CONCEPTION AND DRAFTING OF COURT DECISIONS

SOME UNDOGMATIC OBSERVATIONS ON CIVIL PROCEDURE IN THE DANISH SUPREME COURT

BY

MOGENS HVIDT

"Collegiate composition of courts of law is indeed a strong guarantee for thorough deliberation of orders, decrees, and judgments. It also serves to ensure that changes on the Bench do not cause immediate and deleterious vacillation and uncertainty in court practice. But on the other hand, court work is slowed down by inherent circuity of action, the ill-effects of which it is in turn sought to remedy by channelling to a judge sitting alone a variety of routine matters of a summary nature."

Nellemann, *General Part of Civil Procedure*, 3rd ed. 1887, p. 185.

INTRODUCTION

In the Danish legal system the ordinary courts of law are arranged in three tiers: The Supreme Court (*Højesteret*) sitting in Copenhagen; two appellate courts, the Eastern High Court (*Østre Landsret*) at Copenhagen and the Western High Court (*Vestre Landsret*) at Viborg in Jutland; and eighty-four District Courts (*Byretter*) found in all parts of the country. There is also the Copenhagen Maritime and Commercial Court (*Sø- og Handelsretten*) with jurisdiction in shipping and trade matters in the Greater Copenhagen area and from which appeals lie direct to the Supreme Court. Further courts are found in the Faeroe Islands and in Greenland.

For a great many years, the pattern of distribution of civil matters among the various tiers has been the subject of thorough, even heated, discussion in Denmark. In 1962, Hans Topsøe-Jensen[1] propounded a scheme under which District Court jurisdiction would be substantially extended. At that time I was a member of the Eastern High Court, whose judges found Topsøe-Jensen's scheme to be much too far-reaching. I published an article in opposition,[2] beginning with Nellemann's sentences quoted above as a kind of motto. I was impelled to write by my deeply rooted belief in the eminent qualities of the collegiate system but I had to admit that Topsøe-Jensen was right in many of his specific proposals for the transfer of various types of actions from the High Courts (three judges) to the District Courts (single judges). The question is still of great importance, in particular because of the great backlog of cases in the High Courts and the resulting much too long time of waiting for hearings

[1] *Juristen* 1962, pp. 240–6.
[2] *Juristen* 1962, pp. 421–31.

to be appointed—up to more than twelve months for civil actions and three to six months for criminal cases, depending on the accused being held in custody or not. Quite radical alterations are now being contemplated in Denmark.[3] Without going into the details of these important and complicated questions, I must simply acknowledge that developments over the seventeen years since 1962 have convinced me of the necessity and propriety of a substantial extension of District Court jurisdiction. In my estimation—since all civil actions should be allowed to be heard at two levels, and hearings at three levels should, wherever possible, be avoided—the best allocation of jurisdictions would be to arrange for actions that by their nature ought to be finally decided by the Supreme Court to be initiated at High Court level (including the Copenhagen Maritime and Commercial Court), while other actions ought to begin in District Courts with the possible of appeal to either of the two High Courts and a further appeal to the Supreme Court to be exceptionally allowed subject to grant of Third Instance Certificate. As something peculiar to the Danish administration of justice, such Certificates are granted by the Minister of Justice and not by the Supreme Court.

On the other hand, I still maintain my belief in the collegiate system and its fine qualities, already endorsed by Nellemann in his sober words quoted above. In 1962, I wrote[4] that if a collegiate court functions as it should, this system is an outstanding tool for obtaining good results and for framing decisions in a satisfactory manner. The reciprocal criticisms exercised by colleagues are of inestimable significance, to the delivery of opinions as well as to the drafting of decisions.[5] My thirty-three years as a judge—more than twenty-six on collegiate benches—have caused my belief to grow into a firm conviction.

