

JUDGMENT AND JUDGMENTS - THE ART OF FORMING AND WRITING JUDICIAL DECISIONS

DENNING SOCIETY LECTURE 2017

1. The traditional English judicial approach to litigation involves a trial being conducted by a single judge, and any appeal being decided by a number of judges, normally three on a first appeal in the Court of Appeal and five on a second appeal to the House of Lords/Supreme Court. That has always been something of an over-simplification (for instance Divisional Courts often consist of more than one judge). And it has become even more of an over-simplification as a result of recent developments such as the inclusion of the tribunals in the judicial system (as some of the tribunals have first instance hearings with a three on the bench) and changes to routes of appeal (so that now most County Court appeals go to a single High Court judge). Nonetheless, the concept of a trial being conducted by a single judge and any appeal being determined by a group of judges remains the norm for High Court trials and it reflects my 21 years' experience on the bench.
2. On this basis, first instance judging is rather a solitary activity, whereas appellate judging is something of a group activity – at times, it may seem to advocates, the sort of group activity which would be unacceptable to the League Against Cruel Sports. Another semi-serious point which can be made about our judicial system is that, once it is explained to outsiders, they may think it rather upside-down so far as a potential judicial career is concerned. Rather than starting as a District Judge and going all the way to the Supreme Court, one might have thought that a

novice member of the judiciary should begin in the Supreme Court, where he would never have to deliver an *ex tempore* judgment, he has four colleagues with whom to discuss the case, he has the benefit of both expert advocacy and two judgments which have carefully considered the issues and have winnowed out all the dross, there are no litigants in person, and there is rarely pressure to a quick judgment. If he showed his mettle in the Supreme Court, the new judge could then be promoted to the Court of Appeal, where he would face rather greater pressure, not infrequently having to give *ex tempore* judgments, having fewer colleagues with whom to discuss the case, having only one previous judgment considering the issues, facing quite a few LIPs, and being expected not to delay judgments too long. If he passes muster, he could then progress to being let out on his own as a trial judge, with no colleagues, no earlier judgments, live witnesses, the need to give immediate *ex tempore* judgments on tricky, procedural issues, many LIPS, and often having to resolve complex issues of fact and expert evidence. And the lower down the current pecking order he goes (High Court to Circuit to District Judge) the greater the pressure in terms of cases per hour, the less expert the assistance from the advocates, and the greater the proportion of LIPs. So only an outstandingly able judge would end up as a District Judge.

3. Well, like it or not, that is not our system, and, to be fair, one can see why. Judicial decisions should be supervised by more experienced and expert judges than those who made the decisions, although a sort of judicial Saturnalia¹ is not without its attractions – at least in theory. The point is semi-serious because it embodies a reason why judges in superior courts should think very carefully before giving judgments

¹ The Roman festival when masters and slaves allegedly changed places - see J F Miller, *Roman Festivals* in The Oxford Encyclopedia of Ancient Greece and Rome (2010) p. 172

which criticise judges in lower courts: thanks to the various factors I have mentioned, it is much easier for them to make mistakes or to overlook points. And, of course, there are other reasons for an appellate judge being cautious of criticising the judge below: in particular, as any experienced advocate knows, arguments on an appeal can be very different indeed from what they were in the court below. Of course, there are occasions when an appellate court has a positive duty to criticise a judge, but those occasions are, I hope and believe, rare. A difficult issue is whether the appellate court should consult the judge before criticising him. It seems unfair to criticise a judge, eg for what seems to be unjustifiable delay in giving judgment, without giving him the opportunity to defend herself; on the other hand, is it right for an appellate court to contact the judge about the case without notifying the parties, and if the parties are notified, there is a risk of an unseemly and disproportionate dispute.

4. The other side of this coin is the question of an appellate court complimenting the trial judge. The great majority of first instance judges in this country characteristically give impressive judgments, and it is somewhat dispiriting for such a judge to read an appeal court's judgment which makes no reference to her analysis. Ironically, the difficulty for the appellate court arises from the fact that there are so many judges who regularly write high quality judgments. So many very good judgments come before appellate courts that it would look almost formulaic if an appeal court commented favourably on every good quality judgment under appeal – and it would look positively discreditable to a judge whose judgment was not commented on favourably. Nonetheless, I think appellate courts should be readier than they currently are to refer to at least one passage in the below with express or implied approval. I wish I

had done more of that when in the Court of Appeal – and indeed in the House of Lords and Supreme Court.

5. Another question for an appellate court is when to interfere with a trial judge's findings of fact. In contrast with most legal systems in mainland Europe, where there is often not merely a right of appeal on fact, but what is in effect a right to a re-hearing on fact, the almost invariable rule throughout the UK is that, unless he makes a real mess of it, the trial judge has the last word on issues of fact. In three recent appeals (all from Scotland), the *McGraddie*, *Henderson* and *Carlyle* cases², the Supreme Court has emphasised that an appellate court should be very slow indeed to interfere with the trial judge's factual conclusions. The reason for this is traditionally said to be the advantage the trial judge has in seeing the witnesses.
6. I wonder whether that rationale is justified. I cannot tell if my children, whom I have known from birth, are telling the truth, so, it may be said, how can I rationally expect to be able to tell whether a complete stranger is telling the truth simply by observing and listening to him in the witness box? A successful cross-examination normally rests on one of two bases: that telling points are successfully bowled at the witness, or that the witness is overborne by the cross-examiner or the ordeal of giving evidence. The first basis can, it seems to me, be more economically and more dispassionately, if less theatrically, achieved by analytical argument - and an appellate court is as well attuned to deal with it as the trial judge. The latter basis is simply, at least very often, unfair. A clever cross-examiner can often create a miasma of doubt and suspicion where none is justified. And it is often hard for a judge to tell whether a witness is not telling the truth or is simply bad at giving

