THE ART OF JUDGING

THE HONOURABLE JUSTICE RUTH MCCOLL*

The topic, 'The Art of Judging', raises a myriad of issues. I have chosen to focus on just a few which go to the heart, in my view, of the process of judicial decision-making: the extent to which judges can 'judge', the strains which have arisen concerning judicial methodology, the effects of those strains on intermediate appellate courts and finally, some practical observations on judgment writing.

I THE AMBIT OF JUDGING

Judges 'make' law, but not as legislators. Nor do they function as law reform commissioners.[1] They may expose gaps in the law. Indeed, gaps are 'inevitable in a system of case law built up, haphazard, through the controversies of litigants'.[2] If unable to be filled by the application of precedent to the facts at hand, judges may recommend the gap to the legislature as worthy of consideration for reform.

The received wisdom for many is that judges cannot, and should not, fill those gaps. As Atiyah said, writing of the view of English judges:

> [L]egislators are better equipped to examine proposed changes in the law. They have the machinery of the public service to explore the alternatives … they can consult with many interested parties and groups, and they can publish their proposals for public comment and consideration … when change is needed, many people need notice of the changes in advance; they need to know what changes are going to be made, and when the changes will be effected so as to plan their own activities. Legislation usually gives adequate notice of change in these ways, while change made

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1 See *State Government Insurance Commission v Trigwell* [1979] HCA 40; (1979) 142 CLR 617, 633 (Mason J).

2 Benjamin N Cardozo, *The Nature of the Judicial Process* (1963) 145.

> through the case law system often fails to give due warning in advance.[3]

However, while it might be accepted that trespassing on the legislative domain is impermissible, there is no brightline which clearly marks the boundary for the judiciary.[4] The extent to which the judiciary may approach that boundary is limited by the cases which arise, the need to accord justice to the parties in that case, the tendency of the judiciary to recognise the danger of retrospective judicial 'law-making' and the recognition of the difficulty for the judiciary to identify or measure social change.[5]

The way judges write their judgments and the extent to which, in so doing, they are bound by precedent or can acknowledge the influence of contemporary community attitudes and standards in the development of legal principle, has been the subject of much debate in recent years.[6]

The doctrine of precedent governs the operation of the common law. The oft-quoted statement of that doctrine as acknowledged by Sir Owen Dixon in his famous paper on judicial method, is:

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3 P S Atiyah, 'Justice and Predictability in the Common Law' (1992) 15 *University of New South Wales Law Journal* 448, 549; a similar view has been expressed of Australian judges: Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 124–6, 128–9, 131.

4 Justice M H McHugh, 'The Judicial Method' (Speech delivered at the Australian Bar Association Conference, London, 5 July 1998) quoting Justice Stephen Breyer of the Supreme Court of the United States, see <http://www.hcourt.gov.au/speeches/mchughj/mchughj_london1.htm>; see also Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24 *Adelaide Law Review* 15.

5 See Justice Michael Kirby, 'Judicial Activism' (The Bar Association of India Lecture, New Delhi, 6 January 1997). Excerpts of the address appear in (1997) 16 *Australian Bar Review* 10. The full text can be read at <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_indialt.htm>; see also McHugh J, 'The Judicial Method', above n 4.

6 The debate is not confined to Australia. As Kirby J's paper, 'Judicial Activism', ibid, demonstrates it is a topic which has provoked controversy in both the United States and India.

> Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.[7]

While Sir Owen Dixon quoted this statement as illustrative of the course courts do, and should, pursue, his Honour observed 'that is an error if it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make.'[8] Nevertheless his Honour's statement has been described as 'the purest version of judicial restraint'.[9]

Professor Coper has described Sir Owen's judicial method as 'probably … the single most important point of reference in Australia for opponents and defenders alike of the notion of judicial activism'. He suggests that Sir Owen's remark 'appear[s] to have been aimed at Lord Denning, though Lord Denning later noted, perhaps mischievously, that he agreed with every word of it'.[10] It might also be noted that the same quote was used by Benjamin Cardozo in the Storr lectures he delivered at Yale University in 1921 while he was a member of the New York Court of Appeals.[11]

Cardozo also observed that the quote did not mean that 'there are not gaps, yet unfilled, within which the law moves untrammeled'. He then quoted, with approval, what he described as one of Justice Holmes' 'flashing epigrams':

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7 *Mirehouse v Rennell* (1833) 6 ER 1015, 1023 quoted in Sir Owen Dixon, 'Concerning Judicial Method' in *Jesting Pilate and other Papers and Addresses* (1965) 159.