Indeed, while working at the problem in 1962, I found only one person who uttered any doubt as to the advantages of the collegiate system as such, although he still harboured a reservation in respect of the Supreme Court. That man was the eminent jurist and politician J. H. Deuntzer, who in the Folketing in 1908 on the basis of experience gained abroad, notably in England, made a statement[6] that perhaps deserves to be known also outside Denmark:

> "... It is well known that jurists do not always agree, and when three judges sit together on the bench, this situation will easily arise—it almost always arises; I have seen it in hundreds of cases—where the presiding judge is not allowed to run

[3] Judicial Administration Advisory Council (*Retsplejerådet*): Report No. 825/1977 and the debate thereon in *Juristen* 1978: Ole Unmack Larsen, pp. 77–86; N. C. Bitsch, pp. 251–6; Poul Rønnov, pp. 297–9; Ignaz Tulinius, pp. 361–2; Knud Marstal, pp. 377–8; O. Warring, pp. 379–81; Niels Th. Kjølbye, pp. 395–408; and Bernhard Gomard and Knud Arildsen, pp. 409–36.

[4] *Juristen* 1962, p. 428.

[5] Cf. in addition to references in note 3: Peter Blume in *UfR* 1979 B, pp. 83–8.

[6] *Rigsdagstidende* (Parliament Journal) 1907–08: Debates of the Folketing, col. 7206.

> the show but the others interfere, indeed they may even sometimes gainsay his utterances. This is immediately felt to affect the advocates and the jurors; it means an end to authority and proper direction, and proceedings deteriorate into a free-for-all! I think it would be a significant step forward if the single-judge system were introduced into Danish courts, with the exception of the Supreme Court. But I must admit, frankly, that I have never succeeded in winning over anybody to this point of view; that is how so many truths fare. Even Galileo could not make people understand the diurnal and yearly motion of the Earth, and I have likewise been unable to convince anybody of the excellence of the single-judge system ..."

As will be seen, it was in Deuntzer's opinion the effective direction of proceedings that would suffer under a plurality of judges. And there is probably no denying that temperamental "flankers" on a three-man bench have sometimes raised the temperature in a courtroom by a few degrees. In my days as an undergraduate, a story was told about a divisional court of the High Court where two hot-headed assessors were quarrelling in loud voices over the head of a presiding judge well past his prime. But it is hardly during the actual hearing that the merits—and demerits—of the collegiate system are most apparent. At least in the Supreme Court, the direction of proceedings is a very gentle and peaceful task, and questions are put to the advocates only to a very limited extent, as should be the case where counsel evince good advocacy.

Neither does the collegiate system impinge to any great degree on the preparatory stages of an action. In the High Courts the usual practice is probably for preparatory work to be heard by a single judge. In the Supreme Court, the so-called Appeals Committe (*Ankeudvalg*) is in charge of such matters, cf. the Danish Administration of Justice Act, sec. 2 a (2) and (3). The Committee chairmanship rotates annually among members of the Court, and normally the Committee chairman does not take part in other court work but presides at weekly Committee meetings (on Monday afternoons) dealing with the preparation of proceedings and with written interlocutory appeals. The other two members of this Committee are the preceding and the next following Committee chairmen, but they step in only in case of any dispute, e.g. as to whether fresh evidence shall be allowed to be adduced before the Supreme Court.

In point of fact, the collegiate system plays a material role only in the "hidden" but of course decisive phase of an action: from the moment advocates have concluded arguments and the presiding judge has set down the case for judgment, until judgment is delivered in open court. In the Supreme Court this phase normally takes only one or perhaps two days—seven days or more is exceptional, and at the giving of judgment the general public is usually represented only by a Clerk of the Court and one of the Court Ushers.

It is this final phase of Supreme Court procedure that will be dealt with in the following pages—or in other words: the conception and drafting of Su-

preme Court decisions. Only civil actions will be considered. The problems met with in criminal cases are broadly the same, but in civil actions the drafting of judgments generally requires much greater effort.

HISTORIC DATES

The Constitution of the Kingdom of Denmark Act, 5th June, 1849, gave Denmark its free, parliamentary Constitution. Article 76 of the Act provided for separation of the judiciary and the executive branches subject to rules to be laid down by Statute. Under the provisions of Article 79, the principle of orality in open court should be implemented in so far and as soon as possible. Trial by jury was to be introduced where crimes were punishable by at least eight years' or life imprisonment and in cases of political breach of the law.

