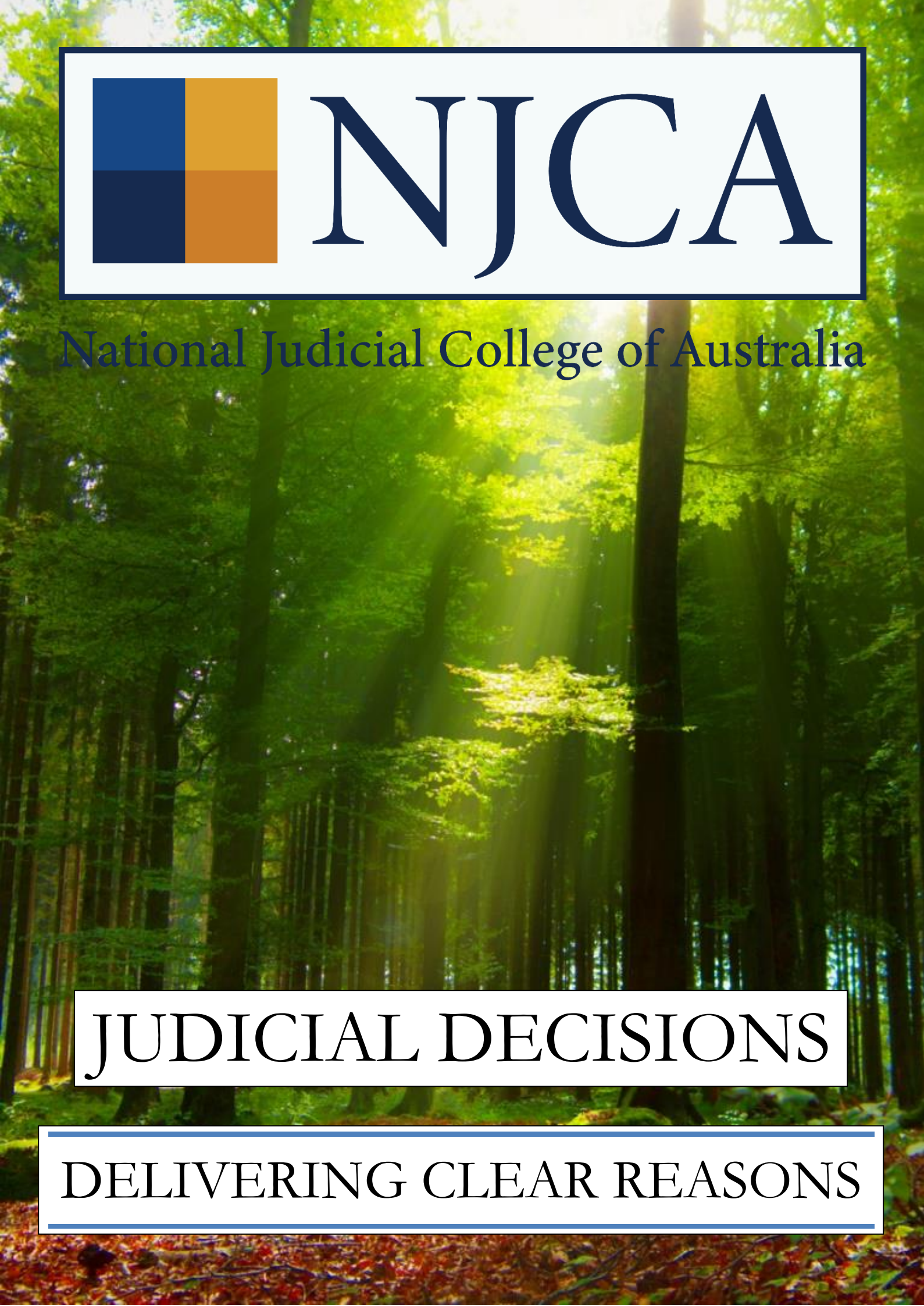

NJCA

National Judicial College of Australia

JUDICIAL DECISIONS

DELIVERING CLEAR REASONS

Oral Decisions

Delivering Clear Reasons

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The Honourable Chief Justice Robert French AC
Chief Justice of Australia

The delivery at the end of a hearing, or very shortly after a hearing, of a well-reasoned, well-structured oral decision can be a demonstration of the courts at their best. The parties, their representatives and the public have the opportunity, where oral decisions are delivered, to see to completion the judicial process of hearing evidence and argument and announcing, in public, a decision supported by publicly stated and comprehensible reasons.

Not all cases lend themselves to expeditious disposition by oral decision. But when a case can be decided in that way, the benefits are many from the point of view of the parties and also from the point of view of the judge.

The selection of cases appropriate for oral disposition and the crafting of reasons for decision are skills which are generally not acquired immediately upon appointment to judicial office. They are the product of experience and discretion. This Monograph brings together the accumulated experience and wisdom of 27 judicial officers from a variety of jurisdictions across Australia. Each provides a short account and, as one would expect, clearly reasoned explanation of his or her approach to the delivery of oral decisions.

As is pointed out in the Preface, this publication is designed to be picked up and looked at in segments. It is a source of invaluable practical guidance. There are overlaps in some of the contributions. Those overlaps are helpful because they indicate important common perspectives derived from the experience of the authors. The book is also eminently readable.

I congratulate the National Judicial College on this publication and thank the authors for their valuable contributions to improving the administration of justice in the courts.

Preface

The Honourable David Lloyd QC and His Honour Tom Wodak

In August 2008 the National Judicial College of Australia published the monograph *Judicial Decisions: Crafting Clear Reasons*. That monograph comprised a series of short papers by judicial officers throughout Australia on how they went about tackling the task of judgment writing, and on how to do so more easily, more efficiently and more effectively.

The NJCA also conducts courses for judicial officers on judgment writing and giving oral decisions. The feedback from the previous monograph and from the courses have included comments that a monograph on oral judgments would be useful.

The NJCA responded to these comments by inviting heads of jurisdictions around Australia to nominate judicial officers who could explain how they go about the task of preparing and delivering oral judgments. Hence this publication, *Oral Decisions: Delivering Clear Reasons.*

This publication is not meant for reading in one sitting. It can be picked up and looked at in short segments. It contains, we believe, useful hints or tips to assist judicial officers in their work.

Oral Decision: Delivering Clear Reasons is also meant to be informative, enjoyable and even entertaining. The contributors are all experienced judicial officers who have learnt, often by trial and error, what works for them and what doesn't. We think it is a useful addition to your bookshelf.

Some contributors discuss giving oral decisions at times after the conclusion of the hearing, varying from later on the same day, to overnight, and even to a matter of days or weeks later. We consider that an oral decision is one contemporaneously connected with the hearing: that is, one delivered immediately after the conclusion of the hearing, or later that day, or, where the hearing finishes late in the afternoon, first thing on the following day. We acknowledge that a range of views on this exist.

We are grateful for the support of the Council of the NJCA under the leadership of the Honourable Chief Justice Wayne Martin and the work of the CEO, John McGinness and his team. We are also grateful to the writer and editor, Ginger Briggs, who has brought her own special skill to editing this publication.

Mostly, however, our gratitude goes to the judicial officers who have contributed and exposed their individual techniques in approaching the task of delivering oral judgments, and who are willing to share their experience and advice with other judicial officers.

The Honourable Justice Peter Biscoe

Land and Environment Court of New South Wales

In recent times, a combination of increased court workloads, support for Hamlet's criticism of "the law's delays", and exhortations by some senior appellate judges have contributed to the pressure on judges to deliver unreserved or swift oral judgments – a return to the practice of half a century ago.

Generally, I deliver an oral judgment:

1. in simple procedural and costs matters
2. in urgent matters. For example, where an urgent interlocutory injunction is sought and delay might cause irremediable prejudice
3. where:

   the facts, issues, arguments and law are clear enough, and

   I have reached a decision and formulated reasons and do not think that there is anything to be gained by reflecting on either.

There are advantages to oral judgments:

- They deliver justice quickly.
- The issues, evidence, arguments and law are fresh in the judge's mind.
- They contribute to the court's efficiency by preventing large numbers of reserved judgments piling up.
- In the event of an appeal, a failure to refer to evidence in an oral judgment or to analyse it fully is more likely to be excused on the ground that the recency of its tender makes it unlikely that it was overlooked. The same failure in a reserved written judgment may support an appeal.

On the other hand, there are potentially greater risks with an oral judgment than a written judgment, including:

- over-hasty judgments
- something overlooked or misunderstood
- verbosity or otherwise infelicitous expression or organisation.

Key themes

- A reserved but quick oral judgment can achieve remarkable results.
- Train staff to make their own notes, and to help you locate documents while you deliver your reasons.
- Headings are the key.

"An oral judgment without prior preparation is at risk of meandering and of overlooking something significant."

Before delivering an oral judgment I often adjourn for an hour or more or overnight to reflect on what decision should be made and on the reasons. I also write or refine a skeleton outline of the judgment. This is a reserved but quick oral judgment. It can achieve remarkable results.

It is useful to have a working copy of any written submissions and important exhibits that can be freely marked.

When delivering an oral judgment, I place before me:

- a list of the written evidence (exhibits and affidavits)
- the written evidence
- any written submissions
- the transcript (if available) or my notes of oral evidence and submissions
- where time permits, a written skeleton outline of the judgment.

To meet or minimise difficulty in reading or organising my notes:

- my staff are trained to make their own notes of the oral evidence and argument, to which (in the absence of a transcript) I can refer if there is a gap in, or a difficulty in reading, my own notes.
- I may mark numbers on parts of my notes (or the transcript) indicating the order in which I propose to address them. For example, the number "1" may signify issue 1 and the evidence and submissions relating to issue 1.

Two tips on how to avoid fumbling around trying to locate documents and cases while delivering an oral judgment:

- I often place coloured postal notes against particularly significant parts of the documents and cases, on which I might make a note; and I may highlight or otherwise mark important parts of my notes or working copies of documents;
- I place the documents and cases on the bench in such a position that they are accessible by my tipstaff who is trained to be alert to assist me, if required, to quickly locate a particular document or case.

An oral judgment without prior preparation is at risk of meandering and of overlooking something significant. Therefore, a written skeleton of the judgment generally is important. It can be developed progressively from the commencement of the hearing, or earlier. I try to structure an oral judgment in the same way as a written judgment. Headings are the key. A written skeleton might have the following headings

Introduction

A short introduction explaining what the case is about. This provides the context needed to understand the issues.

↓

Issues

A list of the issues to be decided, in a sensible sequence.

↓

A heading for each issue

Under each heading I briefly reference the relevant evidence and law, the losing party's position, the flaw in that position, and my decision on the issue. For questions of fact, I begin with short references to significant evidence of the party who has the burden of proof (e.g. aff Smith 6-7, Ex B) followed by the evidence of the opposing party (e.g. aff Jones 12-13, transcript 20.5 – 21.3). Then I say which evidence is preferred and why. I try to find objective documentary support for the determination.

↓

Conclusion

↓

Orders

In a written judgment I often state the result at the outset. In an oral judgment where the litigants are normally present I prefer to state the result at the end because the loser might get the impression of pre-judgment or be stressed by the result yet have to sit patiently in court for a considerable time while the rest of the judgment is delivered; and there is a risk that the winner may not behave altogether appropriately while the rest of the judgment is delivered.

Speaking slowly helps me to express myself better in the more challenging parts of the judgment. If dissatisfied with any words I have spoken, I promptly say I will start that sentence again. I try to keep my words and tone of voice judicious.

If an oral judgment will take a long time to deliver, consideration might be given to the convenience of the parties. Years ago, at the end of a five-day hearing in which I appeared as a barrister, a distinguished Federal Court judge said that he would proceed to deliver an oral judgment which he expected would take him more than a day but that he did not require the parties or their lawyers to remain at the Bar table while he did so. That was in a court where a daily transcript was available.

A practical problem in many courts is that the official transcript of the oral judgment, which the parties may require quickly and which may have a wider public interest, may not be available from the court reporting service for weeks. Meanwhile the time for an appeal begins to run from the date of the oral judgment. When I have access to the audiotape I may wish to consider having my own staff type the oral judgment without waiting for the official transcript.

The extent to which an oral judgment may be edited or revised is explained in the *Guide to Judicial Conduct*[1]*:*

> *A judge may not alter the substance of reasons for decision given orally. That is the basic principle. Subject to that, a judge may revise the oral reasons for judgment where, because of a slip, the reasons as expressed do not reflect what the judge meant to say, or where there is some infelicity of expression. Errors of grammar of syntax may be corrected. References to cases may be added, as may be citations for cases referred to in the transcript.*

[1] (second edition 2007) at [4.5.1] published for the Council of Chief Justices of Australia by The Australasian Institute of Judicial Administration Inc available on the internet at http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf

The Honourable Justice Alan Blow

Supreme Court of Tasmania

In my jurisdiction, oral judgments are usually only appropriate for interlocutory applications and simple appeals from magistrates, that is, cases that have taken minutes or hours rather than days. Because written judgments require revision of the evidence and/or material relied on at the hearing, it saves an enormous amount of time to give judgment orally if possible.

Key themes

- Be strategic about what to read when.
- Use a separate piece of paper for notes on each issue.
- Reserve the right to revise.

"It helps to read the available material in the manner of a grasshopper, hopping from one important part to another and skipping over the inconsequential material, when possible."

Preparation

The more time a judge spends mastering the written material before a hearing, the more likely it is that he or she will be able to give an oral decision. Generally much the same amount of time will need to be spent mastering the material, whether before, during or after the hearing. It therefore makes sense to analyse the material before the hearing.

The object of course is to identify the critical issues. It is therefore most appropriate to use strategic thinking in deciding what to read when. I like to start by reading any document that should provide rapid and thorough enlightenment, for example, the transcript of a magistrate's reasons for finding a charge proven, or the transcript of a magistrate's sentencing comments. It helps to read the available material in the manner of a grasshopper, hopping from one important part to another and skipping over the inconsequential material, when possible.

Notes

If I am planning to give an oral decision, I often make rough notes, to be used as the outline of the decision, before and during the hearing.

If the case involves multiple issues, it helps me to make notes on a separate sheet of paper for each issue. The result should be several pages of thorough notes. Later, when giving the judgment, these pages can be arranged in an appropriate order. For example, on an application for an interlocutory injunction, I might have pages headed "Defendant's conduct"; "Defendant's case"; "Balance of

convenience – Points for plaintiff"; "Balance of convenience – Points for defendant"; and "Damages adequate remedy?"

If I am going to quote a passage from a transcript or a case, then:

- in my notes I use decimals to indicate the position of the passage on the page (e.g. "T135.5" refers to the middle of page 135 of the transcript)
- I flag the relevant page and mark the relevant passage in pencil.

Revision afterwards

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. I see nothing wrong with the revision of transcribed reasons to correct grammatical errors, or to break unnecessarily long sentences into short, clear, simple ones.

His Honour Federal Magistrate Philip Burchardt

Federal Magistrates Court of Australia

In my experience of four years on the bench, oral decisions seem to arise in one of two discrete classes of circumstance.

The first is what might be described as the conventional ex tempore judgment, where the court delivers oral reasons for judgment immediately upon the conclusion of the hearing, or at some very proximate time, for example, an hour or two later or even overnight.

The second circumstance arises when the decision is in truth reserved, but the urgency of the matter makes it necessary to give oral reasons, which obviously can be prepared more quickly.

By definition, there is far more time available to prepare the judgment in the second class of case where the judgment is, in fact, essentially likely to follow the format ordinarily used for reserved judgments. The only difference is it is given orally rather than in writing.

Key themes

- Prepare.
- Do not worry about pauses in speaking.
- Announce the result only at the end.

"In any case where the scope of the proceedings is of any great length and/or the issues are of any significant complexity, in my view it is better to reserve judgment."

So far as true ex tempore judgments are concerned, I would offer the following suggestions to assist in preparation:

- define the issues that the court is being asked to determine. This is often helpfully done by looking at the pleadings and/or application and response, although on many occasions the issues will either have modified from the documentation or simply reflect oral applications
- set out enough of the facts, if possible, that are not in dispute which indicate the nature of the dispute. For example, in a family law parenting dispute, it is appropriate to identify the parents, the children, dates of birth, date of marriage and date of separation. In an initial bankruptcy matter, introductory materials will include the details of the court proceeding that gave rise to the judgment upon which the bankruptcy notice is based, and the dates upon which the bankruptcy notice has been dealt with by a registrar or the court
- set out as much of the parties' arguments as are necessary to determine the dispute, to the extent that these have not already been indicated
- announce your view of the merit of the competing arguments and, by extension, declare what you think the result ought to be.

This method is always assisted by the pleadings or other documents to which you are going to refer. Have them readily to hand and available to be quoted where necessary.

As a concomitant to the previous point, it is important to remember that any delay in the flow of the reasons is not significant. If you need time to find a document, do not get flustered, but take whatever time you need to turn up the documentation you require. This does not detract from the force of the reasons given, and, if anything, adds to the gravitas of the process.

It is implicit in the above remarks that I do not regard ex tempore reasons for judgment as being appropriate, save in cases where either it is an interim hearing or the issues are within a relatively narrow compass such that it is both practicable and otherwise appropriate to give an ex tempore decision. By "otherwise appropriate", I mean in the main where the result, at least to the decision-maker, is clear and unambiguous and does not require extensive time for consideration.

In any case where the scope of the proceedings is of any great length and/or the issues are of any significant complexity, in my view it is better to reserve judgment.

In the second class of oral judgment – in which the matter demands an urgent decision – I follow my standard modus operandi:

- I reread the entirety of the court file, making notes as I go.
- I reread either my notes of evidence and/or the transcript, again making relevant notes.
- I set out the issues and place them in a logical order. For example, in family law property cases, the list will ordinarily be the pool, the contributions issues, the future needs factors, and then the final step, just and equitable.

After working out what the issues are, I then research any issues of law that the parties and/or the case may raise and form conclusions. I decide what the outcome is to be, and then dictate my reasons for judgment, following the issues in the order.

I then handwrite my judgment in full and simply read it when I deliver my oral reasons in court.

By no means all matters that come before the court suit so simple an arrangement, but in principle that is how I approach it. The only significant difference between my oral reasons for judgment and those that I provide in writing is that the written judgment invariably starts with a very early indication of the outcome of the trial. The first page of almost every written judgment contains a summary of the issues and the court's conclusion.

I do not generally follow this structure in oral reasons because it tends to distress the losing party. In some matters, for example migration matters, announcing the result at the beginning may cause an emotional outpouring from a disappointed applicant, and impair my delivery of the judgment. It is better in oral reasons for judgment generally to announce the result only at the end.

His Honour Judge Richard Cogswell

District Court of New South Wales

Looking back

Let me commence with two experiences, one personal and the other professional. My late father was a stipendiary magistrate in Tasmania. He used to sit on circuit in country centres, and I remember one occasion when the family combined his sitting in Swansea with a holiday there. I went along to watch the case he was hearing. I was a teenager and probably thinking of studying law. It was a straightforward case involving the police and a defendant. I listened with interest and was wondering what the outcome would be. When the case concluded my father unexpectedly stayed on the bench and nobody was talking. I felt awkward for a few moments but then I realised what was happening: he was re-reading his notes, making more notes and obviously thinking. I could then understand the silence. The silence accommodated the process. Ever since then (and of course from my own experience at the Bar) I have realised that the process of decision-making can involve silence and that can occur on the bench.

As a solicitor from the late 1970s and at the Bar after that I used a hand-held voice recorder extensively. Earlier in that period there were of course no word processors. When one dictated a long letter or a 10 or 20 page advice, one had to get it right the first time. That meant that before I picked up the dictaphone I had to have a good idea – not word perfect – of what I was going to say. It meant that I had to be organised so far as having available on the desk the materials I needed to refer to or quote from in dictating the advice. More importantly, I had to have in place a structure for the advice as well as a clear idea about the concluded opinion I was going to express. One learnt early in the piece the danger of not having a clear idea about the opinion by the unnerving experience of dictating the advice only to find that one's views were changing as the advice progressed.

Key themes

- Use tabs, highlighters and coloured pens.
- Have a clear idea of the concluded opinion you will express.
- Consider staying on the bench to prepare.

"I found early in my judicial career that if I was preparing written reasons to hand down then I kept modifying the document until it was presentable and read well. This perfectionist streak in me is not a good practice to encourage: I am sitting in the District Court, not the High Court."

The first experience taught me that I can be comfortable with silence in the court room for some minutes while I go through the process of making up my mind and preparing a judgment. The advantage of staying on the bench is that I can stay in the "zone" of the argument and of the views I was forming during the argument without the distractions associated with going off the bench. Because you're in charge everyone keeps conversations to a respectful whisper and they realise what is happening (especially if you tell them).

The second experience taught me the importance of structure and conclusions and how to compose as I speak. By the time we reach the bench we will have done a lot of composing as we speak: in the office, chambers, courtroom, lectures or impromptu speeches.

Looking inwards

I have to confess that one reason I usually (but not exclusively) favour delivering oral judgments is because of my personality. I found early in my judicial career (which readers should bear in mind is less than four years) that if I was preparing written reasons to hand down then I kept modifying the document until it was presentable and read well. This perfectionist streak in me is not a good practice to encourage: I am sitting in the District Court, not the High Court.

Having a destination

Delivering judgments orally means that I do not have to be word perfect but I do draw on those dictaphone skills which were honed over many years. It means I have to be fairly well organised before I embark on the judgment. I need to have made up my mind on the issues to be addressed and to have reasons for my conclusions. This means it is vital that you have grasped the arguments, especially the arguments of the losing party and have an articulated response to those arguments. Like the danger of changing one's mind during a long advice, it is obviously important to have reached a concluded view before you embark on the judgment. If there is a reservation or a less obvious niggling doubt then that can be a danger sign for when you reach the other end of the judgment. In those circumstances it is usually helpful to leave the bench, focus on that point, take up a pen and articulate your response. It might mean that the issue is more complex than you realise.

