Varieties of Judicial Method in the Late 20th Century

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Abstract

This article examines aspects of judicial method in both trial and appellate courts in recent decades. First, it surveys the common law world as it stood in 1960. It criticises various judicial practices in the United States which have not generally been adopted in Australia: delegation of judicial work to others; the delivery of minimally reasoned 'unpublished' opinions; and the production of single unanimous or majority judgments which result from bargaining. It discusses changes in the conditions affecting litigation: the decline of jury trial; increases in the volume and complexity of legislation, and the rate at which it is amended; technological changes affecting the volume of documentary evidence and submissions; and the over-sophistication of judicial assistants. The article also examines changes in judicial doctrine and custom: the insubordination of intermediate appellate courts; the conduct of hearings and judgment delivery; and the increasing length of judgments. It concludes by collecting examples of different styles of judicial writing in Australia and the United States.

I Introduction

Throughout his long and rich life, R P Meagher[1] was active in many spheres. The law was only one of those spheres, but in it he played several roles. Some were successive and some were concurrent. He had an unusually brilliant career as law student, advocate, adviser, legal writer, legal teacher and judge. He is remembered with deep respect and affection in a multitude of circles. It is right that he should be.

He began to have close contact with the law in his first year at the University of Sydney Faculty of Law in 1954, and retained it for more than five decades. This article considers some aspects of judicial method in both trial and appellate courts during that period. What conditions affected it? How did those conditions change? What impact did those changes have? What challenges does judicial method face?[2]

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1 The Honourable Roderick Pitt Meagher AO QC (1932–2011) was a Judge of Appeal of the Supreme Court of New South Wales, among many other eminent roles in the legal profession.

2 Various examples from the conduct of particular judges are given. For obvious reasons those are all taken from the careers of judges who retired some time ago, all but five of whom are no longer alive.

II The Common Law World in 1954

A bird's eye view of the major common law jurisdictions moving west from the International Date Line in 1954 would start with New Zealand. In those days, the judicial system of New Zealand operated almost perfectly. That slice of Scotland which was the small city of Dunedin had a much more significant role in the life of that country then than now, and the Scottish tradition in New Zealand life generally was strong. Although the judges knew little of Scottish law — which is worth examining, and which is recorded in Shaw, Dunlop, McPherson, Rettie, Fraser and the later innominate *Session Cases*[3] — they shared with the Scottish judiciary professionalism to a marked degree. There had been no famous names since Salmond,[4] but any reported case would reveal a steady, skilful, tradesmanlike approach. Thereafter two events happened which, for better or for worse, have changed New Zealand law for ever. On 8 November 1972, Robin Brunskill Cooke was appointed to the bench. On 25 September 1990, the *Bill of Rights Act 1990* (NZ) came into force.

To the north-west lies Hong Kong. In 1954 few would have stopped there. Now many would. The Hong Kong courts are full of capable judges, and not just those who are Non-Permanent Judges of the Court of Final Appeal.

A traveller to the south-west in 1954 would have paid little attention to the Malayan Peninsula, but now the courts, at least of Singapore, backed by a legal profession of high quality, do merit close scrutiny.

On the Indian subcontinent, by 1954 common law based systems had been operating in a sophisticated way for at least a century. Too little attention was paid to them then, and, though they now receive more attention, it is still not enough.

Further west, South Africa presents a paradox. In the 1950s, before the appointment of the Anglophobic Chief Justice Steyn in 1959,[5] every aspect of the South African legal system presented much worth considering, except when it came to human rights. Now the position is largely reversed.

In the north-west, across the Atlantic, Canadian law, recently freed of Privy Council appeals, was only gradually ceasing to operate as it had for many decades. But, like New Zealand law, it was to change forever when the *Charter of Rights and Freedoms*[6] was enacted in 1982.

In the United States, substantive law, judicial technique, and modes of trial differed from those in the rest of the common law world in significant respects.

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3 The authoritative *Session Cases* law reports in Scotland, were cited, prior to 1906, by editor and volume number: the editors were Shaw, Dunlop, Macpherson, Rettie and Fraser.

4 Sir John William Salmond (1862–1924).

5 Arthur Chaskalson, 'The Old Commonwealth (c) South Africa' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009) 362–3.

6 *The Charter of Rights and Freedoms* forms Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

On the eastern side of the Atlantic, in the British Isles, the scene changes again. In 1954 the opinions of the highest English courts — the Court of Appeal and the Court of Criminal Appeal — were extremely important in Australian law, and the opinions of the House of Lords and the Privy Council were even more important. Australian courts were strictly bound by decisions of the Privy Council, to which there was a right of appeal from Australian courts in all cases but those barred by s 74 of the *Constitution*. And the High Court repeatedly said that Australian courts should, as a rule, follow the decisions of the English Court of Appeal[7] and the House of Lords.[8] They were not strictly bound to do so, since appeals did not lie to those courts from Australian courts. But they almost always did. That was because, to use Dixon J's language, diversity was seen as 'an evil', and its avoidance was seen as 'more desirable than a preservation here of what we regard as sounder principle'.[9] And within England an even more rigid system of *stare decisis* prevailed, at least in theory. From 1898 to 1966 the House of Lords was bound by its own earlier decisions. So, subject to certain exceptions, were the Court of Appeal and the Court of Criminal Appeal.

The most famous judge of the day was a member of the Court of Appeal: Lord Justice Denning. He had been a judge for 10 years and was to remain one for another 28 years. The judge to whom time has been kindest, perhaps because of his crisp and attractive prose style and his reputation for authority in oral argument, was a Scots member of the House of Lords, Lord Reid. He had been in the House of Lords for six years and was to remain there for another 21 years. The most dominant judge in his own day was the Lord Chancellor, Viscount Simonds. He had been a judge for 17 years, and was to remain one for another eight. In him, at least, could be seen a preservation of earlier traditions in the final appellate courts. He may have lacked Lord Macnaghten's polished elegance of style. He may not have had the wit — sometimes scintillating, sometimes brutal — of Viscount Sumner. He may not quite have approached the intellectual acuity of successors like Lord Wilberforce and Lord Bingham. Though he pursued his own ideas as to the desirable development of the law, he did not aspire to what posterity was to see as the doctrinal creativity of Lord Atkin. But in his careful analysis of the mass of received authority, Viscount Simonds's standard technique was typical of that employed by the ablest of his predecessors and successors. After his death, English law and British sovereignty was to be radically changed — first by the aftermath of British entry into the European Economic Community in 1973, and then by the enactment of the *Human Rights Act 1998* (UK) c 42.

