ORAL DECISIONS IN THE REAL WORLD

National Judicial College of Australia

Oral Judgments Course

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DEPUTY CHIEF MAGISTRATE THEO TSAVDARIDIS [1]

Introduction

This session will cover strategies and skills to equip you to make speedy but proper decisions in the context of a busy court. Dr John Lowndes, a retired Chief Judge of the Local Court of the Northern Territory, once described it as a 'fine art' to deliver 'a well-prepared and structured oral decision that is supported by clear and adequate reasons and which effectively communicates [with] the parties and their legal representatives – and [with] the public at large'.[2]

The importance of giving reasons

The importance of giving reasons for decision are well known and have been stated by other speakers at this conference. As is the case with written reasons, oral reasons must set out 'the reasoning which led to the conclusion'.[3]

I add some observations from three recent matters on appeal in the Supreme Court of New South Wales determined from decisions of the Local Court of New South Wales. The matters all concerned, albeit minor, sentences imposed in the absence of the accused. This can occur under s 182 of the *Criminal Procedure Act 1986* (NSW) if the accused has entered a plea of guilty in writing to the Registrar. The accused's written plea may be accompanied by additional written material containing matters in

[1] Deputy Chief Magistrate, Local Court of New South Wales. The author acknowledges Dr John Lowndes OAM FAAL in the papers of 'Oral Decision Making in the Real World' and 'Explaining the Requirement to Give Adequate Reasons for Decision in as Simple a Way as Possible' and the work of Magistrate Peter Dare SC's paper, the original paper of which was derived from Magistrate Gordon Lerve (as his Honour then was; later, Judge, District Court of New South Wales), as published in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011). The author also acknowledges the assistance of Dane Luo, Bachelor of Commerce (Honours) and Bachelor of Laws (Honours) student, The University of Sydney, in the preparation of this paper.

[2] Dr John Lowndes OAM FAAL, retired Chief Judge, Local Court of the Northern Territory, 'Oral Decision Making in the Real World' (Speech, NJCA Oral Decisions Program, June/July 2022) 19.

[3] *AK v Western Australia* (2008) 232 CLR 438, 451 [36] (Gummow and Hayne JJ). See also *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317, [38] (Ashley JA, Warren CJ agreeing at [1], Nettle JA agreeing at [3]).

mitigation of the offence. In all three matters, the Supreme Court held that the Local Court Magistrates did not give adequate reasons.

In *Roylance v Director of Public Prosecutions (NSW)* [2018] NSWSC 933, the Magistrate imposed $330.00 fines in respect of two charges of possessing a prohibited drug. In sentencing the accused, the Magistrate made a passing reference to the fact that the accused had provided some references and the method of hiding the drugs to avoid detection. Justice Bellew held:

> A judicial officer is obliged to give reasons for his or her decision. As a general proposition that will require a record of the facts upon which the conclusion is based, and the process of reasoning by which the conclusion is reached. Failure to provide adequate reasons is an error of law. What is adequate must be assessed according to the circumstances of each individual case. …
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> Even making allowance for [the proceedings being dealt with on an ex parte basis and the Magistrate was delivering ex tempore reasons], the Magistrate remained under a duty to give reasons in a way which expressed his findings clearly, and which enabled the parties to understand the basis for his decision to record a conviction and impose a fine in each case. In my view, the reasons do not satisfy that test. There is a passing reference to the character references relied upon by the plaintiff, but there is no indication of how (if at all) that material was taken into account. Perhaps even more fundamentally, it is not apparent from the reasons how and why the Magistrate determined that it was appropriate to impose a fine of $330.00 in each case. It would not be possible for either party to determine the basis upon which the Magistrate reached his decision by reading the reasons.[4]

In *Hayes v Director of Public Prosecutions (NSW)* [2019] NSWSC 378, Campbell J found that the Local Court Magistrate had not given adequate reasons and stated:

