Writing Judgments

Annual Lecture 2005

by

Lord Hope of Craighead

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Writing judgments is an art, not a science. It is not something that is easily taught, and I am not sure that is an appropriate subject for a lecture such as this. Far better, you may think, that we should follow our own instincts and build up our expertise by practice and experience. Each case, after all, is different, and it is the nature of the case that dictates the problems that are to be solved and shapes each judgment. Moreover, we spend much of our judicial lives looking at other people's judgments. Our bookshelves and websites are full of them. It is the lifeblood of our existence. We all think that we know what is expected of us when the time comes to put pen to paper or to settle down in front of our computer screens. Why should we be regimented when it is perfectly satisfactory for us to do what comes naturally?

I do not wish to suggest, of course, that we should be regimented. In the Continental system the opposite is true. This is seen as an application of the rule of law, which governs all public authorities. The legitimacy of the judicial power is rooted in the idea that the law must be complied with and that everything that a judge does must be regulated. In Spain, for example, it is a constitutional requirement that reasons for judgments must always be given [1], and judgments are prepared according to the Basic Law of the Judiciary and regulations contained in the laws of Civil and Criminal Prosecution about the way reasons for decisions must be formulated [2]. It is not surprising that, in order to meet requirements of that kind, judges are trained how to write judgments [3]. The training that they receive is designed to ensure that their judgments conform to a uniform pattern. There is a fixed format of judicial decisions, with no discussion or acknowledgement that there may be several possible outcomes. This system serves to reinforce the apparent objectivity of the judgment by concealing much of the judicial reasoning process [4]. The product is that of the system as a whole, which is essentially collegiate in nature, not that of the individual. The essential requirements for a reasoned decision are satisfied and, in a culture that favours judicial anonymity, the system seeks to ensure that the work of no single individual stands out from the common pattern [5]. There is no encouragement in this system for variation in style according to the writer's taste or for embellishment. The style of judges in the common law systems, on the other hand, has been described as that of masterful advocates defending their own conclusions – the very opposite of that of Continental judges ingrained with notions of regulation and officialdom [6].

It is not easy to penetrate judgments that are written in Spanish, Dutch or German unless one is an accomplished linguist. But one can get some idea of what this means from reading some of the earlier decisions of the European Court of Human Rights, which show all the signs of having been written by a civil servant according to a pre-determined formula. You may have noticed that more recent decisions, especially of those of the Chambers presided over by Sir Nicolas Bratza [7], show a greater trend towards individuality. But, as a general rule, the formula still prevails in that court. Sir David Edward, who sat for 12 years [8] as a member of the European Court of Justice in Luxembourg, now sits as a temporary judge of the Court of Session in Edinburgh. The opinion that he delivered in his first case [9] in the Court of Session was characterised by simplicity of structure and economy of language that is typical of the judgments issued by the ECJ. The style was distinctive precisely because it was so disciplined – quite unlike the conversational, combative or rhetorical styles that we in the common law jurisdictions are used to.

Just over 20 years ago Alan Paterson, now a Professor of Law at Strathclyde University, wrote a book about the process of decision-making by the Law Lords [10]. He had studied their methods, and most of them had given him interviews. The thesis of his book was that decision-making in the House of Lords should be seen as a social process [11]. By that he meant

[1] Spanish Constitution (1978), art 120.3. [2] The Basic Law of the Judiciary (LOPJ-1985), the Law of Criminal Prosecution (LECr 1882) and the Law of Civil Prosecution (LEC-2000); I am grateful to my colleague Baroness Hale of Richmond for these references. [3] See Lord Rodger of Earlsferry, *The Form and Language of Judicial Opinions* (2002) 118 LQR 226, 227. [4] Jacqueline Hodgson, *Codified Criminal Procedure and Human Rights: Some Observations on the French Experience* [2003] Crim LR 165, 168. [5] In Spain, article 689 of LOPJ-1985 enables a judge, by means of a reserved vote, to dissent from the decision of the majority. [6] J Gillis Wetter, *The Style of Appellate Judicial Decisions* (1960), 35, quoted by Lord Steyn in his Bentham Club lecture, University College London (1996), *Does Legal Formalism hold sway in England?*, pp 56–57. [7] E.g. *Pabla Ky v Finland*, application no 47221/99, 22 June 1994. [8] From 1992 to 2003. [9] *Skinner v Scottish Ambulance Service*, 2004 SLT 834. [10] *The Law Lords* (Macmillan, 1982). [11] Ibid, Introduction, pp 7–8.

that the speeches that were delivered by the Law Lords were the product of a complex series of exchanges between the Bar and Bench and between the Law Lords themselves. But he was surprised by the fact that fewer than half of the Law Lords whom he interviewed had given any thought to who their audiences were when they were preparing and delivering their speeches [12].