Practicalities

I find it helpful to use tabs and highlighters. It is important to have legislation, case law and other materials nearby and ready to quote from. You should mark your notes of the oral evidence and those parts of the exhibits that you want to refer to. If I am delivering the judgment straight away then I spend a moment organising these various items on the bench so that I can find them when I need them. In the quiet process of reviewing the arguments and reaching a conclusion about them, I usually note my conclusion in a different coloured pen in the margin, supported by my reasons. I find it helpful to use what I have learnt from Professor James Raymond[2]'s judgment writing courses.

[2] Professor James Raymond; Legal Writing Consultant, New York (USA); formerly Director of English Composition, University of Alabama (USA). See: www.benchandbar.info

I try to have an introduction which articulates the issues and briefly summarises what the case is about.

To stay or go?

Not all oral judgments can be delivered after a few moments or minutes, without leaving the bench. Others need half an hour or a couple of hours in chambers and can be delivered later in the morning or in the afternoon. Others might be delivered after a few days or a week or so.

What kinds of decisions do I find I can make after a short period of reflection on the bench? Usually they are appeals or motions. A District Court judge in NSW hears sentence appeals from magistrates where the judge exercises an independent discretion and delivers their own sentence. Often one can make up one's mind after hearing both arguments and a short period of reflection. Magistrates will be very experienced in this of course. The same goes for civil motions. Other obvious candidates are decisions on the admissibility of evidence where reasons are sought or appropriate to give.

Other decisions I might deliver after a week or a few weeks. I still try to deliver them orally to keep the perfectionist at bay. Practice will obviously vary among jurisdictions. I warn counsel that whoever comes to take the judgment needs to be in a position to stay for some time. I am not bothered by spending some hours delivering a longer oral judgment, even punctuated by morning tea or lunch breaks. I indicate to counsel that such a process has the advantage for them and their clients of getting a decision sooner rather than later. Also if counsel have occupied some days or weeks conducting the case before me I see no problem in my occupying a few hours delivering judgment. If a written version of the judgment is needed for publication or for the parties then the transcription service will send it back to me and I can revise it, giving it paragraphs, punctuation and proper syntax.

It can be helpful either on the bench or during a short adjournment to take a fresh page and write the headings that you need to address during the course of the judgment. These might be quite fundamental for a new judge: introduction; issues; oral evidence and exhibits; legislation and case law; competing arguments; findings of fact; conclusions of law and conclusions on each issue. It's a helpful discipline to do such a list to ensure that you don't overlook something obvious.

His Honour Magistrate Peter Dare

Local Court of New South Wales

The vast bulk of decisions delivered in local (or magistrates) courts are both oral and ex tempore. There is rarely time to reserve cases for considered written judgments. Over the years jurisdictional limits have noticeably increased, so that cases formerly within the strict province of the District Court are now dealt with to finality in the Local Court. For example, in the criminal jurisdiction matters once regarded as "complex" sentencing cases in the District Court are now commonplace in the Local Court and more often finalised, by oral decision, on a list day.

Key theme

- Oral decisions deserve as much attention as reserved decisions.
- Use a sentencing template.
- Update your template when the law changes.

"Litigants, particularly in crime, are entitled to know the legal and factual reasoning behind any result. This is of even greater significance if a custodial penalty is involved."

Such cases are no less deserving of proper attention because of this. Litigants, particularly in crime, are entitled to know the legal and factual reasoning behind any result. This is of even greater significance if a custodial penalty is involved. A transcript of one's remarks is not taken out except upon request by the parties or in the event of an appeal. It is my experience that by far the greatest number of cases calling for oral decisions concern criminal sentencing cases. In order to cover all the necessary bases and to provide consistency in sentencing, my constant companion on the Bench is a "sentencing template". The original idea for such a template stemmed from my colleague, Magistrate Gordon Lerve, of the Albury Circuit. I gratefully acknowledge his work and I am able to share its content and operation with you with his kind permission and generosity of spirit. Mine is updated regularly with any changes to the law and provides a reliable check-list so that nothing is overlooked in the oral decisions. The format provides a flexible and coherent structure for the decisions.

The terms of reference given to the author for preparation of this paper include that the article not be scholarly or theoretical. I am sure I can guarantee both. The accent is to be on practical contribution and encouraging descriptions of techniques the contributor finds helpful in preparing for and delivering oral decisions and, in particular, of help to new judicial officers. I hope to have more success here.

The legislation and cases referred to reflect the applicable law in New South Wales as at 2010.

The indented passages are for the magistrate.

The charges and the plea

> The Offender stands for sentence in respect of the following charges:

Set out the offences either in full or in short form, stating also the relevant legislation.

> The Offender pleaded guilty on (date). Those pleas of guilty were entered on the first available opportunity and accordingly I allow the full 25 per cent discount, which is a reduction in an otherwise appropriate sentence, for the utilitarian value of the plea: see *R v Thompson, R v Houlton* (2000) 49 NSWLR 383 and S. 22. *Crimes (Sentencing Procedure) Act, 1999(NSW)*. See also *R v Borkowski* [2009] NSWCCA 102 at [32].

If the plea is late, for example on the day of the hearing, or is the result of plea negotiations with the authorities:

> The Offender pleaded guilty on (date). The pleas of guilty were not, therefore, entered on the first available opportunity but were the result of negotiations with the prosecuting authorities. He has thereby received his benefit and is not eligible for further favourable treatment on the basis that the pleas have utilitarian value: see *R v Stambolis* [2006] NSWCCA 56 at [10] – [11].

I see no harm in providing citations as authorities for the propositions put forward in an oral judgment. It provides some indication that you might actually know what you are talking about and provides a reference point for others. There is no need to include slabs of quotations from the respective judgments and I would recommend against it.

Facts

> As is the custom in the Local Court, the matter proceeded by tender of a Police Fact Sheet – Exhibit 1 on sentence. There was no objection to any of the content and I will proceed to sentence on the basis that what is contained within the Fact Sheet are the agreed facts which are as follows:

or

> The Fact Sheet is now part of the court record. It is sufficient for present purposes to simply provide my own summary.

Ensure that the principles in *De Simoni v The Queen*[3] are not breached.

Maximum penalty

If the charge/s are indictable offences being dealt with summarily:

> The statutory maximum penalty for each offence is imprisonment for (X) years upon conviction on indictment. That severity is a good indication as to the objective seriousness of the offences. Section 267 *Criminal Procedure Act 1986 (NSW)*, provides that a Local Court may only impose a sentence of two years but this is subject to Section 58 *Crimes (Sentencing Procedure) Act 1999 (NSW)*, which permits cumulation or partial cumulation for up to five years.

or

> The maximum penalty provided for the offence for which the offender stands for sentence is (X) years

Where one is dealing with, say, a single charge which, viewed realistically, calls for a sentence in excess of the jurisdictional limit of the Local Court and it is not possible to cumulate:

> The matter presently under consideration is one to which the principles enunciated by the Court of Criminal Appeal in *R v Doan* (2000) 50 NSWLR 115 – per Grove J at [35] apply – that is, the result of true construction of the statutory provisions in New South Wales is that, what has been prescribed is a jurisdictional maximum and not a maximum penalty for any offence triable within that jurisdiction. In other words, where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit.

Assessment of the criminality

Make brief comments about the more significant or salient features of the case: then,

> I have earlier looked at the objective seriousness of the offence/s, I now look at the seriousness of the offending. For the purpose of proceeding to sentence I am of the opinion that this matter falls at the (lower)/(towards the lower end)/(below the half-way mark)/(at the half-way mark)/(well above the half-way mark)/(towards the top of the scale)/(is an example of the worst category of this type of offence).

[3] (1981) 147 CLR 383

Criminal history of the offender

Given the time constraints that operate in the Local Court, I annexe to these remarks a copy of the offender's criminal history or set out in summary form the more significant features of the criminal history, for example:

> The offender on (date) was convicted of an identical offence involving the same complainant.
>
> I pay particular regard to the manner in which an offender's criminal record may sound in sentence: *R v McNaughton* (2006) 66 NSWLR 566; *Veen v the Queen (No. 2)* (1988) 164 CLR 465; *R v Wickham* [2004] NSWCCA 193; *Hillier v Director of Public Prosecutions* (2009) NSWCCA 312 and *Weininger v The Queen* (2003) 212 CLR 629.

or

> The offender has no criminal history.

Then

> The offender is generally (not) assisted by his/her record.

Offender on conditional liberty.

> The offence(s) for which the Offender now stands for sentence constitute(s) a breach of conditional liberty in that they breach (details of the order for conditional liberty, for example, a Bond to be of good behaviour, a suspended sentence, bail or parole). That is a matter of "major aggravation": see *R v Ponfield* (1999) 48 NSWLR 327 at [48] and Section 21A(2)(j) *Crimes (Sentencing Procedure) Act 1999(NSW)*. See also *R v Wallace* (2007) NSWCCA 63.

Pre-sentence report

Summarise the more salient or significant parts of the report, indicating whether the contents are accepted or rejected. Often the report will contain hearsay material not led at the hearing on sentence or will conflict with the plea. The report can be accepted on the limited basis of the sentencing options available: see *R v Olive*[4]. One must always be mindful of the decisions in *R v Dodd*[5] and *R v Elfar*[6] as to inappropriate weight to subjective matters and matters put for which there is no evidence or supporting material.

Plea in mitigation and prosecutor's submission

Summarise the pleas, indicating whether the submissions are accepted or rejected in whole (rare, indeed) or in part (sometimes things are a little over the top and need to be put in perspective).

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[4] [2006] NSWCCA 329
[5] (1991) 57 A Crim R 349 at 354
[6] (2003) NSWCCA 358 at [25]

Note, however, *R v Dodd*[7] – "Even so, there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective seriousness of the case:" *R v Rushby* [8]. see also *R v Carroll* [9]

General remarks

Do not go through Section 21A of the *Crimes (Sentencing Procedure) Act 1999* and check each matter – this is fraught with danger and will generally bring about "double counting": see *R v Tadrosse*[10] ; *R v Elyard* [11].

Note the obligation to give effect to Sections 3A and 5 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. If sentencing a juvenile offender, note the obligation to comply with Section 6 of the *Children (Criminal Proceedings) Act 1987(NSW)*.

With multiple offending, note the obligation to comply with the principles of totality as outlined in *Mill v The Queen*[12] and *Pearce v The Queen* [13]. Where cumulation or part-cumulation is required, see *R v Merrin*[14] : "This Court has been at pains to make it clear that sentences for multiple offences are not made concurrent simply because they arise from a single incident of criminality or because they are of a similar nature and committed in similar circumstances."

If a Commonwealth matter, note the requirement to consider the factors set out at Section 16A of the *Crimes Act 1914 (Cth*).

If a custodial sentence is to be imposed, note that it is inappropriate to impose such a sentence unless the sentencing judicial officer is of the opinion that no other sentence is warranted: see *R v Zamagias*[15] *R v Barlow*[16]. If a juvenile offender, note that the relevant legislation provides that a custodial sentence should not be imposed unless the court is of the view that it would be "wholly inappropriate" to deal with the matter otherwise.

If a custodial sentence is to be imposed, is it to be suspended, if so, on what basis? See *R v Zamagis* [17]. If the sentence is to be suspended, note the requirement to initially come to the conclusion that no other sentence is warranted.

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[7] (1991) 57 A Crim R 349at 354
[8] (1977) 1 NSWLR 594
[9] (2008) NSWCCA 218 at [20]-[21]
[10] (2005) NSWCCA 145
[11] (2006) NSWCCA 43 at [39]
[12] (1988) 166 CLR 59 at 63
[13] (1998) 194 CLR 610
[14] (2007) NSWCCA 255 at [36]
[15] (2002) NSWCCA 17 at [24]-[25];
[16] (2008) NSWCCA 96
[17] (2002) NSWCCA 17

If a custodial sentence is to be imposed and not suspended are there "special circumstances" warranting the statutory proportion to be reduced? See S. 44 *Crimes (Sentencing Procedure) Act 1999(NSW)*. If so, set them out, for example, the offender's age, the need for extended supervision upon release, the offender's first time in custody – see generally, *R v Simpson*[18] and *R v Fidow* [19].

If the matter is an indictable offence and you conclude that a sentence outside the jurisdictional limit is warranted, you could express that conclusion in these terms:

> In all of the circumstances, given the facts and the various aggravating and mitigating factors as I have found them to be, I am of the opinion that the criminal in this matter is deserving of a sentence of (for example) three years. This is the significance of the decision in *R v Doan* (2000) 50 NSWLR 115. The initial criminality and appropriate sentence is assessed without reference to the jurisdictional limit. Allowing, as I have, a 25 per cent discount for the plea of guilty, that gives a sentence of 27 months. Accordingly, I impose a sentence of the jurisdiction limit of a fixed term of two years imprisonment.

[18] (2003) 53 NSWLR 704
[19] (2004) NSWCCA 172 at [18]

Her Honour Judge Felicity Davis

District Court of Western Australia

When to deliver oral decisions

It is often recommended that judicial officers reserve decisions in order to have time to reflect on issues of fact and law and provide cogent and well reasoned written reasons. A decision should be reserved if the factual issues or legal principles are complex, there has been a lengthy trial or there are serious credibility issues to be determined.

There are, however, occasions where it is not desirable to adjourn and provide written reasons, but better to deliver an oral decision immediately. For example:

- in simple interlocutory or pre-trial applications (whether civil or criminal)
- in short hearings where there is no factual dispute, e.g. appeals
- when the matter is urgent
- when sentencing (in WA all sentencing remarks are delivered orally and transcribed).

Key themes

- Create a road map for the path ahead.
- Use plain English.
- Address the losing party's position.

"An oral decision does not have to be a work of art and, although it will require some concentrated work, you will not have to spend hours fine tuning it."

Advantages of oral decisions

The advantages of an oral decision are that the parties do not have to wait weeks or months for a decision, and you are relieved of another reserved judgment. An oral decision does not have to be a work of art and, although it will require some concentrated work, you will not have to spend hours fine tuning it.

Recently I was preparing detailed notes on a criminal pre-trial application to be heard the following day, which was to be determined largely from documents on the prosecution brief, when I was visited by a colleague. I debated with him whether to deliver an oral decision or adjourn and publish written reasons. He strongly suggested that, since I had done all the work, I should not reserve but deliver an oral decision immediately. "You are a trial judge," he reminded me. "Your job is to run trials, not to write beautifully crafted judgments." After hearing submissions from counsel and making a few changes to what I had drafted and some additional notes about matters on which I had to make findings, I was comfortable delivering my reasons orally.

The essential requirements of an oral decision

Heydon J outlined the essential requirements for an oral decision in *AK v The State of Western Australia*[20]:

> Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed.

Preparation, preparation, preparation

Like anything else, the secret to success in delivering an oral decision is preparation.

Read ahead – read all the pleadings, affidavits (if they are to be tendered), statements and submissions (if filed).

Research any legal issues which have been identified. Read in advance any authority which either counsel or you identify as being relevant. Have that case with you for the hearing so that you can refer to it when counsel raises it, or you can raise the case with counsel if they have not identified it in their submissions. Mark up any relevant passages for reference during the hearing or when giving your reasons.

Identify and list all the issues which you must determine. Confirm the issues with counsel at the outset of the hearing.

If you can, draft some reasons in writing before the hearing, leaving gaps for details on issues about which you will have to make findings. Draft reasons should be structured in the way you would for written reasons, but be brief.

It is a good idea to make use of templates and precedents. You may find that you are often dealing with similar applications and you are able to develop a template dealing with the legal principles applicable to a particular topic, for instance, the principles relevant to sentencing for a particular type of offence.

If you are able to do so, it is also a good idea to make a list of potential findings. This will usually only be possible where there is evidence on the papers provided to you before the hearing, for example on an appeal or for a sentencing.

You will also need to consider and settle whatever orders may need to be made.

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[20] (2008) 232 CLR 438 at 468

If for any reason you are not able to prepare draft reasons in advance of the hearing, then at the very least you should have a list of headings or a checklist of the matters you need to cover – a "road map" of what you must deal with when delivering your decision. Stick to this when delivering your decision, otherwise you run the risk of omitting a relevant principle or discretionary factor.

Take good notes

If a transcript is being produced it is unlikely you will have access to it, or all of it, before you will be delivering your oral decision. Your note taking must therefore be good.

I try to take verbatim notes and I also make notes on, or amendments to, my draft reasons, relevant to each issue I have identified during my preparation.

Take your time before delivery

Take whatever time you need during or at the end of the hearing to collect your thoughts and make your decision, before delivering your oral decision, especially if the hearing has been lengthy or become emotionally charged.

Adjourn for as long as you think you will need – half an hour, until the afternoon or even until the next day. Remember, you are in charge! If you need more time to consider a point, write something out, undertake some further research, or even run something past a colleague, then adjourn so that you can do whatever you need to do.

Use plain English

However you prepare your oral decision, it is important to use plain English. Your reasons should reflect the way you would normally speak to the parties in court. They need to be able to understand your decision.

Delivery of the oral decision

Make sure all your notes and draft reasons, template or checklist are in front of you, marked up and ordered in a way that you can easily access and follow them.

Go slowly and speak clearly.

Refer to the matter or application which you must decide, setting out who did what to whom, the issues and the applicable legal principles.

Make findings.

When making findings of fact, there is no need for an elaborate recitation of all the facts. Start with facts which are not in issue, make other findings "on the way" as you deal with each piece of evidence and then make findings on disputed issues.

Apply the law to the facts as you have found them.

Pause between each paragraph, and whenever you need to find your papers and gather your thoughts, no matter how long this takes. (Pauses don't show on the transcript.)

Remember – use plain and clear English.

Avoid adjectival or emotional language, as this may raise tension levels in the court room and distract you. Keep your descriptions as neutral as possible.

Keep sentences short. I have on occasions found myself during lengthy oral reasons wondering if I am making sense and, worst of all, trying to remember how I started a sentence! If you think you are not making sense, stop, withdraw what you have said and start the sentence or section of your reasons again, telling the parties that is what you are doing. Do not be embarrassed if you have to do that – you are doing your job as best as you can.

Do not hesitate to clarify or further explain something that you said earlier, or add to what you said earlier, if you find that there is something you have overlooked.

Always keep in mind the above passage from *AK v The State of Western Australia*. In particular, in your reasons you will need to address the losing party's position, clearly explaining why you do not accept that position and why you have arrived at your decision.

Finally, a word of warning about statements made or views that you may have aired in exchanges with counsel during the course of submissions. Statements made or views expressed during submissions which are not subsequently adopted in your reasons for decision will not comprise part of the reasons: see *AK v The State of Western Australia*[21] . If the matters you have stated to counsel in the course of argument form part of your reasoning, you will need to include these in your reasons for decision. However, there can be occasions when it is appropriate to expressly adopt what you said during an exchange with counsel in order to save time and repetition. In that case it is essential to state in your reasons that you have made the relevant finding for the reasons which you outlined during submissions, preferably with a little elaboration so there is no doubt what the reasoning was. This should never be done in respect of significant findings.

Editing of the oral decision

You may wish to reserve the right to edit your reasons. If you do so, any edits should be confined to correcting grammar, punctuation and spelling and resolving any ambiguities. You may add or correct citations for authorities you have referred to. It is also permissible to add headings and paragraph

[21] (2008) 232 CLR 438 at 446, 468 and 483

numbers. It is not permissible to alter the substance of your reasons so as to change the meaning of what you have said: see *R v Tupou*; *ex parte Attorney-General* (Qld)[22] *DPP (Cth) v Thomas*[23]

22 [2005] QCA 179;
23 [2005] VSC 85 at [17]

His Honour Federal Magistrate Warren Donald

Federal Magistrates Court of Australia

A template

For a new judicial officer, or for one new to a particular type of matter, preparation is the key. It is unlikely that on the first several occasions that a judicial officer deals with a particular matter, he or she will be able to deliver an oral judgment without reserving for some time. This is certainly the case when first following the process described below. The delay in delivering the decision and the effort involved is, however, one step along the path to being able to deliver significant numbers of decisions orally and without reserving. The early efforts, therefore, should be seen as necessary strides toward a situation where, in most cases, justice can be delivered promptly and where the debilitating burden of reserved judgments is significantly reduced.

Of significant benefit to me has been decision to *not* attempt oral delivery of decisions when first sitting in a particular area. On completion of the hearing, significant time should be taken to prepare reasons, including appropriate summaries of the law, and dividing the reasons into discrete areas with headings or otherwise. For example, in a family law matter, headings could be included in the reasons for decision relating to the nature of the competing applications; the background facts or history; the applicable law; and then headings where the matter is discussed in the context of the applicable law.

Key themes

- Do not attempt oral decisions when first sitting in a particular jurisdiction.
- Create templates on your computer.
- Use plain language.

"Even when working with guides or templates, it will take some time before the judicial officer will be able to deliver an oral decision either without leaving the bench or only leaving it for a very short period. The process should not be rushed."

The ability to use a word processor (if that is what they are still called) is of great advantage. It allows a judge to save the reasons; improve or modify the form of the reasons and even to use the "template" or "guide" discussed below. Using a computer on the Bench during the hearing removes the need for sometimes indecipherable handwritten notes and also allows the space below each heading to continually expand. The reordering of reasons and discussion of evidence can also then be done often without substantial delay to the delivery of the oral reasons.

