

Judgment writing in final and intermediate courts of appeal

“A dalliance on a curiosity”

The Hon MJ Beazley AO, President, Court of Appeal of New South Wales

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- 1 An essential aspect of the judicial function is the giving of reasons.¹ Much has been written about the topic. Questions are asked as to the audience to whom the judgment is directed, about style, clarity, efficiency, judgment citation and length. Whilst I will touch upon these matters, I wish to explore a different point.
- 2 There has, I would suggest been a discernible shift in the judgment writing process of the High Court. The 5-7 separate judgments of 100 plus pages of the Mason era² and of the early years of the Court under Gleeson CJ³ have been replaced, at least in a sufficient number of cases to make comment, by a minimalist, largely propositional style of reasons, often with a plurality judgment.
- 3 Because a Court speaks through its judgments, this trend, assuming it is a trend, has led me to ask whether this reflects a statement by the High Court of its role at the apex of the appellate hierarchy and whether this in turn has implications for the role of intermediate appellate courts, where the reasons have remained more discursive and detailed, particularly, but not only, where social issues are raised.

¹ See, for instance, *Wainohu v New South Wales* (2011) 243 CLR 181 in which it was held that an Act conferring the power to declare certain organisations as being criminal for the purposes of the *Crime (Criminal Organisations Control) Act 2009* (NSW) was incompatible with judicial power, principally because it exempted judges from any requirement to give reasons for the making of a declaration.

² Eg *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424 whose jurisprudential value has survived by virtue of Brennan J's judgment at esp at 493; *Cunliffe v The Commonwealth of Australia* [1994] 182 CLR 272

³ Eg *Brodie & Anor v Singleton Shire Council* (2001) 206 CLR 512.

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- 4 An exploration of this question can only be made through the decided cases. Time permits a consideration of only a few, and then with a generality that does not purport to be a definitive statement of the full import of the decision.
- 5 Let me start with *Norrie v NSW Registrar of Births Deaths and Marriages*⁴ which concerned a challenge to a decision of the Registrar of Births, Deaths and Marriages to refuse to register Norrie's sex as "*non-specific*". Norrie's contention was that the ordinary usage of the word "*sex*" had developed to encompass more than the binary concept of male and female gender.
- 6 The question in issue was whether the power to register a person's "*change of sex*" after sex affirmation surgery, pursuant to s 32DC of the *Births, Deaths and Marriages Registration Act 1995* (NSW), extended to the power to register a change to a gender identifier that was neither specifically male nor female. The Court of Appeal held that it did.
- 7 The case as argued on the appeal raised questions of changing community values and understandings of gender and the extent to which those matters were relevant to the question of statutory construction with which the case was concerned. The judges of the Court of Appeal, (including in my own judgment), dealt with those questions in a detailed judgment of 306 paragraphs.
- 8 The High Court⁵ in 48 brief paragraphs dismissed the appeal, differing slightly in its formulation of the outer boundaries of the issues raised by the case. The judgment was technical and narrowly framed. Its focus was on the terms of the statute and not on the indicia of changing community standards, advances in medical and other relevant knowledge, the extent to which the Court was entitled to rely on common knowledge,⁶ or how the legislation was to be read cohesively with other legislation in which the gender of a person

⁴ [2013] NSWCA 145 (Beazley JA, Sackville AJA and Preston CJ of LEC).

⁵ *Norrie v NSW Registrar of Births, Deaths and Marriages* [2014] HCA 11; 250 CLR 490.

⁶ *Evidence Act 1995* (NSW), s 144.

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was relevant,⁷ all being matters that had engaged the New South Wales Court of Appeal.