I suspect that the impressions of the Law Lords that Professor Paterson formed as a result of these interviews are capable of being applied to the judiciary generally. I think that we would all agree that the opinions which we deliver are, to a greater or lesser extent, the product of a social process. It involves counsel, other judges and perhaps others, such as our spouses, our children or those we happen to meet on the golf course with whom we may discuss things from time to time. Concern as to who our audiences are is perhaps less widely appreciated. It is a subject that deserves a little thought as, in the best traditions of the Judicial Studies Board, we examine what we are doing and ask ourselves whether we could do it better. So it is to the questions who our audiences are, and how we can best serve them when we are preparing our opinions, that I should like to devote this lecture.

First, our audience. Who do we think we are speaking to when we write opinions? This is not an idle question. For, if we are unclear about this, how can we be sure that we are framing them in the right way? A judicial opinion is, of course, addressed to the parties in whose favour, or against whom, the judge is pronouncing judgment. Unless it is a decision taken in a court of last instance, a careful judge will ensure that the opinion will give a sufficient explanation of the reasons for use by the appeal court. But there is a wider audience. Obviously it includes the legal profession, including other members of the judiciary who may be seeking guidance about what to do in similar cases. Then there are the academics, whose interest is not just to comment and to criticise. They have a teaching function too, so an opinion that is developing the law ought to be capable of being used for that purpose. Sometimes we choose our own audience. This includes members of the public. We issue warnings to those who are tempted to engage in criminal activity, and we try to reassure the victims of crime. We give directions on practice to the profession and to other judges. And sometimes, in an appellate court, we direct our opinions at each other in the hope – usually a forlorn hope, it must be said – that opinion which has been written by the person to whom it is directed will be changed [13]. As Lord Steyn has observed [14], the fact that judges under our system are free to express their disagreement with one another, and do so freely and robustly, is a healthy feature of our democratic system. But, of course, once the opinion is in the public domain it is there for everyone to read who cares to do so.

How then is one to set about the task of preparing a judicial opinion? I can only speak of this from my own experience. And I must confess at once that I have almost no experience of writing judgments at first instance. My progress to the Bench in Scotland took a course that would be unthinkable in the situation we have now in that jurisdiction, which places all judicial appointments in the hands of a judicial appointments board. I was appointed direct from the Bar to the chair of the First Division of the Court of Session as Lord President and Lord Justice General on the recommendation of the Lord Advocate. I was untrained, and I had no previous judicial experience. Within a few days of my assuming the chair I found myself delivering ex tempore judgments in the Criminal Appeal Court. With very rare exceptions thereafter when I was dealing with chancery work at first instance, it was a continuous output of opinions, both written and oral, at appellate level that occupied my time in Edinburgh until, after seven years and still without training, I was moved to the comparative calm of the appellate and judicial committees at Westminster and in Downing Street.

The first question that an appellate judge must ask himself is whether or not to write an opinion at all. The judge at first instance rarely has that option in a case where he is called upon to deliver a final judgment. But at the appellate level there is

[12] Ibid, p 10. [13] I was the recipient of such an address in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [2000] 1 AC 147, where Lord Goff of Chieveley directed a section of his speech which was headed 'The conclusion of Lord Hope of Craighead' at something that I had written in mine in the hope, perhaps, that I might be persuaded to delete it. [14] In his Bentham Club lecture, University College London (1996) *Does legal formalism hold sway in England?* , 56.

usually at least one other judge. The number of judges on the tribunals on which I have sat has varied from three to nine. So there has always been the opportunity for me, except when I find myself a member of a dissenting minority, to remain silent except to say 'I have nothing to add' or 'I agree' or, in the style we use in the House of Lords [15] 'I have had the advantage of reading in draft the speech of Lord X' and so on. The practice has emerged recently of using the word 'privilege' in place of the word 'advantage' [16]. Of course, reading a speech by a colleague with whom one is in agreement is always both an advantage and a privilege. On that view I hesitate to adopt the practice of appearing to praise some speeches more than others. I suspect that the word 'privilege' is reserved for an opinion that is thought to have achieved a particularly high standard of reasoning or of scholarship.

The chairman, of course, has some responsibility in the matter as to who is to write. I usually found myself delivering the leading opinion when I was sitting in the High Court of Justiciary in Edinburgh. This was a considerable burden in the Criminal Appeal Court. It was not until quite late on in my time there that a preliminary sift of the criminal appeals was introduced when provision was at last made for the granting of leave to appeal, as it had to be, by statute [17]. Prior to its introduction the appellant in every case had a right to be heard. There were frequently as many as 75 appeals on the list of cases to be heard each week. Not every appellant turned up, and a number of the appeals went off for other reasons. But the practice was for an opinion to be delivered in every case that was heard, however trivial, to ensure in case of complaint that the grounds for the decision were placed on the record. It would have been quite impossible to keep up with the volume of work if all these cases had been reserved for later decision or made the subject of a written judgment. So a high proportion of them – as may as possible, indeed – were dealt with there and then and were the subject of brief opinions that were delivered ex tempore. I tried to distribute the work among my colleagues. But, as luck would have it, most of the cases that I allocated to them went off. In any case I felt that it was my responsibility as the permanent chairman of the court to do the more important ones and to carry the major part of the workload.