Those reasons can become a template to guide the gathering of evidence in the course of subsequent hearings. This is done by simply using a word processor to delete those parts of the reasons which deal with the particular facts of that matter. What is then left is a guide or template that can be used or adapted for subsequent matters of a similar type. This guide or template will have headings with space to insert new facts or discussion and will have a considered discussion of

the law in relation to that type of matter. Thus the time and effort expended in the preparation of reasons initially is not lost or wasted. The discussions of law can be improved over time, if desired, and amended in the light of developments of the law in the future.

The same template can be "cut and pasted" with other similarly prepared templates using a word processor to create possible templates for other applications incorporating some issues dealt with in one template and issues dealt with in another template.

In many jurisdictions it is possible, prior to a hearing, to access affidavits detailing the intended evidence of the parties and often listed on an "agreed list of documents". After reading these documents, it should be possible to anticipate most issues likely to arise in the course of the hearing and to prepare the template or guide. In any case, most of the relevant issues can usually be discerned prior to the commencement of the hearing.

As indicated earlier, sufficient space can be left under each heading and within the discussion of the law section. If reading from affidavits relied upon by the parties, some brief notes can be made under those headings which can subsequently form part of the oral decision.

Once in court, further notes can be made under each of the relevant headings or as to the law as the evidence and submissions are adduced or given. The less one is familiar with the type of matter, the fuller the notes tend to be. If one is quite familiar with the area, the subject of the hearing, the briefer the notes required. Eventually, as one does more and more of that type of hearing, the notes become almost a "mind jogger" or checklist to ensure that in the course of delivering oral reasons a relevant area is not inadvertently omitted from discussion.

The skill is one that is largely dependent on experience and, of course, on the complexity of the issues to be dealt with. Even when working with these self created guides or templates, it will take some time before the judicial officer will be able to deliver an oral decision either without leaving the bench or only leaving it for a very short period. The process should not be rushed. When first adopting this technique, it might be prudent to reserve overnight or for longer so as to ensure that the spaces within the template or guide contain all that is necessary to be commented upon. Indeed, it may be thought initially that the reasons should be in a form almost able to be published but still delivered orally. As experience and confidence in the area grows it should be quite possible, as indicated earlier, to significantly reduce the notes appearing in the guide and to really rely upon them for guidance only. In those circumstances, and in relatively simple matters, it is sometimes possible to marshal one's thoughts sufficiently to not even leave the bench at the conclusion of the matter and to then deliver reasons. If in doubt either leave the Bench to consider the intended reasons and possibly supplement them in note form before oral delivery.

It is important that the parties and counsel can clearly understand the reasoning behind the decision. As it is delivered orally and often in the presence of the parties, this understanding can only be achieved by the use of plain language and clear and uncomplicated style.

His Honour Judge Roy Ellis

District Court of New South Wales

I remember a time when a criminal jury trial could be started and finished in a day and judgments, even in the High Court, ran to but a few pages! The years since have produced complexity and prolixity in judgments. I doubt there is a judge in the country who does not wish for more time for judgment writing. In my busy criminal practice, the only way I can survive is to deliver oral judgments, usually ex tempore.

While the edification of the parties, the Crown and accused/offender is the primary purpose of providing reasons for judgment, should the matter go on appeal the reasons provided will be closely examined for omissions and errors. Judicial concern regarding such appellate appraisal and possible criticism seems to be a significant stumbling block to delivering oral decisions, especially ex tempore decisions, by many judges. That is a great pity as the advantages of delivering oral decisions far outweigh these perceived disadvantages or concerns. Further, these concerns may be misplaced or exaggerated as it is clear that appellate courts are prepared to and do make allowances when dealing with ex tempore oral judgments.

Key themes

- Keep the paperwork organised.
- Be wary of quoting large extracts from pre-sentence and other reports.
- Ensure your judicial reasoning is clear, consistent and correct.

"As you deliver judgments, whether written or oral, you build up a bank of reference material that can be used again and again."

As is the case with most things, preparation is the key to delivering oral decisions of a high standard. For the recently appointed it is a learning curve which involves developing templates, non-case-specific "purple passages" of law, appropriate practices during the hearing and confidence in terms of decision making and delivery. Before starting any oral judgment you must make your decision regarding the final outcome. Is the evidence admissible? What are the precise details of the sentence? This means that once the evidence and submissions have concluded you should take the necessary time to write out the sentences, including starting and finishing dates, that you intend to impose or the evidentiary ruling you propose to give.

Templates or short "cheat sheets" can be created and used as a tick list as you deliver your oral decision. These templates also provide the structure for the judgment so that the decision and reasons follow a logical and well-structured format. With repetition a well-structured and formatted

judgment will become almost second nature. These "cheat sheets" should be short, in point form and easy to decipher with a quick glance while your mind is focused on the other written material or on articulating your reasons.

During the *voir dire* or sentencing process you should make short point form or keyword notes which can be used as a mental prompt as you deliver your oral decision. These notes should include all relevant legal issues and significant factual matters that need to be addressed in your oral judgment. Similarly, working copies of exhibits such as statements or psychiatric reports should be sparingly highlighted as you are reading them so that they too can be used as a mental prompt or a quotation as you deliver your oral decision.

Once you know what you are going to do, you need to organise the paperwork on the bench. I use a laptop on the bench so I usually open my template or cheat sheet and glance at it every now and again to make sure I am following the right format and I mentally tick off mandatory "mentions" as I give my reasons. Place your notes to one side so you can read them easily and put the other highlighted documentation in the order you intend to refer to them.

Psychological, psychiatric and pre-sentence reports must be considered very closely in any sentencing exercise. However, the desirability of incorporating large extracts of these reports into oral decisions varies considerably. In some difficult sentencing exercises it is necessary to highlight relevant and telling passages within such reports and quote them in full. In other more "run of the mill" cases, especially where there is general consensus regarding the sentence, it is often sufficient to simply note that the relevant report has been read and that the Court has closely considered the information provided, the opinions expressed and the conclusions reached by the author. Another way of incorporating these reports into oral judgments is to refer specifically to headings such as "Background", "Attitude to offence", "Psychological testing" or "Mental health issues", noting that you have closely considered all the information under each of these headings but that you do not propose to extract such material into the oral decision.

As you deliver judgments, whether written or oral, you build up a bank of reference material that can be used again and again. The legal issues should be drafted in a non-case specific manner so that you can include them in any future oral decision. There is a degree of repetition in sentencing in that offences such as robbery, sexual assault and drug supply occur regularly. I have developed "purple passages" dealing with "common" offences and many of the legal issues that also crop up regularly such as principles relating to guideline judgments, standard non parole periods, parity, totality, punishment, victims and rehabilitation. I have these clearly indexed on my laptop and I open them when relevant, minimising them until I need to read from them during my judgment. Other judges simply print them out and create a folder to which they refer while delivering judgment.

In relation to sentencing remarks, the need for detail or legal reference varies considerably. In many cases the outcome is known and accepted by the Crown and defence alike. In some cases a custodial

sentence is the only appropriate outcome and the only issues are the length of the sentence and the ratio between the parole and non-parole periods. I often provide the parties with an indicative sentence while seeking their views as to whether such a sentence falls within the appropriate sentencing range. I do not do this in order to bind the parties but rather to ensure that the ultimate sentence falls within the appropriate range. The views of the parties can often provide a judge with a good sounding board against which to test any stated indicative sentence.

While there may well be a need in any given case to include principles of law, these ought not be couched in legalese as that makes the task more complicated than it needs to be and completely misses the point that the reasons are usually given for the benefit of lay persons – plaintiff's, defendants, accused/offenders and complainants/victims.

The factual basis of any evidentiary ruling or sentence must be included in the judgment. If the facts are brief the agreed set of facts can be read, or even better, the salient facts can be briefly summarised. If the agreed facts are lengthy a reference to their existence and the allocated exhibit number accompanied by a brief summary of the salient facts should be sufficient.

If issues of credibility have been raised they should be determined or a comment made that it is not possible to determine such issues or that determination of such issues is unnecessary for the purpose of the exercise. For instance, arriving at an appropriate penalty does not require that a Court settle every factual dispute that may have arisen but it is usually best to note the problem and how it was dealt with.

Every oral judgment should clearly set out the judicial reasoning process, that is, the application of the relevant legal principles to the facts in the given case. Integrity is essential in this process and its application should be transparent to the audience. Obviously, an interested party may not like or agree with the outcome but still feel comfortable with the decision if the judicial reasoning process is clear, consistent and correct.

In conclusion, getting into the habit of delivering oral judgments encourages decisiveness, preparation and organisation of materials and the Judicial mind. It has the benefit of notifying the parties of the outcome and the reasons for the outcome within an expeditious timeframe. It avoids the need for obtaining lengthy transcripts and then reading those transcripts and the rest of the brief two, three or more times. In my experience, it takes at least four times as long to write a reserved judgment as it takes to deliver an oral decision. Delivering oral decisions therefore has the added benefit of removing or minimising the considerable stress associated with a backlog of reserved judgments. In my view, given the onerous workload under which judicial officers labour, efficient and timely disposal of judgments is unlikely unless a Judge regularly delivers oral decisions.

The Honourable Justice Arthur Emmett

Federal Court of Australia

When a judicial officer is required to make a decision after hearing argument, it would be convenient for the parties to know the decision as soon as the argument is complete. It would also normally be convenient for the judicial officer personally, if he or she has formed a firm view on the matter, to be able to make a decision as soon as argument is complete, before embarking on the next hearing. However, it is necessary in all cases, unless the parties expressly say they do not want them, for the judicial officer to give reasons for a decision. In an ideal world, a judicial officer would be able to give a decision with reasons as soon as the argument finishes.

In the real world, however, that is not possible. It is not possible, of course if the judicial officer has not reached a firm conclusion. It will also be particularly difficult where a hearing has been conducted over a considerable period of time with complex evidence and issues. However, in a case where the issue or issues are readily discerned and the judicial officer has formed a firm view, it would be better for all, including the judicial officer, to give a decision with reasons straight away, while the argument and the reasons for the conclusion are still in the mind of the judicial officer. Clearly, some preparation will be needed before endeavouring to give oral reasons for a decision immediately following the completion of argument.

Key themes

- Do not quote the law verbatim.
- Avoid long sentences in which you may lose your train of thought.
- Correct the transcript while it is still fresh in your mind.

"In any good speech, one starts with saying what one is going to say, one then says what one wants to say and then one finishes by saying what one has said. There is every reason why oral reasons should follow that simple structure."

As with any reasons, one starts with an introduction that involves a statement of the question and the background circumstances against which the question has to be decided. One then launches into the contentions, particularly those of the losing party, followed by the reasons for rejecting those contentions. One then finishes with the conclusion. In any good speech, one starts with saying what one is going to say, one then says what one wants to say and then one finishes by saying what one has said. There is every reason why oral reasons should follow that simple structure.

To begin with, one must have the issues clearly in one's mind. Ideally, one will have formulated the issues, both legal and factual, in advance. Clearly, it will be helpful if the parties have produced written submissions in advance. In that case, the submissions should be analysed and studied with a view to having clear in one's mind the issues and the arguments respectively formulated by the parties. If there are no submissions in advance, careful reading and analysis in advance of pleadings or affidavits, as the case may be, will be necessary. The parts of submissions, pleadings and affidavits that one might want to use in the reasons must be readily accessible, not only for the purposes of the argument, but also when the time comes for delivering reasons. Accordingly, highlighting the key parts of submissions, pleadings and affidavits or can be useful and helpful. Any other technique that will enable one to eliminate the useless verbiage and enable concentration on the essence of the factual and legal material will help.

If the materials are not available in advance, it will be essential to make careful notes during the course of the evidence and argument so that the evidence and contentions can be fairly reproduced in oral reasons.

Where an issue is concerned with the effect of a statute, it is helpful to have a working copy of the relevant provisions available in order to highlight the relevant parts of the statute. Instead of quoting statutes verbatim, it is helpful, in formulating one's reasons, to state the effect of the relevant provision. For example, s 31(1) of the Copyright Act 1968 (Cth) states as follows:

> (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:
>
> (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
>
> (i) to reproduce the work in a material form;
>
> (ii) to publish the work;
>
> (iii) to perform the work in public;
>
> (iv) to communicate the work to the public;
>
> (vi) to make an adaptation of the work;
>
> (vii) to do, in relation to a work that is an adaptation of the firstmentioned work, any of the acts specified in relation to the firstmentioned work in subparagraphs (i) to (iv), inclusive; and
>
> (b) in the case of an artistic work, to do all or any of the following acts:
>
> (i) to reproduce the work in a material form;
>
> (ii) to publish the work;
>
> (iii) to communicate the work to the public; and
>
> (c) in the case of a literary work (other than a computer program) or a musical or dramatic work, to enter into a commercial rental arrangement in respect of the work reproduced in a sound recording; and

> (d) in the case of a computer program, to enter into a commercial rental arrangement in respect of the program.

If the only question in issue concerns the effect of s 31(1)(a)(vi) in the case of the music for a song, one might need to say no more than:

> Section 31 relevantly provides that copyright in relation to a musical work includes the exclusive right to make an adaptation of the work.

Where, as in that example, the section has various elements, only some of which are relevant for the particular issue being decided, it is helpful to highlight only those parts that are relevant to the case in hand, as indicated above, as an aide memoire. That sort of preparation can be carried out before hand or during the course of argument.

Before commencing to give oral reasons, one should have a clear plan in one's mind of the structure of what one is intending to say. If one has pleadings, affidavits or written submissions in advance, one can of course prepare some brief notes of the structure in advance. There is no reason why one should not, without leaving the bench, make some brief notes about the structure of what one is about to say.

It is often helpful to begin with a statement of the principal question or issue that is to be decided. The question should be formulated with care and precision. That helps to get one's mind thinking along the appropriate lines, by easing one's mind into the frame necessary for giving reasons.

Where an issue depends upon a series of written communications, whether they be letters, emails, diary notes or whatever, it will clearly be essential to ensure that, before you commence giving your reasons, you have all of the documentary material in an appropriate order, preferably chronological, or at least in the order in which you are going to refer to the documents in the course of your reasons. Where you have the luxury of having the material in advance, it is essential that you organise that material into a logical form so that you know where it all is when you come to deliver your reasons. That may require preparatory work in advance, particularly where there are considerable numbers of documents involved.

Where possible ensure that the parties provide materials in a form that can be conveniently organised into chronological order. If they are not in good order to start with, take the time during argument to get them into a usable state. As with a statute, highlighting the relevant parts of the documents that you want to refer to in the course of your reasons will make the task much easier.

Where it is necessary to describe the factual background against which the decision is being given, begin with uncontroversial background material to set the stage for the story that is to be told. That helps to get one's mind working along the right track. In particular, uncontroversial facts should be part of the material highlighted in advance.

When giving oral reasons, it is desirable to avoid long and complicated parenthetical sentences, in which one might lose one's train of thought. That requires thinking before each sentence. There is no need to rush the delivery of reasons. Rather, it is preferable to formulate each proposition in one's mind before articulating it. Inevitably, notwithstanding elaborate preparation, there will be occasions where one loses a thought half-way through a sentence. Ideally, one's sentence should not be so long or complicated that that can happen. However, there is no reason why one can not say I withdraw that and start the sentence again.

Experience in dictating, either to a stenographer or into an electronic device, is very useful preparation for the efficient delivery oral reasons. The techniques are very similar. It is useful practice for giving oral reasons to do a first draft of any reserved judgment, by dictating it from beginning to end, as one might do in court when giving oral reasons ex tempore. Attempting to do so will help develop the technique of formulating the structure of the reasons.

Where one proposes to refer to authorities, it is helpful to have a photocopy of the relevant pages to which reference is to be made, with the particular passages that one intends to read or the effect of which one intends to state in the reasons highlighted. Again, it is essential to have all the authorities sorted in advance in the order in which one proposes to refer to them.

One may have several piles of papers on the bench dealing with different aspects of the reasons. There may be one pile of pleadings and affidavits, another pile of documentary evidence, correspondence and the like and the third pile consisting of copies of the cases to which one proposes to refer.

One should educate practitioners who regularly appear before the court to ensure that they make one's life easier by providing the court in advance with the materials that you want, in a logical form. One's task will be easier if a brief outline of submissions has been provided in advance, even if the outline is no more than a list of the topics that are to be addressed by counsel.

Bear in mind that it is permissible to tidy up the transcript of ex tempore reasons, so long as one does not change the underlying reasons. It is permissible to correct grammar and to correct the structure of the reasons, so long as the basic substance remains unaltered

It is highly desirable to endeavour to get the transcript as quickly as possible so it can be corrected while the reasons are still fresh in one's mind. One must be sure to keep all of one's notes and piles of papers together, until the transcript is received so that you can correct it when it arrives.

His Honour Magistrate Martin Flynn

Magistrates Court of Western Australia

Introduction

In May 2010, the following email was sent to each West Australian magistrate on behalf of the Education Committee of the Court:

> You are asked to send an email to the committee setting out one piece of advice on delivering oral judgments that you would give a newly appointed magistrate. Your advice may be short. For example, "Always know the result of the case before you start your judgment." We want to hear your ideas.

The ideas flowed in. Some were funny. "Never prepare a draft written judgment before you hear a case as it will invariably settle." Many were poignant. "Do not change who you are because that is what got you the job in the first place." On examining the responses, I was struck by two things.

Key themes

- Adjourn briefly before delivering your reasons.
- Test your reasoning before you deliver your decision.
- Explain your role to unrepresented litigants.

"The process of working out the result before you open your mouth is bound to improve the quality of the decision."

First, I was able to categorise most of the advice as either a "tip" for adopting a process of decision making or a "trick" to improve the delivery of the decision. Knowing the result of a case before you start delivering oral reasons is a good tip; the process of working out the result before you open your mouth is bound to improve the quality of the decision. Keeping a small file of frequently used quotations on the bench is a useful trick; the delivery is bound to be more fluent. Many magistrates made similar points. I have set out below the frequently recurring tips and tricks.

Secondly, I detected an inherent tension between one frequently suggested trick for delivery (a judgment template) and many of the tips on process. I will say more about the tension between tricks that assist with delivery and improve the quality of the decision in the final section of this paper.

Three tips (on processes to improve the quality of the decision)

1. The most frequently given piece of advice on how to improve the quality of an oral judgment was to always take a brief adjournment before delivering the judgment. "It doesn't matter how sure you are about the result, always stand down for a short time at the end of submissions to gather your thoughts and rough out an outline of what you want to say. The decision is more likely to cover all it needs to cover in a clear, concise and orderly manner." There were a large number of variations on this theme: "an adjournment for twenty minutes is a good idea before giving reasons, just to gather your thoughts"; "don't feel rushed into making a decision – if you need time, take it"; "trying to work it out as you go along is a recipe for vague and inconsistent statements – better to have a 5 minute adjournment"; "when defence counsel sits down after presenting a closing, take a moment to ponder"; "never feel rushed to make a decision despite the sense of urgency that counsel impresses upon you".

2. Test your reasoning before you deliver your decision. A number of interesting devices were suggested: "once you have decided on your judgment, consider the alternative in order to test your reasoning"; "make sure that the unsuccessful party knows why he/she failed"; "work out what issues you have to decide, then make findings of fact about those issues, and the law should then tell you what you have to decide".

3. Preparation before the hearing is a good idea. "The more preparation before the hearing the easier it is to deliver oral judgments."

Three tricks (on improving the delivery)

1. Use written templates as prompts to structure the delivery of your oral decision. The template may be used "to help guide you through the process of delivering your judgment". Many magistrates suggested compiling a file of frequently used quotations. In the context of judgments at end of a criminal trial, the file would contain, for example, extracts from Liberato v R[24] or Harling v Hall[25]: "A finding of guilt is not to be reached simply by rejecting the case put forward by the defendant. There cannot be a [conviction unless the court] accepts, that is actually and positively believes to the required standard, the evidence presented by the prosecution on matters critical to proof of guilt.". One magistrate suggested that it was a good idea to "introduce each oral decision with two or three standard sentences. This will get you rolling."

2. Where a party is unrepresented, start with an explanation of your role ("applying law to findings based on evidence") and tell the parties not interrupt while you give your reasons. More than one magistrate made this suggestion. A formula of words was suggested, "I have considered all the evidence and have made my decision. I will now explain how I reached my decision. Please do not interrupt whilst I am giving my reasons." "It should be your aim not to simply provide your decision but to also inform and educate the parties about the process; so far as possible you

[24] (1985) 159 CLR 507
[25] (1997) 94 A Crim R 437 at 443

should de-mystify the process." One result is "to reinforce your own confidence before you commence."

3. Don't forget that you have an audience. "It is easy to just put your head down and give your reasons but see if you can make eye contact with people in court from time to time."

Judgment by template: an illusion

An oral judgment template for frequently made decisions has obvious attractions. The time spent crafting the template is time saved attempting to recall and restate principles that are frequently contained in a judgment. However, there are disadvantages with a template that is overly prescriptive. An overly prescriptive template is one that results in a judgment that pays equal attention to important and unimportant issues. A good judgment should pay more attention to the more important issues.

It would be undesirable for every oral judgment of a magistrates court following a criminal hearing to contain the following: "To the extent that the case against the accused is a circumstantial case, I cannot convict unless the guilt of the accused is the only rational inference that can be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, I must acquit." To include this statement in a case that involved only direct evidence from two opposing witnesses would be to distract attention away from the real issue in the case: the creditability and reliability of each witness. To include only this statement in a case that was wholly circumstantial would be inadequate. For example, the judgment ought make clear that the prosecution had discharged the burden of proving (identified) intermediate facts and then explain the relationship between those intermediate facts and (identified) primary facts, that is, is it a "links in a chain" case or a "strands of wire rope" case.

