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A MATTER OF STYLE? THE FORM OF JUDGMENTS IN COMMON LAW JURISDICTIONS: A COMPARISON

CONFERENCE IN HONOUR OF LORD BINGHAM

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Introduction

This event is beautifully timed. It is a wonderful opportunity to honour Lord Bingham, and to marvel at the riches of his judicial legacy. The quality and accessibility of his judgments is justly famous. This event is also beautifully timed for another reason. By October 2009, our new United Kingdom Supreme Court will be in operation. So there is no better time to think about change.

I cannot think of any prior occasion on which I have heard a comparative study of the forms of judgment. The more I thought about the subject, the more I realised that there were many different benchmarks that could be applied. The more I thought about it the more I realised that there was a certain irony in the title of the conference *A Matter of Style*? There are certainly different forms of judgment. I consider that, at the end of the day, the judge, if free to choose between the different forms, should aim to follow the form that will best enable the message in the judgment to be conveyed, not for any formalistic reason. In this contribution, I shall mainly be discussing judgments of appellate courts.

I will pose a number of questions:

1. Why does the form of judgments matter?
2. What is wrong with judgments?
3. What are the options?
4. What is the solution?

Why does the form of judgments matter?

Judgments are the cornerstone of the common law. The common law is judge-made law. The common law gradually evolved as more cases had to be decided. The judges did not portray themselves as making new law. They had no right or power to do that. They were declaring what the law had always been. There are records of decisions dating back to 1194. The reports from that date are extremely brief but bit by bit a comprehensive jurisprudence evolved. The work of producing the law never ceases because new problems arise and new conditions require old solutions to be adapted or replaced. The practice of the judge giving a reasoned judgment developed comparatively recently. In earlier times, the reasoning had to be found in the record of the argument between the advocates and the bench.

So much for the history. The subject of the form of judgments plumbs the very depths of the common law. In judgments lawyers have to find the reasoning that will tell them whether the same result will apply in another situation or whether there are sufficient distinguishing features. Cases are rarely the same. Since the nineteenth century, the courts of England and Wales have applied a relatively strict doctrine of precedent. In general, the ratio decidendi of decisions of the higher courts are binding on lower courts and the higher courts are bound by their own decisions, but there are exceptions. So, English lawyers have to find the ratio decidendi of a judgment. Reasoning in a judgment is thus crucial to finding out what the law is. The art is to use precedent wisely. As Lord Nicholls has said, one of the well-known ailments of lawyers, meaning common lawyers, is a hardening of the categories.[1] But that is a problem for another day.

The great advantage of the common law is that it enables the judge to develop it, though there are limits which they must observe. Cockburn CJ in *Wason v Walter*[2], described this advantage in these terms:

> "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."

So a judgment in a common law system is likely to be different from a judgment in a civil system. For example, in Germany as I understand it, the emphasis is on finding the norm and on deciding the case by reference to that norm. Moreover, in many jurisdictions, there is much more use of scholarly

[1] *Attorney General v Blake* [2001] 1 AC 258 at 284.
[2] (1868) LR 4 QB 73 at 93

texts than in England and Wales. For other reasons, there is relatively little comparative law although there will, of course, be Community law if Community law is in issue, or Strasbourg jurisprudence if any of the rights guaranteed by the European Convention on Human Rights is in issue.

So what are the problems?

I should make clear that in trial courts many judgments are given orally and ex tempore, but this does not happen in the Appellate Committee of the House of Lords and happens only in a minority of cases in the Court of Appeal.

There is a concern about prolixity. Judgments before the age of the word-processor and databases of case law were often much shorter. We can take as an example the opening lines of the judgment of Lord Atkin in *Donoghue v Stevenson*[3] as a model of brevity for setting out the problem, and also for doing so at the start of the judgment, where it is most conveniently placed:

> "My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health."

Another example of brevity is the statement of facts by Blackburn J in *Rylands v Fletcher*[4], which is less than 300 words:

> "It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.
> It appears from the statement in the case [see pp. 267-8], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears, [see pp. 268-9] that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but

[3] [1932] AC 562 at 578.

[4] (1866) LR 1 Exch 265 at 279.

> that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.
> It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief."

