Obligations Discussion Group
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Judging private law appeals

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I thought it might be interesting to talk not so much about a particular aspect of the law of obligations, but more generally about how one goes about judging appeals in private law. Partly that was because it was something I could speak readily about; I'll come below to the issue of volume and its consequences. It was also partly because Australia has not been well served in commentary. There is no equivalent of which I am aware to the studies by Alan Paterson or Penny Derbyshire.[1] We don't "embed" academics in our courts (not that anyone has to my knowledge ever applied to do so)! And there is nothing like that mine of contemporary information, Lord Hope's diaries.[2] In contrast, there is very little from Australia.[3]

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1 See A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013), P Derbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, 2011).

2 See D Hope, *Lord Hope's Diaries*, Vol III (Lord President 1989-1996), IV (House of Lords 1996-2009), and V (UK Supreme Court and Afterwards 2009-2015) (Avizandum Publishing, 2018 and 2019).

3 Owen Dixon's unpublished diaries and correspondence are a resource that has not been nearly sufficiently investigated, in my opinion, despite an excellent but non-legal biography by the late Philip Ayres (*Owen Dixon: A Biography* (Melbourne University Press, 2007)).

One possibility is that it reflects the fact that Australians are quiet, diffident and retiring, although that seems an unlikely explanation having regard to what I have seen of the BCL seminars in weeks 1 and 2! It may merely be a function of Australia being a small country, whose judges are mostly out of the public eye. It is revealing that John Sackar chose to write a biography not of any Australian judge, but of Patrick Devlin, including his candid correspondence with Felix Frankfurter and Dean Acheson,[4] which reveals much about the way the English Court of Appeal and House of Lords worked in the early 1960s.

Courts of Appeal in different jurisdictions work differently, and so one thing I need to do is to give an overview of how the New South Wales Court of Appeal works. Intermediate courts of appeal are also different from ultimate appellate courts, including because they tend to hear and determine many appeals as of right, and are subject to greater constraints on law-making. I know much more about intermediate appellate courts, and those are the private law appeals about which I'm going to speak. I shall refer to (1) the basic mechanics applicable, (2) what happens each week, (3) the volume of work and its consequences, (4) the nature of appeals, (5) how we go about our work, (6) how we write, and (7) whether there is anything different about private law appeals. What follows reflects my own views.

Mechanics. I should start with how things work. Appeals to the New South Wales Court of Appeal in private law matters lie as of right if they are brought from final decisions involving more than $100,000, and otherwise there is a general right of appeal subject to leave from other decisions. The right of appeal extends to most courts and tribunals in New South Wales – decisions of the Supreme Court and the District Court (but not the Local Court), and also of the Land and Environment Court, the Industrial Courts, the District Court, the Dust Diseases Tribunal, and many decisions of NCAT (although sometimes an appeal goes first to a single judge of the Supreme Court). Especially in public law matters, there is also a supervisory jurisdiction analogous to that which used to be exercised by the Court of King's Bench, which is important where there is no statutory appeal or where there are limits upon the statutory

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[4] J Sackar, *Lord Devlin* (Hart Publishing, 2020).

right of appeal, but this doesn't have a large role in private law. The appeals on which I am focussing are appeals from the Supreme Court and the District Court.

A few points should be noted. First, a minority of those appeals are confined in some way to questions of law, but mostly they are full appeals by way of rehearing, with the Court of Appeal empowered to overturn factual findings and make its own factual findings, and to admit further or fresh evidence,[5] and ultimately to give the judgment that should have been given at first instance. So generally speaking it's very different from, say, review by Circuit Courts of decisions of District Courts in the United States.

Secondly, we don't give "non-precedential" decisions. All are supported by reasons, all decisions are published, and in theory all engage the rules of precedent equally. Of course, many of those decisions will never be applied because they turn entirely on their own facts.

Thirdly, the relatively low monetary threshold hasn't increased for decades. I happen to think that is a good thing. It's quite easy for litigants and courts to spend as much time and money arguing about leave to appeal than to determine the merits of the underlying appeal. Even if leave (or "permission") to appeal is determined on the papers, that will lead to delay and consume public and private resources. I also think the existence of a general visitorial jurisdiction – whereby there is the possibility of appellate review, even in relation to the most legally-uninteresting litigation – is healthy for the legal system (both for the court the subject of appeal, and for the appellate court), so long as it is not a tool for delay and increased costs.