> [T]he obligation to give reasons is an important judicial duty, even in small matters. It is an aspect of the principle that justice must not only be done, but must be seen to be done. The obligation to give reasons in simple cases dealt with under s 182(3) need not be onerous. Given the allowance that must be made for the workload in the Local Court, succinct reasons are appropriate, but they need to measure up to the legal standard Bellew J described in *Roylance*. …
>
> Her Honour had to make some brief, succinct assessment of objective seriousness. Her Honour also had to explain why in her opinion the matter was not an appropriate one for the leniency which the plaintiff sought. It has to be borne in mind that however succinct adequate reasons may be, they need to engage with the issues put forward for determination by the parties and explain, shortly, why a decision is made one way rather than the other. That did not happen here.[5]

[4] *Roylance v DPP (NSW)* [2018] NSWSC 933, [12], [15] (Bellew J).
[5] *Hayes v DPP (NSW)* [2019] NSWSC 378, [13]–[14] (Campbell J).

These decisions serve to emphasise the importance of giving reasons, even in the context of a busy court list with a heavy workload in the Local Court and where the accused person is absent. In essence, this is because litigants are entitled to know the reasoning behind any result.

In *Balach v Director of Public Prosecutions (NSW)* [2019] NSWSC 377, Campbell J suggests that there appeared to be a practice in the Local Court when matters are dealt with under s 182 of the *Criminal Procedure Act 1986* (NSW) for the Court to not consider imposing a non-conviction under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[6] Under s 10, a court may, after finding the offence proved, discharge the accused and dismiss the charge or impose a Conditional Release Order without recording a conviction.[7] Justice Campbell emphasised that, where there is a 'live question' about whether the court should exercise its power under s 10, it would be necessary for the court to deal with the issue and give reasons as to whether or not such a penalty should be imposed. The significance is that, although the accused person did not expressly seek a s 10 disposition, the Supreme Court held that it must still be considered by the Magistrate where it is clear on the material.[8]

Preparation before court

As with all our work, preparation is the key to being able to deliver an oral decision. Wherever possible, one should become acquainted with the nature of the case and the issues that are to be determined by reading and analysing the documentation and material already on file. 'Identifying the issues helps you to manage the case … It creates reference points. One can readily see the significance of pieces of evidence' and to understand why a piece of evidence is given or a witness is called.[9] Understanding the issues is thus fundamental to giving an oral decision. Understanding the issues before you get onto the bench is helpful, not just to give yourself a head start in thinking about the potential issues and matters to be raised and deciding the *order* in which the issues should be determined, but also to give you an opportunity to conduct research on legal issues and reading in advance.

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[6] *Balach v DPP (NSW)* [2019] NSWSC 377, [12] (Campbell J).

[7] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1).

[8] It is suggested that a Magistrate should consider the test in s 193(1) of the *Criminal Procedure Act 1986* (NSW), which states '[i]f the accused person pleads guilty and *does not show sufficient cause why he or she should not be convicted or not have an order made against him or her*, the Court must convict the accused person or make the order accordingly' (emphasis added). A Magistrate should also have regard to the disjunctive factors enunciated in s 10(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

[9] Deputy Chief Magistrate Peter Lauritsen, Magistrates' Court of Victoria (as his Honour then was; later, Chief Magistrate, Magistrates' Court of Victoria) in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 65.

In terms of general preparation, I always find it helpful to print off a copy of the relevant legislative provisions. In the context of sentencing, this immediately allows me to identify the maximum penalty. There is also utility in printing out the surrounding provisions. For example, it is important to identify whether there are any separate offences for circumstances of aggravation so as to be aware of aggravating circumstances which, if taken into account, would violate the *De Simoni* principle.[10]

I also find it helpful to have with me on the bench a copy of key legislation, including the *Crimes (Sentencing Procedure) Act 1999* (NSW) (which is the relevant sentencing statute in NSW) and bench books by the Judicial Commission.

Although less common in the sentencing context, it may be helpful to prepare a chronology or drafting some reasons with gaps for details, which can be added to during the course of the hearing. This may be gleaned from the pleadings, affidavits and other filed documents in civil proceedings.

