



Emmanuel College

Papers

**Reasons for judgment: objects and
observations**

by

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The Honourable Justice Susan Kiefel AC

The Honourable Justice Susan Kiefel left school at 15 and commenced employment as a legal secretary. She is now a Justice of the High Court of Australia, appointed in September 2007. At the time of her appointment she was a judge of the Federal Court of Australia and the Supreme Court of Norfolk Island. She served as a judge of the Supreme Court of Queensland from 1993–1994 before joining the Federal Court. She was admitted to the Queensland Bar in 1975 and was the first woman in Queensland to be appointed Queen’s Counsel, in 1987.

Justice Kiefel served as a part-time Commissioner of the Australian Law Reform Commission from 2003 to 2007. She has a Masters of Laws degree from Cambridge University.

Justice Kiefel was appointed a Companion in the General Division of the Order of Australia in 2011 for eminent service to the law and to the judiciary, law reform and legal education.

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Reasons for judgment: objects and observations

In 1993, Sir Harry Gibbs delivered a paper on "Judgment Writing" to a judges' conference¹. He remarked, at the outset, that asking a retired judge to speak on the topic brought to mind the saying of a 17th century French moralist² that men give good advice when they are no longer capable of setting bad examples. Sir Harry was customarily modest. His judgments were examples of the best qualities of judgment writing: brevity, clarity and accuracy.

It is not my purpose this evening to discuss methods of judgment writing, which may be of greater interest to an audience composed entirely of judges. I understand my audience tonight to be broad. My discussion is therefore at some points necessarily general. I propose to touch upon some aspects of the reasons given for judgment in our courts: the respects in which they are important; their development historically; and their position comparatively. There are, I believe, some misconceptions about how joint judgments amongst appellate judges come about. I will offer some insights into this process. I shall conclude by addressing whether style is a matter of importance in judgment writing.

The reasons for a judgment are of course of special importance to the parties to litigation. They are bound to abide by the decision pronounced by the court and need to understand how the court has dealt with their case and reached its decision. Sir Harry observed that in our society, it is important that the parties to litigation be convinced that justice has been done or, at the least, that an honest, careful and conscientious effort has been made to do justice in their case.

This is not to underestimate the importance of reasons for judgment to the wider public. Many judgments have an importance beyond the resolution of the dispute between the parties to the litigation. Sir Harry's speech accepted that citizens of a modern democracy like Australia will have an interest in some judgments. He said that they are not likely to accept a decision simply because it has been pronounced, but are inclined to question it. Thus it is important that carefully considered reasons be provided with as much clarity of expression as the subject allows.

Judgments are clearly important to legislators and governments. They may identify the limits of legislative power and how the power given by valid

¹ Later published in (1993) 67 ALJ 494.

² Duke de la Rochefoucauld, *Maximes, and Moral Reflections*, (1802 edition) at 86-87.

legislation is to be exercised. Parliament may say what the law should be; the courts say what it is to be understood to say and how it is to be applied. Judgments may have a constitutional dimension. They may serve to identify the role of the courts. In the federal sphere, they affirm that role as separate from that of the legislative and executive branches.

In our system of precedential law, judgments of the ultimate appeal court may correct an error in past judgments; they may develop and extend an aspect of the common law, taking it closer to a legal principle. They may identify the direction which the law is taking. Judges are conscious of what they are undertaking and have these matters in mind when they are drafting their reasons. Judgments have an educative role in our system. They form the basis for texts which explain the law and for academic discussion. This is not true of other systems, where the law is more abstract in conception and its exposition largely the province of law professors.

Written reasons for judgment incorporating detailed findings of fact and a critical analysis of prior decisions is a relatively recent development in our system. So is a truly precedential system in English law. The first recorded use of the word "precedent" was in a case in 1557³. A judgment in medieval times was a conclusion entered upon a roll, which contained no reasons and stated no law⁴. The development of legal principle occurred in the oral part of the court process, in the conversations between judges and advocates. It was later that these discussions were reported. Their principal purpose is thought to have been to distil ideas for the purposes of legal education which took place within the Inns of Court and in which the judges participated. The emphasis did not shift to judicial statements of the law, as such, until Tudor times when there had developed a desire for greater certainty of outcome in the court's processes⁵. Even so it was a long time before the written judgment known to us was produced.

A comparison between the report of reasons given by Lord Chief Justice Coke in 1613⁶ and the famous judgment of Lord Mansfield on the subject of slavery in *Somerset v Stewart* in 1772⁷ is indicative of the slow progress in the

³ Berman, Harold & Charles Reid, "The Transformation of English Legal Science: From Hale to Blackstone", *Emory Law Journal* 45 (Spring 1996) 437 at 446.