Fourthly, the preparation of each appeal is "front-loaded". That means that appellants have to file submissions up front, relatively shortly after filing the notice of appeal (6 weeks for the appellant, followed by 4 weeks for the respondent: UCPR r 51.37). Similarly, respondents who wish to cross-appeal, or challenge the competency of the appeal, or rely on a notice of contention, must do so promptly (within 2 or 4 weeks: UCPR r 51.17, 51.40). That enables a

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[5] See *Supreme Court Act 1970* (NSW), s 75A(5)-(10).

realistic estimate of the length of the appeal and the papers that need to be included in the appeal books to be made. It also means that on the first return date, usually before a Registrar, 6-8 weeks after the appeal has been commenced, there is an expectation that the parties will be given a hearing date. That in turn has a dramatic effect on adjectival applications, such as applications for expedition, for stays of execution, and for security for costs. When I came to the Bar, one would wait two or three years for an appeal to be heard, and applications for expedition were commonplace – so much so that there were three categories of expedition that could be sought and granted.[6] But today the Registrar will allocate appeal dates in two or three months' time if the appellant has complied with the rules, and it is seldom worth spending time on a contested interlocutory application when the whole appeal will be heard and determined promptly.

If a case is truly urgent, we can and do hear it very quickly. Cases in the last 12 months include claims based on mesothelioma (*Coveney v Asbestos Injuries Compensation Fund Ltd* [2024] NSWCA 317), challenges to company resolutions made when an on-market takeover was pending (*Yowie Group and Bolton v Keybridge Capital Ltd (No 3)* [2025] NSWCA 168), an injunction preventing the Legislative Assembly from expelling a member found guilty of sexual offences prior to his appeal against conviction being heard (*Ward v Hoenig* [2025] NSWCA 180), and whether plans for a boys school to admit girls next year complied with the trusts establishing the school (*Student A by his tutor Peter Johnston v Council of Newington College* [2025] NSWCA 230), all of which were heard and determined within days or weeks of being commenced. We bear in mind that it is almost always easier to hear and decide an appeal promptly, rather than to hear and decide an interlocutory injunction or stay pending appeal, because for the latter it is necessary to consider the strength of the view but also other discretionary considerations.

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[6] Broadly speaking, expedition in categories A, B and C involved the appeal being listed for hearing within around 1 month, 2 months or 3 months respectively from the date expedition was granted, with differing regard to the convenience of counsel already briefed. See for example *Harwin v Wood (No 1)* [1993] NSWCA 132 (Category A); *Witham v Holloway (No 1)* [1992] NSWCA 281 (Category B); *Cosmarnan Concrete Pty Ltd v Zuvela* [1994] NSWCA 65 (Category C).

2. What happens each week. The President and the 9 Judges of Appeal tend to sit 3 or 4 days a week, although some of those hearings may not go for the full day. Most appeals are listed for a half day or a day, although there is a substantial minority of appeals which are rightly set down for two or three days (and there are "mega-appeals" to which I shall return). The judges are generally speaking allocated randomly with a view to spreading the workload equally. That works because we are a court of generalists. Everyone is expected to do, and does, participate in appeals in all areas of the law. Everyone ends up sitting and hearing cases in areas where they had no or only limited practice before becoming a judge (for me, that was crime and personal injury; I've now heard some 250 criminal appeals and probably around the same number of personal injury appeals). Of course, there are areas of expertise as well, and the President will try to sit at least one judge who has expertise in insurance law, or aviation law, or planning law, or other speciality in appeals involving those areas.

The composition of the Bench is not disclosed until the afternoon of the day before the appeal is heard.

In advance of each appeal, but not disclosed to the parties, one judge is allocated by the President to write the first judgment. That judgment is expected to deal sufficiently with the facts, the procedural history, the grounds of appeal and the parties' submissions, so as to avoid repetition even if the court is divided. This judge is known as the "starred judge". Once again, that is allocated with a view to spreading the load evenly. Ideally, the starred judge might have the following day out of court in order to break the back of the writing of the judgment. It is unusual (and probably an administrative accident) for a judge to have stars on consecutive days.

That contrasts with courts where there is no formal system, and courts in which the presiding judge is expected to allocate first draft responsibilities after the same panel has heard, say, a week of appeals. There are pluses and minuses – sometimes appeals which look straightforward turn out to be very difficult, and vice versa. But on the whole I think it is a good thing, especially for more recently appointed Judges of Appeal, that the burden of preparing first judgments in their share of appeals is centrally allocated.