Most of these cases were the subject of a single opinion, which was delivered as the opinion of the court. But it used to be the practice when I started at the Bar for the chairman to deliver his own opinion first, and then call on the other members of the court in turn to give them an opportunity to deliver their own ex tempore opinions. Those who were on the wings then had to decide, usually on the spur of the moment, whether they should say anything. It was rare for these invitations to produce any response other than the time-honoured words 'I concur' or 'I have nothing to add'. Sometimes they produced no response at all. I remember Lord Justice General Clyde issuing such an invitation to a colleague who had by then been on the bench for over 30 years and was aged 85 – he had been appointed, of course, long before the institution of a retiring age. It met with silence from Lord X. His chin had lowered to his chest and his eyes were closed. 'Lord X agrees!' declared Lord Clyde triumphantly, as he moved on to the next case. The fact is that it was very difficult even for the most experienced judge to add anything substantial on these occasions unless he had prepared something beforehand. The initiative lay with the judge who was delivering the first opinion, which was delivered after a brief discussion with the other judges and without any opportunity for them to read or hear what was to be said before it was spoken from the Bench.

I soon learned that it was necessary, in the interests of clarity and efficiency, to have something in writing before me before I embarked on these exercises. My practice was to set out an outline of the facts of the case, which were usually agreed, and then to provide myself with a note of the main points that were to be decided and perhaps a phrase or two here or there that I could use in the main part of the judgment, depending on the way the decision went. These notes fell far short of a fully reasoned judgment, so it was always necessary for me to complete

[15] Prior to 18 December 1963, when the speeches were delivered in this abbreviated form for the first time in *Cleisham v British Transport Commission* 1964 SC (HL) 8, the practice was for the Law Lords to read their opinions: see 1964 SLT (News) 5. [16] E.g. Lord Rodger of Earlsferry in *R v Dietschmann* [2003] 1 AC 1209, para 45, referring to the speech of Lord Hutton. In *Will's Trustees v Cairngorm Canoeing and Sailing School Ltd*, 1976 SC (HL) 30, 150, Lord Salmon said that he had been privileged to read the speech of Lord Dilhorne, with which he then disagreed. [17] Criminal Justice (Scotland) Act 1995, s 42.

the job orally. These opinions were recorded, and some days later a transcript of what I had said was returned to me so that it could be checked over before it was issued to the parties and to the law reporters. I found this a rather depressing exercise, as the grammatical blunders and incoherence of my spoken words were revealed to me on paper [18].

It was clear to me also, from time to time, that the propositions of law that were set out in these opinions were in need of editing in the interests of accuracy and clarity. I was conscious that any changes of that kind might be thought to be a fraud on the public, as the end product would not be the same as that which I had been presenting to them in the presence of my colleagues on the bench. But I was also acutely aware of the fact that my audience was not confined to those who had been listening to me in the courtroom. The fact that these decisions were at risk of being reported in the law reports and commented on in published articles, as many of them indeed were [19], and the fact that even those that were not were made available to anyone who wanted to read them in the Advocates Library meant that I was addressing a much wider audience. It was with that audience in mind – the legal profession in Scotland in general – that I felt that I was entitled to try to make more sense of what I saw before me in these transcripts. But I was conscious too that there were strict limits on how far I could go in the process of editing. It seemed to me that an opinion issued in this way, whose primary function after all was simply to tell the parties why they had won or lost, was an unsatisfactory method of making law. So at the end of these weeks I always ended up with several cases that were to be the subject of an opinion in writing at a later date.

The practice in Scotland in my time was for the chairmen of the appellate courts to write most of the leading judgments. So it was rare for me to have to ask myself whether I should add my opinion to that written by others. That is not how it is the House of Lords, of course, where the tradition is that the chairman, even when he is the Senior Law Lord, sits as primus inter pares rather than as president of the court. The decision as to whose is to be the leading opinion usually lies with the chairman after discussion with the other Law Lords. I say 'usually' because the matter may be taken out of the chairman's hands if he finds himself in the minority. In earlier days there was no need for such a discussion, as it was assumed that every Law Lord would deliver his own speech [20]. The practice in the Privy Council is different. Its traditional function is to provide advice to Her Majesty, as it is to the Queen herself that the appeals lie in all the jurisdictions from which the appeals come except those that are now republics within the Commonwealth. It is said that Queen Victoria did not wish to be troubled with too many judgments, so a single judgment is issued by the Board unless there is a dissent [21]. However the decision is taken – and this applies in every appellate court, wherever there is an opportunity for more than one opinion – the question then for the other judges is whether they too should write or whether the leading opinion should be left to stand by itself.

There are two schools of thought on this issue. One, which Lord Reid favoured, is that the development of the law is assisted if there is more than one opinion [22]:

> 'The truth is that it is often not possible to reach a final solution of a difficult problem all at once. It is better to put up with some uncertainty – confusion if you like – for a time than to reach a final solution prematurely. The problem often looks rather different the second time you deal with it. Second thoughts are not always best but they generally are.'