The Danish Administration of Justice Act, which took effect on 1st October, 1919—seventy years after the Constitution Act of 1849 had held out its promise thereof, caused radical changes to the Danish legal system and to court procedures, both in civil and criminal cases. But the Supreme Court was not materially affected by the new Act. The orality now introduced into Danish courts generally had already been predominantly applied in the Supreme Court since its creation in 1661. The new rule ordering evidence, wherever possible, to be given before the trial judge, did not apply to the Supreme Court, and the principle is still only sparingly used in this court. Open court procedure, on the other hand, was already an acknowledged principle in the Supreme Court. The advocates (*Højesteretssagførere*) who, before the judicature reform, had right of audience in the Supreme Court kept this privilege—for a time![7] The number of judges was originally a matter for the King to decide. The Supreme Court Ordinance (*Højesterets-Instruksen*), 7th December, 1771, implied that "The Supreme Court can at all times be composed by a fair number of judges"—and that each case be heard by at least nine judges. This lowest number was introduced as early as in 1690 and applied to oral hearings until 1953. For a great many years the Court had thirteen members and operated as an indivisible unit. After the Second World War, because of the rapid increase in number of trials, the Court was extended to comprise fifteen judges, and the minimum allowed for each trial was fixed at five. The Court was divided in two Divisions, each with seven judges, and this left the fifteenth member in charge of the Appeals Committee referred to above. Allocation of judges to either Division is changed four times a year.

[7] On the abolition of Supreme Court Advocate Test Cases, see Report No. 164/1956. Right of audience before the Supreme Court is now accorded any advocate who for five years has practised as advocate with right of audience before the High Courts and is recognized by the High Court as skilled in addressing the Court.

Normally, one Division handles "Seven-man Cases", weighty and important cases, while the other Division has five judges. This arrangement leaves two judges in a stand-by position. The Divisions alternate each month between Seven- and Five-man cases, and they rank absolutely equal in status. It should be noted that the figures given are minimum figures. Cases of great importance, such as cases dealing with the constitutionality of an Act of Parliament, may be heard by the Court in pleno; and when a judge-nominee takes part in deliberations before his appointment to the Supreme Court bench, the case will usually be heard by a collegiate court of nine, eleven, or thirteen judges.

The Danish Administration of Justice Act, sec. 43(2) contains a provision on judges' pre-appointment tests, something probably to be found only in Denmark, to the effect that any person intended for appointment as a Supreme Court judge shall first prove his capability for filling such a position by giving opening judgments in at least four cases, of which at least one shall deal with civil matters. Leave to take part in such pre-appointment tests is granted by the Minister of Justice upon recommendation made by the Supreme Court. As this recommendation is based on the Court's own opinion on who may be deemed to be suitable for the job, and as in practice the recommendation is always acted upon by the Minister, the subsequent pre-appointment test may be said to be a formality only—though quite a taxing experience for the nominee!—and since the turn of the century no candidate has been found wanting. The provision is, however, still a safeguard against appointment of unqualified judge-nominees.

Although, since 1919, Supreme Court procedures have of course been subject to the provisions of the Administration of Justice Act, the Supreme Court Ordinance of 1771 referred to above is still applied to a great extent. Under the said Act, sec. 43(2), the judge-nominee when delivering his test judgment must carefully observe Article 23 of the Ordinance, in that he "when counsel rest their cases, and the parties have been ordered out, prior to judgments being delivered by the appointed judges, shall give his regular opinion in the manner laid down in Article 12 on opening judgments, that is to say: Give *Speciem facti* or a brief *Recit* of the case; deduce the true *Qvaestion* that during proceedings has been or ought to have been vented; then adduce the applicable provisions of Statutes and Ordinances; and finally draw the Conclusion that to his mind is correct in the matter; and this his judgment, though not to be included in the Computation for the drafting of the final judgment, shall by one of the Clerks of the Court be recorded in a book set apart for that purpose ...".