⁴ J H Baker, *An Introduction to English Legal History*, (4th ed, 2002) at 197.

⁵ J H Baker, *An Introduction to English Legal History*, (4th ed, 2002) at 198.

⁶ *Brown v Crashaw* (1613) 2 Bulstrode 155 [80 ER 1028].

⁷ *Lofft* 1 [98 ER 499].

development of the modern judgment. The report of Lord Coke's opinion on a writ of prohibition takes 14 lines of the report and contains a brief statement of the law, his rulings on the evidence and a conclusion. One hundred and sixty years later, Lord Mansfield's identification of the questions occupies almost a full page, and his "opinion" another page, but the arguments take over 10 pages of the report.

The length and detail of modern judgments is peculiar to common law legal systems. We would consider the reasons of French courts to be inscrutable. It is often impossible to determine how a conclusion was reached by their courts. German judgments are more forthcoming. It is sometimes suggested that civil law courts have the benefit of the law stated in codified form and therefore do not need to explain the law and its application in depth. This rather overstates the completeness and clarity of continental Codes, which are often expressed at a high level of abstraction, and it understates the judicial creativity which is sometimes applied by continental judges. It should not be assumed that civilian countries do not refer to earlier decisions at all; but they do not analyse them in great depth and they tend to state only the salient facts in a conclusory way.

In our system, the true importance of a trial judge's function lies in the findings of fact which must be made. Errors which are made concerning the law, or the application of the law to the facts, which is the final step in a judgment, can be corrected by appellate courts. But it is not so easy to undo findings of fact which form the foundation for a judgment. It is therefore understandable that Sir Harry said that he believed "that more injustices are created by erroneous findings of fact than by errors of law. Even where a case appears to depend only on a question of law, it will often be found that the question ... will depend on the way in which the facts have been found."⁸

In our legal system the trial judge finds the facts as they are most likely to have occurred on the evidence addressed by the parties as relevant to the issues they have identified. The premise for our adversarial system is that it is the parties' right of action that is being pursued. It is sometimes suggested that the inquisitorial process, which involves the court making enquiries and examining witnesses in stages, is more likely to ascertain the truth of a matter. On the other hand, in our system witnesses are subjected to rigorous and focussed questioning by advocates who have a detailed knowledge of their clients' cases. It should be borne in mind that in a system such as Germany a panel of three judges sits on cases in all but the lowest courts. Such a practice

⁸ Sir Harry Gibbs, "Judgment Writing" (1993) 67 ALJ 494 at 497.

might be of assistance to some of our trial judges who hear complex trials over months and are required to produce hundreds of pages of reasons on their own. This difference in the processes of the courts is reflected in the fact that Germany has over 20,000 judges and we have about 1,000. Per head of population we have one judge for 22,000 persons; Germany has one judge for every 4,000.

Intermediate appellate courts are principally concerned with the correction of error. They are concerned to ensure that judgments of the lower courts correctly state the law. The reasons of an appellate court may therefore need to explain the law for the benefit and guidance of the lower courts.

The High Court, as the highest appellate court and constitutional court, has other dimensions to its role. The reasons for judgment of the court may need to explain a further step taken in the development of the law or, in a novel case, the development of the law and the statement of principle being the province of the court. This is especially so in the case of constitutional law, which, in many areas, is in a continuous process of development and elucidation.

Generally speaking, it is not possible for appellate judges to write a judgment in a timely way on every case that they hear. Most, if not all, courts have a policy of delivering judgments within a specified period, often ranging from three to six months. In some cases there may be nothing that a judge can usefully add to a draft which has already been produced by a colleague. Sir Frank Kitto recounted an occasion when he and Sir Wilfred Fullagar had torn up their incomplete drafts, after receiving one from Sir Owen Dixon, which they regarded as much better. It must be said that Sir Owen regarded his ability to influence the Court as depending upon having a draft around quickly. But then he was able to write judgments of high quality in a very short period of time. More recently the Master of the Rolls, Lord Neuberger⁹ suggested that writing an unnecessary judgment is a form of vanity. This may be a little harsh.