The other view, which I know is felt particularly deeply in criminal cases, is that a plurality of opinions tends to confuse the courts below, who are looking for clear and simple guidance on the issue of law of general public importance that was before the House. Here an awareness of what the audience to

[18] My successor as Lord Justice General, Lord Rodger of Earlsferry, has confessed to similar feelings of humiliation: *The Form and Language of Judicial Opinions*, p 231.
[19] Commentaries by Sheriff Gerald Gordon QC in the Scottish Criminal Case Reports were particularly well informed and penetrating, similar to those provided in England and Wales by Professor Sir John C Smith ['JCS'] in the Criminal Appeal Reports. [20] In *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763 Lord Bingham of Cornhill and Lord Steyn departed from this tradition when they delivered what appears in print as a joint speech. [21] Baroness Hale of Richmond broke new ground when she delivered a concurring opinion in *Naidike v Attorney General of Trinidad and Tobago* [2004] 3 WLR 1430. [22] The *Judge as Lawmaker*, 12 JSPTL 22, 28–29.

whom the opinion is addressed requires is critical. You will, I am sure, have noticed that a marked change in the practice of the House has occurred in recent years under the leadership of Lord Bingham. Under the rules of the House every member of the appellate committee is required to deliver a speech when the House delivers its judgment before the question as to how the case is to be decided is put to the vote. But when lay members of the House are sitting as a select committee it is the usual practice for a single report to the House to be prepared which is concurred in by all members of the committee, and it is normal for the Law Lords when sitting as an appeal committee to deliver a report in this form to explain the reasons for the decision they have taken on a matter of procedure [23]. The appellate committee in its turn has found this to be a useful vehicle for use in those cases where the development of the law is best served by the issuing of a single judgment. The careful observer will have observed that the first cases where this device has been used after hearing an appeal were criminal cases where Lord Bingham of Cornhill, a former Lord Chief Justice, was in the chair [24]. It has been used also for the issuing of the judgments in two tax cases presided over by Lord Nicholls of Birkenhead [25], which raised questions about the application of the *Ramsay* [26] principle.

One may ask then what it is that moves other members of an appellate court who are in agreement with the decision of the court to write their own opinions when there is no need for them to do so. Once again I can only speak for myself, as I search my conscience and look back at my own record. There is, I must confess, an element of self indulgence here, and I think that I am not alone in succumbing to this temptation. The time that is given to the hearing of each case by the House, the seminar-like nature of the hearing and our practice of discussing the case by presenting our conclusions to each other one by one in turn before we leave the committee room all tend to germinate thoughts in our minds that are sometimes hard to discard. Producing a written opinion may be the only way of satisfying ones need to express these thoughts. It is, after all, all we have to show for ourselves when the case is over. But there are other reasons. Sometimes there is a difference of approach to the issue that is worth putting down in writing. Sometimes one is bold enough to think that the reasoning might be expressed better, and sometimes one believes that the point at issue is sufficiently novel and sufficiently important and difficult for it to be worth adding one more reasoned opinion in the hope that this may add weight to the judgment overall. From time to time too, aware that I have the unusual privilege of sitting in a court whose jurisdiction covers the whole of the United Kingdom and following Lord Fraser of Tullybelton's example [27], I take the liberty of saying something in an English appeal that I think may be of interest from the standpoint of Scots law [28].

Given then that one is faced with having to write an opinion, or succumbs to the temptation to do so, how is one to go about this task? What are the tricks of the trade that may be used to assist the person to whom it is addressed? And what are the pitfalls that must be avoided? Every opinion must have a beginning, a middle and an ending, of course. It must set out the facts, and it must contain some reasoning. In the lower courts, at least, the propositions of law that it contains ought to be supported by authority. Those are the basic ground rules. But it is possible to say a bit more than that.

First there is the beginning. There is nothing more daunting than the blank page, or a blank screen on ones computer. For the whole of my judicial life in Edinburgh I worked on paper. My practice was to write my opinions out in rough into a notebook and then to dictate them to my secretary. I adopted this practice when I was at the Bar shortly after I had taken silk. I was prompted to do so when, as usual, I had delivered a written opinion to my instructing solicitors without keeping a copy of it. Some weeks later I received a letter from them telling me that they had lost the opinion and asking me whether I would be kind enough to prepare another one, which I duly did. Several weeks went by. I then received another letter from

[23] E.g. *R v A* [2001] 1 WLR 789. [24] This device was first used in *R v Forbes* [2002] 2 AC 512. [25] *Barclays Mercantile Business Finance Ltd v Mawson* [2004] 3 WLR 1383; *Inland Revenue Commissioners v Scottish Provident Institution* [2004] 1 WLR 3172. [26] *Ramsay (WT) Ltd v Inland Revenue Commissioners* [1982] AC 300. [27] *NWL Ltd v Woods* [1979] 1 WLR 1294, 1310. [28] E.g. *R v Manchester Stipendiary Magistrate, ex parte Grenada Television Ltd* [2001] 1 AC 300; *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169, paras 55–60.

the solicitors telling me that they had now found the original opinion and that they were surprised to discover that the advice which I had given in the second one was quite different from that which was set out in the original. 'Would counsel be good enough to tell us which is right?', they asked. When I moved to the House of Lords and no longer had my own personal secretary I found it more convenient, and more efficient, to use a computer. So in my case it is the blank screen, not a blank page, that now confronts me as I sit down to write.