Preparation during court

Equally important to preparation before court is preparation during the course of the trial or hearing. Justice Alan Blow (as his Honour then was; later, Chief Justice, Supreme Court of Tasmania) emphasised that 'good note-taking [throughout the proceedings] is essential if the judicial officer is to give an oral decision either at, or shortly after, the conclusion of the hearing'.[11] Effective note-taking is a means of ensuring that the 'sharpness of detail' does not leave you quickly when the hearing has concluded.[12] Judge John McGill found that taking very detailed notes aided his concentration and assisted in implanting the evidence and submissions into the his short term memory to the extent that it would enable an oral decision to be delivered at the conclusion of the hearing.[13]

There are many ways to take notes. For me, I use a notepad that has a 5 cm margin on the right hand side. On the larger left column, I take detailed, nearly verbatim notes of the submissions of the parties and the questions and answers of witness testimony. It is always helpful to have answers or submissions word for word so that I can quote them verbatim in the decision. On the right margin, I make notes and

[10] *The Queen v De Simoni* (1980) 147 CLR 383, 389 (Gibbs CJ, Mason J agreeing at 395, Murphy J agreeing at 395).

[11] Justice Alan Blow, Supreme Court of Tasmania (as his Honour then was, later Chief Justice, Supreme Court of Tasmania) in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 7–8.

[12] Justice Andrew Bell, President of the Court of Appeal, Supreme Court of New South Wales (as his Honour then was; later, Chief Justice, Supreme Court of New South Wales), 'Delivering Reasons in the Tribunal Context' (NCAT Members Training Day, Sydney, 21 October 2019) [58].

[13] Judge John McGill SC, District Court of Queensland, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 46.

put abbreviations or symbols for significant testimony or submissions. I will also make notes of the demeanour of witnesses and their credibility. As I take notes, I would occasionally leave spaces so that additional notes may be added. I also find it helpful to have several different coloured highlighters on hand to also colour code different things so that I can readily identify the relevant passages for later recall.

I emphasise that each judicial officer must find the approach that best suits them. Magistrate Tina Privetera stated that she keeps two notebooks on the bench.[14] In one, she takes detailed notes as each witness gives evidence and uses double spacing so that further notes can be added later. In a separate book, her Honour keeps the parties' submissions. The purpose of doing this is to keep the submissions and evidence separate when it comes to delivering an ex tempore decision later.

Judge Frank Gucciardo stated that he has separate sheets headed 'Facts' and 'Law' and progressively notes essential matters which must be addressed during the hearing.[15] His Honour would progressively place the items in the sheet in a hierarchy of relevance by numbering them.

In cases that raise multiple issues, Justice Blow preferred making notes on a separate sheet of paper for each issue. By the end of the hearing, there would be several pages of thorough notes which can be arranged in an appropriate order prior to delivering an oral judgment.[16]

Structure of an Oral Decision

Judge Richard Cogswell SC emphasised that before embarking on an oral decision, a judicial officer must have a destination. His Honour stated:

> I need to have made up my mind on the issues to be addressed and to have reasons for my conclusions. This means it is vital that you have grasped the arguments, especially the arguments of the losing party and have an articulated response to those arguments. Like the danger of changing one's mind during a long advice, it is obviously important to have reached a concluded view before you embark on the judgment. If there is a reservation or a less obvious niggling doubt then that can

[14] Magistrate Tina Privetera, Magistrates' Court of Queensland, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 86–8.
[15] Judge Frank Gucciardo, County Court of Victoria, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 42–3.
[16] Justice Alan Blow, Supreme Court of Tasmania (as his Honour then was, later Chief Justice, Supreme Court of Tasmania) in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 7–8.

> be a danger sign for when you reach the other end of the judgment. In those circumstances it is usually helpful to leave the bench, focus on that point, take up a pen and articulate your response.[17]

It is often very helpful to take a moment after the hearing has concluded and prepare one's thoughts before delivering an oral decision. One very common way to use this time is to prepare a 'list of headings indicating matters essential for the decision including the legislation under consideration, the issues to be decided, the legal principles applicable, the principles upon which a decision might be exercised and the orders to be made, especially if there is some possibility of some significant departure from the orders sought'.[18]

Judge Cogswell commented:

> It can be helpful either on the bench or during a short adjournment to take a fresh page and write the headings that you need to address during the course of the judgment. These might be quite fundamental for a new judge: issues; oral evidence and exhibits; legislation and case law; competing arguments; findings of fact; conclusions of law on each issue. It's a helpful discipline to do such a list to ensure that you don't overlook something obvious.[19]

It is common for judges and magistrates to create and use templates for various kinds of matters. It is important that any templates are regularly updated to reflect changes in the law and based on personal experience. For this session, I will use an oral ex tempore criminal sentence as a template however the strategies and skills that I refer to are applicable to a wide range of circumstances, including bail decisions, interlocutory matters and criminal and civil trials.