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7 *Waghorn v Waghorn* (1942) 65 CLR 289, 292 ('pay the highest respect'), 297. In that case the High Court followed the English Court of Appeal in preference to one of its own decisions, which it overruled. However, on occasion it refused to follow English Court of Appeal decisions. See, eg, *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 in *Cowell v Rose Hill Racecourse Co Ltd* (1937) 56 CLR 605.

8 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, 320.

9 *Wright v Wright* (1948) 77 CLR 191, 210.

III The Factors Affecting Judicial Techniques

In the early part of the post-1954 period, Australian judges shared certain experiences. They had all endured the Great Depression. Many had served in the First World War or the Second World War or both. They, and even those who had not seen military service but had shared the national agony, had suffered unpleasant experiences. But the experiences were broadening. They helped to put litigation into perspective. Increasingly, from the 1980s on, very few judges had had these experiences or anything like them.

Further, while there are now 1000 judges in Australia, in 1954 there were many fewer. That remains true even if one includes the magistrates of those days, many of whom were not comparable in ability with their contemporary successors. A small judiciary tends to be more homogeneous than a large one. The same may be said of the bar, which has multiplied five-fold.

Judicial techniques are not affected only by doctrine, but by material and institutional factors as well. From 1954 Australian judges came under various pressures to which they had not been exposed earlier. In some respects they responded below the level of consciousness. To some pressures they sought solutions by searching abroad. They made some borrowings and rejected others.

IV American Judicial Techniques Not Adopted in Australia

It is convenient at the outset to indicate two borrowings which Australian courts have not made.

Australia has not adopted the American judicial practice of delegating to associates the writing of judgments. At least before 2005 it was commonly said that only two of the Supreme Court Justices were totally responsible for their judgments. One was Justice Scalia — a fact readily to be inferred from his distinctive style. The other was Justice Breyer who, though he received first drafts from his staff, tore them into such small shreds that the eventual judgments were all his own work. Certainly they, too, have a distinctive style.

This custom of delegation is apparently widespread. It certainly set in long ago. In the 1950s Douglas J — not usually thought of as a high priest of traditional judicial technique — said to his colleagues: 'For one year why don't we experiment with doing our own work? You all might like it for a change.'[10] In 1976 it was said that 'there are appellate judges whose style [appears to change] annually'.[11] In 1985, Judge Posner referred to 'the ghost writing society, judicial

[10] Artemus Ward and David L Weiden, *Sorcerers' Apprentices — 100 Years of Law Clerks at the United States Supreme Court* (New York University Press, 2006) 245.

[11] Alvin B Rubin, 'Views From the Lower Court' (1976) 23 *University of California at Los Angeles Law Review* 448, 456.

sector'.[12] In 1993 he spoke of 'the handful of judges who today still write their own opinions',[13] saying:

> most judges…are happy to cede opinion-writing to eager law clerks, believing…that the core judicial function is deciding, that is, voting, rather than articulating the grounds of decision.[14]

He also said:

> When judges got busy, the first thing to be delegated was opinion writing; yet even today it would be considered a scandal if judges delegated the hearing of testimony or argument. [15]

And he did describe the delegation of opinion writing as a 'scandal'.[16] Certainly most Australian judges would regard delegating the task of writing reasons for their decisions as scandalous — just as scandalous as delegating the making of the decisions themselves.[17] It seems unlikely that the scale of any delegation in Australia extends beyond the miniscule. There have been rumours of a handful of judges who delegated judgment writing. Perhaps there are others. But most Australian judges would see delegation as wrong for several reasons. One is that, like much other legal work, judicial work is personal. Judges cannot understand the evidence and the law unless they work through it for themselves. That process may alter the orders which the judge initially thought to be appropriate. The orders may also change because the conclusion reached by silent thought often alters after the judge attempts to write down reasoning which would justify the conclusion, but finds it impossible. As Posner said:

> The difference between what is merely thought in silence and what is written down is a reason for having judicial opinions rather than blind announcements of results. It also cautions against allowing law clerks to draft judicial opinions. The law clerk will be reluctant to confess to the judge or even to himself that the outcome that the judge told him to write up will not write (and he may think it due to his own inexperience), while the judge, by not writing, will be spared a painful confrontation with the inadequacy of the reasoning that supports his decision. The judge could be thought to be delegating the dirty work of defending an unprincipled decision to the clerk. Delegating implementation is a traditional method of avoiding having to confront the consequences of one's decisions. I am not suggesting that it is a conscious strategy of judges. The judge does not know the opinion will not write, and the law clerk will not tell him.[18]

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12 Richard A Posner, *The Federal Courts: Crisis and Reform* (Harvard University Press, 1985) 231.

13 Richard A Posner, 'What Do Judges and Justices Maximise? (The Same Thing Everybody Else Does)' (1993) 3 *Supreme Court Economics Review* 1, 19.

14 Ibid.

15 Ibid 26.

16 Richard A Posner, 'Judges' Writing Styles (And Do They Matter?)' (1995) 62 *University of Chicago Law Review* 1421, 1425. The varieties of conduct involved in the practice are described, and the practice is defended, in Patricia M Wald, 'The Rhetoric of Results and the Results of Rhetoric: Judicial Writings' (1995) 62 *University of Chicago Law Review* 1371, 1383–5.

17 In *Geras v Lafayette Display Fixtures Inc* 742 F 2d 1037, 1046 (7th Cir, 1984) Posner J rightly said: 'A district judge cannot tell his law clerk, "You try this case — I am busy with other matters —— and render judgment, and the losing party can if he wants appeal to the court of appeals"'.

18 Posner, above n 16, 1448.

Further, to take the drafts of others and modify them may only be to damage what they did. That is because to change the expression of a thought is often to change the thought itself. And, so far as the function of reasons for judgment is to expound the law, and to some degree to make it, it cannot be delegated.

