

# *On being a judge*

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In what I shall discuss this evening about being a judge, I will be speaking from an Australian perspective. An observation made by Sir Harry Gibbs, a former Chief Justice of the High Court of Australia, seemed to me a fitting opening. Judges are fond of quoting others. That may be because it is part of the judicial method. On the other hand, it may suggest a lack of original thought. Sir Harry said<sup>1</sup>:

"In a democracy, every educated citizen should have an understanding of the role of the judiciary, the manner in which the courts function and the history of the relationship between the courts and other organs of government. This is particularly important because ... the independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves and the support and confidence of the public."

What is required of a judge is reflected in the oath taken upon appointment, which is "to do right by all manner of people without fear or favour, affection or ill will." Before discussing what this commitment entails, I will first consider why a lawyer might decide to take up judicial office.

What is it about the office of judge which attracts men and women to it?

It is hardly the financial rewards. Although generous by the standards of many in the community, a judge's salary is far less than most judges could earn in practice as a lawyer. In most courts, this differential is ameliorated, to an extent, by a pension provided at the end of a judge's service. Without that aspect of a judge's remuneration, it might be difficult to attract experienced lawyers of ability to the higher courts.

It is not the lifestyle. On taking appointment as a judge, a person is largely cut off from the camaraderie of the Bar, where most judges will have spent a long time. It is not always possible for judges to mix with barristers as much as they formerly did. That is not to say that judges do not get on with other judges. Some even enjoy each other's company. But for the most part, judges call it "collegiality", which implies that it is not as much fun as a barrister's life.

The life of a judge does not have the excitement of that of a barrister. A barrister's working life may involve long hours and pressure, but, in the case of advocates, it is punctuated by success in court. A judge's life is more of a continuum, with a workload which is constant. In some courts it has been described as "relentless". The hours may not be quite as demanding as those of a barrister in a long, complex trial but they are long and at the end of the trial, when the lawyers leave, the judge starts the important work of writing a

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<sup>1</sup> Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, (1997) at v.

judgment. Judges feel pressure to write judgments within a reasonable time. But they do not receive compliments for managing a complex trial well nor for writing a concise and correct judgment. To the contrary, their judgments may be the subject of public criticism, to which they are unable to respond.

The position of a judge is still afforded a high status in our society. But, as judges well know, the status and the respect which accompany it are afforded to the office, not the person. Nonetheless, given that status and the importance of the role, most lawyers who are offered an appointment feel a sense of honour. Indeed the older view, still maintained by some today, is that a person has a duty to accept appointment.

Most obviously, judges must enjoy managing the progress of matters in court and writing judgments if they are to derive personal satisfaction from their work on a day to day basis. There can be great satisfaction felt – in managing a difficult day in court or a long trial; in finding a path through the jungle of issues sometimes presented by the parties to litigation; in providing redress to those wronged; in resolving a difficult legal question; and in writing a judgment well – albeit that success is assessed according to a judge's own standards, which must necessarily be high. Enjoyable as is the role of a barrister, there is something infinitely more satisfying about reaching a solution to a problem than there is in composing a clever argument. That satisfaction is enhanced on the occasions when a judge is able to contribute to the development of the law or the maintenance of its certainty.

Judges also have the advantage of a belief in the social importance of the work they are doing and the social recognition of its importance. Not all jobs have this attribute. Judges have a strong sense of the institution of which they are a part and of the judiciary as a body of persons having a common and deep understanding of our legal traditions and the importance of the rule of law to our way of life.

Judges may be reticent in saying that they enjoy their work, particularly if they are a judge in, say, a criminal court, but those suited to it really do enjoy it. However, it is not a job for everyone.

Where do judges come from?

It is well known that, in Australia and England, judges are mostly drawn from the ranks of senior barristers. This has not always been the case in Australia. In the early days, the new colonies were not able to induce the best and brightest lawyers to travel from England to be judges. It was, in any event, just as important that the appointee have the physical ability to withstand the journey by sea to Australia and then to survive the deprivations of the colonies. As a result, many of the early judges were young and inexperienced.

