment in an appeal against the rejection of a claim for stamp duty exemption. The plethora of television shows like *CSI* indicates the examination of violent death is, to many people, intrinsically interesting. The challenge is to maintain this interest while broadening the focus beyond the immediate circumstances of the death. If the connection between the analysis of public health and safety issues or matters pertinent to the administration of justice and the death or other possible deaths is made apparent, the findings may more readily galvanise prophylactic action.

Of course, all of the attributes of effective writing are equally applicable to coroners' findings. A table of contents, headings and a detailed introduction are essential in all but the most straightforward cases. The techniques used in building and other technical cases that allow lay readers to penetrate dense detail are essential. Consider a glossary of technical terms and acronyms in longer findings. Diagrams and photographs help illuminate text.

How far to follow the chain of causation

In criminal and civil cases, the parties set the parameters. They determine what evidence will be led to define the issues on which the judge adjudicates. Coroners are required by their constituting legislation to make findings in relation to the identity of the deceased and the time, place and cause of death. They are also given wide scope to investigate underlying issues or contributory causes. For example, Queensland's *Coroners Act 2003* provides that a coroner may comment on anything connected with the death that relates to public health or safety, the administration of justice, or ways to prevent similar deaths.

The challenge this creates for coroners is to determine how wide and how deep to probe for contributory causes. The Australian Transport Safety Bureau (ATSB) suggests that the investigation of such issues should continue as long as it is reasonably likely to generate solutions that might prevent other accidents. The trap coroners need to avoid is failing to focus sufficiently on this aspect of their findings until after the hearing has finished. Unless coroners explore the possible prevention issues before the hearing begins, they run the risk of only identifying these issues when writing findings and discovering that not all appropriate witnesses have been called, not all necessary questions have been asked, or all relevant submissions sought.

The ATSB suggests creating a safety factors map. For an inquest, this would be done when the investigation report had been produced but before the matter is listed for hearing. List the material events, individual actions and local conditions that seem to have contributed to the accident. As the inquest proceeds, some might be shown to have played no part and others may emerge, but in most cases the majority will be obvious from the outset. Then identify the risk controls that failed to prevent them culminating in death and the organisational influences that allowed those most proximate contributory factors to occur.

Unless this analysis occurs before the hearing, a coroner may find that the prevention issues crystallise in a haphazard fashion as the findings are being written. This may result in the opportunity for sound recommendations based on the input from all of the interested parties being lost.

During the hearing, I keep sheets headed with these issues and note evidence of relevance as it is given.

Possible reforms will often have been suggested in the investigation report and others will emerge as the inquest proceeds. Share these with the parties so that their final submissions respond to the possible recommendations.

Compliance with coroners' recommendations is not mandatory. Therefore, if inquests are to contribute to public health and safety or the administration of justice, it is essential that coroners' recommendations have credibility, particularly among the industry or profession most affected. Link them to the death from which they arose and ensure they are self explanatory. The planning and mapping I've described in this section should make each of those outcomes more likely.

The most important thing is to begin

This anthology was inspired by a similar Canadian collection, *The most important thing is to begin: The art and craft of timely judgment writing*. Coroners have a distinct advantage in this regard over their colleagues sitting in criminal and civil law jurisdictions, in that the vast majority of the evidence is available to the coroner before the inquest commences. Writing a draft finding at that stage helps with the identification of prevention issues with the advantages outlined earlier; it also highlights the gaps and conflicts in the evidence that need to be addressed in the hearing. When the hearing proceeds it is a relatively painless task to insert any new evidence, contrasting it with versions contained in the statements or reports and indicating the basis on which one version is to be preferred.

I try to begin drafting inquest findings as soon as I have read the investigation report. I then read the statements and add in pertinent evidence omitted from the investigation report. When the inquest commences, provided there is not too much other work demanding urgent attention, I continue this process in breaks throughout the day and after court. By employing this method, I can deliver findings a day or two after the evidence closes. This is particularly useful when the inquest takes

place in a remote centre, as it obviates the need to return, or to deliver findings over the less personal video link. Naturally, relatives and other parties appreciate the matter being finalised expeditiously and I can move on without reserved judgment weighing on me. It's wise to warn counsel for all parties that you intend to do this, so that they are ready to make submissions soon after the close of evidence.

His Honour Federal Magistrate Michael Baumann

Federal Magistrates Court of Australia

Begin with the end in mind

These observations on judgment writing arise from nearly eight years on the bench of the Federal Magistrates Court sitting predominately (but not exclusively) in the family law jurisdiction. The observations are perhaps less applicable to work in the appellant jurisdiction, or where significant disputes as to legal principles arise rather than factual disputes.

Key themes

- Capitalise on your initial "gut feeling" by making notes straight after the trial.
- Use question headings.
- If you set a deadline, meet it.

"Remember, for most litigants, theirs may be the only legal reasons they will read in their lifetime. They deserve to sense the case is about their issues and not a sterile, rigid examination that loses the human element within the words."

Preparation

Know your case. If necessary, remind yourself of any recent jurisprudence in the area. If the trial is by affidavit, read the material to familiarise yourself with:

- the history of the dispute. Consider preparing your own chronology of important dates and events and keep it in front of you during the hearing so you can add to it
- major witnesses — other than the parties — and what they say
- the major factual disputes. Distil these. Most cases often come down to a handful of key issues which shape the discretion you will exercise. It may be helpful to make a separate list of those issues under appropriate headings
- in some cases, the procedural history including earlier interim or interlocutory orders. Include those dates in your chronology.

This preparation may also help you guide the advocates to the critical areas in their cross-examination and submissions during the hearing. This reduces trial time, reduces costs, and means there is less evidence to sift through when preparing your reasons for judgment.

Note taking during the hearing

Every judicial officer has a different approach. Some cases rarely require the need for a transcript. Sometimes critical cross-examination (for example, of competing experts where technical language is being explored) is all that is necessary. Good and effective note taking enhances the focus of your decision making and is likely to expedite the delivery of reasons.

Having determined the key issues in dispute before the hearing, be alert to recording relevant points. Headings in your benchbook — using different coloured pens or other markers — will often help remind you of critical concessions or observations by the witnesses. Ensure you record the actual words accurately. Such a recitation in your reasons may make a powerful statement.

If credit is likely to be an issue (rather than just a different perception of history), consider again maintaining a separate sheet on the bench to record statements which might help explain why you have formed a particular view.

The initial "gut feeling"

Often, after a hearing, you will have some initial views about your decision. This is your freshest perspective, so get it down in some form straight away. Even a short handwritten view of your gut feeling on the critical factual issues — or even the result — will help later. In busy courts, you may not be able to come back to the judgment writing on that case for some time. At least the short summary will remind you of the critical issues and most likely prevent "rehearing" the whole case in your mind (or with a full transcript) again.

If you want to write, dictate or prepare a more complete initial reasons, and have time, do so. It is easier to settle and reduce some thoughtful ramblings at a later time than to start over anew.

Headings

The practice now generally adopted is:

Introduction
↓
Factual background
↓
Issues in dispute
↓
Sequential analysis of issues, including relevant law
↓
Conclusion

This template works for most judgments. However, be flexible to ensure it flows nicely to the reader — generally a litigant without legal qualifications — by using headings that pose the question that needs answering. For example, if an issue in a case is whether a contribution is a gift or a loan in a family law property case, consider the heading:

> Was the $100,000 received as a gift or a loan?

Remember, for most litigants, theirs may be the only legal reasons they will read in their lifetime. They deserve to sense the case is about *their* issues and not a sterile, rigid examination that loses the human element within the words.

Paragraphing

Short sentences, with good paragraphing, reduce misunderstanding and confusion. Headings transform discrete issues into a logical and discernible pathway in the journey to the conclusion. The text of the judgment is usually enhanced by the use of footnotes, including citations and references to parts of the evidence. For example: "Para 13 of the husband's affidavit — exhibit 12."

Conclusions

Unlike a novel, it is not necessary to leave the conclusion to the final sentence of the book. Some judgments will be easier to understand if you identify the conclusion early in the reasons, and then explain your decision. It is likely a litigant will read the orders first anyway.

Sometimes, in a lengthy judgment, a conclusion supported by a summary of the major findings works well.

Ultimately, even though personal or court generated templates often save time, the reasons represent your personal assessment of the facts and applicable law in that case. Do not be a slave to a precedent if an adjustment will help the litigants understand why you arrived at your conclusion.

Delivery

In high volume courts, there is much pressure to deliver *ex tempore* reasons so that you can move on to the next case. If you are not comfortable with this, but would like to enhance your capacity to do so, speak to members of your court who have a reputation for delivery of high quality *ex tempore* decisions, and find out the techniques they use.

It is likely good prior preparation is the key.

If you are able to give the litigants a date by which the reasons will be delivered — and you are certain you can achieve that timetable knowing your future commitments — do so. Most complaints to a head of jurisdiction are about a delay in delivery of reasons for judgment.

Lawyers, be they judicial officers or in practice, are trained to comply with timetables. Setting a reasonable achievable delivery date is often the catalyst for putting a judicial officer under sufficient pressure to deliver reasons in a timely manner. If you give a date — even if it is in six weeks time — meet that date. Litigants will understandably express concern if they prepare themselves for delivery and it is put off.

Most courts have a published protocol for delivery of judgments. Ensure you or your associate maintain a list of reserved decisions, the date they were reserved, and either the anticipated date of delivery or the date — within the protocol — by which it must be delivered.

Diarise or create electronic reminders at least one month and then two weeks before the date by which that judgment will be overdue. If your court commitments or personal circumstances (for example, your health), are likely to cause a delay in delivering the judgment within the time, inform your head of jurisdiction (or regional coordinating or administrative judge) immediately and explore relief opportunities to enable you to complete the judgment.

Finally

Judgment writing should be an enjoyable exercise — and can be. Getting it right is the important focus, and explaining to the losing party why their case did not succeed in ways that they should understand is critical.

As we move through our judicial careers, it is inevitable at some time, for some reason, we will have a judgment which has caused an intellectual block. Don't stress about it. Ask a colleague to work through it with you, comfortable in the knowledge that, by doing so, if they confront a similar obstacle they will feel free to seek your counsel.

In so doing, you are importantly helping the litigants, who deserve to get their decision in a timely, structured and readable manner; your Court's reputation; and, of course, yourself.

A happy judicial officer is generally a productive judicial officer.

The Honourable Justice David Bleby

Supreme Court of South Australia

Begin at the beginning

Writing a judgment usually begins before a word has been spoken in the trial or hearing. If the pleadings or notice of appeal reveal potentially numerous or complex issues, try to identify them at the outset. The list will be refined and modified as a result of the plaintiff 's opening or the appellant's outline of argument, and may require further modification as the trial or hearing proceeds. Early identification of the issues and the order in which they should be dealt with is an essential first step in planning the judgment.

If the trial or hearing is relatively short and without extensive oral evidence, and if the case is appropriate, plan your judgment and make notes under each heading with a view to delivering an ex tempore judgment.

During the trial

I am one of a diminishing breed of keyboard illiterates. I am therefore inhibited (some might say retarded) in the efficient use of a computer. However, some of these deficiencies are overcome with the click of a mouse in a user-friendly program and the increasing use of a voice recognition program. For that reason, I still make extensive handwritten notes during a hearing. However, even if I were keyboard literate, I would be reluctant to use a keyboard in court. I think there would be a perception of my concentrating more on the keyboard than what is being said at the time.

Handwritten notes are still useful for finding topics and words, but where I have the option, I invariably choose an electronic transcript with search facilities. The search capability can soon take you to the appropriate point in the transcript when required. If real time transcript is available, that is even better.

Key themes

- Identify the issues before the trial.
- Prepare an index for long judgments.
- Periodically review your outstanding judgments.

"There will be times when you complete the hearing not knowing what the answer should be. Make a note of your dilemma. If you have not reached a conclusion before you start writing, start writing in accordance with your chosen structure. More often than not, your written analysis of the facts or, if it turns on a difficult question of law, your written analysis of the legal principles, will dictate the answer."

In a long case with extensive oral and/or documentary evidence, I will use my notes to discuss with my associate, at the end of each day, the points that need to be noted or the annotations that need to be made against the person's evidence under appropriate issue or topic headings. Those headings will include the previously identified issues. Where credit is in issue, it will include notes about that witness's credibility. By this means, the annotations can be readily retrieved or supplemented as the case proceeds, whether in a hard copy or by way of electronic annotations to the transcript.

Even in a relatively short case, reviewing the proceedings at the end of each day and making notes on the particular topics and issues will pay dividends when you later prepare the judgment.

The structure

I am a great believer in headings, both for the purpose of planning the judgment and in order to make it more readable. In a long judgment, it helps to prepare an index which refers to relevant paragraph numbers. My structure usually follows the following pattern:

Introduction

A brief summary or review of the issue or principal issues in the case. The length of the introduction will be appropriate to or commensurate with the overall length and complexity of the judgment.

↓

The facts relevant to the issue to be determined

In a civil trial, this will state the uncontroverted facts, and list and dispose of each of the relevant facts in issue. The disposition of each factual issue may require a preliminary discussion of and findings as to the credibility of a number of witnesses and/or inferences to be drawn from non-contentious facts and documents. There may therefore need to be a number of further subheadings within this heading.

In a judgment on appeal, the section relating to the facts will usually summarise the relevant facts found by the trial judge or of the relevant evidence led in a criminal trial.

↓

The relevant principles of law

These may sometimes be quite briefly stated, but contentious issues may take up a substantial part of the judgment. Do not do more than is necessary in the circumstances.

The relative convenience of electronic cutting and pasting can easily induce habits of laziness in identifying what a particular decision stands for. The

temptation is to rely only on paragraphs of *obiter dicta*. For clarity of judicial reasoning, nothing can replace the enunciation of the principle on which the binding or persuasive decision has been based.

↓

Discussion — the application of the law to the facts

If possible, I try to avoid laborious repetition of the arguments of the parties. Occasional reference to some aspect of the argument may be made if appropriate, but those reading the judgment are more interested in the author's process of reasoning in reaching the conclusion. A good outline or written submission from counsel will provide the basis for the text of your decision in part, if not in whole.

↓

Conclusion

This need only be relatively brief as the reasons for your conclusion will generally be apparent from the discussion. One helpful word of warning is attributed to Sir George Ligertwood, a former Judge of the Supreme Court of South Australia:

> *If you have had a look at the law and the result does not make common sense, then go and have another look at the law.*

In a more complex judgment, this structure may need to be repeated according to the different issues that arise. For a long judgment, settling on a structure early can aid the process substantially, especially where only broken periods of time are available to write the judgment. It will become less daunting if discrete sections or headings can be completed, sometimes even before the hearing is completed.

Minimising the backlog

In a high-volume, short-hearing jurisdiction, where decisions are made on the papers, it is essential to keep ahead of the hearings. Prepare *ex tempore* judgments or notes before the hearing, and deliver *ex tempore* judgments if possible. Where difficult points are involved or the argument takes an unexpected turn, be prepared to abandon the attempt at the *ex tempore*. The parties are entitled to the best you can do in determining their case.

Where a reserved judgment is necessary and, as is usual, cannot be begun immediately, make or dictate a note of your conclusion and the reasons why you reached it. Thirty minutes spent on an outline will possibly save hours later on.

There will be times when you complete the hearing not knowing what the answer should be. Make a note of your dilemma. If you have not reached a conclusion before you start writing, start writing in accordance with your chosen structure. More often than not, your written analysis of the facts or, if it turns on a difficult question of law, your written analysis of the legal principles, will dictate the answer. As the Honourable Justice Baynton of the Court of Queen's Bench for Saskatchewan has observed: "Thinking and writing are inextricably related. Thinking enables writing and writing clarifies thinking."

Prioritising outstanding judgments

It is temptingly easy to deal with the easy and/or short judgment and to defer the long and difficult one. I have some sympathy for that practice, especially if it means an ability to clear the deck in order to devote the necessary block of time to deal with the difficult judgment. However, if adopted, that practice should only be given a finite life. It will not work if more and more uncomplicated judgments accumulate, pushing the complex one further back.

I find it useful for my associate to keep and update a list of all outstanding judgments and when they were reserved, to review that list periodically and to set priorities with my associate as to what he or she may usefully do to aid the process, and to fix on the order in which I will tackle the list. Often, factors besides the order of hearing will determine urgency, such as a judgment on appeal against conviction where the appellant is in custody or faces the prospect of a retrial.

Out of control?

Life on the bench can, at times, be lonely, but do not keep your problems to yourself. If the list of outstanding judgments is becoming unmanageable, speak to your head of jurisdiction and request time out of court. Heads of jurisdiction should also ensure that adequate judgment writing time is factored into the judicial roster and case allocations.

If a particular judgment is giving you trouble, talk to a colleague about it. You are not necessarily going to be the fount of all wisdom in every particular case. I do this in a court where there is no separate court of appeal, and on the clear understanding that any assistance given will not bind my colleague or inhibit him or her in any way from saying or doing whatever is necessary should they sit on an appeal from my judgment.

A few drafting hints

Avoid long sentences. The reader's attention is more likely to be retained by short descriptive sentences.

Use plain language. Avoid Latin phrases.

Use the names of parties rather than, for example, "plaintiff ", "defendant", "third party", "appellant", "respondent". You are writing about people. They are entitled to the courtesy of being properly identified in your narrative. However, with most judgments now being posted on the

internet within hours of publication, use discretion in identifying actual people and places. Their identity in a given judgment must be balanced against their right to privacy and not to be victimised in ways not dreamt possible before the advent of the internet and search engines.

Never do your final editing and proofreading yourself. Make use of your associate for that purpose. Depending on the calibre of your associate, encourage him or her to take a critical look at your reasoning.

Attend a judgment writing course and a follow-up course or seminar some years later.

The Honourable Justice Alan Blow OAM

Supreme Court of Tasmania

Judgment writing tips

Preparing before the trial

Do some well-targeted preparation before the case starts to identify the critical issues in the case, especially any issues that counsel has not spotted. This will require mastering the basic facts, and any unfamiliar areas of statute law and case law.

Mastering the evidence

In a trial of any length, a running transcript is essential. A system that works for me involves making handwritten notes, using a separate page for each major issue in the case, and listing transcript references on each page. I use decimal points. (For example, 103.1 means the top of page 103, and 103.5 means the middle of page 103.)

Delivering oral judgments

Delivering an oral judgment saves an enormous amount of time. In my jurisdiction, oral judgments are usually only possible in interlocutory applications and simple appeals from magistrates. I have some suggestions about oral judgments:

- If I give oral reasons in a lower court appeal, as a matter of courtesy I have them transcribed and sent to the magistrate.
- It is often a good idea to state that formal written reasons will be published, and to reserve the right to revise the oral reasons.
- Once oral reasons have been transcribed and edited, think twice before publishing them on the internet. My first judgment was an oral one, but it involved an unusual question of law, and I published it on the internet with the unfortunate consequence that my reasoning was criticised in the *Australian Law Journal*.

Key themes

- Keep a running transcript.
- Begin when the memory is fresh.
- Use headings, dot points, plain language and simple sentences.

"The ideal judge is a pedantic proofreader. In this court, every published judgment is read aloud beforehand by one person to another. Experience has shown that this reveals typing errors that otherwise would go unnoticed."

Beginning when the memory is fresh

A stale reserved judgment takes much longer to write than a fresh one. Sometimes counsel's written outlines will be all that is needed to revive the memory. Sometimes those outlines will be non-existent or hopeless.

If there is time to dictate or write a draft judgment before the judicial memory fades, that will save a lot of time. If there is not enough time to do that, some possible strategies are to:

- prepare rough notes outlining the whole judgment
- draft the introduction
- prepare draft reasons in relation to one or two critical issues, leaving the introduction and conclusion until later.

Prioritising reserved judgments

Methodically writing judgments in the order in which they were reserved might work for some judges, but it does not work for me. I prioritise and re-prioritise, more or less according to the following principles:

- Some cases are urgent or semi-urgent, for example appeals by people in custody.
- I like to write small judgments before big ones, and easy ones before hard ones.
- Sometimes I have to shelve the easy and small judgments before something hard and/or big becomes embarrassingly stale.

Writing

Try to identify the issues that will decide the case. Otherwise you might spend a lot of time deciding questions of fact or law that turn out to have no bearing on the result.

Write an introduction that tells the reader in the first paragraph what the case is about. For example: "This appeal concerns the rights and liabilities of a worker and his employer pursuant to the [X] Act, after the following sequence of events …"

Use headings. Most readers will not want to read all of your judgment.

Use dot points. They make lists much easier to read and comprehend.