Second, Australian courts have not adopted the much-criticised American practice of dealing with rising caseloads by issuing large numbers of 'unpublished opinions', which contain either no reasons or very brief reasons, and which are not to be cited as authority.[19]

There is one further American practice, which exists here, if at all, in only a mild way. There the custom is for a single majority judgment to be delivered, particularly in the Supreme Court, but also in intermediate appellate courts. Those 'single' judgments are often not the unified intellectual product of a single mind, but the product of a great deal of unseemly bargaining on substantive points. Here, there is no equivalent pressure for a single majority opinion. Here, an opinion drafted by a single judge may be modified by the suggestions of others for additions, deletions, reframing or reordering, but this is only rarely the product of bargaining. It reflects only a simple acceptance by the author that the suggested change is an improvement. There are probably, however, a few unanimous decisions of the High Court in the 20th century which did result from substantive bargaining.

V Changes in Institutional and Material Conditions

Four changes in institutional and material conditions have affected judicial method here.

One is the decline of jury trial. In 1954 many civil cases in the District and Supreme Courts were heard by jury. Now, at least in New South Wales, hardly any are, outside defamation cases. Though jury trial remains a central feature of trials for serious crimes, it has declined to some extent in favour of trial by judge alone. Presiding over a jury trial requires intense concentration in court, and, even with the aid of bench books, a considerable degree of work out of court. But the judge is relieved of some burdens. The chief of these is the burden of actual decision on the facts. The judge in dealing with a jury must be authoritative and certain about everything but the facts, and the luxury of legal speculation, with its recourse to non-local authority and to the writings of practitioners and academic lawyers, is not open. The fewer jury trials a judge does, the more a judge is likely to be attracted by that luxury in non-jury trials. In contrast, the need to stick closely to the point in jury summings-up will tend to encourage a judge who hears many jury trials to adopt the same methods in non-jury trials. And a judge who is obliged to conduct many jury trials, and to direct juries, as it were *ex tempore*, is likely to give *ex tempore* judgments quite commonly when sitting without a jury. The decline of jury trial has accompanied, and has probably helped cause, a decline in *ex tempore* judgments and a rise in the apparent sophistication of reserved judgments.

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[19] Wald, above n 16, 1373–7.

A second change concerns the rate at which complex legislation is enacted and amended or replaced. In 1955, 55 statutes were enacted in New South Wales, covering 539 pages; in 2007, 99 statutes were enacted, covering 1,945 pages — four times as many. In 1955, 71 statutes were enacted by the Commonwealth Parliament, covering 341 pages. In 2007, 184 statutes were enacted, covering 6,457 pages — 16 times as many. And the explosion in regulation-making is probably even larger. Kenneth Minogue has said:

> The propensity to be forever tinkering with the rules under which we live may be called hyperactivism. It is a morbid condition partly … because it tends to induce activity before experience has generated enough understanding of our situation to allow us to act wisely. … Its general outcome, when unchecked by other elements of our culture, is towards the vulgar identification of being active with merely being visibly seen to be busy.
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> …The fate of the unadaptable dinosaur haunts us, and makes us feel that if we keep still for a moment we shall fossilize to the spot. There is a haunting sense that the pace of change is leaving [us] behind, and that nothing but running hard will allow us to keep up with the rest of the advanced world. Like most follies, that of hyperactivism is defended on the grounds of necessity. We live, it is said, in a complex modern society, and such societies cannot do without constant change and extensive regulation. No rat trying to get to the end of a treadmill was ever in a more desperate condition.[20]

After Sulla retired as dictator of the Roman Republic, Tacitus described the ensuing trends thus: 'The more corrupt the government, the more numerous the laws.'[21] We have lived through a period illustrating that grim saying. For the judiciary, the consequence has been to increase the significance of statutory construction and reduce the development of non-statutory sources of law. And, because the intervals between statutory changes are tending to shorten, bench and bar alike are never confident about having the correct statute, or the correct version of it, to hand. The process tends to bring a febrile, jumpy, impermanent air to judicial work.

A third change relates to the physical features of non-curial life. In 1954 there were few photocopiers, no telexes, no faxes, no email and few dictating machines. Every reserved judgment had to be laboriously typed. A century earlier, Sir William Page Wood VC only delivered one reserved judgment, and declined to deliver more on the ground that the labour of writing them out by hand was 'positively injurious to my health'.[22] In the 1950s it remained common practice to compose reserved judgments in handwriting before they were typed, which certainly shortened them. The rise of new business machines has affected judicial method in two ways. First, it increased the bulk of litigation, because documentary tenders, once small in scale, became enormous, and at a time when the trial was declining in orality in other ways. Second, older judicial habits of judgment writing became at risk of succumbing to 'a cut-and-paste mentality, where it becomes all

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[20] Kenneth Minogue, 'On Hyperactivism in Modern British Politics' in Maurice Cowling (ed), *Conservative Essays* (Cassell, 1978) at 120–1.

[21] *Annals*, III, 27: '*Corruptissima re publica plurimae leges*'.

[22] WRW Stephens, *A Memore of the Right Hon William Page Wood, Baron Hatherley* (R Bentley, 1883) 87.

too easy to replicate quickly whole tracts of unedited text, whether hoovered up from the law reports or legal databases, from textbooks and articles, or even from the *verbatim* evidence itself.'[23] The practice could be defended by a Rankean appeal to the primacy of the sources. But it leads to increases in the length of judgments. It creates a suspicion that the material so generously quoted has not in truth been properly understood and evaluated by the mind of the judge. There is an even more unattractive practice, described thus by the United States Court of Appeals for the Seventh Circuit:

> The judge wrote an opinion which consists largely of paragraphs cut out of the defendants' brief and pasted into the opinion without even the courtesy of retyping. We have criticised this judge's practice of copying portions of a winning party's brief into his opinions before. … We shall not repeat these criticisms. We trust the practice will now cease.[24]

The practice, unfortunately, is not unknown here.

A fourth change concerns the nature of the personnel supporting judges. In 1954 the judge normally had the services of a typist and a tipstaff. Often neither had legal qualifications. Now, it is the norm for tipstaves to be legally qualified. They are not only academically brilliant, but also conscious of that fact. These paragons are supported by other research staff with those traits. Staff of this type create pressure for sophistication, or the appearance of it.