In 1973, a study of the High Court of Australia<sup>2</sup> offered a snapshot of a typical High Court Justice. That person was a male, white, Protestant raised in Sydney, Melbourne or, less frequently, Brisbane, and of British ethnic origin. He was from an upper middle class background, went to a high status school, often private, and then proceeded to one of the main universities where he had a brilliant academic record before proceeding to the Bar.

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<sup>2</sup> Neumann, *The High Court of Australia: A collective portrait 1903-1972*, 2nd ed, (1973) at 105-106.

Today three of the Justices of the High Court are women. The Justices have different religious backgrounds. Not all have been to private schools and the majority do not come from particularly privileged backgrounds. The diversity of judges in the lower courts is even greater.

The reasons most judicial appointments come from the ranks of barristers are obvious. Barristers have an understanding of courts as institutions. They have been imbued with a sense of duty to the courts. They are experienced in courtroom procedures, the rules of evidence and legal reasoning. They have had to make hard decisions under pressure and have the confidence to do so. They are used to digesting large amounts of information in areas outside their own discipline. This is a skill not to be underestimated when it comes to judging. When I was a new barrister, a senior barrister at the Queensland Bar explained this use of memory and its aftermath by analogy with water in a bathtub. During preparation for a trial, he said, the barrister retains a lot of information. When it is over, all that is left in the memory is the equivalent of a ring around the tub.

There are some aspects of a barrister's method which are not suited to the role of a judge. Advocates are trained to argue. By comparison, even if there is the occasional lively exchange, a judge for the most part listens and enquires. But some judges I have known have found it difficult to throw off the robe of a barrister. Further, barristers write opinions, not judgments. Although successful barristers must see the possibility of a contrary argument, they are only required to hold to the argument for which they contend, which favours his or her client, and to seek to persuade the court to accept it. As I shall later discuss, writing a judgment involves more than the mere expression of a justifiable opinion.

What qualities are necessary in a judge? Here I speak of course of the model judge.

Integrity comes highest on the list. In the words of the former President of the Supreme Court of Israel<sup>3</sup>, "judging is not merely a job but a way of life ... that includes an objective and impartial search for truth. It is ... not an attempt to please everyone but a firm insistence on values and principles; not surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions according to temporary whims but progressing consistently on the basis of deeply held beliefs and fundamental values."

Lord Radcliffe, who was widely regarded as a fine judge, described a model judge as "wise, learned and objective"<sup>4</sup>. Clearly knowledge of the law is a prerequisite. To knowledge of the law must be added knowledge about society, about cultural, political and social influences, and about the relationship of the law to society, not just in the present, but also historically. Wisdom in this context may be taken to include an understanding of human affairs and a good deal of common sense.

Judges live in and are part of the community. It is sometimes suggested that their role puts them out of touch with society. To the contrary, they probably see more diverse human behaviour than most people would want to. Our former Chief Justice, Murray Gleeson,

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<sup>3</sup> Barak, *The Judge in a Democracy*, (2006) at 110.

<sup>4</sup> Radcliffe, "The Lawyer and His Times", in Radcliffe, *Not in Feather Beds: Some Collected Papers*, (1968) 265 at 276.

speaking on this topic<sup>5</sup> suggested that the real grievance about judges may not be that they are out of touch but out of reach. That is to say, they cannot be influenced and will not enter public debate about their judgments.

Lord Radcliffe said that a model judge is objective. Objectivity implies judicial neutrality. It recognises that a judge must be impartial and must be seen to be so. It was not so long ago, you may recall, that the House of Lords had to set aside its own judgment against ex-President Pinochet of Chile, because one of the majority judges was associated with Amnesty International, an organisation which was involved in the case as an intervener<sup>6</sup>. A judge must render an impartial decision unaffected by any personal views or prejudices. Of course we all have some; judges need to have some insight into what theirs are. An example which comes to mind is that of a former judge in Queensland. It was well known in the legal fraternity that he had something more than a personal dislike of a particular Queen's Counsel. It was regrettably sometimes evident in the courtroom, but never in his judgments, which were the model of objectivity.

