

ADEQUATE, SUFFICIENT AND EXCESSIVE REASONS

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It is said that Lord Mansfield once advised a businessman, who had recently been appointed as one of the King's Justices, that he should only ever give judgments (which would probably be right) and never give reasons (which would almost certainly be wrong).

1 Judges give reasons in almost every case. The giving of reasons is a normal incident of the judicial process.² The obligation to explain how, and why, a particular decision has been reached stems from the common law. In more recent times, it has been suggested that this duty has a constitutional dimension as well.³

2 As a matter of sound practice, administrators usually give reasons. However, unlike judges, they are only obliged to do so when statute so demands.⁴

3 Complaints about the failure to give any, or any adequate, reasons have become more common in recent years. As I hope to demonstrate, the law in this area has grown rapidly. There is also a significant body of legal writing on this topic.

The justification for giving reasons

4 Plainly, there are a number of justifications for requiring the provision of reasons.

¹ Judge, Court of Appeal, Supreme Court of Victoria. The opinions expressed in this paper are my own. They are not to be taken as reflecting the views of any other member of the Court of Appeal. I acknowledge the assistance of my Associate, Emily Brott, in the preparation of this paper.

² *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 ('*Osmond*').

³ *Wainohu v New South Wales* (2011) 243 CLR 181. In *Wainohu*, legislation which empowered Supreme Court judges to make specific declarations and decisions, but included a provision stating that any judge making such an order was not required to provide reasons, was held to be invalid. The exemption from the duty to give reasons was repugnant to institutional integrity and incompatible with the exercise of judicial power. At the same time it was recognised that not every judicial order need be accompanied by reasons.

⁴ *Osmond* (1986) 159 CLR 656.

5 In the case of judicial review, reasons enable a reviewing court to be satisfied that the decision-maker took into account all matters that he or she was required to consider, and did not have regard to extraneous material. Reasons also enable the reviewing court to determine whether any other form of jurisdictional error has been demonstrated.

6 There is an ongoing debate, amongst administrative lawyers, as to whether a failure on the part of a decision-maker to provide reasons when asked to do so, should of itself be regarded as establishing a breach of procedural fairness, or some other ground of judicial review.

7 In *Osmond v Public Service Board of New South Wales*,⁵ Kirby P, in the New South Wales Court of Appeal, held that there was a general common law duty to give reasons. That duty existed irrespective of whether the decision was judicial or administrative in character. His Honour emphasised that the duty existed whether or not the legislature had chosen to impose such an obligation.

8 President Kirby explained the benefits of a duty to provide reasons.⁶ First, it enabled the recipient to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie. Secondly, it answered the frequently voiced complaint that good and effective government could not win support or legitimacy unless it was accountable to those whose rights it affected. Thirdly, the prospect of public scrutiny would provide officials with a disincentive to act arbitrarily. Fourthly, the discipline of giving reasons could make decision-makers more careful, and rational. Finally, the provision of reasons could provide guidance for future cases.

9 It is fair to say that the merits of giving reasons have never seriously been doubted. That is so even when one factors in the additional burden that this task imposes on decision-makers. Obviously, the need to give reasons can result in

⁵ (1984) 3 NSWLR 447.

⁶ Ibid 467-70.

significant additional cost and delay.

10 Of course, statutory obligations to give reasons have been imposed upon administrators for many years.⁷ At the same time, it must be recognised that Kirby P's approach to the duty to give reasons was specifically rejected, on appeal, by the High Court.⁸ There it was held that the introduction of such a duty was a matter for the legislature, balancing all competing policy considerations, and not to be effected by the 'blunt indiscriminating' approach of judicial innovation.⁹

11 Why do judges give reasons? In my opinion, there is no better explanation than that given by McHugh JA (as his Honour then was) in *Soulemezis v Dudley Holdings*:¹⁰

The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice": *The Writing of Judgments* (1948) 26 Can Bar Rev at 491. Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In *Defence of Judicial Candor* (1987) 100 Harv L Rev 731 at 737):

"... A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power."

Thirdly, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases: Taggart "Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases" (1983) 33 University of Toronto Law Journal 1 at 3-4. Hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.¹¹

⁷ See for example, at the Commonwealth level, s 28(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth); s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). In Victoria, the same general duty is cast upon decision-makers by s 8 of the *Administrative Law Act* 1978.

⁸ *Osmond* (1986) 159 CLR 656.

⁹ *Ibid* 669-70 (Gibbs CJ).

¹⁰ (1987) 10 NSWLR 247 ('*Soulemezis*').

¹¹ *Ibid* 279. Quoted by Justice Alan Goldberg writing extra-judicially in 'When are Reasons for Decision Considered Inadequate?' (2000) 24 *Australian Institute of Administrative Law Forum* 1.

12 There is a difference, it seems to me, between what the law expects by way of
reasons from administrative decision-makers, and the obligation imposed upon
judicial officers.

13 In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*¹² the High Court
cited with approval a passage from a judgment of the Full Court of the Federal Court
in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*¹³ to the effect that, when
dealing with the reasons of an administrative decision-maker, these were 'not to be
construed minutely and finely with an eye keenly attuned to the perception of
error'.¹⁴

14 I have not seen the *Wu Shan Liang* admonition applied to judicial reasoning.
There is no reason in principle why, in some cases, that should not be done.

15 The balance of this paper will focus primarily upon the obligations that rest
upon courts, in relation to the provision of reasons, rather than any lesser obligations
that rest upon tribunals exercising quasi-judicial functions. However, some of what I
have to say may be applicable entirely across the board.

What are adequate or sufficient reasons?

16 Regrettably, this question does not admit of a simple answer. It is always a
matter of degree. Judges, acting reasonably, may have quite different views on this
subject.¹⁵

17 In *Soulemezis* two members of the New South Wales Court of Appeal
expressed quite different views as to how much detail had to be provided if a judge's
reasons were to be regarded as adequate. Kirby P, who dissented, held that both the
grounds which led the judge to a conclusion on disputed factual questions, and the

¹² (1996) 185 CLR 259.

¹³ (1993) 43 FCR 280.

¹⁴ Ibid 287. See also *Politis v Commissioner of Taxation (Cth)* (1988) 16 ALD 707, 708 (Lockhart J).

¹⁵ See for example *Ta v Thompson* [2013] VSCA 344 where the Court was divided on the question
of whether adequate reasons had been provided by a magistrate who recorded a conviction
for possession of heroin.

findings on the principal contested issues had to be set out, in full. Mahoney JA took a more flexible approach. His Honour observed that the law did not require a judge to make an express finding in respect of every fact leading to, or relevant to, that judge's final conclusion of fact. Nor did a judge have to reason, and be seen to reason, from one fact to the next, along the chain of inference leading to the ultimate conclusion.

18 What seems to be clear is that the bald statement of an ultimate conclusion, even by reference to the evidence said to support it, is unlikely, in many cases, to be sufficient. There must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed.

19 Reasons may be lengthy, and even prolix, without being adequate.¹⁶ A global, or general pronouncement, on the part of a judge that he or she has considered all the relevant evidence and reached a conclusion based thereon is not an adequate statement of reasons. Nor is it normally sufficient to set out the arguments of both sides and state simply that the contentions of one party are to be preferred to those of the other.

20 A judge, though obliged to give reasons, is not required to address every submission that was advanced during the course of the hearing. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster.

21 Plainly, judges are not expected to deal specifically with every consideration that passes through their minds as they proceed to their conclusion. However, any submission that is worthy of serious consideration should, ordinarily, receive some attention in the reasons provided.