VI Changes in Doctrines and Customs

There have been various changes in doctrine and custom since 1954 which have affected judicial method.

The doctrine of *stare decisis* has changed, both in theory and practice. Towards the end of his long career, Chief Justice Dixon began to doubt whether adherence to English authority was always wise. There was a premonitory sign when, in relation to occupiers' liability, he said in 1960: 'Why should we here continue to explain the liability which [the] law appears to impose in terms which can no longer command an intellectual assent and refuse to refer it directly to basal principle?'[25] Then, in 1963, less than a year before he retired, in a dissenting judgment he indicated a view which the other four members of the Court agreed with: that House of Lords decisions should not be followed at least if, like that in *Director of Public Prosecutions v Smith*,[26] they stated 'fundamental', 'misconceived' and 'wrong' propositions 'which I could never bring myself to accept'.[27] There soon followed the abolition of appeals to the Privy Council in three stages beginning in 1968 and concluding in 1986 with the enactment of the

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[23] Roderick Munday, 'Judicial Footnotes: A Footnote (With Footnotes)' (2006) 170 *Justice of the Peace* 864, 866.

[24] *Lynk v LaPorte Superior Court (No 2)* 789 F 2d 554, 558 (7th Circ, 1986) (Posner J) (Cummings CJ and Bauer J concurring). See also *Andre v Bendix Corp* 774 F 2d 786, 800–1 (7th Circ, 1985).

[25] *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274, 285.

[26] [1961] AC 290.

[27] *Parker v The Queen* (1963) 111 CLR 610, 632.

Australia Acts[28] — the last stage in the Australian movement to independence. In that year, the High Court in *Cook v Cook*[29] said that earlier statements that State Supreme Courts, including Full Courts, should generally follow the English Court of Appeal were no longer to be seen as binding. This was understandable for a variety of reasons, including an increasing divergence between the statutory background in England and that in Australia. Further, the vastly increased size of the English Court of Appeal caused some inevitable internal inconsistencies in its work. Their Honours in *Cook v Cook* then cast doubt over whether decisions of the House of Lords and the Privy Council were binding. That they should not be binding was more than defensible in relation to post-1986 House of Lords and Privy Council decisions: for the attainment of complete Australian independence took place while the United Kingdom was in the process of losing it during the transformation of the European Economic Community into the European Union. But *Cook v Cook* was potentially destabilising in relation to pre-1986 decisions, by leaving it to single judges, if they wished, to depart from longstanding pillars of Australian law. For a time they did not do so.

But recent times have witnessed an even more destabilising tendency — a radical new judicial technique not contemplated by *Cook v Cook*. Not only have trial judges and intermediate appellate courts in Australia declined to follow well-regarded English authorities, they have also declined to follow High Court cases based on them, sometimes without the point being raised by or with the parties.[30]

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[28] *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).

[29] (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ).

[30] In one line of cases, single judges in the Supreme Court of New South Wales and the Full Court of the Supreme Court of South Australia have treated the views of the House of Lords in relation to clogs on the equity of redemption as being wrong: *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323; *G & C Kreglinger v New Patagonia Meat & Cold Storage Co Ltd* [1914] AC 25. That was despite those views having been approved by the Privy Council: *Fairclough v Swan Brewery Co Ltd* [1912] AC 565; and in High Court dicta: *Baker v Biddle* (1923) 33 CLR 188; *Toohey v Gunther* (1928) 41 CLR 181. Instead, they held that clogs were only bad if they were unconscionable: *Westfield Holdings Ltd v Australian Capital Television Pty Ltd* (1992) 32 NSWLR 194; *Re Modular Design Group Pty Ltd* (1994) 35 NSWLR 96; *Epic Feast Ltd v Mawson KLM Holdings Pty Ltd* (1998) 71 SASR 161, 173; *Lift Capital Partners Pty Ltd (in liq) v Merrill Lynch International* (2009) 73 NSWLR 404. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, an intermediate appellate court treated restitutionary doctrines unsupported by Australian appellate authority as the appropriate technique for dealing with what traditionally was handled by the first limb of the rule in *Barnes v Addy* (1874) LR 9 Ch App 244. That happened even though that decision of the Court of Appeal in Chancery (Lord Selborne LC, W M James and Mellish LJJ concurring) was supported by much English authority approved by the High Court. In *Friend v Brooker* (2009) 239 CLR 129, a novel extension of the equitable doctrine of contribution was made by an intermediate appellate court despite its limited support in Australian authority and its contradiction by English and High Court authorities. Then there are cases concerning the decision of the majority of the High Court of Australia (Mason J, Stephen and Wilson JJ concurring) in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, which was based on statements in the House of Lords that the circumstances surrounding a contract were only to be examined to resolve an ambiguity. On two occasions that was not followed by an intermediate appellate court on the ground that it was inconsistent with later decisions of the House of Lords, later decisions of intermediate appellate courts in Australia and later decisions of the High Court which were silent on the point: *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382, 384–5 [1]-[4] and 406–7 [112]–[113]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15, 24–5 [14]-–[18], 29 [42], 33 [63], 70–86 [239]–[305].

This decline in respect for precedent is curious. The decisions of courts which do not follow precedent are themselves less likely to be followed in future either by their successors or by courts lower in the hierarchy: for if the trial and intermediate appellate divisions of superior courts will not follow decisions which bind them and substitute new precedents, why should others see themselves as bound by those new precedents?