A strong work ethic is necessary in a judge. Most courts are very busy and usually have established protocols regarding the time within which judgments should be delivered. In some courts, the workload is unremittingly heavy and can only be managed by constant application to the work. There can be no swifter way of losing the confidence of the profession or the public than to have a lazy or disinterested judge hearing a case or writing a judgment.

Much has been said about the need for a judge to be courteous to the lawyers appearing before the court and to witnesses. It is not only an example that needs to be set, it is the most effective way of managing proceedings. In court, a judge's real temperament is exposed. When it is said that a person does not have the temperament to be a judge, this usually implies that the person has a combative manner or a short temper; whereas a model judge is calm and measured. Courtesy extends to the litigants and it should be evident in the reasons for judgment. It was once famously remarked<sup>7</sup> that the most important person in the courtroom is the litigant who is going to lose.

Judges can influence lawyers and others in the courtroom towards courteous behaviour by their example. They may also remind counsel of the need for courtesy by other means. In a trial conducted in the early 20th century in Victoria, a witness whilst under cross-examination made a comment audible to the barrister cross-examining, but not to the trial judge. The barrister protested to the judge that the witness had mumbled something to the effect that he was a rude, bullying barrister. The judge asked the witness if this were true. The witness admitted that it was. The judge chided the witness, but not perhaps in the way the barrister had hoped: "You mustn't mumble, you really must not mumble", he said<sup>8</sup>.

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<sup>5</sup> Gleeson, "Out of Touch or Out of Reach?", paper delivered at the Judicial Conference of Australia Colloquium, 2 October 2004 and published in (2005) 7 *The Judicial Review* 241.

<sup>6</sup> *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

<sup>7</sup> Megarry, "Temptations of the Bench", (1998) 16 *Alberta Law Review* 406 at 410.

<sup>8</sup> Mason, *Lawyers Then and Now: An Australian Legal Miscellany*, (2012) at 162.

Decisions made by a judge may be difficult and they may attract criticism. A judge must be able to make an unpopular decision and turn his or her face against criticism. Once a judgment is given, judges do not further explain or justify the decision they have reached. They speak once, in the reasons provided in the judgment.

No-one likes to be said to have been wrong, but it is the task of appellate courts to correct errors. When a judgment is overturned on appeal, its author must accept it with good grace. A judge's feelings in this regard are not important. Having said that, it is also the duty of appellate courts to be courteous and respectful of judges in the lower courts. It has also been said that once a judgment has been published, its interpretation belongs to posterity<sup>9</sup>. What others see in a judgment may sometimes take the author aback. It must be accepted that others will make of it what they will.

To this non-exhaustive list of qualities necessary in a judge, I would add the ability to behave in a collegiate manner. This is not often discussed. It is probably not something that those who are appointing judges are particularly interested in, and I do not suggest they should be or that they could in any event test for this quality. Courts can no doubt function with some judges who are not collegiate. They may nevertheless be able judges. But collegiality is as important in the workplace of judges as it is elsewhere.

#### What do judges do? Trials

Having considered why one might decide to become a judge, and the type of person suited to that role, I now turn to that elusive question: what do judges do? Obviously they sit in court and hear cases. But there are different kinds of courts and different kinds of cases.

Let us consider the trial judge, who presides over hearings alone. In our system in Australia, there are a number of levels of trial courts which rise in complexity of matter to the superior level of our State Supreme Courts and the Federal Court of Australia. In these courts, there is also provided an intermediate appellate court – intermediate because the final appeal court is the High Court of Australia.

Trial judges may preside over civil or criminal trials. A civil trial usually involves the hearing of witnesses, followed by argument and a judgment. The role of a judge in a criminal trial where there is a jury is different because the ultimate decision-maker is the jury and no judgment is therefore required.

When I was about to undertake my first criminal trial as a judge, I was told by a very experienced judge that a good summing up on the facts and directions on the law for the jury was a real intellectual challenge; he was right. This is not always well understood. A trial judge has to be very careful not to overstate or understate the evidence, lest a jury be influenced. The facts have to be presented in a structured way so that they are not only comprehensible but able to be linked to the real issues, which the judge must identify for the jury. Explaining criminal law concepts is not always easy.