² *McGraddie v McGraddie* [2013] 1 WLR 2477, *Henderson v Foxworth Investments Limited* [2014] 1 WLR 2600 and *Carlyle v Royal Bank of Scotland Plc* 2015 SLT 206

evidence – which would be unsurprising given the artificial and intimidating circumstances in which oral evidence is given in court. And, even when a witness is caught out in a lie, it is worth remembering that criminal judges regularly instruct juries that the fact that a witness lies about one point does not mean that he is lying about other points.

7. Indeed, I think that there is a genuine argument that it is a positive disadvantage for a judge to see a witness: it can subconsciously remind the judge of someone she likes or dislikes. In the same way that names have resonances with us because they conjure up specific people we like or dislike, so I suggest do appearances and mannerisms. I remember early on as a trial judge realising that I was doing my best to make myself believe a witness whose evidence was plainly inconsistent with the contemporary documents, and realising that it was because his mannerisms and appearance reminded me of my late father.
8. A Swedish study some carried out around 12 years ago³ supports the notion that humans are poor lie-detectors, and suggests that the more confident we are the more likely we are to be wrong. Observers assessing the reliability of live witnesses and witnesses on video had in each case an accuracy rate very close to 50%, and the study also showed that the observers were more confident when making an incorrect judgement of truthfulness than when making a correct judgement. This is confirmed by a 2008 paper⁴, which summarised the results of over 25 studies testing the accuracy of professional investigators' assessments of the veracity of evidence shows that they were successful in identifying truth in about 56 per cent of cases. There is thus force in the view expressed by one researcher who wrote that “[t]he legal systems employed in common law

³ S Landstrom, P Granhag and M Hartwig, *Witnesses Appearing Live vs on Video: Effects on Observers' Perception, Veracity Assessments and Memory* (2005) 19 *Applied Cognitive Psychology* 913, as described in M Green, footnote 5 below, p 32.

⁴ A Virj, *Detecting Lies and Deceit: Pitfalls and Opportunities* (2008).at 187-8, described in M Green, footnote 5 below, p 33

countries are based, in part, on a fundamentally flawed principle ... that the human beings who are charged with the task of discriminating truthful from deceptive evidence are able to do so accurately and consistently”⁵.

9. Having said that, I support the rule that findings of fact should not be appealable save in very clear cases, and I do so for a good, common law, pragmatic reason, which was well expressed in a passage in a US Supreme Court judgment⁶ which Lord Reed quoted in the *McGraddie* case:

“Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. ... [T]he parties ... have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much. ... [T]he trial on the merits should be the ‘main event’ ... rather than a ‘tryout on the road’.”

10. A trial judge has to decide points of fact, and, whatever level she is at, a judge has to decide points of law. Such decisions constitute a particularly demanding duty in our system. A judge has not merely to decide the point, but to give her reasons, and to do so in public. Accordingly, any judgment is open to media criticism, to appeal to superior court, and to academic scorn. And reasons can be problematic. The great Lord Mansfield was famously supposed to have said to an army officer, appointed governor of a west Indies island and who had no experience in law, “Tut, man, decide promptly, but never give any reasons for your

⁵ M Green, *Credibility Contests: the elephant in the room* (2014) 18 Int'l J Evidence and Proof 28, 29

⁶ *Anderson v City of Bessemer* 470 US 564 (1985), 574-575

decisions. Your decisions may be right, but your reasons are sure to be wrong”⁷.

11. I have already had something of a mini-rant about findings of fact insofar as they are based on live evidence. The best guides to reliability of an individual’s testimony on an issue are, in my view, (i) consistency with objective evidence – eg contemporaneous correspondence, (ii) internal consistency – ie consistency with that individual’s testimony on other issues, (iii) inherent likelihood, and (iv) consistency with other witnesses’ testimony. Human memory is frail and the subconscious is very good at persuading us that what we want to have happened and what suits us to have happened did in fact happen, particularly in the context of preparation for a trial. I have heard many witnesses who I have concluded were not telling the truth on some point or points, but my strong impression (which I have to accept is not a safe basis) is that the great majority of them were not lying but had convinced themselves – which means that they thought they were telling the truth, which makes life difficult for a judge who believes that he can detect a liar. My experience also suggests that one of the difficulties for a trial judge in a complex case is that hardly any witness, other than one whose testimony is limited to a very narrow issue, gives evidence which is wholly reliable. And that, of course, makes the judicial task of assessing the oral evidence even more difficult.