Use plain language if you can.

Use simple sentences, especially when describing a sequence of simple events.

Sometimes it is a good idea to refer to parties by reference to their roles (for example, the employer, the worker, the hotel company) instead of their status in the litigation (for example, the second-named third party). This can be very useful where there has been a series of appeals, with the appellant at one level becoming the respondent at the next.

When dictating a judgment that is too long for me to finish in one go, I get my secretary to print an incomplete draft, edit it, dictate a little more, and repeat the process again and again until I have a complete draft judgment.

Proofreading

The ideal judge is a pedantic proofreader. In this court, every published judgment is read aloud beforehand by one person to another. Experience has shown that this reveals typing errors that otherwise would go unnoticed.

His Honour Magistrate Guiseppe Cicchini

Magistrates Court of Western Australia

Delivering judgments

Ensuring timely judgments

Always set yourself a timeline for the delivery of the judgment. A self-imposed deadline is crucial. Attempt to deliver judgments within one month of the final day of hearing. In complex cases attempt to deliver the judgment within two months.

At the conclusion of the hearing announce to the parties how long you believe it will take to deliver the judgment and if appropriate fix the date and announce it.

Always adhere to your self-imposed time limit. If some unforeseen circumstance occurs which prevents you from adhering to your schedule immediately inform the parties about the delay and give them an indication of how much longer it will take. It may be appropriate in some circumstances to fix a fresh date for the delivery of the judgment

Where possible start work on your judgment immediately. In any event, after the end of the trial, always:

- briefly summarise the facts
- identify the issues
- where possible, address the issues with a view to completing a rough draft there and then
- where the immediate completion of a rough draft is not possible, jot down your thoughts and impressions of the evidence given by witnesses relating to each issue.

Begin preparing your draft judgment as soon as possible, preferably within a couple of days of having heard the matter. Give your judgment writing top priority. If necessary work nights, weekends and holidays to ensure that you comply with your self-imposed deadline.

Key themes

- Deliver the judgment within one month of the hearing date.
- Use a standard format.
- If you are having problems, ask for help.

"If you are having difficulty with a particular issue which prevents your progress, do not ponder for too long. Do not let it fester. If you cannot resolve it on your own act immediately by discussing the issue with a colleague. However, remember that discussion with any more than one or two of your colleagues is time consuming and will defeat the delivery of your judgment in a timely manner."

Doing those things will ensure you complete the draft judgment expeditiously, relieving the pressure. The bulk of your work is done, although invariably you will need to revise and edit your draft judgment to its final form.

The judgment writing task will be easier and less daunting if you keep your judgments short. Set out the facts of the matter in a concise form. There is no point in reciting all of the evidence. Any recitation of the evidence where needed must be tailored to address your findings on a particular issue.

Writer's block

Avoid delay. Identifying the issues immediately following the trial is imperative, and creates the launching pad for writing your judgment. Any failure to immediately identify the issues and address them by jotting down your preliminary thoughts will lead to writer's block.

It will be easier to start your judgment if you adopt a standard format. My format is as follows:

Prepare an introductory statement concerning what the case is about.

↓

Identify the issues.

↓

Identify the facts not in dispute and those which are.

↓

Address the issues by:

- making findings of the disputed facts in relation to those issues
- referring to the losing party's argument in relation to each issue and stating why you reject that argument by reference to findings of fact made and/or the case law and/or statutory provisions.

↓

Announce the result.

Receiving and organising evidence

Keep detailed notes of the evidence.

During long trials prepare a daily summary of the evidence, cross-referencing the same to any documentary evidence received.

Flag the documentary evidence with the witnesses' name. Use a post-it slip attached to the document to identify the witnesses' evidence pertinent to it and the issue or issues to which it relates.

Prepare a sheet for each witness that identifies the key evidence given by that witness and (if possible) the issue to which it relates.

For long complex matters involving a great deal of documentary evidence, use a whiteboard to create flow charts. Identify the identities involved, the issues, the documentary and oral evidence relevant to that issue.

Keep physical exhibits neatly organised so that they are easily accessible.

Where possible, receive electronic copies of exhibits, transcript and submissions.

Whether or not to reserve

Always give an *ex tempore* decision where the facts and the issues are relatively simple and the result is clear in your mind. If you are confident about the outcome, give your decision there and then. If you need a little more time to consider and deliver your decision, take a short break in order to gather your thoughts and prepare your judgment to deliver it orally.

Only reserve where the issues are numerous or multi-faceted, the facts are complex and/or the amount of documentary evidence does not allow you to deliver an *ex tempore* decision.

Accumulation of reserved judgments

Work on one judgment at a time and prioritise it. Start it and finish it in the one go, even if it means working after hours. Do not — subject to identifying the issues and jotting down your preliminary thoughts immediately following the trial — leave the judgment partly done in order to begin another.

Work on your oldest outstanding matter first and then move on to the next oldest and so forth. This will ensure that no judgment will be outstanding for too long.

If you are having difficulty with a particular issue which prevents your progress, do not ponder for too long. Do not let it fester. If you cannot resolve it on your own act immediately by discussing the issue with a colleague. However, remember that discussion with any more than one or two of your colleagues is time consuming and will defeat the delivery of your judgment in a timely manner.

If you are overwhelmed by the number of outstanding reserved decisions in the light of more to come, act immediately by discussing with your head of jurisdiction ways in which the flow of new matters can be stemmed. Ask for time out of court to finish outstanding judgments.

If you are in such difficulty also advise your closest colleagues. Share your problems. Your job in completing outstanding judgments will be made easier with their support.

Her Honour Magistrate Wendy Cull

Magistrates Court of Queensland

Notes from a State magistrate

In court — how to receive and organise evidence to prepare for the judgment

In the central Brisbane courts we have access to immediate digital replay of proceedings; on circuit to remote areas we use portable tape recorders. Regardless of technology, it is useful for a magistrate to access actual recordings. Transcripts may not be available for weeks, by which time the urgency of producing a decision is lost, and the excuse for delay established.

I write notes as the witnesses speak, whether or not the matter is one that will be reserved or is likely to end with an *ex tempore* decision. An asterisk in the margin identifies significant information; my initials with bracketed words indicate my comment or query, and not the words of the witness; a note of the time in the margin helps me find the relevant place in the recording quickly.

I use a separate writing pad to jot down observations, findings, short summaries, conclusions — anything that seems important at the time and may be incorporated in the decision.

If the matter is a longer one and I have identified key issues, I keep a separate page for each so that I can make reference to relevant parts of the evidence, particularly conflicting versions of fact or opinions. These notes complement the parties' submissions at the end of the hearing.

Key themes

- Use actual recordings of the trial.
- Allocate separate notebooks and pages for different issues.
- Employ the "helicopter view" at the beginning of your judgment.

"What is required is timely disposition of matters with comprehensible reasons for decision. At the end of the day, I don't worry about whether someone might disagree with me. The important thing is to do the best I can based on how I see the facts, then to get on with the next decision."

Out of court — timely judgments

Get started as quickly as possible; don't use the excuse that a matter is part-heard to delay writing a decision.

Start with the overview of the case — or the "helicopter view" as the NJCA Judgment Writing Program describes it. It doesn't matter that your view may change. Rereading your description of

what the case is about will quickly bring you back to where you were at the end of the evidence received before adjournment to a "part-heard" date or list. (My comments here assume you type at least part of your decision yourself.)

In the Magistrates Court of Queensland we provide a monthly update on the number of decisions that have been outstanding more than a month, and the number of part-heard matters. The process of identifying these matters is motivating!

I no longer set deadlines for reserved decisions in the hope that I can meet them. A date when a decision is to be delivered may discourage procrastination, but it can create unhealthy stress levels, and often necessitates a sleepless night. I try to write a decision, notify the parties that it will be delivered in 48 hours, then reread it. Once that is done, and minor corrections made, I put it out of my mind.

Every judicial officer needs to find a way to tackle matters that have become burdensome. My solution is to recognise I've delayed long enough, email my first draft, no matter how incomplete or disjointed, to my home computer, take my handwritten notes, counsel's submissions and cases home with me, shut myself in my study for a few hours, often very early in the morning, and begin. Invariably my interest is rekindled as I work out what I need to locate in the digital recording or transcript, which exhibits I need to consider, and whether there are any other bits of the jigsaw that are missing. In short, you just need to get on with it! It is very satisfying to turn scrappy notes into a typed form that can be cut and pasted, knowing that the points that seemed relevant, controversial or interesting at the time have been consolidated and rendered legible so that they can be qualified and adopted — or discarded.

In summary criminal trials, there is often only one issue, or contested fact. This is the time to be decisive, organise your notes, and deliver your decision. On the spot decisions obviate the need for a recital of evidence. If my trial notes and observations are legible and coherent, I put them in an appropriate order by numbering the marked passages, starting with identification of the issue, identifying relevant evidence and conclusions, summarising the losing party's position, making a finding about that position. I then read those numbered passages into the record. Occasionally I do this without leaving the courtroom; alternatively, I give a time when the decision will be delivered, later that day or next morning.

Writing

Issues

I was fortunate to attend an NJCA Judgment Writing course in 2007. I have adopted techniques taught there to simplify and shorten my decisions. The opening "helicopter view" provides a context within which I identify the issues as they appear to me. Much of the evidence is then inconsequential. Evidence relevant to the first issue is set out, and a decision made. This usually leads into and narrows what is needed to address the second and following issues.

Consistency
Decide on a form that you feel happy with, and follow that formula.

For example, draw a line where what is said will be past tense or present tense. It may be that you record anything said by a witness during the trial in present tense, but things that occurred before that will be in past tense, as in: "Mr Black says the car reversed at high speed."

Similarly, people can be referred to as Mr Black and Ms White, or as Black and White. You may use titles designating profession, Dr Green or Professor Orange. If the players in the proceeding are more conveniently identified by such titles, you may decide to use Mr or Ms as well. All that is necessary is consistency.

Authorities
I never assume counsel's references are accurate, complete or in context. It takes time to check cases, but it is too often time well spent. If the reference is made in written submissions, ask for the case if you have any difficulty accessing the source.

Reasons
Of course reasons are the most important part of any decision, particularly the reasons for rejecting the evidence or legal argument of the losing party. Asking "why?" is a certain way to focus your thinking. Give reasons for any conclusion. Why do you believe the version of one witness over another? Why is something inconsistent — and with what? If something is "clearly" the case, why is that so?

Don't go back
It's like an exam. Once the decision is published — unless your practice is to read a decision into the record in the expectation of reviewing the transcript for typographical errors — let it go. As a magistrate, I make decisions at the first line of defence. What is required is timely disposition of matters with comprehensible reasons for decision. At the end of the day, I don't worry about whether someone might disagree with me. The important thing is to do the best I can based on how I see the facts, then to get on with the next decision.

His Honour Magistrate Hugh Dillon

Local Court of New South Wales

On the craft of judgment writing — some short ruminations

The great American judge Learned Hand suggested: "It is as craftsmen we that we get our satisfaction and our pay."[1] Most decisions by Australian magistrates are oral, *ex tempore* judgments in criminal matters. The Downing Centre Local Court in Sydney, however, has the largest number of civil filings of any court in Australia. Most of the sixteen or so magistrates permanently sitting there regularly deliver civil judgments. With the increasing complexity of magistrates' work, the craft of delivering timely decisions and judgment writing are skills each must master.

Defeating delay

Oral judgments

Whenever possible, deliver an oral judgment at the conclusion of the hearing or trial. There is no more efficient way of reducing delay.

Set a deadline

If a decision has to be reserved, set a deadline in court for the delivery of the judgment. Adjourning to "a date to be fixed" almost inevitably results in delay.

Keep a list

I keep a running list of outstanding decisions in table form stuck down beside my computer. The table sets out the names of the parties, the date the hearing ended and the date the decision is due.

Key themes

- First decide if you need to give a written or oral decision.
- Keep a running list of outstanding judgments next to your computer.
- Take pride in writing in a clear, elegant style.

"The worst structure occurs when a judge recites the evidence of each witness seriatim without relating that evidence to the issues or the arguments made by counsel. This is a recipe for the kind of decision that is routinely overturned on appeal: 'Dr X said [this]. Dr W said [that]. I prefer the evidence of Dr X. Verdict for the plaintiff.'"

[1] *The Bill of Rights 77* (1958) cited in Shapiro, F R. *The Oxford Dictionary of American Legal Quotations*, NY: Oxford, 1993 p. 270.

An organised approach to decision making

Identify the issues

It may be a statement of the obvious but the key to good judicial decision making is identifying the contested issues.

That process starts as soon as the court file lands on your desk. It continues with an **examination of the pleadings**, indictment or charge sheets. A careful reading of the pleadings is never wasted time: it helps focus the judicial mind on the real issues. Statements of claim, defences and replies should be cross-referenced so that judge or magistrate knows precisely what is admitted and what is in contest.

In the Magistrates Courts of New South Wales, it is rare to receive an opening address from the police prosecutor. If the **particulars** alleged in a criminal matter are unclear in the Court Attendance Notice (the charge sheet), the court or the defence should ask for them.

In civil matters, the Local Court Practice Notes require parties to file a **statement of agreed facts** and issues. An opening address, often from both parties, is the customary way of establishing the background and what is in dispute.

Fact-finding

Having identified the issues, the next major problem for the judicial decision-maker is finding the facts. In my experience, judicial officers are much more troubled by questions concerning facts than law: whom to believe and why? Two helpful articles addressing this issue have been published by the Honourable Justice Peter Young of the Supreme Court of New South Wales: "Practical Evidence: fact finding"[2] and "Fact finding made easy".[3]

In the latter, Justice Young suggests that, when deciding whether to accept or reject a witness's evidence, you should consider:

- the inherent consistency of the story. If the evidence contains internal contradictions, it cannot be accepted as a whole. The question may then be which part to reject
- the consistency with other witnesses
- the consistency with undisputed facts
- the consistency with prior statements or representations
- the credit of the witness
- the witness's demeanour and any characteristics which you can observe in the witness box or courtroom, such as hearing and eyesight, and the ability to judge distances
- the inherent probability or improbability of the evidence.

[2] Young, P W. "Practical Evidence: fact finding" (2007) 27 ALJ 21

[3] Young, P W. "Fact finding made easy" (2006) 80 ALJ 454

A failure to explain adequately why you have accepted one version of events over another is an appealable error. If all else fails, remember that one party bears the onus of proof. If it does not pass the test, it fails.

As the case proceeds

It is wise to keep notes on issues that do not fall within the pleadings, such as **witness credibility**, observations on witness demeanour and so on. When giving reasons for preferring one witness over another, such notes are priceless, especially if, as is frequently the case in magistrates courts, cases are adjourned part-heard sometimes for months between hearing days.

In a hearing of any length, it is self-evident that **keeping abreast of the evidence** on a daily basis will greatly assist the judge when the time comes to make the decision (or sum up in a jury trial). Ideally, you will index and cross-reference the evidence against the various issues you ultimately need to determine.

In a complex matter, a detailed **chronology** is also an invaluable tool for organising the facts and the evidence in relation to the issues.

Control the tender bundles

There is an unfortunate practice among some counsel of handing up tender bundles containing vast amounts of irrelevant material "for completeness". Usually this is done without objection. Courts under time pressure often resignedly accept this burden. Judges have three choices: to reject the bundles until the relevance of each document is proven; to provisionally admit the material; or to accept them on the basis that only that material which is demonstrated to be relevant and which is referred to in submissions at the conclusion of the case will be taken into account. The approach taken should be made clear on the court record. From a pragmatic point of view, the last is probably preferable as loss of court time dealing with each item is minimised. The judgment may include a remark to the effect, "As I stated when admitting the tender bundle(s), I have taken into account all the evidence I have heard and all the exhibits to which counsel have made reference in their submissions."

Written submissions and oral addresses

As far as possible, oral submissions are to be preferred to lengthy written submissions. It is easier to get counsel to focus on the real issues when you can speak to them face to face. The Honourable Justice Dyson Heydon AC has said:

> *The next aspect of the trial which can cause difficulty is the final addresses. They are often delivered, in non-jury cases, where the time allotted for the hearing is about to expire. Hence written submissions are often employed in substitution for, or substantial supplementation of, oral argument. Of course written submissions can in themselves be useful … But it is a truth which ought to be universally acknowledged that barristers will say things in written submissions which are sillier, longer and more repetitive than they have the courage to say orally. The burden of dealing with written submissions, particularly days or weeks after the hearing has ceased,*

> *is often much greater than that of dealing with crisp and focussed oral submissions at a time when bench and bar have the evidence freshly in mind. One aspect of the burden flows from excessively detailed reference to only marginally significant evidence. Another flows from voluminous citation of authority … At least for trial judges, the making of careful and clear findings of fact in relation to the issues posed is a much more important activity than scholarly display, unless the case is one of the relatively rare cases where intense scholarly activity is necessary.*[4]

Part-heard hearings

If a case is adjourned part-heard, it is wise to make a detailed note of the evidence, how the evidence appears to be developing in relation to the issues, any preliminary thoughts or queries you may have about the issues or evidence or witnesses and, in particular, your evaluations of the witnesses. However, never place these notes on the court file where the parties may have access to them. My practice is to keep my notes in a special lever-arch folder for part-heard matters.

At the end of the hearing

I was taught that, if the decision is to be reserved, you should not leave the courthouse without at least writing or dictating a brief synopsis of the facts, issues, assessments of witnesses and setting out in point form some tentative conclusions. This is a practice recommended by the Honourable Chief Justice Murray Gleeson AC.

A contemporaneous document of this kind greatly reduces the time-wasting effort of refreshing your memory from transcripts and exhibits, and is a much more reliable guide to assessment of witnesses than a later reading can provide. Relying on the document increases efficiency and the quality of the decision making process.

Writing the judgment

Is there a reason to write?

In magistrates courts law will rarely, if ever, be created. There are, nevertheless, good reasons for some decisions to be given in writing. It may be that the case raises legal issues that are novel or that, in an age of specialisation, you are in new territory. Sometimes, especially on country circuits, resources may not be available to check the law quickly. Magistrates may consider that parties, often unrepresented people in small claims disputes, will better understand their reasons if given a documentary record which, if they wish, a lawyer may explain to them further.

Magistrates, like other judges, often deal with complex civil cases involving multiple causes of action. It is a counsel of perfection for magistrates to give an *ex tempore* oral decision in such cases. As much as the parties may like a decision on the spot, they prefer a well-reasoned decision delivered reasonably promptly. Magistrates are generally criminal lawyers by training, and caution in making decisions involving complex commercial issues is creditable.

---

[4] (2004) 6 TJR 429 "Practical Impediments to the Fulfilment of Judicial Duties" (429-443) at p.437-8.

There is always pressure to bring on another case. In New South Wales, the practice is for a certain time to be allocated for civil trials in magistrates courts. If the hearing is not completed within that time, the case is adjourned to a date usually months in the future. The hearing of the evidence frequently finishes late in the day. Half an hour or an hour spent delivering an oral decision may mean that the waiting case is marked "Not Reached" and will be delayed some months at considerable expense to the parties. In my experience, that places magistrates under pressure to reserve and write judgments that might otherwise be delivered orally. The solution to that problem lies in the hands of administrators and heads of jurisdiction.

Settling down to work

When beginning work on a judgment in any complex matter, I suggest setting aside a block of two hours to organise and skim the material. This gives the writer an overview.

If you have not done it during the trial, this is the time to summarise the issues and to identify the witness evidence and exhibits relating to each of the issues. This should be the organising principle for the analysis of the evidence.

Some Canadian judges suggest the best way to begin writing a judgment is a sort of "stream of consciousness" draft, which is later refined. That may work for some, but I contend it is not to be recommended. It carries the risk that important issues or evidence will be overlooked or given insufficient weight. The best written judgments are carefully structured, precise, concise documents. (See, for example, any judgment by the Honourable Chief Justice Gleeson AC.)

Structure

The **best structure** for a judgment, in my opinion, is what Professor Jim Raymond calls the "shotgun house" structure. (A shotgun house is a simple house commonly found in the southern states of the United States — "a house in which each room follows the other in a straight line leading from a front porch to a back porch".) [5]

This judgment begins with a short overview of the case, then sets out the issues to be determined. Each issue is then dealt with to its conclusion in a separate compartment of the judgment, with all the relevant evidence and arguments drawn together under one heading.

The **worst structure** occurs when a judge recites the evidence of each witness seriatim without relating that evidence to the issues or the arguments made by counsel. This is a recipe for the kind of decision that is routinely overturned on appeal: "Dr X said [this]. Dr W said [that]. I prefer the evidence of Dr X. Verdict for the plaintiff."