Customs common in the 1950s have faded away. Then, it was common for both trial and appellate judges to walk onto the bench ignorant of what the case was about — sometimes deliberately and proudly ignorant, and not irrationally so. Often appeals as well as trials were opened by counsel reading the pleadings — a method of helping the ill-prepared work their way into the case, but on occasion disturbed by Chief Justice Jordan's indication that he knew well enough what was in the pleadings and that he wanted to hear what the point of the appeal was. Proceedings would then flow on, with the appropriate parts of the authorities — of which there were many fewer than now — being read in full and debated with the bench. Then, save in the most complex of cases, the court could proceed to deliver judgment *ex tempore*. Although the time devoted to oral argument was greater then than now, the merit of this system lay in its fair and public nature. There was no time for points not raised in argument to occur to the judicial mind after reservation; any reference to fresh points or authorities in an *ex tempore* judgment could provoke an application to be heard on them after the reasons had been delivered but before orders were made. Although these procedures were less common in the High Court and the House of Lords, they were not unknown. In the early 1880s the House of Lords delivered *ex tempore* reasons in half the appeals.[31] The same was true in 1912.[32] But this custom has changed. Modern judges perceive themselves to be working much harder than their predecessors, and they perceive the pressures on the courts to be greater than in the past. They may be right. But what matters is not the fact that their perceptions may be right, but the fact that they exist. Those perceptions have led to attempts to shorten the time for oral argument, and to avoid time-wasting by trying to isolate key issues, by various forms of what might loosely be called 'case management'. A key element in case management is the requirement to file written submissions. To the increased factual complexity of many cases — whether it be the result of the complexity of commercial transactions, or a growth in the detail of medical and other expert evidence — has been added increased complexity in legal analysis and in voluminous reference to case law, much of it unreported and unreportable but easily obtainable through computers.

In these circumstances, to a greater degree than in the 1950s, the delivery of unreserved judgments — which is still very common — depends on much preliminary work. The carrying out of that work creates a risk that an appearance of prejudgment may be conveyed. Counsel in Melbourne would regard it as a great triumph if Brooking J interrupted the argument to write something down in his notes for judgment, for if he wrote something between the lines he was paying the

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31 Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Weidenfield and Nicolson, 1978) 71, n 197.

32 Ibid 72.

tribute of adjusting his judgment to meet a good argument, while if he turned the document sideways in order to write in the margin, there was a chance he might actually be changing his mind.

Another trend has been accentuated since 1954. It was common, at least in the Anglo-Australasian legal world, for reasons for decision to be given – detailed, but generally compact. This had not always been so. Before the 19th century reasons — either as given or as reported — could be fragmentary. Indeed, in Scotland the reasons tended not to be reported at all until the end of the 18th century. When reporting there began to grow up, it irritated Lord Eskgrove, who complained bitterly of the reporter that 'the fellow taks doon ma very words'.[33] Quite old authorities can be assembled in support of the duty to give reasons, but in 1971, in *Pettitt v Dunkley*,[34] there was a sharp reminder of its existence. Stress on the obligation to give reasons has increased since then. It is now much more common to see a ground of appeal complaining about a failure to give reasons, and sometimes the ground succeeds. Here, in contrast to the US, the custom is not to skimp reasons for judgment. If anything, in some hands they have become over-elaborate.

VII Judicial Method before the Hearing

With that background, analysis of the elements of judicial method can be divided into three parts: pre-hearing work, work at the hearing, and post-hearing work.

In relation to pre-hearing work, the following issues arise. Should the court conduct preliminary work on the case? The answer must be affirmative if the parties have been directed to provide materials for preliminary perusal.[35] Should a draft judgment be prepared with a view to delivery of an *ex tempore* judgment, or in order to serve some other purpose, such as a preliminary ordering of thought? This must be a question of taste. One risk in preparing a draft judgment in advance is that the case may settle. Another is that preconceptions may grow up which cannot be shaken by the evidence or by later argument. That point is relevant to another question which faces appellate courts: should the case be discussed before the hearing?

Another question is whether the parties should be notified before the hearing of matters troubling the court. This is a reasonable course. The alternative is not to tell the parties until after the oral hearing has begun. At that time, counsel, being perhaps harassed, weary and ill-equipped to deal comprehensively with the new points, may request the adoption of the highly unsatisfactory course of filing written submissions after oral argument has concluded.

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33 Lord Cockburn, *Memorials of his Time* (Adam & Charles Black, 1856) 165.

34 [1971] 1 NSWLR 376.

35 That was Lord Diplock's position, though not that of other Law Lords. See Alan Paterson, 'Does Advocacy Matter in the Lords?' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart, 2011) 257–8, 262.

VIII Judicial Method at the Hearing

In relation to the hearing, the following issues arise.

Is the court at liberty to rest its decision on points of law or fact which the parties have not raised? That is a difficult question. Points of law cannot be raised on appeal if they could possibly have been defeated by calling evidence at trial. And even if that test is met, the appellate court may decide not to entertain a new point of law on which it lacks the assistance it might have got from the court appealed from. Further, the court is deciding between adversaries and relying on them to raise the issues; it is not an inquisitor. On the other hand, the court is not obliged to decide the case on a shared but erroneous assumption of the parties about the law; or even about facts emerging from the evidence. It has to do justice according to law in the light of the evidence.

Where it is legitimate for the court to consider points, whether of law or fact, on which the court may rest its decision, and which the parties have not raised, to what extent should the parties be informed of them? That is an easy question. The parties must be informed of all points of law of that kind,[36] whether they occur to the bench during oral argument or after it is closed, and, in the latter event, should be given a further opportunity of making submissions on them.[37] The same is true of all points of fact of that kind — whether they relate to the observations of parties and witnesses which the legal representatives may not have noticed,[38] to matters which might be the subject of judicial notice,[39] and to aspects of common or specialised experience which might affect the reasoning of the judge or the jury.[40] Losing parties may choose not to take advantage of these opportunities, but that failure is to be visited on their own heads.

Apart from the innumerable occasions on which a trial judge may have to take positive steps to control the trial, how far should the court intervene in argument? There is no doubt that some counsel dislike intervention, because it can disturb the flow of an address. It can cause ideas which counsel meant to develop to be sidelined and eventually to vanish without trace. Some appellate judges dislike intervention too. They do so partly for the same reason. They dislike judicial interruptions which prevent a plausible but not fully understood argument by counsel from being put in the way that counsel would wish it to be put. Some judges are temperamentally averse to intervention. Excessive interruption can also involve irrelevant hobbyhorses occupying too much time and attention. But few judges express these dislikes. An exception is Lord Morris's behaviour during the hearing of *Allen v Flood*,[41] the great case on the extent to which trade union officials not involved in a conspiracy and not causing breaches of contract can

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36 *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 398; *Pantorno v The Queen* (1989) 166 CLR 466, 473; *Friend v Brooker* (2009) 239 CLR 129, 171–4 [114]–[118]. See Alan Paterson, *The Law Lords* (Macmillan 1982) 38–43; Paterson, above n 35, 260–1.