Magistrate Peter Dare SC proposed a list for sentencing matters composed of the following headings:

1. The charges and the plea
2. Facts
3. Maximum penalty
4. Assessment of the criminality
5. Criminal history of the offender
6. Offender on conditional liberty
7. Pre-sentence report

[17] Judge Richard Cogswell SC, District Court of New South Wales, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 12–5.
[18] Justice Wayne Haylen, Industrial Court of New South Wales, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 46.
[19] Judge Richard Cogswell SC, District Court of New South Wales, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 11–3.

8. Plea in mitigation and prosecutor's submissions[20]

Based on Magistrate Dare's work, of which I am very grateful, I propose the following structure for headings in an ex tempore sentencing decision.

The charges and the plea

Consistent with the informality in an ex tempore decision, particularly one in the Local Court to an accused person without legal representation, I would suggest beginning the decision as follows:

> The accused comes before the Court charged with the [name of the offence, eg possession of a prohibited drug] contrary to [the statutory provision, eg s 10 of the *Drug Misuse and Trafficking Act 1985* (NSW)]. The accused has [pleaded guilty OR been found guilty following a hearing].

I note that occasionally it is more appropriate to adopt a more conversational tone when giving reasons for decision. In those cases, instead of referring to the accused in third person, it may be appropriate to use words like 'you'.

I also find it helpful, when discussing the offence, to state the statutory maximum penalty. Where the court is sentencing very close to or at its jurisdictional limit, it is important to mention this point. For example:

> The statutory maximum penalty for the offence is [maximum penalty, eg imprisonment for five years]. Section 267 of the *Criminal Procedure Act 1986* (NSW) provides that a Local Court may only impose a sentence of up to two years for a single offence. Pursuant to s 58 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the Local Court may issue a sentence of imprisonment for up to five years where there is cumulation or partial cumulation. In circumstances where the maximum penalty is greater than the jurisdictional limit of this Court, I apply the principles in *Park v The Queen* [2021] HCA 37 and *R v Doan* [2000] NSWCCA 317. Those principles are that the sentencing judge should use the maximum penalty as the yardstick or starting point as to the objective seriousness of the offence. The relevant jurisdictional limit is applied after the appropriate sentence for the offence has been determined. The jurisdictional limit cannot be regarded as some form of (or as a substitute for) the statutory maximum penalty.

[20] Magistrate Peter Dare SC, Local Court of New South Wales, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 14–7.

I see no harm in providing citations for various propositions as authorities in an oral decision. Of course, there is no need to include slabs of quotes from multiple decisions but I think it can give confidence to the parties that the legal principles and tests have been identified and applied.

Facts

It is custom in the Local Court that the agreed facts – often in the form a Police Fact Sheet – are tendered on sentence. It would then be appropriate to summarise the agreed facts that form the court record.

Assessment of criminality

After setting out the facts, it is then a good idea to discuss the objective seriousness of the offences. Where the offence is not so grave as to warrant the imposition of the maximum penalty, a court is bound to consider where the facts of the particular offence and offender lie on the 'spectrum' that extends from the least serious instance to the worst.[21] Common expressions used are that the offending falls at the 'lower end', 'towards the lower end', 'below the mid range', 'at the mid range', 'well above the mid range', 'towards the top of the scale' or 'so grave as to warrant the imposition of the maximum penalty'. The High Court emphasised in *R v Kilic* (2016) 259 CLR 256 that the last expression should be used in place of the 'worst category' or 'an example of the worst category of this type of offence'.[22]

Aggravating and mitigating factors

The next part is to identify the aggravating and mitigating factors. It has been stated that the judicial officer must clearly identify 'the relevant factors, the weight given to them, and their role'.[23] It is important that the judicial officer expresses whether a factor has actually been taken into account.[24]

It is common to refer to the criminal history of the accused as well as any submissions or references they have made. This includes, in particular, identifying if the accused has been convicted of an identical offence or a similar offence involving the same complainant. It can also be identified if the accused has no criminal history or if the accused is not assisted by their criminal record.