The easiest way to get going, of course, is to begin by saying who the parties are and, if one is sitting in an appellate court, identifying the court from which the appeal has been taken. But one can from time to time be more adventurous. Some judges are better at this than others. Lord Denning is, of course, famous for the brevity and the originality of the words and phrases with which he began his judgments [29]. In our own time Lord Hoffmann is, I believe, the greatest exponent of the art of finding a neat way into the case by identifying the essence of it before getting down to the boring details – indeed the boring details may not even have to be dealt with once the opinion has developed a life of its own in this way. It may look easy, but he has confessed to me that it has sometimes taken him longer to write the first paragraph than it has to complete the rest of the opinion. The product that results from this is comparable to the work of an artist or of a composer. But it takes time, and in a busy court one may not have that luxury. So there is much to be said for beginning with the boring details, especially if this is to be the only opinion in the case.

The middle offers the opportunity for infinite variation according to the subject matter. The main thing, I suggest, is to do ones best to make all the detail that it has to contain accessible. By that I mean that the reader to whom it is addressed must be able to pick up the bits that interest him without getting lost or necessarily having to comb through all of it. It is, I think, our common experience that much of what we write is of passing interest only and that, apart from the litigants themselves who may study every sentence and – in the event of an appeal, the appeal court will do so too – only some parts of it are likely to attract the attention of the wider audience. There are some tricks of the trade. What litigants want is an explanation in simple terms which they can understand [30]. Sentences should be kept short [31]. So too should the paragraphs. The use of paragraph numbers, which have been introduced to enable our opinions to be made use of on the internet, has assisted this task. It is clear that paragraphs have become shorter since they were introduced [32] – an unexpected and, I believe, welcome benefit. There was some resistance to the idea when it was first mooted on the ground, for example, that to put paragraph numbers onto our opinions would be too laborious. But this and other similar problems have been mastered by the technology, and I do not think that anyone now objects to them.

Then there is the use of headings, of footnotes, of endnotes, of indices and of annexes and appendices. We have adopted the first quite liberally, although they are a comparatively recent innovation. But for the most part, in contrast to judges in the United States Supreme Court, who find it convenient to use footnotes to conduct their arguments with each other [33], and in the High Court of Australia, we have not favoured footnotes or endnotes [34]. Indices are unusual, but they can be used to good effect in longer judgments [35]. It is rare for

[29] See, for some examples, *Hinz v Berry* [1970] 2 QB 40, 42B; *White v Blackmore* [1972] 2 QB 65; *Lloyds Bank v Bundy* [1975] 1 QB 326, 334. [30] See Lord Reid, *The Judge as Lawmaker*, 12 JSPLT 22, 25: 'Technicalities and jargon are all very well among ourselves – a system of shorthand – but in the end if you cannot explain your result in simple English there is probably some thing wrong with it'. [31] The test, known as the Felsch Test, may be used to assess readability. Where w = the average number of words per sentence and s = the average number of syllables per word, the readability score is computed according to the formula: 206.835 – [((1.015) w) + (84.6) s]. A score of over 50 is considered to be satisfactory. Lord Denning's opening paragraphs in *Hinz and White* (see footnote 19) score 76.30 and 85.99 respectively. [32] The first reported case in which numbered paragraphs were used by an appellate court in the United Kingdom was *Ex parte Guardian Newspapers* [1991] 1 WLR 2130, the judgment in which was handed down by Brooke LJ on 30 September 1998. The Court of Session adopted the practice in March 2000: *Cullen v Cullen*, 2000 SC 396. House of Lords and the Privy Council started using numbered paraphraphs in January 2001: *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143; *Snell v Beadle* [2001] 2 AC 304. [33] E.g. *Rasul v Bush* (2004) 542 US in which the Supreme Court held that the US courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals at Guantanamo Bay: see Steven J for the majority, fns 8, 9 and 10 and Scalia J's dissent, fns 3 and 4. [34] Lord Rodger of Earlsferry, *The Form and Language of Judicial Opinions* (2002) 118 LQR 226, 234; Francis Bennion, *Fussnotes and other Annotational Engines* (2004) 168 JP 754, 755: '.. all such aids to understanding should be deployed by authors and editors with discretion. The old motto applies. If in doubt leave it out.' [35] For a recent example of the use of a helpful index in a comparatively short judgment, see Wall LJ's opinion in *R (Fisher) v English Nature* [2005] 1 WLR 147, 150, para 5.