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<sup>9</sup> *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 at 567 [14] per Lord Hoffman.

To observe a criminal trial is to observe an important social process involving the making of an accusation, the attempt to prove it and the resolution by members of the community sitting as a jury. A judge is participating in something of a ritual. Each aspect of a criminal trial has social, as well as legal, significance.

All trials involve the leading of evidence from witnesses followed by cross-examination. The barrister's task is to piece the evidence together, or to pull it apart. The judge's task is to follow the evidence and rule on objections as they arise. Objections to evidence are taken more often in criminal trials, where the admissibility of evidence is carefully scrutinized. Judges presiding over criminal trials need to have a good grasp of the issues arising from the offences charged, of the prosecution case, and of course of the rules of evidence. Judges need to be alert to problems with the prosecution's evidence even if the defence does not object. Retrials are to be guarded against. Judges must ensure that the accused has a fair trial without unnecessarily hindering the prosecution in the presentation of its case. Many judges appointed to superior courts do not have experience in criminal trials. Their background may be in commercial law or equity. Nevertheless, it has been my experience that many of them become exemplary criminal trial judges.

Differences of opinion have been expressed about the extent to which trial judges can discern whether a witness is telling the truth. Demeanour can on occasions be telling, but it is not always a reliable guide to such an important question. Trial judges have to be careful about reaching conclusions about people's credibility based upon matters of impression, not the least because findings adverse to a person's credit can be damaging beyond the outcome of the trial. Appellate courts are less likely to interfere with a finding of credit where it is said to be based upon the trial judge having heard and seen a witness. A trial judge must therefore explain how an adverse opinion was formed. Rather than making adverse credibility findings, most trial judges these days would seek more objective, concrete indications when resolving contradictory versions of events. Inconsistencies may point the way. A careful reconstruction of the narrative, with a view to identifying objective facts which render one version more probable, is another method.

The importance of the work of a civil trial judge tends, in my view, to be underestimated. One can speak of the importance of legal issues on appeal, but if the facts are not properly found, there is no reliable platform for the argument. As Sir Harry Gibbs said<sup>10</sup>, "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."

One of the challenges for a civil trial judge (and increasingly these days also for criminal trial judges) is the quantity of material which must be read before a trial commences and the voluminous written submissions which are often provided at its conclusion. There has been a marked shift in the last few decades from oral presentation of evidence and argument at the hearing, to written witness statements or affidavits and greater reliance on written submissions. This shift was intended to render trials more efficient, but it is not clear whether it has succeeded. Written statements make it hard for witnesses too. Previously they would have had the opportunity to recount events before being exposed to cross-examination. Nowadays they are only shown their written account for identification, usually crafted in lawyers' language (which itself provides fodder for questions about who is the true author of

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<sup>10</sup> Gibbs, "Judgment Writing", (1993) 67 *Australian Law Journal* 494 at 497.

an account), before being subjected to cross-examination. Cross-examination tends to be longer too, because the opposing counsel has the time to examine the written statements in detail. In days gone by, when cross-examination was conducted on the spot after listening to an opening summary of the other party's case and then the evidence of the witness, the cross-examiner had to focus on the salient points.

Generally speaking, litigation now takes longer than it did 35 years ago. When I came to the Bar in the mid-1970s, a long trial was four days. Lawyers focused on the causes of action which would be productive of success. Many actions are now over-pleaded. Too many unnecessary issues are raised. Trial judges have consequently become case managers, but, in my experience, no matter how much a judge rails against pleadings bloated with irrelevant issues, it is usually to no avail. There may be a number of reasons why this practice has developed, and there is no sign of it abating.

This is a convenient point at which to correct a common misunderstanding about a judge's working life. Some people seem to think that a judge's productivity may be measured by how many days and hours he or she spends in court. However, most of the working life of a civil trial judge and an appellate judge is spent not in the courtroom, but in chambers reading up for what lies ahead and writing judgments. Judgments can be very, very time-consuming and judges often have a backlog of them. Whilst any judge's preferred position would be to be completely up-to-date, the reality is that sometimes a judge is only able to write a partial draft or an outline of the judgment in the matter just heard, before the judge either goes back into court to hear the next matter or returns to another judgment that is half-written. Judges are constantly juggling court with judgment writing.