12. When it comes to issues of law, a problem which is sometimes encountered by judges, particularly in the Supreme Court, is whether to limit one’s analysis to the specific point to which the case gives rise, or whether to seek to lay down the law more widely. As a judge, one sometimes feels this a no-win issue. If the court is cautious and limits itself to the point at issue, it will be criticised for being timid, for ducking

⁷ John Cordy Jeaffreson in *A Book About Lawyers* Vol 1 (1867)

the once-in-a-generation lifetime opportunity to deal with an area which needed sorting out, coupled with the rhetorical question: “What is the Supreme Court for if not to sort out the law?” On the other hand, if the court tries to sort out the law more widely, it will be attacked for going into points which were not fully argued, for deciding points without appreciating the implications, and with the rhetorical question: “Doesn’t the Supreme Court realise it is a court not a legislator?” The short answer is that a judge should tread very carefully indeed before stepping outside the area of what she needs to decide, and in particular should consider the degree of confidence which the court has that it appreciates all the implications and the extent of the need for the law in the relevant area to be clarified.

13. An area of law which has had quite an airing over the past 20 years has been the interpretation of contracts. In a number of decisions from the 1998 *Investors Compensation* case⁸ to *Arnold v Brittan*⁹ in 2015, the UK’s top court tried to give detailed guidance as to how far it was permissible to depart from the natural meaning of the words, and how much weight it was appropriate to give to surrounding circumstances and commercial common sense when interpreting a contract. The basic principles were laid down by Lord Wilberforce in two cases in the 1970s, *Prenn v Simmonds* and the *Reardon Smith* case¹⁰, and I rather wonder whether the substantial recent further exegesis has amounted to little more than a somewhat self-indulgent over-analysis. As the principal judgment-writer in *Arnold v Britton*, I would say in my defence that my concern was that some lawyers had concluded that Lord Hoffmann’s characteristically brilliant judgments in the *Investors Compensation* and

⁸ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896

⁹ [2015] AC 1619

¹⁰ *Prenn v Simmonds* [1971] 1 WLR 1381, *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989

¹⁰ *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900

the *Chartbrook*¹¹ cases, as interpreted in the *Rainy Sky* case¹², gave the court greater scope to depart from the words of the contract than had previously been thought following the two Wilberforce cases. The purpose of *Arnold* was to emphasise the point that there had been no change in the law, but it appeared that the message did not get through, and the Supreme Court had to make the point clear in *Wood v Capita* earlier this year¹³. I think that a lesson from this saga for all judges may well be that, if you want to summarise the present state of the law in a judgment, think twice, and if you decide to go ahead, say in very clear terms that you are not changing the law, and that you are simply summarising it.

14. When discussing points of law, it is instructive to contrast the position of a judge with that of an academic lawyer. The academic has the advantage of being relatively free to choose the problem she wishes to address, whereas the judge has to deal with the case which the litigants choose to bring to court: the academic dines *à la carte*, whereas the judge has to make do with *table d'hôte*. The academic normally has a fair time to consider any problem, whereas a judge is always under some time-pressure. And an academic can look at any solution in a more dispassionate and rounded way, as she is not tied to a particular set of facts in the same way as a judge, who will, by definition, be dealing with a specific case, or occasionally a few specific cases. An academic is, I think, normally less interested in practicalities than a judge, not only because she is not dealing with the issue on a particular set of facts, but perhaps more because she is less likely to have come across them in past cases or to expect to come across them in subsequent cases.

¹¹ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101

¹² *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900

¹³ *Wood v Capita Insurance Services Ltd* [2017] 2 WLR 1095

15. Although neither a judge nor an academic appear to have a vested interest in or bias towards, a particular solution, in practice a judge may well be influenced by what are often called “the merits” of the particular case, whether by reference to the particular facts of the case or more widely. And the academic, I suspect, is sometimes interested in a new or controversial idea, so that she gets noticed – or gets published, and, while some judges like to make a splash, there is no pressure on them to do so – rather the contrary if anything.
16. Unlike an academic, a judge has the advantage of adversarial debate, and for many judges listening to contrasting oral arguments and testing those arguments with questions to the advocates seems to be of particular value. It was certainly a factor which weighed heavily with one well known judge and academic, Sir Robert Megarry, a remarkable Chancery judge and an outstanding writer on property law. When sitting in the High Court in the 1969 *Cordell* case¹⁴, he reached a judicial conclusion which was the precise opposite of that which he had expressed in his excellent book on real property¹⁵. He described ‘[t]he process of authorship’ as ‘entirely different from that of judicial decision’, because while the author ‘has the benefit of a broad and comprehensive survey of his chosen subject as a whole’, ‘he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.’ This observation is unsurprisingly quite popular with judges, but they often overlook the fact that Sir Robert’s decision on this point in *Cordell* was subsequently overruled in the *St*

¹⁴ *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17

¹⁵ RE Megarry and HWR Wade, *The Law of Real Property*

Edmundsbury case¹⁶, by the Court of Appeal, who thought (albeit reluctantly) that he had got the answer right in his book.

17. There is of course a potential problem with oral argument, and that is that some legal teams are better than others. In other words, there is a real risk that a case will be resolved by reference to which party has the better legal team rather than by reference to which party has the better legal case. I refer to “legal team” advisedly, as the ultimate presentation of a case has a number of components, of which advocacy (in the sense of the actual presentation of the arguments in court) is but one. It is difficult to know the extent to which good (or indeed bad) advocacy makes a difference to the outcome. Almost by definition, a judge will not know whether he or she has been influenced by the strength (or weakness) of the advocate’s advocacy, as opposed to the strength (or weakness) of the content of the advocate’s argument. A good judge should try and focus on the arguments not the advocacy. Having said that, I have no doubt but that the legal team can make a real, often a crucial, difference to the outcome of a case, in identifying the issues, the points to be taken, the evidence to be called and the authorities to be read.