the appellate courts to use annexes and appendices. But two examples can given of situations where this technique is useful. In *Ghaidan v Godin-Mendoza* [36], Lord Steyn attached appendix to his speech that listed cases where a breach of an ECHR right had been found to be established and the courts proceeded to consider whether to exercise their interpretative power under section 3 of the Human Rights Act 1998 or issue a declaration of incompatibility under section 4 – information that could not sensibly have been reproduced in any other way; and in *R (Hooper) v Secretary of State for Work and Pensions* [37] Court of Appeal dealt with the statutory provisions relating to the various benefits that were in issue by summarising them in the judgment and setting them out in full as an annex, which, albeit in a reduced font size, occupied three and a half pages of text. The placing of a headnote on the page is, surprising as it may seem, also a matter about which some judges feel quite strongly. When I use headnotes, which I do quite frequently, I always begin them on the left-hand margin. But Lord Steyn has always insisted that his headings should be placed centrally. That is how they appear in the official copies of the judgment when they are issued by the House. They ought also to appear in this way in the law reports [38] if they were faithful to the original, but in practice regrettably this seldom happens.

Footnotes used to be difficult to reproduce in a typewritten text and had no place, of course, in judgments that were produced orally. But they can be produced at the touch of a button on one's computer, and when preparing a lecture such as this I use the facility liberally. It was commonplace at one time to find case references relegated from the main text to footnotes until publishers of the law reports dropped this practice on the ground that complicated the typesetting and was too expensive [39]. Instead the reports adopted the helpful practice of grouping all the cases that were referred to in the judgments and in the argument at the start of the report and including all the relevant references. There can, surely, be no objection now to footnotes on the ground of cost. It is all a matter of taste, and there are signs that they are being resorted to by judges at first instance when this appropriate. But the oral tradition is still with us, especially in the House of Lords where we deliver what are still described as speeches. I dislike endnotes as they lack the immediacy of a footnote on the same page, but appendices can serve a useful function especially if they are designed, as in Lord Steyn's case, to contain tables that cannot be described conveniently in the main text [40].

I have left to the last in this section my observations on style and the use of language. Style has been described as that which can be left out by paraphrase [41]. It can be rhetorical, literary or conversational. Sometimes ones choice of style, albeit unconscious, is dictated by the subject matter. A 'high' or declaratory style is often resorted to by an appellate court in criminal cases, having regard to the needs of the audience. A 'low' [42] or exploratory style is used where the writer sets out to persuade the reader by debate. This is the world of everyday speech. Formality is discarded. Rhetorical questions are used. Phrases such as 'of course' are used also, to reassure readers that they and the writer are on the same wavelength. Sometimes the writer chooses to descend to the vernacular, using the words 'guys' for example, as Lord Rodger of Earlsferry did when he described the race for first registration in Scots property law [43].

In the hands of some judges their style is so distinctive that it has become their voice or their signature. The contrast is between those on the one hand who burden their opinions with factual detail, quote heavily from previous judicial opinions, prefer the familiar to the unfamiliar and stick rigidly to all the conventions and current norms of political correctness, and those on the other who prefer to converse with their audience, leave out unnecessary details and avoid too much quotation so that what they have to say seems new and fresh. Judges in the latter category are those who seem to enjoy writing – although in truth it may take just as much effort, and perhaps more, for them to create their opinions than the rest of us.

[36] [2004] 3 WLR 113, 130–134; see also p 125, para 39. [37] [2003] 1 WLR 2623, 2679; see also para 5. [38] As in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763. [39] The practice was ended by the Council of Law Reporting in 1969. [40] See note 37. [41] Richard A Posner, *Judges' Writing Styles (And do they matter?)* 62 Chicago LR 1421, 1422. [42] For the adjectives 'high' and 'low' see Posner, loc cit, 1427. [43] *Burnett's Trustee v Grainger* 2004 SLT 513, 543, para 141: 'Nice guys finish last and don't get the real right'.

By language I mean, of course, the English language. Other languages may appear in quotation sometimes. Lord Hoffmann and Lord Rodger are accustomed to reading texts in German, so they have no difficulty in slipping German phrases into a judgment when this is appropriate [44]. French and even Latin [45], despite official discouragement, may appear from time to time to adorn the text in similar circumstances. Classical Greek, which never had much relevance to legal reasoning but was used sometimes for emphasis [46], appears to have disappeared entirely. One should, of course, not forget that English is the language of the court [47]. Where foreign languages are used a translation should be provided, unless the meaning of the foreign words are so well known as to make their translation superfluous.

The English language is, as we all know, remarkably versatile. In the right hands a phrase or two, neatly fashioned, can convey much more than a whole paragraph. One thinks of Lord Reid and Lord Wilberforce as leaders in the practice of this art. Lord Wilberforce's observation that 'no contracts are made in a vacuum; there is always a setting in which they have to be placed' [48] is one example among many that could be quoted. In our own time Lord Steyn and Lord Hoffmann have the same ability. The persuasive power of Lord Steyn's judgments is greatly enhanced by the uninhibited way he draws on compelling phrases, such as 'an intense and particular focus' [49] and the word 'concrete' (in its adjectival sense) [50], when he is developing his argument. Even in less inspired or less expert hands, the character of the judge may be revealed to the reader through the style of his writings. It would be nice to think that the example of the experts could be emulated. But I think that we who are less gifted have to face the fact that the attractive use of language is indeed an art that comes more easily to some than to others. The best we can do is try our best to keep our sentences short and our propositions simple and accessible.

