REASONS ON THE RUN

JUDICIAL OFFICERS' BULLETIN

JUDICIAL COMMISSION OF NEW SOUTH WALES

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AN AGE OF REASONS

Judicial officers in New South Wales must give reasons for virtually all important decisions they make in the exercise of their office. Whatever doubts existed earlier about this obligation, they were removed, in this State, by the clear instruction of the Court of Appeal in 1961 in *Pettitt v Dunkley*.[1]

Originally the rule obliging the giving of reasons was expressed in terms which were derived from Parliament's intention in conferring a right of appeal. That intention could not be frustrated, or rendered nugatory, by the failure of a judicial officer to state his or her reasons. To do so would itself amount to an error of law and authorise the intervention of the appellate court.

Later, however the rule was expressed as being "an incident of the judicial process". This is how Mahoney JA described it in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited*[2] in words which have now been endorsed by the High Court of Australia with the qualification that although this is a *normal*

incident, it is not a *universal* incident of the process.[3]

Not all judicial decisions require the giving of reasons. Many practice decisions, some rulings on evidence and other categories of decision do not require reasons as a matter of law. But if the decision is important to the issues before the court the obligation to expose the grounds for decision will typically arise.[4] Reasons may be given in a formal statement prepared by the judicial officer, certified by the associate or clerk, entered in the records of the court and sometimes (in the case of superior courts) published in the law reports as a precedent for the future. But reasons must also be given for many decisions which will never enjoy such transitory fame. In the typical day of the judicial officer of this State, the giving of reasons is a constant companion. Some even complain that we live in the age of reasons - rather than an age of reason.

Most Australian judicial officers, and many lawyers, realise the heavy burden imposed by the obligation to prepare and give reasons. They are liable to be scrutinised closely by the parties, their legal advisors and appellate courts. However, this ethos of understanding does not extend far beyond the legal profession. The community is impatient of delays in the judicial process, whether at first instance or on appeal. Citizens expect us to be prompt in furnishing our reasons and resolving disputes in a reasoned way.

There is no doubt that the workload of judicial officers, at least in New South Wales, is rising rapidly. In the Court of Appeal, for example, the number of appeals filed annually, which the Court must dispose of, has risen by 247%

since the establishment of the Court in 1965.[4] In the same time, the judicial complement of that Court has remained exactly the same. The judicial establishment of all other courts in the State has increased in the same time. But so has their workload. This provides an additional pressure for the giving of reasons *ex tempore*.

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

REASONS: THE AUDIENCE & THINGS TO AVOID

Judicial officers constitute an empire of individualists.[5] To lay down general rules, whether about *ex tempore* reasons or most other topics affecting them, amounts to a presumption. Individuals have different ways of expressing themselves. Some have great gifts of oral communication and will reflect them in *ex tempore* reasons. Some who had great gifts of advocacy may not have that special talent which is necessary for the delivery of tight and convincing *ex tempore* reasons for a judicial decision. An accurate recall of the precise detail of relevant evidence and a clear perception of applicable principles of law afford the best foundations for proceeding to an *ex tempore* judgment which is at once accurate and

compelling.

It is, of course, necessary to have clearly in mind the audience whom one is addressing when giving reasons. It must be defined, whether one is preparing the reasons in the quiet of chambers or delivering them to the watchful parties, lawyers and others collected in open court. On this question there is much writing. Generally it is agreed that reasons are addressed principally to the litigants (especially the losing litigants), to the legal profession, to one's judicial colleagues and ultimately to oneself and one's conscience.

In any expression of reasons for a judicial decision, necessarily a judicial officer will disclose aspects of his or her own personality. I have suggested elsewhere that humour should be kept to the minor key in judicial reasons because of the seriousness with which parties generally take their litigation and because the parties cannot usually answer back effectively.[6] I also suggested that the use of a heavy-handed irony was best avoided, for much the same reason. Humour and irony tend to fall flat in the cold pages of a court transcript. In some overseas countries of the common law attention has lately been paid to educating judicial officers, as leaders of the community, to avoid sexist or gender-specific language in their reasons.[7] I support this view. The High Court of Australia has given a firm lead to judicial officers throughout the country in this regard. A scrutiny of that Court's reasons in recent years will demonstrate the care with which most of the Justices have avoided the exclusive use of the male personal pronoun.[8] Judicial officers do well to follow this lead and to ensure that, in their courtrooms, the attitudes and

prejudices of earlier times have no place and are given no voice, least of all by the judicial officer presiding in the court.

FINDINGS OF FACT & RULINGS OF LAW

I will now express some practical suggestions for the giving of *ex tempore* reasons. Naturally, much depends upon the issue being dealt with and the opportunity which the judicial officer has had to anticipate the issue calling for decision and reasons and to prepare for it. At trial, there may be little or no such opportunity. Then, all too often the drama will unfold, carried on by its own inexorable momentum. Typically, there will be little time for reflection, still less for research. Appellate courts must respect the difficulties under which judicial officers often labour in this regard. Reversal on appeal should never offend the *amour propre* of any judicial officer who has done the best possible in the circumstances. Appellate wisdom after the event should ever be mindful of the stresses and strains of conducting a trial in a busy court list.