I am told that in some United States appellate circuits, it would be considered most improper for one judge to mention any aspect of an imminent appeal to another in advance of the hearing. Our approach is quite different. We meet formally 15 minutes before an appeal starts, when everyone will have read into the appeal and have preliminary views (although often the most useful thing is that not all judges have noticed a late amended notice of appeal, or an abandonment of some of the grounds, or a last-minute authority). We talk before and after adjournments. We normally reserve judgment in each appeal, but when judgment is reserved, it is normal for each member to have a view on each issue in the appeal (although sometimes that view might be "I need to re-read the cross-examination on that point to decide ground 3"). The result is that the judge writing the first draft has a reasonable idea of what is likely uncontroversial and what may be controversial.

So there are processes and habits which tend towards concordance. It strikes me as much more satisfactory than s 59 of the *Senior Courts Act 1981* (UK) which precludes separate judgments without the leave of the presiding judge in decisions of the Criminal Division of the Court of Appeal.[7] Indeed, on the few occasions in the Court of Criminal Appeal in which I have dissented, it has invariably been because I have taken a different view on the facts – and if there is to be a further application for special leave to appeal to the High Court, it is highly desirable to the administration of justice, not least to the losing party, that the disagreement be known.

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[7] See also Lord Neuberger, "Developing Equity – A View from the Court of Appeal" (Chancery Bar Association Conference, 20 January 2012), p 5: "One of the more difficult questions is whether appellate courts should produce multiple judgments or a single judgment. At least on the civil side, I would defend to the last the right of a judge to give a reasoned judgment in the terms which he or she wants. But tell that to the CACD, where single judgments are de rigeur. So, if you disagree with your colleagues on an appeal, you still have to subscribe to the judgment of the court – sometimes, I am told, a judge even has to give a judgment with which he or she does not agree".

There are accounts of lobbying by judges in favour of their preferred view of the law.[8] I have never encountered anything like that in any civil appeal. I certainly don't do it. If the written reasons don't persuade, so be it. That is quite distinct from letting the parties and my colleagues know what my preliminary views on each issue are – that may be necessary as a matter of procedural fairness to the loser, and it is very helpful, especially if I don't have the "star", so that the starred judge knows areas of disagreement.

There is also a system where for every appeal, track is kept on when each appeal was heard, who has written, who has not, and therefore how many outstanding stars each judge has. We use a simple spreadsheet, completed in hand by the Court of Appeal researcher, updated by emails accompanying each circulation of a draft or concurrence or dissent. (We each have two staff, who may be a PA and a recent graduate, or two recent graduates; there are also two other researchers available when they can be spared by the President – we are well served in this respect – and in my opinion this has many benefits to the Court and to the legal system as a whole.)

Finally, about every fortnight the Court publishes "Decisions of interest", a short document which gives a summary of around 3 recent Court of Appeal decisions, plus a couple of other Australian intermediate appellate decisions, and a couple of overseas decisions. The current and previous 50 such bulletins are on the website https://supremecourt.nsw.gov.au/practice-procedure/nswca/decisions-of-interest0.html

3. The volume of work and its consequences. There is much to be said for the proposition that if you are interested in decisions developing private law, the New South Wales Court of Appeal is a good place to look, simply as a matter of volume. A crude measure of volume is the number of media neutral citations each year. The High Court of Australia hears and determines 48, 43, 39, 43, 50 decisions a year, the majority are either criminal appeals or constitutional cases, leaving little room for private law (however that is

[8] See for example A Paterson, "Presidency and the Supreme Court: Lord Neuberger's Legacy", Judicial Institute Lecture, University College London, 2 December 2019, pp 42-43, and D Neuberger, "Judgment and Judgments – The Art of Forming and Writing Judicial Decisions", Denning Society Lecture, 2017, para 31.

defined). If one performs the same crude count of media neutral citations allocated for the last five years for the New South Wales Court of Appeal, the numbers are 360, 338, 284, 329, 317 – roughly seven times the volume (with the same dip corresponding with the impact of the COVID-19 pandemic). The much larger number of appeals means that even though most are uninteresting to anyone but the parties, there are many more appeals giving rise to contestable questions of law and therefore interesting judgments.

Media neutral citations are a very crude measure, and some care is required. At the intermediate appellate level, in State jurisdictions other than New South Wales, it is necessary to bear in mind that there is no separate Court of Criminal Appeal. Hence, by way of example, of the 20 most recent Victorian Court of Appeal decisions when I looked last week ([2025] VSCA 234-254), 11 are criminal appeals, and of the remaining 9, one was a judgment by consent, two were applications for leave dealt with in short order, and one was an application for security for costs. Five were substantive judgments in civil appeals. The 20 most recent decisions of the NSW Court of Appeal ([2025] NSWCA 209-228) include 5 procedural decisions, one substantially unopposed application to remove a legal practitioner from the roll, 2 leave applications addressed shortly and 1 supplementary costs judgment, but that still leaves 11 substantive civil appeals. The main point is that there is a separate series of 2025 NSWCCA which are exclusively decisions of the NSW Court of Criminal Appeal. Other States have courts of criminal appeal, but do not allocate a separate series of media neutral citations to their decisions.