18. In the 1983 House of Lords *Air Canada* case in 1983¹⁷, Lord Wilberforce said this:

“In a contest purely between one litigant and another, ... the task of the court is to do, and be seen to be doing, justice between the parties There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if

¹⁶ *St Edmundsbury Diocesan Board v Clark (No 2)* [1975] 1 WLR 468

¹⁷ *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438

the decision has been in accordance with the available evidence and the law, justice will have been fairly done”.

That remains the common law approach – the judge decides the case according to the evidence the parties choose to put before her. Even in these days of greater judicial pro-activity, she cannot call a witness¹⁸.

19. Lord Wilberforce’s observations related to findings of fact, but they apply, albeit with reduced force, to issues of law. A judge cannot investigate the facts outside the evidence presented by the parties, whereas a judge can investigate the law beyond what the parties have submitted. However, a judge can rarely be fairly criticised for deciding a legal issue solely by reference to the arguments and authorities cited by the parties, although, if a vital point or case is not mentioned, the resulting judgment may well be wrong, and in a common law system, that can be a real problem. And, incidentally, this point serves to emphasise that the quality of our law rests on practising lawyers as well as judges.

20. Having said that, while they normally limit themselves to the territory fought over in court, judges not merely can, but sometimes do carry out their own research, or have their own ideas. When judges do consider that there is a legal point which was not properly put before the court, it is often after the arguments have been fully ventilated; in such cases, I think that a sensible judge will tell the parties of the new idea and invite their submissions on it – initially (and normally only) in writing. If the judge decides the case on the basis of his or her new point without the parties having the opportunity to deal with it, there will be an understandable and justified sense of injustice on the part of the losing party. Quite apart from this, the judge’s sense of self-preservation should

¹⁸ There is no reason, so far as I am aware, to think that observations in cases such as *In Re Enoch and Zaretsky*, *Bock & Co’s Arbitration* [1910] 1 KB 327 and *Jones v National Coal Board* [1957] 2 QB 55 do not remain good law

ensure that the point is put to the parties: the judge will look less than clever of in due course an appellate court decides that the point is a bad one. And if the judge is in the Supreme Court, while that risk would be avoided, the very fact that it would not arise underlines how unfair it could be on the losing side to decide the case on a point on which there has been no argument.

21. Of course, unlike the time when *Cordell* was decided and when I started as a barrister, written argument now plays an important part in any legal proceedings. Judicial attitudes to pre-reading vary greatly. When it comes to reading the papers ahead of the hearing, a first instance judge has to do quite a lot of work in a substantial case with witnesses, but the position is a little less clear where the hearing is simply going to raise a point of law (as is the position in virtually any appeal). I suggested in a talk three years ago that judges in that sort of case can be divided into Pre-Raphaelites and Impressionists. Judicial Pre-Raphaelites read everything, whereas Judicial Impressionists read very little – often just skimming the skeleton arguments. Pre-Raphaelites have the advantage of being better prepared and ready to ask the relevant questions. But they risk wasting much time as, once the case gets going, most of the documentation turns out to be irrelevant, and some of the points raised in writing are often dropped. Also, there is a concomitant risk of not seeing the wood for the trees, and of having a preconceived idea of where the argument should go. Impressionists run the risk of not really being on top of things until after the hearing, so that they do not have the same degree of grip over the hearing, and intelligent questions may only arise in the judicial mind when it is too late to raise them with the advocates. When I talked about this in Australia, I incautiously confessed to being an Impressionist, and a few days later, the Daily Telegraph carried a story

with the headline “UK’s top judge admits he doesn’t read the papers in a case”¹⁹.

22. When it comes to presenting oral arguments to an appellate court, it is often difficult for an advocate to know how to pitch his submissions, as different judges will not only have different experiences, but they will have done a different amount of reading. These days, both in the Court of Appeal and in the Supreme Court, the judges will almost always have had a fifteen-minute meeting ahead of the hearing, but it is, in my experience, rather unpredictable how much of that time, if any, will have been taken up discussing the merits of the case. If they have discussed the case, the judges will at least be roughly on the same page. But, often in the more controversial and difficult cases in the Supreme Court, I found that the Justices would steer off committing themselves to any sort of provisional view, even amongst themselves.

23. However, after the case, they will always discuss the case, initially normally immediately after the hearing. I believe that intra-judicial discussion in appellate courts is not merely legitimate but valuable. The function of any appellate court is to ensure, as far as possible, that the law is principled, clear and sensible, and that is why the Supreme Court tries to take cases on topics on which they think that the law needs to be clarified, modernised, or sorted out. It seems to me generally desirable in those circumstances that the judges dealing with an appeal not only have the benefit of oral and written arguments from the parties and the thoughts of the judge or judges in the courts below, but also the ability to thrash out the arguments between themselves after the hearing.

24. Further, in several Supreme Court cases in which I have been involved, there has been a fairly wide range of opinions between the Justices after

¹⁹ <http://www.telegraph.co.uk/news/uknews/law-and-order/11028942/Lord-Neuberger-Britains-most-senior-judge-admits-he-doesnt-read-all-papers-in-a-case.html>

the hearing, so that, if they stick with their views, there will be a series of judgments, which contain different reasoning, so that it is very difficult, and sometimes even impossible to extract a *ratio* for the decision even if all the Justices are agreed in the outcome. Sometimes, this is unavoidable because the Justices are all immovable in their views, but I think that the Supreme Court has a duty to try and do its best to find its way to narrowing any disagreement and to achieving a ratio, or at least to minimise any disagreement and, even more, any confusion.