22 One area that often gives rise to difficulty, when it comes to preparing reasons for judgment, is the manner in which findings as to credibility should be expressed.

¹⁶ See *Dornan v Riordan* (1990) 24 FCR 564 where a report of 178 pages was held not to disclose the relevant Tribunal's reasoning process sufficiently to avoid an error of law.

How much detail is required? To what extent should the judge explain precisely why he or she prefers the evidence of one witness to that given by another? This problem can be exacerbated when it comes to dealing with conflicting expert evidence, as often occurs. It will usually be necessary, in such cases, to state not merely whose evidence the judge accepts, but also to explain, in appropriate detail, why the judge reached that conclusion.

23 In that regard, judges should endeavour to recognise and give effect to the importance to the parties, to the public, and to appellate courts of providing adequate reasons. As I have previously suggested, administrative decisions are generally afforded greater latitude. However, even those decisions should meet the basic requirements of procedural fairness associated with the need to explain why a particular result has been reached.

24 In *Telstra Corporation Ltd v Arden*¹⁷ Burchett J referred with approval to *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* in which it was said that ‘the extent to which a court must go in giving reasons is incapable of precise definition’.¹⁸ His Honour reiterated a view that he had previously expressed to the effect that reasons given by administrative decision-makers should not be read pedantically, but sensibly.¹⁹ He added that provided the reasons expose ‘the logic’ of the decision, and contain findings on those matters of fact essential to that logic, they would normally be adequate.²⁰

25 If it is not possible to understand from the reasons given how the conclusion was reached then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion.

¹⁷ (1994) 20 AAR 285.

¹⁸ (1983) 3 NSWLR 378, 381 (Hutley JA).

¹⁹ *Dodds v Comcare Australia* (1993) 31 ALD 690, 691.

²⁰ *Ibid.*

26 If certain evidence presented was relied upon, that fact, and the reasons why it was so relied upon, should be stated. Merely summarising the evidence will not be sufficient.

27 If the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail. The reasons must demonstrate that a finding of fact was based upon logically probative evidence. If they do not do so, an appellate court will not strain to find a basis upon which the decision below can be upheld.

'Horses for courses'

28 The duty to give reasons is, of course, an integral part of any judge's task in deciding a case. I would add that it is also an important part of any judge's task in ruling upon a procedural question, an interlocutory issue, or determining an evidentiary point.²¹

29 The content of that duty will, of course, vary. The obligation that rests upon a busy magistrate, hearing perhaps dozens of summary matters in a day, will obviously be less onerous than that which rests upon a judge in one of the higher courts.

Summary justice - Magistrates' Courts and VCAT

30 Magistrates' Courts and the Victorian Civil and Administrative Tribunal (VCAT) deal, between them, with the overwhelming bulk of all disputes that are institutionally resolved in this State. VCAT is not a court,²² but it exercises powers that are, in many respects, judicial in nature. Its members are subject to specific

²¹ Rulings given upon points of evidence, in the course of a trial, are normally accompanied by the briefest of reasons. Sometimes, common sense dictates that nothing need be said when the objection taken is obviously frivolous, or, it is plain that the evidence is not admissible. However, in any case in which there is a contestable issue as to whether a particular piece of evidence should be received, the judge should state, albeit succinctly, the basis of the ruling.

²² *Director of Housing v Sudi* (2011) 33 VR 559.

statutory duties, regarding the provision of reasons, under the *Victorian Civil and Administrative Tribunal Act 1998*.²³

31 Magistrates generally give only the most cursory of reasons, particularly in summary criminal matters.²⁴ This is perhaps, in part, because appeals to the County Court from their decisions in such matters are by way of re-hearing *de novo*. It is obvious that reasons are likely to be of less importance in such circumstances. An appeal lies to the Supreme Court from a magistrate's decision, but only on a point or points of law. While the prerogative writs are available, the conditions under which they will be granted are so narrowly circumscribed as to make their use a rare occurrence.

32 A useful illustration of the extent of the duty to provide reasons, at the Magistrates' Court level (and, it might be said, at the level of the County Court hearing an appeal *de novo*), may be found in the recent decision of the Court of Appeal in *Ta v Thompson*.²⁵

33 In that case the appellant was convicted of possession of heroin in the Magistrates' Court. His conviction was upheld on appeal to the County Court. The facts were as follows. The police located 0.1g of heroin in the bedroom of a house that was solely occupied by the appellant. The heroin was found in a wardrobe. There was evidence that some days earlier, he had hosted a New Year's party. The appellant claimed that he knew nothing about the heroin, and that it must have been left there by someone else.

34 The County Court judge, who heard the appeal, gave her decision immediately after the close of submissions. She said that she had heard the evidence about a party at the appellant's house, and other matters surrounding the state of the

²³ Section 46(2).

²⁴ They are not to be criticised for doing so. Where, for example, a magistrate is asked to impose the minimum period of disqualification and fine for a 0.05 offence, and is willing to accede to that request, it is hardly necessary to say anything further.

²⁵ [2013] VSCA 344 (*Ta*).

premises. She added that, with regard to that matter, she had no other evidence upon which to rely apart from that given by the appellant. She said that she did not accept his evidence and, accordingly, found the charge proved.

35 The appellant brought proceedings by way of judicial review seeking orders in the nature of certiorari. He submitted, inter alia, that the judge had failed to provide adequate reasons to explain her decision, and, in particular, why she had rejected his account. The application for review was dismissed by Whelan J (as his Honour then was).

36 The appellant then appealed. Osborn JA (with whom Beach JA agreed) analysed the County Court judge's treatment of the appellant's evidence in some detail. His Honour noted that the judge had observed that there was no evidence corroborating his assertion that there had been a party, on New Year's Eve, 'at which people were sleeping all over the place'. The appellant, being the occupier of premises in which drugs were found, bore the onus of proving that he had no knowledge of their presence. The case therefore depended upon the judge accepting his evidence. The judge had found him to be a witness whose evidence was not credible. Little more needed to be said.

37 Osborn JA pointed out that there were major hurdles to be overcome if the appeal were to succeed. In the first place, it would have to be shown that the County Court judge's reasons were so inadequate as to give rise to an error of law. Even that would not be sufficient. Error of law on its own, falling short of jurisdictional error, would not justify the grant of certiorari.

38 His Honour noted that there was some uncertainty in the authorities as to whether, in the absence of a right of appeal, the duty to give reasons was as extensive as it might otherwise be.²⁶ However, he was in no doubt that even though no appeal lay from the County Court judge's determination, it was a final decision of the kind for which reasons had to be given.

²⁶ *Perkins v County Court of Victoria* (2000) 2 VR 246, 270 [55]-[56].

39 In Osborn JA's opinion, the reasons did not have to be particularly extensive. All that was required was that the judge state the grounds for her decision. That was essential in order to satisfy the various purposes for which reasons were to be provided, as laid down in *Fletcher Constructions Australia Ltd v Lines Macfarlane & Marshall Pty Ltd*.²⁷

40 His Honour found that there were good reasons for concluding:

...that the obligation to give reasons did not go as far as that which is imposed where a decision is subject to an appeal by way of rehearing but was limited to that ordinarily imposed when a decision is subject to an appeal on questions of law only.²⁸

41 Osborn JA referred to *Soulemezis*, and to *Huntsman Chemical v International Pools*,²⁹ in which the New South Wales Court of Appeal re-affirmed the principles expounded in the former case. He said that if the approach taken in *Soulemezis* was to be followed, then the County Court judge's reasons had to explain the grounds for her conclusion in sufficient detail to enable the Court of Appeal 'to see the grounds upon which it was based but did not require detailed reasoning as to the evidence'.³⁰

42 Osborn JA concluded that Whelan J had been correct in holding that:

Where there is no right of appeal in relation to factual findings, the requirement for the provision of reasons as to factual findings is less rigorous. This is such a case.³¹

43 His Honour said that he did not accept that:

...it must be inferred that her Honour's decision rested upon further grounds which she did not identify. A conclusion that a decision maker is not satisfied to the relevant standard may not bear any or any material elaboration.³²

²⁷ (2002) 6 VR 1, 32 [101].