The majority of appeals do not give rise to any question of law. However, the volume means that there tend to be dozens of times each year when the Court is asked to develop questions of private law. There is ample material to fill a fortnightly bulletin with three cases of interest.

Some of the most interesting of those appeals will be subject to a further appeal to the High Court, but once again the sheer volume means that most will not be.

4. The nature of appeals. Most appeals are from generalist courts with broad jurisdiction – from the Supreme Court at first instance, and from the District Court (which has a broad common law jurisdiction for actions not exceeding $1.25 million), with around 60% of appeals

coming from the Supreme Court, and 20% from the District Court.[9] Appeals from those courts are appeals by way of rehearing and extend to challenges to findings of primary fact – including questions of breach and causation and loss – and can extend to wholesale challenges to the trial, especially where little turns on testimonial evidence, because the case is documentary or has been conducted on the basis that all witnesses were credible and reliable. It is not unusual, say, to be taken to all of the evidence which bears on a motor vehicle accident and asked to find that the District Court erred in finding or failing to find breach. But many appeals, and perhaps the majority of successful appeals, focus on questions of law, to which less appellate deference is given. Often there are simple forensic reasons for that course, such as demeanour-based credibility findings by trial judges. For example, we were asked to consider the requirement that a testatrix "know and approve" of a will, and in particular whether it was sufficient without more that a will be read out loud to a mentally competent testatrix who then approved it, precisely because those were the only favourable findings that the appellant had in his favour. Incidentally, after quite a deal of historical investigation, it was quite clear that it was not sufficient merely to read out the will, but it was quite unclear whether the source of the rule in New South Wales or even for that matter in England was a rule of court, or judge-made law (*Lewis v Lewis* (2021) 105 NSWLR 487; [2021] NSWCA 168).

There are questions of law and questions of law. The most common questions of law arising in private law appeals are highly specific questions, such as the legal meaning of a contractual warranty or a deed of trust or a will, or whether a statute on its proper construction extends to the highly specific facts of the particular appeal. Often these will be of no broader interest. Sometimes they can be. We had a case last year on the meaning of 19th century colonial legislation establishing the Catholic section of Rookwood cemetery (the largest necropolis in the southern hemisphere), which arose because of a dispute about whether it was a charitable trust and therefore regulated by the charities regulator as opposed to the Auditor-General, which could not be answered satisfactorily without a careful understanding

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[9] See *Supreme Court of NSW Annual Review 2024*, p 17 (showing that of 303 and 312 filings in 2023 and 2024, some 180 and 195 were appeals from the Supreme Court, and 55 and 60 were appeals from the District Court).

of the context concerning colonial grants of land and the establishment of trusts to hold church land by statute (*Catholic Metropolitan Cemeteries Trust v Attorney General of New South Wales* (2024) 116 NSWLR 814; [2024] NSWCA 30).

The decisions of greatest interest to a broader audience are relatively "pure" questions of law, which will have application beyond the facts of the particular case.

Examples include:

- Whether there is a duty of care in a novel case? (consider a claim for pure economic loss, or psychiatric injury, by the owner of a valuation company following a negligent statements that the valuations were incompetent: *Perera v Genworth Financial Mortgage Insurance Pty Ltd* (2017) 94 NSWLR 83; [2017] NSWCA 19 or whether a builder owed a duty to a subsequent owner for defects in the common property of commercial premises: *The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479; [2013] NSWCA 317)
- Does a covenant not to sue preclude a claim for contribution from a guarantor? (*Lavin v Toppi* (2014) 87 NSWLR 159; [2014] NSWCA 160)
- Does a release of the fiduciary preclude a claim for knowing assistance? (*Cassaniti v Ball* (2022) 109 NSWLR 348; [2022] NSWCA 161)
- Is there a general power to wind up a trust on or analogous to the just and equitable ground? (*David & Ros Carr Holdings Pty Ltd v Ritossa* [2025] NSWCA 108)
- Does a successor trustee owe a fiduciary duty to a former trustee? (*Jaken Properties Australia Pty Ltd v Naaman* (2023) 112 NSWLR 318; [2023] NSWCA 214)

I once looked at all 94 civil appeals in which I had participated in 2020, and counted 23 decided novel questions of law, as opposed to the application of undisputed principle to the facts of the case.[10]

Those examples, taken from central areas in contract, tort and equity, quite commonly involve questions of statutory construction. This is expected – although there has been a tendency at least until recent times for academic commentary to neglect this. It is a consequence of what

[10] M Leeming, "The Modern Approach to Statutory Construction" in B McDonald, B Chen and J Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 45 at 46-47.