- 9 The High Court's approach was to be welcomed – it had turned, what to the Court of Appeal was a difficult and contentious case into a simple case of unambiguous statutory construction. However, there is no social learning or dissertation in the Court's reasons. That may be explicable on at least two bases. First, the legislation itself recognized sex change, but had not in express words recognized a non-specific sex. Secondly, the Court had dealt with gender characteristics in *AB v Western Australia*⁸ – although in that case, the legislation was framed in binary gender terms. It may therefore have been considered unnecessary to revisit that territory (other than by way of footnote to *AB*).
- 10 The recent case of *Lindsay v The Queen*⁹ is another example. The appellant, an Aboriginal man, had been convicted of murder following a trial before a jury, in circumstances in which he had stabbed and killed the deceased after being the subject of a homosexual advance. The appellant was offered money for sex, in his house and in front of his family. The appeals to the Court of Criminal Appeal of South Australia and subsequently the High Court primarily concerned the adequacy of the trial judge's directions relating to the partial defence of provocation.
- 11 The principal judgment in the Court of Criminal Appeal, that of Peek J (with whom Kourakis CJ agreed), comprised 186 paragraphs, and very comprehensively outlined the relevant evidence and authorities.¹⁰ Peek J found that, although the jury were misdirected as to provocation, the proviso should apply and the appeal be dismissed. This was primarily because

⁷ See, for instance, *Crimes Act 1900*, s 61H; *Court Security Act 2005*, s 10; Crimes (Administration of Sentences) Regulation 2008 cl 43(2); *Industrial Relations Act 1996*, s 55(4); *Landlord and Tenant (Amendment) Act 1948*, s 62(5)(t); and *Conveyancing Act 1919*, s 76.

⁸ [2011] HCA 42; 244 CLR 390.

⁹ [2015] HCA 16; 89 ALJR 218.

¹⁰ *R v Lindsay* [2014] SASFC 56; 119 SASR 320.

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provocation should not have been left to the jury. As in *Norrie*, one important strand of reasoning related to community values. His Honour considered, on the basis, inter alia, of academic literature, that although provocation may well have arisen in times when homosexual acts were criminalised and men were accustomed to resort to violence to defend their honour, “*times [had] very much changed*”.¹¹

12 The High Court allowed the appeal in two judgments, comprising 89 paragraphs. The central finding was that Peek J erred in placing weight on contemporary attitudes to homosexuality given that there were circumstances of the advance, other than its homosexual nature, that might give rise to provocation.¹² However, the circumstances of the killing were outlined in only a few sparse paragraphs.¹³

13 There are other examples. In *Clark v Macourt*,¹⁴ a case concerning a fundamental question about the calculation of damages in contract, the High Court allowed an appeal from a judgment of Tobias AJA of 164 paragraphs (with which Barrett JA and I agreed in short concurring reasons)¹⁵ by a majority decision, the most substantial judgment being that of Keane J, comprising 71 paragraphs. The case was by no means simple and its outcome in the High Court has excited some academic controversy.¹⁶ The focused, somewhat sparse approach of the Court was, perhaps, surprising in the context of Tobias AJA’s very extensive review of authority.

14 Subject matter aside, the case involved the application of the principles of damages in contract law to unusual factual circumstances. However, the court with a minimalist approach stated the relevant principles in what I have already characterised as a propositional style. In short, it was making a

¹¹ At [235]

¹² At [35]-[37] per French CJ, Kiefel, Bell and Keane JJ and [81] per Nettle J.

¹³ At [8]-[10] per French CJ, Kiefel, Bell and Keane JJ and [57]-[58] per Nettle J.

¹⁴ [2013] HCA 56; 253 CLR 1.

¹⁵ *Macourt v Clark* [2012] NSWCA 367.

¹⁶ Winterton, David, “*Clark v Macourt: Defective Sperm and Performance Substitutes in the High Court of Australia*” (2014) 38 *Melbourne University Law Review* 755.

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statement as to what the law is as opposed to engaging in any detailed way, in either a search for the correct principle of law or an explanation of why the law is as it stated it to be.

15 In *Magaming v The Queen*,¹⁷ the appellant was an Indonesian fisherman who had been convicted of people smuggling offences which the trial judge held fell “*right at the bottom end of the scale*” of seriousness.¹⁸ *Magaming* challenged the constitutionality of mandatory minimum sentencing laws which had resulted in his conviction of a term of imprisonment of five years. The constitutional challenge was rejected in the New South Wales Court of Criminal Appeal in a lead judgment of Allsop P comprising 126 paragraphs, with which the other members of a five judge bench agreed.¹⁹ A majority of the High Court dismissed the appeal in 54 paragraphs. Fewer applicants were involved before the High Court than before the Court of Criminal Appeal; however, largely, the same questions arose. The circumstances of the offences and the offenders were outlined in only two introductory paragraphs of the High Court decision.²⁰ Unlike the Court of Appeal decision which explored in depth the purpose of the legislation, the High Court made crisp statements of the law with only short exploratory reasons. *Magaming* therefore provides a clear example not only of the High Court’s condensed approach to factual context, but also its propositional approach to authority and argument.