25. So, I do not agree with the view that it is desirable, or indeed realistic for each appellate judge to write his own judgment before he sees any of his colleagues' draft judgments. That view is sometimes justified by the argument that if a judge is influenced by another judge's judgment before she writes, that would be an illegitimate incursion into judicial independence and unfair on the parties. But, as already discussed, any risk of unfairness on the parties is dealt with by giving them the opportunity of dealing with any new point which occurs to the court. And, in my view, post-hearing discussions and circulating of draft judgments has nothing to do with judicial independence; anyway, even if it has, judicial independence is institutional as well as individual: in an appeal case, the bench is, as it were, a single judicial institution as well a collection of individual judges.

26. The notion of a single bench of judges and a bench of single judges throws up a difference between the common law and the civilian law. The common law tradition is very different in this connection from that of the civilian law, as any reader of Luxembourg Court judgments appreciates. The common law happily contemplates each appellate judge writing her own judgment in the same case; fifty years ago, a House of Lords or Court of Appeal decision with only one judgment was unusual, at least outside the criminal law, and a decision with five or three full

judgments was common. In the French courts, as in the CJEU, the EU court in Luxembourg, single judgments of the court are *de rigueur* – indeed decisions of the *Cour de Cassation* rarely even have reasons. I suppose it can be said that a civilian law appeal involves a single hearing before a single court which happens to have a number of judges, whereas a common law appeal involves simultaneous hearings before separate judges each of whom happens to be in the same court.

27. The disadvantages of the mandatory single judgment are apparent to anyone who has had to wrestle with some of the obscure CJEU judgments, which bear all the hallmarks of a report written by a committee, which includes people who do not agree with the decision and where there are disagreements as to the reasoning between those who agree in the outcome. So, it is by no means unknown for the CJEU to give decisions which fail to answer the question referred, and, even when the Court purports to answer the question, it not infrequently does so in terms which are incomprehensible or contain mutually inconsistent statements.

28. While I am no doubt influenced by the fact that I was brought up in a common law system, I believe that it is much better to give each appellate judge the individual right to contribute her own judgment. Not only does it mean that common law judges' judgments are much more interestingly written – with individual style and even humour, as opposed to the relatively leaden, boiler-plate-ridden and didactic civilian court judgments – a topic on which the late Lord Rodger had much to say²⁰. Nonetheless, the fact that a common law appellate judge can write a judgment in every case most certainly does not mean that she should do so.

²⁰ See eg A Rodger, *Humour and Law* 2009 SLT (News) 202

29. When a judge disagrees, a dissenting judgment will, obviously, normally be appropriate. Lord Ackner, a former Law Lord, once observed that “one only dissents when one’s sense of outrage at the majority decision outweighs one’s natural indolence”²¹. Outrage may seem a strong word, but it is fair to say that in my experience, the cases which many appellate judges feel most strongly about are those where they found themselves dissenting. I had the chastening experience of dissenting in the first case I heard as a Law Lord²², and I was writing my dissenting judgment as a sole dissenter after I had thought that I was in a majority of three to two – so my sense of outrage at my four colleagues’ views was reinforced by my feeling that I had been betrayed by two of them, and that I was having to devote a large chunk of my Easter holiday to writing a judgment – which was consequently much too long.

30. While outrage may be the stimulus, a dissenting judge should not insult or be rude about the majority judgment. It undermines or “degrades” the standing of the court, as a number of articles pointed out in relation to Justice Scalia’s excoriating dissenting judgments²³. Anyway, judges should have sufficient confidence in their arguments and in the way that they express them to let their reasoning speak for itself. When the Supreme Court Justices discussed this around two years ago, one of my colleagues suggested that insults and hyperbole could be included in drafts of judgments when exchanged between ourselves, but would be deleted when the final version of the judgment was prepared for publication. I was happy to agree this, not least because one would then have the fun of seeing the insults without the embarrassment of having them deployed in public.

²¹ A Paterson, *Lawyers and the public Good: Democracy in Action* (2012), p 173

²² *Stack v Dowden* [2007] 2 AC 432

²³ See eg https://www.washingtonpost.com/opinions/justice-scalias-appalling-zingers/2015/07/31/0f5db50c-36f5-11e5-b673-1df005a0fb28_story.html?utm_term=.cf64e0326332

31. Some appellate judges are more prone than others to seeking to persuade their wavering or potentially wavering colleagues to agree with them. I have only once consciously taken such a course, and I believe that I approached my colleague very diffidently, but my colleague may have had a different view. In general, I must admit to disapproving of such a course: as I have said, a judge should let her judgment speak for itself. Given that this is the Denning Society lecture, it is worth mentioning that he used to appear in the great 1920s Court of Appeal, consisting of Bankes, Scrutton and Atkin LJJ. Scrutton and Atkin were not only the two stronger judges, but they were also judges who quite often disagreed, and as Denning told the story they “fought for the body of Bankes”²⁴. I have somewhat mixed feelings about the fact that such Homeric tussles were generally unknown in the Court of Appeal and Supreme Court in my time, although on the whole I am relieved.