Ian Barker QC makes a similar point in relation to addresses. His remarks are pertinent to judgment writing. At a Legal Services Commission of South Australia conference, he said:

---

[5] See Raymond, J. "The Architecture of Argument" (2004) 7 The Judicial Review 39 at 46.

> *The Crown Opening should be direct and simple and to the point. I think the Prosecutor should tell the jury precisely what the facts are and how they are to be proved. And he should deal with the matter issue by issue and not witness by witness. It's a mistake, I think, to get up and tell the jury that you are going to call A and he will say this, and you are going to call B and he will say this and you will call C and he will say this … The jury then knows it's going to hear a lot of evidence but they don't know what the issues are and, in my opinion, an opening needs, merely an exposition, albeit carefully, of the issues which they are going to have to deal with.* [6]

Result first or last?

There is no iron rule which suggests either approach is better. It all depends on circumstances. If you are going to refuse bail in a bail application, for example, it may be wise to announce the result at the end of the reasons. The alternative may be to listen to an angry man hurl abuse at you as you give your reasons. On the other hand, there is probably no point keeping parties in a civil case in suspense: you can give the result with the reasons following.

Writing style — some miscellaneous reflections

Some judges think as they write and this works for them. Others do not write a draft until they have thought their way through the problems. The first method seems to lend itself to prolixity; the second to brevity.

Many plain English advocates have a checklist of dos and don'ts. (For example, "Write short sentences", "Use English words not Latin" and "Use the active rather than the passive voice".) George Orwell had a similar approach. However, in his famous essay, "Politics and the English Language" he urged: "Break any of these rules rather than say anything outright barbarous."

Paradoxically, grandiloquence and self-importance undermine the intended effect when used in judicial prose. Thucydides said: "Of all the manifestations of power, men most respect restraint."

There seems to me to be merit in the suggestion that judges who write their decisions by hand tend to give more concise, more precise reasons. There may be a natural rhythm in handwriting that aids conciseness. For judicial officers with associates or secretarial staff this may be an attractive method. Magistrates in New South Wales do not have this luxury, but do have laptop computers — efficiency suggests that they should learn to type.

Some Canadian judges recommend that counsel's written submissions be obtained in digital form and cut-and-pasted into judgments. I disagree. I have tried this but, in my view, judgments so constructed tend to suffer from unnecessary prolixity and imprecision.

A judgment will always be clearer when the parties' names are used rather than the nomenclature, for example, "the plaintiff", "third cross-claimant", "the second third party". It sounds and seems

[6] Barker, I. "Opening and Closing Addresses to a Jury" in Eames, Geoff (ed), *Criminal Law Advocacy,* Legal Services Commission of SA, Adelaide, 1984, p.44.

more courteous and respectful if parties are given their titles — "Mr Brown", "Ms Wolff" — than if they are referred to merely by their surnames. It appears to be British practice to use surnames alone. It may be culturally acceptable in the UK, but in Australia, addressing another person in this way seems unpleasantly patronising or superior. It is *The New York Times* house style to refer even to enemies of the United States by their titles.

Finally, judgments are not usually works of art. Nevertheless, many judges take pride in their writing. A useful tool for the writing judge is a legal thesaurus. I use *Burton's Legal Thesaurus* by William C Burton (Macmillan, NY, 1980). Others are available: see Amazon.com.

The best book I know on improving writing style is Joseph M Williams's *Style: Toward Clarity and Grace* (University of Chicago Press, Chicago, 1995). In an elegant and sophisticated treatment, it goes far beyond the rules of the plain English school of writing. It does not lay down rhetorical laws, but is primarily intended to check barbarous writing. For example, it emphasises that there is no special magic in short sentences. The best writing incorporates short and long sentences. It has rhythm.

The Honourable Justice John Dowsett

Federal Court of Australia

Judgment writing — random thoughts

I have some reservations about giving advice concerning judgment writing. The conditions under which judges (including magistrates) work vary significantly from court to court. More importantly each case is unique and deserves to be treated accordingly. Finally, each judge is different — has different strengths and weaknesses. We, each of us, must do what we can with what we've got. This will depend upon skill and experience, but it may depend even more on pressure of work and the quality and number of support staff. Much of what follows should be seen as suggestion rather than prescription. It certainly does not describe any unfailing practice of mine.

Key themes

- Ask questions. Aim to be in command of the case.
- Begin the oldest judgment first.
- Be humble, fair, honest and logical.

"Some judges dictate their thoughts immediately upon coming out of court. For those with sufficient wisdom and humility to experience self-doubt, that may be a good system. For those who are beguiled by their own rhetoric, it is a fatal trap."

During the trial

Decisions made early in a case may facilitate or hinder judgment writing. The tendency towards trials based on affidavits or witness statements has not made that process easier. Very often it leads to there being two versions of evidence-in-chief instead of one. Frequently, the judge's capacity to assess the witnesses is undermined by his or her not having seen them tell their stories. A trial is supposed to be about testing evidence, but we have largely given up a major traditional part of that process in the fond hope that it will save time. If we are not bound by statute to proceed on affidavit or by witness statement, we should ask ourselves how we will be better assisted. In some cases, oral evidence may make judgment writing easier.

Similar considerations arise in connection with submissions. Increasingly, we call for written submissions before and after the evidence. In the end we often get (usually repetitive) oral submissions as well. The difficulty with this is that no stone will be left unturned. Arguments, which would be laughed out of court if presented orally, look deceptively persuasive on the printed page. We seem to have developed a dual process. At one time, all submissions were oral. Then we introduced outlines of argument which were generally limited in length to about three pages. Now, we frequently allow full written argument and oral submissions. Logic suggests that we should either

have an outline, developed orally, and at length if necessary, or full written submissions with very short oral development. The more the argument is repeated, the more forms it will take, and the harder it will be to summarize it in the reasons.

It is important to keep track of documents. Frequently, there are amendments to the pleadings, affidavits, witness statements and/or documentary evidence, so that there are multiple versions of them. It is very easy to find oneself writing a judgment based on a superseded version. We are disciplined to keep track of exhibits, but that discipline has not traditionally extended to our treatment of other documents. It can be a very dangerous trap for the unwary.

A judge should aim to be, at the end of the hearing, more or less "in command" of the case. By that I mean that he or she should have an understanding of the factual and legal issues even if not of the likely outcome. Although that proposition may sound obvious, it is very easy, especially where the evidence is largely in written form, to find oneself completely mystified as to what the case is really about, even after submissions. Judges are frequently reluctant to ask questions — of witnesses or of counsel. It is partly an attitude inherited from our predecessors who, especially in jury trials, tried to keep in the background. Whilst care is still needed in jury trials, it cannot seriously be suggested that a judge should generally refrain from asking questions in order to clarify his or her understanding of the evidence and to test submissions. That is the only way to ensure command of the case.

Managing reserved judgments

Before turning to the writing of reasons, I should say two things about managing reserved judgments. Firstly, a judge should have a formal system for recording and keeping track of them. Although it may be painful for all concerned, there should also be a system which regularly brings outstanding judgments to his or her attention. Any pain will be a valuable incentive to disposing of them. Secondly, the judge should usually choose the next judgment by reference to age. It is too easy to turn to the "easier", "shorter" or "more important" judgment. That approach is unfair to litigants in earlier cases and may contribute to the development of mental blocks about particular cases. Occasionally, a case may require priority, but that should be the exception rather than the rule.

Deciding and explaining

Deciding the case and writing reasons for that decision are, in a sense, distinct processes but in another sense, they are part of one process. The decision may well influence the way in which one writes the reasons. Writing the reasons will frequently clarify and hone one's thinking about the decision. For that reason, a judge should not put off writing the reasons until he or she knows the outcome. The important thing is to start. In these days of word processors, it does not matter much if one explores dry gullies and then has to abandon part of what has been written or re-arrange it. Nothing focuses the concentration so much as having to identify a proposition so clearly that it can be recorded in writing.

The corollary to that proposition is that the judge should not be persuaded by his or her own prose. A proposition often looks deceptively authoritative once it is in writing. Some judges dictate their

thoughts immediately upon coming out of court. For those with sufficient wisdom and humility to experience self-doubt, that may be a good system. For those who are beguiled by their own rhetoric, it is a fatal trap. A critical attitude to one's own work is a distinct advantage in producing quality judgments, even if it involves a significant personal burden.

Develop a style of writing which eschews unnecessary words and phrases. Wherever possible reduce the number of words used to express an idea or state a fact. The law reports contain cases decided at various points in the history of the development of the law. There have been times when brevity was important and other times when the rhetorical flourish was valued. Many phrases used in the reports are unnecessary prolix. Our training focuses on reading judgments, and we often acquire the language of the past as part of our legal "education". Some of it is useful, indeed necessary, in describing various legal concepts with precision. But some of it is simply language of an earlier time. The trick is to know the difference, to use technical language with an eye to its technical meaning, and to avoid mere jargon and flowery prose.

There is no one correct way to arrange reasons. In some cases, it will be easier for the writer (and the reader) to identify the facts before looking at the law. In other cases, the reverse will be true. Sometimes, the issues will be so narrow that the writer may focus on one point, all but ignoring much of the other evidence and many of the submissions. In other cases, he or she will have to deal with many issues which are, in the end, irrelevant to the way in which the matter is actually resolved. These different situations will be reflected in the main themes of the reasons and, therefore, in the way in which they are organized.

There is a marked distinction between a style which includes extensive extracts from the evidence and the cases, and a style which avoids that practice. Both approaches have strengths and weaknesses. The inclusion of extensive extracts lengthens the reasons and may conceal the thrust of the reasoning. On the other hand, summarizing the evidence and paraphrasing other judges' reasons can sometimes omit critical subtlety of meaning. As with so many other aspects of our work, that is a matter of judgment.

Conclusion

In the end it is important to keep in mind that "judging" is about "judgment". We cannot expect that our decisions will involve only the black and white application of clear rules to clear facts. Every legal problem reflects the variety of human conduct. The reasons must reveal the way in which the judge, representing society, has judged the conduct of particular people in particular situations. In judging others, we assume an awful responsibility. Reasons should reflect the humility, fairness, honesty and logic which we have applied in discharging that responsibility. Much time is spent in judicial education in arguing about the audience for whom judicial reasons should be written. I suspect that ultimately, we write for ourselves — in order to justify to ourselves the decisions which we reach and impose on others. If we are genuinely satisfied with them, then we can live with ourselves, but that satisfaction must be genuine.

His Honour Federal Magistrate Rolf Driver

Federal Magistrates Court of Australia

Judicial officers on a lower level court need to deal with a high volume of cases that are generally, but not always, short and straightforward. In that judicial environment, it is essential to be able to deal with judgments promptly. I take the view that the highest obligation on a judicial officer is not hearing cases; rather it is making decisions. There is no point in hearing a large volume of cases if they are not completed by timely decisions.

In a high volume jurisdiction, it is necessary to make as many decisions as possible *ex tempore*. There are simply too many cases to reserve judgment in a significant proportion of them. That said, reserving judgment is necessary in some cases and, in some jurisdictions, it may be necessary in a reasonable proportion of cases. Judicial officers need to ensure that they have sufficient time available to deal with reserved judgments. That requires some rigour and foresight in establishing appropriate diary rules. It also requires an acceptance from the relevant court administration that judgment writing time is no less important than hearing time.

Where it is necessary to reserve judgment, it is important to deal with it within a clear time frame. It is inevitable that the work undertaken on a reserved judgment will expand to fill the available time, whatever that available time is. It often helps to tell the parties at the end of a hearing when judgment will be delivered so as to set a clear deadline. In other circumstances, once submissions are received and the scope of the task is clear, it is important to set a realistic deadline, to inform the parties of the judgment date anticipated and to stick to it.

Key themes

- Your highest obligation is not hearing cases but making decisions.
- Only deliver ex tempore judgments if the decision is clear.
- Oral judgments require confidence and a clear roadmap.

"It is inevitable that the work undertaken on a reserved judgment will expand to fill the available time, whatever that available time is. It often helps to tell the parties at the end of a hearing when judgment will be delivered so as to set a clear deadline."

As I have already noted, the burden of reserved judgments can be minimised by giving judgment *ex tempore* wherever possible. It should be possible where the issues are straightforward and the outcome is clear. If you are uncertain, do not attempt an *ex tempore* judgment. There is nothing worse than having to change one's mind partway through an oral judgment.

Giving an oral judgment requires some confidence but there are several tips for making the task easier. First, it is essential to be familiar with all of the material before dealing with the case. This requires pre-reading and accepting the risk that time spent in that reading may be wasted if the case settles. A working copy of the most important documents on which one can note the important points will also assist. Written submissions on the legal issues are usually very helpful when provided in advance.

Secondly, it is important to take notes of developments during the hearing for comparison against the documents. One may go into court with a preliminary view but that view will often change significantly during the course of even a short hearing. Your notes in these circumstances are a vital *aide-memoir*.

Thirdly, ensure that you have a mental road map to the oral judgment before commencing it. Think of it like memorising a route to a destination from a street directory. Develop a mental picture of the route to be taken and the various turning points. Keep that mental picture with you until the judgment is given. Organise the documents that you will refer to in the oral judgment consistent with that mental road map. Keep the documents close to hand in the desired order so that they can be referred to with a minimum of interruption.

As with any judgment, it helps to divide it up into a logical sequence. Start with an introduction, then go to the background facts, then identify the issues to be resolved. Refer to the law to be applied and the parties' submissions. Then deal with your own reasoning and the disposition of the case.

Fourthly, take as long as you need at the end of a hearing before commencing the oral judgment. Most people cannot begin an oral judgment of any complexity without leaving the bench, if only for a short time, to collect their thoughts and order the documents. Some will be assisted by taking the time to draft some notes to refer to during the course of the oral judgment. That may not be necessary where one has a clear mental road map.

Fifthly, it is generally not necessary to read extensive text from documents onto the transcript for the purposes of an oral judgment. So long as the relevant extract is identified during the course of an oral judgment, the text can be incorporated later if a judgment is written up. Obviously, having a judgment transcript helps that process enormously. In a simple oral judgment, parties do not need to sit and listen to a recitation of the known facts or, indeed, a recitation of well-known legal principles. Where these are set out accurately in a document before the Court, it is permissible to simply adopt passages from those documents for the purposes of the oral judgment and, if necessary, incorporate them in a written text later. Of course, if text is taken from other documents, it must be attributed.

The process is simplified and the burden on staff is reduced if documents can be provided in electronic format so that relevant text can be incorporated quickly and simply.

Finally, it is permissible to revise a transcript of an oral judgment to correct transcript errors, as well as errors of grammar or slips of the tongue, so long as the sense of the oral judgment is not altered. A short and pithy oral judgment, properly edited, often looks and reads better than a long and ponderous reserved judgment.

Avoid reading a prepared judgment in court. If the judgment is sufficiently final to be read, it is better to simply hand it down as a published judgment.

The Honourable Justice Kevin Duggan AMRFD

Supreme Court of South Australia

A judgment is not simply a decision; it is also a means of communication. The judge should be sensitive to the needs of potential readers of the judgment, including litigants, appellate courts and the wider community.

Informing litigants

A primary purpose of the judgment is to explain to the litigants how the decision was reached. Give particular attention to informing the losing litigant why he or she has lost.

Aiding appellate courts

Courts of appeal are under increasing pressure brought about by the complexity and volume of cases.

Usually, the judgment appealed from will be the appeal court's introduction to the case. A helpful summary of the facts and a clear explanation of the way in which the law has been applied to those facts will assist considerably.

While it is not the primary function of the judge to write judgments for the benefit of courts of appeal, it is essential that the judge's process of reasoning be set out precisely.

Educating the wider community

The publication of judgments on the internet has increased the potential of the courts to communicate more effectively with members of the public.

In most cases the public audience will be small, but a clear explanation of the basis of a decision serves the joint purposes of informing the public in a transparent manner of the way in which the law has been applied to the facts of the case, and educating the public about how the courts operate in general.

Key themes

- While you shouldn't write for a court of appeal, ensure your reasoning is set out precisely.
- Clear the way for thinking and writing.
- Avoid judgment writing diseases!

" [Judgment writing] diseases have flourished with the demise of the typewriter and the introduction of word processing. Pages can be incorporated into a judgment by the click of a mouse."

A self-serving purpose

The discipline of setting out the process of reasoning assists the judge in testing the conclusions to which the reasons lead.

As Spigelman CJ has said:

> … *it is my experience and I believe it to be the universal experience of the Australian judiciary, that the need to write down in a systematic format the true reasons why a judge has reached a particular conclusion, means that that conclusion is more likely to be the correct conclusion.*[1]

Preparation

It has been said that writing is the hardest form of thinking.

In a complex case, the writer should not be overloaded with tasks associated with the judgment at the time of writing when those tasks can be performed earlier. References to the evidence, a chronology, the indexing of exhibits and notes on witnesses should all be prepared during the trial so as to clear the way for thinking and writing.

It is helpful to prepare a skeleton of the judgment before writing.

The art of finding a neat way into the case

Lord Hope has stressed the desirability of "identifying the essence of [the case] before getting down to the boring details".[2] He refers to Lord Hoffman as the best exponent of this art.

If there are not too many issues, it is best to set them out in the opening stages of the judgment and to provide a brief summary of the facts to put the issues into context.

> *The writer who loses the opportunity to state clearly at the outset the issue in hand (as he or she sees it) has lost a vital chance to communicate effectively with the potential audience and to grasp its interest and favour.*[3]

Style

The writer should aim for a reader-friendly judgment.

---

[1] Spigelman CJ, Speech to the National Judicial College, Beijing, 10 November 2003 – available on the Internet at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_101103

2 Lord Hope, *Writing Judgments*, Judicial Studies Board Annual Lecture 2005 at 6 — available on the Internet at http://www.jsboard.co.uk/downloads/annuallecture_2005_proof_220305.pdf

[3] The Honourable Justice Michael Kirby, *On the Writing of Judgments* (1990) 64 ALJ 691 at 701.

> *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.*[4]

It is obvious that a judgment should be expressed in clear and simple language. Short sentences are recommended.[5]

Occasionally it will be necessary to refer to technical issues of a legal or non-legal nature. However, it is part of the art to reduce these to readily understood explanations.

> *Technicalities and jargon are all very well among ourselves – a system of shorthand – but in the end if you cannot explain your result in simple English there is probably something wrong with it.*[6]

"Plain English for judges", a paper by James Raymond[7], is a useful practical guide.

Other matters

When sitting as an appellate judge it is advisable to make notes of discussions with the other judges at the time of or shortly after those discussions.

The longer the writing of judgments is put off, the harder the judgments are to write.[8]

If there are parts of the judgment which are likely to attract media attention, careful drafting is required to avoid misunderstanding.

The checking of drafts by the associate is an essential part of the process. The associate should be directed to be forthright and frank and to examine all aspects including the soundness of the legal propositions, statements of fact, readability, style and accuracy.

Judgment writing diseases

Most of these diseases have flourished with the demise of the typewriter and the introduction of word processing. Pages can be incorporated into a judgment by the click of a mouse.

Cititis

---

4 Sir Frank Kitto, *Why Write Judgments*, (1992) 66 ALJ 787, 795.

5 Lord Hope op cit footnote 31 refers to a test known as the Felsch Test to assist readability. Under the test w = the average number of words per sentence and s = the average number of syllables per word. The readability score is computed according to the formula: 206.835-[((1.015)w)+(84.6s)]. A score of 50 is considered to be satisfactory. Lord Denning regularly scored in the 70s and 80s.

6 Lord Reid, *The Judge as Law Maker*, 12 JSPLT 22, 25.

7 Professor James C Raymond *Plain English for Judges*, National Judicial Orientation Program.

8 In *Why Write Judgments?* (1992) 66 ALJ 787, 793, Sir Frank Kitto refers to an occasion when Starke J commented to Dixon J that he would "put a case away and let it simmer". The Chief Justice replied: "You mean put it away until you have forgotten the difficulties".

Over citation of authority. Present in plague proportions since the advent of the internet.

This condition is particularly acute when the excessive citation of authorities is in relation to non-contentious legal principles.

Factitis
Excessive reference to facts which are unnecessary for the decision.

> *The more that is said, the less that is read.*[9]

Peripheralitis
Long meandering excursions into remote issues so as not to waste the results of extensive research by the judge and associate.