37 *Spring v Guardian Assurance plc* [1995] 2 AC 296, 316.

38 See, eg, *Government Insurance Office of New South Wales v Bailey* (1992) 27 NSWLR 304.

39 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 511.

40 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 640.

41 [1898] AC 1.

molest the trade of others. Lord Halsbury and Lord Herschell engaged in repeated interruptions, to the point that argument became a dialogue between them without assistance from counsel. This provoked Lord Morris into saying: 'Now I can understand what is meant by molesting a man in his trade.'[42] Modest intervention only was Sir Owen Dixon's practice. 'He confined himself to Delphic comments, conveying that sense of Olympian omniscience and detachment which is apparent when reading his judgments.'[43]

The opposite approach was taken by one of the greatest of Australian advocates, Sir Garfield Barwick. On leaving the High Court in 1981 he said:[44]

> I early found that I liked talking to a judge and I liked him to talk to me…. And I came to think that the silent judge, the chap who would not speak to me, was almost anathema. I had to devise means of making him talk. I may have succeeded in that. No-one has ever had to stretch himself much to make me talk I am afraid, and no-one has ever had to work very hard to find out what the tendency of my mind may be, and some that may have disturbed. I am sorry if it has.

Sir Maurice Byers was less kind about Sir Garfield's technique:

> I don't mean to suggest that when putting an argument you felt like a dispatch rider delivering a message across no man's land amidst a storm of shells and bullets — only that you needed your wits about you to keep upright.[45]

In contrast, Sir Maurice said that the first few times he appeared before the High Court presided over by Gibbs CJ: 'I was quite disconcerted. It took me some time to spot the difference. I was the only one talking. All the Judges appeared to be listening.' Of course, the testing of submissions is one thing. Irascibility — however much it has been provoked — is another. And rudeness is yet another. Both irascibility and rudeness — whether to counsel or to other judges — are not strictly incompatible with the achievement of high judicial quality. There are significant examples of irascible, rude but outstandingly able judges. But this conduct does not assist in achieving high judicial quality. It is unsatisfactory in appeals. It is even less desirable in trial judges, where there is no judicial colleague to protect beleaguered counsel from petty tyranny. The interruption of argument by legitimate questioning may bring evils in its train, but they are necessary evils. Irascibility may be hard to control, but it is an evil that is not necessary. Rudeness is even less so. And interruptions designed to prevent particular arguments being put are quite wrong. The judicial manner of Lord Bingham — or in Australia, Chief Justice Gibbs, or Sir Nigel Bowen, or Mr Justice Mahoney — is the desired standard.

To what extent should the courts encourage or discourage the employment of written submissions by the parties in substitution for or in addition to oral argument? The rise of written submissions is one of the most striking of the post-

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42 R F V Heuston, *Lives of the Lord Chancellors 1885-1940* (Oxford University Press,1964), 110.

43 Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 879.

44 'Retirement of Sir Garfield Barwick as Chief Justice' (1981) 148 CLR v, vii.

45 'Toast to Sir Harry Gibbs, New South Wales Bar Association Dinner, 5 December 1986' [1987] *Bar News* (Autumn), 9.

1954 changes. The opportunity to supply well-drafted written submissions is valuable, for they can have great utility. But full advantage is not always taken of that opportunity. And bloated and undiscriminating written submissions, often containing submissions so silly that their makers would never have had the nerve to advance them orally, is positively inimical to the doing of justice.

IX Judicial Method after the Hearing

After the hearing, many questions can arise. It is not possible now to do more than list some of them.

Where a single judge is sitting, should judgment be delivered *ex tempore*? What about where an appellate court is sitting?[46]

Should appellate judges meet after the hearing to discuss the case?[47] Or does this run the risk that, during the discussion, fresh points will emerge which were never raised with the parties?

If there is division of opinion among an appellate court, should those in the minority only dissent if their opinions are held with particular strength? If so, how much strength?[48]

If an appellate court agrees in the result but not in the reasoning that leads to it, should separate judgments be published? And if there is substantial agreement in the reasoning, but disagreement on incidental doctrinal matters, emphasis or style, should separate judgments be published?[49]

To what extent should judgments have recourse to legal treatises or articles,[50] particularly since the courts are much more concerned with doctrinal questions which to modern academic writers are insufficiently broad, ambitious or interdisciplinary?[51] To what extent should judgments correspond with the type of reasoning employed in those treatises or articles — what A W B Simpson called

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46 For a discussion of problems with ex tempore judgments in appeal courts, see Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 *Law Quarterly Review* 226, 229–32. In the days when many appeals to the High Court were by right on the ground that $20,000 was at stake, it was common for three judge benches to decide ex tempore — and very valuable those judgments are in the now declining field of assessing damages for personal injury.

47 For an affirmative answer, see Louis Blom-Cooper, 'Style of Judgments' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009) 155. See also, Wald, above n 16, 1413–15.

48 Wald, above n 16, 1412–13.

49 For arguments either way, see Louis Blom-Cooper, above n 47, 154–5. See also, James Lee, 'A Defence of Concurring Speeches' [2009] *Public Law* 305. For a discussion of the difficulties of getting an agreed majority opinion in America, see Wald, above n 16, 1377–80.

50 See, *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16 (Megarry J). See also, Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart, 2001); Paterson, above n 35, 278; Keith Stanton, 'Use of Scholarship by the House of Lords in Tort Cases' and Alexandra Braun, 'Judges and Academics: Features of a Partnership' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart, 2011) 201, 227.