16 *The Commonwealth v Australian Capital Territory*,²¹ the ACT same-sex marriage case, is another notably condensed High Court judgment touching on a very live social issue. The unanimous judgment opened with the sentence, “[t]he only issue which this Court can decide is a legal issue”. The

¹⁷ [2013] HCA 40; 252 CLR 381

¹⁸ Quoted at [7]

¹⁹ *Karim v The Queen* [2013] NSWCCA 23; 83 NSWLR 268 (Bathurst CJ, Allsop P, McClellan CJ at CL and Hall and Bellew JJ).

²⁰ See at [5] and [7]. For a critique of this approach, see Anna Dziejdzic and Sophie Walker, ‘The High Court on Mandatory Sentencing in *Magaming v The Queen*: Only Part of the Story’ on Opinions on High (13 November 2013) <<http://blogs.unimelb.edu.au/opinionsonhigh/2013/11/13/dziejdzic-walker-magaming/>>.

²¹ [2013] HCA 55

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judgment comprised 62 paragraphs, about half of which addressed the core constitutional question, namely, the meaning of “*marriage*” in s 51(xxi). Perhaps the most legally vexed question that arose, being the jurisprudential approach to take to the shifting boundaries of “*marriage*” over time, was dealt with in 10 paragraphs,²² notwithstanding the existence of substantial commentary on the issue.²³

- 17 The case was decided, against the Territory, on conventional principles of statutory interpretation, although the constitutional finding could be seen as a silver lining for same-sex marriage advocates. At no point did the Court acknowledge a role in the larger public dialogue surrounding same-sex marriage and relationships. Indeed, the Court’s short, propositional approach, particularly on the Constitutional question, seems almost to deny the existence of any substantial legal controversy, let alone the social dynamic that underpinned the attempted legislative reform.
- 18 What does this tell us, if anything, about the present role and function of the High Court? There are a number of immutable aspects of its function, the most fundamental of which is its constitutional role in determining the law of Australia “*as is appropriate to the times*”²⁴. It is, in its appellate role, a court of error.²⁵ In addition, the High Court has in recent years emphasised the centrality of the institutional integrity of courts in the separation of powers doctrine enshrined in the Constitution. The increase in statutory governance of large aspects of hitherto common law rights and of new rights²⁶ has also had its impact.

²² At [14]-[24].

²³ See, for instance, McLean, James “The Constitutionality of Same-Sex Marriage” (2013) 15 *The University of Notre Dame Australia Law Review* 1; Lindell, Geoffrey “Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey - North America and Australasia” (2008) 30(1) *Sydney Law Review* 27; Zanghellini, Aleardo “Marriage and Civil Unions: Legal and Moral Questions” (2007) 35(2) *Federal Law Review* 263.

²⁴ *Queensland v The Commonwealth* (1977) 139 CLR 585 per Barwick CJ at 593.

²⁵ See for instance *AJS v The Queen* [2007] HCA 27; 235 CLR 505 at [39] per Kirby J.

²⁶ Eg in the area of biodiversity legislation and patent rights.

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- 19 The Court may consider that the social and/or value-laden underpinning of many of the cases that come before it have already been laid out by the intermediate appellate court. Another possibility is that the Court's current approach to its judgment writing is responsive, at least in part, to the criticisms made in the past as to its lengthy judgment writing. There is substantial commentary decrying extended recitations of undisputed facts, dense citation, the marshaling of long lists of factors of minimal relevance, and other forms of jurisprudential padding.²⁷ These criticisms are made of all courts in the judicial hierarchy.
- 20 Australian courts have been identified as particular offenders. One analysis of High Court judgments given in the century to 2007 found that, in comparison with the final courts of appeal of Canada and the United States, the High Court has consistently (and increasingly) produced the longest judgments by average word length.²⁸ If we are in the early days of a trend towards more focused and succinct High Court judgments, it may be, in part, in response to these critiques.
- 21 It may also be that into its second century, aspects of the Court's jurisprudence are settled and therefore do not require long dissertation. In short, there is simply less to argue about. The High Court's focus may, in summary therefore, be on ensuring that lower courts 'get it right'. In other words, we may be witnessing the playing out of the Court's constitutional role in judgments that it has determined should be relatively short and unadorned.
- 22 What, then, is the position in intermediate courts of appeal? The starting point in the consideration of judgment writing, as in all forms of writing, is audience and purpose. Judgment writing poses its own challenges because of the