[21] *Elias v The Queen* (2013) 248 CLR 483, 494–5 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
[22] *R v Kilic* (2016) 259 CLR 256, 266 [19]–[20] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[23] *R v Mills* (2005) 154 A Crim R 40, 48 [49] (Wood CJ at CL, Grove J agreeing at 54 [81], Hoeben J agreeing at 54 [82]) (Court of Criminal Appeal of New South Wales).
[24] *R v McNamara* [2005] NSWCCA 195, [37] (Hall J, Simpson J agreeing at [48], Buddin J agreeing at [49]).

It may be helpful, particularly for new judicial officers, to have a list of aggravating and mitigating factors by your side when dealing with this. However, judicial officers should be mindful that no list is exhaustive and the court can consider any objective or subjective factor that affects the relative seriousness of the offending. Indeed, it has been commented that the introduction of a list of aggravating and mitigating factors in s 21A of the *Crimes (Sentencing Procedures) Act 1999* has made the task of sentencing courts 'more difficult, or at least more prone to error'.[25]

It may be helpful to give some planning as to how the aggravating and mitigating factors will be explained and taken into account. One must be careful that they are not 'double counting'.[26]

Sentencing discounts

Generally, there is a discount given for plea of guilty. It is important to state when the plea of guilty was entered and, depending on the statutory or caselaw applicable in your jurisdiction, to state the quantity of the discount. An example would be:

> The accused pleaded guilty on [date]. Those pleas of guilty were entered on the first available opportunity and accordingly I allow the full 25% discount, which is a reduction in an otherwise appropriate sentence, for the utilitarian value of the plea.

If the plea was entered at a very late stage, it is also important to note the reduced utilitarian value of the plea and explain that the commensurate, applicable discount is therefore lower.

Other considerations

It may also be relevant to consider the pre-sentence report. However, as Magistrate Dare noted, the report may contain hearsay material not led at the hearing on sentence or will conflict with the plea.[27] His Honour also noted that one must always be mindful to not place inappropriate weight on subjective matters and matters without evidence or supporting material.

The appropriate penalty

There are also other matters that may need to be set out.

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[25] *Elyard v The Queen* (2006) 45 MVR 402, 410–11 [39] (Howie J) (Court of Criminal Appeal of New South Wales).
[26] See ibid [40] (Howie J).
[27] Magistrate Peter Dare SC, Local Court of New South Wales, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 17.

If a custodial sentence is to be imposed, it is inappropriate to impose such a sentence unless the judicial officer is of the opinion that no other sentence is warranted.[28] In some cases, the legislation may require that the judicial officer make a record of its reasons for deciding that no penalty other than imprisonment is appropriate.[29]

Where there are multiple offences arising from a single incident of criminality or committed in similar circumstances, it is important to note the obligation to comply with the principles of totality.[30]

In a Commonwealth matter, note the requirement to consider the factors set out in s 16A of the *Crimes Act 1914* (Cth).

Delivering an Oral Decision

The language and style of the oral decision is of great importance. The language used should be plain English and simple with the goal that 'the parties should leave the courtroom understanding what the decision is and why it was made'.[31]

Judge Felicity Davis gave this advice:

> I have on occasions found myself during lengthy oral reasons wondering if I am making sense and[,] worse of all, trying to remember how I started a sentence. If you think you are not making sense, stop, withdraw what you have said and start the sentence or section or your reasons again, telling the parties that is what you are doing. Do not be embarrassed if you have to do that – you are doing your job as best as you can. Do not hesitate to clarify or explain something that you said earlier, or add to what you said earlier, if you find that there is something you have overlooked.[32]