In the appellate courts of the United Kingdom, if a judge agrees with another's judgment a simple concurrence is stated as "I agree with ...", or a very short concurring judgment appears. The author of the judgment is thereby identified. In the United States, one judge is chosen to represent the majority or minority view, but again authorship is evident. This is not the case in all Australian appellate courts. If a judge expresses agreement with a draft

⁹ "Open Justice Unbound", Judicial Studies Board Annual Lecture (16 March 2011) at [24].

produced by another judge, the latter might join the former into the judgment. It will appear as a joint judgment without the authorship being identified. The level of discretion judges have as to whether to join another to their judgment may vary as between the different appellate courts in our system. In the High Court at present it is expected that a judge will join his or her concurring colleagues into the judgment, but it has not always been thus.

Truly joint judgments, where two or more judges contribute to a single draft, are rare. Very occasionally it may be possible to divide the labours of a judgment into discrete sections. This necessitates careful editing to achieve consistency of style. But it is not usually possible to collaborate completely on a task such as judgment writing. There may be additions which another judge may, very respectfully, suggest. There can be no obligation to accept them.

Opinion about whether joint judgments, or indeed a single judgment of the Court, are to be preferred to individual judgments has, for a long time, been divided. Sir Harry and Sir Frank Kitto¹⁰ did not consider that a categorical answer could be given. Sir Harry was disposed to think that it was preferable to have individual judgments on an appeal concerning an important point of law. Certainly in constitutional law cases it is more common to see judges of the High Court writing separately. In this area they may have strong views about the development of principle. An advantage of a number of judgments is that they may provide different and more nuanced approaches, which may be desirable to the development of the law. On the other hand, it is sometimes of greater benefit when the court is seen to speak with one voice on an important question or in a controversial case. Even Sir Owen Dixon, who told Sir Frank that he usually regretted agreeing in another's judgment, continued to do so on occasion. And as Sir Frank said, "the advantage of certainty in the law was aided by his doing so"¹¹.

The means by which a first draft of reasons for judgment is produced vary. In some courts a judge is allocated the matter prior to hearing; in others a judge may volunteer or is asked to do so following discussion after the hearing concludes. A judge is less likely to be identified if they do not engage substantially in the discussion. This is a practice sometimes employed when a judge does not wish to write and may explain why some courts allocate beforehand. When a judge does undertake to do a first draft, he or she will usually try to write in a manner which will permit the other judges a greater opportunity to join in. The more individualistic stylistic aspects of the judge's

¹⁰ Sir Frank Kitto, "Why Write Judgments?" (1992) 66 ALJ 787.

¹¹ Sir Frank Kitto, "Why Write Judgments?" (1992) 66 ALJ 787 at 796.

usual writing style will be suppressed. On such occasions our judgments may share the feature of anonymity which typifies the judgments of civilian countries. Judgments written in this style can present a challenge to those who consider they can pick the author.

In continental countries there is no scope for dissent amongst a panel of judges nor for a separate concurring opinion. It has been suggested that this may lead to judges compromising their own opinions. This would not be acceptable in our system. Australian appellate judges undertake a rigorous assessment of a colleague's draft and of their own opinion. They must be astute to subtle expressions of opinion in a colleague's draft. They would not feel able to concur unless they were completely satisfied that it expressed the view they held. Intellectual honesty requires nothing less. This may require that they undertake, to a significant extent, a kind of parallel draft before concurrence.

Does the style in which a judgment is written matter? Law students might think so. They are often attracted to dissenting judgments, where it is possible to be more flamboyant in expression. Some judges and commentators have attempted to define judgment writing styles. Justice Cardozo¹² referred to the "magisterial or imperative" judgment, and the "demonstrative or persuasive". One his Honour described as "tonorial or agglutinative" which, you might readily infer, is not a complimentary description. His Honour described it as a "dreary succession of quotations [closing] with a brief paragraph expressing a firm conviction that judgment for plaintiff or for defendant ... follows as an inevitable conclusion"¹³.

Lord Denning was the master of memorable opening lines – which could immediately identify a person ("Old Peter Beswick was a coal merchant in Eccles, Lancashire"¹⁴) or transport the reader to a scene ("It happened on April 19, 1964. It was bluebell time in Kent"), a rather strange opening to a judgment about a motor vehicle accident causing personal injuries¹⁵. It has been observed by an Australian judge¹⁶ that the best known – "In summertime, village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch" – is pure fairy

¹² Benjamin Cardozo, "Law and Literature", *The Yale Review* (July 1925) 699 at 702.

¹³ Benjamin Cardozo, "Law and Literature", *The Yale Review* (July 1925) 699 at 714.

¹⁴ *Beswick v Beswick* [1966] 3 WLR 396 at 400.