The basic structure of any judicial opinion or statement of reasons is ordinarily syllogistic. This much derives from the very nature of the judicial office.[9] The relevant facts are found. The applicable rule of law is stated. The conclusion results from the application of the law, so stated, to the facts, so found. In a busy trial court, the findings of fact need not be set out at great length. They can be confined to the barest outline. However, they should mention and resolve any important relevant disputes of fact which have been the subject of evidence or address.[10] Otherwise, the parties will leave

the court with a sense of grievance that a relevant issue, tendered for decision, was overlooked or ignored. If, despite evidence and earnest pleading, an issue appears irrelevant,or does not affect the outcome of a case, the judicial officer should say so.

It has frequently been said that the findings of fact made by a judicial officer determine the outcome of the overwhelming majority of legal disputes. Judicial officers at first instance must therefore take special pains to discover the facts accurately, to resolve relevant disputes about them and to state their findings in as brief a form as possible. Usually, a chronological presentation of facts is the most logical. Once the facts are clearly stated, attention shifts to the statement of the applicable rule(s). It is important then to have the relevant statute close at hand - or the applicable casebooks with the passage of authority conveniently flagged whilst giving an *ex tempore* judgment. Copious quotation from previous decisions is usually undesirable. Preferable by far is the extraction of the principle and a citation of the case or text from which the principle is derived. However, repeated experience demonstrates that even expert courts, operating under a familiar statute, can mistake the statutory provisions which fall to be applied. Unless a judicial officer is absolutely sure that the words of an applicable statute are well known, it is useful, in applying those words, to repeat the statutory provision in the course of giving *ex tempore* reasons. The very act of repetition will permit a concentration of the mind on the precise language to be applied to the facts which have been stated.

It is surprising how often knowledge of apparently familiar words is assumed but, when revisited, the words are found to bear other messages, even to the mind of an experienced judicial officer.

CHANGE OF JUDICIAL MIND

Probably the most horrible thing that can happen to a judicial officer in the midst of giving *ex tempore* reasons for a decision is to change one's mind. It is a commonplace that, even in preparing well thought out reasons, a judicial officer may change the conclusion halfway through the text. A previously unnoticed but vital piece of evidence may just tip the scales. The perception of a key word of a statute, or the appreciation of the requirements of binding authority, may lead the judicial officer to the grim realisation that a result must follow which is different from that which was intended (and even announced) when the giving of reasons commenced.

The temptation to sail on to the previous destination, ignoring the offending rock of authority which has so unkindly and belatedly appeared ahead, may then appear irresistible. To do this might be psychologically understandable. But honesty, integrity and fidelity to legal duty require a different response from anyone who has taken the judicial oath. An honest judicial officer, faced with the predicament which I have recounted, will pause. He or she will invite further submissions on the point which has just appeared. If necessary, an adjournment will be called to permit reflection and to allow the judicial officer to reach a sound decision - the best that can be offered, true to conscience and to the law as it is finally understood.

A few words of reassurance can close this section. Within any applicable statutory requirements or rules of court it is possible, and entirely proper, for a judicial officer to revise *ex tempore* reasons. It is not proper to revise the transcript of a summing up to a jury (except to the extent that an obvious typographical mistake has occurred or a mis-recording of what was actually said). Where no jury is involved, the judicial officer may elaborate and correct the text when it is presented by the court reporter. This should always be done promptly as delay in the presentation of revised reasons is a major source of delay in appeals. It is thus a cause for parties' becoming out of time or filing deficient notices of appeal.

Finally, it is appropriate to say that the giving of *ex tempore* reasons becomes easier in time: with the confidence which comes with experience and self-assurance. When, eventually, it has become too easy that is a sure sign that the judicial officer should take a break or look around for new challenges outside judicial life.

IN OUR TEMPORARY CHARGE

The judicial officers of Australia are the inheritors of a proud tradition which has endured for eight centuries. We should be mindful of the twin scourges of the administration of justice: cost and delay. The work of the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration assists Heads of Jurisdiction and court committees to face squarely the problems of delay and access to justice. An increased and improved provision of *ex tempore* reasons, both at trial and on appeal, is one element of an overall plan for

improving the efficiency and the performance of their duties by judicial officers of this State. All of us need to reflect upon our individual contribution to the efficiency of the system which is in our temporary charge.

ENDNOTES

* This is an extract from a longer essay "*Ex tempore Reasons*" to be published in a future issue of the Australian Bar Review. It is based on an *ex tempore* address to participants in a Residential Course for Magistrates conducted by the Judicial Commission of New South Wales at Windsor, New South Wales on 30 April 1991.

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1. [1971] 1 NSWLR 376 (CA).
2. [1983] 3 NSWLR 378, 386 (CA).
3. See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667.
4. See *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 260, 269, 279 (CA).
5. M D Kirby, "On the Writing of Judgments" (1990) 64 ALJ 691.
6. *Ibid* 698f.
7. (1991) 65 ALJ 3, 5.
8. See M D Kirby, *op cit* n 5, 698f and cases there cited.
9. See Kitto J in *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (197) 123 CLR 361, 374f; *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173, 197 (CA).
10. See *NRMA Insurance Ltd v Tatt and Another* (1989) 92 ALR 299, 312 (CA).
11. See eg *Holden v Tol Chadwick Transport Ltd* (1987) 8 NSWLR 222 (CA).