This would be a convenient place to try to identify what makes a good judgment. The first quality is, of course, that it should get to the right answer, preferably for the right reasons. It should deal with all the points that need to be dealt with. It should not gloss over difficulties but fairly confront them. It should be bold, where necessary, and authoritative. It should be relevantly expressed. As for other qualities, concision, if it can be achieved, is one of them. There also needs to be a logical flow of argument. This greatly helps accessibility. It is one of the great features of the speeches of Lord Bingham. It has made his judgments accessible to a wider audience. Another quality is this. From time to time what is needed is to go back and identify the principle as it has been developed and to restate it in terms that are appropriate for modern conditions. It is also often necessary to discuss whether, and, if so, how far and in what terms, to develop the law. Lord Bingham has also been a shining example in this regard. A good appellate judge is always looking for ways to improve the law or move it on, and there are usually many opportunities to do this with the jigsaw that is the common law. It is in the nature of the common law system that there may not be an opportunity to deal with the same issue again at appellate level for a very long time.

In recent times, appellate judgments have become longer and, of course, merit is not proportionate to length. The problem is acerbated in the appellate courts where in theory, and often in practice, more than one judge will give a full judgment. The problem of prolixity leads to a problem of accessibility: it becomes harder and harder for lawyers to keep up with the law and for the public, if ever minded to read a judgment, to understand it.

Accessibility would probably not have been regarded by earlier generations as very important. But judgments are becoming more and more important because more and more political questions are being left to judges. Judgments are therefore reaching a wider audience than just the parties.
That is what prompted the Court of Appeal recently in *Birmingham City Council v Doherty*[5] to bemoan the fact that they had had to work through six full judgments of the Appellate Committee of the House of Lords in a previous case, and to argue in favour of a single, or single majority, judgment in that case.

[5] [2007] LGR 165 at [62] to [65].

Prolixity makes a judgment less accessible. That means, of course, less accessible to lawyers, scholars, students, the public and courts and lawyers abroad.

I am glad to say that it is not just a problem unique to England and Wales. It is said that it is so rare for the High Court of Australia to have a single judgment that when, on the centenary of the High Court of Australia, there was a fly past (which impressed the visiting judges greatly), a leading advocate turned to the visitors and said, "Why, they do this every time there is a joint judgment!".

What are the options?

Broadly speaking, there are three main forms of judgments in appellate courts:

> *1. Single (or sole) judgments*, for example (generally speaking) Criminal Division of the Court of Appeal of England and Wales, and historically the Privy Council, (uniformly) Court of Justice of the European Communities and some civilian courts, such as the Federal Supreme Court of Germany (but not, for example, the Federal Constitutional Court of Germany).
>
> *2. Seriatim judgments* – for example, the Court of Appeal of England and Wales and the Appellate Committee of the House of Lords.
>
> *3. Single majority and separate dissenting/concurring judgments.* – for example, the Supreme Court of the United States and the European Court of Human Rights.

All these forms of judgment will be familiar. I do not propose to go into them. Adjudication is a complex process and none of these models is a pure form. The English style is seriatim judgments. There are, of course, many variations in these basic models but the purpose of setting out the models is to show the *spectrum* of forms of judgment available. A single or sole judgment may be one which different judges have written different parts. Such a judgment may be called "a composite judgment". However, in my experience, that is rare because of the difficulties of editing the various parts to produce a consistent whole. The three models set out above show the range of options available to judges when writing their judgments in collegiate courts.

The practice of the Supreme Court of the United States was developed by Chief Justice Marshall. He encouraged the court to deliver an oracular single opinion or a single majority opinion. The process continued after his departure, although since the 1940's judgments have been more fragmented. Nonetheless, the Supreme Court of the United States has never had the

practice of seriatim judgments as we have. Perhaps, as Lord Devlin said, "The US Supreme Court like the vines of France is not for transplantation."[6]

I turn next to the very important question of the dissenting judgment. Some dissenting judgments are useful; some are not. But there is no serious suggestion in England and Wales (save in the courts I have mentioned) that judges should not be able to write dissenting judgments. It is sufficient that they can be useful. They plant the seed for future development. They can point out difficulties and other solutions and other courts not bound by the decision of the majority under the doctrine of precedent may in time decide on the course advocated by the minority.

I would add that *obiter dicta* are also valuable: as Lord Devlin said, these are "rumblings from Olympus" which "give warning of uncertain weather."[7]

Let us consider for a moment the reasons for adopting a single or single majority judgment. I would summarise the main reasons as follows. First, it is said that a single or single majority judgment should make law more certain, coherent and accessible. Secondly, in certain special cases, such as constitutional courts in developing democracies, there may be a need for collective rather than individual responsibility. This may be the case in some common law jurisdictions, but not in the United Kingdom. Thirdly, in civil systems, there is a less rigid approach to precedent and so there may be less need to set out the full reasoning. However, the reason generally advanced for a single or single majority judgment is that it should make the law more certain, coherent and accessible. I stress the features of coherence and accessibility, to which I return below.