Sadly, there is no "one size fits all" template for an oral judgment. Each judgment must be crafted to fit the issues that arise in that case. For this purpose it is undoubtedly very helpful to have a file of quotes that can be used with frequently arising issues. However, it will be equally important to attempt to articulate, in your own words, exactly why the unsuccessful party has lost their case.

The Honourable Justice George Fryberg

Supreme Court of Queensland

Introduction

I shall not deal with the advantages and disadvantages of giving ex tempore reasons for judgment, nor with the arguments in favour of or against them. Neither shall I pepper the paper with citations or footnotes. The focus of my brief is "how to". The tips are largely subjective and based on my own experience. They are particularly directed to new judicial officers and are primarily relevant to decisions at first instance, but I make some reference to the position of intermediate appellate courts.

Key themes

- Take the opportunity to deliver oral reasons.
- Reserve if a party is an unrepresented litigant.
- Keep sentences short.

"While you cannot usually prepare ex tempore reasons in advance, you can prepare yourself. Giving reasons ex tempore is notoriously easier with experience, so don't dodge the experience."

Preparation

Usually it is not possible to prepare ex tempore judgments in advance. Either the evidence or the parties' submissions or the time will be unavailable. Your normal preparation for the hearing well help you if the possibility of ex tempore judgment emerges.

An exception to this occurs with appeals heard in the Court of Appeal, where the whole of the record and the outlines of submissions should be available some days before the hearing. In simple matters, typically some sentence appeals, draft reasons for judgment can be written and circulated in advance, modified as necessary during the hearing and, after a short adjournment, read out in court. But these are not true ex tempore reasons.

While you cannot usually prepare ex tempore reasons in advance, you can prepare yourself. Giving reasons ex tempore is notoriously easier with experience, so don't dodge the experience. If the case is suitable, give the judgment on the spot, even if you do have time to reserve the case in hand. You won't be left with nothing to do later. Enjoy the sense of satisfaction which comes from not having added to your list of reserved judgments.

Preparing yourself is largely a matter of psychology. Early in your career it requires some courage; giving reasons ex tempore feels uncomfortable. It's really like diving into an unheated pool in spring:

uncomfortable at first, fun when you get used to it but not something most people would try in midwinter.

Forget about your jurisprudential legacy. It doesn't matter if you don't cite all relevant authorities or record all the detailed facts. It doesn't matter if the recorded reasons are not a literary masterpiece. It doesn't matter if your decision is never cited as a precedent. Ex hypothesi, the case is a simple one, in which case it won't ever be a leading authority, or an urgent one, which would make it a dubious authority. Your path to the High Court bench will not be impeded nor your image sullied by your ex tempore judgments. In fact, quite the reverse.

If you are confident about the correctness of your decision, don't be afraid of the possibility of being wrong, at least when sitting at first instance. The Court of Appeal is kind to ex tempore judgments and your colleagues aren't bound by your decision. Remember your time as a practitioner: the parties are always anxious for an early decision no matter how long they have taken to bring the matter on – perhaps because of it. This is particularly true of interlocutory applications.

Choose the right case

Cases with a large volume of evidence or complex evidence or difficult points of law tend to be unsuitable for ex tempore judgments. Few of us have the skill of Jessel MR, Lord Roskill, Lord Denning or Sir Samuel Griffith. Short, non-complex matters are usually suitable. It does not matter whether the issues are of fact or of law. Sometimes an ex tempore judgment is virtually a necessity, for example rulings on objections or on a "no case" submission in a criminal trial.

As a rule of thumb, aim to decide bail, interlocutory and summary applications (using those terms expansively) by giving ex tempore reasons, while knowing that occasionally this will be impossible. The same applies when sitting as a single judge hearing an appeal. Consider the possibility of an ex tempore judgment in trials, even trials of several days' duration, while recognising that most of us need to reserve judgment after such trials most of the time.

Consider the quality of the submissions. Good submissions make an ex tempore judgment easier, but bad ones do not necessarily exclude it. An important question is, have the issues been adequately canvassed ? Consider the quality of counsel appearing.

At the end of submissions, consider whether you have a firm view as to the outcome (albeit, perhaps, subject to working out matters of detail and calculation). If you don't, the case is not suitable for an ex tempore judgment; if you do, then don't be shy.

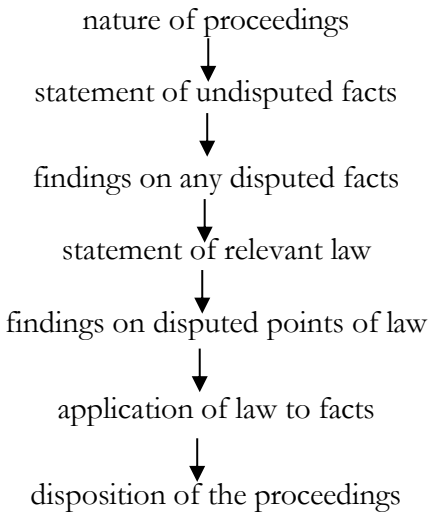
If the matter involves an unrepresented litigant who is not a known querulous litigant, it may be better to reserve. Have regard for tender feelings. Nothing will satisfy the querulous litigant, so you might as well give the judgment ex tempore.

If the parties are present in person, there is an advantage in delivering an ex tempore judgment. People tend to be more accepting of reasons which they hear themselves.

Method

If you have the opportunity to take a luncheon adjournment or even an overnight adjournment to prepare an outline after the close of submissions, do so. If not, devote at least five or ten minutes to this task. You don't have to leave the bench, but you can do so if you feel uncomfortable in the silence.

Keep the structure of the reasons simple and standard:



Make a list of all points raised by counsel in their outlines and use it, together with the outlines, to create headings for the judgment.

Don't decide any more than is essential for the resolution of the case. Identify specifically the relevance of any statements of law and express them with no more generality than is necessary for the case.

Look at the application, affidavits, exhibits, legislation and cases for accuracy as you give your reasons, and precis from them. Don't quote them at length aloud – say "take in [quotation name]" and insert it when you are revising the reasons. Only read aloud the essential bits, not the context.

Keep your sentences short, lest you forget the beginning before you get to the main verb – let alone the end! This also helps in preventing the omission of a necessary step in the reasoning.

Unless the formal order is simple, ask the parties to prepare a draft in conformity with your reasons; it saves time and effort. And don't forget to hear the parties on costs.

Revise the transcribed reasons promptly, while matters are fresh in your head. In civil cases edit it as much as you like, without changing the thrust of it.

His Honour Judge Frank Gucciardo

County Court of Victoria

1. Look at the depositional material and decide, if reasonably possible, whether this case is suitable for delivery of an oral decision. If so, decide if the case is suitable for a written decision which will be read to an audience or delivered ex tempore, partly written, partly improvised?

2. On sheets headed "Facts" and "Law" respectively, progressively note essential matters which must be addressed as you listen to the evidence and submissions.

3. At the end of the day's hearing review your notes and distil/summarise, in short and precise sentences, the matters which are vital to address.

4. Progressively place in a hierarchy of relevance the items noted on your sheets by numbering them.

5. Prepare brief draft answers to the question:
- Why do I prefer one view over another?
- Why do I reject or accept a piece of evidence?
- Why do I reject or accept a submission?

6. Annotate your notes with your immediate reactions and comments. This is a crucial internal commentary which will help you to frame your decision when you review the note.

7. Make the decision first! Outline your pathway to the outcome clearly or signpost the route to the destination in simple terms of *why*, not *how*.

8. Remind yourself that speaking as a means of thinking is *not* oral decision making. Thinking out loud is *not* communicating an outcome. Oral reasons are *not* "thoughts in motion" or stream of consciousness.

9. View oral decisions as part performance involving verbal and non-verbal communication: voice tone and pitch, eye contact and pauses.

10. Use a voice recognition tool on computer to practice your delivery and structure.

Key themes

- Annotate your notes with your immediate reactions.
- Reserve for 30 minutes.
- Practice your delivery. Use tone, pitch, eye contact and pauses

"Find a muscular, credible voice."

Checklist

Before you start:

- reserve for 30 minutes
- remind yourself who the audience is
- ensure the introduction:
  - is issue driven
  - foreshadows structure
  - includes the decision
- ensure the structure:
  - gives context first, and
  - details later
- only relate the facts you must decide on
- don't restate the law if it is settled.

The performance

- Learn your best way to manage confidence and anxiety issues
- Do breathing exercises
- Take moments of silent concentration
- Find a muscular, credible voice.

His Honour Justice Wayne Haylen

Industrial Court of New South Wales

For years, and probably before Justice Michael Kirby's article "Ex Tempore Judgments – Reasons on the Run"[26], there has been much discussion about the need for speedier justice and how, in part, that goal might be attained by encouraging judicial officers to make wider use of ex tempore judgments. While that approach has much to commend it, I do not support the view expressed, from time-to-time, that judicial officers involved in courts below appellate level should not waste time with detailed judgment writing but should address briefly the essential legal and evidentiary issues arising in each case, leaving it to the appeal courts to grapple with the complexities of the case should they arise for review. The task of any appellant court is lightened by a careful, if concise, recitation of all relevant facts and law in a first instance judgment. In the scope and range of judicial decision making there is, nevertheless, clearly a place for ex tempore judgments.

The court of which I am a member deals with a combination of industrial and related matters where the rules of evidence and aspects of the criminal law are applied, for example, occupational health and safety prosecutions. There is within the court a tradition, some would say, unfortunate, of lengthy judgment writing and a definite expectation from those who habitually appear in the jurisdiction that their cases will be the subject of close judicial analysis. The court's judgments are subject to appeal to a Full Court of the Industrial Court as well as scrutiny by the Court of Appeal. This history and the expectations of the parties, however, has not dissuaded members of the court from providing ex tempore judgments in suitable cases: despite the history to the contrary there appears to be at least an acceptance of that course being adopted and sometimes clear appreciation expressed by the parties that the matter has been speedily dealt with and in an appropriate manner.

Key themes

- Don't rush the delivery.
- Think and speak in paragraphs.
- An oral decision does not lessen the requirement to provide adequate reasons.

"It is best to keep an open mind as to whether the matter is suitable for ex tempore decision. In circumstances where the case, on first reading appears suitable, but at the hearing turns out to have unexpected complexities, you can always change your mind and reserve judgment."

26 (1995) 25 University of Western Australia Law Review 213

My preparedness to deliver ex tempore judgments was much influenced by my experience as counsel when appearing over many years before Justice Wilcox in the Federal Court. As frequently occurs in the jurisdiction of the Industrial Court, the Federal Court has faced the difficulty of dealing with numerous interlocutory applications. Justice Wilcox had the great ability to deftly deal with many of these applications by way of ex tempore decision, even though some appeared to involve complex legal and factual issues. In simpler matters, such as interlocutory applications concerning particulars, His Honour had the capacity to get to the core of the matter and was often able to dispose of the issue at a directions hearing after engaging in some dialogue with the legal representatives and without the need for a more extensive and formal hearing.

That anecdote highlights a significant issue, namely, identifying the cases that are suitable for ex tempore decisions. Clearly, many interlocutory applications are likely to fall into this category, especially where the facts are not largely in contest or where the argument is confined to whether or not a particular principle applies in the circumstances of the case. There are also cases where the facts may be lengthy but once established, the applicable legal principle is not in doubt. It does not necessarily follow that a matter requiring a day or two of hearing is not a matter that is suitable for an ex tempore judgment. It is best to keep an open mind as to whether the matter is suitable for ex tempore decision. In circumstances where the case, on first reading appears suitable, but at the hearing turns out to have unexpected complexities, you can always change your mind and reserve judgment. Ultimately, it is a personal decision and one with which the judicial officer must feel comfortable.

The reluctance of some judicial officers to give ex tempore decisions is often their lack of experience in the task and a concern that some important issue of fact or law will be overlooked or that the language may appear inappropriate. In many respects they are the same type of concerns that face judicial officers when they are initially required to deliver written judgments and become acutely aware of the difference between that exercise and their own experience as legal practitioners with writing opinions. Judicial officers who are accustomed to giving dictation (or, more likely, to use a dictaphone) may be more comfortable embarking upon the task of making an ex tempore decision but those who have computer skills and are used to preparing their own judgments are likely to have the same facility for organising their thoughts. In short, there is no particular experience that makes a judicial officer more or less suited to giving oral judgments and there is much to be gained both for the worthwhile object of speedy justice and in the personal satisfaction flowing from attempting the task.

Having accepted that oral judgments should be a normal part of the judicial function, the following suggestions may be of some assistance to those proposing to undertake that course:

- In deciding whether or not to deliver an ex tempore decision, it is useful to consider the present caseload and, having regard to the issues involved in the matter, to assess whether there is a risk of having to wait too long before a reserved judgment can be delivered.
- A judgment likely to be of significance only to the parties and their legal representatives is probably appropriately delivered ex tempore.
- Prior to the hearing, it is useful to make a list of headings indicating matters essential for the decision. Include the legislation under consideration, the issues to be decided, the legal principles applicable, the principles upon which a discretion might be exercised and the orders to be made, especially if there is a possibility of some significant departure from the orders sought.
- If time permits have your associate read the court file and prepare a list of unusual terms or names, including technical or trade/business terms. That list can be provided to the court reporter and a copy may also be referred to, if necessary, during delivery of the judgment.
- It is now common for evidence to be received by affidavit and, in many cases, the parties also provide a list of those matters upon which they agree. If it is possible to read these materials before the hearing, then the essential factual and legal issues can be readily established. Vital points can be highlighted for use during delivery of the decision.
- During argument, take the opportunity to request the legal practitioners to clearly identify the relevant facts and law, especially those issues you have identified as significant in the case. Practitioners appear not only to present their case but also to assist the court.
- Remember that an oral decision does not lessen the requirement to provide adequate reasons for the decision – the shortness of the decision alone will not indicate any inadequacies in reasoning. If the main issues have been identified and the relevant legal principles applied, the appropriateness of the decision will not be diminished by its relative brevity.
- Immediately before delivering judgment, make sure that all the relevant documents (including pleadings, submissions, legislation and rules) are close by and available. The task can be assisted by using the previously identified parts of the pleadings and the parties' written submissions.
- When delivering the judgment, take your time and do not feel the need to rush – the parties will understand the difficult nature of the task.
- In the course of delivering the judgment, try to use short sentences and avoid double negatives (so loved by lawyers). Think and speak in paragraphs, as this approach will have the added advantage of allowing later editing of the transcript so that the judgment will be set out and formatted in the same way as a reserved judgment.
- At the beginning of the ex tempore judgment, state the issues and ensure that the factual and legal issues disputed by the parties are resolved at the conclusion of the decision. Remember, the facts found will often resolve the case.
- It is important not to be burdened by reference to extensive authority cited by the parties as much of it will stand for a well-established principle that has merely been applied to certain circumstances. It is sufficient to succinctly cite the main relevant authority or the proposition from a judgment that is influential or decisive in the case under consideration.

- Take a short adjournment (or, if available, overnight) before delivering the judgment. This satisfies the parties that the matter has been properly considered while fresh in the mind of the judicial officer and also provides an opportunity to revise and tighten the terms of the judgment.
- Lastly, take the opportunity to read the transcript version of the decision. Often, the transcript does not totally reflect all that was said and sometimes there are sections that may not be well expressed. It is entirely proper to correct an ex tempore judgment to clarify its terms but there can be no alternation to the thrust and substance of the judgment.

The Honourable Justice David Hodgson AO

Supreme Court of New South Wales

Oral judgments are sometimes called ex tempore judgments, and in these notes I will use these expressions interchangeably. However, I do not take this as meaning that oral or ex tempore judgments are unprepared or unscripted. Generally, for me, an oral judgment requires considerable preparation and scripting.

There are two large advantages in giving oral judgments, if it can be done satisfactorily:

1. they give the parties an early resolution of their dispute
2. they save one's own time.

We aim for just, quick and cheap resolution of disputes. Ex tempore judgments certainly make resolution quicker, and they may make it cheaper. They mean there will be no separate attendance at court to take the judgment, and they often mean there can be immediate resolution of incidental issues such as costs and the precise form of the orders (these being issues that otherwise could require time for legal practitioners to renew their acquaintance with the case). Generally, if one makes reasonable choices as to when to give ex tempore judgments, the resolution of the dispute should be no less just.

Key themes

- Try to give ex tempore judgments in most interlocutory hearings.
- Use the parties' names.
- Set out established facts early in the judgment.

"For me, deadlines promote concentration and efficiency."

It generally takes me some time to prepare for ex tempore judgments, both before and during the hearing, as well as perhaps an hour or two after the hearing. But this time is less – often very much less – than the time it takes to prepare a reserved judgment. This is because I prepare when I am most familiar with the evidence and the submissions, and when my attention is fully engaged; and also because for me deadlines promote concentration and efficiency.

There is, of course, the disadvantage that the judgment may not be as well expressed or comprehensive as could have been achieved by reserving. This is a factor to be taken into account when choosing whether or not to give an ex tempore judgment.

When should an ex tempore judgment be given?

In the case of a final hearing, where, subject to the possibility of appeal, one's decision will determine the rights of the parties, ex tempore judgments should generally be given only if one is confident of the result and confident that one can give acceptable reasons for that result either immediately or after a short preparatory period (say, an hour or two, or perhaps a little more).

One exception to this is where a final decision is urgently required. Then, one can appoint an early time to give an oral judgment in the hope/expectation that one will be able to work it out by then.

If I am not immediately ready to give an oral decision and the hearing has ended in the morning or early afternoon, I might tell the parties that I expect to give judgment in the afternoon. If the hearing ends late in the day, I might tell them that I expect to give judgment at a specified time next morning. As mentioned earlier, I have found this concentrates the mind very well.

In the case of interlocutory hearings, one should I think try to give an ex tempore judgment in most cases, and to that end be aiming during the hearing to be in a position to give a decision and reasons at the end of the hearing (I will suggest later that these reasons often need not be elaborate). Sometimes, this may not be possible. Sometimes interlocutory applications are of similar substance and complexity to a final hearing, and of similar importance to the rights of the parties; in which case they may need to be addressed similarly to final hearings.

If at the end of an interlocutory hearing I am not sure of the result, I sometimes just take an adjournment of a few minutes to think about it, or else appoint a time later in the day when I expect to give judgment. In the case of interlocutory hearings, even if one is not sure of the result at the end of the hearing, it is generally possible to recognise those cases where a decision can be reached within this sort of time period, and those cases where it can't and it is necessary to reserve.

How should ex tempore judgments be organised?

In the case of judgments given after a final hearing, and substantial interlocutory judgments, I think ex tempore judgments should be organised in the same way as reserved judgments, generally following these steps:

1. A brief statement explaining what relief is sought, and who are the parties
2. A concise narrative of facts relevant to the issues to be determined, which are not in dispute
3. Statutory provisions and other written instruments, where these are to be discussed
4. A list of the issues to be determined
5. Each issue then determined in turn
6. The conclusion

1. A brief statement explaining what relief is sought, and who are the parties

I suggest this be no longer than necessary to give an understanding of who is seeking what in the proceedings. In a simple case, it may so no more than "the plaintiff sues the defendant for damages for personal injuries arising out of a road accident in which a car driven by the defendant struck the plaintiff". However, if the relief sought is more complex, or if there are multiple parties, or if there are cross-claims, then enough must be said to make the interrelationship of the various claims for relief clear. In such cases, I think it is generally best right at the start of the judgment to identify the parties by brief names (such as "Mr Jones" or "Mrs Smith", or forenames if the parties are members of a family, or a one or two word name for a company, or "the Council" or "the Tribunal", or an acronym, and so on). This helps to avoid the confusion one can get from using expressions such as "the first cross-claimant" or the like. If you want to let the parties know the result early in the judgment, this can be done here as well.

2. A concise narrative of facts relevant to the issues to be determined, which are not in dispute

In most cases there is a framework of facts relevant to the issues that are either common ground or so clearly proved that reasons are not necessary. I think it is extremely helpful to decision-making to set this out concisely in chronological order early in the judgment. If these undisputed facts are correctly identified, there is no need to refer to the evidence supporting them or to give reasons for them. If chronologies have been provided by the parties, these are helpful in providing this narrative of facts; but they are not always complete or accurate, and they may include things that are not common ground. In setting out this framework of facts, generally there should be no reference to or quoting of evidence, and no resolution of disputed issues. It is sometimes convenient to flag points at which the contentions of the parties diverge, foreshadowing issues that will be resolved later. I have often found the identification and concise setting out of this common framework quite difficult and time-consuming, but in my opinion it is always extremely helpful.

3. Statutory provisions and other written instruments, where these are to be discussed

If the case involves significant issues in the interpretation or application of statutory provisions, it is helpful to set these out after the narrative of facts (or occasionally, before this narrative). If the case involves significant issues in the interpretation or application of other written instruments, and if it has not been convenient to set out the relevant parts of these instruments in the narrative of facts, then this should also be done here.

4. A list of the issues to be determined

At this point it is generally easy to prepare a numbered list identifying and describing briefly, in logical order, the issues to be determined, with reference to what has previously been set out. This list may include issues of fact, issues of law, and issues concerning how fact and law combine. The issues should generally be identified as separate issues only if they are not significantly interdependent. Very often factual issues are interdependent, because they depend not just on evidence relevant to each individual factual issue, but also on the credibility of witnesses who give

evidence on a number of factual issues. In that event, I think it is best either to treat these factual issues together, or else to deal with credibility of witnesses as a separate issue. Generally, factual issues would be dealt with before legal issues.