The choice of individual words and phrases can give rise to difficulty. 'Judges told to mind their language', said the headline to an article by Clare Dyer [51] about the advice to judges on the use of language that is contained in the Equal Treatment Bench Book, which since May last year has been issued to every new judge on appointment by the English Judicial Studies Board. The judges are told to not to overlook the use of gender-based, racist or homophobic stereotyping. There is no problem there in principle, of course. The modern judge is well aware of the need for sensitivity in these areas, and that language and ideas that may cause offence do not stand still. There has been some resistance to the idea that judicial opinions should be constrained by what has been described as mere 'political correctness'. It is not easy to avoid using words such as 'postman' and 'businessman', as we are told to do, when these are encountered so often in every day speech. But I believe that the book's advice should be taken seriously. This is all part of having regard to the needs and character of one's audience. An opinion that causes offence because of the careless use of words that may imply gender-based, racist, homophobic or even ageist stereotyping risks bringing the judiciary as a whole into disrepute. The problem can usually be avoided by rephrasing a sentence that may cause difficulty. I shrink from using the grammatically incorrect 'their', which for me still indicates the plural, as a gender-neutral substitute for the singular 'his' or 'her'. But a twist or two in the wording of the sentence will either make its use appropriate or remove the problem. Quite apart from political correctness, some words or phrases are so much part of legal jargon – 'the said', for example, or 'the

[44] E.g. Lord Rodger's quotation from article 830(1) of the Bürgerliches Gesetzbuch in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, para 167; see also his quotations from the German Constitution or Grundgesetz and from the BverwGE in *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546, para 167. [45] See Rix LJ's quotation from Lucretius, *De Rerum Natura*, I, 101 ('*Tantum religio potuit suadere malorum*') in *(Williamson) v Secretary of State for Education and Employment* [2003} QB 1300, 1329, making the point that great dangers exist in the potency of religious belief and in its potential for conflict; and Lord Rodger's quotation from Ulpian, D.9.2.13.pr, in his remarkable concurring speech in *R v Bentham* [2005] UKHL 18, para 14, '*Dominus membrorum suorum nemo videtur*: no one is the owner of his own limbs'. [46] See Lord Radcliffe's reference in *St Aubin v Attorney-General* [1952] AC15, 45, to the prayer of Ajax ('*Εν δε Φάει και όλεσσον*'), which he said had been heard before in their Lordships' House, when commenting on the obscurity which had been created by legislation about estate duty. [47] This not so in the Privy Council in Channel Islands cases, where the practice is for the French texts to be quoted without translation: *Snell v Beadle* [2001] 2 AC 304. [48] *Reardon Smith Line v Yngvar Hansen-Tangen (trading as Hansen-Tangen)* [1976] 1 WLR 989, 995H, quoted by Lord Steyn, *Interpretation: Legal Texts and their Landscape* in *The Clifford Chance Millennium Lectures* (Oxford 2000), p 82. [49] E.g. *Marc Rich & Co v Bishop Rock Ltd* [1996] AC 211, 236C–D; *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 224, para 18. [50] E.g. *R v A* (No 2) [2002] 1 AC 45, 65, para 38; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 680D–E. [51] *The Guardian*, 13 May 2004. In *The Times* Frances Gibb's article, published on the same date, was headed 'Judges told to watch their language in changed society'. In *The Independent* Robert Verkaik's article was headed 'Judges given new advice on political correctness'.

instant case' (so characteristic of the speeches of Lord Diplock) – that they are best avoided altogether. 'Chilling effect' is one of the phrases that has been so overused that I would put it into my wastepaper basket.

Then there are quotations from poetry and from literature. Used sparingly and with care they can embellish a judgment [52]. Lord Hoffmann quoted from poetry in his first speech in the House of Lords [53], and he has teased us by recalling Schrödinger's cat, an animal about whose misfortunes most of us know little – in suitably obscure language [54]. References to Dickens's *Bleak House* appear from time to time in Lord Bingham's judgments [55]. I doubt whether quotations of this kind are appropriate in an opinion that is being delivered at first instance, although in November 2004 Judge Robert Gigante, a US judge, is reported to have given a judgment in lyrics which he had adapted from a song by the Beatles [56]. It is best, I suggest, to leave this technique to the senior judges and, if one happens to regard oneself as a senior judge, to leave it to those who can use it without any risk of inviting the suspicion that they are showing off.

