NJCA WRITING BETTER JUDGMENTS PROGRAM

OPENING ADDRESS BY THE HON ALAN BLOW AO, CHIEF JUSTICE OF TASMANIA

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I would like to begin by paying my respects to the traditional and original owners of this land, the palawa people. I acknowledge the contemporary Tasmanian aboriginal community and recognise their enduring culture and continued connection to the land and sea. I also thank the National Judicial College of Australia for inviting me to speak to you.

Any discussion about writing better judgments needs to address the fundamental questions of why we write judgments, and for whom. From one perspective, we write them because we have to. For decades now it has been clear that any judge or magistrate who makes any decision or order without giving adequate reasons for that decision or order commits an error of law. It is said that the obligation to give reasons exists so that the parties to a case can understand why the decision went for or against them, and because the existence of rights of appeal makes it necessary for reasons to be given. Reasons need to be given so that any errors can be identified, and so that assertions as to error can be evaluated.

But it is not as simple as that. As a general rule, the courts must conduct their proceedings in public so that justice can be seen to be done. The community as a whole is entitled to know why a particular decision has been made, just as they are entitled to see witnesses give their evidence, and to hear counsel present arguments. It is because of the open justice principle that the superior courts now routinely publish practically all their judgments on the internet, with very limited classes of exceptions. Depending on the circumstances of the particular case, your

readership might be limited to the parties and their lawyers, if any. Your readership may include an appellate court. In exceptional cases your readership might include the media. Writing for posterity, or for those who read the law reports, will occur rarely, if ever.

The ideal judgment is both thorough and brief. As a minimum, the judgment should reveal the way in which the matter came before the court, the issues in the case, the basic facts giving rise to the disputed issues, the applicable principles of law, and the author's reasoning process If the evidence of one witness has been preferred to that of another witness, some explanation should be given as to why the evidence of one was preferred to that of the other. It is not enough, these days, to say "I prefer the evidence of the police", or "The evidence of the constable had the ring of truth about it."

When you reserve a judgment and come off the bench, more often than not I expect you will know what you are going to decide, and why. If it is going to be some time before you can write a judgment, it is often a very good idea to make some notes, listing the significant issues and any conclusions or tentative conclusions that you have reached. For a busy judge, a trial can really eat into the day, but it is worth taking the time to make notes so that you can quickly come to grips with the issues when you return to the matter to begin writing, weeks or even months later.

In a long trial, I would advise against writing several pages each day summarising that day's evidence. Some judges do that, and they often end up with judgments that are far too long with little or no analysis of the significance of much of the summarised evidence. In a case with a lot of issues, I will often start making notes using a separate sheet of paper for each issue, noting which witness said what in relation to each issue, with transcript page numbers.

Some judges work on their judgments strictly in the order in which they reserved them. Surgeons in the Royal Navy used to treat injured sailors strictly in the order in which they were brought to them until the triage system was invented. There is no reason why judges should not fast-track some decisions and leave others that have less importance and/or less urgency. Often I will work on a short decision because I know that I can get it out of the way, in preference to doing a little work on a long judgment that I will not be able to finish for ages.

If possible, it pays to decide what the outcome of the case is going to be, and on what basis, before you start writing. You should at least identify what the critical issues are likely to be. If you embark upon the journey without knowing your destination, there is a big risk that effort will be wasted on aspects of the case that turn out to be insignificant.

The opening paragraph or paragraphs of a judgment are critical because they explain to the reader, or should explain to the reader, the nature of the case and its fundamental issues.

Some of you are probably familiar with the opening paragraph of Lord Denning's judgment in *Miller v Jackson* [1977] I QB 966 at 976. It begins as follows:

> "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. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge

> of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. "

Lord Denning certainly explained how the matter came before the Court of Appeal, and what the issues in the case were. Much as I admire his lyrical literary style, there are a few negative comments that I should make in passing. First of all, it is generally a very good idea to try to write a judgment that is appeal proof, whereas this one tends to suggest that a fully informed lay observer – one of the judiciary's imaginary friends – might reasonably apprehend that his lordship might not have brought an open mind to the dispute between cricket lovers and a newcomer.

Another point is that it is often undesirable to say unpleasant things about people who can't respond, even newcomers. I very much regret something I said in a workers compensation appeal not long after I was appointed as a judge:

> "When Christopher Columbus made his famous voyage in 1492, he set out without knowing where he was going; arrived somewhere, but did not know where he was; and returned home without ever knowing where he had been. The learned chief commissioner had a similar series of experiences in the course of the hearing."[1]

I should not have said that, and it did not seem funny when I was overturned on appeal.[2]

My final point about Lord Denning's opening paragraph is that it is misleading and deceptive in the impression that it creates of the so-called village of Lintz in County Durham. An academic from the University of Tasmania went there some years ago to have a look at the place. These days we can all look at it using Google

[1] *Beadle v State of Tasmania* [2001] TASSC 65 at [15].
[2] *State of Tasmania v Beadle* [2001] TASSC 122 at [15].