¹⁵ *Hinz v Barry* [1970] 2 QB 40 at 42.

¹⁶ The Hon Justice L J Priestley in "The Writing of Judgments: A Forum" (1992) 9 *Australian Bar Review* 130 at 140.

tale; "the brutal fact", he said, "was that this was a scungy little ground surrounded by the worst artefacts of modern British industrialism".

Occasionally, a case permits a judge a certain licence in the manner of expression. In his judgment concerning the administration of the movie actor Errol Flynn's estate¹⁷, a certain enjoyment may be detected in Sir Robert Megarry's identification of the issue for determination. His Honour said:

"Errol Flynn was a film actor whose performances gave pleasure to many millions. On June 20, 1909, he was born in Hobart, Tasmania, and on October 14, 1959, he died in Vancouver ... When he was seventeen he was expelled from school in Sydney, and in the next 33 years he lived a life which was full, lusty, restless and colourful. In his career, in his three marriages, in his friendships, in his quarrels, and in bed with the many women he took there, he lived with zest and irregularity. The lives of film stars are not cast in the ordinary mould, and in some respects Errol Flynn's was more stellar than most. When he died, he posed the only question that I have to decide: where was he domiciled at the date of his death?"

Lord Atkin, most famous for his biblical allusions in *Donoghue v Stevenson*¹⁸, was also capable of irony. It is a not uncommon judicial tool, although it has its dangers. In his dissenting judgment in *Liversidge v Anderson*¹⁹, he used a quotation from *Alice in Wonderland* to attack his colleagues in the majority on their construction of the statute in question. He said: "I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.'" The attack had an impact – for the other Law Lords did not speak to him for a very long time²⁰.

Sir Harry²¹, whilst conscious of the varying styles of former judges of the High Court, eschewed style for its own sake in favour of the more fundamental qualities of a judgment. The essential quality, he observed, is clarity; the second is as much brevity as the subject will permit. What gives the judgment

¹⁷ *In re Flynn Dec'd* [1964] 1 WLR 103 at 105.

¹⁸ [1932] AC 562.

¹⁹ [1942] AC 206 at 245.

²⁰ The Hon Justice Michael Kirby, "On the Writing of Judgments", (1990) 64 ALJ 691 at 699.

²¹ Sir Harry Gibbs, "Judgment Writing" (1993) 67 ALJ 494 at 498-499.

its style is the lucidity, accuracy and economy of the language used, the logical coherence of the thought and the rejection of the irrelevant. A judgment, he said, must be objective and impersonal. Lord Radcliffe had said²² that "one hint that the judge is ... palming off emotion as reason, and authority has flown out of the window".

Most judges would agree that a reasoned judgment involves logical and rational analysis²³. The extent to which purely logical reasoning is undertaken has been questioned. It has been suggested that judgment writing is more of an exercise in persuasion than is generally acknowledged, rather than containing compelling logic, and that it is the appearance of logic which judges strive for²⁴.

Those who have spoken on the topic of judgment writing have spoken of the difficulty involved and the self-discipline that it requires. Sir Harry regarded the writing of a "satisfactory judgment" as involving "painstaking, arduous effort"²⁵. Sir Frank reminisced of a time long before "when he had thought that as the years went by the writing of judgments would prove easier", but they did not²⁶.

The writing of reasons of judgment is important to judges, as it is to those who read them. It is a task in which the judge constantly challenges assumptions and conclusions and frequently revises his or her method of expression. It is not likely to be understood that some judgments involve many drafts. In this regard Sir Harry approved of what Justice Brandeis had said about judgment writing: "There is no such thing as good writing. There is only good re-writing."²⁷

²² Foreword to *The Language of the Law: An Anthology of Legal Prose* (1965) at xiv.

²³ Sir Laurence Street, introduction to "The Writing of Judgments: A Forum" (1992) 9 *Australian Bar Review* 130 at 130.

²⁴ Michael Chesterman in "The Writing of Judgments: A Forum" (1992) 9 *Australian Bar Review* 130 at 131.

²⁵ Sir Harry Gibbs, "Judgment Writing" (1993) 67 ALJ 494 at 502.

²⁶ Sir Frank Kitto, "Why Write Judgments?" (1992) 66 ALJ 787 at 787.

²⁷ Justice Louis Brandeis, quoted in Robert Leflar (ed), *Appellate Judicial Opinions*, (1974) at 187; Sir Harry Gibbs, "Judgment Writing" (1993) 67 ALJ 494 at 496.



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