FROM EX-TEMPS TO TREATISES
HOW LEADING JUDGES WRITE

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Introduction

Intermediate appellate courts, like trial courts are obliged to give reasons, whether ex-tempore or reserved, sufficient to properly expose in a transparent way the reasoning process in the exercise of judicial power, doing equal justice according to law.

Basil Fawlty could run his Fawlty Towers Hotel superbly if he did not have to be bothered by guests. I sometimes think I could run a wonderful intermediate Court of Appeal if I didn't have to be bothered by judgments, my own and others: especially the High Court's! And when I met up with former JCA President, David Harper, his first words about retirement were that he was not missing the judgment writing.

Like most of you, sometimes I feel overwhelmed by the burden of constant, timely judgment writing. Other times I look at it as an opportunity to assert my individuality and creativity, albeit within the framework of the facts and law of the particular case I am considering.

And when I have my judgments cited and handed up to me in court, I am just as torn. Unless they are very recent, I have forgotten them completely. I have a sinking feeling in my stomach and a little voice in my head saying, "I hope you didn't muck it up." Sometimes I am relieved to find I didn't muck it up. Sometimes I think, "Wow could I have said that?" Other times I think, "Gee, that's pretty good, did I write that?"

My point is that judgment writing is both onerous (who wants to write a judgment or hear about judgment writing for that matter on a pleasant Saturday spring afternoon?) and pleasurable (how good is that light bulb moment when you've peeled away the layers and realised that the complex legal argument put forward was really nothing but a sophisticated try on?). Judgment writing can be a challenge but it can also be satisfying. And what a privilege to deliver equal justice according to law to litigants in conflict.

The hardest part about judgment writing, especially in cases which you think are difficult or dreary, is getting started. It's never as bad as you feared: usually! And as the wise Dalai Lama often says, everything, even a monster judgment, has a beginning and an end. So start the thing!

Although I had seven and a half years as a trial judge, for the last 18 plus years my work has been in appellate judgment writing. Some skills are the same at both levels. Some are different.

Ex-tempore judgments

There is generally less opportunity for ex-tempore judgments but ex-temps are by no means uncommon in:

- case management decisions, applications for stays and applications for security for costs;
- straightforward applications for leave, extensions of time or appeals where there is no obvious merit. Many self-represented matters may be in this category;
- relatively simple matters clearly warranting correction; and
- simple appeals against sentence and civil applications for leave.

When preparing such matter for hearing I usually have the assistance of written outlines of argument, at least from one party, and some written material to peruse before the hearing. Preparation, when possible, is important. If I am considering an ex-temp, I either hand write or, if there is more time, dictate a draft identifying the orders sought to be appealed and what the matter is about; the grounds or the proposed grounds of appeal and the orders sought; the issues and if I have a preliminary view, the reasons for the conclusion. I make sure I leave plenty of room for alterations and additions to the draft during the hearing. I appreciate that this preparation time and the benefit of material beforehand will not always be available at trial level.

If I have a reasonably clear preliminary view of the outcome and I am not sitting alone, I will circulate the rough draft to the other judges before the hearing.

I think the following general observations about ex-temps also may have some application at trial level. With experience you will get adept at deciding whether you can give an ex-temp or whether you need to reserve it.

I encourage you to refine your ex-temp techniques so that you have the confidence to deliver ex-temp reasons where appropriate. They are only appropriate where you are sure of the result. Remember always, our duty is to do equal justice according to law. Ex-temps are not like summing-ups or final directions to juries where every word said to the jury must be accurately recorded. You can revise ex-temps as long as the changes do not do too much violence to the meaning of what was said in court.

Ex-temps are efficient. The parties have the result immediately and they are generally kinder to you. It is much more difficult and a lot more work to return to a judgment months after the hearing. And ex-temps are also great for the court's timeliness statistics. When giving ex-temps, always pay attention to the orders. It is much easier to edit a stream of consciousness into sensible sounding sentences than to do serious repair work to orders. And when the order is right, the parties will be more forgiving if the reasoning is a little rough. Remember, appeals are from orders, not reasons.

The only down side of ex-temps is if there is likely to be an appeal and you are concerned that your raw reasons may be successfully criticised as inadequate. This judgment call comes with experience. And even experienced judicial officers sometimes get it wrong. C'est la vie. Appeals are the burden of trial courts – and also of intermediate appellate courts. When Michael Kirby was appointed President of the New South Wales Court of Appeal, a District Court judge, Tom Dunbar, wrote a congratulatory letter which included these verses:

"If 'tis the lot of such as we
From great heights peed upon to be;
Why then bareheaded we wait to see
What shall descent from mighty Kirby P?"

As a former first instance judicial officer, I empathise with Judge Dunbar's sentiments. But as an intermediate appellate judge, I also empathise with Michael Kirby's presidential response that the "'peeing on' would not only be done *by* Kirby P – but *on* Kirby P from Lake Burley G!"

My point is: do not eschew ex-temps simply for fear of appeals.

It is important to watch out for urgent matters. At appellate level examples include short sentences where delay will render the appeal nugatory, or Attorney-General appeals against a sentence which is soon to expire, and civil appeals where, absent a timely decision, the appeal will become pointless. Ex-temps in urgent matters are desirable but this will not always be possible. Alternatively, if the court is completely confident about the outcome, and it is desirable to pronounce the orders as soon as possible but, say, there is an important legal principle which needs careful consideration, it may be appropriate in courts with the power to give ex-temp orders but with the statement that the court will publish its reasons later.