#### What do judges do? Appeals

The task of a judge in an appellate court is different from that of a trial judge. Appellate courts rarely hear evidence. The focus is upon the correction of errors in what has occurred in the courts below. The larger part of the work of intermediate appellate courts in Australia is crime. It may constitute as much as 75 per cent of the work of some courts and may require a dedicated court of criminal appeal.

Issues will usually be refined by the time a matter reaches an appellate court. However, sometimes the issues may change, if permitted by the appellate court. It is a truism about legal matters that the real difficulty usually lies in identifying the correct question.

Intermediate appellate courts may hear appeals about whether the facts were incorrectly found by a trial judge. In criminal cases, courts may be asked to consider whether a verdict can be sustained on the evidence or whether the trial miscarried. Either way, judges must often peruse a large part of the record of evidence at trial. This does not occur as frequently in the High Court, but it does happen from time to time.

Most intermediate courts of appeal are constituted by three judges; very occasionally five. Five is the usual number of Justices who sit on ordinary matters in the High Court. The Court sits all seven members in constitutional matters or where a matter has special importance, for example where a party seeks to overturn a previous decision of the Court.

In some appellate courts, the judges on the panel to hear a matter meet before the hearing, but this is not always productive because argument has not been fully developed and dialogue between counsel and the Bench has not taken place. The real utility of the pre-

hearing meeting is to identify problems or matters which may need to be addressed by the parties or the court.

During argument on an appeal, judges will ask questions of counsel; they might put propositions to them for comment; they might point out a difficulty in the parties' arguments. The conversation is not only with counsel. Judges are also listening to what their colleagues are saying. In a sense, the judges are also speaking to each other by the questions they put to counsel.

At the meeting following the hearing, the judges will express views they have formed and identify difficulties they have with the arguments. In the High Court, our post-hearing meetings are largely unstructured. Often it will be obvious whether there is a majority view – at least in a preliminary sense, for judges will not consider themselves bound by an opinion expressed in the meeting until they have given the matter full consideration.

Generally speaking, it is not possible for appellate judges to write a comprehensive judgment in a timely way on every case they hear. Most courts have a policy of delivering judgments within a particular period. In the case of the High Court, it is six months. It will be shorter if some urgency attends a case. Often one judge of the panel which has heard the appeal will be asked to write a first draft and to circulate it to the other judges, who will then consider whether they can agree with it or not.

The method by which a judge is assigned this task differs between courts. Some courts assign each appeal before the hearing. In the High Court, this is determined post-hearing. It usually only occurs when there is a level of consensus and therefore the possibility that others will agree with the view expressed, although sometimes when the Justices are undecided, one will volunteer to write a first draft in any event. A Justice might volunteer to do so because of his or her particular interest in the issues or it may lie within an area of special experience. Or it may simply be that it is a Justice's turn. In constitutional cases, it is often the case that many of the Justices will want to write alone anyway, so no-one undertakes a first draft. There are no fixed rules.

Looking back at earlier reports of cases in the High Court, one may be struck by the number of individual judgments written. In more recent times, by which I mean the last few decades, one sees more joint judgments. This may simply reflect an increase in the volume of work; it may also indicate a shift in attitude.

Most appellate judges in Australia would, I think, express a preference for a joint judgment where it is possible, when judges are in agreement, unless a judge has a different approach to reasoning to the same conclusion and wishes to express it or has something that he or she wishes to add. One English judge has gone so far as to suggest that it is a vanity to write when there is nothing to be added<sup>11</sup>. Of course if a judge cannot agree, he or she must write in dissent. No judge would agree unless able to do so completely.

Views have differed over the years about whether joint judgments are to be preferred. One of Australia's most distinguished jurists and a prolific judgment writer, Sir Owen Dixon, once told a colleague that he usually regretted agreeing with another's judgment; nonetheless,

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<sup>11</sup> Lord Neuberger, "Open Justice Unbound?", paper delivered at the Judicial Studies Board Annual Lecture 2011, 16 March 2011 at 10 [24].

he continued to do so on occasion. His colleague later remarked that "the advantage of certainty in the law was aided by his doing so"<sup>12</sup>.