Pompositis
Vividly described by Sir Gregory Gowans in his case notes as:

> *The over-elaboration of the grounds upon which a decision is rested and the ultra-refinement of the thought processes involved are calculated to present an aspect of artificiality which makes it remote from the understanding and judgment of ordinary people. Further when there goes along with this the fact that the search for precedent and principle necessarily looks to and draws upon history and this becomes the subject of special emphasis there is an added tendency for ordinary people to regard the process as remote from reality and concerned with things that are past and outworn.*[10]

Orbis terrarumitis
A desire to "go global" and explore legal issues, the resolution of which are unnecessary for the case at hand. Particularly painful if the onset is at first instance.

Mazeitis
A judgment in which one is easily lost in the opening pages.

Copius Quotitis
Excessive quoting from the judgments of others.

Acknowledgement: The author has suffered from all of the above diseases.

[9] Sir Gregory Gowans, Reflections.

[10] Ibid.

His Honour Judge Brian Gilchrist

Industrial Relations Court of South Australia

A lesson learned

When I was first appointed to the bench, I felt compelled to write judgments the same way as everyone else had written them.

I used the same template, starting each judgment with: "This is an application pursuant to rule [x] or section [z]."

I appreciated it was not a very enticing way to begin a decision and that it disclosed little about the case. I did not, however, think it was my place to question the style that I had inherited from my predecessors.

Judgments that I had read were replete with dates. I assumed that this demonstrated that the judge was on top of the facts. Keen to make a similar impression, I loaded my judgments with dates even though they rarely had any relevance to the resolution of the case.

Like those before me, my judgments contained lengthy citations from legislation and cases. I would cut and paste slabs of transcript in the belief that I was demonstrating that I had carefully read and understood the evidence. I rarely read lengthy citations in other's judgments so I do not know why I expected anyone to read them in mine but I put them in there just the same.

Key themes

- Identify issues early.
- Confer with counsel to ensure you share an understanding of the issues.
- Edit to delete material that does not add to your reasons.

"I also came to appreciate that by writing in a clear and logical style I not only made it easier for others to understand me, it made it easier for me to understand me!"

The judges that my lecturers at law school lauded often used Latin phrases. I felt compelled to do likewise. As I was never a great Latin scholar, I would often check the meaning of a Latin phrase before I used it in a judgment. It never occurred to me that someone reading my judgment would share my ignorance of Latin and that it might be better to use the English equivalent.

There are many judgments that I have read that I did not understand. There are others that I have read two or three times and I think I know what they mean but I am not completely certain. I am sure that I have produced similar efforts.

It was not until I attended a judgment writing course a few years ago that I realised just how badly I wrote. It was only then that I appreciated that there was no legal precedent that compelled me to

write as I did. I realised that would not be breaking any rules by using plain English, avoiding Latin phrases and making the judgment readable to people other than judges and lawyers.

I also came to appreciate that by wring in a clear and logical style I not only made it easier for others to understand me, it made it easier for me to understand me!

Rather than a rambling flow I came to understand that structure is the key and that with structure can come a readable, understandable and more efficient product.

My approach

I have the structure of the judgment in mind before I commence writing it. I base that structure on the issues and I attempt to identify them as early as possible. These will comprise:

- issues of fact
- inferences to be drawn from the facts
- issues of law
- the application of the law to the facts
- all or some of the above.

If the papers filed before the case commences permit a tentative assessment of the issues, I will make a note of them and raise them with counsel during their opening addresses.

As the case unfolds some issues will go away. The focus of others will change and some new issues will emerge.

Over the course of the trial, I will restate to counsel what I understand the issues in dispute to be and give them an opportunity to comment. If, during the course of the hearing, I am unsure as to what issue particular evidence or a particular submission relates to, I will seek clarification.

During final addresses I will repeat the process. Hopefully, by the end of the trial, counsel and I will have a collective understanding of the issues in dispute and the relevant evidence and submissions.

The first draft

I generally commence writing a judgment by setting out the issues and the using them as individual headings. Under each heading I summarise the respective positions each party has asked me to adopt in respect of that issue. I then set out my reasons explaining why I prefer one position to the other.

I attempt to list the issues in a logical manner. If, for example, there is jurisdictional challenge or a limitation point I will deal with that first. Otherwise I will arrange the issues as best suits the case, whether that is chronological or otherwise. My first draft will usually look like this:

Issue A

X's position

Y's position

I prefer Y's position because…

↓

Issue B

X's position

Y's position

I prefer Y's position because…

↓

And so on

Once I have dealt with each issue I will then set out my conclusion.

Editing

Once I am reasonably confident that successive drafts are taking shape, I begin editing. This is primarily focussed towards avoiding unnecessary repetition, deleting material that does not add to the reasons, and generally making it more readable.

I start by writing a beginning. I reread the latest draft and try to summarise what the case is about to form the basis of my opening paragraphs. I then collect all of the issues that I have identified and set them out after my introduction.

I then revise my analysis of each issue. Invariably the winning party's position on a particular issue reflects the defect in the losing party's position. Thus, to set out both parties' submissions and then to explain why I prefer one over the other may be repetitious. In that event, I incorporate the winning party's submissions into the reasons why I have rejected the losing party's position.

Sometimes in deciding how a particular issue is to be resolved I will have embarked upon a convoluted journey. This is something I may need to do to be confident that I am reaching the right result, but it may not be necessary for the reader to share that journey with me. In final editing I will endeavour to cull from the reasons findings or explanations that on further reflection I think are unnecessary.

Lawyers often speak in jargon, as do the cases to which they refer. This language will often creep into my draft reasons. During editing, I attempt to spot these and replace jargonistic words with more readable alternatives.

My first drafts may contain lengthy citations. As I explained earlier these are unlikely to be read and anyway, by themselves, they add little to the judgment.

I ask myself whether the citation is really necessary. I invariably decide that it is better to explain what I understand the case stands for, what I think the legislation means or what I understood the witness to be saying. If some reference to a case, legislation or the evidence is necessary, I attempt to limit the reference to no more than a few words.

Structure

My judgments now commence with something like:

This is a case about…
At issue are:
Issue A
Issue B

I then set out the relevant background and then move onto to my resolution of each issue. Then I summarise my conclusions and set out the orders that I make.

Some final observations

Some issues are very difficult to resolve and I have often agonised over a decision. Sometimes, after I have completed the decision, I will leave it for a week or two and then reread it before deciding to hand it down. On occasions I have written two judgments leading to different outcomes, and a few weeks later have returned to decide which one I will publish.

However, I limit how long I will wait and I rarely go over that limit. I reason that if I have gone through the process methodically, have been transparent with my reasoning, and that process leads to a particular result, then so be it. I will have properly discharged my duty and further delay will not assist the parties or me.

Once I have published a decision, I attempt to put it out of my mind. There is nothing more I can do about it. If I have made an error, then hopefully it will be corrected on appeal.

The Honourable Justice Kenneth Hayne AC

High Court of Australia

Writing a set of tips about judgment writing puts a premium on clarity, accuracy and economy. Precedent dictates that there should be no more than ten.

- Make preparation count.
- Fix upon a structure.
- Remember your audience.

"What language do you use? Why not try English rather than legalese? And if you are writing in English, why not make it good English that follows the rules of grammar and syntax? But above all, your language must be the language of judgment, not polemic or vituperation, not the language of the tabloid newspaper headline, not slang or argot. "

First, there is the challenge of doing it. There are always other things to do. So **start now**! Put the first thoughts on paper as soon as you can, and then finish the task while the evidence and the arguments you have to consider are all fresh in mind. Delay and difficulty are directly related. The longer you wait, the harder it gets.

Second, make your **preparation** count. Preparing a case before and during its hearing should all be done with the view to the end of making orders and giving reasons. It is before and during the hearing that the bones of the judgment are being collected. Make sure that they are collected in a way that you can use them.

Third, remember your **audiences**. Why does the losing party lose? Many issues are argued in a case. Few are determinative. Recognise and deal with all the arguments, but give prominence to what is determinative. There is a wider audience. You have to tell others, including the parties' lawyers, the wider legal profession, and an appeal court, how you got to your answer, and how that is consistent with applicable statutory provisions and proper application of relevant principles. Reasons must reveal fidelity to applicable principles.

Fourth, fix upon a **structure** for the work. Your first thoughts about structure should be when you are preparing the case before hearing, and working out what seem to be the issues in the case. But the design of your judgment will develop as the case proceeds. Can the reader see that design, and use it to help navigate their way through the judgment? Are there enough pointers showing where you are going in your reasons and where you have been?

Fifth, what **language** do you use? Why not try English rather than legalese? And if you are writing in English, why not make it good English that follows the rules of grammar and syntax? But above all, your language must be the language of judgment, not polemic or vituperation, not the language of the tabloid newspaper headline, not slang or argot. Cut out as many epithets and intensifiers as you can. Usually they add nothing.

Sixth, leave yourself a **trail**. Early drafts of a judgment should include reference to the sources you relied on for statements you make in the draft judgment. When you have checked the accuracy of what is written in your final draft, some of those references can be omitted.

Seventh, do you really need all of those **block quotations**? Can you make the point in your own words? If not, would a shorter quotation make the same point? If you must use a quotation longer than 50 words, tell the reader in the lead-in what you say it shows.

Eighth, could the reasons be **simpler and shorter**? Why not? Technical subjects require technical language. Some legal concepts are complex. Complicated ideas are made up of many elements which often intersect or overlap. Accuracy is essential. But what is the particular point you are making in your reasons? Is that point complicated? Or is it your expression which is complicated?

Ninth, have you stated your **reasons**? Or have you simply stated fact, fact, fact, followed by that magic word "therefore", and then "[X] wins"? What are the legal principles that you say are engaged? Do the reasons state what you say are the relevant principles? Do the reasons show how you say those principles apply to this case?

Tenth, how often have you **revised** what you have written? Revision is the time to refine, to clarify, to simplify, to check, to correct. Revision usually requires rewriting at least part of what you have done. It is revision and rewriting that are the keys to good judgment writing.

The Honourable Justice Catherine Holmes

Supreme Court of Queensland

Here's the challenge: to produce a timely and coherent paper on judgment writing when you have enough trouble producing timely and coherent judgments. Where to begin? It isn't a one-size-fits-all area where the same techniques suit everybody; nor does it follow that what works in appeal judgment writing will work in the trial division. Individual ways of producing judgments are so variable: some people are happy word processing, others work perfectly well with pen and paper. As in judgment writing, the only way forward is to start, with the caution that what follows is no more than an idiosyncratic set of suggestions.

Key themes

- Get started.
- Structure your headings before you start writing.
- Steal from counsel's submissions if they're good.

"Coming back to a judgment which you have left a little too long is like trying to walk on a leg that has gone to sleep. Much more painful than if you had just kept moving."

Getting started

It is a cliché, but the best way of getting started is to put something, anything, on paper. The psychological barrier diminishes when you have something to work with. Coming back to a judgment which you have left a little too long is like trying to walk on a leg that has gone to sleep. Much more painful than if you had just kept moving. If you're really at a loss as to where you're going, the best way to restore circulation is to force yourself to sit down and summarise the evidence. Slowly sensation starts to return, you begin to recall something of what it was all about, you often pick up in the process things that you hadn't actually recognised as important during the trial itself, and you have at least a basis for analysis. If you haven't already got the answers worked out, it's only by writing that you'll manage it. There's something in the question E M Forster's old lady asks: "How can I tell what I think till I see what I say?"

Structure

Most judgments lend themselves to a pattern where, at the outset, you identify the type of matter and set out the issues as succinctly as possible, then identify any relevant statutory provisions, go onto the factual background and your findings, canvass counsel's submissions to the extent necessary, deal with the authorities and finally come to your conclusions.

Headings are a useful way of conferring structure on a judgment. Not only do they assist the reader by making it clear that you have moved on to a different area now, but they impose some discipline on the judgment writing process. Headings make you identify the distinct steps by which you work

through the issues, the facts, the law, and your conclusion. If you can prepare a set of headings before you start on the judgment, you will have an underpinning that helps you keep moving through it. I often end up revising mine after I have finished the judgment in draft form. That process makes me revise the text as well, to make sure it's compact and matches the headings.

Style

Style is a very individual thing. I would simply say that there has been one Lord Denning; there is unlikely to be another. Try to emulate him and you risk sounding more like Enid Blyton. I see judgment writing not as an art form, but a craft: the communication of the essentials in the most compact form possible. I don't entirely subscribe to the view that all judgments must be accessible to the average punter. Most judgments are unlikely to be of significance to anyone but lawyers and the parties, whose chief interest is in the last paragraph.

That is not to say that the language used should be impenetrable. Any sentence lasting more than three lines should be closely examined to see if it can't be broken up. Daringly, I endorse starting sentences with conjunctions. It was good enough for Patrick White, and it seems to me quite useful. A well-placed "But" is an excellent way of signalling a change of direction, while "And" as the leading word in a sentence can emphasise continuity. Curb any tendencies you have to use the same word or phrase repeatedly: you can find yourself out by using the edit function in your word processor to see how many times you've said "in my opinion". Acronyms (of an entity's name, or a statute's title), applied sparingly, can be useful, but a judgment peppered with them is irritating and hard to follow.

Setting out the evidence should be an exercise in concision. Don't quote evidence unless the precise words used are crucial. Similarly, in setting out the law, identify the principle, with references. Don't quote from judgments unless the point is so perfectly expressed that it simply can't be improved on, or unless it is such a fundamental enunciation of the law (usually in a High Court judgment) that to change a word would be dangerous.

Ex tempore judgments

Ex tempore judgments are highly to be desired, particularly in applications and summary hearings. If counsel's written submissions are any good, steal shamelessly from them for the setting out of the facts and issues. I make notes both of the argument and what I'm thinking about it as I listen to it. I put vertical lines beside the bits I want to use in my judgment and if my notes are particularly messy, assign numbers to the different bits in the order in which I mean to set them out in giving my judgment. This degree of organisation does not preserve me from the odd, unsettling feeling that the last long sentence I said may not actually have had a verb; but transcript revision comes in handy.

If you have the luxury of a little time to prepare and the case is essentially in paper form (as with an application on affidavits or an appeal), it may be possible to prepare an outline of the essential facts and issues before you go into court, perhaps with a tentative conclusion. That process will help to give you a good grasp of the case and identify for you the questions you will want to ask counsel.

Then you can amend your draft as you go and use it to give your *ex tempore*. If that proves impossible, at least you have a good start for your written judgment.

Taking notes for and at trial

I think there's some benefit in setting out, before you start a trial, a summary of the issues as you identify them from the pleadings. It's a useful exercise in coming to grips with the case, and it puts you in a position to make sure counsel don't go off on frolics, leaving you confronted by gaps when you come to prepare your judgment. I don't recommend attempting to summarise evidence in advance for a trial where witnesses are to give evidence. It will only muddy your perception of the evidence to come. Nor do I think there is one simple answer to whether you should summarise the evidence as you go through a trial. That seems to me to involve a cost-benefit analysis in each case of whether it will settle and whether the issues are likely to twist and turn in the course of it, so that swathes of evidence that seemed important at the start lose their significance. It comes down to how much time you have and how easily you can identify what you will need for a judgment. That said, it may be essential in a long trial to dictate a summary of the evidence as you go, in order to avoid being overwhelmed by the judgment writing task at the end.

At the least, while you're hearing the case, mark the parts in your notes that you think will be important for your judgment. Towards the end of the hearing, make a note of the issues you are going to have to deal with, and any conclusions or tentative conclusions you have reached on them. At the time it may seem so blindingly obvious that you hardly feel the need, but it is extraordinary how memory can dissipate between then and coming back to the case for judgment writing.

Setting priorities

You must prioritise your judgments in terms of their urgency, which may arise because they involve an individual's liberty, or because delay will affect the value of the subject matter, or because interest is running on a large judgment sum, or because you have left it too long. Don't dither between judgments. It may be necessary to be writing more than one judgment at a time, but identify the most urgent, focus on it and get it out. Nothing is so energising for attacking a mountain of judgments as getting one done.

Intractable judgments

If I am having difficulty getting a judgment done because of its volume or because it's just plain hard, I try to immerse myself in it. I take a manageable portion home each night and make myself do even a little on it, so as to maintain some momentum, however halting. If there is a real hiccup in the law — authorities that aren't reconcilable or a statute that doesn't, no matter how you sweat over it, make sense — the best approach is squarely to identify it in your judgment rather than try and slip around it. Come up with the best answer you can, explaining the difficulties. I find swimming laps helps, when I'm trying to sort out those knotty problems — I can turn things around in my head, as long as I remember to breathe as well.

Revision

When you have something close to your final draft done, review counsel's submissions to make sure you haven't missed anything. I recommend a final read-through of your judgment exclusively for the purpose of chopping out superfluous passages, cutting out any unnecessary words or phrases and converting passive voice to active wherever possible. (Try using the edit function to find each time you have used the preposition "by"; as in, "the gun was found by police" as opposed to "the police found the gun".) It's worth leaving your last draft at least overnight before you do a final reading, in order to come back with a fresher eye for it.

Once you've done that final judgment read — and if possible have got someone else to proofread it — recognise that it will never be perfect. Let it go. As I do now.

The Honourable Justice Murray Kellam AO

Supreme Court of Victoria

Preparation for trial

1. Read the papers before the case commences with a view to (at least partly):

- summarising the issues to be determined
- establishing the basic factual structure of the dispute
- ascertaining the likely relevant law
- starting to collect the more obvious relevant source material (for example, the Acts, leading cases and textbooks).

2. Prepare a basic chronology and a *dramatis personae*.

These two steps will provide:

- a good start to an oral judgment, if one is likely or possible
- the first steps towards the final structure of a written judgment, which I generally divide into five parts (although not necessarily in the following order):
    - a statement of the issues in dispute
    - the facts established by the evidence
    - the relevant law
    - the conclusions
    - the appropriate orders
- a useful roadmap to add to — or delete from — during the hearing of the proceeding.

Key themes

- Prepare a chronology and a dramatis personae.
- Keep up with the evidence.
- Assemble a dot point summary of the case.

"Structure assists with writer's block. If I am having trouble getting started, I write out the factual background and set out the relevant law and draft a statement of the issues. With that draft done, it is easier to move on to writing the conclusions."

During the trial

I use Transcript Analyser, which allows you to identify topics electronically and make relevant notes under each topic. I find it essential to do my noting up by Transcript Analyser before the next hearing day. (Not keeping up with the evidence is a sure fire way of having to reread the whole transcript later.) Thus, as the hearing progresses, the developing parts of the evidence can be noted, cross referenced, and, to a degree, analysed.

Managing separate topics

For those who do not wish to use Transcript Analyser, a useful way of managing separate topics is to have a chart of topics using different coloured pens, or alternatively folders (perhaps of different

colours), to store and organise relevant pieces of transcript relating to the factual and legal topics in the case. For example, "the agreement", "the breach", and "the misrepresentation".

Alternatively highlight the transcript with different colour highlighters for separate topics.

Start to assemble a dot point summary of the judgment, which you can amend from time to time. This document will deal with the five parts I identified, and will also develop the highlighted topics.

Writing

This is where I find it gets the most difficult, stressful and demanding!

The surest way of avoiding delay and stress is to get started as soon as you can and to dictate or write down first thoughts and impressions. The dot point summary commenced during the hearing is useful for this purpose.

I have a standard procedure for writing judgments that is comfortable for me. I generally commence by setting out headings from the dot point summary. For example:

Introduction
(this should briefly summarise the background to the dispute and outline the issues to be decided)

↓

The facts

↓

The relevant law

↓

The conclusions

↓

The orders to be made.

Each of the above may have subheadings. For instance, the facts may be subdivided into "the accident", "the injuries", and "the evidence relating to causation". I find that headings and subheadings provide a useful way to put order into my thinking and analysis. The conclusions may have headings related to the issues such as "the breach of contract", "repudiation", "the acceptance of the repudiation", "the damages".

Structure assists with writer's block. If I am having trouble getting started, I write out the factual background and set out the relevant law and draft a statement of the issues. With that draft done, it is easier to move on to writing the conclusions.

Style

The following suggestions are emphasised in the New Zealand Institute of Judicial Studies judgment writing program:

- Use plain language.
- Use language with which you are comfortable.
- Write in short sentences.
- Keep paragraphs short.
- Employ paragraph numbers, headings and subheadings.
- Avoid Latin tags and legalese.
- Write sparingly. Avoid redundant language.
- Keep things simple. If there is one leading case, refer to it rather than all the variations upon it.
- Carefully edit the end result by checking dates and quotations. Most importantly, edit to avoid repetition, to prune unnecessary quotations and to simplify long sentences.

The Honourable Justice David Lloyd

Land and Environment Court of New South Wales

Ex tempore judgments

A backlog of reserved judgments causes unnecessary stress — all one can see is spending one's evenings, weekends and holidays at one's desk — and this can lead in turn to a lack of enjoyment of the job and even depression.