Gummow J once described as “the supreme importance of statute law”: *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160; [2007] HCA 1 at [35]. Sometimes the character of the question is obvious, because of the impact of the Australian Consumer Law, the Civil Liability Acts, the *Corporations Act*, the Trustee Acts and the various Succession Acts. All questions of breach of duty and causation in cases where there has been a failure to take reasonable care are now affected by the civil liability legislation. One cannot ask whether there is a general power to “wind up” a trust (whatever that may mean) without examining the statutory power to wind up a company. And so on.

Sometimes the impact of statute is more subtle. For example, in *Cassaniti v Ball*, the first issue was the effect of the abolition by statute decades ago of the rule that a release of one joint obligor released all joint obligors upon a suit in equity against a knowing assistant after the fiduciary had been released, and the second was whether there was any equivalent to the abrogated common law rule in equity.

Sometimes an important aspect of the argument is a question of characterisation. For example, one of the decisions mentioned above, *Ritossa*, squarely raised whether there is a free-ranging “Ebrahimi principle” based on *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 which extends to winding up a trust, or is this all merely a matter of statutory construction. That aspect wasn’t especially difficult, since Lord Wilberforce had gone out of his way to point out that the power was derived from Victorian companies legislation. Indeed, a large area of interest to me, which is one reason I am in Oxford, is the interrelationship between judge-made law and statute, and questions of characterisation such as this, which has been dispositive in a number of recent High Court decisions, including *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29.

Sometimes the only question is whether or not we should follow or depart from a line of British authority, there being no Australian decision on point. One example was as to the content of a “special circumstances” exception preventing an adult beneficiary with absolute and presently vested interest in trust property to obtain an *in specie* distribution of severable trust assets; we saw no reason to depart from the British authorities (*Beck v Henley* [2014] NSWCA 201). In *Whittington v Newman* [2024] NSWCA 27, the question arose in an

interlocutory appeal whether, in light of the introduction of a serious harm test to the law of defamation, we should follow all aspects of *Lachaux v Independent Print Ltd* [2020] AC 612. However, the point had not been decided by the primary judge, and the submissions on appeal were brief. It wasn't necessary to decide the point, and so we didn't, although we did attempt to set out for the benefit of future litigation the more recent English decisions which seemed relevant.

5. How do we go about our work? It is a large generalisation, and no two Judges of Appeal have the same approach, but I think it is fair to say that we tend to adopt an incremental, minimalist approach. Often deciding only what is necessary to resolve the appeal. That isn't merely because at least in some areas of law that is what the High Court has said is the "required approach" (*Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2024] HCA 25 at [37]-[39], and, in areas of statutory construction, see *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468; [2022] NSWCA 150 at [41]). It is mostly because most appellate judges are quite busy. It is perfectly true that we may have one or two days out of court each week. But in addition to preparing for the next appeal, each judge if he or she is to determine 80-120 appeals each year must turn around 2 or 3 appeals each week.

Further, many of the most interesting appeals come from the Commercial List, the Corporations List and the Real Property List of the Supreme Court. Normally the decision at first instance will have been determined expeditiously, and the Court of Appeal attempts, as a general rule, to give a commensurate level of expedition to those appeals – there's no point in having a general expectation of a turn-around time of days or a few weeks at first instance if the loser can then expect disproportionate delay by launching an appeal. And there's a further very pragmatic reason for speed. If there is an expectation that most appeals will be allocated a hearing date on the first return date assuming the appellant has filed its submissions, and also an expectation that many appeals will be determined within a month and most within 3 months, then that takes the sting out of applications for stays of execution and security for costs and expedition.

So there are powerful reasons telling against attempts to restate the whole area of the law, over and above what is necessary to resolve the appeal. That said, there may be a slightly

different approach involved depending on whether one party is challenging a proposition of law.