The need for certainty is particularly important in areas such as criminal law. Appellate judges are conscious of the position of a trial judge, who is not assisted by a multiplicity of judgments, all with some qualification or addition. And in some controversial cases, the view is taken that it is preferable that the court speak with one voice, if it can.

On the other hand, it has been said that the reputation of a judge depends upon the quality of his or her judgments<sup>13</sup>; and that the judgment is the voice of the judge<sup>14</sup>. These views might present something of a conundrum when put against those regarding the advantage of joint judgments.

In the High Court, we do not currently adopt a system such as that in the United Kingdom (and in Hong Kong) where one leading judgment may be written with the other members of the court publishing separate concurrences, even if they say no more than "I agree with Justice X." By this means, the author is always evident. In the High Court when a Justice signifies concurrence, he or she is joined in the judgment (by which I mean his or her name is added to it) if that is so desired. When a judgment is published, it will not be apparent who the author is. It is partly for this reason that Justices will make a conscious effort not to intrude their own personality into their reasons when they are writing a first draft for the other members of the Court to consider.

It is rarely correct to say that what appears as a joint judgment was co-written by the judges ascribing their names to it. It is, in my experience, quite rare to have an appellate judgment written by more than one judge, not the least because it is difficult in a practical sense to do so. Very occasionally, a judgment will be able to be divided into discrete sections, but even then substantial editorial adjustments are necessary so that the judgment appears homogenous. It does happen that a concurring judge will suggest an addition or amendment. There is no obligation to agree to any changes. Some joint judgments in the past have clearly suffered from too much input and the clarity of the judgment has thereby been compromised.

Some commentators appear to devote considerable time to the question whether some judges group together in agreement, which is to say share a mindset. Sir Anthony Mason has said<sup>15</sup> that, having sat with many judges, he has not encountered any two who shared an entirely identical outlook. Some have a rigid view of precedent, others do not. Some are conservative in areas such as property law or tax, but less so in relation to social issues. This has also been my experience. Even approaches to statutory interpretation can differ markedly.

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<sup>12</sup> Kitto, "Why Write Judgments?", (1992) 66 *Australian Law Journal* 787 at 797.

<sup>13</sup> Mason, "The Art of Judging", (2008) 12 *Southern Cross University Law Review* 33 at 39.

<sup>14</sup> Barak, *The Judge in a Democracy*, (2006) at 205.

<sup>15</sup> Mason, "The Art of Judging", (2008) 12 *Southern Cross University Law Review* 33 at 38.

## Judgment writing

As I have mentioned, a considerable portion of most judges' working lives is devoted to judgment writing. The three principal qualities of good judgment writing are brevity, clarity and accuracy. Sir Harry Gibbs said that the writing of a satisfactory judgment involved painstaking, arduous effort<sup>16</sup>. Another former Justice of the High Court said<sup>17</sup> that he had once thought that as the years went by the writing of judgments would prove easier, but it did not. There is something of a sigh of relief when a judge concludes a judgment which has involved a degree of difficulty, pauses and then moves on to the next.

Reasons for judgment are written methodically, but there is no set formula. The method varies with each case and depends upon what is presented for decision, the logical order of topics and the importance or emphasis that a judge has determined. The method of writing judgments also differs as between a civil trial judge and an appellate judge, because the trial judge finds facts.

The starting point for any judge is the identification of the *real* issues. A trial judge will have analysed the parties' pleadings prior to trial, but the issues may have taken on a different complexion in the course of a trial, and the judge will in any event need to assess which of them are likely to be determinative of the case. The issues to be decided will determine what facts need to be found. A starting point may be the facts which are not in dispute and the development of a chronology of events by reference to them. Within that framework, areas of controversy may be identified and then resolved. Resolution of factual controversy usually requires a judge to consider what is more likely to have taken place. This may be akin to detective work and requires a deal of common sense.