By contrast, the reasons for adopting seriatim judgments include:

1. Judicial independence. Judicial independence is fundamental to the common law. It is of two kinds, decisional and institutional. The type of judicial independence relevant at this stage is decisional judicial independence: judges must be free to decide the case as they think fit and to express their reasons fully and freely. If there are different perspectives on the legal issue or different routes from reaching the solution, each individual judge has to be free to write those reasons in his own words. For example, in a case concerning a woman's ability to have fertility treatment, I decided that it would not be right for my judgment to form part of the judgment of the court. I had written it in part from a woman's perspective and wanted it to be seen as such, especially as the decision was to reject the woman's case. I would add that some judges say that they cannot be sure that they do agree with another's judgment until they have worked a judgment out on paper for themselves, though that is not logically a reason why they should publish all that they write. The real reason for seriatim judgments is judicial independence.

[6] Devlin, *The Judge*, (Oxford, 1979), page 7.
[7] Devlin, op. cit., page 11.

2. Accountability of judges - It is by their judgments that judges are made accountable for their decisions, which can in general be appealed. Therefore, in principle, they ought to be free to express their reasons as they think fit.

3. The practice of seriatim judgments avoids any risk of adjustment of reasoning. It is often the experience of judges on courts which only issue single judgments that judges have to modify their reasoning in order that the judgment should obtain the largest majority. This means that the reasons are not fully stated. This can hold back the development of the law. The effect of having a single or single majority judgment may be that it lacks the style of an individual justice. In addition, it may also mean that some judges have to compromise on reasoning and that the judgment as published may not set out the real reasons why the judges came to their conclusion.

There are other factors influencing the form of judgments, such as personalities, resources and institutional factors. As to personalities, members of the judiciary have unparalleled independence of action and thought. Therefore personalities are bound to matter. Justice Scalia for instance is very outspoken and is frequently critical of his colleagues in his judgments. Justice Sandra Day O'Connor by contrast often tried bring the views of different judges together. The individual makeup of court is bound to make a difference to its ethos and to its output.

Individual judges have different ways of expression. Some of them use literary quotations or historical explanations or metaphors or examples to explain the point that they are making. The quotations and so on are often the things which people remember. Therefore, they can assist accessibility and can be used within reason for this purpose. Lord Denning was particularly known for some of the opening words of his judgments, for example: "A gigantic ship was used for a gigantic fraud. She was the Salem, a supertanker."[8] or "Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for nearly 300 years. His family had been there for generations. It was his only asset but he did a very foolish thing."[9] or "It happened on 19 April 1964. It was blue bell time in Kent."[10]

As to resources, some courts have more funds for lawyers or judicial assistants than others with the result that more research can be done. As a result, it has been said that some judges' function may have been reduced to the function of editors, rather than writers, of judgments. This, if correct, is, I think, a regrettable development and objectionable in principle.

Institutional arrangements to facilitate engagement are very important and influential. Sometimes judges have special meeting rooms, or a fixed series of meetings. But, to be effective, internal discussion need not be formal. There

[8] [1982] QB 946 at 982.
[9] [1975] QB 326 at 334.
[10] [1970] 2 QB 40 at 42.

can be useful informal meetings over the telephone or in one another's rooms. I will return to that point.

So what do we have to do to solve the problems of accessibility and prolixity? What is the solution?

A. Accessibility

I would make the following suggestions to improve the accessibility of appellate judgments:

1. 'Roadmaps' in judgments
2. Press summaries
3. Fuller headnotes
4. Shortening judgments

By "road maps" in judgments, I have in mind some indication at the start of the judgment of the organisation of material within it, or alternatively, in a very long judgment, an index. Shortening judgments is self-explanatory. It is too easy to add in citations that are not strictly necessary. It may also help if the judgment contains its own summary. In a case that attracts public attention, the court can also usefully publish a press summary. This often helps accuracy in press reporting.

If judgments cannot be shortened or simplified, it may help if law reporters develop a way of providing fuller headnotes. Obviously, they are only concerned with what was actually decided by a case. But, if individual judges have expressed views on important issues and their views are not part of the ratio of the case, it would facilitate accessibility if the headnote could go on to summarise those views.

B. Prolixity

I would make the following suggestions to reduce prolixity in judgments:

1. Increased internal engagement, and
2. Regular consideration of the option of a single majority judgment

I would stress the value of *internal engagement*. It does not have to be lengthy; it does not have to be formal. It can occur at any stage. If it takes place before a hearing, the issues to be heard can be reduced. If it takes place immediately after the hearing, the judges can give their immediate reactions to the arguments while they are fresh in their minds. Another useful time to have a discussion is after the leading judgment has been produced and the other judges have had a chance to study it and to map out any points which they would want to make in a separate judgment. If the case breaks new ground, the internal engagement to which I refer is not simply about deciding the case. It is bound to cover how far the court should develop the law and in which direction, how far earlier cases should be overruled and so on. Those

issues are relevant to ensuring coherence in the law. To obtain coherence you need collaboration.