If the only questions are factual, then I am inclined to say upfront that *the principles of law are agreed, and may be sufficiently stated as follows* (and then set them out as concisely as may be). That serves a few purposes. It tells readers that this case is likely to be of little interest. It tells the High Court that if it is asked to grant special leave to determine a question of law, that court is being asked to do something we were not. And it relieves me of the task of attempting to be comprehensive on the qualifications and exceptions to the applicable legal principles. In fact, my hope is that those words will be understood as a not-so-secret code for *this judgment is far from the best to rely on for a statement of principle*. Sir Robert Megarry once observed that "argued law is tough law", especially because of the effect of the "purifying ordeal of skilled argument on the specific facts of a contested case".[11]

Conversely, where we are presented with a novel question of law, I tend to summarise quite fully the arguments that have been advanced by the loser, both in writing and orally. To be honest, that is in part a consequence that one cannot be sure that in opposing an application for special leave to appeal, or a High Court appeal, a respondent will sufficiently point out that the particular submission – often put by newly briefed counsel – had not been made to the Court of Appeal. But irrespective of the possibility of further appeal, it is also helpful, I think, for there to be a full account of the submissions in a novel case, because it is quite possible that there will be qualifications or exceptions which did not arise in that appeal, but will arise in a subsequent appeal. It can be just as important to be clear about what the decision is *not* authority for as what it *is* authority for.

The questions at the intermediate court of appeal level tended to be fine grained. That reflects the interstitial nature of the role. A typical example followed the High Court's decision in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29 that the "*Chorley* exception" was no longer part of the common law of Australia. You will recall that engineers or accountants who successfully represent themselves in litigation cannot recover as part of a

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[11] *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9 at 17.

costs order for their time, but solicitors like Mr Crawford and Mr Chester, who were in partnership with Mr Chorley and who acted for themselves when the firm was sued by the London Scottish Benefit Society, can. But the High Court held that the abolition of the exception did not affect the different rule that work done by an employed solicitor could be recovered at professional rates. Inevitably, that leads to the question what is the position where a solicitor litigant retains a law practice of which he or she is the only manifestation (in Australia, an incorporated law practice where the solicitor is the sole director and shareholder). We haven't quite worked that out so far definitively (see *Birketu Pty Ltd v Atanaskovic* [2025] HCA 2 at [26]) but it illustrates the interstitial issues that arise.

6. How do we write? If I were to choose a single adverb, I would say that we tend to write boringly. For my part, I bear in mind Robert Stevens' argument that it is important for the law to be as boring as possible, in order to preserve its scope for dealing impartially with the divisive constitutional questions which from time to time will arise.[12] I mostly agree, except that the divisive questions are not merely "constitutional". I think the question which over the last 12 years has had a greater effect on more people, and has roused stronger emotions than any other, is whether it was open to NCAT to find that a strata rule forbidding pets in buildings under strata title (*Cooper v The Owners – Strata Plan No 58068* (2020) 103 NSWLR 160; [2020] NSWCA 250), and whether you call that land law or strata law or public law, it is definitely not constitutional law. And if we are writing with a view to producing a joint judgment, the style is apt to be even more boring and anodyne.

We do try to be clear. When reviewing another judge's reasons with a view to agreeing with it, one thing we all have in mind is whether the author has been clear. No doubt we could do much better. One way would be to follow some advice which I think is utterly correct as to the best way to write an essay, or law article, or indeed a book. You write the whole thing, polish it off, then abandon it and start afresh, this time relying on the insights you gained from the first effort. We just don't have time for that or anything like that.

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[12] R Stevens, "Torts" in L Blom-Cooper et al (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009), 629 at 652.

I am quite conscious that short sentences tend to be clearer than long sentences. However, I am also conscious that it will often suit one litigant to apply a proposition taken from my reasons for judgment out of context. That is one reason why I would prefer to express all of the qualifications or exceptions to a proposition in a single sentence, even if it makes the sentence long and unwieldy.

We try to write swiftly. I mean that quite literally. I try to start writing (or more accurately dictating) within 5 minutes of reserving judgment. It is never going to be easier to put onto paper the nuances of the submissions, or findings, or even just the procedural and factual background, than immediately after preparing for an appeal and reading and hearing the parties' submissions.

Appeals are decided by reference to the grounds of appeal. Perhaps more clearly than a trial, the parties determine the issues for determination. Indeed, very commonly the entirety of the record at trial is not before the Court of Appeal, because the parties have (sensibly and in accordance with the rules) decided that much of the evidence is not relevant to any ground of appeal.

Points not decided. Whenever I read that "this was another opportunity lost by the Court to clarify the law on subject xxx", I tend to think that if that is the most insightful thing the author has to say on the case, then unless it is based on a study of the arguments raised and why not all were addressed, it is a rather lazy comment which does not appreciate the function of courts. What after all is the status of obiter dicta from one or more members of an intermediate appellate court on a point not necessary to decide, and which may for that reason not have been the subject of full argument? It also accords with what the High Court has said: see *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8] ("It is important to the efficiency of the system as a whole that intermediate courts of appeal should not feel compelled to treat determination of non-dispositive issues in appeals before them as the norm") and [101]. Non-dispositive passages in reasons for judgment can actually cause more trouble in other litigation.