Earth. Lintz is a very boring middle-class dormitory suburb on the outskirts of Newscastle-upon-Tyne, not a picturesque rural village.

A somewhat different literary style has sometimes been adopted by Justice David Watt of the Ontario Court of Appeal. Here are his opening paragraphs in an appeal against a conviction for murder[3]:

> "[1] In the drug business, loyalty and integrity are important. At every step along the way. Wholesalers. Brokers. Retailers. Street dealers. Everyone has their role. And everyone gets their due, their full due. No one gets short-changed. And no one gets cut out.
>
> [2] Sometimes, however, loyalty and integrity get left behind. Forgotten. Ignored. Payments are short. Deliveries are light. Brokers are cut out. Retailers deal directly with wholesalers.
>
> [3] Disloyalty has its price. And sometimes that price is very steep. As here. One death, a murder. Three trials. Two men convicted of first degree murder. The third acquitted.
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> [4] A jury convicted Fadi Saleh of first degree murder. He says his conviction is flawed because the trial judge admitted some evidence that made his trial unfair, failed to instruct the jury correctly on two unrelated issues, and gave a wrong answer to a question asked by the jury during their deliberations.
>
> [5] These reasons explain why I would allow the appeal and order a new trial."

It is generally unnecessary and undesirable to adopt any form of exciting literary style. The main purpose of the judgment is to set out the judge's findings and reasoning. Ideally the findings and reasoning will be presented in a way that will convince any reader of their correctness, or at least convince the reader that the judge has considered the issues in the case thoroughly and intelligently. Flamboyance might be entertaining, but it generally does not assist in achieving that objective.

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[3] *R v Saleh* 2013 ONCA 742.

It is often far more appropriate to begin with, "This is a …". For example:

- "This is a sentencing appeal. On 4 December 2020 the appellant, Frederick Nerk, murdered a man named Bloggs by shooting him with a rifle."
- "This is an action for damages for personal injuries. On 4 December 2020 the plaintiff, Sylvia Smith, was driving her car along Liverpool Street, Hobart when …".

The ideal judgment is lucid, accurate, as brief as possible, logically coherent, and not encumbered by surplusage and irrelevancies. There are a few practices that should be avoided. Unless it is really necessary, it is generally a very bad idea to set out large passages from pleadings, grounds of appeal, or the evidence. Summaries should be used wherever possible.

Similarly, a judgment should not set out page after page of statutory provisions or, even worse, planning scheme provisions, when a summary would suffice. If such provisions do have to be set out verbatim and at length, the judgment will be much more readable and digestible if some commentary is included along the way. For example, "Section 15 of the Act sets out criteria which the decision-maker must take into account. The relevant paragraphs read as follows …".

Side headings should generally be used in a judgment of any length. Lawyers and appeal judges will often travel through a judgment in the manner of a grasshopper, leaping from point to point and looking for matters of interest, not reading every word from start to finish. Side headings and sub-headings make judgments navigable for those who may wish to concentrate on particular aspects of a decision.

Dot points also make judgments easier to follow and understand. I used not to use them, but I now routinely use them, particularly in chronologies and in lists of relevant factors. For example, in a sentencing appeal, I will often cover the mitigating factors in a series of dot points, preceded by the words, "The relevant mitigating factors in this case, and my comments in relation to them, are as follows …".

The use of Latin terms should be avoided. For example, when referring to a reported case for the second or subsequent time, there is no need to say *supra* when one can say "above". In a recent case in our Court of Criminal Appeal, we used a footnote to explain the meaning of "tabula rasa" and the word "palimpsest" in a passage quoted from a 1961 High Court judgment.[4]

Simple sentences should be used where appropriate. For example, in describing the facts in a criminal case, it is often very appropriate to use very simple language. "He jumped the counter, menaced the shop assistant with a kitchen knife, took $600 from the till, and fled."

One pet hate of mine is the use of "they" and "their" instead of "he or she" or "his or her". I accept that sexist language should be avoided. However that is no reason to use the plural when the singular is appropriate. Others may disagree with me, but they do not talk proper. Grammatical mistakes and inappropriate syntax may not be noticed by many people these days, but when noticed they can tend to impinge upon the reputation of a court or of particular judicial officers.

[4] *Shaw v Tasmania* [2022] TASCCA 2 at [65], referring to the judgment of Windeyer J in *Vallance v The Queen* (1961) 108 CLR 56 at 76.

I hope that these comments have been of some value to you. To me, judgment writing is the most enjoyable part of the judicial role. I am very conscious that others have different perspectives. One of my colleagues, now retired, has often said that when first appointed he discovered that he was spending much of his time writing essays, and kept saying to his wife, "What have I done?" However it can be a great source of intellectual satisfaction to compose a judgment that deals with complex issues and resolves them in a comprehensible way.