Part of the answer is to deliver judgments *ex tempore* whenever possible. Avoid the temptation to reserve so as to polish the language or follow up lines of authority. The parties want an answer to their problem, and a judge of first instance should be able to do so without writing a treatise on the law or citing any but the most recent or most authoritative authorities.

In an address delivered at the 2003 National Judicial Orientation Program, the Honourable Justice Dyson Heydon AC cited a number of advantages in *ex tempore* judgments:[1]

- Firstly, "if one is confident that the parties' arguments have been presented competently and that one has grasped the issues, reached clear factual conclusions, is aware of the applicable principles of law, and is capable of stating satisfactorily what one's reasoning process is, there is very little point in reserving judgment, particularly in courts which do not have access to transcripts."
- Secondly, a judge should do anything necessary to prevent large numbers of reserved judgments piling up. Delay causes stress not only to the judge, but also to the parties.
- Thirdly, "appellate courts will make assumptions in favour of an *ex tempore* judgment which they will not make for a judgment reserved for some time. A failure to refer to evidence in an *ex tempore* judgment, or to analyse it fully, is more likely to be excused on the ground that the recency of its tender makes it

Key themes

- There are advantages to an ex tempore judgment if the case goes to appeal.
- Ex tempore judgments encourage procedural fairness.
- If you are spending your weekends writing judgments, talk to your head of jurisdiction.

"As soon as practical after appointment, every judge should attend one of the judgment writing workshops that are offered to the judiciary… You will find as a result that the task is made easier and your judgments will become shorter and clearer. Besides, these programs are themselves entertaining and enjoyable."

[1] Justice J D Heydon AC, "Practical Impediments to the Fulfilment of Judicial Duties", (2004) 6(4) TJR 429

unlikely that it was overlooked. But the same failure in a reserved judgment may support an appeal."[2]

- Fourthly, procedural unfairness can be engendered by reserving judgment. It increases the chance that new thoughts, new arguments or new lines of authority occur to the judge which were not raised by either party; it also increases the chance that some point which was raised by a party may be overlooked. An *ex tempore* judgment delivered after oral argument, on the other hand, will almost always reflect precisely the contentions advanced by each side. At the close of the *ex tempore* judgment, either party can rise and protest that some matter was dealt with on which that party was not heard, or that some other matter which should have been dealt with was not dealt with.
- Fifthly, "*ex tempore* judgments can tend to produce a more efficient trial. If it is known that the judgment is likely to be *ex tempore*, it is likely that only the best points will be advanced, only the key evidence will be referred to, only the necessary authorities cited."

In preparing to deliver an *ex tempore* judgment, I put my thoughts down in writing, either as the case proceeds or during breaks. I find it easier to think about a case when I have seen what I have written.

I set out in writing what the case is all about (who is doing what to whom or who is arguing about what), the salient issues (which I have asked counsel to identify at the outset), and then a series of headings for each issue under which I note the evidence, submissions and my conclusions. These notes then form the basic outline of the *ex tempore* judgment.

Even if, during submissions, counsel refer to a large number of authorities or documentary material that will have to be read, and it becomes necessary to reserve, my notes are a useful reminder and form the basis for the reserved judgment in due course.

Length of judgments and citation of cases

The length of judgments often seems to reflect the length of written submissions.

In his address to the National Judicial Orientation Program, the Honourable Justice Dyson Heydon AC also spoke of the burden of dealing with long and detailed written submissions: "One aspect of the burden flows from excessively detailed reference to only marginally significant evidence. Another flows from voluminous citation of authority… Yet in many instances the mass authority cited gives no more help than would be obtained from consideration of a key statement of principle in a well-known leading case."

I read all the authorities that are cited by counsel. In most cases they add nothing to the relevant principle. If we judges were to refrain from excessively citing cases then counsel may feel that they do not have to do so.

---

[2] Citing *New South Wales Medical Defence Union Ltd v Crawford (No 2)* (NSWCA, unreported, 30 June 1994)

In an article published in 2007, the Honourable Justice Dyson Heydon AC said: "Judgments should be as brief as the case will permit. They should avoid excessive citation of cases … where the law is well settled by a line of authority, judges ought not to seek to restate it where there is no desire on their part to change it. Well-meaning restatements simply produce confusion: they encourage future counsel to submit that the law has changed when it was never intended that it should be changed."[3]

I try to decide only the essential questions that have to be decided. In *Segal v Waverley Council*,[4] the New South Wales Court of Appeal repeated the principle that it is not the duty of the judge to decide every issue which is raised in argument, but to only decide facts and arguments which are crucial to an issue. The Court adopted a statement by the Honourable Justice Michael Kirby in *Soulemezis v Dudley (Holdings) Pty Limited*[5] that a judge must state generally and briefly the grounds which have led him or her to the conclusions reached, and to list the findings on the principal contested issues.

Other appeal courts have been critical of the length of judgments.[6] It is not necessary to deal with matters that are not central to the decision. The duty to give reasons does not exist in relation to every matter raised — only critical issues. Reasons need only be given so far as is necessary to indicate why the decision was made.[7]

Help is available

As soon as practical after appointment, every judge should attend one of the judgment writing workshops that are offered to the judiciary. The tips, not only on the structure of judgments but also on writing style, are invaluable. Then attend a follow up workshop or master class on advanced judgment writing. You will find as a result that the task is made easier and your judgments will become shorter and clearer. Besides, these programs are themselves entertaining and enjoyable.

Avoid stress

In my experience, writing reserved judgments takes far longer, on average, than the hearing. I once kept for my own information an accurate record of how long it took to produce a reserved judgment. I did so for 39 consecutive reserved judgments. I found, to my surprise, that it took on average four times the hearing time to produce a reserved judgment. In discussing this with other trial judges I discovered that my experience is not unusual.

---

3 Justice J D Heydon AC, *Reciprocal Duties of Bench and Bar*, (2007) 81 ALJ 23 at 39

4 (2005) 64 NSWLR 177

5 (1987) 10 NSWLR 247 at 259

6 For example, *Customs & Excise Commissioner v A* [2003] 2 WLR 229 at [81]-[82]; *Digi-Tech (Australia) Ltd v Brand* [2004] NSWCA 58 at [282]

7 *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 388; *Kiama Constructors Pty Ltd v Davey* (1996) 40 NSWLR 639

The Honourable Denis Mahoney AO, former president of the New South Wales Court of Appeal, estimated that it took him about one and a half times the hearing time, on average, to produce a reserved judgment.

"One of the worst strains that a judge faces is the outstanding judgment."[8] As already noted, a long backlog of reserved judgments can lead to judicial stress and the prospect of having to face one's evenings, weekends and holidays at one's desk, can lead to loss of enjoyment of the job and even to depression. Litigants are entitled to expect that cases "will be disposed of by prompt, energetic and sharp judges — not slow, tired and worn out judges".[9]

Almost universally, superior courts in Australia now have a regular system in place for judgment writing time — a typical split being three weeks of court hearing and one week completely free of court commitments. Some courts allow greater judgment writing time — two weeks of court time and one out of court — and, in two cases, one to one.

This leads to the timely delivery of judgments, and reduces judicial stress. But one still can have a string of reserved cases, leading in turn to delays in delivery. Fortunately, most heads of jurisdiction nowadays are alert to the problem, and allow additional court-free time, rather than have a judge work unhealthily long hours. An unhappy, stressed, or depressed judge is not a good judge. If you find it necessary to spend evenings and weekends working on reserved judgments, it is not a sign of weakness to then ask your head of jurisdiction for additional court-free writing time.

[8] The Honourable Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria, Inaugural State of the Judicature address, 22 May 2007

[9] ibid.

The Honourable Chief Justice Wayne Martin

Supreme Court of Western Australia

These notes record the personal views of someone who has spent some time reading the judgments of others, but only a short time writing judgments of his own. Although most judgments follow an established and predictable format, within that format writing styles vary widely. Such variety is to be encouraged, in my view, because it diminishes the impression that judgments are stereotypical, or written to a formula, without the application of individual thinking by the judge concerned. My own style of writing has evolved since my relatively recent appointment, and hopefully will continue to evolve. These notes should therefore be taken as some personal views and suggestions, and should certainly not be construed as an attempt to provide a definitive guide to the art of writing judgments.

Key themes

- Consider your audience. All of them.
- Use standard, logical structures.
- Use short rather than long sentences.

"Last, but by no means least, the judgment is written for the general public, who have an interest in the justice system which serves their community. In order to serve their interests, the judgment must be coherent and comprehensible to the average reader without legal training."

The audience

Articles on the subject of judgment writing often commence with a consideration of the audience for whom the judge is writing. At the risk of being trite, I will do the same, because a consideration of the differing audiences for whom the judge writes informs the approach he or she takes to the structure and content of a judgment.

At the risk of being branded an egotist, in difficult cases, the primary beneficiary of the judgment writing process is me — in my capacity as a decision-maker. In some cases, the conclusion is quite obvious, and the written judgment's primary purpose is to inform others of the view that one has already formed. However, in more difficult cases, the process of writing the judgment provides the framework for the intellectual processes required to arrive at a reasoned conclusion. Document that process as it occurs. In a civil trial, this will involve identifying the issues, scrutinising the evidence and making all necessary findings of fact, and then applying the law to the facts to produce a conclusion. The burden of making the process intelligible to others promotes logical and coherent thought. It also encourages attention to details which might be missed if the process takes place mainly in one's mind.

So, for me at least, a vital aspect of the judgment writing process is the discipline which it affords the intellectual process of arriving at a conclusion. In my limited experience, if I find it difficult to enunciate a conclusion or, on reviewing the draft, it is unconvincing, it is almost invariably because it is wrong, or at least because some important part of the process has been omitted, or a mistake has been made.

After the judge him or herself, the most important readers of the judgment are, of course, the parties. I agree with those judges who have expressed the view that a vital requirement of every judgment is that it coherently explain to the losing party or parties exactly why they lost. The winning party or parties will usually be so flushed with euphoria that the reasons why they have been given the outcome — to which they always believed they were entitled — will be of little interest, although no doubt their legal advisers will be interested in the extent to which the reasons might withstand appellate scrutiny. On the other hand, the losing parties — denied the outcome which they usually believe to be their right — are entitled to a full and coherent explanation, which pays attention, and appropriate respect, to each and every substantive contention which they advanced.

Perhaps the next most important reader is the appellate court or courts which might be called upon to review the judgment. For that audience, by far the most important part of the judgment at first instance is the findings of fact or, if the case involves judicial discretion, the reasons why the discretion was exercised in a particular way. While it is, of course, important to identify and enunciate the legal principles which have been applied to the facts, detailed enunciation of the historical development of those principles is unlikely to be of any great interest to an appellate court, which will have its own view of the law. It is obviously much harder for an appellate court to form its own view of the facts, so if the judgment at first instance is inadequate or obscure in the area of fact-finding, the appellate court will either have to shoulder that burden itself, or send the matter back for a retrial — each of which has obvious unsatisfactory aspects.

Next, it is convenient to group a number of audiences interested in a judgment together — other courts, the legal profession, and legal academics. Unlike the appellate court, these audiences will be much more interested in the enunciation of legal principle and its application than in the facts. However, if the case is routine and unlikely to attract the attention of other courts, or the legal profession or legal academics, there is little point or purpose in a detailed review of prior authority or academic treatises — provided the judgment says enough about the legal principles to show that they are correct, and to enable an appellate court to see just how the conclusion was reached.

Last, but by no means least, the judgment is written for the general public, who have an interest in the justice system which serves their community. In order to serve their interests, the judgment must be coherent and comprehensible to the average reader without legal training. And because of the understandable desire of the media to seek sensation which might attract audience attention, care must be taken to avoid using expressions which, when taken out of context or viewed from a particular perspective, might diminish confidence in the judiciary, or the application of standards which would not be supported by the general community.

Types of decisions

I regularly give three different types of decisions — interlocutory, after trial and on appeal. Although some criminal cases are now tried by a judge sitting alone, and interlocutory rulings must be made in the course of criminal cases, generally speaking I only give written judgments in interlocutory matters or after trial in civil cases. However, my appellate work embraces both criminal and civil cases. I will offer some comments about each.

Interlocutory

The policy of our court is to actively discourage interlocutory disputes. We therefore encourage the parties to limit the argument advanced in relation to interlocutory matters, and it is now my practice to always give an immediate oral decision. The transcript of that oral decision can be used to produce a written (and edited) judgment in due course, if either of the parties requires it, or if the decision might possibly be of any enduring interest to others.

Of course, if an immediate decision is to be given, the judge must be fully prepared at the time of oral argument, and must have read and digested all necessary written materials. My own practice is to prepare, on one page, a short structure of the judgment — which might comprise perhaps five or six headings in the appropriate order, and under which reference to particular papers are located. That structure will often take the form of identifying the issues, the relevant affidavit evidence, the findings of fact, the principles being applied, and then the reasoning process, showing how those principles, when applied to the facts found, leads to a particular conclusion. Although I have found that my oral judgments delivered at the conclusion of argument tend to be more conversational in style than my reserved decisions, appropriate editing of the transcript (of form and language, not substance) can produce a satisfactory written judgment. I have found, through experience, that the time taken to prepare and deliver an immediate oral decision, including editing that decision, is a fraction (perhaps one-quarter to one-third) of the time which is taken if a decision is reserved and a written judgment delivered later. So, in my experience, in interlocutory matters, immediate oral decisions suit the interests of the parties, and enhance the efficiency of the court.

Judgment after trial

Of course, the format of a judgment will depend on the nature of the trial and the issues that have to be determined. However, I usually find that this basic structure can be adapted to most trials:

The parties

↓

The issues

↓

The facts

↓

The expert evidence (if any)

↓

The law

↓

The reasoning

↓

The conclusion

The parties

I have a strong preference for using the names of the parties throughout the judgment, rather than describing them by their status (for example, plaintiff and defendant). This preference may be idiosyncratic, but I have noticed when reading judgments that they are much easier to follow if names are used consistently. I suspect that it makes the judgment more meaningful and intelligible to the parties as well.

The issues

In the introduction to the judgment, when the issues are being described in more general terms, it is often unnecessary, and undesirable, to go into detail about the pleadings. Recitation of passages from the pleadings tends to obscure more than it elucidates. And it is very boring. If the particular terms of the pleading are relevant to a particular issue, it is better to deal with those terms later, in the course of the reasoning process relating to that issue, rather than at the point of introduction.

The facts

We are all familiar with those judgments which take the form of a précis of the evidence given by each witness. When reading them, one cannot escape the impression that the author has read the transcript with a dictaphone at hand, providing edited highlights. While reviewing the transcript and summarising it may be useful in developing a judgment, it should not be in the judgment itself. Rather, the judgment should make findings of fact, referring to the evidence only when necessary to explain those findings, or for the purposes of explaining why a conflict in the evidence has been resolved in a particular way.

For obvious reasons, the findings of fact should be set out chronologically. A chronology provided by the parties provides a helpful start. The documentary evidence, and the testimony of the witnesses can then be cross-referred to that chronology. Contentious issues of fact can be identified in the chronology, and the competing evidence relating to those issues referred to, for the purposes of elucidating the process of reasoning that has led to the resolution of that conflict in a particular way.

That is, of course, not to say that observations about the demeanour of witnesses have no place in a judgment. However, consistent with recent authority, I find demeanour to be an unreliable guide to the truth. An assessment of all the evidence, by reference to logical probability, identifying any relevant conflicts and inconsistencies is, in my opinion, a more reliable guide than demeanour.

Expert evidence

As with factual evidence, reciting large chunks of expert evidence is seldom necessary or helpful. Sometimes it can be a substitute for elucidation of the process of reasoning that has led the judge to prefer the view expressed by one expert over another. The authorities, of course, make clear that the judge must enunciate that process, so that the parties, and an appellate court, can be assured he or she has engaged intellectually with the expert issues, and not merely preferred one opinion over another for an unexplained reason.

The law

As I have already indicated, all a judgment at first instance need contain is a reference to the legal principles applied. Detailed historical analysis of the development of those principles is, frankly, a waste of time and paper, unless the point is novel or of enduring interest to other courts, the profession, or legal academics.

Reasoning

This is the critical part of the judgment. It is the portion that can be expected to attract the greatest attention from the parties and any appellate court. In my opinion, it is sufficient if the intellectual process which has resulted in the conclusion is elucidated. Didactic sermons, rhetorical flourishes and hyperbole should all be avoided.

Conclusion

This portion of the judgment will usually be brief, bringing together the previous conclusions, summarising them, and identifying the orders appropriately made.

Summaries

I have experimented with providing a short summary of the judgment, either at the commencement or its conclusion. In some cases, I have thought a summary at the commencement of the judgment has been useful. In others, I have excised the summary from the draft because of a fear that, if read in advance of the process of reasoning, it can appear thin, or even unsustainable. Sometimes I have included a summary in the conclusion, particularly in lengthy judgments. Perhaps I lack the skill to use summaries effectively. I am still working on them.

Appellate judgments

Of course, the structure and content of an appellate judgment will be heavily influenced by the issues raised on appeal. However, once again, a general structure can accommodate most cases:

The parties.

↓

The issues.

↓

The judgment under appeal.

↓

The grounds of appeal and reasoning in relation to each.

↓

The conclusion.

The parties

My enthusiasm for using the names of the parties instead of their role in the litigation as a descriptor is even greater in appeals, where use of the terminology appellant/respondent can be even more confusing if one is quickly trying to ascertain the role which that person played in the facts.

The issues

In some appeals it is difficult to give a general description of the issues raised. In those cases, reference to the issues can be left until the grounds of appeal are addressed in detail.

The judgment at first instance

The judgments of all superior courts are now generally available over the internet. Accordingly, only include those portions of the judgment under appeal that are essential to the reasoning relating to the issues determined on appeal. A summary of the position adopted by the judge at first instance will usually be sufficient.

The grounds of appeal

Sometimes each ground of appeal can and should be addressed separately. However, there is often the tendency for grounds of appeal to be repetitive, or to overlap. In such cases, group the grounds of appeal in respect of particular issues, and then address those issues, rather than dealing with each ground separately. However, the judgment needs to identify which grounds are being addressed under which issue.

In relation to the style of appellate judgment, I strongly support the views expressed by the President of the Court of Appeal of New South Wales recently. He urged the use of temperate language by appellate judges when describing the judgment below, or the judicial officer responsible for that judgment. Avoid hyperbole and rhetoric.

As appellate judgments are more likely to be scrutinised and cited for the legal principles enunciated, there is much greater justification for a fuller assessment of those principles than in judgments at first instance. However, if the cases and the principles to be derived from them have recently been summarised in another judgment, reference to that judgment is, in my view, sufficient, and repetition of large tracts from that judgment unnecessary.

Style

I will now make brief reference to certain stylistic views — some of which appear to receive general support, and some of which do not.

I have already mentioned my preference for using names as descriptors rather than roles. Avoid Latin terminology wherever possible, along with technical legal terms and jargon.

Headings and subheadings make a judgment much more readable, and also assist appellate courts, other judges and scholars in readily identifying the particular passage which they seek. Short sentences are better than long sentences, and short paragraphs are better than long paragraphs. Shorter judgments are better than longer judgments. Limit quotations from previous authorities, and in general only include them where they provide a succinct summary of the principles to be applied, or where citation is necessary in order to identify an error in the reasoning process, or conflict in the previous authorities.

I favour footnotes in preference to endnotes, although I understand that there are technical difficulties in relation to the electronic presentation of judgments on court websites and in AustLII, which preclude this. An index is very useful in longer judgments, but probably unnecessary for shorter judgments.

Conclusion

I hope these idiosyncratic observations are helpful. I also hope that any reader does not test my own judgments against the objectives I have set out in these notes, as I fear in many instances they will be found wanting.

The Honourable Justice Peter McClellan

Supreme Court of New South Wales

In my view there are three essential requirements for successful judgment writing:

- The ultimate judgment should be as concise and clear as the case will allow.
- The first draft must be prepared as soon as possible after the hearing ends.
- The draft must be carefully revised, until it displays clarity of thought and simplicity of expression.

Judgment writing has benefited considerably from the word processor, but there are dangers. When I started as a barrister, the discipline of the electric typewriter meant that the first draft of an advice was usually the last or, at most, the second last draft. The word processor allows greater flexibility and refinement of drafts. The benefits should be found in both clear expression and concise reasons. A prolix judgment may satisfy the author, but it will rarely satisfy anyone else.