32. In some cases of no particular importance and where the judge does not feel strongly, a dissent may be inappropriate, although some judges feel that their judicial oath prevents them from saying that they agree with a judgment when they do not. In many cases where there is to be a dissent, it can and therefore should be short. As Lord Walker said in a 2009 dissenting Supreme Court judgment²⁵, “Since no issue of principle is involved it would be quite inappropriate to give any lengthy explanation of my reasons”. In other cases, a dissent may be very important. In the Court of Appeal, there is of course, the secret hope that there will be a further appeal and the dissent will be triumphantly vindicated.

33. Concurring judgments are in many ways more problematic than dissenting judgments. Dissenting judgments will rarely confuse or muddy the ratio of the majority judgment, whereas concurring judgments

²⁴ D Foxton *The Life of Thomas E. Scrutton* (2013), p 221

²⁵ *Re Sigma Finance Corporation*, [2010] BCC 40, para 41

often give rise to precisely that problem. However, sometimes, the amendments required to the lead judgment to satisfy a judge who would otherwise give a confusing concurring judgment may be more unsatisfactory than if the concurring judgment goes ahead.

34.Indeed, there is much debate around the issue of whether it is better to have a single judgment or multiple concurring judgments. I am on record as having discouraged multiple judgments, and that remains my view in many cases, but it is very much of a generalisation.

35.One class of concurring judgment which should be discouraged in my view are what I have called “vanity judgments, by which I mean a judgment which is intended to agree with the lead judgment, but does not add anything other than saying “See - I really have understood this case” or “Hey - I can do a better judgment than the lead judgment” or “I am interested in this point, and want to write about” or simply “Hello - I am here too”. Such judgments, of which virtually every appellate judge, not least myself, has been guilty, are at best a waste of time and space, and, at worst, confusion and uncertainty – although they are popular with academics. And there are some cases, such as judgments which are intended to give guidance to courts below, where it is positively undesirable to have more than one judgment. An example is the 2011 *Pinnock* judgment²⁶ where the Supreme Court was seeking to give guidance to judges sitting in the County Court as to how to deal with possession actions where residential occupiers who had no domestic right to remain raised a defence based on article 8 of the European Convention.

36.I acknowledge that there is some – if limited - force in the notion that, if all the other judges simply agree with the judgment-giver, some people may think that they were little more than passengers in the case. As

²⁶ *Manchester City Council v Pinnock* [2011] 2 AC 104

Dyson Heydon, the former Justice of the Australian High Court, put it, “Separate judgments show individual judges facing up personally to the agony of decision rather than taking the easy way out and siding with the crowd”²⁷. Additionally, sometimes a leading judgment can be so convoluted, so incomprehensible that a short concurring judgment may help any appeal court or any party appreciate the court’s reasoning. I also believe that, when the court is split, the judge with the decisive vote sometimes owes it to all concerned, including to herself, to write a reasoned judgment explaining why he has decided the appeal the way he has. Such a judgment need not be long.

37. Having said all that, just as with dissenting judgments, if a judge agrees with the conclusion but does not agree with all the reasoning, in a lead judgment, it may be that she has a duty to write – at least on the point or points with which she disagrees. Of course, there was no way in which the chair of a panel could prevent any of my colleagues from writing if they wished to do so.
38. Connected with this aspect is the question whether appellate judges should be encouraged to write a joint judgment. In my view, there is much to be said for it. As Dyson Heydon implies, unless you are a saint, however much you put into someone else’s judgment, it is never as much as you put into a judgment in your name – so a judge can be expected to put more into a judgment of which he is a joint recorded author than into a judgment which is another judge’s name. Joint judgments also encourage a court internally to be collegiate and help make a court look collegiate externally. And, if it is right to seek to cut down the number of concurring judgments, there will be fewer judgments to write, so joint judgments are a good way of making up for that aspect.

²⁷ Dyson Heydon AC *Threats to Judicial Independence – The Enemy Within*, Middle Temple Night 23 January 2012, published in [2013] LQR 1

39. In my five years in the Supreme Court, I think that I have had mixed success in terms of avoiding unnecessary concurring judgments and having a clear ratio. It is perhaps worth referring to the *Miller* case²⁸ in this connection. After the hearing, it was apparent that we were 8-3 for dismissing the Government's appeal. Many of the eight were of course very keen to write their own judgments, but we all agreed that it would be highly desirable that the majority coalesced around a single judgment if we possibly could. A number of majority judgments saying slightly different things could have led, not unreasonably, to adverse criticism, with regard to both length and inconsistency, particularly given the public interest in the case, the controversial nature of the issue, and the likely media coverage of the decision. Given that there were differences of views on some aspects, the production of a single majority judgment was not an easy task, and it became no easier after the first draft was circulated and Lord Reed and the other two in the minority circulated their judgments. However, with all eight in the majority making significant contributions, and with some giving and taking in email traffic, we managed to reach a judgment to which we could all bring ourselves to agree and indeed of which we could all claim authorship. It did not make for a restful Christmas break. I rather envied the minority three each of whom could write a judgment which satisfied the writer and did not have to be negotiated or to be subject to compromise.