8 Sir Owen Dixon, ibid 165.

9 Kirby J, 'Judicial Activism', above n 5.

10 Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 557.

11 Cardozo, above n 2, 68–9.

> [J]udges must, and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.[12]

Like Sir Owen, he clearly 'favoured gradual over overt or abrupt change'.[13] However even Cardozo recognized that there was room, both in constitutional and private law, for abandoning a precedent 'found to be inconsistent with the sense of justice or social welfare' when the rule was not thought to have influenced the conduct of litigants and, further, when it was the product of outmoded institutions or conditions.[14]

In recent years Sir Owen's writings have been used to highlight the distinction between orthodoxy and what is described as 'judicial activism', defined by one commentator as 'using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case … serving some function other than what is necessary for the decision of the particular dispute between the parties'.[15]

On the other hand, as McHugh J observed in 1998, Sir Owen's words were said to 'sound nowadays like a voice from another world' and, in particular, to fail to recognise that 'judicial method [can] legitimately be influenced by political, social or economic factors'.[16] According to his Honour, by 1998 'the law-making function of the court [was] accepted by the overwhelming majority of lawyers'.

Views of what constitutes 'judicial activism' are not uniform. It has been described as a response to the changing needs of the times, and as not confined to 'a particular ideological or social viewpoint'.[17] It has also been described as 'usually code for disagreement with a

12 Ibid.

13 Coper, above n 10, 566.

14 Cardozo, above n 2, 150–1.

15 Heydon J, above n 3, 113.

16 McHugh J, 'The Judicial Method', above n 4.

17 Kirby J, 'Judicial Activism', above n 5.

judge's legal method or interpretive principles, especially when that method or those principles accelerate the pace of change beyond the gradual and evolutionary so much favoured by Sir Owen in his Yale address' or 'often code for simple disagreement with substantive outcomes, whether those outcomes be radically conservative or radically progressive'.[18] In short, in Professor Coper's view, 'the terminology of activism is so loaded, and carries so much baggage, that it does not advance the debate unless it is carefully unpacked'.[19]

The debate continues. Whether it is one which any longer concerns the way in which I, as a judge of an intermediate appellate court, write may itself be a matter of debate for reasons which follow.

II CONSTRAINTS ON THE ROLE OF AN INTERMEDIATE APPELLATE COURT

It might be said that intermediate appellate courts must steer an artful course between Scylla and Charybdis, the danger of deciding too much and that of deciding too little.

Under the common law system, the courts are bound to follow the ratio decidendi of a case decided by courts higher in the judicial hierarchy than the court deciding the case.[20]

It has been said that an appellate court's role 'may be one of refashioning common law to deal with problems that have not hitherto arisen for judicial decision or that have not been resolved in

18 Professor Dworkin quoted in Coper, above n 10, 562.

19 Ibid; see also the various attempts at classification of judicial activists described by Justice Robert French, when still a judge of the Federal Court of Australia, 'Judicial Activists – Mythical Monsters?' (Paper delivered at the 2008 Constitutional Law Conference, Sydney, 8 February 2008) 9–14, see <http://www.gtcentre.unsw.edu.au/publications/papers/docs/2008/351_JusticeFrench.pdf>.

20 R Cross and J W Harris, *Precedent in English Law* (4th ed, 1991) 6; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, [60] (McHugh J). The quandary a trial judge faces when deciding whether a case has been decided by the Court of Appeal if it goes on appeal to the High Court, and is affirmed on different grounds to those of the Court of Appeal was discussed by Campbell J in *Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* [2006] NSWSC 844; (2006) 67 NSWLR 569, [300] ff.

a satisfactory manner in prior cases.'[21] The extent to which intermediate appellate courts can undertake that step may be questionable in the light of the High Court's statement that it is inappropriate for such a court either to abandon a 'long-established' rule or fail to apply 'seriously considered dicta' of members of the High Court'.[22]

The first proposition is consistent with the doctrine of precedent. The second may raise more problems than it resolves. No one would doubt the constraining effect of the doctrine of precedent, but if the ratio decidendi of a higher court decision is directly in point it must be applied.