My objective is to write a judgment expressed in plain language where the facts are recorded, credit and relevant factual findings explained, and the conclusion clearly expressed. I try to avoid complex discussion of the law where the relevant principles are available from a recognised authority. Neither the parties nor the legal system benefit from a judge digging in a field of past but settled controversies. I also take care to edit out any criticisms of witnesses, counsel or, in appellate matters, trial judges, where they are not essential to the reasoning process.

Key themes

- Aim for clarity of thought and simplicity of expression.
- Organise your thoughts clearly.
- Start writing.

"My objective is to write a judgment expressed in plain language where the facts are recorded, credit and relevant factual findings explained, and the conclusion clearly expressed. I try to avoid complex discussion of the law where the relevant principles are available from a recognised authority. Neither the parties nor the legal system benefit from a judge digging in a field of past but settled controversies."

Falling behind

There is no doubt that a backlog of reserved judgments can seriously erode your enjoyment of life as a judge. In my experience, the only way to avoid an accumulation of reserved judgments is to create a first draft as soon as possible after the hearing is

finished — either that day or within the next few days. It does not matter if the draft reads poorly; it may be incomplete and the ultimate answer may not have emerged. If your first thoughts are on paper when the case is fresh in your mind, your mature thoughts will come far more easily.

Different types of judgment

I deliver:

- *ex tempore* judgments which are commonly delivered in the course of trials or when sitting as an application's judge
- judgments at the end of civil trials, some of which may be exceedingly complex
- judgments in the Court of Appeal or, as is common in my case, the Court of Criminal Appeal. (Judgments in the Court of Criminal Appeal, especially sentence matters, are sometimes delivered *ex tempore*).

Ex tempore judgments

I was not a comprehensive or particularly methodical note taker at the bar. As a judge, I only take anything approaching comprehensive notes during counsel's opening, or of the evidence in a criminal trial. Otherwise I tend to confine myself to a note of critical issues, submissions or pieces of evidence. If I have the chance to read the relevant material — and this increasingly includes submissions — before the hearing, I decide whether to attempt an *ex tempore* judgment.

I try to deliver as many *ex tempore* judgments as possible. Even with the time required for their later correction, a judgment given on the spot will save you considerable time. I do not make extensive notes before delivering an *ex tempore* judgment but follow the method I used at the bar when making submissions. I jot down the topics to be covered and draft the wording of the critical factual findings or legal conclusions. An uncorrected *ex tempore* judgment is always better than the first draft of a reserved judgment, although inevitably more conversational in style. The key is to ensure that your thoughts are organised and you have clearly identified, at least in your mind, the steps you must follow to arrive at a conclusion.

Judgments following civil trials

The most difficult judgments to prepare are those following a complex civil trial with large volumes of evidence, both oral and written. It is usual to have many pages of written submissions. Much of my present civil trial work involves complex factual disputes with, in most cases, disagreements between experts. I liken judgments in these cases to painting a picture. You start with a blank canvas and gradually compile the pieces which will fit together to provide a harmonious account of the problem and its answer. Sometimes the hardest task is to commence. Even if the ultimate answer is unknown at the beginning, the discipline imposed by recounting the facts and describing the relevant legal principles will often reveal the appropriate conclusion.

As with the artist, constant reflection and revision contributes significantly to the quality of the final reasons. If I am finding it difficult to start or I have real difficulties along the way, I take my pen and start writing. The initial thoughts may come slowly and require significant revision but it initiates the

creative process. The constraints of time and the demands of other tasks often require that separate blocks of time are devoted to the drafting of discrete parts of the judgment. I find it helpful, as often as possible, to go back to the beginning and work through the existing draft, revising where appropriate, before approaching the sections which require original work.

I have three methods of primary drafting. I do not use a keyboard. For relatively simple judgments, or where extensive factual material must be recorded, I use a Dictaphone. Most other first drafts I dictate to my associate as she types. I find the discipline of explaining the case as she records it, with the opportunity to use her recollections, provides a better quality first draft than if I confine myself to the Dictaphone. The most difficult sections of any draft, often the ultimate statement of legal principles, I write by hand. I use a pen to revise and prepare subsequent drafts. A first draft may be reworked many times. It is common for sections of the first draft to be entirely deleted or significantly edited as the draft develops.

When the draft approaches finality I spend time checking counsel's written submissions and the transcript of oral argument to ensure that I have dealt with all relevant issues.

Appeal judgments

Judgments in appeal matters are generally easier to prepare than judgments following complex trials. The facts have been found and, even if challenged, are summarised. The law, or at least the relevant decisions, will generally be provided by counsel, although further and sometimes extensive research may be required. As with trial judgments, I find it essential that a first draft is prepared within a short time after the hearing has concluded. Being a judge of an intermediate court of appeal, I believe it is important to confine the discussions of previous authority to those which define the relevant principle or from which it may be identified. In the Court of Criminal Appeal, I am conscious of the fact that trial judges will read the judgment to obtain guidance as to how to handle similar problems in later trials, and write accordingly.

Timeliness

To ensure that a judgment is not overlooked and all are dealt with in a timely fashion, my associate maintains a complete list showing the status of the draft of each judgment The list is available to me and the researchers and serves as a constant reminder of the progress in each matter.

His Honour Magistrate Kym Millard

Magistrates Court of South Australia

A magistrate's tips on timely judgment writing

I vividly recall my first day as a magistrate. I was forced from day one to confront the task of judgment writing and delivery of *ex tempore* reasons.

My timing could have been better. I should have started a week later. I had arrived at the local court in a small claims week where each magistrate sitting in the court was allocated eight trials a day for four days of the week. I was handed a pile of files, shown my chambers and told a tipstaff would be up to get me in twenty minutes. My supervisor told me not to spend too long reading the files, as half of the trials would go away. He rushed off before I could ask how I could predict which trials would proceed.

My supervisor's comments proved accurate as four cases resolved without intervention from me, but by the end of my first day on the bench I had four reserve judgments. (My tipstaff was apparently a genius at settling general civil matters, but had absolutely no interest in road accidents.) Not a good start. At that rate by the end of my first week I would have sixteen reserve judgments. It was obvious I was going to have to substantially improve my mediation skills or I must give *ex tempore* judgments.

Key themes

- Stop the witness if you need to take notes.
- Keep a running sheet. Colour-code the issues.
- Finishing a judgment is as important as taking on a new trial.

" I have learned it is important to share such difficulties with a colleague. Before consulting a colleague I try and define the issues in my own mind so that I can pinpoint the particular difficulty. My colleague's time is also valuable."

I spent some time during breaks speaking to my colleagues about how they managed their lists and gave *ex tempore* judgments. I picked up a number of tips. Some worked for me, others I discarded.

By the completion of my induction period at the local court, I had learned a few ground rules that provided a platform to build on. Over the years I have added to the platform.

Pre-hearing preparation

Pre-hearing preparation is a critical factor in the timely and effective delivery of a judgment at the end of the hearing and particularly enhances the prospect of giving an *ex tempore* judgment. This process is now somewhat easier following the widespread adoption of pre-trial conferences and

status hearings in civil and criminal jurisdictions. Colleagues' notes about relevant issues and authorities recorded on the court file are very helpful.

I get the files early to consider the nature of the dispute or the charges and ensure I am familiar with any recent authority touching on the likely issues to be explored. Fortunately, legal research resources now available on the web have made that task somewhat easier. I will make some brief notes as to what I might expect the evidence to address.

I approach each day of a multiple day hearing in similar vein having as far as possible given some thought to the legal issues that are likely to arise.

Note taking

Other than in minor civil claims where the parties are unrepresented, I generally make almost verbatim notes. That leaves little time in the hearing itself to make specific notes on such matters as impressions of witnesses. I try to make brief notes at the end of each day's hearing.

I had been in the habit of dictating a précis of the day's hearing. Now I am more computer literate, in longer trials in particular, I often prepare a running sheet as the trial progresses. The notes are not lengthy — again just a précis of the important issues.

In minor civil claims I conduct the hearing in an essentially inquisitorial fashion. I find it difficult to write verbatim notes and conduct the hearing but often I will stop witnesses and say: "Just let me make a brief note of that."

As minor civil cases proceed, I mentally check to ensure I have extracted relevant facts or issues and not simply let the parties tell their story.

Working with the file and exhibits during the hearing

I ask the parties to provide an additional copy of exhibits — a working copy — as I find it useful to highlight relevant points in my copy while the witness is referring to the original.

In many trials there will be more than one important issue. I assign a different coloured highlighter pen for each issue and note the issue and the pen colour in a schedule. I also highlight the notes in my bench-book or in the transcript if provided and use coloured post it notes or flags to speed up the process of commenting upon or directly quoting from passages in the exhibits.

In lengthy trials I will often refer — briefly — to a particular document in my daily running sheet, noting the issue with a determined colour tag. The note may be as simple as: "Dr X records history of P's symptoms — pg 5 of her report — orange." This will be married up later with a note that: "Dr Y recorded P's symptoms — pg 4 report of 15 Feb 2006 — orange." If I have the transcript, I then highlight relevant portions of P's evidence in orange and tag them with an orange flag or post it slip or do the same in my note book if no transcript is provided.

Unfortunately trials are often not completed in the allocated days. It can be difficult getting back to a matter after a lengthy delay, particularly when I have a number of part-heard matters running during the listing period. I find it useful to close off my running sheet or notes with some comment as to the issues covered to date, witnesses called to date, topics still be to covered, witnesses yet to be called and their anticipated evidence.

A delay will obviously provide an opportunity to review the evidence and legal issues. If the delay is lengthy — say more than two months — I generally now ask for that transcript. Depending on how far the evidence has got, I will sometimes use the time to dictate or type up a draft of the opening and preliminary issues.

The judgment writing process

Wherever possible in summary or minor civil matters I do not reserve a judgment. This is subject to overriding provisos that I believe I can competently address the legal issues that may have arisen and I have a clear view as to how any dispute on the facts should be determined.

I have reached this position not only because of the volume of work in summary courts but also because at summary level the issue is often confined to one of credit. In my considered opinion, it is extremely rare for a preliminary view of credit while the facts are fresh in memory to be enhanced or altered by delay.

I have found it a useful exercise before delivering an *ex tempore* judgment to step down from the bench for twenty or so minutes to clear my head and write an outline to ensure I have covered the issues. I close my chambers door and shut down the phone so that I will not be distracted. Occasionally I find that although I left the bench with intention of returning to deliver a judgment, I am troubled on an issue and need further time.

In longer trials — generally civil matters — counsel frequently ask for additional time before making final submissions. It is my practice to grant such requests — despite the difficulty of rescheduling the matter — conditional upon counsel providing a written submission. Written submissions are often very useful in summarising the facts and identifying legal principles. I can then limit oral submissions to core issues.

In indictable matters — particularly where imprisonment is a real possibility, or in general civil claims — I would reserve in most cases but often only overnight, or for a few days. I rarely deliver a written judgment in such a time frame. I will deliver an oral judgment reserving the same rights to myself had I delivered a strictly *ex tempore* judgment namely:

- to edit these reasons to improve expression
- to make further findings of fact or determinations of law consistent with the judgment and reasons.

Our rules require written judgments to be delivered in a timely fashion — within two months of the decision being reserved. I try to complete most reserved judgments within four weeks. I find I work better within a narrower deadline.

The longer the trial the greater the expectation of the parties — and the appellate courts — for a longer set of reasons. That said, a lengthy trial does always indicate complex issues.

I aim to write a succinct analysis of the facts and the legal principles. I generally make brief findings on relevant factual disputes without quoting great slabs of transcript. I try and recognize my task is to deliver reasons that the parties themselves — not just their lawyers — can understand but are sufficiently comprehensive that an appellate court may see that I addressed all pertinent issues. I refrain from lengthy quotations from exhibits or from case law. While I enjoy the process of legal analysis, I also try to bear in mind that at this level I am not expected to write a thesis on the law of evidence or criminal procedure.

Having completed a first draft I leave the judgment for two or three days to get on with other tasks. I have learned that it is better to leave it completely and resist the temptation to come back to it over and over again making minor changes — this is not an effective use of my time. The final editing process may take as long as writing the first draft. I check to see that I have not fallen into the error in criminal matters of indicating simply a preference for the evidence of certain witnesses. At times I have thrown away the first draft and commenced the process over again.

Writer's block

From time to time I find it hard to begin a reserved judgment. This is generally because the matter lacked any interesting issue, I am unable to find any relevant authority on the point or I may be troubled as to where the truth lies on certain issues. Sometimes my lack of enthusiasm relates to counsel being unconvincing or belligerent.

In a criminal trial, I occasionally find agonising over a case may in itself indicate the answer. This agonising may be the same process that a jury would go through in its determination of proof beyond reasonable doubt. But unlike a jury I cannot simply return with the response "not guilty". I must give adequate explanation for the decision so must be careful not to simplistically adopt a position that I do not know where the truth lies. The struggle at times is how to express my thoughts.

I have learned it is important to share such difficulties with a colleague. Before consulting a colleague I try and define the issues in my own mind so that I can pinpoint the particular difficulty. My colleague's time is also valuable.

Ultimately the answer lies in commencing the judgment and determining to finish it even if that means working to midnight or the odd weekend. But that should not become the norm and I occasionally find it necessary to consult my supervisor or co-ordinator to arrange to obtain time out

of court. The completion of a reserved judgment is as important — in many respects more important — to upholding the interests of justice as taking on a new trial.

If given the time out of court to write a judgment I owe it to myself, my colleagues and the parties to get on and complete the judgment.

The Honourable Justice Geoffrey Miller

Supreme Court of Western Australia

The following suggestions for judgment writing are based on my experience in writing judgments in the General Division of the Supreme Court (mainly in the criminal jurisdiction and on single judge appeal), and, more latterly, in the Court of Appeal. They are not intended to give advice on the writing of civil judgments following long and complex trials. They are intended to provide some assistance for newly appointed judges. Under no circumstances do I suggest that experienced judges need the advice I am giving.

Key themes

- Write judgments in the order you heard the cases.
- Don't let others interupt you.
- Remember, a judgment is not a work of art.

"If necessary, affix a sign to the door of your chambers. "Judge writing judgment" or "Do not disturb" will do. It is amazing how often associates, colleagues and others will interrupt you in the course of a working day. The judgment writing process needs to flow, and it can only flow if you can give it full and uninterrupted concentration."

Timeliness

It is generally agreed that one should write the first draft of a judgment as soon as possible after hearing a case. This requires a certain amount of discipline. If a matter concludes by lunch, it is absolutely essential that you attack the judgment immediately after lunch. Putting it off a day will not help. Putting it off more than a day will make it harder to get back to it. It is amazing how fresh the evidence and the submissions are when the first draft of a judgment is written immediately after the hearing.

In long cases, a draft judgment cannot be written in an afternoon. It is vital to have sheet of paper outlining the general structure. When you have reached a point at which you have to cease dictating, it is easy enough to note where the judgment is up to. It can there be picked up as soon thereafter as possible.

In some cases, it will be necessary to read materials before beginning to dictate the judgment. Keep this to a minimum. It is much easier to spend time reading than it is to begin dictating. It is generally possible to marry the two together. Begin the dictation and read the materials as you go. They are far easier to summarise when it is done that way than to spend a half-day or a day reading and then beginning the judgment.

Judgment format

Headings are now generally accepted. Headings give structure to a judgment. They also enable a judgment to be written in sections if it is long and you cannot complete it at the first attempt.

When necessary, leave gaps in the judgment to be completed later. Often, you will think of a case, but be unable to bring the reference to mind. A note in brackets is sufficient to remind you, your associate or research assistant to research it later.

When dictating the judgment, accept that you will think of things that should have been incorporated in earlier sections. Simply dictate "Insert A", "Insert B", and so on, and be prepared to place them back in the judgment at the appropriate places.

Chronological order of judgments

It is generally accepted that judgments should be written in order of the cases heard. Leaving the "hard ones" and concentrating on easier judgments will create problems.

There will be cases when you need to defer a long judgment for a short time to enable you to have a free day (or days) to attack it. If so, there is no reason why you should not take the opportunity to dictate a shorter judgment in the interim. However, beware of putting the long judgment aside too long.

Avoid interruptions

If necessary, affix a sign to the door of your chambers. "Judge writing judgment" or "Do not disturb" will do. It is amazing how often associates, colleagues and others will interrupt you in the course of a working day. The judgment writing process needs to flow, and it can only flow if you can give it full and uninterrupted concentration.

Target for delivery of judgment

If you hear a case within a month, then — unless it is a case which has occupied a number of weeks during the month — set yourself a target to finish the first draft of the judgment within the month.

Most courts have protocols for ideal delivery times. Do not, however, be influenced into delaying the writing of a judgment in the knowledge that you have a few months ahead of you. Generally speaking, the judgment must be attacked within the month the case is heard. The sooner the process begins, the better.

Settling the judgment

There is an unavoidable tendency to revise drafts time and again. I have seen examples of judges revising drafts of short judgments up to six or seven times. For shorter judgments, three revisions should be a maximum. Generally, two revisions should be enough and then the judgment should go to the associate or research assistant for checking.

It is different when dealing with long and complex judgments. They require much more attention and may necessitate multiple drafts.

The Honourable Chief Justice Murray Gleeson AC has expressed the view that a judgment is not a work of art. Whilst it can be massaged and honed down time and again, the parties to litigation just want the result. They do not want a perfect judgment. How many times have you delivered judgment and seen the parties immediately turn to the last paragraph on the last page? There is no beauty in a legal judgment and it is a mistake to see it as a work of literature.

On the other hand, a judgment must reveal the judge's reasoning process. The parties need to know this and appeal courts insist upon it.

Avoid allusion to literature and attempts to replicate Lord Denning's: "It was bluebell time in Kent." Personal idiosyncrasies need to be kept out. (For example: "It is an absolute tragedy to have to send this man to gaol.")

Recognising a problem

If you get seriously behind with a judgment, or if you have a mental block, see the Chief Justice immediately. The problem of delay can sometimes be overcome by being taken out of court to complete the judgment. If you are given a number of days to do it, then it must be done. There is no excuse for failing to complete it within that time. If there is a problem — writer's block, for example — some form of counselling may be needed. The Chief Justice is the best person to decide that. It may also enable the Chief Justice to appreciate that there are some cases that some judges should not be allocated.

In general

Judgment quality cannot be sacrificed for speed, but judgments can be written quickly and with precision. It takes experience. It also requires an appreciation that much of what is dictated for a judgment is superfluous. When you first revise the draft judgment, be merciless. Delete unnecessary and repetitive detail. Cut the judgment to its bare bones.

A review of reported judgments delivered 30 or more years ago generally reveals much more precision of style and content in the judgments that were written at that time. The tendency in recent times has been to dramatically expand the content of our judgments. Over-lengthy quotations and long dissertations on supporting authority are unnecessary. A former Chief Justice once told me that he liked a Court of Appeal judgment I had written where I cited two cases to support a fundamental proposition. He asked why a colleague had cited nearly 50 cases on the same point. The moral is not to make unnecessary work for yourself. Judgment writing is generally fact-specific and, in the great majority of cases, a great deal of authority will not be required.

His Honour Judge Geoffrey Muecke

District Court of South Australia

The judge needs time before the trial begins to read the book of copy documents, or the pleadings. He or she can then discern what the issues might be at trial, and start thinking about a structure for the ultimate judgment. That structure should be in writing, and be as detailed as it possibly can be even before the trial starts, so that the judge, during the trial, can vary it and annotate it where the witnesses have something to say about the various issues.

The plaintiff's opening is a good place to tease out whether the issues are as they appear in the pleadings, whether there are other issues, and what relief the plaintiff seeks. At the conclusion of the opening, the judge should revise the structure of the judgment.

It takes significant discipline on the part of the trial judge, but at the end of each day's evidence it is useful to dictate, from broad notes taken during the day, supplemented by the written transcript, what has been said about the significant issues in the trial. At the beginning of the dictated notes, it is useful to describe each witness's physical characteristics and give your impression of them. This will help later, depending on the time available to write the judgment.

Key themes

- Read the copy documents before the trial begins, and identify the issues.
- Dictate notes at the end of each day.

"At the beginning of the dictated notes, it is useful to describe each witness's physical characteristics and give your impression of them. This will help later, depending on the time available to write the judgment."

The judge can then dictate, preferably from transcript, where important or vital evidence is given, and the thrust of that evidence, with a page reference.

None of the above needs to be extensive, although some notes on some witnesses and on some issues will be more extensive than on others — such as the actual parties to the litigation.

Hopefully, by the end of the evidence and submissions, the judge will have a structure for the judgment, some notes about his or her impressions of the witnesses, and references to the evidence relevant to different parts of the structure.