Sometimes an ex-temp is ready to be delivered but the matter is reserved because of concerns about its effect on a litigant, usually self-represented.

If there are a number of matters listed for hearing, before the court on the same day, the presiding judge will discuss the allocation with the other judges before the hearing. A judge allocated a less complex matter may be able to deliver an ex-temp, although perhaps it is more a provisional judgment written on the papers, with room to adapt for oral submissions, rather than the true ex-temps given in busy trial courts.

Reserved judgments

Most judgments in my Court are reserved. Even if the judgment is to be reserved, it is smart to begin making notes or dictating a draft judgment at the time you prepare the appeal. A statement setting out the order appealed from, the background to the appeal, the grounds of appeal, the issues and the competing contentions will be a great help when you return to write the judgment, perhaps many weeks later.

If the presiding judge has not allocated the writing of the first draft before the hearing, at the conference immediately after the hearing, my Court's practice is always to ensure a judge is allocated to write the first draft. The hope is that ordinarily the first draft will be circulated within about two months. In difficult cases or when judges become busy, ill or are on leave this is not always possible. Very often pressures of work have the result that a judge is not able to return to the judgment for some weeks by which time he or she has heard many other cases and has pretty much forgotten what this one was about. This is where notes made during the preparation of the appeal for hearing, during the appeal hearing itself, and the preliminary thoughts immediately after the hearing, can be invaluable. Judicial officers at all levels, including appellate, should make wise use of their time in court by making notes

for their subsequent decision-making and judgment writing, whether ex-temp or reserved. Note-taking has the added advantage of keeping you awake during dreary submissions.

My Court has the benefit of a transcript of the hearing. It is far from word perfect but is a very useful aide memoire to return to when writing judgments in more difficult cases. It is especially useful, if, like me, your notes are sometimes either illegible or incomprehensible.

My Court is also fortunate to have electronic appeal record books in all civil and criminal appeals. I find the simple "control F" search feature useful when checking evidence on a particular point, finding where an exhibit was tendered etc.

Over time, you will develop your individual judgment writing style and preferences. You may also develop your own basic format for getting your judgment juices running.

First, begin. Returning to the Dalai Lama's wisdom of everything having a beginning and an end, it is also a good idea if judgments have a middle. I usually begin quite unDenningesque-like, with a practical statement about the order under appeal and the grounds of appeal. I then briefly state and summarise how I will approach my reasons, for example, if the ground of appeal is that the jury verdict is unreasonable, and I have decided it is unmeritorious, I will state that this ground of appeal requires the court to review the whole of the evidence at trial. I explain I will set out the relevant evidence and the appellant's contentions before stating my reasons for refusing the appeal against conviction. I often put the result of the appeal early in the judgment.

You will note I did not deal with the respondent's contentions. Judgments, ex-temp and reserved, can be shortened if the result is generally consistent with the contentions of one party by only setting out the contentions of the losing party.

We all have idiosyncratic judgment writing styles and mine is to attempt to write in a way which can be understood by ordinary people, using short and simple concepts whenever possible. I am not always successful, especially in complex cases turning on legalistic terms of statutes or contracts. Whether I address the law or the facts first will depend on how those issues have developed in that particular case. I will do my best to explain how and why I have reached my decision and to set out the applicable law. It is helpful to make an initial summary in your own words of the relevant legal principles. Encompass this in your judgment, citing the case or cases with pages and paragraphs in footnotes, rather than setting out long slabs of other people's judgments.

I find headings and sub-headings useful, especially in longer judgments. You might commence your deliberations using headings or add them after preparing your first draft to provide structure and direction.

Editing is important. When I am sick of editing I pass the draft on to my associate to edit. After he or she has made the discussed changes, I edit it for a final time. If Jane Austen wrote judgments, she would say, "It is a truth universally acknowledged, that no matter how carefully a judgment is edited, the typo gremlins appear." There always seems to be something missed. But recognise when it is time to let go of your baby. There comes a point where the judgment will not be improved by yet another tinker. Like an artist who ruins the freshness of a painting by over-working it, you can over-gild the lily. Publish the thing! And get on with the next one.

Timeliness

A word about timeliness. Like many courts, mine has a protocol that ordinarily judgments should be delivered within three months of the hearing. In complex cases this is not always possible. Compliance with the protocol is sometimes made difficult when judges take leave, especially if more than one judge takes leave at different times in the three month period. We regularly circulate a list of undelivered judgments identifying the judges with responsibility for the first draft, the age of the judgment, and the date of circulations. When judgments are undelivered after three months, they are mentioned at the monthly meeting of the judges of the Court of Appeal and of both divisions of the Supreme Court. This is an effective management tool as no judge likes their judgments to be mentioned at those meetings. Of course, we recognise that sometimes judgments simply need more time to complete and that the three month protocol is not set in stone. Thank heavens! Again, our solemn duty is to do equal justice according to law. And sometimes that takes more than three months.

I will end where I began, with the wisdom of the Dalai Lama. You will be pleased to know that, like your monster judgments, this presentation, having had a beginning, and, I think, a middle, has now reached its end.