Deputy Chief Magistrate Lauritsen (as his Honour then was; later, Chief Magistrate, Magistrates' Court of Victoria) recommends the style of Lord Denning MR to be a good model because it is conversational,

[28] *R v Zamagias* [2002] NSWCCA 17, [24]–[25] (Howie J, Hodgson JA agreeing at [1], Levine J agreeing at [2]).
[29] See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2).
[30] *Pearce v The Queen* (1988) 166 CLR 59, 63 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).
[31] Magistrate Robert Pearce, Magistrates' Court of Tasmania (as his Honour then was; later, Judge, Supreme Court of Tasmania) in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 82–5.
[32] Judge Felicity Davis, District Court of Western Australia, in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 20–4.

uses short, simple sentences, is an oral narrative style, uses the active voice and avoids legal jargon.[33] In *Miller v Jackson* [1977] QB 966, Lord Denning MR wrote:

> In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. … So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.[34]

Amending an Oral Decision

The ability of a judicial officer to revise the transcript of their ex tempore judgment is consistent with established judicial protocols. The position of was summarised by Kirby J as follows: 'it is always possible, and entirely proper, for a judicial officer to revise ex tempore reasons, even extensively, without altering their substance or the orders which they sustain'.[35] Clause 4.5 of the *Guide to Judicial Conduct* (3rd Edition) provides:

> **4.5 Revision of oral judgments**
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> A judge [which by virtue of clause 1.1 includes magistrates] may not alter the substance of reasons for decision given orally. That is the basic principle. Subject to that, a judge may revise the oral reasons for judgment where, because of a slip, the reasons as expressed do not reflect what the judge meant to say, or where there is some infelicity of expression. Errors of grammar or syntax may be

[33] Deputy Chief Magistrate Peter Lauritsen, Magistrates' Court of Victoria (as his Honour then was; later, Chief Magistrate, Magistrates' Court of Victoria) in 'Oral Decisions: Delivering Clear Reasons' (National Judicial College of Australia, 2011) 67.

[34] *Miller v Jackson* [1977] QB 966, 976 (Lord Denning MR).

[35] Justice Michael Kirby, President of the Court of Appeal, Supreme Court of New South Wales (later, Justice, High Court of Australia), 'Ex Tempore Judgments — Reasons on the Run' (1995) 25 *University of Western Australia Law Review* 213, 229.

> corrected. References to cases may be added, as may be citations for cases referred to in the transcript.[36]

In *Bar-Mordecai v Rotman* [2000] NSWCA 123, Sheller, Stein and Giles JJA cited the following passage approvingly:

> After all, an extemporary [sic] judgment is not always easy to deliver perfectly in all respects on the spur of the moment; there must be corrections which need to be made so as to give the real meaning of the judge, and he is perfectly entitled, it seems to me, not only to correct mistakes, but to alter words which do not express his intended meaning at the time when he uttered them.[37]

Chief Justice Murray Gleeson, writing extra-curially, stated:

> There is no reason, in law or in policy, why a judicial officer who delivers a judgment ex tempore should be strictly bound to the precise manner in which the reasons were expressed. On the contrary, judges and magistrates are encouraged, where it is possible and appropriate to do so, to decide cases promptly and to give their judgments immediately. It would not advance that policy to prevent them from later improving the manner of expression of their reasons, provided, of course, that they do not alter the substance.[38]

However, there are limitations to the extent in which an oral decision may be amended. Changes of substance are generally not permitted. This was most succinctly stated by the High Court last year in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 388 ALR 257. The Court stated that:

> [A] judge has some ability to improve the expression of her or his judgment in published reasons, *so long as she or he does not change the substance of what was said in ex tempore reasons or make other material changes*. Depending upon any applicable rules of court, it may be accepted that in civil proceedings (without a jury) there is latitude for a judge to revise ex tempore reasons. That capacity may not be limited to slips, or to mistakes, or to matters of style. However, *changes of substance are not permitted*.[39]

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[36] Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3rd ed, 2017) cl 4.5 <https://aija.org.au/wp-content/uploads/2017/12/GJC-3ed-Nov2020.pdf>.