Increasingly, good judgment writing in an appellate court will also call for good leadership. If there are separate judgments, the presiding judge should facilitate a discussion, even over the telephone, to make sure that the implications of any different or additional view are fully worked out. Leadership in this sense is not inconsistent with the importance attached to judicial independence.

It is engagement internally which will ensure that the Supreme Court has judgments that are lasting and of the highest quality. Independence is not compromised in any way by discussing a point.

Drawing the threads together

We have had the present system of seriatim judgments for many years. In fact there is a whole spectrum of forms of judgment from seriatim judgments to composite judgments. But there is a bias to seriatim judgments. The institution of the Supreme Court is an opportunity which will never recur and a logical time to think about the practice of forms of judgment. Leading Supreme Courts across the world have considered the system of seriatim judgments, and adopted different ones. I have already mentioned the practice of the Supreme Court of the United States. By way of further example, in Canada, in response to criticism from the profession about prolix judgments, the Supreme Court decided some years ago to strive for a single judgment of the court wherever possible and for a single dissenting judgment if there were opposing views. The change has I understand been well received. I should make one thing clear. A single majority judgment does not mean that you cannot also have concurring judgments, just as they do in Strasbourg. But the main reasoning will be in one place and expressed in the same terms in the single majority judgment. It is also theoretically possible to say in a single majority judgment, "One of us, X LJ, thinks as follows". A single majority judgment is not inconsistent with judicial independence.

Society is increasingly less homogenous. The judiciary of United Kingdom is also a little less than homogenous than it used to be in the past. Both these factors mean that there will be more and more perspectives to be taken into account in deciding some cases. These perspectives will enrich judicial decision-making. I anticipate therefore that even if there are more single majority judgments in the future, there are likely to be concurring judgments too. One advantage, however, of the single majority opinion is that it would appear first in the law reports, so that the reader would know at the outset what the decision of the majority was.

It should be noted that writing a single majority judgement may not be easy. Temperamentally, judges in a common law system have very independent lines of thought. Nearly all judges in the higher courts in England and Wales come from the self-employed bar and have never acted in partnership, as solicitors have. If there are more single majority judgments, that may lead to delay in writing judgments, which is not desirable.

I am not saying that that a change is *necessarily* appropriate for this jurisdiction. The form of judgment is a matter for the ethos of the particular court. But there is no reason to have only one form of judgment. What we should do is look at the possibility of change as part of the whole process of bringing about the new Supreme Court.

I would start the process of change by having more regular consideration of the various options as to the form of a judgment. Of course, if the court decides to have a single substantive judgment, the adage may apply that it takes longer to write short than to write long. It is as so often a question of balancing priorities. I would say that the value of having every single judge express the reasoning in his own words in every case is not necessarily in every case as great as having a coherent and certain statement of the law covering all the points the judges would separately have wished to raise. What the court has to balance is judicial independence versus risk to coherence in the law, and collaboration.

In practical terms my proposal would often involve an early decision that one person is going to write the lead judgment, and who that person is, and an understanding that the other members of the court will not generally circulate their own judgments until they have seen the lead judgment. If that practice is observed, overlap and inconsistencies can be minimised.

So my suggestions for England and Wales are as follows:

(1) Whenever an appellate court has to prepare a judgment after hearing a case, it should consider the form its judgment should take.

(2) It should consider whether in that instance judicial independence requires a series of separate judgments or whether the view of either the majority or the minority can be expressed in a single set of reasons.

(3) Whenever there is a concurring or dissenting judgment, the author of the judgment should (a) make it clear with what reasoning or propositions in the main judgment the author agrees or disagrees and (b) avoid if possible repeating the facts or citations of authority already set out in the main judgment. As a supplement to that, it does not meet this proposition merely to say, "My judgment is in substantial agreement with that of the lead judgment". But that is, I suppose, better than nothing, and there may be circumstances where that is an appropriate course.

(4) There should be internal engagement at appropriate stages in the preparation of judgments.

Finally, I would emphasise that the decision between a single majority judgment and seriatim judgments is likely to involve a balance between judicial independence on the one hand, and, on the other hand, collaboration and the risk to coherence in the law. Those are the principles primarily at

stake when a decision is made as between the forms of judgment generally used in a common law system.

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