However elevating dicta of a superior court to the level of ratio decidendi does not accord with the doctrine of precedent. There is no doubt that such dicta warrants close and respectful consideration. However, as Sir Anthony Mason has observed, the judicial deference inherent in applying 'non-binding decisions and dicta, without making any attempt to analyse their worth … is an abdication of function and is to treat such decisions and dicta as binding authorities'.[23] And, too, as Gleeson CJ has said, treating 'judicial reasons as a smorgasbord of obiter dicta from which the reader is invited to select according to taste' has 'little to do with the task that confronts practitioners, and judges, in the discernment and application of binding legal principle'.[24]

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21 E Campbell and H P Lee, *The Australian Judiciary* (2001) 15.

22 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107, [134]; *Farah* has been described as 'a clarion call to orthodoxy, and adherence to existing precedent': Lee Aitken, 'Unforgiven: Some Thoughts on *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*' (2007) 29 *Australian Bar Review* 195, 209. McHugh JA, while on the New South Wales Court of Appeal, while accepting that an intermediate court of appeal could not 'make law as freely as an ultimate court of appeal', rejected the view that, subject to the doctrine of precedent, such a court should have a 'law making function … less than that of an ultimate court of appeal': Justice M McHugh, 'Law Making in an Intermediate Appellate Court: the New South Wales Court of Appeal' (1985–88) 11 *Sydney Law Review* 183, 184–5; his Honour also touched on this issue in his 1998 address, 'The Judicial Method', above n 4.

23 Sir Anthony Mason, Chief Justice of Australia, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 106.

24 Chief Justice Murray Gleeson, 'Some Legal Scenery' (Keynote Address to the Judicial Conference of Australia, Sydney, 5 October 2007) 18, see <http://www.hcourt.gov.au/speeches/cj/cj_5oct07.pdf>.

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107, the Court did not offer any insight into what test an intermediate court of appeal might apply to determine whether dicta was 'seriously considered' or not. Sir Anthony posited that remarks which should not be 'blindly' applied included statements about the law which were not the product of 'considered examination' because they were common ground or not the subject of argument. Further, in his view it would be 'indefensible to apply, as if they had some authoritative or persuasive value, remarks in a judgment which do not appear to be directed to the problem in hand' or to give great weight to an *ex tempore* as opposed to a considered judgment.[25]

Further, intermediate appellate courts must acknowledge the common law of Australia. Accordingly, they should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation or in relation to the common law, unless they are convinced that the other court is wrong.[26]

Briefly to two other dangers: that of deciding too little and that of deciding too much.

While there is no universal rule, it is necessary for intermediate appellate courts at least to consider whether to deal with all grounds of appeal, not just with what appears to be the decisive ground.[27] The benefit of this approach is seen to lie in the avoidance of having to remit the matter to the intermediate court for consideration of

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25 Sir Anthony Mason, above n 23, 106–7.

26 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107, [135]; see also Justice J Toohey, 'Towards an Australian Common Law' (1990) 6 *Australian Bar Review* 185. The limits on the development of the common law of Australia at the High Court level in the light of the special leave system has been the subject of critical comment: see Aitken, above n 22, 196; Lynden Griggs, 'In Personam: *Barnes v Addy* and the High Court's Deliberations in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*' (2008) 15 *Australian Property Law Journal* 268, 275; McHugh J, 'Law Making in an Intermediate Appellate Court', above n 22, 188. These criticisms reflect the fact that because of the special leave system, 'the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes': *Nguyen v Nguyen* [1990] HCA 9; (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ).

27 *Kuru v State of New South Wales* [2008] HCA 26; (2008) 82 ALJR 1021, [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

grounds of appeal not dealt with. This may be a long-term benefit, but it may also be a disadvantage in the short term if the additional reasons also provoke special leave grounds which require determination. The burden this approach places on busy intermediate appellate courts has been acknowledged, but gives way to the undesirability of cost, delay and the need for reargument which may otherwise arise. The significance in the criminal context of a person possibly remaining imprisoned longer than necessary is a compelling circumstance for all grounds to be dealt with which, if established, could result in a verdict of acquittal.[28]