²⁸ *Ta* [2013] VSCA 344, [34].

²⁹ (1995) 36 NSWLR 242.

³⁰ *Ta* [2013] VSCA 344, [42].

³¹ *Ta v Thompson* [2012] VSC 446, [30].

³² *Ta* [2013] VSCA 344, [51].

44 Osborn JA referred, with apparent approval, to Mahoney JA's comment in *Soulemezis* that:

The weight which a judge will give to the evidence of a witness will often be not capable of rationalisation beyond the statement: having heard him, I am not satisfied that I should accept what he says.³³

45 Osborn JA's judgment in *Ta* seems to have been influenced to some degree by the fact that the appellant bore the onus of satisfying the Court that the heroin found in his wardrobe was not his, and that he knew nothing about it.

46 In other words, Osborn JA may have come to a different conclusion regarding the adequacy of the reasons given in *Ta* but for the two factors that stood out in that case. First, the absence of any appeal from the County Court on a hearing *de novo*, and second, the fact that the appellant bore the onus of establishing his innocence. Put simply, Osborn JA found that the County Court judge had not been persuaded by the appellant's evidence and it was sufficient that 'her reasons made clear that she was not so persuaded'.³⁴

47 Priest JA delivered a strongly worded dissent.³⁵ His Honour noted that it had been recognised, specifically with respect to the County Court exercising its appellate jurisdiction, that a judge is not relieved of the obligation to give reasons simply because of the absence of a further right of appeal. As Priest JA noted, this very question had arisen for consideration in *R v Arnold*³⁶ where Phillips JA observed:

One would hope that such a failure on the part of an appellate judge to give any reasons whatever when announcing his determination is an occurrence which, if not unique, is very uncommon. It has frequently been emphasised how important is the giving of reasons to the process of judicial decision-making: see, for example, *De Iacovo v Lacanale* [1957] VR 553 at 557-9 (where the earlier cases are recounted); *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 380-2 (where again earlier authorities are recounted); *Palmer v Clarke* (1989) 19 NSWLR 158 (where the nature of "the common law duty" imposed upon a

33 (1987) 10 NSWLR 247, 273.

34 *Ta* [2013] VSCA 344, [62].

35 *Ibid* [64]-[81].

36 [1999] 1 VR 179. See also *Munro v Brack* (2000) 112 A Crim R 398, 403 [31]-[34] (Beach J).

judge was emphasised); *Soulemezis v Dudley (Holdings) Pty. Ltd.* (1987) 10 NSWLR 247, especially at 278-81 per McHugh JA, and *Sun Alliance Insurance Ltd. v Massoud* [1989] VR 8 at 19-20 per Gray J. In stating the relevant principles, it is always accepted that there is no universal obligation on the decision-maker, even though it be a court, to give reasons (for which proposition *Brittingham v Williams* [1932] VLR 237 at 239 is commonly cited) and what is sufficient by way of reasons in a given case will always depend upon the circumstances (of which *Wightman v Johnston* [1995] 2 VR 637 is a recent example). In *Soulemezis* at 280, McHugh JA (as he then was) said that “the extent of the duty to give reasons is related ‘to the function to be served by the giving of reasons’” (quoting Mahoney JA in *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386). McHugh JA also pointed out (as did Gray J in *Massoud*) that the obligation to give reasons could no longer be seen as dependent upon the existence of a right of appeal: as to which see *Tatmar Pastoral* at 386 and *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666-7 per Gibbs CJ (although of course the hearing of an appeal has often provided the occasion for pointing out the difficulties created by the absence of reasons below). The duty to give reasons, qualified though it is, can be recognised now as “an incident of the judicial process”.³⁷

48 In explaining why he regarded the County Court judge’s reasons as inadequate, even to the point of justifying the grant of certiorari, Priest JA went on to say:

If the judge’s rejection of the appellant’s evidence turned on credit, she did not say so explicitly. There is nothing in her reasons to suggest that she based her failure to accept the appellant’s word on an assessment of demeanour. And save to say that she probably rejected his evidence based on one or other (or a combination) of the possibilities set out above, the judge’s reasons are enigmatic. The appellant was entitled to know ‘explicitly’ the path of reasoning which led to the order dismissing his appeal. He did not get that.³⁸

49 A case which bears some similarity to *Ta* is the well-known decision of the Court of Appeal in *Perkins v County Court of Victoria*.³⁹ There the appellant had been convicted in the Magistrates’ Court of various summary offences. His appeal to the County Court was only partly successful. He then sought judicial review. He failed before Harper J, and appealed from that decision.

50 In dismissing the appeal, Buchanan JA said:

Want of reasons may amount to an error of law where the absence of reasons would frustrate a right of appeal, although even where a right of appeal

³⁷ [1999] 1 VR 179, 181-2 [8].

³⁸ *Ta* [2013] VSCA 344, [78] (citations omitted).

³⁹ (2000) 2 VR 246 (*Perkins*).

exists, the nature of the decision and the circumstances of the case may require no more than a brief ruling, and, where an appeal is *de novo*, an absence of reasons for the decision below can have no effect. Moreover, the provision of reasons for decisions affecting persons' rights and liabilities is usually desirable, serving objectives such as candour in decision-making, the accountability of decision-makers, the reconciliation of parties to the results of litigation and promoting the drawing of conclusions which are rational and soundly based on legal principles. Nevertheless, the general desirability of reasons, and in certain cases their necessity, in my view are not sufficient considerations to found an all-embracing principle that failure to state reasons or adequate reasons for a judicial decision constitutes an error of law vitiating the decision.⁴⁰

51 His Honour continued:

The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law.⁴¹

52 Buchanan JA found that the County Court judge had made clear the grounds for his decision. Therefore, while reasonable minds might differ as to whether that finding was correct, the judge had expressed adequately the basis of his finding.

53 The reasoning of the Court of Appeal in both *Ta* and *Perkins* speaks for itself. Although magistrates (and County Court judges hearing appeals *de novo*) are obliged to give reasons for what they do, they are not expected to go into matters in anything like the detail that would be expected from judges in the higher courts when delivering reasons for judgment.

Trial judges

54 Nothing like the same latitude will be extended by appellate courts to trial judges who hear and determine civil cases.

55 The extent of the obligation to give reasons at trial level is largely to be gauged from an analysis of appellate judgments where the failure to give sufficient

⁴⁰ Ibid 270 [56].

⁴¹ Ibid 273 [64].

reasons has been considered as a ground of appeal.

56 There is now a significant and growing body of case law dealing with adequacy of reasons. A number of these cases turn upon the serious injury provisions of the *Accident Compensation Act 1985* and its interstate equivalents.

57 Before dealing with the recent case law, a brief excursus into history may be of interest. In *Swinburne v David Syme and Co*, an early libel case initiated by the Victorian Minister in charge of the Department of Water Supply, Madden CJ said that although a judge should give his reasons 'he is not bound to do so'.⁴² That view would not command support today.