40. Having deprecated concurring judgments generally, albeit (I hope) mildly, it is right to acknowledge that I believe that there are cases where it may be positively helpful to have more than one judgment. For instance, where the court is changing the scope of the law in a certain area, or is dealing with a complex topic which it has not dealt with before or recently. In such cases, it may be better if there is more than one

²⁸ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583

judgment so that, albeit at the expense of certainty and clarity for the time being, the court can stimulate discussion with other courts and with academics. A recent example is the law of unjust enrichment. It was a topic on which there had been a great deal of academic writing and academic disputation, but very little from the Law Lords or Supreme Court until a trio of cases appeared. In the *Benedetti*²⁹ and *Menelaou*³⁰ cases, I thought it would be appropriate to have more than one judgment coming to the same conclusion. However, by the time we had to decide the third case, the *ITC* case³¹, I felt that the law was better served by a single judgment.

41. It is fair to say that the *Menelaou* case, in which I wrote a judgment, produced mixed reviews. Graham Virgo described it as “arguably the worst decision in the history of the Supreme Court, betraying such ignorance of the law and legal principle and such confusion about the nature of judging that one is left with a sense of bemusement bordering on frustration”³². As Alan Rodger wrote “judges are, of course, much nicer people than academics”³³. But, perhaps more to the point, contemporary academics are not always the best guide. I can take some comfort from the reception of what is now probably the most praised judgment of the 20th century, that of Lord Atkin in *Liversidge v Anderson*³⁴. Sir William Holdsworth thought that the majority were “clearly right because the issue was not “justiciable” or “within the court’s legal competence”, as it was an “administrative or political issue”³⁵. Professor Goodhart not only agreed, but suggested that Lord Atkin’s statement about the majority being “more executive-minded than

²⁹ *Benedetti v Sawiris* [2014] 1 AC 938

³⁰ *Bank of Cyprus UK Ltd v Menelaou* [2016] 1 AC 176

³¹ *Revenue and Customs v The Investment Trust Companies* [2017] 2 WLR 1200

³² <http://private-law-theory.org/?p=8127>

³³ (2010) 29(1) U of Q LJ at 33

³⁴ [1942] AC 206

³⁵ (1942) 58 LQR 1

the executive”, amounted to contempt of court, as it suggested that his four colleagues had “consciously or unconsciously, been influenced by their prejudices or political inclinations in reaching their conclusions”.

42. As Professor Virgo’s comment suggests, academics can appear to approach some issues with an almost manically Manichaeian zeal. I came across that judicially not only in the field of unjust enrichment, but also on the issue of whether an agent holds a bribe which he receives in connection with his agency on trust for his principal. By the time that the issue got to the Supreme Court, there were well over twenty articles on the topic³⁶, representing what the present Master of the Rolls³⁷ referred to as a “relentless and seemingly endless debate”. Having given a judgment one way in the Court of Appeal³⁸, I gave a judgment to the opposite effect in the Supreme Court³⁹.

43. Revisiting those decisions today, it seems to me that, for better or for worse, my approach in each case was rather in contrast to the principled (or, if you prefer, doctrinaire) academic approaches. In the Court of Appeal, I thought that the weight of authority, including a somewhat overlooked and misunderstood House of Lords case in the 1860s⁴⁰, pointed clearly in favour of there being no trust, and, with my colleagues’ agreement, we so held. In the Supreme Court, the seven Justices who sat on the case were, of course, free to depart from authority, and we were persuaded the other way largely by practical and policy considerations⁴¹. While that may understandably appear intellectually unrigorous to some, it seems to me that to rely on precedent

³⁶ See *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, paras 10, 11, 23 and 29, and see also the fuller list in the article in the next footnote

³⁷ T Etherton, *The Legitimacy of Proprietary Relief* (2014) Birkbeck Law Review vol 2(1), 59, at p 60. At p 62

³⁸ *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2012] Ch 453

³⁹ See footnote 36

⁴⁰ *Tyrrell v Bank of London* (1862) 10 HL Cas 26, a complex case brilliantly analysed by Professor Watts in *Tyrrell v Bank of London – an Inside Look at an Inside Job* (2013) 129 LQR 527

⁴¹ See *FHR*, paras 33-45

and then to rely on practicality and policy reflects the pragmatic approach of the common law whose life is famously experience not logic⁴² – but I would say that, wouldn't I? In any event, in that case, given the eminence of the proponents of each of the opposing views, and the force of their respective arguments, logic, or principle, could fairly be invoked to justify either conclusion.

44. The only other case in the Supreme Court where I had to consider the correctness of an earlier judgment of mine in the Court of Appeal was in the 2013 *Virgin Atlantic* case⁴³ which raised a point in connection with issue estoppel and patents. I had dissented on the point in an earlier case in the Court of Appeal⁴⁴, and in the Supreme Court, my five colleagues and I overruled the Court of Appeal, effectively approving my dissent. Two points may be worth making in this connection. The first is that my colleagues and I had no difficulty in deciding that I should write the judgment in *FHR*, which overruled my earlier decision; however, in *Virgin Atlantic*, although I wanted to write the lead judgment, it somehow appeared more seemly to leave it to another Justice given that we were saying that my dissent in the earlier Court of Appeal case had been right. Secondly, having referred to vanity judgments, I suppose that I should publicly censure myself for having given in to the temptation to write a concurring judgment in *Virgin Atlantic* which probably added very little to Lord Sumption's lead judgment.