Next, although it is not uncommon for 'an appellate court [to] perceive a case in a way dramatically different from the case that was run at trial', it is not open to the court to decide the case on that basis, unless the alternative case 'could not possibly have been met by further evidence at the trial'.[29] Determining whether a new point is being raised on appeal does not merely involve an examination of the pleadings or particulars, although they are 'frequently decisive', but also an examination of the 'actual conduct of the proceedings'.[30]

Avoiding the shoals of deciding a case on a basis not run at trial, the appellate court exercising a rehearing function is obliged to 'give the judgment which in its opinion ought to have been given in the first instance', while 'observ[ing] the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record'.[31]

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28 A burden acknowledged in *Cornwell v The Queen* [2007] HCA 12; (2007) 231 CLR 260, [105] (Gleeson CJ, Gummow, Heydon and Crennan JJ). The necessity to consider all issues is not confined to intermediate appellate courts. Where the issue of damages in personal injury cases has been fully litigated, and there is a reasonable possibility that the trial judge's decision on liability in favour of a defendant may be overturned on appeal, it is both just and convenient that the trial judge should proceed to assess damages to guard against the eventuality of a successful appeal: *Nevin v B & R Enclosures Pty Ltd* [2004] NSWCA 339, [75] (Tobias JA) (Sheller JA and Beazley JJA agreeing).

29 *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 77 ALJR 1598, [3], [51] (Gleeson CJ, McHugh and Gummow JJ).

30 Ibid [52].

31 *Fox v Percy* [2003] HCA 22; 214 CLR 118, [23] (Gleeson CJ, Gummow and Kirby JJ).

III THE IMPARTIALITY OF JUSTICE

The function of the judge is, at minimum, 'the disinterested application of known law'[32] or, as another has put it, 'to adjudicate disputes according to law'.[33] It is a judge's duty to maintain the rule of law, to uphold the Constitution, and to administer civil and criminal justice, impartially, according to law.[34] Citizens of a modern democracy demand not only that judicial power be exercised independently and according to law, but also that judicial decision-making be demonstrably rational and fair.[35]

Deep-rooted principles of law dictate that an independent and impartial tribunal must hear cases. Thus a judge must recuse himself or herself if he or she would be actually biased, and, too, 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide'.[36]

There are indubitably other more subtle factors at work of which a judge must be conscious to ensure that notwithstanding satisfaction of the actual or apparent bias test, his or her judgments are impartial. I speak of the subconscious factors that are the product of the environment in which a judge is raised and works. Cardozo drew attention to William James' telling proposition that 'everyone of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema'.[37]

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32 Louis L Jaffe, *English and American Judges as Lawmakers* (1969) 13; Sir Patrick Devlin, *The Judge* (1981) 3.

33 Campbell and Lee, above n 21, 14.

34 Chief Justice Murray Gleeson, 'Who do judges think they are?' (The Sir Earle Page Memorial Trust Lecture, 21 October 1998) see <http://www.page.org.au/res/File/PDFs/lecture_1997_gleeson.pdf>.

35 Chief Justice Murray Gleeson, 'The Role of a Judge in a Representative Democracy' (Speech presented to the Judiciary of the Commonwealth of the Bahamas, 4 January 2008) see <http://www.hcourt.gov.au/speeches/cj/cj_4jan08.pdf>.

36 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337, [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

37 Cardozo, above n 2, 12.

Recognition that such underlying philosophies may influence judicial decisions, and that such philosophies may differ between genders and racial groups, underlies many calls for a more 'representative' judiciary. This is not the occasion for an examination of the rights and wrongs of those calls. All judicial appointments should be on merit, but, as I have said elsewhere, it should be recognised that merit may come differently packaged.[38]

One of the risks inherent in too strict adherence to the doctrine of precedence lies in the application to contemporary circumstances of those subconscious underlying philosophies which influenced long gone forebears. It was recognition of the injustice of applying historic decisions rooted in 'rule-based justice' which Sir Anthony Mason perceived as placing pressure on courts to 'take a more active part in updating the law'.[39] Of course, these remarks are directed more to appellate courts than trial courts. There is much to be said for predictability in the decisions of trial courts.

A judge cannot, and should not, recuse himself or herself because of a concern about the possible influences of subconscious factors. One of the skills in judging lies in ensuring to the greatest extent possible, that the judge acknowledges the possibility of such factors being in play and strives to decide a case free of their operation.