Only, in present-day court practice you would hardly "deduce the true *Qvaestion* that ought to have been vented"! And the judge-nominee need not summarize factum. But "the book apart" is still kept. All things considered,

down through history the greatest change in the Supreme Court set-up is the one caused by the abolition of the absolute monarchy: that the King is no longer entitled "in his own discretion and pleasure to pronounce the tenor of judgments", cf. Article 17 of the Ordinance. And even that Article did never carry much weight. Thøger Nielsen, in the monumental work[8] published on the tercentenary of the Supreme Court, put it like this: "The Supreme Court of Law is distinguished by having remained unchanged to a remarkable degree for three hundred years. It will be of the greatest significance to Danish jurisprudence if this stability can be maintained."

Even Parkinson's famous law on the self-increasing tendency of institutions to expand has left the Supreme Court intact. As already noted, the number of judges has (since 1799) risen by only two, to make fifteen. As regards the Central Office of the Court, Svend Ellehøj says[9] in the work referred to above: "There is thus in Denmark at least one public office that in 1960 employs a staff of the same number as in 1823." This is true also in 1979, with the only modification that now there is one clerk less.

THE "VOTING" (SPEECHES GIVING JUDGES' OPINIONS)

The Danish Administration of Justice Act, sec. 214, provides that judgments and orders shall be agreed by "voting" subsequent to deliberation, and that the Court shall lay down its own rules on the order of voting, always provided that the presiding judge shall always be the last to vote. During judges' deliberation and voting nobody else is allowed to be present, save the two Clerks of the Court who, from their rough drafts, will enter the opinions given in books kept for that purpose. In special circumstances others, for example colleagues from another Nordic country, may attend by leave of the Court.

No judge may take part in voting on any matter of which he has not heard all of the oral presentation in court. Cases expected to take any considerable time are therefore only reluctantly dealt with by as few as five judges.

In the two High Courts, "voting" probably still takes the form of a fairly informal discussion of the matter at issue and of the result that ought to be arrived at. In the Supreme Court, decisions are made on centuries-old, firmly established lines. Victor Hansen, from 1941 to 1959 a prominent member of the Supreme Court, has published a thorough treatise on Supreme Court legal

[8] *Højesteret 1661–1961* (The Supreme Court 1661–1961), edited by Povl Bagge, Jep Lauesen Frost and Bernt Hjejle, p. 520.
[9] *Ibid.*, p. 192.

procedure.[10] When therein he describes the concept of "voting" as a synthesis of deliberation and casting of votes, that terminology does not seem to me to be very precise. The informality inherently characteristic of the concept of deliberation is far from present in Supreme Court "voting". The judges give their opinions standing up at their places on the bench, and the "voting" takes the form of long or short speeches on the matter at issue, without interruptions, each speaker beginning with the result at which he has arrived including the question of costs, and next submitting a detailed exposition of his individual standpoint. Opinions may be given "tentatively" and/or "with (much) doubt". Even without such reservations a given opinion may be altered up to the moment when judgment is delivered. We actually conform to the Supreme Court Ordinance of 1771, whose pithy and vigorous provisions deserve to be quoted here:

> "... 12. When the Parties have been completely and precisely heard, and their requisite Letters and Documents clearly read out by the Clerk of the Court, they shall be ordered to withdraw, and then behind closed doors the matter shall be succintly and properly voted upon. And time shall not by repetition of opinions given by prior Voters be protracted and the Supreme Court thereby detained; however, the King shall appreciate if one or two of those first voting and fully mastering the matter deduce and deliver their votes slightly more circumstantially, still without repeating what was said before. And each of the others, having no particular objection, shall in the matter only refer himself to such vote or votes given as are of even tenor and deemed by him to be most correctly given ... 13. 'Votes' shall be given from below and, for as long as one judge is speaking, all the others shall hold their peace, so that no-one break into the words of the Voter but each and all shall wait until their turn comes and then take particular care not in their Vote to say anything that might offend or seem to aim at slighting anyone holding other opinion. When they all have voted, each shall in turn as before be allowed to vary, to add to or to expand on his Vote according as occasion thereto be given by those voting after him ..."