5. Each issue then determined in turn

Up to this point, there should generally have been no quoting of evidence, no comment on credibility and no resolution of issues. Now, when one comes to deal with issues of fact, one can refer to or quote evidence relevant to the issue under consideration. In dealing with each issue, it is generally best to at least note the contentions of the parties (or at least, of the party against whom the issue is to be resolved), and then give one's decision and reasons.

6. The conclusion

One then draws together the result from the resolution of issues, and deals with the orders to be made and associated questions such as costs. If the precise form of the orders or the result as to costs is not obvious, the parties can be asked for further submissions at this point. (In the case of reserved judgments, directions can be given about short minutes and submissions on the form of the orders and costs.)

The above scheme is for first instance judgments. Appeal judgments follow much the same scheme, except that the first step will extend to reference to the orders made at first instance and to who is appealing from what; and between steps 3 and 4, one sets out what was decided by the primary judge. Step 4 will then identify the issues on appeal.

In many interlocutory judgments, one can take shortcuts. In some cases one might do little more than refer to what is sought in the application, and give brief reasons why one does or does not accede to it. Sometimes it is necessary, or helpful, to outline the submissions for the parties, or at least the losing party; but even this is not always necessary, so long as one's own reasons (which can assume some acquaintance with the circumstances of the case, and can be understood also with reference to the transcript of the hearing, if there is one) sufficiently disclose the reasoning that supports the result.

Preparation, delivery and revision

Except in the cases of shortish interlocutory judgments, I need fairly complete notes to give an oral judgment, and I don't attempt to give an oral judgment unless I have them. So if I think I may be giving an oral judgment, I must work towards having pretty comprehensive notes at the end of the hearing or shortly thereafter. This generally requires some time spent before the case and during the case; but even if in the result I don't give an oral judgment, this time is not wasted. It helps me keep on top of what is happening at the hearing, and gives a good start to writing a reserved judgment.

If one has time before the hearing, I recommend the preparation of notes at least for items 1 to 4 of my scheme, to be ready at the start of the hearing. If one doesn't have affidavits or witness'

statements, but only pleadings, it may not be possible to get very far with the framework of facts that are common ground or clearly established; but if one has affidavits or witness' statements one can progress a fair way to doing this. It may also be possible to prepare notes in outline for item 5. I generally don't have these notes typed: I rarely have time to dictate them, and the notes are provisional and subject to revision. If they're typed, I tend to feel more constrained by them.

During the hearing, I note down evidence and submissions that I think are significant and may figure in a judgment. Where I have prepared a numbered list of issues, I can then note in the margin the number of the issue to which particular evidence and particular submissions relate, and I find this useful when getting ready to give judgment.

As I have said, if I am not ready at the end of the hearing to give a judgment immediately, I give myself an hour or two to complete the notes I need to give an oral judgment.

In giving the judgment, it is not of course necessary to read out pieces of evidence or statutory provisions or extracts from authorities which you are quoting. It is sufficient to identify (by page numbers, section numbers, paragraph numbers or whatever) what is to be inserted in the final judgment.

Finally, remember it is legitimate to make minor revisions to oral judgments when you get the transcript, so long as there is no alteration to the substance. You can correct grammar, improve sentence construction, add some case references and so on.

The Honourable Justice Catherine Holmes

Supreme Court of Queensland

Oral decisions (for the purpose of this paper, ex tempore decisions given at the conclusion of the hearing or very shortly after it) range from the desirable to the necessary. The conditions under which they are delivered are equally variable. The judicial officer may be giving the decision with forewarning, having had the opportunity to read affidavit material and submissions at leisure; or may have to ex temporise, on the strength of oral submissions, about a matter never previously heard of; or may be doing something in between. It's difficult to make suggestions for the entire spectrum of possibilities, but I offer these.

Acknowledging that matters of any complexity or those requiring some reflection on the evidence do not lend themselves to instant delivery, ex tempore judgments are a good thing wherever possible. They enforce succinctness, give the parties speedy resolution and have the advantage for the deliverer that, should they be taken on appeal, any shortcomings are likely to be charitably viewed. They exemplify the proverb, "a stitch in time saves nine". It is tempting to defer the rigours of decision-making, but the time taken to think through and deliver reasons on the spot will increase exponentially if the same judgment is taken back to chambers. And the advantage of proceeding immediately is that the issues are then as clear in one's mind as they will ever be.

Key themes

- If counsels' written submissions are useful, incorporate them into your judgment.
- Be organised.
- Deal with all the loser's arguments.

"Remember that you are not producing a work of art; you are trying to get a job done as expeditiously and efficiently as possible. You need to get all the components in place, but they don't have to look pretty.

Assuming first the position that a decision has to be made on oral submissions without advance notice of the issues, I recommend making notes of all that is said, then marking in some way (I use a couple of vertical lines in the margin; whatever works) those passages which are going to be crucial to the decision given, while also inserting some notes as to the conclusions being made as you go along, similarly marked. A crude but effective way of ensuring some semblance of sequential delivery is to number the sections of your notes in the order you will be using them. It may also help to make a list for yourself on a separate piece of paper of the essential points to be covered (headings, in effect, for the crucial topics) and tick them off as you go.

It is important if the decision is to be given straight away to ensure that you are entirely clear on the facts being advanced and the arguments being put. Make counsel articulate exactly what is being sought in terms of the findings or rulings they contend for and the orders they seek. Have no qualms about asking them to repeat themselves or to explain anything that is not immediately obvious. You are entitled to get everything straight before you attempt adjudication on it, so be as demanding as you need.

Do retire, if necessary, to collect your thoughts, but if the matter is straightforward and you can form a clear view, don't be deterred from giving a decision on it by the fact that your mode of expression may not be as elegant as if you had allowed the judgment to gestate in your chambers for some weeks. You will only dislike yourself later for letting it go.

In the summary trial context, if you have pleadings, make a copy and use a highlighter to mark what is contentious so you are armed with the framework for your reasons. (But don't count on the legal representatives not deviating from them, which may present its own problems.) Whether the trial is criminal or civil, insist on an opening which identifies the issues so you know where you are headed. Taking oral evidence will, at least, give you some breathing space, but be sure to write down your views of the witnesses as the trial proceeds so that you are in a position to incorporate them into your judgment. If access to case reports or legislation in court is unavailable or inconvenient, get the practitioners who appear before you regularly into the habit of handing up copies, and make sure you have your highlighter ready to mark what they say is relevant.

In an application, if you have the opportunity to look at affidavit material and, even better, submissions, in advance, prepare a draft, at least of the facts, and perhaps of some tentative conclusions. To do so will not only be of assistance in delivering a quick judgment, it will clarify in your mind the things you need to ask. It will prove helpful even if, in the event, you don't find it possible to deliver the judgment on the spot. If you have the benefit of written submissions, use them shamelessly. If counsel has set out uncontentious facts and the law for you, don't be too proud to incorporate his or her work into your decision. Originality of expression is entirely unnecessary.

Whatever the context, if you are going to give ex tempore decisions, you should be prepared without compunction to wring every last drop of assistance out of the lawyers appearing. One advantage of giving immediate decisions is that it focuses your mind on what you need at a time when you still have the opportunity to ask the lawyers for more information; sparing you the embarrassment of later asking for supplementary submissions because in the more relaxed atmosphere of postponed decision-making you neglected to explore just what followed from this submission or how that order was supposed to be formulated.

In your judgment, you don't need to reprise the evidence; what you do need to do is to set out the issues, your essential findings of fact and why you have arrived at them, and your conclusions on the

issues. You may not need to mention all the submissions, but you should deal with all the loser's arguments.

Be physically organised. Have any material you are going to quote – case reports, legislation or documentary exhibits – to hand, suitably flagged, so that you can refer to it without a flustered search. Don't be shy about taking time to think about where you are going next while delivering your reasons; pauses won't show up in the transcript. Don't say anything you don't need to, and try not to repeat yourself. But remember that it gets easier with practice, and you will develop your own techniques for organising yourself.

If you are in a position where you often have to produce a particular type of oral decision, think about preparing a format for regular use, with headings to give structure and perhaps incorporating any legal principles or statutory provisions that ordinarily require reference.

If you are able to produce a draft decision in advance on the strength of the written submissions and material you have already received, leave enough space on the page to incorporate points you need to add as a result of counsel's submissions. Think about the effect if you are going to deliver it on the spot. Delicacy may require, even if you feel confident that everything you have already written is correct, that you retire to consider your judgment. It is embittering for counsel to have made extensive oral submissions only to sit down and have the presiding judicial officer launch into what is clearly a prepared set of reasons.

Remember that you are not producing a work of art; you are trying to get a job done as expeditiously and efficiently as possible. You need to get all the components in place, but they don't have to look pretty.

His Honour Judge Richard Keen

District Court of Western Australia

"Before beginning to compose something, gauge the nature and extent of the enterprise and work from a suitable design. Design informs even the simplest structure, whether of brick, steel or of prose… This does not mean that you must sit with a blueprint always in front of you, merely that you had best anticipate what you are getting into… even the kind of writing (speaking) that is essentially adventurous and impetuous will on examination be found to have a secret plan; Columbus didn't just sail, he sailed west, and the New World took shape from this simple and, we now think, sensible design."[27]

Whether an oral decision is not only possible but appropriate in the circumstances is always the first consideration as there could be nothing more embarrassing, not to mention possibly disastrous, than embarking on an oral decision in a matter that is too complex for such a decision or where the circumstances are such that a written decision should be delivered. A number of matters need to be considered; the urgency, whether the facts and legal issues are complex and whether the oral decision can be articulated reasonably shortly.

Key themes

- Develop a structure before the trial.
- Put yourself in the shoes of the listener.
- Omit needless words.

"The blueprint that I started with has now turned into a roadmap taking me from the description of the case to the conclusion in a logical way. There should be no backtracking going over old ground and, hopefully, not too many diversions along the route."

Preparation for hearing

My approach to the task of delivering an oral decision is, in many ways, similar to that of a written decision.

In my view the starting point is always to identify what the matter is about; what the parties are arguing about and to summarise the facts. If there is a dispute as to the facts, then those that are not in issue I note in a notebook for use at the hearing. So it should be possible before embarking on the hearing to set out the story and, if necessary, how the matter has got to the stage where it is.

My next step is to identify the factual and legal issues. These should be apparent from the papers. If this is not the case, then the parties should be asked to articulate what they are. In a simple matter

27 William Strunk Jr and E B White, *The Elements of Style*, 50th anniversary ed, 2009 Pearson Longman.

this may be left to the hearing but time can be saved and a better understanding of the case obtained if counsel is asked before hearing to clarify these issues. It also enables any false issues that have arisen to be swept away.

Having established the issues, I find it helpful to write them down in separate sections of my notebook. To those sections I add comments dealing with any questions that may arise in my mind so that these may be teased out with counsel at the hearing. I insert appropriate headings and allocate sufficient space to each issue to note the evidence relevant to that issue, my own observations on the evidence (including on witnesses and their credibility), the submissions made at hearing, my analysis and conclusions.

One advantage of the headings is that there is less risk of overlooking or omitting to deal with a necessary point at the hearing and, when the time comes, on delivering the decision.

I find a chronology helpful in most cases. It should be possible to prepare this in advance and add to it as the hearing progresses.

Finally, I give consideration to the relief that is sought. Again I identify each area of relief on a separate sheet and consider alternatives that may be open. As with the other issues, I set them out separately with my comments on matters to raise at hearing and space for submissions and observations.

If the matter involves documents, then I will have my associate ascertain whether I may read them or some of them before the hearing. I request that a bundle be prepared for my use so that I may mark them with any comments that arise in preparation and with counsels' submissions and my observations at hearing.

Where legislation, rules or authorities are involved I ensure that I have copies or extracts prepared with relevant passages highlighted.

If there are other matters that arise on the papers I deal with them in a similar fashion in my notebook so that by the time that I go into court I have a structure leading from the subject matter, through the factual and legal issues to the findings and conclusion. In other words, (returning to my opening) I have gauged the nature and extent of the enterprise and am ready to work from a suitable design. Unlike Columbus I hope that I am not embarking into the unknown and will not meet too many strange, unexpected and novel situations on the journey. If that was to occur the prudent course might be to throw away the notion of an oral decision and to settle for a written decision and use the blueprint for that purpose.

The hearing

Having set myself a structure and having clarified any issues with counsel at the start of the hearing I find it important not to allow counsel to meander around the issues. Whilst counsel should be left to argue the case as he or she decides is forensically most favourable, generally I find it helpful to confine counsel's argument to one issue at a time before moving on to the next recognising that there may be some overlap or it may not be possible in a trial where evidence is to be lead. By requiring each counsel to do this I am able to bring together in one place all of the relevant material on a particular issue and have a better chance of keeping them on track.

My structure is intended to take the issues through a logical sequence and even if counsel does not follow the same sequence my note taking of the arguments will be ordered and easily recalled when the time comes to deliver the decision.

Where there are documents involved and I have received a working copy of them I mark that working copy with my observations and also highlight passages referred to and relied upon by counsel using a different colour for each party. In that way I can readily identify the relevant passages for later recall.

The decision

Once the hearing is complete if I need time to sort the material and analyse it I will adjourn for a short period. What that does is to allow me to compose my thoughts, filter the information and discard all that is unnecessary for the decision. Strunk and White's "Omit needless words" is a useful catchcry. It also provides an opportunity to ensure that all facts and arguments which are critical to an issue have been canvassed and that all essential questions that have to be decided are dealt with.

Having started with a structure that has allowed space for comment, observations and findings and having ensured that all of that has been attended to (necessary findings of fact and law with adequate reasons given for each finding and the application of the law to the facts) all that remains is the conclusion and the relief (if any) to be granted with a final check is to ensure that the losing party's argument has been fully dealt with.

The blueprint that I started with has now turned into a roadmap taking me from the description of the case to the conclusion in a logical way. There should be no backtracking going over old ground and, hopefully, not too many diversions along the route.

Finally having marshalled my thoughts I am ready to deliver the decision. In some cases I may have been able to write substantially what I want to say but in other cases have detailed notes. To proceed without either is to run the risk of an unstructured or, at worse, an incomprehensible delivery.

I try to put myself in the listener's shoes. Having said that it is still important that I speak in my own style, that is what comes naturally (but appropriately), with no affectation or legalese but using plain

English to achieve clarity. To the extent that it is possible, the "keep it simple" mantra is worthwhile. All the rules of grammar and syntax which one would employ in a written judgment should be followed.

Conclusion

The structure of an oral decision requires as much attention to detail as a written judgment. By identifying the issues, the matters that may arise and taking proper notes during the hearing there is usually a flow to the work which will simplify the ultimate task of delivery of the decision and result in a decision that is clear and concise.

The Honourable Justice Lex Lasry

Supreme Court of Victoria

Many trial lawyers who become judges (myself particularly included) find the delivery of ex tempore rulings[28] more difficult than they imagined. It can be difficult to deliver comprehensible reasons at short notice, which display an understanding of the relevant facts, an analysis of the arguments and an identifiable awareness of the relevant law. However, it is a necessary skill to be learned and refined to improve the efficiency of a criminal trial.

In this short paper I offer some comments and techniques that have helped me as a trial judge in giving rulings at very short notice in criminal cases. My comments assume the following well known hypothetical. The trial is well underway, and the crucial prosecution witness is about to be called. Counsel for the accused stands and says, "Your Honour, there is a matter I need to raise with you in the absence of the jury". You explain to the jury that these sorts of interruptions occur often in cases like this and, while it is inconvenient, your job as the trial judge is, after all, to supervise the fairness of the trial and to ensure its adherence to the law.

The door to the jury room closes and so commences what suddenly appears to be an alarmingly complex argument. Once the arguments are completed you are confident in the outcome, but clearly a detailed ruling is necessary. The stakes are high because the issues raised about the witness's evidence are significant, and in the event of a guilty verdict they will likely be argued in the Court of Appeal.

Key themes

- Remember you are not writing for prosterity.
- Structure your note taking.
- If overcome with doubt, pause and reconsider.

"The ruling is the product of both art and science. The art is in the formulation and performance of the reasons, particularly for the benefit of the losing party. The science is in the organisation of mind and on paper."

The ruling that follows is the product of both art and science. The art is in the formulation and performance of the reasons, particularly for the benefit of the losing party. The science is in the organisation of mind and on paper. There are several very good reasons to deliver reasons ex tempore if you can. The first question to be asked is, is this a result about which I must give

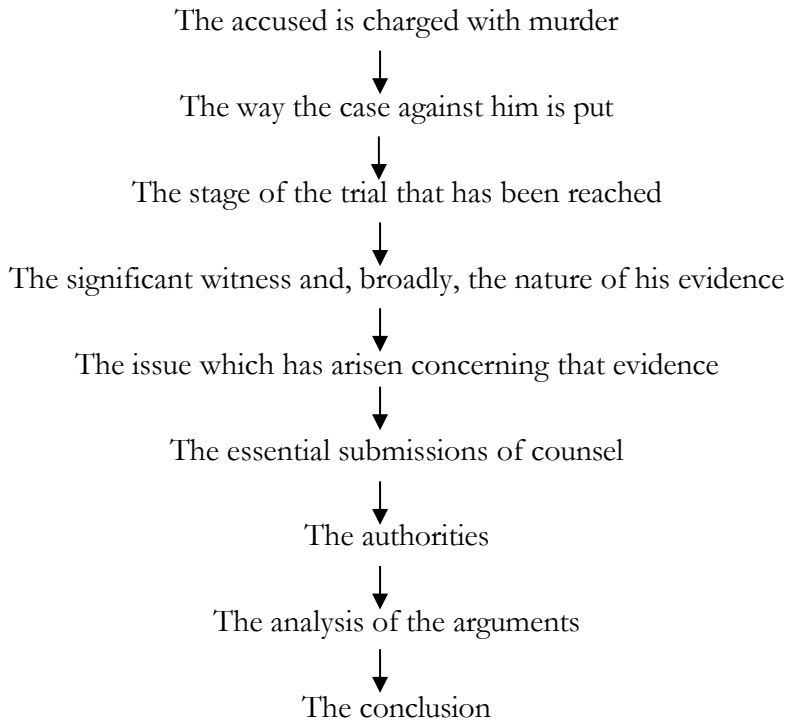
28 For these purposes, ex tempore rulings are those delivered without any notice or out-of-court preparation.

reasons? For the sake of this paper I assume the answer is an overwhelming "yes". The next question is, "can I do it now?" I will return to this, but assuming the answer is also "yes", it is then about organisation and confidence. There are significant benefits in an ex tempore ruling – the relief when it is done, the avoidance of another reserved judgment to be prepared outside court hours and, perhaps most importantly, the jury can return to the court and the trial can continue. So, in my opinion, do it whenever you are sufficiently confident of the result.

The best advice I was given when I began as a judge is that I was a trial judge and I was *not* writing for posterity. For some of our colleagues that is a difficult concept to accept, but to accept it aids the efficiency of delivering ex tempore rulings.

There is, of course, another option. Announce the result and indicate that reasons will be given or published later. With all due respect, I regard this as bad practice unless absolutely necessary. Articulated reasoning leads to confidence in the result. If it really is that complex (and it might be) then it is better to adjourn and take time to prepare more considered reasons. If time is needed to reflect then it is far better to replenish the coffee supply in the jury room and take the time. The worst result is to take that less onerous course and then, as the trial progresses, observe it becoming clearer and clearer that further analysis and thought was needed before your judicial commitment was made to the result.

An important part of being able to give reasons at the end of the submissions is the note taking and the organisation of the material. Make the order in which matters are dealt with logical. From the outset of the argument begin to arrange your notes under headings which will aid the structure of the ruling. For example:



Structured note-taking will make the formulation of your reasons much easier and will aid counsel and the parties to readily understand them. This important aim will also be furthered by the use of short sentences and straightforward language. Use the active voice and use the first person singular.

It might sometimes be appropriate to begin with the outcome, although I have moved away from that as a logical progression. The object of giving oral reasons is to inform counsel and the parties of both the result and the reasons. If the result is known from the beginning, the reasons may be the subject of insufficient attention, particularly by counsel, and misunderstandings may result. In a criminal trial it is important that the reasons for the ruling you have given are well understood.

Although it as desirable to approach every procedural or evidentiary ruling during a trial with the intention of dealing with it ex tempore, there will be circumstances where that is not appropriate. Such matters include the complexity of the factual situation, a lack of confidence in the conclusion or a lack of confidence in knowledge of the relevant legal principles. Further, it may also be desirable in some cases to avoid even the appearance of pre-judgment by commencing the ruling the moment counsel resumes his or her seat.

In his excellent article "Ex Tempore Judgments – Reasons on the Run"[29], Michael Kirby offered some advice. He suggested that accurate recall of the detail and a "clear perception of the applicable principles" are required for an ex tempore ruling. Humour, allusions to literature and offensive or condescending language are to be avoided. Finally, he suggested that we forget any Latin we think we know. I would add Greek to that suggestion. Most accused in the dock do not understand those languages and nor do many lawyers.

There is one other circumstances to be considered. Your ex tempore ruling starts and then you are suddenly overcome with doubt and the feeling that, "I am not at all sure about this after all". What to do? Under no circumstances sail on regardless. As Kirby says, "An honest judicial officer will pause, may request further submissions and perhaps adjourn to consider it."

Ex tempore rulings can, of course, be revised. It is always possible and proper to revise, even extensively, without altering the substance. As the New South Wales Court of Appeal said in *Bar-Mordecai v Rotman*[30]*:*

> After all, an ex-temporary judgment is not always easy to deliver perfectly in all respects on the spur of the moment; there must be corrections which need to be made so as to give the real meaning of the judge, and he or she is perfectly entitled, it seems to me, not only to correct mistakes, but to alter words which do not express his intended meaning at the time when he uttered them.