IV WRITING JUDGMENTS

I turn briefly to some more coalface issues concerning judging. I will consider only that aspect of judging which concerns the preparation of reasons.

Reasons for judicial decisions are directed at an audience which includes the parties to litigation, other judges, the legal profession and the public.[40] The delivery of public reasons is integral to the

38 Justice Ruth McColl, 'Women In The Law' (Address to the Anglo-Australasian Society of Lawyers, 3 May 2006).

39 Sir Anthony Mason, above n 23, 95.

40 Gleeson CJ, 'The Role of a Judge', above n 35, 21.

system of open justice in which we operate. The main object of a reasoned judgment 'is not only to do but to seem to do justice'.[41]

The parties are the most important audience. They need to know why they have won or lost. The judgment must speak clearly to them. But there is an audience beyond the parties, although the parties are undoubtedly indifferent to that larger mass. 'The client cares little for a "beautiful" case! He wishes it settled on the most favourable terms he can obtain'.[42]

But the judge cannot just write for the litigant. The judge must also write for those who examine a judgment to determine whether it is a precedent for a case to be argued or decided. Judgments must also be accessible, both in the sense of comprehensible and practically available, to the public. They often provide the best insight into the operation of the legal system that the public can get. In the criminal sphere the judge's sentencing remarks explain to the public (as well as possibly to an appellate criminal court) why a particular sentence was imposed and how it compared to the range of sentences imposed for that particular crime. The availability of judgments on the Internet should enhance community understanding of the legal system.

A judgment must be a reasoned resolution of the issues of fact and law raised for determination. Lord Macmillan was of the view that the 'art of composing judgments [was] not taught [but was] acquired by practice and by study of the models provided in the innumerable volumes of the law reports in which are recorded the achievements of past masters of the art'. Nevertheless his Lordship then provided some valuable insights into the technique. Those which are universal truths include 'clarity of exposition', both doing, and being seen 'to do justice', as well as the embellishments of 'style, elegance and happy phrasing'.[43]

41 Lord Macmillan, 'The Writing of Judgments' (1948) 26 *The Canadian Bar Review* 491.

42 W G Miller, *The Data of Jurisprudence* (1903) quoted in Cardozo, above n 2, 35.

43 Lord Macmillan, above n 41.

The view that the art of writing judgments could not be taught is long gone, overtaken by the recognition of the importance of judicial training.[44] Library shelves groan with books about the judicial process and, in particular, judgment writing.

It is impossible to lay down a prescriptive statement as to the proper composition of a judgment. I take it as a given that judgments should be accessible in the sense I have already explained. Judgments should clearly set out, and deal with, critical controversies of fact and law. How they do so, however, will depend on the idiosyncrasies of the particular judge. They may be masters of brevity or, as Kirby J has described some, 'minimalists, given to perceiving legal problems as requiring no more than analysis of critical words in a legislative text or reasons expressed in past judicial decisions', or they may perceive the necessity, or be naturally inclined, to provide longer reasons.[45]

However the rule which is fundamental to appeal and trial courts alike is that 'an obligation concerning the giving of reasons, lies on any court, including an intermediate court of appeal, so far as it is necessary to enable the case properly and sufficiently to be laid before the higher appellate court'.[46]

Whatever limits may be imposed on intermediate appellate courts in relation to the development of the law, the role of such a court in at least expounding, and if needs be clarifying, the law, cannot be gainsaid.

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44 See, for example, Chief Justice Murray Gleeson, 'Judicial Selection and Training: Two Sides Of The One Coin' (Paper delivered to the Judicial Conference of Australia Colloquium, Darwin, 31 May 2003) see <http://www.hcourt.gov.au/speeches/cj/cj_judicialselection.htm>; the Judicial Commission of New South Wales's monograph, 'A Matter of Judgment – Judicial Decision-Making and Judgment Writing', is a useful, and manageable reference point for those who do not wish to be overloaded.

45 Justice Michael Kirby, 'Appellate Reasons' (Paper delivered to the Supreme and District Courts of Western Australia Judges' Seminar, Perth, 23 October 2007) 2–3, see <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_23oct07.pdf>.

46 *Pettitt v Dunkley* [1971] 1 NSWLR 376, 380–2 (Asprey JA), 386–92 (Moffitt JA). The classic judgment cited for this proposition is *Carlson v King* (1947) 64 WN (NSW) 65, where Jordan CJ found wanting a District Court judgment stating 'I do not agree with the submissions on behalf of defendant. I find a verdict for plaintiff for £175. Judgment accordingly.'