58 In 1932, Sir Leo Cussen, in delivering the judgment of the Full Court in *Brittingham v Williams*,⁴³ put the matter more in accord with current thinking:

We must not be taken as laying down a universal rule that a judge is bound upon request to give reasons for his decision. A case may turn entirely upon a finding in relation to a single and simple question of fact, or be so conducted that the reason or reasons for the decision is or are obvious to any intelligent person; or a claim or defence may be presented in so muddled a manner that it would be a waste of public time to give reasons; and there may be other cases where reasons are not necessary or even desirable.⁴⁴

59 New South Wales judges have traditionally been somewhat more inclined to insist upon the provision of adequate reasons in every case. Sir Frederick Jordan, in particular, emphasised the need for all courts, even those exercising summary jurisdiction, to provide reasons. He accepted, of course, that the reasons need not be elaborately stated.

60 In *Carlson v The King*⁴⁵ Sir Frederick observed that reasons should contain not merely a summary of the evidence and a statement of the decision reached but should also disclose the actual process of reasoning adopted in arriving at the decision.

⁴² [1909] VLR 550, quoted in *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 19.

⁴³ [1932] VLR 237.

⁴⁴ *Ibid* 239.

⁴⁵ (1947) 64 WN (NSW) 65.

61 The decision of the New South Wales Court of Appeal in *Pettitt v Dunkley*⁴⁶ provides a useful illustration of the development of principle in this area. In an action for negligence, where the plaintiff had been struck by a motor vehicle, a District Court Judge found for the defendant, saying only this:

It would not help in view of this lady's condition of health, psychomatic [sic] or otherwise, for me to give any other reasons. I simply enter my verdict. I return a verdict for the defendant.

62 The plaintiff appealed under s 142 of the *District Courts Act 1912* (NSW) which gave a right of appeal where the appellant was aggrieved 'on a point of law'.

63 Asprey JA, after referring to previous authority, said:

...for a magistrate to content himself saying 'I have reached my decision after having considered all of the matters which the statute requires me to consider' is not a proper fulfilment of the obligation which rests upon him as a judicial officer to see that his reasons are 'explicitly stated', to use the language of Sir Frederick Jordan...⁴⁷

64 His Honour continued:

...where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law.⁴⁸

65 Returning to the position in this State, in *Llewellyn v Reynolds*⁴⁹ the Full Court made it clear that where a judge rejected evidence which had not been challenged,

⁴⁶ [1971] 1 NSWLR 376.

⁴⁷ Ibid 381. See also *Lock v Gordon* [1966] VR 185 (O'Bryan J).

⁴⁸ *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382.

⁴⁹ [1952] VLR 171.

and was not itself inherently improbable, without giving any reasons for having done so, that finding might be set aside.⁵⁰

66 In *Sun Alliance Insurance v Massoud*,⁵¹ the Full Court adopted much of Asprey JA's reasoning in *Pettit v Dunkley*. There, Gray J, expressed the opinion that 'the decided cases show that the law has developed in a way which obliges a court from which an appeal lies to state adequate reasons for its decision'.⁵² While his Honour noted that the sufficiency of reasons would always depend on the particular circumstances of the case, he articulated two criteria where reasons would be inadequate: (1) where an appellate court is unable to ascertain the reasoning upon which the decision is based, and (2) where justice is not seen to have been done.⁵³

67 *Soulemezis* remains the seminal case on the adequacy of reasons. An injured worker succeeded in gaining compensation in the District Court. However, the judge awarded her only limited benefits, terminating on a particular date. Thereafter she was deemed 'fit for work'. The date chosen was the date of a CAT scan report that was tendered in evidence. The plaintiff appealed that finding, arguing that she was still incapacitated after that date. She argued that there was no basis for the judge's finding, and that his Honour had failed to give adequate reasons for the decision reached.

68 The judgment of Mahoney JA, on appeal, is particularly instructive. In considering what reasons must be given, and what a judge does in writing a judgment, it is relevant to distinguish between the 'essentials and the peripherals'.⁵⁴ For example, where there is an appeal from his order, it is proper that the judge make apparent those matters which should be apparent if the right of appeal is to be

⁵⁰ See also *De Iacovo v Lacanale* [1957] VR 533, 557-9.

⁵¹ [1989] VR 8.

⁵² Ibid 18.

⁵³ Ibid.

⁵⁴ *Soulemezis* (1987) 10 NSWLR 247, 272.

exercised by the unsuccessful party and if the appellate court is to be able to do what, in the particular appeal, it should do.

69 Mahoney JA was at pains to observe that a formulaic approach to judging was impossible. To require a judge to detail the various steps by which he reasoned to his conclusion was to mistake the nature of the reasoning process. In his Honour's opinion, the objection to what the judge had done, at first instance, was that he had not explained with sufficient clarity how the CAT scan could (and did) lead to the conclusion that, after that particular date, the worker's condition had changed.

70 Nonetheless, and despite the inadequacy of the reasons given, Mahoney JA dismissed the appeal. He concluded that any error on the part of the judge in that respect did not, in the particular circumstances of that case, give rise to a point of law.

71 McHugh JA agreed with Mahoney JA that the appeal should be dismissed. His Honour considered that the adequacy of a judge's reasons will depend 'on the importance of the point involved and its likely effect on the outcome of the case'.⁵⁵ While the finding that the appellant was fit for work from the date of the CAT scan did involve a crucial fact, McHugh JA suggested that 'great care need[ed] to be taken that dissatisfaction with the finding of fact d[id] not mislead the Court into holding that the learned judge ha[d] failed to give his reasons for his finding'.⁵⁶ Although the judge had not given any specific reasons for his finding, it could be inferred that he considered the plaintiff to be fit for work because the CAT scan did not reveal any abnormality. It was not to the point that that finding may itself have been incorrect.

72 According to his Honour:

An erroneous or perverse finding of fact raises no question of law and cannot be challenged by way of appeal. What is decisive is that his Honour's judgment reveals the ground for, although not the detailed reasoning in

⁵⁵ Ibid 279.

⁵⁶ Ibid 281.

support of, his finding of fact. But that is enough in a case where no appeal lies against the finding of fact.⁵⁷

73 Moving to recent authority dealing with the adequacy of reasons, particularly in the context of serious injury cases in this State, it is worth considering first the decision of the Court of Appeal in *Franklin v Ubaldi Foods Pty Ltd*.⁵⁸ There the appellant had sustained a lower back injury during his employment as a chef. He had been lifting crates, and other items weighing between 10 and 25 kilograms. A County Court judge dismissed his application for compensation under the *Accident Compensation Act 1985*.

74 Ashley JA considered the adequacy of the reasons given by the judge as then required by the relevant section of the Act. At that time, s 134AE provided that the reasons given by the court in deciding a serious injury application should not be ‘summary reasons but shall be detailed reasons which are as extensive and complete as the court would give on the trial of an action’.⁵⁹

75 His Honour referred to *Hunter v Transport Accident Commission*⁶⁰ where Nettle JA had said, in relation to an application under s 93(4)(d) of the *Transport Accident Act 1986*, that although the extent of the reasons required would depend upon the circumstances of the case, they should deal with the substantial points raised by the parties, include findings on material questions of fact, refer to the evidence or other material upon which those findings were based, and provide an intelligible explanation of the process of reasoning that had led the judge from the evidence to the findings, and from the findings to the ultimate conclusion.