And when it is over, save for revision, it is over. You can go to your tipstaff and say, "Yes, bring the jury back please."

(1995) 25 University of Western Australia Law Review 213

[30] (2000) NSWCA 123 at [195]

His Honour Deputy Chief Magistrate Peter Lauritsen

Magistrates Court of Victoria

Oral decisions

Why give oral decisions?

In the Magistrates Court, there are various reasons:

- There are numerous simple cases. The giving of brief, oral reasons is imperative because there would be no time for written reasons.
- An oral decision is sometimes conversational in tone. Its content is expressed less formally than a written reason. It may lack precision. Usually, it is more emphatic than written reasons and carries the speaker's body language.
- Generally, parties expect a decision at the end of the case.
- The submissions and the evidence are still fresh in your mind.
- If, on reflection, one has misunderstood a submission, then it is clarified without recalling the parties.
- It enables any findings of fact or issues that you overlooked in your reasons to be addressed there and then (exceptions to the judge's charge to a jury).

Adequacy of reasons

A judicial officer must give adequate reasons for his or her decision.

The provision of adequate reasons serves five purposes. It:

- informs the parties as to why they have won or lost
- satisfies the parties that all relevant matters, both fact and principle, have been considered
- enables a proper understanding of the basis upon which the decision was reached
- is a salutary discipline for the decision-maker
- facilitates the exercise of rights of appeal and the exercise by the appellate court of its function.

What constitute adequate reasons depends on the nature of the case. They must address all of the issues raised by the parties and not abandoned and must address the evidence bearing on the credit of witnesses (for and against).

Key themes

- Give adequate reasons.
- Understand the evidence.
- Use Lord Denning as a literary model.

"In our court, the pleadings do not often give a good or current reference point. This is especially so with defences and the pleadings of self-represented litigants. Generally, their efforts are pointless because they do not reveal the issues."

Assembling

In the context of a serious civil trial, understanding the evidence is fundamental to an giving oral decision. I do not include simple car accident or debt cases.

An ability to understand the evidence depends, in part, on the preparation at the start of the hearing. This is achieved by identifying the issues – whether legal or factual. A reading of the pleadings is a start. Then requiring the parties to identify the issues is the next step.

Identifying issues helps you to manage the case:

- It forces the parties to identify the issues and it holds the parties to what they say are the issues.
- It creates reference points. One can readily see the significance of pieces of evidence because of the identification of issues. One can then understand why a piece of evidence is given or a witness called. In our court, the pleadings do not often give a good or current reference point. This is especially so with defences and the pleadings of self represented litigants. Generally, their efforts are pointless because they do not reveal the issues.

At outset, one should investigate how the parties intend to conduct their respective cases. Establish:

- which witnesses are to be called and what they will say – not simply the number
- who goes first
- the concessions. One always searches for the common ground.

During the trial or hearing

This may seem trite, but a judicial officer must understand the evidence and appreciate its significance as it is given. The judicial officer must have the courage to seek clarification if unclear. Counsel will rush through the case and witnesses will rush through their evidence. (It is understandable with witnesses – generally, they do not want to be there giving evidence.) This may involve:

- asking counsel why he or she is asking certain questions
- reading the exhibit when it is tendered and querying its significance if that it is not apparent.

Outline

For each defended case, I use a standard outline with headings:

Overview/introduction – parties; claims; relief; defences

Matters agreed

↓

Key disputed issues

↓

Non-key disputed issues

↓

Facts

↓

Relevant law

↓

Discussion -- issues

↓

Conclusion/orders

Reasons for decision

The structure of the oral decision is the same as a written decision. My structure is:

Overview or introduction

Identify the parties and relationship. briefly explain what the dispute is about and what the parties seek by way of relief

↓

The issues in dispute

Explain the claims and defences to them.

↓

The facts in chronological order

Include agreed matters.

Where the fact is important, explain why particular finding made.

↓

The relevant law

↓

Discussion

With the law in mind, discuss the facts you used to reach a conclusion.

A statement of what the parties seek enables you to resolve all issues in your reasons.

Statement of oral reasons

The style of Lord Denning MR:

- is conversational as befits an oral decision. He speaks to the parties
- uses short, simple sentences. Usually, each sentence contains a single fact. Sometimes, there are two facts, but rarely more. It is an oral narrative style. He does not always use properly structured sentences
- uses the active voice
- avoids excessive use of negatives, which can be confusing
- avoids legal jargon
- uses common, clear idioms and metaphors
- uses the parties' names rather than plaintiff or defendant. It personalises the matter and avoids confusion.

The judgment in *Lloyds Bank v Bundy*[31] starts:

> Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him…
>
> Now there is an appeal to this court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound."

The passage identifies the claim (foreclosure), the relief (possession), the defence and, without saying so, who is going to win the appeal.

Lord Denning then devotes the next nine paragraphs to the facts. He quotes short passages of the evidence.

If the evidence reveals a series of events, then the preparation of a chronology of events is most helpful. Usually, the parties' evidence is developed chronologically. The events may then be segregated by headings and sub-headings of your choosing.

31 [1975] 1 QB 326 at 334.

Sentencing remarks in pleas of guilty in criminal matters

Most magistrates courts conduct the equivalent of a "mention list". This is a daily parade of accused persons wishing to plea guilty to offences. Many such cases are listed daily. Since the time available for each is necessarily limited, the sentencing remarks are also limited. There is no need to recite the facts of the offence for these have been read out by the prosecutor and accepted minutes earlier, usually without relevant dissent. Generally, the sentencing remarks should deal with the matters, which caused the magistrate to impose the sentence. These will include:

- the plea of guilty, the extent of discount for a plea of guilty;
- any previous convictions or findings of guilt and their affect.

Where the accused seeks a particular disposition, then it may be necessary to state the disposition is or is not appropriate. For example, where the accused seeks a disposition under s 19B(1)(d) of the *Crimes Act 1914* (Cth), as a minimum, a magistrate should[32]:

- briefly explain the two stage test
- set out the factors which established the existence of the discretion to impose a s 19B order (the first stage)
- set out the factors which persuaded the magistrate to exercise the discretion in the accused's favour.

32 *DPP v Moroney and ors.* (2009) VSC 584 at [37].

His Honour Judge John McGill

District Court of Queensland

Traditionally, and in the absence of statutory provisions to the contrary, a judge gives judgment or makes an order by speaking in the court. That decision will subsequently be perfected in a formal written document for the court records. This is in accordance with the tradition of orality in the courts, one of the few aspects of that tradition left in the civil area.

Judicial officers, however, do not just make decisions. They are expected to give reasons for their decisions, at least when the decision involves the resolution of any matter in controversy between parties. The process of giving reasons may these days not occur orally. At one time all reasons were given orally, even when they had already been incorporated in a written document; they were read in court. Apart from the tedium involved, there is little practical difference between preparing written reasons which are formally published without being read, and preparing written reasons which are read in court. The process of preparation is much the same, and in each case the reasons are the polished product of considered deliberation about the matter.

Key themes

- Ensure the matter is in your jurisdiction.
- Give written reasons to difficult litigants.
- Don't embark on an oral decision unless you are confident of what the decision will be.

"The first question is, when should an ex tempore decision be given? The short answer is, when you can."

In this respect, they may be contrasted with reasons which are given at the end of the hearing, which are necessarily oral. These not something prepared in advance; essentially you are composing as you go, and some are better at this than others. You have the consolation that in civil matters there is a good deal more leeway to revise the transcript of your remarks later. It also follows that there has been no additional legal research after the conclusion of the hearing, and that the decision is the direct product of what has happened during the hearing, together with any reading undertaken by the judicial officer in advance. It is to this process, which is traditionally referred to as an ex tempore decision, that this note is directed.

The first question is, when should an ex tempore decision be given? The short answer is, when you can. If you feel that you would like to give further consideration to the matter, or that you need to read something else before deciding it, or even that you might not be able to formulate proper reasons without the opportunity for further preparation, take time to do so. Very occasionally, there

will be matters which really have to be decided straight away, and then you have to do the best you can. Otherwise, deal with the matter straight away if you feel you can. There is also the practical consideration that, if giving the reasons will take some time, it is undesirable to force parties to sit around while you drone on interminably in the courtroom, and more convenient just to return to chambers and pick up the dictaphone.

You should not embark on an immediate decision unless you are confident at the beginning that you know what the decision will be. I have had the experience when dictating written reasons of discovering that a reasoned analysis of the matter led to the opposite conclusion to the one that I had initially thought was appropriate. In those circumstances, that did not matter, but it would be very embarrassing if it happened while you were delivering reasons in court. It makes you look indecisive, and might also invite the parties to renew the struggle before you.

One other practical consideration: when dealing with a litigant in person who shows any sign of being difficult, I think it is better to give written reasons, if only to avoid the risk of provoking further argument. I say something like: "Well, you have given me a lot to think about, and I will have to consider carefully the various points you have made. I will prepare written reasons, and my associate will be in touch with you to advise when my decision will be published."

The basic structure of an oral decision should be the same as of a written decision, though hopefully the process will be somewhat simpler: you identify the issues, identify whether particular issues are agreed, not agreed but not contested, or contested and how, make any necessary findings of fact, state your decision on contested issues, and why, explaining in particular why you have rejected at least the major submissions for the unsuccessful party. You then deal with any precautionary findings appropriate in relation to contested issues of fact, and identify any applicable matters of law if this has not been covered earlier. You explain how you get to the particular judgment or order that you are going to make. Then you make it, which may involve signing a draft order which has been provided (with or without amendments), or inviting the parties to make further submissions as to the terms of the order in accordance with your decision.

One difficulty in formulating reasons is that parties frequently do not adopt in their submissions a systematic approach to the relevant issues. It is very helpful if the parties agree that there are, say, five issues in a particular matter. and work through all five in the same sequence. More commonly they will not even agree on the matters in issue, and their submission will be dictated more by tactical considerations. Approaches vary: some counsel like to lead with their best point, while some like to save it until last, perhaps so that it sounds better in comparison with what has gone before. Some submissions are the product of a general lack of organisation. Sometimes submissions on a particular point have to be extracted from a party by something like a set of judicial interrogatories.

Although in theory judges should be able to act merely as umpires, deciding the issues thrown up for their determination by the parties and resolving matters in accordance with their decisions on those

issues, that (in my experience, at least) is rarely the way things happen in practice. Partly that is because judges these days are more inclined to take control of the proceedings (for better or worse), and partly because legal advisers do not always prepare and present matters as well as is assumed by the traditional theory. A hearing should not be too inquisitorial, but inevitably these days there will be some inquisitorial element.

If you spot a point which everyone else seems to have missed, the important thing is to say so during the hearing. There may be a good reason why the point has not been raised, or the parties may want the opportunity to make submissions on it, or to give the point fuller consideration themselves before finalising the hearing. Do not save the point for exposure for the first time in your reasons, or that will create problems of procedural fairness.

One other issue of which I am particularly conscious, as a member of an inferior court, is the question of jurisdiction. If you are in the same position, you should always check to see that the matter is within the jurisdiction of your court. My own experience, when sitting in the applications list, is that about once a week a matter comes before me which as it stands is not within the jurisdiction of the District Court, so that an amendment is necessary in order to give the court jurisdiction, or the matter has to be transferred to the Supreme Court. Since not infrequently this occurs with matters that have already been before at least one other judge, my impression is that members of inferior courts do not pay as much attention to the question of jurisdiction as they should.

In a practical sense, it is a good idea during the hearing to make notes which will be at least a key to or outline of the reasons which you will deliver, so as to give them some structure. Depending on the nature of the matter, this may include something like a reference to the name of the Act under which the application is made, the numbers of particular sections, or the rule number, and a list of the issues that arise, with some indication of the parties' position in relation to each issue. It may be helpful to provide some notes of the points that have to be covered when giving your decision in relation to a particular contested issue. Finally, if the order is one you are not familiar with, it may be helpful to draft out the actual terms of the order you are proposing, although this can be done later, if necessary, after receiving further submissions.

How much you will need to note down in this way will depend very much on you: sometimes just a reference to a single word or a few words will be a sufficient reminder of a particular topic on which you can enlarge without referring to detailed notes. If you want to refer to a particular paragraph in an affidavit, or page in the transcript, or date, or section of an Act, or case, note them here so as to prevent your having to scrabble around to find something which by that stage the parties might think you ought to know. The same applies to names, although I go to some lengths to avoid using people's actual names, particularly if they are not parties, essentially because of considerations of

privacy. The names of witnesses, for example, are rarely essential, but even oral reasons may end up on the internet.

Ultimately what notes you need to make in this way will vary from matter to matter, and experience will be your best guide. I suggest, however, that this note be kept separate from any other notes that you take in the course of the trial or hearing. I like to take a very detailed note of evidence and submissions, largely as an aid to my concentration and to assist in the process of implanting them in my short-term memory. Most of what I write down in this way I never look at again. Others have different approaches. If you do take detailed notes like this, don't mix them up with the notes which are the framework of oral reasons.

The other advantage of preparing a framework as you go is that it helps you to ensure you have covered everything that has come up in the course of the hearing. As you deliver the reasons, and check off the points on your outline, you will know that you are covering the ground comprehensively. If an issue has received significant attention, but you do not think you need to decide it, say so; if nothing else, it may avoid debate later about whether it was overlooked.

The only other suggestion I can make is: practice makes perfect (or, perhaps, habit helps with hurdles).

His Honour Magistrate Matt McLaughlin

Magistrates Court of Queensland

A couple of years ago, my son, a young lawyer, attended a lecture by Justice Michael Kirby at QUT campus in Brisbane. The students applauded long and loud when he took the stage, and he began by saying "I know why you all love me – headings, sub-headings, sub-sub-headings, and dot points." The crowd roared their approval.

A good decision should not only be correct in its conclusions – it should be able to be easily followed and understood. It should follow a logical progression so that when revisited by a reader, that part of the decision being looked for is easy to locate. It is not hard to see why law students (and crusty old magistrates) enjoy reading judgments of Kirby J. While the winner in any dispute is quite happy to simply know he or she is the winner, the loser inevitably wants to know why he or she lost.

This paper is a discussion about oral decisions, and the starting point is to accept that oral decisions do have their limitations. The precision and fluency of a carefully considered reserved decision cannot be matched by an oral ex tempore (at the moment) decision. Even so, the obvious advantage to the parties involved is that they get a result then and there, thus avoiding the costs, inconvenience and stress in having to return to the court at a later date to find out the result. What all parties to any case want is an answer to their dispute.

Key themes

- Use the parties' closing addresses to clarify any troubling issues.
- Make notes at the end of each day.
- Structure is imperative.

"While the winner in any dispute is quite happy to simply know he or she is the winner, the loser inevitably wants to know why he or she lost."

There are also advantages to the judicial officer in giving an oral decision. It is time consuming, and often tedious, to re-read transcripts of evidence long after hearing the evidence. Impressions gained from listening to a witness are often hard to recapture when reading a transcript. Perhaps most importantly, it is my experience that you will never have the evidence from a hearing more fresh in your mind than when you have just heard the evidence. Reading a transcript weeks later is just not the same.

It is somewhat daunting to give an oral decision for the first time. Lawyers by nature are careful, and the risk of making a mistake which would not occur with more careful consideration is a genuine

concern. Practice certainly helps, but of course there will always be some cases where the issues are so complex that a reserved decision is the only way to deal with it.

As a magistrate, most of the cases I deal with have fairly straightforward issues to resolve, and do not involve terribly serious matters. These are cases where every effort should be made to give an oral decision on the day the evidence finishes. There is nothing wrong in adjourning for a short while to return to chambers and consider the matter, but a decision on the day is what the parties want.

I have a few practices that I follow to assist in giving oral decisions.

During the hearing

- As a magistrate, a transcript will not be available on the day of a hearing, and will usually take weeks to materialise. Careful notes are therefore essential. I make a point of noting important answers by a witness word for word, so that I can quote them verbatim in the decision;
- I divide my notebook into two columns. On the left I summarise (and quote where necessary) the evidence; on the right I make comments to myself opposite the relevant piece of evidence such as: "this is count two"; "but see the evidence of X at page Y contesting this"; "primary evidence is here"; "defence of Z raised here"; "good witness – confident, unshaken". When reviewing the notes to give a decision, it is the right column I go to when I need to find a piece of evidence.
- If the hearing lasts more than one day it is a mistake to just stop work at the end of the day's evidence. Before going home I make a point of returning to chambers and putting down some thoughts, sometimes only 10 or 15 lines. Comments about important inconsistencies between the evidence of witnesses save trawling back through your notes to find that part you vaguely remember. Dot points about things such as strengths and weaknesses in a case; which elements of an offence are proved by what evidence; what elements are not proved etc., are often quite plain just after hearing the evidence, but even a day or two later can be difficult to reassemble from many pages of notes. Put your thoughts down while they are fresh, and resist the temptation to just go home after a long day in court.
- Get involved in the closing address of each party. If there are issues which are troubling you and which counsel is not mentioning, then ask counsel to submit on the point. If counsel makes a submission you disagree with or do not follow, tell them why you are having difficulty accepting their submission and invite further comments. The closing addresses are an excellent opportunity to be reminded of the strengths and weaknesses of a case; important pieces of evidence; relevant case law, and so on. To listen in silence to addresses is often to miss an opportunity to thrash out the real issues.

Framing the decision

- As a magistrate you are in effect both the judge and the jury, and a decision must therefore reflect that as the judge you have directed the jury to consider various matters. A wonderful tool for this purpose in Queensland is the District and Supreme Court Benchbook[33]. This is very useful where issues such as identification; the rule in Browne and Dunn[34]; the rule in Jones and Dunkel[35]; prior inconsistent statements; defences such as mistake of fact, accident, self defence or provocation and so on, arise. In giving a decision I frequently say "I remind myself that as the decider of fact I need to bear in mind the following matters in respect to the issue of X". I then read directly from the Benchbook into the record, making whatever additions or changes are required by the case in point. We have all seen appeal decisions where the court at first instance is criticised for not stating clearly that various matters were taken into account in reaching a decision.
- Returning to Kirby J, and the benefits of a logical progression being followed, in my view the single most important aspect of a decision is its structure. This means firstly that it is essential to know where you are heading before you commence. Never start reciting evidence and legal principles if the end result is not already clear in your mind – the decision will likely be rambling and difficult for a party to follow. The first step is to make a final decision in your mind, and only then should the reasons for the decision be stated. Secondly, there needs to be an identifiable progression in the decision even if headings, sub-headings and dot points are too difficult to use in an oral decision. At some stage a decision needs to discuss: (a) the facts which are agreed; (b) the facts in dispute and the different versions; (c) which disputed facts are accepted or rejected and why; (d) the applicable law; (e) applying the accepted facts to the law; (f) the decision. I use this basic recipe for framing a decision and ensure that I know what I will say on each topic before beginning. There is no need to address the topics in this order, but sooner or later each topic needs to be addressed.

While all of the above is basic stuff, it is so often the case that going back to basics is a good way to approach any challenge. Giving an oral decision is really just a matter of planning for it from the beginning, and sticking to the plan.

[33] Available on the internet at http://www.courts.qld.gov.au/2265.htm
[34] Browne v Dunn (1893) 6 R 67
[35] Jones v Dunkel (1959) 10l CLR 298

His Honour Magistrate Kym Millard

Magistrates Court of South Australia

Inevitably magistrates are required to give ex tempore judgments or rulings, not because matters before magistrates do not often have extreme legal complexity but because the volume of work in the magistrates courts is such that if magistrates reserved all their decisions they would have a docket list of uncontrollable magnitude. With the pressure of work in the Magistrates Court, magistrates are rarely given allocated time out of court to prepare or write judgments and do not have the benefit of having legally trained assistants (associates) to undertake much of the legal research in respect to a specific issue that might arise in a given case. This and the unending nature of the workload make timely judgment delivery a necessity.

My approach, then, is to give an ex tempore judgment regardless of the length or complexity of the case.

I have found that pre-hearing preparation – and in a multiple day trial adequate reflection and summary note making at the end of each day – are critical in a timely delivery of a judgment or ruling. Whether I am sitting in a criminal list or a civil list I always insist upon being provided with the files for the following day's list no later than 4 o'clock on the day prior to the hearing. I then read the files and where it is clear that a legal issue arises I endeavour to research so far as possible the issue beforehand.

One of the difficulties with civil cases in particular is that unless the parties are legally represented, they may not be able to formulate a good argument about the issues that might arise but it might be self-evident from reading the pleadings prepared by a lawyer on their behalf. I familiarise myself with the legislation that might touch upon the matters and be in a position to discuss that legislation with the parties. I also endeavour to familiarise myself with any recent authority from a higher court that might touch upon the issues that are likely to be explored at the trial or upon the application. The availability of

Key themes

- Prefer ex tempore judgments whenever possible.
- Refrain from giving lengthy quotations.
- Appellate courts often take a more generous approach to oral judgments.

"Reflection on evidence very rarely assists me on matters of credit. When the facts are fresh in my memory and witness accounts and demeanours are fresh in my mind, I find that delay inhibits rather than enhances the judgment-writing process."

considerable legal research material over the internet and web services has certainly made this task much easier over the years.

Although I endeavour to take notes and indeed at times I take verbatim notes in matters, I generally have found it difficult to keep verbatim notes where the parties have been unrepresented. However I have found it useful to make some brief notes about a matter before I go in so that where the parties are unrepresented I can ensure that I have touched upon some relevant issues – almost a tick and flick list – before completion of the evidence.