It may be desirable to note what the Court is not deciding, and sometimes also to explain why that course is being taken. That is not so much to forestall academic criticisms such as I have mentioned, but to make it easier for lawyers and other courts to know whether or not our decision is or is not authority for a proposition.

But once again there is no one-size-fits-all rule. There are times when the principles are unclear, and it is useful to restate them. There are even times when it seems clear that the profession (or some of it) have failed to appreciate that there is an important point of principle, and hence it is useful to explain the law for the benefit of future cases, and indeed sometimes – albeit very rarely – to invite the point to be taken in some future proceeding.[13]
Before concluding that another court is wrong (often in some minor way – because a qualification has not been expressed, or because a proposition is expressed too broadly), I do two things if I can. First, I speak to one or more members of the Court – they may well shed light on why that passage of the judgment was written as it was. Secondly, I review the written and oral argument. One of the advantages of electronic appeal books (in NSW, parties must supply both hardcopy and electronic) is that the written submissions for the last 15 years are readily available (to me, not to the public). And the transcript may usually be obtained without great difficulty. I try to remember and apply the proposition that the words of every judgment must be read in context. I also bear in mind that the members of the other court were almost certainly doing their best to resolve the issues as advanced before them. If that is so, then there can be no occasion for language which is other than polite.

Should we be one-voiced or multi-voiced? I quite like Gregorian chant, but I prefer Renaissance polyphony, and I incline the same way with judgments.

A judge has an entitlement to write separately, if he or she wishes. But we don't have (and haven't had for quite some time) judges who for whatever reason will write their own judgment at length, duplicating what is contained in the starred judgment. Most of the time, there is agreement as to the result and the reasoning, and the primary writer will often accede to a request to express a proposition slightly more narrowly if the broader proposition does not

[13] See for example *R v Bui* [2025] NSWCCA 114 at [3]-[7], [8] and [262].

command assent. He or she may even agree not to decide an unnecessary point. And where there is disagreement – which I think is a healthy thing – it can be explained concisely. If for example I have the star and I know that a colleague is inclined to dissent on ground 4, I will attempt to summarise the arguments and material bearing on ground 4 in the hope that he or she can use that to express his or her divergent view.

I tend to agree, on the whole, with Lord Reid's statement in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1084 that "it is never wise to have only one speech in this House dealing with an important question of law". There are some important reasons of principle in favour of Lord Reid's approach. One is the very point Lord Reid had in mind, namely, the risk that a single speech might be read textually, as if it were a statute, rather than as expressing the applicable principles. Another is that multiple reasons for judgment will assist in developing the law, and in particular avoiding mis-steps. A third is one of appearance. Especially if an appeal is being allowed, it is a good thing for the losing litigant, who will be stripped of the fruits of its victory at trial, to see that three judges have separately and demonstratively considered the merits of the appeal.

But for me there is another important reason. It is almost always easier to write separately than to participate in a joint judgment. Many people who think about language have views about particular words and phrases and forms of syntax, and those views diverge. Some are potentially divisive. May an infinitive be split? Can "second" be an adverb in the same way that "first" can? Can "they" be used as a singular pronoun and, if so, is there a word "themself"? What precisely does "plurality" mean? There are many others. Of course there are easy circumlocutions for all these issues, but my point is that the process of reaching consensus on the form of expression, as opposed to the essential reasoning, takes time, and that time is in my view often better spent working on the next appeal, especially when I can agree with the reasons of another judge without buying into these issues of form.

That said, sometimes it is important that the Court speak with one voice. It all depends. The only thing that is clear-cut on this topic, in my view, is that there is not a one-size-fits-all

solution to every appeal.[14]

7. Is there anything different about private law appeals? The instinctive answer is that there shouldn't be. The Court of Appeal is performing the same statutory function, hearing and determining an appeal by way of rehearing, with power to admit further or fresh evidence, to make fresh or different findings of fact, so as to give the judgment or make the order ought to have been made at first instance. Section 75A of the *Supreme Court Act* is blind as to the subject matter of the appeal. It's quite different from the position before 1972, when there were quite different procedures (arrest of judgment and judgment *non obstante veredicto* at common law, and appeals only in equity).

The meaningful distinction in today's civil appeals is not common law versus equity. It is private law versus public law. And although the distinction is the opposite of clearcut, that does not prevent it from being useful (no less than does the existence of dusk prevent a meaningful distinction between day and night). I think there are some differences between private law and public law appeals.

One is size. We have in recent years seen a growth in what may be called "mega-appeals" which take 5 or 8 or 10 or more days. These are invariably private law appeals.