51 Charles W Collier, 'The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship' (1991) 41 *Duke Law Journal* 191.

their 'self-conscious erudition'?[52] Is there a risk, as Lord Rodger suggested, that the judge who knows that after judgment there will come academic scrutiny will produce a judgment 'which shows, on its face, that the judge too has read the literature and has got the academic tee-shirt'?[53] To what extent should academic textual apparatus be employed — tables of contents, other tables, footnotes,[54] headings, sub-headings, cross-references, schedules, appendices and charts? Dr Munday has asked whether these methods merely:

> indulge a discourse that is directed at a quite different constituency [from the parties] – a constituency that busies itself in historical sources, in the *minutiae* of a self-regarding scholarship, in display, in the sprawl of background literature, in recondite allusion and in all the other distracting self-indulgences that can gratify a restless intellectual curiosity? [55]

And Lord Rodger — a bachelor — waited 'with a certain fascinated horror for the moment when judges choose to follow another, nauseating, academic habit and begin by thanking their "partners" and "kids" for tolerating their absence during the long hours needed to produce the opinion.'[56]

Is length to be avoided? If so, can problems of excessive length be met by abbreviating accounts of the facts, or quotations from the evidence, or quotations from cases or statutes?[57] Can extensive quotation from cases be seen as 'rarely warranted' and 'be read as betraying a lack of intellectual confidence — or even…a certain intellectual indolence'?[58]

To what extent should judgments decide only the precise legal points at issue? Should judges, in the words of Walter Bagehot, decline to 'bestow conclusions on after-generations' and 'let posterity decide its own controversies'? Or should they, again in Bagehot's words, offer 'an ample exposition of principles applicable to other disputes'? Is it right for the judge to view the controversy as being 'not a pitiful dispute whether A or B is entitled to a miserable field, but a glorious opportunity of deciding on some legal controversy on which he has brooded for years, and on which he has a ready-made conclusion'?[59] Does the decision of a small point require examination of a much larger principle?

What criteria should apply to the manner in which a judge expresses disagreement with a member of the same court, or with the author of some earlier decision?

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52 A W B Simpson, 'The Survival of the Common Law System' in *Then and Now 1799-1974. Commemorating 175 Years of Law Bookselling and Publishing* (Sweet & Maxwell, 1974) 64.

53 Lord Rodger, above n 46, 237.

54 Ibid 234–6; Roderick Munday, 'Fish with Feathers: English Judgments with Footnotes' (2006) 170 *Justice of the Peace* 444; Munday, above n 23, 864.

55 Munday, 'Fish with Feathers', above n 54, 448.

56 Lord Rodger, above n 46, 237.

57 For a description of the significance of the way in which the facts are stated, see, Wald, above n 16, 1386–90.

58 Munday, above n 23, 866.

59 Norman St John-Stevas (ed), *Bagehot's Historical Essays* (Hobson, 1971) 133–4.

Should appellate judgments set out all the arguments of the parties? Or only the crucial arguments of the losing party? Or none of the arguments of the parties?[60]

Then there are more mundane questions, though they can have great practical importance. Where trial judges whose findings of fact on a first set of issues prevent a second set of issues from arising, may they abstain from finding the facts on the second set of issues? Or should they guard against the risk that an appellate court may disagree with the findings on the first set of issues by finding the facts on the second set of issues as well in order to avoid the evil of a new trial? If so, should they also deal with all the arguments advanced by the parties on that second set of issues, somewhat hypothetical though the exercise may be?[61] And if a decision by an intermediate appellate court on a first set of grounds of appeal makes it unnecessary to decide a second set, is it desirable to deal with the second set?[62] Is a negative answer sufficiently supported by referring to the increase in the burden on a busy intermediate appellate court — unnecessarily if the High Court dismisses an appeal? Is an affirmative answer sufficiently supported by referring to the increase in delay if the High Court allows an appeal and the matter has to be remitted to the intermediate appellate court?

X Four Categories of Judgment

It is time to depart from this perhaps excessive filleting and anatomising of problems for the judicial method, and to turn to some categories of judgment considered as a whole. The styles of trial and appellate judgments exhibit considerable variety. Within each style there are satisfactory and less satisfactory examples. Putting aside the routine instances, there are four categories of interest in the last six decades.

The first category is marked by a taut, brisk, muscular style, as free as possible of dicta. The technique involves isolation of the minimum issues on which the case turns, and the resolution of those issues with the most distilled approach to fact-finding and the most economical approach to discussion of the law. It is an old style, repeatedly employed by Jordan CJ and Cussen CJ. Though old, it has survived into modern times, but with a declining number of adherents. In the High Court its leading exponent was Starke J. It has flourished most in intermediate appellate courts: in WA through Burt CJ, in SA through King CJ, in NSW through Street CJ, Glass JA and Meagher JA, in Queensland through McPherson JA, in the Federal Court of Australia through Hely J. It is easier for appellate judges, dealing with more refined issues than trial judges, to adopt this style, but it can be employed by trial judges. Two illustrations can be found in McLelland J's decisions in *United States Surgical Corporation v Hospital Products International Pty Ltd*[63] and *Ritz Hotel Ltd v Charles of the Ritz Ltd*.[64] The former occupies

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60 Louis Blom-Cooper argues for an affirmative answer to this question in Blom-Cooper, above n 47, 161–2.

61 Lord Rodger, above n 46, 227.

62 *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274.

63 [1982] 2 NSWLR 766.

48 pages of the NSW Law Reports, but the case took 125 days to hear. The latter occupies 61 pages of the same reports, but the case took nearly eight months to hear. Neither judgment wastes any space. Complex factual findings are crisply made. Legal analysis of the many authorities cited — in the latter case, nearly 300 of them — is conducted with brevity but also with an air of confident command. So far as this first type of judicial technique deals with the law, it may rest on a grim determination, if not to hand on the received legal inheritance entirely unchanged, at least to do as little damage as possible to it.

A second approach, which may differ from the first only in degree, is somewhat more expansive, less pared down, but it remains businesslike and direct. It rejects irrelevance and longwindedness. Each issue is isolated, examined and disposed of before the next is taken up. The reader has a sense of orderly, steady and efficient progress. In the High Court one exemplar was Gibbs CJ. Another was Mason CJ. In NSW, Hope JA, Samuels JA and Kearney J illustrate it. A Victorian example is Smith J. A South Australian example, at least in many of his judgments, is Wells J. A good example from the Federal Court of Australia is Lockhart J.