Along with much better legal research tools, one of the other great benefits that technology has brought the courts has been digital recording. I have found it very useful, if I have missed a point, to go into chambers and have my clerk download to my computer the evidence that has just been taken. I can then quickly locate a particular question and answer that might have concerned me or a particular piece of say an expert's evidence that might be relevant and make some further notes about that. That enables me to go back into court within a few minutes and be confident that I have understood what the evidence has been in respect to a topic.

Provided I am confident that I have understood the evidence and the legal issues that have arisen in the matter, I generally do not reserve to produce a written judgment. I have found that reflection on evidence very rarely assists me on matters of credit. When the facts are fresh in my memory and witness accounts and demeanours are fresh in my mind, I find that delay inhibits rather than enhances the judgment-writing process. I generally make brief findings on relevant factual disputes without seeking to quote at length the evidence given by the parties. Where I rely on texts or case law, I refrain from giving lengthy quotations. I refer to the relevant texts or judgments and endeavour only to address the pertinent issues.

Having been a magistrate for more than 20 years and in that time given literally hundreds if not thousands of ex tempore judgments and rulings, I have noticed that appellate courts have often taken a more generous approach to an ex tempore judgment or ruling than they have when a matter has been adjourned for some weeks or months to allow a more detailed consideration. That generally fills me with some confidence in approaching an ex tempore judgment. I have also found that parties – especially those who are self-represented – often are far more ready to accept a decision given 'on the spot' – even where unfavourable – than one that they have had to wait weeks or months to receive.

Whenever I am giving an ex tempore judgment where credit of the parties is an issue, I try to temper my language to ensure that, so far as possible, I do not belittle a party or a witness. Where there is a clear finding of preference of one party's evidence to another, I specifically refer to the points of difference between the evidence and the reasons why I prefer one account to another. I avoid statements such as, "X was a very impressive witness and I accept her evidence wherever it conflicts with the evidence of Y".

Where an urgent ruling is required I find it helpful to give the parties a brief analysis of my decision and a synopsis of the reasons and then reserve the right to publish more detailed reasons. This is particularly relevant if the parties need an interlocutory order such as an injunction or a restraining order where a delay in giving a decision will only create difficulties. It is possible then to go away and give more detailed analysis after looking at all the material and in particular authorities that have been considered in the ex tempore process but not referred to in any detail in the ex tempore remarks. When I give an ex tempore judgment I will reserve to myself the right to subsequently make minor amendments with respect to grammatical expression and syntax. That reservation requires discipline to ensure that the final product is close as possible to the original and does not explore issues that have later come to mind.

I acknowledge that much of the ability to give a good ex tempore judgment or ruling depends on the confidence that one can bring to the process on the day in question. There are some days where frankly because of other issues I may not be able to bring the same skills to the table that I could bring on another given day. I need to be fair not only to myself but also to the parties to ensure that if through other pressures I am not in a position to give a good ex tempore judgment that I do not do so. However generally I take the view that whenever possible I should give an ex tempore judgment or ruling as it is good for the parties, good for my clerk and good for my own piece of mind.

Sometimes just stepping out for 30 minutes will be enough. Sometimes it is appropriate to give myself overnight or a day or so to reflect on one aspect. But in my view nothing is as good in my job as giving a soundly produced ex tempore decision.

The Honourable Justice Debra Mullins

Supreme Court of Queensland

I propose to deal with one aspect of giving oral decisions which reflects the subject of papers I have given on "Judicial Writing in an Electronic Age"[36]. The topic applies equally to oral decisions. The availability of reasons for judgment and sentencing remarks (and even media reports of those decisions) on the internet gives greater accessibility to the content of those decisions. That raises the issues of unnecessary infringement of the privacy of litigants or witnesses and the potential for contributing to identity crime.

In delivering sentencing remarks or other oral decisions, it is a good practice to avoid references to personal details about the defendant, the victim, parties or witnesses that are not necessary to justify or explain the sentence or the reasons for the decision. This assists in limiting potential negative consequences from the electronic dissemination of the oral decision.[37]

Some courts or jurisdictions have developed protocols or guidelines for addressing the protection of personal information in judgments. These protocols or guidelines set out the reasons for their development and make suggestions for strategies that can be used by judicial officers in preparing reasons for decisions to minimise disclosure of personal information. One publicly available policy is that which was published on 10 December 2007

Key themes

- Consider privacy issues.
- Record information in general terms.
- Refer to witnesses by role rather than by name.

"The availability of reasons for judgment and sentencing remarks on the internet ... raises the issues of unnecessary infringement of the privacy of litigants or witnesses and the potential for contributing to identity crime."

36 Justice Debra Mullins "Judicial Writing in an Electronic Age" (http://archive.sclqld.org.au/judgepub/2004/mullins211204.pdf); Justice Debra Mullins, "Update on "Judicial Writing in an Electronic Age" – Five Years On" (http://archive.sclqld.org.au/judgepub/2009/mullins031209.pdf)

37 The problem of identity crime is referred to in Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, "Final Report Identity Crime", March 2008 (http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)%7E6Final+Report+Identity+Crime+March+2008.PDF/$file/6Final+Report+Identity+Crime+March+2008.PDF)

by the Supreme Court of New South Wales "Identify Theft Prevention and Anonymisation Policy"[38]. The protocols on this topic emphasise the importance of avoiding disclosure of "unique personal identifiers" such as date of birth, place of birth, residential address and full details of family members.

There is so much of what we do as judicial officers which is habit. When information is given to the court in the form of evidence or submissions, it is easy to recite that information in the decision in the exact terms in which it was given. Invariably the exact date of birth is given of a defendant, party or a witness. It is rare that the exact date of birth is an essential part of the decision. The practice I have developed in taking down submissions on sentence is to convert the exact date of birth to the age of the defendant which is usually sufficient for the purpose of the sentence and avoids putting in the public domain a unique personal identifier that can be used to create an identity for criminal purposes. I take the same approach to the defendant's address. When the prosecutor states that a search warrant was executed at the defendant's address and states it in full, I record that the search warrant was executed at the defendant's residence and that is the form of expression I use in my sentencing remarks.

It is also common for the residential address of a victim to be disclosed in full during the court hearing. The fact that the victim was assaulted in the victim's home will be a relevant fact, but it is exceptional that the exact address of the victim's home is required to be disclosed in the course of the sentencing remarks. When I record the information I am being given about a victim, I modify the information so that I have recorded it in less exact terms that will be appropriate for inclusion in the sentencing remarks. I take the same approach to the address of a victim for the purpose of any restitution or compensation order. When making the order, I do not disclose the full address of the beneficiary of the order, but identify the address by reference to a document that is identifiable on the file by the registrar of the court.

Apart from victims, I feel strongly about unnecessary disclosure of personal information in respect of a defendant's family and witnesses in any proceeding who may be incidental participants and not participants by choice. It is usually sufficient to note that a defendant who is being sentenced has children and possibly the number of them and their ages in general terms (such as two young children), rather than referring to their names and specific ages. It is quite common for medical conditions of members of a defendant's family to be disclosed in great detail during a sentencing hearing. I reflect on what is relevant from the medical information and limit my disclosure of the details of any medical condition accordingly. In many cases it is the fact that there is a medical condition that requires ongoing treatment or support from other family members that is sufficient for the purposes of the sentence. Similarly, I exercise care when incorporating quotes from medical

38 Supreme Court of New South Wales "Identity Theft Prevention and Anonymisation Policy" (published 10 December 2007)
(http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Identity_theft_prevention_policy.doc/$file/Identity_theft_prevention_policy.doc)

reports into my sentencing remarks to avoid inadvertent disclosure of unnecessary personal information that may be recorded within the quote.

It is also rare for the full name of a witness to be essential to the decision. The surname of the witness will be sufficient in most cases. In other cases, it may be sufficient to refer to the witness by the role that the witness played in the events, such as the taxi driver, the neighbour or the plaintiff's mother.

I use a checklist for my sentencing remarks to ensure that I cover all the relevant matters that must be taken into account in imposing the sentence. I have a different checklist for other matters where I frequently give oral decisions. It is helpful in preparing a checklist that is relied on for giving an oral decision to include a reminder to avoid unnecessary references to personal information in giving the oral decision. It is an approach which now has almost become second nature in my formulation of oral decisions.

In summary, I suggest it is useful for judicial officers to be aware of:

- potential negative consequences for parties and witnesses from unnecessary disclosure in oral decisions of personal information and, in particular, unique personal identifiers
- the strategy of recording the personal information given in the course of a hearing in less specific terms, in order to facilitate its inclusion in the oral decision in a way which avoids unnecessary disclosure of personal information without reducing the effectiveness of the sentencing remarks or the reasons for the decision.

His Honour Magistrate Robert Pearce

Magistrates Court of Tasmania

Background

At the time of writing this paper I have been a magistrate in Launceston in Tasmania for just over a year. I have learned from my discussions with others that that there is no uniform approach to the preparation and delivery of oral decisions. I mention that only to reassure myself and others that there isn't a right and wrong way. Of course certain boxes have to be ticked, but each judge or magistrate can adopt a method that suits him or her and feel comfortable in doing so.

In my role I give oral decisions with reasons almost every day. The volume of work and the time constraints mean that there is not always an opportunity for quiet reflection. The most common decision is sentencing of offenders. There are often defended hearings, mostly in the criminal jurisdiction but also the civil jurisdiction. I also determine bail applications, applications for restraint orders, child welfare matters, civil disputes and administrative appeals – the list goes on. I am still figuring out the best way to do things. So the content of this paper is a combination of what I now do and what I think I should do.

Key themes

- Take notes.
- Follow a structure.
- Avoid formulaic legal phrases.

"The parties should walk out of court understanding what the decision is and in general terms why it was made. They should not walk out wondering 'what just happened?'"

Should there be an oral decision?

The first decision is whether there should be an oral decision at all, and if so whether it should be given immediately or after an adjournment. The second task is to formulate the decision and, last but not least, to deliver the decision.

The ability to give an oral decision immediately on the conclusion of a matter is a huge time saver. The parties learn the result of their case without delay. However if I am in any doubt about whether to give an oral decision straight away I generally do not do so. I adjourn to either properly formulate oral reasons or, in appropriate cases, prepare written reasons. Sometimes the adjournment to formulate an oral decision need only be for a short time – perhaps only a few minutes or until the next day. Even though I have made up my mind about the result I may be too tired at the end of a long day to do justice to the reasons and a short adjournment will allow me to collect my thoughts. On other occasions a longer adjournment is required. Sometimes cases are adjourned because they

are part heard. I can then use the time to prepare notes for an oral decision or start a written decision. If a very preliminary draft of the decision is either written or dictated while the case is still fresh it is not a great leap to convert that draft into written reasons if time permits. I am one of those for whom the preparation of written reasons assists in the decision making process in difficult cases.

Why give reasons?

I prepare reasons with an eye on why there is a requirement to give reasons at all. There are two main ones. The first is so those affected by the decision are left with a proper understanding of why a decision was made. It is fair and just that this should be so and increases (hopefully) confidence in the judicial system. The second reason is that failure to give sufficient reasons for a judicial decision will sometimes amount to an appealable error. The reasons should disclose to an appeal court the findings of fact and the reasoning that led to a decision.

Note taking

One of the most helpful aids in the formulation of reasons is good note taking.

I keep notes in a hard cover book with numbered pages. I note the evidence and submissions on the right hand page only, leaving the left side clear. I find it helpful to use this space to make running notes and comments to myself. For a sentence it can be a reminder about the penalties and the important sentencing factors. In a defended hearing the notes are about the issues and evidence as the case proceeds. It may be that a piece of evidence corroborates or is in conflict with another witness. I can make side notes about the credibility of a witness and why I have formed a particular view about him or her. Notes can be made about the contents of documentary evidence. I even use the space to write bits and pieces as I go that may form part of reasons later on. These can be helpful prompts in the giving of a decision particularly if there is an adjournment without the case being completed.

Sentencing decisions

Magistrates and sentencing judges are generally obliged to give reasons for sentences. The amount of detail required will vary according to the circumstances of the case. Failure to give reasons for a sentence may amount to appealable error. I try to give clear reasons for the simple reason that an accused person is entitled to know why he is being dealt with in a particular way. Most sentences are delivered orally. Many are given immediately. Some are reserved either so I can reflect on them or wait for a pre sentence or other report. If a sentence is adjourned for a report my practice is to write down as much of the sentencing comments as I can straight away with my preliminary view about what the orders will be and put the notes away until the report is received. Then the only thing left to do is amend or add to the notes depending on the contents of the report.

In my jurisdiction only difficult, controversial or particularly serious cases warrant sentencing comments being reduced to writing for publication. However in all cases I find it helpful to follow a general structure for sentencing comments which is roughly as follows:

Restate the charge/s and whether the defendant has pleaded guilty or been convicted.

↓

State the important facts that impact on the sentence.

It is unnecessary to restate all the facts when there is no dispute about them but it is worth touching briefly on facts that have a particular mitigating or aggravating effect. If there has been a disputed fact in a hearing it is important to find the facts for the purpose of sentencing.

↓

Outline mitigating factors – plea of guilty, remorse, amends, good character, and prospects of rehabilitation.

I usually put this in terms of, "It is in your favour that…"

↓

Mention any relevant personal factors – age, employment and family.

↓

State the existence or absence of prior convictions.

↓

State any need for specific or general deterrence.

↓

Comment on minimum or maximum penalties.

↓

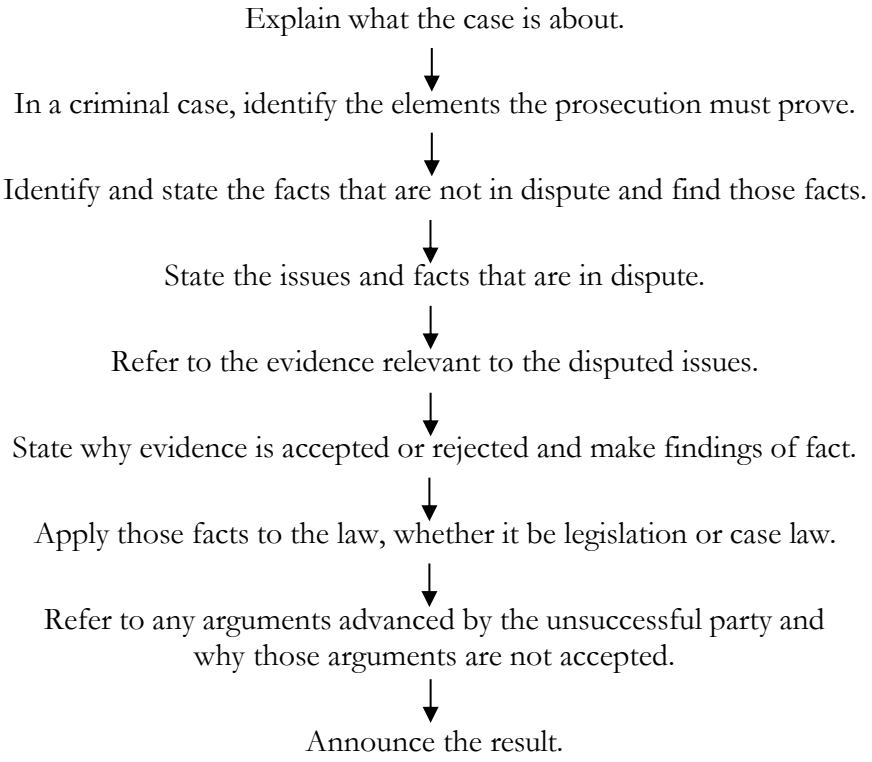
Announce the orders.

Before and during a contested proceeding

Although it is not always possible, it is helpful to be familiar with the issues that are likely to be relevant before a contested hearing starts. In criminal matters I try to read the complaint, think about the facts that the prosecution must prove and what the defence might be. Sometimes the parties will outline the issues at the start of the hearing but remember that in the absence of formal agreement the prosecution in a criminal matter still has the onus of proving all the elements of the charge.

In civil matters I read the pleadings and, if time permits, have a quick look at the legal issues.

When it comes to making a decision I try to structure an oral decision in the same way that I would structure written reasons:



Delivering the oral decision

The way that an oral decision is delivered is in many ways almost as important as the content. Whilst the content is important for legal reasons the other primary function of giving reasons is undermined if, no matter how beautifully crafted the legal judgment is, the meaning is lost on the parties:

- Try to use language that the audience can understand. The words used to a 13 year old being sentenced for shoplifting a chocolate bar will differ to the words used to the parties in a commercial civil claim. In either case however try not to use legalese or formulaic legal phrases.
- Make decisions as short as possible. After a while the eyes of the parties will glaze over. If the reasons need to be so long that they cannot retain the attention of the parties, at least during the critical parts, then perhaps the reasons should be written. The parties should walk out of court understanding what the decision is and in general terms why it was made. They should not walk out wondering "what just happened?"
- Sentencing decisions in particular require engagement with the person being sentenced. This is not always easy to achieve, particularly if notes are being read or referred to. However the impression I have is that the comments are much more likely to be taken notice of if they are addressed, at least in some critical parts, directly to the defendant.

Her Honour Magistrate Tina Previtera

Magistrates Court of Queensland

After many years of trialling different approaches to judgment writing, and exposure to the ruminations of other judicial officers on the subject, I have developed and maintain specific practices which I personally find useful when preparing for the delivery of both ex tempore and written/reserved decisions. They are not meant to be prescriptive in any way.

I always hope and aim to give an ex tempore decision, as it is the best way to avoid delay and the inevitable pressure which results from having reserved decisions. I never presume, however, that I will be able to do so, given that, until the evidence unfolds, the issues do not crystallise.

Having said that, I generally reserve decisions involving complex or novel facts, legal argument or issues, or when the hearing has been a multi-day or part-heard matter.

Regardless, however, of whether I give an ex tempore decision or reserve the decision, I follow a number of self-imposed rules which make the judgment writing process less difficult than it was before I adopted them.

Key themes

- Aim to deliver a ex tempore decision.
- Ensure you have the relevant law on the bench.
- Note the time of important evidence so you can replay it on the digital recording.

"I do not recite all of the evidence, as it is fresh in everyone's mind."

Before the hearing commences

I make sure I have access, before the commencement of evidence, to the relevant legislation on the bench. If the matter involves the civil jurisdiction, I read the pleadings and affidavit material prior to the commencement of the evidence. In the civil jurisdiction, I will also make notes prior to the commencement of the evidence, in relation to the competing claims.

During the hearing

I keep two notebooks on the bench. In one, I take detailed notes as each witness gives their evidence. I use double line spacing so that I have room to add any comments as the evidence unfolds or when I am organising my notes to write a decision. I keep the submissions of the respective parties on a sheet separate to my notes, again using double line spacing so that I can make any additional notes as required.

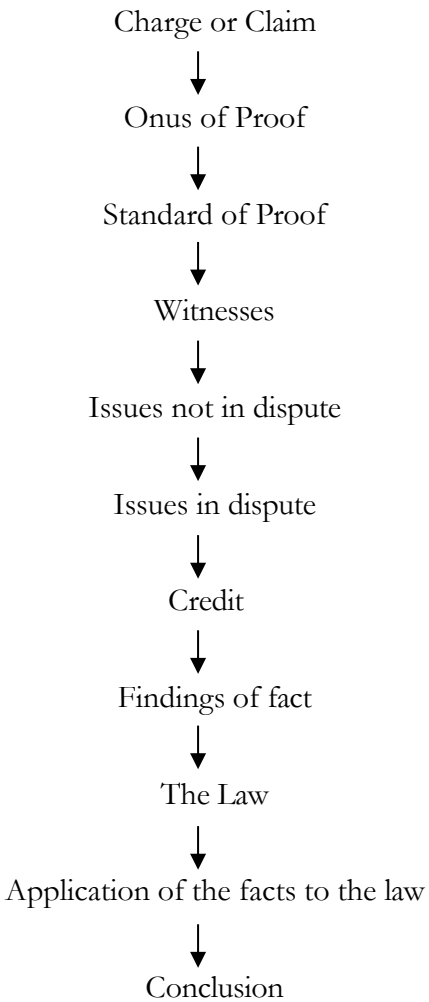
The second notebook is reserved for my decision writing, which I may begin during the hearing if the issues quickly crystallise and it becomes clear that I will be able to give an ex tempore decision.

Due to the accessibility of digital recording, I always ensure that I note the time of any particularly important evidence. I can then replay it before giving a decision.

I also clearly mark in my notes inconsistencies within a witness's evidence, any inconsistencies between the evidence of a witness and other witnesses, undisputed facts, prior statements, the reliability or probability of the evidence, and any relevant demeanour or characteristic of a particular witness which bears upon the issue or reliability of their evidence.

At the conclusion of the hearing

If I decide to deliver an ex tempore decision, I stand down in order to organise my notes and my thoughts and prepare a decision to be read into the record. (To proceed straight from hearing to delivering a decision can be fraught with difficulties, not the least of which is the perception of the parties that either the decision was made prior to the end of the evidence or without proper consideration of the evidence.) I then organise my notes, symbolically differentiating between categories in a list comprising the following headings;



I am then able to organise them into the writing of a decision to be read into the record. Given that the decision is ex tempore, I do not recite all of the evidence, as it is fresh in everyone's mind.

If I decide to reserve my decision, I always nominate a definite date on which the decision will be delivered. For me, this practice reduces the likelihood of procrastinating more than is necessary. To leave the date to be fixed at a later stage makes it too easy to put it off, the consequences of which can only be increased stress levels and increased delay.

The decision

I use the above fixed formula for my decision-writing, whether the decision is delivered ex tempore or is reserved. Additionally, I do not commence a written reserved decision until I can succinctly, in one or two short paragraphs, set out the issue/s for determination. If I am unable to do that, I do not hesitate to speak to a colleague in order to achieve that outcome.