76 Ashley JA went on, in *Franklin*, to say that insofar as the judge may have rejected evidence or other material upon which a party relied, the judge should refer to that evidence or material and explain why it was rejected. While it was not

⁵⁷ Ibid 282.

⁵⁸ [2005] VSCA 317 (*Franklin*).

⁵⁹ Section 134AE was repealed by the *Justice Legislation Amendment (Miscellaneous) Act 2012*, but continues to have effect in relation to certain cases initiated prior to 1 January 2013 and not decided by that date.

⁶⁰ (2005) VSCA 317 (*Hunter*).

incumbent upon the judge to deal with every argument and issue that may have arisen, where an argument was substantial or an issue significant, it should be addressed. Put simply, failure to expose the path of reasoning was itself an error of law.

77 Ashley JA made clear that the mere recitation of evidence, followed by a statement of findings, without any explanation as to why the evidence was said to lead to the findings was ‘about as good as useless’.⁶¹

78 To illustrate the requirements that had to be met in a case of the kind that confronted the Court in *Franklin*, it should be noted that Ashley JA discussed seven shortfalls in the trial judge’s reasons for rejecting the appellant’s claim in that case. In brief, they were as follows:

- the starting point of the appellant’s case was that after hard work on 29 October 1999, his pre-existing symptoms got much worse. The judge never addressed whether he accepted or rejected the appellant’s evidence as to the events on 29 October 1999;
- if the judge rejected the appellant’s account, he did not provide any objective circumstances which gave it some support;
- simply to recount various medical histories and the appellant’s response when faced with them in cross-examination, left their significance, as the judge perceived it, unexplained;
- if he rejected the appellant’s account of events concerning 29 October 1999 for the reason that the appellant was not creditworthy, the judge made no finding on that;
- the judge wrongly concluded that the appellant had been made aware that unless he could demonstrate an injury after 20 October 1999, then his present application would fail. The evidence did not necessarily show this;
- the judge’s statement that the plaintiff ‘chose to press on with employment and only after giving notice of resignation by letter dated 14 October, for the first time he consulted a doctor in respect of what he now describes as “severe pain in his lower back”’ left very uncertain what the judge meant to convey. If he meant to convey that the appellant had made up an injury only

⁶¹ *Franklin* [2005] VSCA 317, [37], quoting Nettle JA in *Hunter* (2005) VSCA 317, [28].

after giving notice, then this would stand in opposition to the judge's conclusion that the appellant had indeed suffered a compensable lower back injury. If he meant something else, he did not say so; and

- if the judge thought that the appellant was un-creditworthy, certain objective evidence tending to the contrary required consideration.⁶²

79 The Court of Appeal has applied the principles laid down by Ashley JA in *Franklin* on a number of occasions.

80 For example, in *Alsco Pty Ltd v Mircevic*,⁶³ the trial judge dealt with a conflict between medical experts by placing greater weight on the evidence given by those witnesses whose opinion was tested in court. She rejected the evidence of two neurologists, and another acknowledged expert who had arrived at a different conclusion. The Court of Appeal concluded that the judge had provided sufficient justification, in her reasons for judgment, for having done so.

81 In *Meadows v Lichmore Pty Ltd*⁶⁴ the plaintiff, whose work duties included repetitive and quick packing and unpacking, developed a pain syndrome or 'functional overlay'. The resultant pain and disability had both physical and psychological aspects. The trial judge accepted that the pain and suffering consequences relied on did reach the 'very considerable' level required, but was not satisfied that those consequences had an organic basis. The judge therefore dismissed the application for compensation.

82 The plaintiff appealed on a number of grounds, including that the judge had failed to provide adequate reasons for his decision. Maxwell ACJ (with whom Robson and Dixon AJJA agreed) dismissed the appeal, finding that:

- the trial judge had applied the correct legal test and his decision was well open on the evidence;
- it was not possible on the evidence to separate the physical from

⁶² *Franklin* [2005] VSCA 317, [40]-[52].

⁶³ [2013] VSCA 229.

⁶⁴ [2013] VSCA 201.

the psychological causes of the pain and disability from which the plaintiff was suffering (or at least it was open to the judge to conclude that they could not be separated); and

- the reasons given by the judge were entirely adequate.⁶⁵

83 In considering the adequacy of the reasons given, Maxwell ACJ held that the judge's reasons:

...dealt with both the substance of the evidence of the medical practitioners relied on, and the strength and weaknesses of that evidence, in quite sufficient detail to enable [the plaintiff] to appreciate why the application had failed.⁶⁶

84 According to Maxwell ACJ, the conclusion arrived at by the trial judge was essentially quite straightforward. It was that the evidence did not allow the judge to be satisfied that the pain and suffering consequences which the plaintiff described were the result of the physical injury, rather than having been brought about by the functional overlay (or chronic pain syndrome) described in the medical reports. In the circumstances, and having regard to the body of evidence that suggested that the pain and disability was primarily due to psychological causes, that conclusion was open to the trial judge.

85 In *Wingfoot Australia Partners Pty Ltd v Kocak*⁶⁷ the High Court turned its attention to the question of adequacy of reasons in cases of this kind. In 1996, the first respondent suffered an injury to his neck while at work. In 2009 he commenced two proceedings in the County Court. The first sought leave to bring proceedings for common law damages in respect of the injury and was, in effect, a serious injury application. The second sought a declaration of entitlement in respect of injury under the *Accident Compensation Act 1985*. This was in the nature of a statutory compensation application.

86 The statutory compensation application was sent to the Magistrates' Court. Three medical questions were referred to the medical panel for determination. The

⁶⁵ Ibid [5].

⁶⁶ Ibid [39].

⁶⁷ (2013) 303 ALR 64.

medical panel gave a certificate of opinion to the Magistrates' Court, along with a written statement of reasons for its opinion. After receiving the certificate, the Magistrates' Court made orders, by consent, which were expressed to 'adopt' and 'apply' the opinion, and to dismiss the statutory compensation application.

87 The serious injury application came on for hearing in the County Court. The employer foreshadowed a contention that the County Court was bound by the opinion of the medical panel. The worker applied to the Supreme Court for an order in the nature of certiorari, quashing the opinion of the medical panel on the ground that it had failed to give adequate reasons for its opinion. The application was dismissed by the primary judge. The Court of Appeal allowed an appeal and made the order sought.

88 On appeal to the High Court, one of the issues to be determined was whether the reasons given by the medical panel were, in fact, inadequate.

89 The High Court reversed the decision of the Court of Appeal. It said:

The Court of Appeal considered that a higher standard was required of a written statement of reasons given by a medical panel under s 68(2) of the Act. On the premise that *Brown* held that the opinion of a medical panel must be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act, the Court of Appeal analogised the function of a medical panel forming its opinion on a medical question to the function of a judge deciding the same medical question. Accordingly, it then equated the standard of reasons required of a medical panel with the standard of reasons that would be required of a judge giving reasons for a final judgment after a trial of an action in a court. The application of that judicial standard in circumstances where an affected party had provided to the medical panel opinions of other medical practitioners and had sought in submissions to rely on those opinions, and where the opinion formed by the medical panel itself did not accord with those opinions, meant that "it was incumbent on the [P]anel to provide a comprehensible explanation for rejecting those expert medical opinions or, if it be the case, for preferring one or more other expert medical opinions over them". Rejection of the premise and the analogy, for reasons already stated, entails rejection of the conclusion that the higher standard is required. *A medical panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.*⁶⁸

⁶⁸ Ibid 79-80 [56] (citations omitted) (emphasis added).