"Votes" are still given "from below". Previously, it was always the most-recently appointed judge that spoke first, but since 1940, when two new judges were appointed at the same time, they have spoken alternately. Following partition of the Court, the four most junior judges—two in each Division—are now "First Voters", each handling his separate share of the work. The duties of a "Second Voter" are essentially identical to those of a "First Voter" in so far as preparation of trials is concerned, but the heaviest load is indeed carried by the judge giving first opinion.

"Voting" begins immediately the hearing is closed and the case is set down for judgment—except where the Court adjourns at the end of the day. For

[10] *Retsplejen ved Højesteret* (Supreme Court Legal Procedure), 1959, pp. 169–74; Report No. 164/1956, Part II and Annexes 13–21; Thøger Nielsen, *op. cit.*, pp. 526–34; Hurwitz, *Tvistemål* (Litigation), 4th ed., 1956, pp. 312–17.

seven years, I myself gave first opinions and on many occasions anxiously watched the hands of the clock move towards 2 p.m., the hour fixed for the Court to rise.[11] I was torn between the desire to deliver my speech and have a peaceful afternoon, and the urge to turn over the problems in my mind once more. The judge giving first opinion is supposed to fully master not only the matter in hand but also the relevant case law and legal theory. Depending on the circumstances this will require much toil. Paradoxically, prolonged hearings are relatively less burdensome as problems tend to sort themselves out as the case progresses, helped along by the arguments submitted by counsel.

The pattern of a first opinion depends, of course, on the matter to be dealt with and the individuality of the speaker. An essential thing to remember is: Not to give a lecture on jurisprudence but to take up a position on a particular matter. The best approach will often be to tackle the matter forthright, dissect the problems, and then refer to precedents and authorities in support of the conclusion. But occasionally—for instance when reference is made to an Act rarely used by the courts—an introduction of a more general nature will be appropriate. And, of course, one should bear in mind that one's colleagues on the bench possess the same written material as oneself, and have heard the same arguments—and, as an elderly colleague told me on my installation, that the doctrine of tortious liability is generally known!

I have always championed the rule that judges should not in advance dig into a matter more than is strictly required—otherwise, the oral presentation in court will not be very exciting, and one's mind should be open to all of the proceedings (the giving of evidence, the submission of argument). But as I have already said, the judge giving first opinion must prepare so thoroughly that it takes some doing to keep an open mind. I found that gradually I was able to avoid preconceived opinions (except of course in obvious cases), and I have indeed, as have probably all my colleagues, seen the tables turned during replication or rejoinder.

Normally it will suffice if the second speech is somewhat shorter than the first one, in particular if it is in agreement. Moreover, any second (or subsequent) speaker who is reasonably in doubt as to what the final outcome will be, may prudently give a "tentative" opinion in opposition. This will serve to intensify arguments in the next following opinions. If the "tentative" opinion does not find favour, its author can always switch over and join the majority.

Through the ages, judges' names were not set out in Supreme Court judgments. Decisions were strictly of the whole Court and commanded consequent authority. Grounds were not given until 1856 and then only very briefly.

[11] Hours for Supreme Court sittings were fixed already in 1773 to be: Monday, Tuesday, Wednesday, Thursday, and Saturday from 9 a.m. to 2 p.m.—In 1807, Friday was substituted for Saturday.

After July 1, 1937, dissenting opinions were made known but still without judges' names. Anonymity was discarded as recently as July 1, 1958, and now judges are answerable by name for their opinions. Only formally may dissenting opinions be said to detract from authority, for the suspicion has indeed always been present that all nine judges could hardly see eye to eye in all matters. Conversely, with dissenting opinions given, the true picture of Court opinion comes out much better, and grounds are given in much greater detail. Also the influence of judgments as precedents—a subject not to be discussed here[12]—is to varying degrees dependent on any dissenting opinion given. Though of no significance in cases where interpretation of statutory provisions offers only the alternatives A or B, for here it is immaterial whether the decision is arrived at by a 4–3 vote or one of 7–0, it is another matter where problems are of a "sliding" nature, as for example in deciding the degree of negligent liability, that leave room for discretion; here the ratio of votes (for and against) may be of consequence. The dissenting opinions can, as expressed by Victor Hansen, serve to characterize the matter as a borderline case.