²⁷ See, for instance, Posner, "Judges' writing styles (and do they matter?)" (1995) 62 *The University of Chicago Law Review* 1421 at 1442, Neuberger, "Sausages and the judicial process: the limits of transparency" (2015) 12 *The Judicial Review* 131 at 138; Waye, "Who are judges writing for?" (2009) 34 *University of Western Australia Law Review* 274 at 278; Allsop, "Appellate judgments – the need for clarity" (2012) 1 *Journal of Civil Litigation and Practice* 181.

²⁸ Waye, "Who are judges writing for?" at 283-4; see also Groves and Smyth, "A century of judicial style: changing patterns in judgment writing on the High Court 1903-2001" (2004) 32 *Federal Law Review* 255.

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multiple functions judgments serve and the multiple audiences for whom they are important. This is nowhere more true than in the context of the intermediate appeal.

- 23 The first audience for which any judgment is written is the parties to the dispute – indeed, one piece of advice often given to judges is to write for the losing litigant.²⁹ Confidence in the legal system and therefore in the rule of law, demands that litigants understand the reasons for their loss and, in particular, that it was by operation of law and not judicial whimsy or eccentricity. This is best achieved if the basis of the reasoning that leads to the outcome is revealed. This may be seen as part of the intermediate appellate court’s significant rule of law function.
- 24 There is a second audience, those who have an interest in the legal issues raised in the judgment of the intermediate appellate court. Regardless whether it is correct to say that intermediate courts of appeal have a declaratory function, these judgments are of fundamental importance for this audience – it is the revelation of the way the law is administered in the particular jurisdiction.
- 25 For intermediate courts of appeal there is of course a third audience – the High Court and the requirements of *Kuru v NSW*,³⁰ although it is not the point of this paper to consider the implications of that decision.³¹ Nor do I seek to touch upon questions of writing for the higher appellate court.³²
- 26 As is apparent, therefore, I have not discerned a similar, propositional approach in judgments of intermediate appellate courts as I have in the High Court. There are reasons why this is likely to be so, relating to the function

²⁹ Waye, “Who are judges writing for?” at 276.

³⁰ [2008] HCA 26; 236 CLR 1, at [12]

³¹ See similarly, in the criminal context, *Cornwell v The Queen* [2007] HCA 12; 231 CLR 260 at [105]

³² Posner contends that the potential for appeal in the use of a highly formal, characteristically legal approach to language and structure, designed to appeal to the expectations or perceived expectations of other judges, at the cost of clarity. I do not share that view of Australian intermediate appellate court decisions. See Posner, “Judges’ writing styles (and do they matter?)” at 1431.

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and practice of intermediate courts of appeal. In particular, intermediate appellate courts do not have the same constitutional function as the High Court, and there remains debate as to their declaratory role in the development of the law.³³ Further, appeals in intermediate courts are by way of rehearing, which is likely to require a fuller consideration of factual as well as legal issues. In courts such as the New South Wales Court of Appeal, the practice of assignment of a lead judgment to a particular judge may require the setting out of facts and arguments for the other judges on the bench. Finally, intermediate appellate courts are bound to apply the common law of Australia, which necessitates the consideration of judgments of other intermediate courts on the issue in question and, should there be a challenge to the correctness of those judgments, of whether they are “*plainly wrong*”.³⁴

27 More pertinently to the point I seek to make in this paper, there is value in presenting a case in its context – factual, legal and, in some circumstances, social and political – so that the basis of the reasoning and therefore the outcome is transparent. This necessitates a more comprehensive but not verbose judgment writing process which, in the result, will not only be dispositive of the case but may also valuably record the legal, social and political history of the times.

³³ See Allsop “Appellate Judgments – the need for clarity” (2012) 1 *Journal of Civil Litigation and Practice* 181 at 182

³⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [135].