90 It may be said that the task that confronts County Court judges faced with resolving serious injury applications is a daunting one. Appellate courts insist that adequate reasons be given for any decision reached, in circumstances where there is often a paucity of material upon which those reasons can be properly based. Usually, in such cases, it is the applicant alone who gives *viva voce* evidence and is cross-examined. It is rare for any of the medical experts to be called. In such circumstances, the reasons for decision will necessarily suffer from an inability on the part of the judge to see and hear the witnesses give their evidence, and be cross-examined. There will also be little time for reflection.⁶⁹ However, one thing is clear. The reasons must be such as to reveal (although in a particular case it may be by necessary inference) the path of reasoning which leads to the ultimate conclusion. If reasons fail in that regard, the losing party will not know why the case was lost, rights of appeal will be frustrated, and the consequence will be that the inadequacy gives rise to an error of law.

91 When it comes to criminal cases, the requirement that judges give reasons takes on a completely different aspect. At least in this State, juries decide questions of guilt or innocence. Their reasons are, of course, inscrutable. Judges give reasons only in relation to rulings in the course of trials, and, importantly, in sentencing remarks.

92 With regard to reasons for sentence (and it might be said, sentencing judgments on appeal), it should be remembered that in *R v Lim; R v Ko*,⁷⁰ Brooking JA lamented:

Nowadays, no appeal against sentence is complete without the citation of authority, and Mrs Hampel and Mr Tehan both rose to the occasion by referring us to a number of reported cases. I have not found it necessary to discuss any of them, although I venture to record with respectful concern the melancholy fact that in one of the cases relied on, *R v Downie & Dandy* (1998) 2 VR 517, it was found to be desirable, as an interim measure, to lay down nine large bundles of propositions as part of "the law on prevalence", which was said at 520 to await its Labeo. I note with apprehension that Labeo is the Roman jurist reputed to have written 400 books.

⁶⁹ This very point was made by Ashley JA in *Franklin* [2005] VSCA 317, [38].

⁷⁰ [1998] VSCA 54 (*Lim and Ko*).

Most appeals against sentence can and should be disposed of without the citation of authority. We must do what we can to strive for simplicity. The present case is no exception so far as authority is concerned.⁷¹

93 If at all possible, rulings should be kept brief. Regrettably, in an age of ever-increasing complexity, particularly in trials involving sexual offences, there is often a great deal that must be said. Some evidentiary rulings, particularly in the field of tendency and coincidence evidence, require detailed analysis. Nonetheless, the judge who presides over a criminal trial is usually a great deal better off, in terms of the obligation to provide reasons, than his or her counterpart sitting as a judge alone in civil matters.

Intermediate appellate courts

94 The first thing to say is that these courts are principally concerned with the correction of error.⁷² Unlike the High Court, which has broader responsibilities, they are not primarily tasked with the development of the common law, or even the exposition of high points of principle.

95 That is not to say that courts at this level do not, from time to time, contribute significantly to the development of legal doctrine. They are, of course, concerned to ensure that judgments of the lower courts correctly state the law as part of what might be termed ‘quality control’. Their reasons may therefore need to explain the law for the benefit and guidance of lower courts.

However, intermediate appellate courts have neither the time, nor the resources, to give every case that comes before them the treatment that, in a perfect world, it

⁷¹ Ibid [10]-[11].

⁷² *Crampton v The Queen* (2000) 206 CLR 161, 217 (Hayne J). Even his Honour’s statement that appeals are for the ‘correction of error’ is not quite accurate. In sentence appeals for example, we often allow ‘error’ to be perpetuated since we will not interfere with a sentence that we regard as inappropriate unless we are satisfied that it is ‘manifestly’ excessive or inadequate. In other words, it must be ‘wholly’ outside the range. The fact that we would have chosen a different sentence, and by implication, view the sentence imposed as too high or too low, is of no legal consequence. In that sense, the Court of Appeal does not correct error, in this area, unless the mistake made is egregious.

might merit.⁷³ Courts of appeal throughout this country are literally swamped with heavy case-loads. The line must be drawn somewhere.

96 In truth, most of the work done by intermediate appellate courts is carried out in areas where the law is relatively well-settled, and the issues to be determined on appeal concern its application in the particular circumstances of the case. Some of this work, it must be said, is quite mundane. A good deal of it, particularly in civil appeals from judge-alone trials, is purely fact based. Of course, that does not mean that the issues raised are easy to determine.

97 Criminal cases make up a substantial proportion of the work of the Court of Appeal. Many of the matters that come before the Court are sentence appeals. Although it has been said many times that the submission that a sentence is manifestly excessive (or manifestly inadequate) does not admit of great elaboration, my experience over the years has been that counsel are not dissuaded from putting forward lengthy and even prolix arguments in support of their particular case.

98 The Court of Appeal almost always provides detailed reasons for its decisions. It differs, in that regard, from its predecessor, the Full Court, whose judgments on sentencing matters were almost always delivered *ex tempore*, and were usually brief in the extreme.

99 These days, a typical sentencing judgment begins by setting out, in the form of a table, the actual sentence or sentences imposed below. The judgment then sets out the grounds of appeal which are occasionally elaborately stated. It then usually proceeds to a detailed summary of the circumstances surrounding the offending. Sometimes lengthy extracts from the written summary tendered by the prosecution on the plea are included.

100 There is often then an outline of each side's written case. When I speak of an

⁷³ The former President of the New South Wales Court of Appeal recently described intermediate appellate courts as 'sweatshops'. See K Mason, 'The Distinctiveness and Independence of Intermediate Courts of Appeal' (2012) 86 *Australian Law Journal* 308, 312.

‘outline’ it may, of course, be far more than that. Written cases tend not to be brief. This is then followed by a conclusion which, as Brooking JA observed in *Lim and Ko*, all too often contains copious, and sometimes quite unnecessary, reference to authority. There is, on occasion, reference to what are said to be comparable cases, generally ‘cherry picked’ by the party relying upon that material.

101 In my opinion, many of the sentencing judgments delivered by the Court of Appeal could be shortened considerably without any harm being done to the quality of the reasoning. I can say this because I am myself an habitual offender in this regard. To paraphrase the great French mathematician, Blaise Pascal, I often write long judgments because I simply do not have the time to write short ones.

102 I was interested to discover, recently, that my colleagues in New South Wales have sought answers to the problem of the excessively long judgment, and have experimented with possible solutions.

103 In New South Wales, s 45(4) of the *Supreme Court Act 1970* provides:

If, in dismissing an appeal, the Court of Appeal is of the unanimous opinion that the appeal does not raise any question of general principle, it may, in accordance with the rules, give reasons for its decision in short form.

104 This section has been used on a number of occasions. The results are readily apparent.⁷⁴ Judgments that might have been expected to run for perhaps 20 or 30 pages, without really saying anything of great consequence, are reduced to two or three pages at most. It seems to me that nothing is lost by this, and a good deal of judicial time and effort is spared.

105 Section 45(4) is, of course, narrow in scope. It applies only to civil appeals, and indeed, only to those cases where the appeal is dismissed. It seems to me that there is no reason why a similar provision, perhaps more broadly drafted, could not be adopted in this State.

⁷⁴ See for example *W & P Reedy Pty Ltd v Macadams Baking Systems (Pty) Ltd* [2007] NSWCA 146; *Independent Print Media Group Publishing Pty Ltd v Estate Agents Co-operative Pty Ltd* [2007] NSWCA 352; *Animax Films Pty Ltd v Simlogic Pty Ltd* [2011] NSWCA 73; *Millis v Valpak (Aust) Pty Ltd* [2013] NSWCA 249.