A third category is more subtle and complicated. It may be said to originate in the style adopted by Dixon CJ and Evatt J, and, to a lesser extent, Latham CJ — for the style of earlier members of the High Court was, as in the cases of Griffith CJ, Barton and O'Connor JJ, much briefer, or, as in the case of Isaacs JJ, much more idiosyncratic and passionate. The method rests on the slow development of complex and interrelated themes. Sir Maurice Byers, in commenting on the clear style of Chief Justice Gibbs, said:[65]

> This is at once the most difficult of skills to master and the writer's most precious gift to the reader. There is about almost every judgment of Sir Owen Dixon that I have read a slight haze of ambiguity, a hint of baffling distances and remote horizons. A Gibbs judgment is crystal clear.

But the ambiguity, the baffling distances and the remote horizons were often deliberate. Deliberate or not, in them lay the possibility of future development. More modern examples include the somewhat less ambiguous Kitto J and the quite unambiguous Gaudron J. It is not easy to summarise, dissect or truncate the reasoning of those whose techniques fall within this category. It is notorious and significant that Dixon CJ did not employ headings, or even many paragraph breaks. Many paragraphs in *Australian Communist Party v The Commonwealth*[66] go on for more than one page, and in *New South Wales v Bardolph*[67] there is one paragraph that is more than five pages long. This phenomenon is not an accident. There are few points at which the subtle flow can be broken.

Finally there is a heterogeneous miscellany. Its members share non-routine methods of judgment writing, yet they fall outside the first three groups and they share no other defining characteristic. Only one example will be taken: Sir Victor Windeyer. No Australian judge has ever possessed a more distinctive and brilliant

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64 (1988) 15 NSWLR 158.
65 'Toast to Sir Harry Gibbs' above n 45, 10.
66 (1951) 83 CLR 1.
67 (1934) 52 CLR 455 at 510–15.

prose style. No Australian judge has revealed, in a court on which have sat extremely learned judges like Isaacs CJ and Dixon CJ, deeper learning of many kinds. Windeyer J was said not to be fast in court. But who could appear fast with Barwick CJ, whom Sir Paul Hasluck compared to 'an eager fox terrier',[68] vigorously reorganising the intellectual environment to suit his own desires? Windeyer J was also said not to be fast in producing judgments. But even if that can now be established, the brilliant style and the deep learning certainly rested on meticulous craftsmanship. Craftsmanship takes time. His 18-page judgment on equitable assignments in *Norman v Federal Commissioner of Taxation*[69] went through 12 or 14 drafts,[70] in an era when any significant change to a typed page required the whole page to be retyped and all the pages which followed. Dixon CJ praised that judgment, though only in wintry fashion: 'I do not know that there is anything contained in it with which I am disposed to disagree.'[71] But it is as close to being a masterpiece as a judgment can be, and there are many others from Mr Justice Windeyer's pen to rival it.

XI Judge Posner's Pure, Impure and Narcissistic Styles

The amorphous categories just traversed may be compared with Posner's division of the styles of American judicial opinions into three groups: pure, impure and narcissistic.

The pure style is characterised by 'a lofty, formal, imperious, impersonal, "refined", ostentatiously "correct" (including "politically correct"), even hieratic tone.' The pure style is directed to the parties and their lawyers. It is 'characteristic of the vast majority of opinions written by law clerks, which means most opinions in all American courts today'. It is 'the inveterate style of law review editors, from whose ranks most of the clerks are drawn.'[72] Most American judgments employ the pure style. Posner's examples of its supreme exponents are Cardozo, Brandeis, Frankfurter, Brennan and Harlan (the younger) JJ.

The impure style tends 'to be more direct, forthright, "man to man", colloquial, informal, frank, even racy, even demotic.'[73] The impure style is directed not to the parties and their lawyers, but to 'one in a thousand" who can see through 'the artifice of judicial pretension" characteristic of the pure style. Posner's examples of the impure style are Holmes, Douglas, Black and Jackson JJ, and Learned Hand J. The ponderous Latinity of Jackson J's mannered and overwritten prose does not seem to position him correctly in this group. And not all Posner's adjectives apply to Holmes J, whose lofty and grand seigneurial manner, self-consciously redolent of high culture, could not be described as colloquial, racy or demotic.

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68 Sir Paul Hasluck, *The Chance of Politics* (Text, 1992) 95.
69 (1963) 109 CLR 9, 23–40.
70 *Ex rel* Mr D Graham QC, his associate at the time.
71 (1963) 109 CLR 9, 16.
72 Posner, above n 16, 1432.
73 Ibid 1426.

The narcissistic style is described by Posner as 'the unmediated expression of self'. His example is Blackmun J, some of whose opinions Posner described as 'maudlin', 'melodramatic', 'unreasoned', 'narcissistic', 'sophomoric' and 'gratuitously indecorous'.[74]

Can Australian judges be fitted into these categories? So far as there are standard judicial styles here, they do not correspond with the pure style in America. There are a few, but only a few, successful exponents of something corresponding roughly with the impure style. Examples could be listed of those who employ the narcissistic style. However, perhaps because Australian judges do their own work, Australian judgments reveal a much wider range of idiosyncrasy, and it is much more difficult to organise them into Posner's three categories.

XII Conclusion

The criticisms made by A W B Simpson in 1984 of English appellate judges remain true of Australian appellate judges. They produce opinions which are 'rambling and excessively detached'. They reveal 'undisciplined individualism' and a 'complete lack of any collegiate spirit'. It may be, as Simpson said, that these factors reduce 'much of their work to mere confusion'.[75] But despite these criticisms, the judgments do reveal that their authors have in some measure preserved independence — from the legislature and the executive, but, perhaps equally importantly, from each other.

There never was a judge who possessed a more independent spirit than Meagher JA. That spirit received intense and vigorous expression in his judgments. He was quite exempt from external control and the influence of others. He was totally free of cant and of the demands of fashion. No one ever took less account of public opinion for its own sake. The instincts of the herd never affected him. No one was less likely than him to suffer the fate of the Gadarene swine. He saw his duty as being to hear full argument from counsel and then to concentrate on trying to formulate his personal view of what should be the just outcome of the controversy according to law. In those qualities lie the sources of his greatness.

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74 Ibid 1434–5.

75 A W B Simpson, 'Lord Denning as Jurist' in J L Jowell and J P W B McAuslan (eds), *Lord Denning: The Judge and the Law* (Sweet & Maxwell, 1984) 450–1.