The Internet age has transformed the writing and citation of judgments. The recognition that the accountability of the courts is enhanced by the publication of virtually all judgments online, imposes considerable pressures on their authors. Judgments which might hitherto be seen by only the judicial officers who decided the case, the parties and possibly the court staff, and which contain no statement of legal principle now achieve immortality on the court's webpage. It is an understandably human temptation to ensure that each judgment is a paragon of judgment writing.

Further the increased accessibility afforded by online judgments offers the temptation of reading and citing many decisions in which the same principle of law has been discussed in either one's own, or other intermediate appellate courts, even if that discussion has not cast any new light on the principle. The danger is 'information overload' which may obscure the search for the binding rule of a case.[47]

I do not pretend to be any less susceptible to this temptation than many other judicial officers. Acknowledging the issue is, I hope, part of the art of judging.

V THE TRIAL JUDGE

I will make some brief observations about the art of judging in the context of the trial judge. I have focussed on the area which comes under most scrutiny in appellate courts: the process of fact-finding and of exposing the reasons for decision.

47 Gleeson CJ, 'Some Legal Scenery', above n 24, 18.

A trial judge is obliged

> to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal [including] not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision.[48]

Failure to make such a note may invoke principles of procedural fairness and constitute a failure to exercise the relevant jurisdiction.

It is not necessary for a judge to refer to all the evidence in the proceedings or to indicate which of the evidence is accepted or rejected. The extent of the duty to record the evidence given and the findings made depends, as does the duty to give reasons upon the circumstances of the individual case.[49] However, it is necessary to explain why one critical witness is preferred over another,[50] why expert evidence is rejected,[51] in short to expose his or her reasons for resolving a point critical to the contest between the parties in a manner which would enable the parties to identify the basis of the decision and the extent to which their arguments had been understood and accepted.[52]

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48 *Carlson v King* (1947) 64 WN (NSW) 65, 66 (Jordan CJ) cited in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 257 (Kirby P), referred to with approval by Hayne J (McHugh and Gummow JJ agreeing) in *Waterways Authority v Fitzgibbon; Mosman Municipal Council v Fitzgibbon; Middle Harbour Yacht Club v Fitzgibbon* [2005] HCA 57; (2005) 79 ALJR 1816 (*Waterways Authority*) [129].

49 *Mifsud v Campbell* (1991) 21 NSWLR 725, 728 (Samuels JA) (Clarke JA and Hope A-JA agreeing).

50 *Hadid v Redpath* [2001] NSWCA 416, [53] (Heydon JA) (Stein JA and Grove J agreeing); the judgment also contains an interesting comparative analysis of the utility of *ex tempore* as opposed to reserved judgments.

51 *Mistral International Pty Ltd v Polstead Pty Ltd* [2002] NSWCA 321, [79] (Sheller JA) (Meagher JA and Beazley JA agreeing).

52 *Ainger v Coffs Harbour City Council* [2005] NSWCA 424, [48] (McColl JA) (Mason P and Hunt A-JA agreeing).

As the trial judge's reasons 'are to be understood as recording the steps that were in fact taken in arriving at that result', a failure to state reasons may reveal an error in the process of fact finding.[53]

In the area of expert evidence, a trial judge must explain why he or she accepts or rejects the opinion of a suitably qualified expert, unless there is a reason why it lacks weight.[54]

These are but a few of the many obligations imposed on trial judges. Such judges often operate in environments where the pressures of work militate in favour of *ex tempore* judgments rather than permitting the luxury of rumination. But within those confines, the art of judging lies in observing the aforesaid principles to the greatest extent possible.

53 *Waterways Authority* [2005] HCA 57; (2005) 79 ALJR 1816, [130]; see also *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183, [149]ff (Basten JA).

54 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 382; see also *Moylan v Nutrasweet Co* [2000] NSWCA 337, [63]ff (Sheller JA) (Beazley and Giles JJA agreeing); *Wiki v Atlantis Relocations (NSW) Pty Ltd* [2004] NSWCA 174; (2004) 60 NSWLR 127, [56]ff (Ipp JA) (Bryson JA and Stein A-JA agreeing).