106 In one sense, we seek to achieve something similar, at least in criminal cases,
by the use of the leave procedure. Often, however, reasons for either granting or
refusing leave are given at considerable length, with much attention to detail. This
can result in a good deal of wasted effort, as there is a high rate of election in cases
where leave has been refused.

107 In recent years, the High Court has, on a number of occasions, considered the
adequacy of reasons given by intermediate appellate courts, in criminal matters. For
example, in *BCM v The Queen*⁷⁵ the appellant appealed against his conviction for
indecent dealings with a child under 10 years. There were inconsistencies in the
complainant's evidence (who was aged six at the time of the alleged offending). The
jury at trial convicted the appellant on two counts of indecent dealings but could not
come to a decision on the third count (which the complainant brought to the
attention of authorities more than a year after she complained of the first two
instances).

108 In dealing with the appellant's challenge to the reasonableness of the verdicts
on appeal, De Jersey CJ said that there was a rational explanation for the jury's
inability to reach unanimity on the third count. The fact that the complainant
delayed for a year before raising the third allegation concerning events that she
alleged had occurred within the same short interval may have been viewed by one or
more jurors as adversely affecting the reliability of that allegation. Therefore some
jurors may have doubted the reliability of the complainant's account 'without
doubting her overall credibility'.⁷⁶

109 The appellant appealed to the High Court arguing that the Queensland Court
of Appeal gave insufficient reasons for its decision. The High Court referred to its
decision in *SKA v The Queen*⁷⁷ outlining the principles to be applied in determining a
challenge to the sufficiency of the evidence to support a conviction. The majority in

⁷⁵ (2013) 303 ALR 387 ('BCM').

⁷⁶ Ibid 392 [29].

⁷⁷ (2011) 243 CLR 400 ('SKA'). See also *M v The Queen* (1994) 181 CLR 487.

SKA had highlighted the requirement that the appellate court's reasons disclose its assessment of the capacity of the evidence to support the verdict.⁷⁸

110 In *SKA*, French CJ, Gummow and Kiefel JJ were not satisfied that the New South Wales Court of Appeal had come to its conclusion (that it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the applicant) after having weighed the competing evidence. Therefore, as was said in *BCM*, the Court's 'obligation [will not be] discharged by observing that the jury was entitled to accept [the complainant's] evidence and act upon it'.⁷⁹ The Court must assess the evidence for itself.

111 In *BCM* the High Court did not believe it to be 'in the interest of justice to remit the proceeding to the Court of Appeal for it to determine afresh the challenge to the reasonableness of the verdicts'.⁸⁰ Instead, it analysed the inconsistencies that the appellant relied on to call into question the complainant's reliability before discussing the rest of the evidence presented at trial.

112 The Court concluded that '[n]one of the criticisms of [the complainant]'s evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict'.⁸¹

113 It should also be noted that the High Court has imposed upon intermediate appellate courts the very considerable burden of having to deal, in many cases, with each and every ground of appeal that is pursued.⁸² That obligation arises even if the matter can be disposed of on the basis of one single, and simple, point. This has long been a bone of contention, so far as these courts are concerned. One can understand the logic of the High Court's position, since a failure to address all grounds that are

⁷⁸ Ibid 409.

⁷⁹ *BCM* (2013) 303 ALR 387, [31].

⁸⁰ Ibid [32].

⁸¹ Ibid [47]. In civil appeals, a similar burden is placed upon intermediate appellate courts, since they are required, as part of the process of rehearing, to review the whole of the evidence led below. See generally *Allesch v Maunz* (2000) 203 CLR 172, 180.

⁸² *Cornwell v The Queen* (2007) 231 CLR 260, 300; *Kuru v New South Wales* (2008) 236 CLR 1, 6.

pressed may lead to unnecessary cost and delay if the decision on the short point is overturned by the High Court. Such cases are likely to be rare. The question must be asked whether, from a policy perspective, the 'requirement' that all grounds be addressed really makes good sense.

The High Court

114 The High Court is this country's ultimate appellate and constitutional court. Its role is to state and develop the law, and not to correct error in individual cases. It normally hears only those cases that are of general importance in the administration of justice. Many of these cases present difficult issues for decision and require detailed analysis of highly technical legal principles or complex legislation.

115 At the same time, as has been observed,⁸³ the contrast between the style of judgment writing in the High Court, in recent years, and that of other courts of ultimate jurisdiction (including the Supreme Court of the United Kingdom and the Supreme Court of the United States) is stark. That contrast cannot be explained solely by reference to the difference in the types of cases heard and determined by each court.

116 The abolition of appeals as of right to the High Court, and the substitution of the special leave to appeal regime in 1984, were designed to enable that Court to control the flow of appeals, and to give priority to those cases raising questions of the ultimate importance.

117 The creation of the Federal Court in 1976 was also, in part, designed to alleviate the burden placed upon the High Court in the discharge of its heavy responsibilities.

118 Nonetheless, the burden presently borne by the seven members of the High Court is obviously crushing. They are required to sift through literally hundreds of

⁸³ See Ronald Sackville, 'Appellate Judging: Onwards and Outwards Towards Mid-Century' (2012) 86 *Australian Law Journal* 249.

applications for special leave to appeal each year.⁸⁴ Many of these are dealt with on the papers alone, but each of them must be read and considered. Reasons are given in every case. It is scarcely surprising that in the vast majority of cases that come before the Court, the reasons are extremely brief. Unfortunately, they are also often uninformative.

119 What does it mean to say that a particular case does not provide ‘a suitable vehicle’ for the grant of special leave? Normally one will have to go back to the transcript of the oral argument to try to work out why the Court has arrived at that conclusion. What is one to make of the statement that the decision below is not ‘attended with sufficient doubt’ to warrant the grant of special leave? How much doubt is sufficient? And what particular aspects of the decision below are attended with any doubt?

120 Sometimes the Court refuses special leave because the decision below is said to have been correct. That, at least, provides an explanation that is both comprehensible, and meets any conceivable requirement that adequate reasons be given.

121 The same cannot be said for the template reasons given when special leave is refused. Yet, as a practical matter, the sheer volume of work that confronts the Court requires that reasons be given in a wholly abbreviated form.

122 The paucity of reasons given on special leave applications is more than amply compensated for by the detail, and attention, that the Court gives to its reasons for judgment in those cases which it hears as appeals.

123 That is not to say that the decisions of the Court are always written in a

⁸⁴ In *Collins (Alias Hass) v The Queen* (1975) 133 CLR 120, 122 it was noted that special leave applications are really only applications to commence proceedings. Until the grant of leave there are no proceedings *inter partes* before the High Court.

helpful manner. Some judgments are written in a style that is unduly dogmatic and even abrasive.⁸⁵

124 In some cases, the Court provides reasons that are so difficult to follow as to render them almost incomprehensible.⁸⁶ Occasionally, the Court produces a judgment that has no discernible ratio, and results in nothing but confusion.⁸⁷

How should judgments be written?

125 This paper is about the adequacy of reasons, and not how they should be expressed. Questions of style or form are an entirely separate matter. Style is very personal. Some judges write expressively, and even flamboyantly, while others are so 'judicial' and measured in what they say that their readers find the end product turgid and uninviting.