This will also give a clear indication of what parts of the ultimate judgment will require the most attention and what parts will require the least attention by way of findings of fact and comments on witnesses.

I consider that having this is very important because if a new trial starts the next day and goes for some time, with another trial following immediately after that, there is at least something from which the judge can ultimately write the judgment without starting all over.

All of this takes enormous discipline, however, and it is very tempting to let a day or two go by hoping that the case will settle with no judgment required. Regrettably, if one does the work, the case will settle on the fifth day, whilst if one doesn't, the case will proceed to judgment.

His Honour Judge Damian Murphy

County Court of Victoria

Don't write it — deliver it!

There is an aphorism among print journalists: "Don't get it right, get it written!" Ought this apply to judgments? Should it be: "Just deliver it, right or wrong!"? Leave the appeal court to correct any errors, just make sure the parties get a result and the judicial officer can sleep at night without the guilt of the days ticking away on that reserved judgment.

Judicial office has its pressures, but in civil proceedings the need to deliver judgment looms, sometimes with dread, even before the trial. How to pull together the disparate threads of pleadings, evidence, written and oral, and argument into a persuasive defensible coherent judgment? Further, how to do so with the pressure of other listings, and within a time span which respects family life, meets the expectations of the parties and the community for expeditious justice, and avoids the cogency of a witness's demeanour fading with the sands of time, let alone that first visceral impression of where the justice of the case lies at the conclusion of the hearing? The solution: the (revised) oral judgment.

Key themes

- Don't reserve your judgment.
- Identify the key issues early.
- Be confident!

"Remember, the difficulty of delivering judgment increases exponentially with the elapsed time from the end of the trial. The clear advantage of delivering judgment just after argument is that both the evidence and arguments will be fresh in the judge's mind."

A glance at the law reports shows that the contraction cur. adv. vult. (the court wishes to be advised) spans the reservation of decisions from one day to many months. For a busy intermediate trial court, reserving is often a luxury which performance minded bureaucrats and jurisdiction heads are wont to discourage. There is a clear conflict between that weighty, word-perfect tome which extensively canvasses the evidence and authorities and which can be handed down in triumph, and the pressure from listings to put the next case before the judge. It must, however, be steadily borne in mind that the intermediate court judge is writing reasons for the parties and not for a spot in the law reports. The losing party wishes to know whether he/she/it lost, and why. Any infelicity in the delivery of the message is a small price to pay. But how to do it?

Preparation is all

The Victorian Court of Appeal recently remarked that it was able to deliver an *ex tempore* judgment in a criminal appeal because it had, before the case was heard, been supplied with the competing outlines of argument and agreed facts. At a trial level, this is rarely likely to be the case, but in a short trial it may be appropriate to alert counsel that you would be assisted by such an outline during address. The last thing to do is to invite written submissions to be delivered after final address. In any event, preparation before and during the trial is the key to expeditious delivery of judgment. Before trial you may discern the salient factual and legal issues from the pleadings, interlocutory applications, or a quick skim of court books, if they have been filed.

The key issues for decision ought also to be clear from the plaintiff 's opening and the defence response. At that point, jot down those issues as headings on a separate pad, add relevant evidence in note form as the trial progresses, and cross reference to the court book. As the trial unfolds, the matters for decision will become refined, and a more detailed picture of the competing evidence and contentions can be crystallised. This will apply particularly in personal injury cases where, once issues of credit are resolved, the case may turn on the judges' acceptance of the medical evidence propounded on each side. As that competing medical evidence is elucidated, if it is in documentary form, flag and highlight it so that critical conclusions can be easily identified for the judgment. Relevant authorities can be skimmed over lunch.

In a short trial, even if a final address is not accompanied by an outline, it will be an opportunity for an iterative process between the court and counsel where the critical contested issues can be identified, and how conclusions one way or the other will shape the ultimate outcome. As these decision points are identified, note the competing arguments from each side on the separate pad in summary form.

Decision point — confidence counts

Your mental attitude to delivering an unreserved judgment is fundamental. Judges are there to decide. As a trial moves to completion, from a few hours to a day, to two and more days, through a mounting transcript and pile of exhibits, through to the tension of final addresses, there always is swirling in the mind of the judge the big question: "Can I do it? Can I wrestle with the beast of evidence, authorities and arguments, and deliver my decision then and there or soon thereafter? From a germ of where the merits and justice lies, from a gut feeling, can I descend to the critical issues, synthesise and grapple with them, resolve them, and then articulate the decision *tout de suite*? Do I have the confidence?"

Remember, the difficulty of delivering judgment increases exponentially with the elapsed time from the end of the trial. There is also some research to the effect that one's intuitive response to an issue is every bit as good as a response formulated over hours and days of cerebration.

The clear advantage of delivering judgment just after argument is that both the evidence and arguments will be fresh in the judge's mind. This may obviate the need to refer extensively to any

available transcript. It also means that the judge can summarise the effect of relevant evidence and argument by reference to notes or outlines of argument without the need for tight paraphrasing. It means that when you make a shorthand reference to some evidence or submission, everybody in the courtroom understands what you are referring to. A reference to the "second point in the argument of the plaintiff" is perfectly clear to all.

How to do it? Backing your judgment

It is said that one would not eat sausages after watching them being made. Does this apply to judgments? Should the judge be reticent about showing him or herself at work? The answer must be an emphatic "no", but caution is needed. There is a spectrum in unreserved judgments. At one end is an interlocutory application or short ruling where the judge rattles off a decision as counsel resume their seats. At the other there is an exposition from a handwritten draft over hours or even days with lengthy references to transcript, exhibits and authorities. "Can I do it?" "Can I do justice to the case and the parties?" "Where does this case fit?" In the middle is the case where the judge may look ungainly, where there are papers flying everywhere, where the sentences are poorly strung together, the judge backtracks and gets the names of witnesses and things wrong, where there is no soaring rhetoric, where the judge is thinking or explaining on his or her seat, yet judgment is being delivered. How to do it?

The headings made and added to in the running of the trial now provide the skeleton for the judgment about to be crafted and delivered. The judge may be in a position to have thought about the issues over night or lunch. When argument has ended, the judge will have an understanding of the scale of the case. Has he or she decided one way or the other? Is this mountain too big to climb this afternoon? But how about by tomorrow or the next day or after a weekend? What about by the end of the current circuit?

First, set a time for the judgment: "4.00pm today" or "tomorrow at 9.30am". It doesn't matter if you have to push it out, the parties can wait. But a deadline imposes a discipline on the judge.

Next, set out the skeleton of the judgment using headings on separate pages or loose leaf sheets. For example: introduction, statutory background, issues, plaintiff 's witnesses, defendant's witnesses, competing arguments, conclusion, and orders.

Depending on the judge's familiarity with the issues under consideration, it may be unnecessary to sketch out beforehand much introduction or statutory background. The competing evidence can get ad libbed by reference to notes. Where necessary, incorporate parts of transcript by reference. For example: "I refer to page 73 lines 4-14." Documentary evidence can be included: "I include the third paragraph of page 3 of Dr X's report where she says [abc]."

The competing arguments on points in issue may be the subject of reference to written outlines, but otherwise can be briefly summarised.

It may be worth handwriting the critical reasoning. Thus, if the case turns on the application of a statutory test, then the precise reasons why or why not it is made out should be handwritten so that by doing so the judge is able to convince him or herself that the decision must go one way or the other. Similarly, the reasons why a breach of duty for example is made out should be set out so that an appellate court can recognise that the trial judge did grapple with the issues at trial. The same applies to why one cogent witness is preferred over another.

Delivering the judgment — the buzz of articulation

You can do it! Be confident! Gird yourself. It's going to be messy. You will be inarticulate and stumble as you paraphrase evidence and argument on the run. You may forget something, or even your train of thought. You will shuffle your papers as you look for that just-remembered remark in support of your conclusion. There will be pregnant pauses as you find that sentence deep in an exhibit or gather a profound phrase to drive home a conclusion. You will look a goose. But this is not a public speaking exercise! You are delivering a judgment. That is what you were appointed to do. You are looking the parties in the eye as you articulate why one has lost and the other has won. It has more immediacy and poignancy than an outcome buried deep in pages of typescript weeks after a trial.

Revising the transcript

In due course a transcript of the decision will emerge. Then the judge can put it into some shape by adding headings and paragraphs. Moving text around to make it flow more logically, deleting repetitions, checking quotes, correcting tenses, and ironing out the infelicities. Believe me this is a much easier task than starting from scratch days or weeks after the trial. Try it sometime!

Her Honour Judge Helen Murrell

District Court of New South Wales

Judgment writing tips for judges sitting in crime

Interlocutory decisions

Do not delay the trial any longer than necessary. When writing an interlocutory decision, speed is more important than style. The following will suffice.

- A brief overview of the trial, to provide context.
- A statement of the issue or issues for determination.
- An overview of each issue with a brief reference to the facts.

Judge alone trial

Develop a template for the general legal directions. I say "I am aware that …", followed by the direction, stated briefly.

At the outset of the trial, ensure that the issues are identified. During the trial, you may wish to organise your notes by reference to the issues.

If the evidence is complex and/or lengthy, keep a running summary of it on your computer, organised logically, perhaps chronologically. This inspires a justified feeling of confidence — that you have the facts under control. However, when it comes to formulating your judgment, you must be ruthless and discard all non-essential material.

During the trial, draft the non-contentious parts of your judgment, including an introductory overview, a summary of the charges, a statement of the main issues and the general legal directions.

At the conclusion of the trial, inform counsel of the additional legal directions that you propose to give in the

Key themes

- Develop a template for general legal directions.
- Look at the offender when delivering a sentence.
- Sentencing is intuitive. Deliver the sentence while the case is still fresh.

"If there is media interest, consider a written decision. Give journalists copies of the decision. Written publication and immediate dissemination should minimise erroneous reporting. Media interest provides you with a real opportunity to inform and educate the public."

particular case and consider any submissions on the proposed additional directions. Immediately incorporate the additional directions into your draft judgment.

Often, in a judge alone trial, the main issues are legal issues. If so, when formulating the judgment, the facts can be stated briefly and before you deal with the legal issues.

If there is a significant disputed fact, state the contention of the party losing the factual dispute, then your reasons for finding otherwise.

Sentencing

Try to deliver most sentences *ex tempore*. At the conclusion of addresses, you should have a good sense of the appropriate outcome. If you don't, request further assistance from counsel. If you're still in doubt, seek advice from other judges.

Develop a template that suits your personal style. This will facilitate organised and thorough *ex tempore* decisions.

Personal matters must not affect a sentence. Do not formulate a sentence when you are tired or cranky.

Be considerate and respectful. If appropriate, in your sentencing remarks, acknowledge people other than the offender who are affected, such as the victim and the offender's family. I look at the reader when a victim's impact statement is read and to look at the offender when delivering a sentence.

Because sentencing is intuitive, it is particularly important that you deliver the sentence promptly, before you lose the sense of the case.

General tips

- Less is more. It also requires a lot more effort.
- Use the active voice.
- Avoid double negatives.
- If there is media interest, consider a written decision. Give journalists copies of the decision. Written publication and immediate dissemination should minimise erroneous reporting. Media interest provides you with a real opportunity to inform and educate the public.
- Internet publication of significant decisions opens your court to the public.
- Try to limit reserved decisions to a maximum of one at any time. You should be able to concentrate on the case before you if there is only one reserved decision smouldering in your chambers. If reserved judgments mount up, obtain time out of court.
- Seek advice from other judges.
- Attend judicial education programs designed to enhance communication skills.

His Honour Judge Nigel Rein

District Court of New South Wales

Judgment writing

Much has been written on the subject of judgment writing and it is unlikely that anything in this paper will not have been said in one form or another many times before. In this paper I shall concern myself solely with judgments in the civil arena.

Ex tempore or reserved?

Ex tempore judgments are encouraged, but some judges find it easier to deliver *ex tempore* judgments than others.

The choice is not as stark as it seems — since it is possible to prepare notes, even extensive notes, from which the judgment or a significant portion of it can be read. An obvious rule of thumb is never deliver an *ex tempore* judgment unless you are clear as to the result and the main path by which you have reached that result. If there is an urgency about delivering judgment you should make that clear when giving your judgment.

Much of the approach to reserved judgments can be applied to *ex tempore* or hybrid *ex tempore*. As I shall explain, preparation for *ex tempore* judgments will assist in delivering reserved judgments.

Reserved judgments — when to start writing

I recommend starting to write a judgment at a very early stage. The draft judgment is not the ultimate conclusion on fact or law, but part of the process by which you will reach your final conclusion. Much of what you write initially will be background and explanatory material, and it will include a brief statement of the issues which you are called upon to decide. Some of your draft will need to be refined, even radically altered, but you are on the path to writing the judgment. This process may enable you to give an *ex tempore* judgment. Proceed on the basis that the case will not settle unless you have a very clear and reliable indication that it is likely that it will. I do not subscribe to the view, firmly held by some, that you should not commence writing until you have reached a conclusion. On the contrary, I find writing assists in reaching a conclusion. Even when you think you have reached a conclusion,

Key themes

- Prepare early.
- Proceed on the basis that the case will not settle.
- Encourage the parties to give an opening address.

"This process of defining the issues is the single most important aid to judgment writing since it will provide a road map for the judgment and hopefully remove false issues. It will often shorten the trial too, either because an issue is removed or because it is easier to exclude irrelevant evidence."

setting out the reasons may lead you to doubt the correctness of your initial approach and alter your views.

Active work on the judgment whilst the trial is in progress is more likely to give you better understanding of the evidence and its significance and an opportunity to clarify matters.

It is tempting to approach submissions on legal issues with the thought that you will be able to consider all of the issues later. You will, but looking at the issues now is far better. The cases cited may even reveal an evidentiary matter that needs to be cleared up and can be dealt with whilst a witness is in the box or can be recalled.

This leads to one of the difficult issues: "How can I work on this case if I have to work on that outstanding judgment from one or more months ago?" It is never easy to juggle competing demands, but active involvement in the present case will save you time in the future.

An effort to get on top of a hearing now will be time well spent — you are immersed in it and you have a far better appreciation of it at this point in time than you will have in a few months or even weeks.

The judgment

The essential and paramount goal in judgment writing is to explain to the parties (and anyone else reading the judgment including the relevant appeal court) why you have reached the conclusion that has lead to the verdict and judgment for the successful party. Clarity of expression is the single most important element of achieving that goal. I suggest:

- Begin the judgment with a one or two paragraph summary or overview of the case.
- Set out the non-contentious background in which the dispute sits. Hopefully little in this first section will need to be changed later.
- State the issues. If not all the issues are agreed, state your views on the dispute.
- Generally, do not set out what are not issues. However, you may choose to do this occasionally, particularly where you feel that an argument might have been run — for example: "no estoppel was asserted" or "the defendant did not dispute that it was an occupier of the premises".
- Set out procedural history only if it has relevance — particularly if, without it, your approach might be seen as precipitous.
- Ensure that you have made all relevant findings. Sometime you will think you have but objectively you have not done so.
- Summarise the relevant principles you have drawn from cases — assuming the citation does not itself set out the very matters that need consideration.
- If you are making findings of credit, be clear about your conclusion. The parties need to know whether your find X dishonest or merely unreliable or confused. Sometimes it is difficult to find the right balance between the necessary expression of adverse findings and avoiding, if possible, unnecessary denigration of a party or witness.
- Conclude the judgment with a short statement of result.

- Generally speaking, avoid literary flourishes and humour — Lord Denning's style is best left to Lord Denning.
- Avoid extensively citing submissions of either party unless those submissions express your own view of the particular aspect of the matter.
- Avoid citing extensive passages from cases. If you have quoted citations in to help you consider the issues, reduce the extent of citation as you refine the draft
- Cite legislative provisions, but again, work to reduce non-relevant portions.
- Be very careful in expressing views about the conduct of non-parties.

Drafts

To the chagrin of my associate, I often go through my drafts quite a number of times. Do not be afraid to change the expression, content or even conclusions. One dangerous area is moving parts of the draft around and not rereading the entire judgment to see if it all fits together. Try to have your associate read the finished judgment from the start to finish to see if he or she understands it, and to proofread it for typographical and syntactical errors.

If you have prepared a draft but do not know where it leads in terms of result, it is not a bad thing to leave it for a few days and read it again later. On the second reading an error of approach may reveal itself more readily. Another technique is to write out the argument leading to the conclusion, even if you are not sure that it is correct. As you write, it is entirely possible that the penny will drop.

Lists of issues

Judgment writing is much assisted by good preparation. Having read the pleadings encourage counsel to prepare an agreed list of issues. If they are unable to agree on a list of issues it usually bespeaks a fundamental misconception by one or all parties, that must be flushed out early. Never decline plaintiff's counsel's offer to open, and encourage the defendant(s) to give an opening too — it is remarkable how often counsel will be surprised by what has and what has not been included by his or her opponent.

I will sometimes prepare a list of issues myself and invite counsel to indicate whether they wish to add or subtract issues.

This process of defining the issues is the single most important aid to judgment writing since it will provide a road map for the judgment and hopefully remove false issues. It will often shorten the trial too, either because an issue is removed or because it is easier to exclude irrelevant evidence.

Obtaining assistance from legal representatives

Where both (or all) parties are represented by competent and diligent practitioners, your judgment is likely to be easier to write. You can take steps to have counsel provide the assistance you need. I have mentioned the desirability of a statement of issues, but it does not end there. Counsel may refer you to a long list of authorities without descending into detail as to which support his or her

case and you are entitled to require more precision. Some judges will indicate that they will read only those documents in a massive bundle to which their attention will be specifically drawn, often prompting a withdrawal of many documents. I require bundles of documents to be paginated since it makes it so much easier to locate documents during the hearing and to refer to them in the judgment. If a schedule or analysis of documents is desirable, then organise it. When doctors or solicitors handwritten notes are tendered I ask counsel to identify those portions that are relied on and to have a typescript prepared should the notes be other than perfectly legible. It is not appropriate to try and decipher this material after the hearing has concluded. Where legislation is complex and the subject of amendment, it is a good idea to require an agreed copy of the relevant provisions to avoid you having to hunt it down.

In short, whatever will assist in reducing hearing time and judgment writing time is worth considering and requiring from the parties' representatives.

Her Honour Judge Margaret Rizkalla

County Court of Victoria

Help from the unsuspecting

I have found that the most useful tools for expeditious judgment writing are the resources lurking at the bar table. Counsel need not be brilliant before they can be of valuable assistance in forming a judgment. The parties define the issues, and it is their expectation that the court will determine them. This is, after all, the court's most important function: deciding the issues between the parties.

Before arriving at court, counsel should:

- have analysed their case
- have analysed the opposing party's case and assessed its weaknesses and strengths
- be able to enunciate the orders they seek and why they are entitled to them.

These are effectively the framework of the final judgment and too often counsel's work is wasted because it is not called upon by the judge. It is time well spent to make clear to counsel at the outset that they will be required to provide an opening and a response and a closing and a response, the latter delineating the orders sought and the basis for them. Not only does this provide useful material for the ultimate judgment, but it also saves a great deal of court time by identifying the issues early, which means unnecessary evidence and submissions are not pursued in the hearing. Importantly for the judge, it also means the bones of the judgment are exposed and it provides some structure for the final result.

Key themes

- Use counsel as a resource.
- Take notes during the trial, but not too many.
- Dictate a rough draft before the next case.

"Counsel need not be brilliant before they can be of valuable assistance in forming a judgment. It is the parties who define the issues, and it is their expectation that these will be determined by the court."

If counsel arrive at court without an opening or response, it is my practice to indicate what will be required before evidence begins and stand the matter down for an hour or so to allow them to do so. Unless it is impossible, I would request that they provide the material in a form which allows me to use it on the computer. I can then use the material in my judgment. At the very least, a copy in writing should be provided. This is not a waste of time — it will mean that counsel will have to descend to analysing the case if they have not already done so, and will allow both them and the judge to concentrate on answering the questions raised by the issues in the case. I have no doubt this saves time in the long run.

By using this method, once you have determined who is to be successful on the various issues, you are able to adopt the arguments and submissions in counsel's documents. In particular, you can quickly identify the losing party's arguments and enunciate why they are unsuccessful in your findings. It makes your analysis of each issue marry with the way it is argued and by reference to the evidence and any authorities necessary you can simply state your conclusions.

I have found this method works whether you have one or numerous issues.