I find that identifying the issues for determination before I commence to write is far more successful for me than the written stream of consciousness approach. The latter only delays fixing in my mind the issues for determination and extends the time over which the decision is made. Ultimately, it also results in significant editing.

If I type the decisions myself, I also find that I engage in interminable editing as I type, and so I prefer to dictate my decisions, and edit only once.

I also try to complete the final draft at least 24 hours before the decision is due to be delivered so that I have time to consider it in the form in which it will be received by the parties. I would like to say that I am always happy with the final result, but that alas is not the case; although if I am particularly troubled because of the complexity of a decision, again I do not hesitate to discuss it with a colleague so that I am satisfied that the decision can be delivered. Once delivered, I try to forget about it and move onto the next one.

His Honour Judge David Robin

District Court of Queensland

It was a surprise to be asked to contribute to this publication. The explanation was the relatively large proportion and number of "ex tempores" amongst decisions under my name recorded in the Queensland Courts website. Typically, those have been submitted, not for any lasting value, but to provide a record of the work of the courts (District Court of Queensland and Planning and Environment Court) that anyone interested may examine, or simply to preserve decisions and the reasons for them for later reference, which may become important, even at a subsequent stage of the same litigation (current registry practices do not preserve written or transcribed oral reasons for decisions in court files).

At the Bar, I was impressed by the elegance of ex tempore reasons delivered by Lucas J at the end of some trials in which I appeared. In those days, no court reporter was assigned for matters in "chambers", as the applications list was called. In that jurisdiction, it was common for reasons to be given for a decision only if requested by a party – in the course of argument, the court's reasoning may well have emerged clearly enough. Judges from time to time wrote out reasons in their notebooks, then read them out for the benefit of the parties at the conclusion of the hearing. I recall such exercises by Mackenzie J as models of clarity and economy of words. In the first years on the court I strove to emulate him in this respect. Then came the luxury of court reporters present and a new freedom from the discipline of expressing oneself succinctly in writing.

Key themes

- Prepare as much as possible.
- Tell the loser why he or she lost.
- You cannot always avoid a reserved judgment.

"You should go beyond what strikes your own mind as compelling reasoning. Bear in mind that you have to persuade the parties and whoever else may examine your efforts that you were sufficiently in command of the facts and the law bearing on each issue."

It has been my rule to have and to express reasons for every decision made as a judge, not least to demonstrate to myself and anyone interested that I understand what is being sought and the relevant considerations in and implications of granting it, even (I could say particularly) in *ex parte* applications. You would not believe how common it is for the court to be asked to do things which there is no jurisdiction to do. Reasons ought to be given for any decision which is not a formality or straightforward, including for exercises of discretion regarding substantive relief or costs.

Many of the contributions in the NJCA's anthology *Judicial Decisions – Crafting Clear Reasons*[39] laud ex tempore decisions as serving the interests of community, parties and courts by avoiding delay as well as freeing judges from a burden of reserved judgments. Only Senior Judge Tony Skoien expressed misgivings: he preferred to deliver written reasons the next day: "an ex tempore Judgment, when transcribed, usually reads rather poorly". He is right – but the parties may be grateful to be spared another day in court. Justice Peter McClellan advanced a different view: "An uncorrected ex tempore judgment is always better than the first draft of a reserved judgment." I am inclined to agree with that. On the civil side, a judge has some latitude in correcting a transcript to produce something more workmanlike or informative, by bringing in references to legislation or authorities, extracts from documents or evidence – a welcome contrast from the criminal side, where one must be cautious about changing what has been transcribed as said in court in justification of a sentence or important ruling, in a summing up even more so.

Ex tempore is literally "out of the time" but to lawyers means "at the time". I take ex tempore decisions or reasons to be ones "composed, spoken ... at the moment, without premeditation or preparation"[40] In court work, the supposed usual understanding of "without the assistance of notes, or without reading" seems inapposite.

If you are keen to hand down a decision supported by reasons ex tempore, you may be well advised to pursue any inclination and opportunity to read in advance of the hearing relevant filed documents, affidavit evidence, submissions, and even some of what you think will be the applicable law if you are not reasonably confident about that already. Bitter experience working at first instance is that all too often interesting matters go away for one reason or another, and that such preparations are wasted. There will be opportunities in contests already underway to do such work during adjournments from one day to the next. A colleague tells me that he goes into court on what he expects to be the last day with an introduction to his judgment already written – a useful foundation for receiving and assessing closing arguments. Obviously, preparation in advance may help any attempt at ex tempore reasons. You can never be sure, however, what are the pertinent issues until the hearing.

From time to time courts hand down a decision immediately, indicating that reasons will be delivered later (to protect rights to vote at an impending election[41], or, more typically, to get someone out of custody who ought not to be there). So far as I recall, I have not done that. Circumstances may make it appropriate; you will be committed to writing reserved reasons, which ought to come out well before the appeal period expires to allow the parties to consider their positions.

[39] Judicial Decisions – Crafting Clear Reasons (National Judicial College of Australia, August 2008)
[40] "Ex tempore" Oxford English Dictionary online: http://www.oed.com/
[41] Rowe & Anor v Electoral Commissioner & Anor [2010] HCA Trans 207

To embark on delivering ex tempore judgments you must be confident of what are the relevant legal rules, what are the facts and your decision. It may well promote confidence in forging ahead if you have dealt with the same or similar issues previously. The evidence and the steps in your reasoning process may require organisation. Post-it stickers or similar markers are useful. They can be numbered in the order of intended reference and fixed to written submissions, exhibits, documents in the file or your own notes. If the parties do not provide copies of pages you may want to shuffle into useful order for reference in expounding oral reasons, you should be able to get copies made quickly by your associate or a court officer. Reasons are important for the benefit of the parties at the current or later stages of their dispute and of any appeal court that may become involved; reasons may have wider usefulness if some guidance can be extracted for the future from what you have decided and your reasons.

As for any set of reasons, those given ex tempore should identify the relevant facts, if appropriate by reference to an extraneous statement held to be reliable, and state findings if there has been any decision resolving some conflict about the relevant facts. There should be a sufficient indication of the law or other principles you are setting out to apply. There should be an explanation of how the facts or the applicable rules or both in combination lead to the outcome.

Of course, the reasons should spell out to the loser, especially if self-represented, why he or she lost. It can be just as important to indicate why the winner succeeded, especially why a discretion was exercised as it was or an indulgence granted. In planning cases close questions often arise as to whether change to a development proposal or approval should be allowed, or deficiencies in a developer's process that might have an impact on opportunities to object should be excused. The key issue may be whether something is "substantial". Giving reasons for the assessment made ought to head off suspicions of inattention to detail or capriciousness, and promote consistency, at least within your own decision-making.

You should go beyond what strikes your own mind as compelling reasoning. Bear in mind that you have to persuade the parties and whoever else may examine your efforts that you were sufficiently in command of the facts and the law bearing on each issue.

Do not rely on encountering the tenderness which Heydon J suggested that appellate courts might show towards decisions supported by ex tempore reasons (see *Judicial Decisions: Crafting Clear Reasons*[42] page 61, citing NSW *Medical Defence Union v. Crawford (No 2)*[43]).

However anxious to avoid a reserved judgment, you may have to confront and defer to difficulties of a practical or social nature. Delivering ex tempore reasons takes time. It imposes on the participants in the hearing by detaining them to listen to an exposition of reasoning which can be

[42] 2008 (National Judicial College of Australia)
[43] NSWCA 30 June 1994 (http://caselawsearch.lawlink.nsw.gov.au/ccaarchivejudgments/1994/1994_364.pdf)

inelegant, halting, discursive, protracted, maybe all of those. It holds up those in the next case(s). It may detain court staff, unreasonably, if late in the day, after usual hours, and it may happen that court reporting services are unavailable, because special arrangements have not been made in time. If you are anxious to establish something in the nature of a precedent, delivering an ex tempore decision may be unwise. See *Valentine v. Eid*[44], especially as interpreted in Wikipedia[45]. Reference to the plethora of judgments, frequently ex tempore, nowadays available electronically suggests that the haphazard reporting of ex tempore decisions nearly two decades ago may no longer be so significant. It seems untenable to suggest that a reasoned decision given ex tempore does not bear examination, even if the chances are higher that something important may have been overlooked.

[44] (1992) 27 NSWLR 615, 621

[45] "Ex tempore" is a legal term that means 'at the time'. A judge who hands down a decision in a case soon or straight after hearing it is delivering a decision ex tempore. Another way a judge may deliver a decision is to reserve his decision and deliver it later in written form. An ex tempore judgment, being off the cuff, does not entail the same preparation as a reserved decision. Consequently, it will not be thought out to the same degree
http://en.wikipedia.org/wiki/Ex_tempore
August 2010

His Honour Judge Michael Shanahan

District Court of Queensland

Sentences in Queensland are usually delivered on the day that submissions are made. It is unusual for a sentence to be adjourned for consideration, although this is advisable where a matter is complex or a studied consideration of comparable sentences is required.

Before court

I prepare for a sentence by ensuring I have a copy of the indictment or any summary charges which are to be dealt with. I read any material forwarded by the parties such as agreed statements of fact and medical/psychiatric reports which are to be tendered. I do not read the depositions or statements tendered at committal proceedings as the basis for the plea as accepted by the prosecution may be different from that disclosed in police statements.

In court

In court I make notes of any issues to which I wish to refer in my sentencing remarks. The first of those is a summary of the number of charges and their short title. The notes include a summary of the facts of the offences as alleged and accepted particularly with regard to any aggravating or mitigating features. I note the accused's particulars including a summary of any criminal history emphasising any similar past offending, jail sentences or breach of court orders to which I wish to refer. I particularly note whether the offences occurred in breach of any previous court orders.

Key themes

- Read any material forwarded by the parties.
- Towards the end of defence submissions, formulate a sentence and invite submissions on it .
- Become familiar with sentencing law.

"I do not slavishly cover all sentencing guidelines or considerations as defined in sentencing statutes. I refer only to those that have particular relevance to the present matter."

I make a brief summary of any comparable sentences relied on, with reference to any points of distinction. Where counsel suggest a range of penalties, I expect the submission to be supported by Court of Appeal authorities or, if the offence is an unusual one, by relevant single judge decisions.

Towards the end of defence submissions, I formulate a sentence, indicate it to the parties and invite submissions on that. If the sentence involves the setting of a parole date, I invite the parties to confirm the date so as to achieve the sentence I have indicated. This is particularly the case where

the accused has spent time in remand custody which needs to be taken into account in setting the appropriate date.

Sentencing remarks

My sentencing remarks follow (to my mind) a logical pattern. It is useful to develop such a pro forma which can be followed in delivering sentence remarks. I do not slavishly cover all sentencing guidelines or considerations as defined in sentencing statutes (e.g s9 *Penalties and Sentences Act 1992* (Qld)). I refer only to those that have particular relevance to the present matter.

I commence with a short form recitation of the charges to which the accused has either pleaded guilty or been found guilty. I set out the time period over which the offences have been committed.

I give a summary of the facts of the offences including the accused's role and any aggravating or mitigating features. I comment on any effect caused to a victim, and the contents of any victim impact statements.

I set out the accused's personal background including his or her present age and the age at the time of the offences. I summarise any relevant criminal history particularly similar past offending and whether the offences breach court orders or were committed on parole or on bail.

I set out any relevant personal circumstances particularly present employment, family responsibilities or any medical or psychiatric issues. This is particularly relevant where those issues would impact on the accused's time in custody (for example, old age or specific medical conditions).

I canvas any issues of parity with sentences imposed on co-offenders and any issues of totality which arise by reason of other sentences imposed on the accused.

I state how seriously I view the offence, particularly when compared with other sentences placed before me. If necessary I distinguish those comparables or adopt them by a comparison between the pertinent facts.

I note any particular issues in mitigation particularly where that warrants a non-custodial penalty. I refer to any steps taken that show significant rehabilitation.

I particularly indicate taking into account a plea of guilty, cooperation with the authorities or providing information about other matters. I specifically refer to any volunteering of offences, the timing of any plea and the saving of a complainant from being required to give evidence. It is important to state on the record what allowance is being given to recognise these factors. This can be achieved in a number of ways such as a reduction of the head sentence or the setting of a parole date at an earlier time than would otherwise apply. The sentencing remarks should be clear as to what mechanism is adopted and the impact on the sentence meant to be achieved. Where a head

sentence is reduced, I indicate what the head sentence would have been to ensure that the discount is clear.

I then deliver the sentence ensuring that a separate sentence is delivered for each charge where that is required or sentencing on the indictment if that is permitted.

At the conclusion of the sentence I ask each party whether any additional orders are required (or if they wish to bring to my attention any errors I have made).

Comment

In formulating the appropriate sentence I take into account the specific submissions as to penalty made by each party. Those submissions should have been supported by authorities. If they have not been provided and I need them, I ask for them and adjourn so that the parties can provide them.

Finally it is important to be familiar with the sentencing legislation (which is becoming increasingly complicated) particularly in relation to which orders can be combined with others, and where statutory provisions require any penalty to be cumulative. It is also important to be familiar with sentencing decisions of the Court of Appeal. This is necessary for the assessment of submissions made by both the prosecution and the defence as to the appropriate penalty as there is usually some distance between them and it is not always appropriate to pick the mid-point!

The Honourable Justice Peter Young AO

Supreme Court of New South Wales

Judges are as infinitely different in temperament and personality and in the way they tackle their workaday tasks as any other section of the community. Thus, what follows are the thoughts of one judge, albeit one who has been on the Bench of the Supreme Court of New South Wales for over 25 years at first instance and on appeals, as to how he personally views this topic. I hope that this will be useful to others, but would not be at all surprised if some find it unhelpful to them with their own individual style of working.

My general rule, both at first instance and on appeal is that if a judgment can be safely given as an ex tempore judgment, it should be. Of course, on appeal, there are at least two other judges to consult and, if even one of them feels that judgment should be reserved, then it must be, no matter what one's one inclination.

Of course, the workloads of courts vary tremendously. I write from the background of the Equity Division of the NSW Supreme Court. The lists are pretty heavy and the division is what might be termed a 'high volume' court. However, there is a fair settlement rate and the cases that proceed tend to be from half a day to a week so the judge is in a different situation to a magistrate with a multitude of cases or a District Court Judge with a running list.

Again, whether one can give a judgment ex tempore depends on whether there has been enough time to get thoroughly on top of the material, both factual and issues of law. In the NSW Court of Appeal where we sit in court only three or three and a half days a week, one usually has an afternoon shortly before the hearing when one can read the appeal papers and make sufficient notes to be able to give an ex tempore judgment if appropriate. Where the evidence is by affidavit or witness statement and there does not appear to be much contest as to the facts, the same can be done if time permits. If the court in which you are sitting hands you the file a few minutes before you go on the Bench or if the evidence is wholly oral, there can be no such preparation.

Key themes

- If you can safely give an ex tempore judgment, do so.
- Never announce the result and give reasons later.
- For appeals, the first instance judgment can be adapted to create a template.

"One must always remember that the judge is deciding the dispute as presented by the parties, not what he or she would have preferred them to present."

One danger in doing that preparation is that one may prematurely form a view before hearing counsel. Often this will occur because one attributes overmuch importance to one part of the evidence or overlooks other parts of the evidence or the way the case is actually presented differs greatly from what one expected when reading the material beforehand. One must always remember that the judge is deciding the dispute as presented by the parties, not what he or she would have preferred them to present.

However, with those caveats, I affirm my view that a judge should ordinarily deliver an ex tempore judgment if safe to do so.

One reason for doing this is a purely practical one. In my view, having a pile of six or more reserved judgments hanging over one induces depression. Further, the longer the gap between the end of the hearing and the writing of the judgment, the more one forgets the finer points and the longer it takes to prepare the judgment as one has to reread the transcript and the relevant documents. Unfortunately, in courts where there are considerable delays in providing a transcript of evidence to the judge, this extra effort often cannot be avoided.

On a similar line of thought, even if it is your habit to write six or even 30 drafts of a document before you are satisfied with it, you will be very lucky if your workload allows you that luxury without your colleagues complaining about your slowness. Remember too, that, unless you're on the High Court, the odds are that few people will ever actually read what you have written and those that do, will not be checking your grammar, but will be looking at the reasoning and the result.

A more public spirited reason is that, at the end of the case, the people intimately involved are still in court and it is far more satisfying for them to hear the result than to be told by their lawyers that the judge will give his or her decision, "probably before Xmas".

I have on more than one occasion in this note deliberately used the words "safe" or "safely". These denote, that where a judge has any unease (other than doubt of his or her ability to give an ex tempore judgment) about the case, the judge should reserve as once a decision is given it is irreversible except, of course, on appeal and appeals cost the parties considerable expense. I have put those words in brackets in this paragraph as many judges doubt their ability to give an ex tempore judgment. However, one is really forced to learn to do it and the sooner the better.

When one is thinking to oneself that it is possible, safely, to deliver an ex tempore decision, one must ask oneself whether it is appropriate to do so. There are some cases where it is unwise to give an immediate set of reasons for decision unless the urgency of the case dictates otherwise. Even in those cases, it may be wise to reserve overnight so that the arguments can mature in the mind.

What one should never do, except in the most obvious case or in the most exceptional circumstances, is to announce the result and say that you will give reasons later. This removes your ability to change your decision if you later think of some fresh point that might affect the result.

Remember too, that once you have given a judgment in court, you cannot alter it. When revising the transcript of an ex tempore judgment you can add an authority or two and correct minor grammatical errors like split infinitives, but that is really as far as you can go even though, with hindsight, some concepts could have been better expressed.

One type of case where an ex tempore judgment is often not appropriate is where there is a dispute about the care of children. Experience shows that parties are happier if they feel that the judge has taken time to think deeply about the problem before deciding the issue.

A like situation is where the hearing has been emotionally charged, it may be better to reserve the decision until the parties (or the lawyers) have calmed down. Occasionally too, a party will request that the judge not deliver judgment in his or her presence as a heart attack may be engendered.

There are, indeed, some cases, where a near riot will break out if a powerful group lose a case and want to demonstrate their muscle. There is a true story of a judge in Papua Nuigini who had to deliver an unpopular decision which he had reserved. He went onto the bench one morning and merely said, "I find for the plaintiff and I hand down my written reasons" and left the bench hurriedly to get into his car for a fast trip to the airport and the plane to Australia.

Putting the practical matters aside, one case where it is often unwise to give an ex tempore judgment is where there has been unequal representation of the litigants. The judge can easily be swayed by the impressive advocacy of the better performer and needs to put the matter aside until there is time quietly to consider the substance of the arguments. The same applies when the judge feels that both counsel performed inadequately.

Another case where one does not give an ex tempore judgment is where there is a test case including situations where counsel tell the judge that the case is the first where a particular point has arisen for decision and the decision will have an effect on a section of industry.

Of course, a judge has to reserve if the court usually rises at 4pm and the argument finishes somewhere between 3:40pm and 4:30pm as both the court staff and the advocates usually need to do other tasks after the hour at which the court customarily rises. Unless the matter is urgent, there is no reason to delay them by giving a 30 minute oral judgment when the judge can dictate the same thing into his or her tape recorder while having a cup of coffee in chambers shortly afterwards.

The most common case for reserving judgment is where, at the conclusion of the case, the judge is unsure of the result. This may be because the case is a novel one or the judge feels that counsel have

not fully explored all the relevant matters or it is necessary to reread the evidence when the transcript is available to be sure that vital evidence is precisely stated in the reasons and there are other factors that may influence the decision to reserve in individual cases.

Once a judge has reached the view that he or she might give an ex tempore judgment, the judge has to think how best to prepare for its delivery. This will depend on the time that was available before the case, the duration of the case and whether one is sitting at first instance or on appeal.

The first step is to put the headings on separate sheets of paper. Dealing first with appeals, this step is quite easy as one has the Notice of Appeal and other material which lists, either singularly or in groups, what the complaints are.

On appeals, the next step is to go to the computer and get the first instance judgment on screen and copy on to a blank page the primary judge's statement of the facts and the reasons for his or her vital findings and the decision. Convert this material so that it is in order of an introduction, a concise statement of agreed facts, a list of the issues (from your headings) and then rearrange the material copied from the first instance judgment under the headings. Then type in your provisional thoughts as to each issue and print out in at least double spacing.

You now have a template for the judgment. However, remember it is a template – do not just read out what you have cribbed from the first instance judgment as your own. Either quote or adopt the material into your own words and style. This exercise can be done either before the oral argument commences (as you will have written submissions from each side to show you the ambit of the argument), during the lunch break or overnight if the appeal is to go more than a day.

During the argument make notes in the appropriate place in your template. The notes will usually be simple such as "here read para 23 on p 456 of the Blue Appeal Book". At the end of the case you should have sufficient prompting from your annotated template to give an ex tempore judgment.

At first instance, one will not usually have sufficient time to prepare a substantial template. However, early in the case, one should be able to write down the basal facts and background. Then, as the evidence develops, you make notes on the sheet with the relevant heading. There is usually the opportunity to do this during boring parts of cross-examination such as *Browne v Dunn* cross-examination, so long as one has one ear on the oral evidence. If the case is to go two days or more, there may be time overnight to convert these notes into a more complete template to which additions and deletions can be made as the case progresses.

One more caution, it is usually wise by oneself or one's legally trained assistant to at least spot check the noting up of the principal legal authorities relied on as, regrettably, some counsel merely take them from text books which may be out of date.

To summarise, judicial life requires that as many judgments be given ex tempore as can safely be done. Judges must as early as possible after appointment master the skills necessary to do this. However, they must also consider in each case whether practical and other factors mean that it would be more appropriate to reserve the decision.