Dissenting opinions are of importance also in fields within which the law is in a state of development. Even if the majority of judges are on firm ground where, in a given case, they apply standard legal terms such as "good custom of advocacy" or "good custom of audit", because the act done is not at variance with what has hitherto been accepted, a dissenting opinion may indicate that the criterion ought to be in some respect tightened up—and this may then be the consequence. It may be said, perhaps a little daringly, that a minority opinion may be given under less restraint than that of the majority.

It is indeed a general truth that unanimity cannot be taken to mean that a case did not give rise to doubt. All the judges may have been much in doubt, and still the scales were tipped the same way by them all. Such doubt cannot always find expression in grounds, and a dissenting opinion may then, depending on the circumstances, have a salutary effect. And by the way: What judge has not while speaking for the minority found consolation in the serious doubt that might exist with the majority—in the hope that in the end justice might be done? And yet such hope will rarely be satisfied! There seems to be a psychological-legal law of nature to the effect that any doubt harboured by the majority will quickly wither away.

Section 216 of the Danish Administration of Justice Act provides, *inter alia,* that, upon an equality of votes, the vote cast by the presiding judge shall be decisive. The problems relating hereto have given rise to extensive literature.[13]

[12] On the question of precedents, see Victor Hansen, *op. cit.*, pp. 200–14; Thøger Nielsen, *op. cit.*, pp. 521–6; Bernhard Gomard, *Civilprocessen* (Civil Procedure), pp. 377 and 384.

[13] See Victor Hansen, *op. cit.*, pp. 175–89 (incl. the literature given in note 1); Gomard, *op. cit.*, pp. 381–7.

I myself, however, do not remember having met with any practical problem in this respect during my years with the Supreme Court.

To anybody newly arrived on the Supreme Court bench, the "Voting" procedure may well seem rather rigid. It is an unwritten rule previously strictly enforced and still—almost always—complied with, that final outcomes are not discussed prior to deliberations, so as to avoid untimely persuasion. But the individual speeches, and the interaction of junior judges' thoroughly prepared studies with the more senior judges' points of view dictated more by their sound sense of judgment, are extremely productive and gratifying. To anyone taking part in it, a deliberation of the Supreme Court is without doubt a stimulating and exciting experience.

DRAFTING OF JUDGMENTS[14]

A draft judgment is prepared as soon as possible by the most junior judge of the majority. At the time when there were nine judges on the bench, the draft was first revised by a committee of three comprising the presiding judge, another judge appointed by the presiding judge, and the draftsman, and subsequently by the full Court. At the latter meeting, any proposal for radical alteration was, I think, not very welcome. Nowadays, drafting is discussed by all the judges working on a case, and in straightforward cases a final judgment may be agreed immediately on the basis of the handwritten draft. Most frequently, however, each judge is given a copy draft, which is then dealt with in one or more debates during which any dissenting opinion, written by the most junior judge of the minority, is incorporated in the text.

Such drafting of judgments can be a very laborious job—sometimes as time-consuming as the "Voting"—and equally exciting. Case problems are discussed informally and grounds are finely dissected and analysed, so as to ensure that the opinion of the Court is expressed as fully and clearly as possible. The various elements are balanced against each other, and choices are made whether to express something in a main sentence—or as an interpolation breathed between two dashes.

Drafting also requires the linguistic standard to be kept at a high level. Judgments are almost always meant to be read primarily by the litigants and their counsel, and then by jurists and other readers of the Danish Law Weekly, *Ugeskrift for Retsvæsen* (*UfR*). These judgments may, and ought to, be written in strictly technical language—as briefly and tersely as possible. Naturally, very long sentences must be shunned, and the language must always be as straight-

[14] The Danish Administration of Justice Act, sec. 216(5) and sec. 218(1).—Victor Hansen, *op. cit.*, pp. 189–98; Thøger Nielsen, *op.cit.*, pp. 521–38; Hurwitz, *op. cit.*, pp. 306–11.

forward as possible, though of course the grounds cannot be rendered in colloquial style. A judgment that has been successfully drafted so as to concentrate in a few pithy sentences the relevant points of both fact and law, entitles its drafters to lean back, deservedly, and say: "Well done!"