Common sense is less helpful when a judge is dealing with expert evidence. But the larger part of the resolution of such evidence will hopefully have occurred during the trial, when the judge was also able to question the expert witness or counsel in order to ensure that the judge had a proper grasp of the evidence.

The solution to the case is arrived at by applying the law to the facts as found. This is not as simple as it sounds. It may come as something of a surprise to some students that the facts in a real case almost never fit neatly into those of a decision in a case book. A judge must explain why the ratio of a previous decision is appropriate to be applied or is to be distinguished. Legal principles must be articulated and reasons given as to how they are applied on the facts of the case. Sometimes the law as stated must be adapted to the case, although trial judges will hesitate to create a new rule, one which has not been stated by an appellate court.

Appellate judges also write judgments conscious of previous decisions and, in the High Court in particular, of where the law is headed. Sometimes it is necessary to go back further. In 2011, for instance, the High Court gave judgment in a case<sup>18</sup> which necessitated a consideration of what was said to be the privilege of a person not to give evidence against his or her spouse. An examination of the records of cases going back to the 17th century did not

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<sup>16</sup> Gibbs, "Judgment Writing", (1993) 67 *Australian Law Journal* 494 at 502.

<sup>17</sup> Kitto, "Why Write Judgments?", (1992) 66 *Australian Law Journal* 787 at 787.

<sup>18</sup> *Australian Crime Commission v Stoddart* (2011) 244 CLR 554.

confirm the existence of such a privilege, at least to an extent which was thought to be reliable. In a case<sup>19</sup> heard last year, the argument that a man could not in the 1960s be convicted of raping his wife was rejected on the basis that the law of marriage in Australia had taken a different turn from English law in the early part of the 20th century. Most judges, I would think, have an abiding interest in legal history and understand its importance.

Some judgments necessitate consideration of decisions of courts in other jurisdictions. Australian judges have of course looked to England and the United States in the past, but less frequently to the law of the major European legal systems. There are a number of reasons why Justices of the High Court have been hesitant to do so, not the least of which is language, although translations of overseas decisions are now becoming more readily available. Judges are also understandably cautious about making assumptions about foreign law without the benefit of understanding the operation of the legal system as a whole.

Does style in judgment writing matter? Most judges would be more interested in substance than style. Lord Denning was a favourite with students because of the style of his judgments. His opening lines, though attractive, were not always accurate. For example<sup>20</sup>: "In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field when the young men play and old men watch." But as an Australian judge who investigated the matter has pointed out<sup>21</sup>, the cricket field of which Lord Denning spoke was in "brutal fact ... a scungy little ground".

Judges usually avoid humour. Litigants, understandably, do not find judgments amusing. Even humorous references to groups other than litigants are to be avoided. The New South Wales Court of Appeal once considered the case of a man who had maintained domestic relations with three women at the same time – with none of the women knowing of the others' existence. In his reasons for judgment, one judge remarked that the man's success in this subterfuge was consistent with his success as a used car salesman. It is rumoured that this comment elicited a letter of protest from a group representing the interests of used car salesmen. The same judge later counselled against the use of humour in judgment writing<sup>22</sup>.

A judge also has to be careful of criticising other judges. Judges on the receiving end of such treatment are quite capable of putting an erring colleague in his or her place. Lord Atkin, in his dissenting judgment in *Liversidge v Sir John Anderson*<sup>23</sup>, decided to employ irony in criticizing a colleague's approach to the construction of the statute in question. His Lordship said: "I know of only one authority which might justify the suggested method of construction: "When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean, neither more nor less"". Rumour has it that the other Law Lords did not speak to Lord Atkin for some time.

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<sup>19</sup> *PGA v The Queen* (2012) 245 CLR 355.

<sup>20</sup> *Miller v Jackson* [1977] QB 966 at 976.

<sup>21</sup> Priestly, "The Writing of Judgments: A Forum", (1992) 9 *Australian Bar Review* 136 at 140.

<sup>22</sup> Mason, *Lawyers Then and Now: An Australian Legal Miscellany*, (2012) at 24.

<sup>23</sup> [1942] AC 206 at 245.