Of course there was a time – not too distant from today – when such long appeals were the norm. If you have a look at private law appeals reported in 1964 Appeal Cases, *Rookes v Barnard* [1964] AC 1129 was a 15 day appeal – 10 days in July followed by 5 days in November, *Hedley Byrne & Co Ltd v Heller* [1964] AC 465 was an 8 day appeal, *Lewis v Daily Telegraph Ltd* [1964] AC 234 was a 9 day appeal, *Commissioner of Railways v Quinlan* [1964] AC 1054 on occupier's liability to trespassers took 6 days, *Dingle v Associated Newspapers* [1964] AC 371 took 6 days, and even something so straightforward as the scope of the power of advancement in an appeal from a trustee's originating summons where there could be no disputed facts took 3 days in *Pilkington v Inland Revenue Commissioners* [1964] AC 612. This came about because there were no written submissions, and endless passages of

[14] See D Neuberger, "Judgment and Judgments – The Art of Forming and Writing Judicial Decisions", Denning Society Lecture, 2017, paras 38-40.

evidence and authorities were read out loud (and as Lord Devlin complained, you couldn't even read ahead because he had to share his law reports with his older, slower colleague).[15]

Today's mega-appeals are appeals which take the length of time of ordinary appeals in the 1960s, but they are vastly more complicated. Oral argument is supplemented by hundreds of pages of written submissions and thousands of pages of appeal books. They emerge from trials which took weeks or months. Often they are brought by liquidators (see for example *Anderson v Canaccord Genuity Financial Ltd* [2022] NSWCA 168, *Cassaniti v Ball* (2022) 109 NSWLR 148; [2022] NSWCA 161 and *DSHE Holdings Ltd (Receivers and Managers appointed) (in liq) v Potts* [2022] NSWCA 165), or they are class actions such as *Queensland Bulk Water Supply Authority (t/as Seqwater) v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206 – which is to say that they are proceedings brought on behalf of a group of people: creditors or shareholders or class members.

In such appeals we do employ some additional case management. Ideally, the parties will each provide an indication of the most important documents to read at the outset, and we will tend to insist on a roadmap to make sure that the hearing finishes in the 5 or 10 days allocated for it. Ordinarily it will be appropriate to have one or more directions hearings before a Judge of Appeal who may well be a participant in the appeal itself (and often in such cases there are interlocutory disputes). When it comes to producing a judgment, often but not invariably the work can be divided, and if everyone agrees, we can produce a joint judgment. We can also do that even if there is a minor point as to which we disagree (see for example *Anderson v Canaccord Genuity Financial Ltd (No 2)* (2024) 115 NSWLR 1; [2024] NSWCA 161 at [149]-[158]).

It is quite likely that in such appeals there will be novel points, because so many points will have been argued. One of those mega-appeals (*Cassaniti*) gave rise to the effect of a release of the fiduciary on a claim against a *Barnes v Addy* knowing assistant. Another

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[15] "Days – literally days – are occupied with reading out loud the records of evidence and the judgments in the relevant authorities. You cannot even pick up a Law Report and read the parts that you think matter instead of the parts that counsel thinks matter, because there are never enough copies to go round and you have to look over your neighbour and exchange polite glances when the time comes to turn the page": Devlin to Frankfurter, 31 March 1964, reproduced in J Sackar, *Lord Devlin* (Hart Publishing, 2020), p 195.

(*DSHE Holdings*) asked whether the declaration and payment of a dividend to members could constitute damage.

A second difference is that many public law appeals concern challenges to exercises of discretion, and also involve discretion, both because there is apt to be a requirement of leave to appeal, and because if the appeal succeeds, the court may itself be exercising some discretion as to relief. On the other hand, there are more instances of private law appeals where the issues are binary, and the outcome follows directly from their determination.

A third difference is impressionistic, and would be difficult to confirm empirically. It derives from the nature of the litigation. A lot of private law litigation is discretionary, in a way that most crime, most bankruptcy, much migration law, much family law and much child protection law is not. Add to that the obvious fact that most disputes are resolved without going to litigation, and only a minority of those cases which are commenced go to trial. That means that fully litigated private law trials are more likely to be closely run races, and that has the consequence that many private law appeals are also relatively closely run races – where there are to say the least respectable arguments that can be put on behalf of both sides. It is difficult, after all, to understate the capacity of contracting parties and testators (whether or not assisted by lawyers) to execute ambiguous documents and of legislatures to enact statutes whose operation is highly contestable in the unforeseen circumstances which in fact have eventuated. Of course, this is a very good thing for litigators!

I hope that gives you a flavour of how we go about judging private law appeals. Thank you for the opportunity to do so.