126 Lord Denning MR was a master at presenting attractive opening lines. Two of his classics were: 'It happened on April 19, 1964. It was bluebell time in Kent,'⁸⁸ and 'In summertime, village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch'.⁸⁹

127 One of my personal favourites, is the opening sentence, and the following lines delivered by Edmund Davies LJ in his judgment in the celebrated case of *R v Collins*.⁹⁰ The issue was whether the defendant had committed burglary when he climbed up the ladder to a bedroom of a house on the second floor, looked in through an open window, and saw a young lady sleeping naked in her bed.

⁸⁵ An example of this is *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, where some of the language used by the Court was intemperate and, I would respectfully suggest, quite inappropriate.

⁸⁶ See *Viro v The Queen* (1978) 141 CLR 88.

⁸⁷ *HML v The Queen* (2008) 235 CLR 334.

⁸⁸ *Hinz v Berry* [1970] 2 QB 40, 42.

⁸⁹ *Miller v Jackson* [1977] 1 QB 966, 976.

⁹⁰ [1973] 1 QB 100.

Mistakenly assuming that he was her boyfriend, she beckoned him in, and had sexual intercourse with him. It was only thereafter that she realised her mistake.

128 The question to be resolved on the appeal was whether the defendant had entered the house ‘as a trespasser’. His Lordship commenced his judgment by saying:

This is about as extraordinary a case as my brethren and I have ever heard either on the bench or while at the bar...

Let me relate the facts. Were they put into a novel or portrayed on the stage, they would be regarded as being so improbable as to be unworthy of serious consideration and as verging at times on farce.⁹¹

129 Not everyone has the ability to use language so effectively. Nor should they necessarily endeavour to do so. Murray Gleeson, former Chief Justice of the High Court, did not write in this vein. Yet his judgments were always clear, and succinct. They were a pleasure to read.

130 One aspect of his writing that stood out was his ability to formulate, concisely, with precision, and right at the outset, the issue to be determined. Any judge wishing to write well, and particularly at an appellate level, would do well to follow that approach.

131 Other contemporary judges whose written work I have greatly admired include former Justices Michael Kirby and Dyson Heydon. Both wrote extraordinarily well, with an attention to detail, and rigour, that stood out.

132 Michael Kirby has also written, extra-judicially, on the subject of judgment writing.⁹² He speaks, in his paper, of the ‘blessed trinity’ of good judgment style.⁹³ By this he means brevity, simplicity and clarity. It is instructive to note that he puts brevity first among the list of ‘blessed’ attributes.

⁹¹ Ibid 101.

⁹² Michael Kirby, ‘On the Writing of Judgments’ (1990) 64 *Australian Law Journal* 691.

⁹³ Ibid.

133 Recently, I had occasion to revisit several of Dyson Heydon's quite remarkable judgments on various evidentiary subjects. He is, of course, a complete master in that field.

134 In *Australian Crime Commission v Stoddart*⁹⁴ Heydon J delivered a judgment unlike any other that I have ever read. It is, if you like, a mini-treatise on one small aspect of the law of evidence, but covered in such depth as to evoke nothing but admiration. It was a dissenting judgment. It proves the value of occasional dissents. If you have not had the opportunity to read his Honour's analysis of the history of spousal privilege, may I suggest that you do yourself a favour, and see how a superbly well written judgment is crafted.

135 Of course, the rest of us are mere mortals. The pressure under which we work, whether it be as trial judges, or in intermediate appellate courts, means that we do not have the time to write, and re-write, as we would wish.

136 One thing is critical. We must know our audience. If we are writing, in essence, for the losing party, as is often suggested, we must focus upon why he or she has met that fate. The winning party will seldom care.

137 If we are writing for the legal profession, present and perhaps future, we will structure what we say quite differently. Even then, we should always aim for the 'blessed trinity'.

138 There is one thing I would caution against. Judgments should not be written with an eye to what an appellate court might do. Say what you think, and explain as clearly as possible, how you came to your decision. If someone else, further down the track, takes a different view, then so be it.

139 Judge Richard Posner is, in my opinion, one of the greatest living American jurists. He is a stern critic of writing that is prolix and unduly complex.⁹⁵ Unlike

⁹⁴ (2011) 244 CLR 554, 571-620.

⁹⁵ Richard A. Posner, *Reflections on Judging* (Harvard University Press, 2013).

most judges in the United States, he writes his own judgments. He largely avoids footnotes. He despises the 'Blue Book' method of citation. His judgments are all the better for that.

140 A lengthy judgment, littered with copious footnotes, may at first glance seem impressive. All too often, however, one is left with the feeling that there is an element of self-indulgence in writing in that vein.

141 I have a strong aversion to lengthy judgments. The fact that I am myself a repeat offender in that regard merely means that you should do as I say, and not as I do.

142 Over the past 16 years I have delivered probably thousands of judgments. Some of these were written as a trial judge, and others as a member of an appellate court. I have been exposed to just about every style of judicial writing. I have also endeavoured, as best I can, to keep up with trends in modern legal scholarship.

143 I recently sat interstate on a criminal appeal from a judge-alone trial. The trial judge found the accused not guilty of murder, and set out in almost 400 pages, his reasons for acquittal. I am ashamed to say that our own judgment on the appeal came to almost 200 pages. On reflection, I consider that both the trial judge's reasons and our own judgment were about twice as long as they ought to have been.

144 When I sat on the Federal Court, I was put on an appellate bench in a case where the primary judgment ran for 1565 paragraphs and took up almost 500 pages in a single volume of the law reports. It took literally weeks to read and digest. We managed to confine the judgment on appeal to a mere 123 pages. Sadly, this case was not unique.

145 Difficult as it may be to believe, I have seen sentencing remarks that run for more than 100 pages. I have also seen sentencing remarks that are extensively footnoted. I have no idea why that was done. I doubt that the prisoner being sentenced was concerned to know precisely what the various legal authorities cited

had to say about arcane aspects of sentencing law.

146 Judicial writing courses are valuable. I have participated in such courses and benefitted greatly from them.⁹⁶ I would encourage all judicial officers to expose themselves to the comments and criticisms of people like Professor James Raymond, who are truly expert communicators.⁹⁷

147 That is really all I have to say. I would stress that writing does not come easily to me. Every judgment that I prepare goes through at least several drafts. I wish it were not so. I have seen, at first hand, the work of judges who can produce wonderfully clear reasons, overnight, and in a single draft. Indeed, I have seen judges who can routinely produce *ex tempore* reasons that are word perfect. They are few and far between. There are not many of them sitting today.

148 I believe it was Professor Raymond who said that every word in a judgment must earn its place. Too many judgments, unthinkingly, follow a pattern that is unhelpful to the reader. Is it really necessary to set out, in painstaking detail, the procedural history of the matter? Sometimes that may be required, but I would think only rarely so. Is it essential, to set out verbatim, massively long quotes that have been extracted from previous judgments when what is said could have been summarised in a few short sentences? Is cutting and pasting really to be regarded as good writing? Is it absolutely necessary to recount the entire history of a particular legal doctrine in order to expound the law on some point in issue?

149 It seems to me that in our reasons for judgment we write far too much. I am not suggesting that those reasons should be ‘dumbed down’. However, even the most complex of legal and factual issues can be dealt with using plain language. If we include unnecessary material in our reasons, then plainly, they are in that sense, ‘excessive’. The giving of excessive reasons may be less of a vice than the failure to

⁹⁶ I refer, in particular, to the contribution made to better judgment writing by Professor James Raymond, and the courses he has run in this country.

⁹⁷ See Ronald L. Goldfarb and James C. Raymond, *Clear Understandings: A Guide to Legal Writing* (West Publishing Company, 1988).

provide adequate reasons. It is a vice nonetheless, and one that we would do well to try to overcome.