As for my conclusions on the evidence, before any evidence is heard but once the issues are clear, I create a document setting out those issues as headings. As the case proceeds, I take short notes under the relevant headings so as to allow easy reference to the transcript, if necessary, and to act as an *aide memoir* when I reread them. I use a computer to take notes, but it would work just the same on paper, although one sheet per issue would be best so you can rearrange as you go. The computer does have the advantage of allowing easy scrolling and adding notes to various headings as well as easy editing and rearranging once you are out of court and the matter is still fresh. One of the key matters for me is to ensure that I don't take too many unnecessary notes — just enough to be a reference point. This I am still refining!

At the end of the hearing, the optimum for me is to immediately — before taking another matter — dictate a rough draft of the judgment from my notes and the material provided by counsel, filling it out with a mixture of my short-term memory and reference to the transcript. This then allows me to move on and come back and revise and refine when the document is sent back to me in my folder on the computer.

I have found that attempting to fully type the draft myself is both physically difficult and time consuming, and an inefficient use of my time. The method I have described above has proved for me to be the best of both worlds. I do my own revisions and editing on the computer and then provide the final judgment.

As for the structure of the judgment, I try to follow a simple formula:

A paragraph explaining *Who Did What To Whom*.
A brief statement of *Who Wants What and Why*.

↓

Essential background — enough so an innocent reader could follow the judgment.

↓

Briefly, the issues I have to decide.

↓

Go through each issue in turn. Under each heading, I indicate why the losing party is unsuccessful, referring to the evidence as necessary.

↓

If necessary, I may recap the findings on each issue very briefly and the final conclusion which arises from the determination of these issues.

↓

The orders.

The Honourable Justice Peter Rose

Family Court of Australia

Suggestions for judgment writing

Structure

I have found that a basic structure is appropriate to all civil proceedings, regardless of the cause of action. It will:

- ensure that you satisfy the basics for content of a judgment
- provide building blocks for the judgment that you can systematically deal with
- provide a concentrated focus in preparation of a judgment to be given *ex tempore* or on a reserved basis
- ensure you are not swamped by a large volume of evidence, case outlines and written submissions to the point that writer's block develops
- allow the parties, their legal representatives and perhaps an appellate court to read and absorb the judgment with less difficulty than might otherwise occur.

A simple model for judgment writing includes: an introduction; a statement of legal principles; findings of fact; the application of the principles to the facts; a conclusion with reasoning process; and the orders.

A clear, succinct introduction, followed by a precise statement of the issues, will provide the setting and the context for what follows. As Professor Jim Raymond said in a judgment writing workshop in Queensland in 2003, an introduction is "prime real estate — not a hot dog stand".

The structure that I have found to be of assistance is:

Key themes

- Use a basic structure that can become either a reserved or an ex tempore judgment.
- Summarise rather than transcribe the evidence.
- Don't try to emulate Lord Denning. Avoid colouring the issues.

"Padding should be discarded. Examples are the unnecessary regurgitation of all of the orders sought by the parties, or of lengthy statutory provisions. It should be possible in most cases to provide the substance of that material. Otherwise, reading of the judgment may be elevated to a new level of tedium."

A brief introduction.

↓

The principal issues of law and/fact.

↓

Historical background.

↓

Relevant legal principles with reference to the leading authorities.

↓

Appropriate subheadings to review of the evidence followed by findings of fact.

↓

Conclusion with adequate reasons incorporating submissions and the application of the legal principles to the facts.

↓

Orders.

Aspects of judgment writing

Stating the law

Unless the complexity of the legal issue requires it, a succinct statement of the legal principles by reference to the leading judgments is all you need.

Findings of fact

So far as the review of the evidence leading to findings of fact is concerned, there is no requirement for the trial judge to provide, in effect, a transcript. All that is necessary is a summary of the evidence given by parties and/or relevant witnesses, with any quotations you may need to resolve the conflict of evidence and issues of credit leading to findings of fact.

Obviously the findings of fact are crucial and their omission may create a ground of appeal, despite how carefully you have reviewed the evidence.

Adequate reasons

It is sufficient for me to refer to the well established guidelines followed by Australian superior trial courts, namely:

> *The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if:*
>
> i. *the Appeal Court is unable to ascertain the reasoning upon which the decision is based; or*
>
> ii. *justice is not seen to have been done.*

In the two above stated criteria inadequacy will often overlap.[1]

Other suggestions

Pre-trial preparation is important. Apart from reading the relevant material, including case summaries, chronologies, pleadings, witness statements and affidavits, your own note taking will greatly assist. Those notes should include the main features of the chronology, any commercial entities and the principal issues. The notes will then give you the framework for both trial management and development of the structure for the judgment.

In many cases the parties have invested much in the litigation, both financially and emotionally. Sensitive issues often have to be resolved. I suggest avoiding the temptation to colour introduction of the issues. It may give offence and be seen as nothing other than self-indulgence, demeaning to the parties and arrogant. The temptation to do otherwise should be left to those who consider themselves the equivalent of Lord Denning.

Rambling sentences and lengthy paragraphs should be avoided.

Padding should be discarded. Examples are the unnecessary regurgitation of all of the orders sought by the parties, or of lengthy statutory provisions. It should be possible in most cases to provide the substance of that material. Otherwise, reading of the judgment may be elevated to a new level of tedium.

Some excellent advice has been given by the Honourable Justice Henry Hutcheon, a member of the British Columbia Court of Appeal: "What the public wants is a judgment long enough to do the job and not much longer."

His Honour Senior Judge Tony Skoien

District Court of Queensland

Tips on judgment writing

I will set out, very briefly, how I write judgments. But what works for me may not work for you. For example, I am not sufficiently computer literate to use mine for judgment writing. You probably are. I write by hand, believing, as the Honourable Chief Justice Gibbs did, that my brain works at about the same pace as my writing.

Ex tempore?

Unless it is a simple matter (for example, an application for disclosure or joinder) I have found that an *ex tempore* judgment, when transcribed, usually reads rather poorly. I'd rather deliver it, written, the next day.

When to start?

I almost never start a complex judgment immediately. A delay of a day or so can work miracles of order and clarity. The brain unscrambles. Good ideas crystallise at unlikely times, for example, while under the shower, gardening, or walking. But you should start at least within a week.

How to start?

I follow the advice of an excellent teacher we had at my secondary school. "Boys, when you have a task, a problem, take a large clean sheet of paper and start to write." Or, type, or dictate — whatever you prefer. Just putting something down organises the mind.

What to start with?

Working out appropriate headings is a good idea. Settling on the headings not only organises the mind but it gives you discrete topics to work on, one at a time. Ultimately, it will help the reader.

Key themes

- A transcribed ex tempore judgment often reads poorly when transcribed. Deliver something written the next day.
- Use headings.
- Be clear, brief and to the point.

"I follow the advice of an excellent teacher we had at my secondary school. 'Boys, when you have a task, a problem, take a large clean sheet of paper and start to write.' Or, type, or dictate — whatever you prefer. Just putting something down organises the mind."

A common list of headings could be:

Introduction
Use proper names for the parties rather than "plaintiff" and "defendant". Set out the relief sought.

↓

Background and/or chronology

↓

The law
Remember to delete all unnecessary detail.

↓

Disputed facts

↓

Evidence on disputed facts and findings of fact
This may entail various subheadings. You must demonstrate why you reach each finding of fact.

↓

Application of law to fact
Again, this may require subheadings.

↓

Conclusion

Conclusion — first or last?

Some judges announce the result at the beginning of the judgment. I don't, not because I'm writing a whodunit, but because I want to demonstrate the thought processes by which I achieve the result.

Style

We all have our own style and it is difficult to change it now. Obviously we try to be clear, brief and to the point. Sometimes I find it necessary to recast overlong, over-complicated sentences; prune unnecessary detail; and delete repetition. Remember that a misused word can be confusing — for example, is "significant" the right word or do you just mean "big", is "transpired" the right word or do you just mean "happened"?

I avoid dot points in favour of numbered sub-paragraphs. How much easier is it to be referred to "para [47](8)" rather than "para [47], eighth dot point"?

The use of italics, or bold type (or similar) for quotations helps the reader. So does the careful use of margins.

At about the final draft stage I ask my associate to read it through carefully and to identify obvious errors as well as passages which lack clarity.

The Honourable Justice Ann Vanstone

Supreme Court of South Australia

In writing a judgment my stylistic aims are to:

- be as brief as possible
- be as clear as possible
- adhere to a format.

In terms of content, I set out to:

- satisfy the losing party that I have understood their case or their argument
- explain why I have rejected it.

Be as brief as possible

The quest for brevity involves constant analysis and re-evaluation, then the courage to cut out what is unimportant. The red pen starts its work in a swashbuckling way — cutting out references to whole swathes of evidence — and then, towards the end, descends to a sentence-by-sentence analysis, excising unnecessary phrases or words. As Professor Jim Raymond instructs: "Every word needs to earn its place on the page."

I try to minimise quoting lengthy passages from evidence or argument, legislation or authorities. It can be a burden to the reader and, anyway, most passages contain only one point critical to the case at hand and that can be more succinctly expressed if extracted (with attribution) and placed into context. But, if I have to, I lead into the passage with an introduction or paraphrase of it, so that the readers know why I am asking them to read it. Sometimes the paraphrase will turn out to be sufficient.

Key themes

- Be succinct. Minimise quotations.
- Shape the entire judgment with reference to the final result.
- Satisfy the losing party that you have understood their argument.

"The red pen starts its work in a swashbuckling way — cutting out references to whole swathes of evidence — and then, towards the end, descends to a sentence-by-sentence analysis, excising unnecessary phrases or words."

Be as clear as possible

The cutting down process enhances the clarity of the writing because the real thrust of the case and the essential question(s) for decision emerge more clearly when not clothed in superfluous detail.

If I feel like I am losing the thread, it helps me to ask myself: "What is the point of this paragraph?" or "Why does this matter?"

In terms of expression, the fresh eyes of my associate are invaluable. If he or she is unsure of the meaning of a paragraph or a sentence then I revise it, even if it is clear to me.

Adhere to a format

It is almost impossible to be either brief or clear if you don't know where you are heading. The way the judgment starts — which I think is all-important — is dictated by the final result. Which background facts you choose to mention is a function of the decision itself. And so, if I cannot make up my mind about a case, I might delay starting the judgment so that I can think about it, or try to redefine the issues until it is clearer to me, or perhaps jump into the analysis in the hope that it will help my thought processes. For this reason, I do not usually find it at all helpful to ask my associate to set out the facts. Building up is easier than cutting down.

Almost invariably I follow the same format, whether I am writing at first instance or as an appellate judge. It involves a very brief introduction — setting out the issue(s) in the broadest terms — then the background facts — but only the ones that count — then I analyse the issues or appeal grounds. Finally, the ultimate conclusion.

One of the advantages of the format is that I always know how I will begin. Also, if the matter is fairly clear, the first two sections can often be done in draft in advance of an appeal hearing. Furthermore, it means that, because I can visualise the form of a judgment, I can go straight to the analysis of a particular issue or ground of appeal, even if the early writing is not done.

Satisfy the losing party that I have understood their case or their argument

It is the critical part of the losing party's argument that I endeavour to set out. That might entail reference to witnesses that the party relies on, or to particular authorities. I do not feel obliged to set out the argument in comprehensive detail. I try to put the case at its highest.

Rather than setting out one facet of the argument and then dealing with it, I think it is neater to summarise the whole argument as a block. Then the analysis and refuting of the argument seem to flow more easily.

Because the losing party's argument needs to be adequately outlined, it is one of the things which I try to get onto paper straight after an appeal, particularly if I will not get back to the judgment for a while. At that time it is fairly easy to dictate the essence of the arguments and the reasons for rejection. Another approach in these circumstances is to encapsulate the question or questions for decision.

After a trial, I try not to put the matter aside until I have completed a fairly detailed plan of the judgment, which because of my format really means a plan of the analysis. The detail runs to each

issue I will deal with, the evidence to be discussed in respect of it (including page references) and the cases that I shall refer to. Armed with such a plan, it is fairly easy to delegate work on one or more of the topics to my associate. Then, when I find some time to return to it, the plan enables me to pick it up more quickly and deal with a discrete section if I wish.

Explain why I have rejected the case

It is hard to generalise here because this analysis should be the meat of the judgment and each case is so different.

If I need to refer to authorities, I try to explain what principle is involved before descending to detail. I do not find it useful to cut and paste. It is important to ensure that the reader doesn't lose the thread or wonder how it fits together.

Last thoughts

Since I settled upon my format I have not had as much trouble getting started on a judgment. These days I find that if I am struggling it is usually because there is not enough information, or I have not distilled or framed the questions for decision correctly in my mind.

I have resigned myself to the fact that I shall always think I am closer to the end of a judgment than I am and it always takes much longer than expected. I tend to think that I spend more time editing my judgments than other judges do — and that therefore their acuity and technique are superior — but my personal assistant tells me (kindly) that we all edit interminably.

The Honourable Justice Margaret Wilson

Supreme Court of Queensland

Consider who will read your judgment: the litigants, whose story you are telling; an appellate court, which may dissect it; lawyers, who may refer to it. It needs to tell the story, bring out the issues for determination, and explain why they have been resolved as they have. Above all, it should be clear and simple.

The form and content of reasons for judgment and the process for their production vary enormously. But the essential structure of a judgment will usually follow a fairly standard format — identifying issues of fact and law, findings of fact, a statement of applicable principles and applying the law to the facts. The various units will often have to be broken down into sub-units as the judgment is drafted. Assembling a table of contents, and regularly updating it, can assist in maintaining that structure; headings and subheadings are essential. Most well written judgments are the product of much revision and cutting and pasting.

The first decision you have to make is whether:

- you deliver an *ex tempore* judgment
- you reserve the judgment and nominate a date and time for its delivery
- you simply reserve judgment, on the understanding that the parties will be notified when it is ready for delivery.

Most interlocutory applications can and should be determined relatively promptly after the hearing. So, too, with many applications made pursuant to statutes and brought by way of originating application (or notice of motion) and supporting affidavit evidence.

Key themes

- First decide what kind of judgment to deliver.
- Structure carefully. Resist the temptation to string together summaries.
- Attack issues of credit early in the judgment.

"Receiving evidence and submissions is an exacting assignment. Devise a system of note taking beyond mere recording of the spoken words of witnesses and counsel. In testing and absorbing the detail and true import of each party's case, you need to engage in ongoing analysis, thinking ahead to possible outcomes and whether they might be justified."

It is not always easy, or necessarily expedient, to formulate an *ex tempore* judgment under the intense scrutiny of the litigants and their legal representatives. You should not feel inhibited from retiring to chambers or to a jury room adjacent to the courtroom for a short while to collect your thoughts and

sketch the outline of the judgment. Decisions on technical or otherwise difficult matters may best be prepared overnight. Bearing in mind other reserved judgments and your schedule in the immediate future, you may nominate a date for delivery of judgment in a few days' time, so meeting the litigants' call for a speedy determination and setting an attainable goal in the disposition of reserved judgments.

Judgment writing after a trial can be particularly demanding, both because of the volume of material to be considered and the number of issues to be determined.

Receiving evidence and submissions is an exacting assignment. Devise a system of note taking beyond mere recording of the spoken words of witnesses and counsel. In testing and absorbing the detail and true import of each party's case, you need to engage in ongoing analysis, thinking ahead to possible outcomes and whether they might be justified. The use of headings, marginal cross-referencing notes and comments (albeit provisional in nature) can be very useful.

Take stock of the evidence and the legal issues at regular intervals during the trial. Prepare summaries of the facts and notes on legal issues as the case progresses. Having a full transcript of the evidence and submissions in an electronic format that can be searched and notated will speed recall and cross-referencing.

It may sometimes be worthwhile reviewing large portions, if not the whole, of the transcript and reading widely across the legal questions, before honing in on the real issues and their resolution. This is time consuming, but if you do it in a disciplined, orderly way, your judgment writing will be informed, confident and decisive.

Whether you dictate your notes, write them out in longhand or use a computer is a matter of personal preference. So, too, with the judgment itself. Few people have the gift of being able to dictate crisply, succinctly and logically, and most have to compose at least some of their text on paper or a computer screen. A judgment must have structure and form: resist the temptation merely to string together the summaries written along the way, and don't be afraid to edit and recast passages numerous times.

It is unnecessary and distracting to clutter the text with multiple references to cases on well-established principles and citations for cases. Use footnotes instead. Of course there will be occasions where detailed discussion of authorities and their application to the facts is required. But it is often sufficient just to state the principle for which a case is authority, and then apply it to the facts in hand.

When a large part of the evidence is in written form, such as witness statements and bundles of documents, judgment writing can seem a Herculean task. As yet the proportion of paperless trials is quite small, and most judges still have to consider how best to use the limited electronic tools available to them to expedite the process.

So far as practicable, take time to read the documents as the trial progresses, in order to follow what are sometimes elliptical references to them in oral questioning and submissions. But their sheer volume sometimes precludes this. A constantly updated exhibit list showing the exhibit number, the date it was tendered, the page in the bundle of documents, the nature of the exhibit, by whom it was tendered, and references to it in the transcript, can be useful.

Credibility may be pivotal to the outcome of a case. It is important to describe the conduct, character and bearing of the witnesses whose credit is in issue, to highlight where their evidence is consistent and inconsistent with objective facts, and to explain why one is preferred to another. As the case progresses, make notes of points apparently bearing on credibility — but it may not be until all of the evidence and submissions are in, and you have had the opportunity to reflect on your impressions of the witnesses, that you are able to piece the jigsaw together. In crafting the judgment it is often best to place the discussion of credibility at an early point: it helps the judgment flow and is an essential part of the story you are telling.

Every judge needs a system for recording reserved judgments, noting when each matter was heard, the dates for further submissions (if any), when those submissions were received, and what, if any, indication the parties were given about when judgment could be expected. Many courts have adopted protocols for the timely delivery of reserved judgments; you need to be ever mindful of these, but you should not be unduly diffident about approaching your head of jurisdiction to discuss any difficulties you experience in meeting the time goals.

Marshalling available resources is a hallmark of efficiency. A diligent, enthusiastic associate (or law clerk) can be an invaluable research assistant. There are various tasks which may properly and productively be assigned to the associate. For example:

- where the parties furnish written outlines of submissions in advance, preparing summaries drawing together the competing submissions on the various issues
- researching discrete questions of law, writing case notes, and preparing research memoranda
- collating references to evidence relating to particular topics and submissions on particular topics. A Scott Schedule style summary of the evidence of different witnesses on a topic or even of the differing accounts given by the one witness can be very useful. Most associates are adept at searching documents in electronic form (including transcripts) using database search programs such as ISYS
- proofreading, not only for typographical errors, but also to check the accuracy of paraphrasing of evidence or the effect of authorities, and the accuracy of transcript references
- converting abbreviated footnotes into a conventional format (such as that in the *Australian Guide to Legal Citation*).

Judgment writing can be one of the most intellectually fulfilling aspects of judicial life — but it can be arduous, sometimes tedious. Having a full and varied individual court calendar is stimulating; it can also quickly lead to an accumulation of reserved judgments, which can be surmounted only by maintaining a steady nerve and resolute application. Good luck!

References

Australian Guide to Legal Citation: publication of the Melbourne University Law Review Association, Melbourne, 2nd ed. 2002, available at http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf

AustLII: Australasian Legal Information Institute. See http://www.austlii.edu.au/

Baynton: Justice G.W. Baynton, Saskatchewan Court of Queen's Bench, contributor to *The Important Thing is To Begin*

Denning: Baron Denning of Whitchurch, Master of the Rolls (UK); "It was bluebell time in Kent" (Hinz v Berry [1970] 2 QB 40,42)

ISYS: Search Software. See http://www.isys-search.com

The Important Thing is To Begin: March 2003 publication of the National Judicial Institute of Canada

National Judicial Institute: the National Judicial Institute of Canada is the body responsible for the development and delivery of educational programs for judges in Canada. See: http://www.nji.ca

President of the Court of Appeal of New South Wales: Justice Keith Mason, "Throwing Stones: A cost/benefit analysis of judges being offensive to each other", 6 October 2007, available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason061007

Raymond: Professor James Raymond; Legal Writing Consultant, New York (USA); formerly Director of English Composition, University of Alabama (USA). See: www.benchandbar.info The article "The Architecture of Argument" available at http://www.benchandbar.info/architecture_of_argument.htm

Transcript Analyser: a software program which provides users with a method of analysing trial transcript and other legal documents. Wandalan Pty Ltd 2003. See: http://www.wandalan.com.au/

Warren: The Honourable Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria. Her 22 May 2007 "Inaugural State of Judicature Address" is available at http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Library/SUPREME+-+Speech+-+Inaugural+State+of+Judicature+Address+%28PDF%29