[37] *Bar-Mordecai v Rotman* [2000] NSWCA 123, [195] (Sheller, Stein and Giles JJA), citing *Bromley v Bromley* [1965] P 111, 116 (Danckwerts LJ).

[38] Chief Justice Murray Gleeson, High Court of Australia, 'Revising Transcripts of Summings-Up' (1997) 9 *Judicial Officers' Bulletin* 25, 25.

[39] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 388 ALR 257; [2021] HCA 6, 267 [31] (Steward J, Kiefel CJ agreeing at 258 [1], Keane J agreeing at 258 [2], Gordon J agreeing at 258 [3], Edelman J agreeing at 258 [4]) (emphasis added).

Judicial officers should be most cautious in revising oral decisions in the context of a criminal trial. In *Lam v Beesley* (1992) 7 WAR 88, Owen J said, after reviewing the authorities that if changes to a judgment were matters 'such as could lead to an *appearance of altered substance*' as opposed to matters of form, that was sufficient, in the context of a criminal trial, to render a conviction unsafe and unsatisfactory.[40]

For civil matters, the relevant test was stated by Beazley JA (as Her Excellency then was; later President of the Court of Appeal, Supreme Court of New South Wales) in *Todorovic v Moussa* (2001) 53 NSWLR 463. The test is as follows:

> In a civil action, I would consider that the appropriate test in determining whether an alteration to a judgment is permissible is *whether the change is one of substance in fact* and not the higher test stated by Owen J in the case of a criminal trial.[41]

In that matter, the District Court Judge had added the sentence 'I do not accept Mr Fefelov as an accurate witness' in the approved transcript of the reasons, which did not appear in the oral judgment. On appeal the Court of Appeal acknowledged that the finding did not change his Honour's ultimate finding, was 'was wholly consistent with [that ultimate finding] and therefore, it could be argued, could not have come as a surprise'.[42] Nevertheless, the Court of Appeal held that the additional statement was one of substance. Justice Beazley held:

> There are arguments which tend to the opposite conclusion. In the first place, it was a critical finding. The rejection of Mr Fefelov as a witness of truth was an essential underpinning of his Honour's finding against the appellant. Secondly, had that finding not been made, the appellant could have rightfully complained that his Honour had failed to consider adequately relevant evidence in the case, namely, that of his corroborative witness. Those two matters alone, in my view, point persuasively to the additional statement in the judgment being one of substance and therefore impermissible.[43]

In the next paragraph, her Honour held that '[w]here a judgment has had impermissible alterations made to it, the proper approach is to treat the judgment as if the additions had not been made'.[44]

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[40] *Lam v Beesley* (1992) 7 WAR 88, 95 (Owen J) (emphasis added).
[41] *Todorovic v Moussa* (2001) 53 NSWLR 463; [2001] NSWCA 419, 468 [46] (Beazley JA, Powell JA agreeing at 464 [1], Sperling J agreeing at 470 [61]) (emphasis added).
[42] Ibid 469 [51] (Beazley JA, Powell JA agreeing at 464 [1], Sperling J agreeing at 470 [61]).
[43] Ibid 469 [52] (Beazley JA, Powell JA agreeing at 464 [1], Sperling J agreeing at 470 [61]).
[44] Ibid 469 [53] (Beazley JA, Powell JA agreeing at 464 [1], Sperling J agreeing at 470 [61]), citing *Palmer v Clarke* (1989) 19 NSWLR 158, 170 (Kirby P, Samuels JA agreeing at 173).

In summary, it is entirely proper for an oral decision to be amended to clarify its terms, add authorities and correct mistakes. However, appellate courts have warned against making changes that go to the thrust and substance of the judgment. The takeaway lesson from this warning is to take care when formulating oral reasons to cover the substantive material on which the decision was based.

Conclusion

Delivering a well prepared and structured oral decision is a fine art that can only be mastered and perfected by experience and practice. It is hoped that the wealth of experience, knowledge and wisdom imparted by each and every one of the esteemed judicial officers referenced in this paper will be of assistance and guidance to you.