45. Now, I am aware that this talk may seem so far to be something of a meander, and that you, or at least some of you, were expecting me to tell you all how to write judgments. I have to admit that this is a talk which seems to have developed something of a life of its own. At the risk of seeming to be boxing way above my weight (and indeed in a different

⁴² OW Holmes, *The Common Law* (1881), p. 1

⁴³ *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160

⁴⁴ *Coflexip SA v Stolt Offshore MS Ltd (No 2)* [2004] FSR 34

ring), an observation of Thomas Mann about his novels comes to mind. He wrote that “things have a will of their own and shape themselves accordingly”⁴⁵ I had been subject to some teasing about the notion that a retired judge should tell serving, and I suppose prospective, judges how to write judgments from some of my fellow Benchers in Lincoln’s Inn. In 2009, I produced notes for a Judicial College course for prospective judges and recently appointed judges on “First Instance Judgment Writing”. I have looked at it, and do not consider that its contents merit repetition in this talk. Its contents are largely apparently obvious, although, as I say in the notes, it is one thing to know a point, and another to apply it. For those who are interested, or who have mislaid their sleeping pills, it may well still be available⁴⁶.

46. Nonetheless, one or two points which I made in those notes are perhaps worth relaying this evening. First, indignation and snide comments are best avoided in a judgment. They suggest bias and often produce an adverse reaction in an appellate court. Similarly, jokes should also be resisted. They may seem to be appreciated at the time, but they normally look pretty lame afterwards – and they may suggest to an appellate court that you were not concentrating on the real issues. Thirdly, if you are finding it difficult to explain or to justify your conclusions of law or fact, it may be because they are wrong. Fourthly, try to use short sentences in *ex tempore* judgments. Lord Denning was the leading exponent of this rule, sometimes to the point of self-parody (blue bell time in Kent⁴⁷ may, if I may put it this way, ring a bell for the Denning Society). If you speak in long sentences, with subordinate clauses and the like, you will find that your sentences will run out of control, as you will not remember how the sentence started, and will therefore be quite unsure how to end

⁴⁵ Quoted by R Cohen in *How to Write Like Tolstoy* (2017), Chapter 2

⁴⁶ Not through all, or indeed any, good bookshops, but (I think) through the Judicial College

⁴⁷ See *Hinz v Berry* [1970] 2 QB 40

it. Finally, if you are writing a reserved judgment, a piece of advice which Lord Bingham took from his hero Dr Johnson: If you write a sentence or phrase with which you are particularly pleased, you should normally delete it at once.

47. A different point, but one which I have always thought important, is that there is no reason for a judge to be unpleasant or rude, even where there is a reason to believe that there has been wrong-doing on the part of a lawyer or client. A pleasant atmosphere in court is more inductive to the advocates and witnesses giving of their best. Any judicial investigation of issues should be through tough questioning, not an aggressive manner: ultimately, it is the arguments which a judge should test, not the advocates. That is true of judges at all levels, although it does put one in mind of Lord Asquith's famous dictum that "[i]t is the duty of a judge of first instance to be quick, courteous, and wrong, which does not mean that the Court of Appeal should be slow, rude, and right, for that would be to usurp the functions of the House of Lords"⁴⁸.

48. Finally, having discussed some of my own decisions this evening, I should perhaps end with a point which is something of a self-admonishment. It is sometimes tempting for a judge to defend or discuss a decision to which she was a party, especially a decision in which she gave a judgment. And it is perhaps especially tempting to discuss (ie to attack) those decisions where she dissented. But I think that it can often be both undignified and dangerous for any judge publicly to discuss such a decision. That is because, when discussing their own decisions, judges are no longer impartial and detached deciders, coolly deciding an issue, on the basis of the arguments and facts which the parties have chosen to put before the court. The judge becomes an advocate, committed to one

⁴⁸ This is hard to source. See for instance <http://archive.spectator.co.uk/article/13th-october-1961/8/letter-of-the-law>

answer because she has made it publicly clear where she stands, and she has a reputation to defend, normally by justifying her judgment, but occasionally by explaining or excusing it. That does little for the standing of that judge, and little for the standing of the judiciary generally. Anyway, a judge who has given a judgment is rarely the best person to defend it. Similarly, for a judge to indulge in public criticism of a decision in which he dissented will tend to undermine either the decision itself or the standing of the judge concerned – or both.

49. A further problem with a judge speaking publicly about her judgment arises from the rather obvious and anodyne proposition that either she will add nothing to what is in the judgment or she will add (or subtract) something. If she adds nothing, then she might as well keep quiet. If she adds something, then there is an obvious problem, namely is what she has said after giving the judgment relevant when another judge is subsequently considering the judgment? It is embarrassing and potentially unfair on legal advisers, advocates and judges if a senior judge, in a speech out of court, adds to or qualifies a judgment which she has given. It is even worse if a judge says publicly that she considers that a decision she gave or a reason she gave for it is, in her revised view, bad. What is another judge to do, and what are lawyers to do, about the judgment? In the end, the simple truth is, as I have said twice already this evening (albeit in different contexts), that a judge should let her judgment speak for itself.

50. This is a rule which I have sometimes breached (once or twice quite in quite a substantial way), and, while it was quite fun at the time, I regret it now. I fear that I may well have got close to breaching the rule this evening, but I hope that, if I have done so, it has served to make this talk a little more interesting than if I had limited myself to telling you all how to write judgments.

51.Thank you.

David Neuberger
2017

Lincoln's Inn, 30 November