References to academic literature are far more common than they used to be. Thanks to judges such as Lord Goff of Chieveley who was in close contact with academics such as his great friend Professor Christian von Bar of the University of Osnabrück, there is, of course, now a much more healthy dialogue between academic writers – 'the third branch of the profession', as they have been called by Professor Kenneth Reid of Edinburgh University – and the judiciary. Appellate judges are particularly conscious of the good work that has been done by academic lawyers to reveal weaknesses in the existing law and to explore new territory. Their work has, for example, helped the judiciary to expand the frontiers of the law of negligence. Where this is so, it is only right that credit should be given when it is due [57]. References to academic literature may also be used as a convenient guide to further reading, as can be seen from the many speeches using this technique which have been delivered by Lord Steyn [58].

Lastly in this chapter, there is the problem of when to quote and when not to quote extensively from the opinions of other judges. This is a distinct issue from the routine task of referring to previous authority. Quotations are useful where one wishes to trace the way the law has been developing or to explain the origins of a proposition that one wishes to adopt or must follow. They may be necessary where previous inconsistent authority has to be distinguished or departed from. But lengthy quotations can be very boring, and they tend to interrupt the flow of an opinion. They should never be used as a substitute for explaining one's own process of reasoning. It is perfectly in order to adopt the wording of a previous judgment as one's own, so long as a reference is given to explain its origin. There is always a risk that a vivid expression that someone else has created will become associated with the adopter rather than the orginator. I am sure that Lord Wilberforce, when he referred to what he said had been called 'the austerity of tabulated legalism' and used inverted commas when he did so [59], did not expect that that phrase which he has made famous would be regarded so widely today as his own invention.

The end of the opinion, when we reach it, should be simple enough. We have to tell the reader what was decided, and something will usually have to be said about costs. But

[52] Lord Kilbrandon in *Assessor v Renfrewshire v Mitchell* 1965 SC 271, 280 illustrated his decision on the question whether caravans were heritable or moveable for the purposes of valuation for rating with this quotation: 'The user of a caravan in the ordinary sense can say with the poet Montgomery: "Yet nightly pitch my moving tent/ A day's march nearer home." ' [53] In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 777: 'There may come a Secretary of State who will say with Larkin: "Despite all the land left free/ For the first time I feel somehow/ That it isn't going to last/ That before I snuff it, the whole/ Boiling will be bricked in . . ./ And that will be England gone/ The shadows, the meadow, the lanes/ The guildhalls, the carved choirs" and promulgate a policy that planning permission should be granted only for good reason.' [54] Erwin Scrödinger used a story about a cat sealed in a box together with a deadly chemical to demonstrate the apparent conflict between what quantum theory tells us is true and what we observe to be true about the nature and behaviour of matter. This unhappy animal made its first appearance in Lord Hoffmann's speech in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 249, 399E–E ('and leaving aside the problem of Schrödinger's cat'). Like the Cheshire cat, it made two further barely visible appearances in his speech in *Gregg v Scott* [2005] 2 WLR 268, 286–287. [55] E.g. *Ridehalgh v Horsefield* [1994] Ch 205, 226: 'The one great principle of English law is, to make business for itself . . .' [56] Giving his decision to move a trial from New York City to Albany in a claim by Dr Gil Lederman that he would not get a fair trial in New York City because he had previously been accused of making George Harrison sign autographs as he lay dying: *The Times*, 7 December 2004, Law Section, p 8: 'Something in the way he treats/ Attracts bad press like no other doctor.' [57] E.g. *Chester v Afswar* [2004] 3 WLR 927, 952, para 88; R *(European Rome Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 WLR 1, 37, para 37. [58] Ibid, para 22. [59] *Minister of Home Affairs v Fisher* [1980] AC 319, 328, quoting from de Smith, *The New Commonwealth and its Constitutions* (1964), p 194.

reaching the end ought not to be seen as the end of the exercise. It provides an opportunity for going back over the whole product. This is so much easier than it used to be if it is on a computer, as one can scroll up and down, cut and paste and print out selected pages for review without troubling one's secretary. My own practice, apart from checking for mistakes of course, is to have a look again at how the whole thing has been paragraphed. I may move a sentence here or there to ensure that the important ones are in the best place, and I may shorten my sentences by breaking them up for greater clarity or emphasis. The aim, as I have said, is to make the thing as readable and accessible as possible.

The result of our labours may be forgotten as soon as it has been issued. Even if it makes the law reports, the pages on which it appears may lie unopened for year after year and perhaps for ever. But I see no reason why we should be disturbed by this. Writing a judicial opinion is not, after all, an exercise in self advertisement. If it attracts attention, and proves to be useful, so much the better. And one must also have in mind when writing it that it may have a wider audience. But in the end of the day its function is to serve the public interest, and in particular that of the litigant. It has to satisfy the rule of law that says that the litigant has a right to know why he has won or lost his case. Where the public interest requires that the law be clarified, the opinion must satisfy this purpose also. All else is there as an adornment. How fortunate we are however that, in our legal tradition, the character of our judges can live on through their opinions. Each volume of the law reports contains, in this way, a portrait of each of the judges whose work is reproduced in them. This is how the common law is made. It is our gift to posterity.

Lord Hope of Craighead

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