On the other hand, in this many-faceted age of ours, cases may be of such broad interest to the general public that the judgments will have to be written, so to speak, for the benefit of all one's fellow countrymen. Here the task is equally clear: The wording must be more unorthodox and as far as possible intelligible to everybody. The last few years have seen a few cases of this kind, and the Supreme Court rulings have been readily accepted by the general public. A case in point is the judgment of February 2, 1978, on the "Christiania Free City" (*Fristaden C.*), reported in 1978 UfR 315.

After having at last turned a phrase to satisfaction, we must call to mind what my predecessor Trolle sometimes said: "No reader of this judgment will pay any attention to why we used precisely this expression—and in a fortnight's time we shall have forgotten it ourselves!" And yet: it is a noble art!

There is, as is well known, an ever-present problem: Whether a Supreme Court judgment, in the words of Thøger Nielsen,[15] shall be confined entirely to resolving a specific contentious issue, or, taking the action as its immediate occasion, it shall aim at establishing what must be taken to be the present general position of the law. The starting point is clearly that the dispute before the Court must be decided on the basis of the evidence produced, the contentions submitted by parties, and—a cardinal feature—the arguments of counsel. In my opinion, the Supreme Court does not shrink from making pronouncements of a more general nature, whenever it finds sufficient reason to do so. But the giving of what might be called an *obiter dictum* may depend on the arguments submitted where these have only fleetingly touched upon a matter of periferal importance to the matter in hand. Where the consequences of a general dictum seem uncertain, the Court will, rightly I think, keep silent and wait until the question is put in earnest.

ANALYSIS OF THREE YEARS' SUPREME COURT JUDGMENTS IN CIVIL ACTIONS

For several years the number of cases heard annually by the Supreme Court has fairly constantly been some 350, inclusive of interlocutory appeals. About

[15] *Op. cit.*, p. 521. See also the—for that age—unusually acrimonious exchange of words between L. A. Grundtvig, Niels Lassen, *et al.*, in *UfR* 1912 B, pp. 241 ff.—and, from the present day, Knud Illum in *UfR* 1970 B, pp. 245–56; and, in contradistinction, J. Trolle, *et al.*, *ibid.*, pp. 261–73 and 277–80. The reader is further referred to Henrik Tamm in *Juristen* 1963, pp. 469–79 and in *UfR* 1968 B, pp. 234–6.

300 are civil and about 50 criminal cases. Some of the civil cases are abandoned or compromised during their preparatory stages before the Supreme Court and are thus not tried by the Court. Therefore, the Court has been able to work at a steady pace, and it has been possible to give reasonable notice of dates for the hearings—on an average 3–4 months after preparation for trial (production of new evidence, etc.) has been completed.

In the years 1976, 1977, and 1978, a total of 311 judgments were delivered in civil actions—106, 120, and 85 respectively. These figures do not include decisions where the Court declined to entertain a case because the appellant (most often a party conducting his own case) did not appear at the trial or had not prepared a chronological extract of the matter.

From the judgments it is seen that 118 cases were dealt with by seven judges (more than seven in a few cases where a judge-nominee took part), while 193 were "Five-man Cases". These latter cases thus clearly preponderate, even after several like cases have been discontinued after appointment for hearing (often immediately before trial) because they are compromised at the last moment, or because appeal has been sought just to gain time, or because appellant's counsel has delayed too long before delving deeply into the matter and only then realized that the appeal would fail. Normally, it will then be impossible for the Court to appoint another case. This situation is regularly criticized in the Advocates' Weekly (*Advokatbladet*) by the Appeals Committee chairman, but to only slight avail.

"Seven-man Cases" are of course discontinued for similar reasons, but much less frequently.

Peter Blume[16] has recently—as has Victor Hansen[17]—talked of a general presumption under which cases were to be dealt with by five judges. Such a presumption can hardly be said to exist.[18] The chairman of the Appeals Committee will read the judgment appealed against before the first preparatory hearing and will form an opinion on the number of judges required, and the question will be discussed with counsel on the appointment of a date for the trial. Normally, the choice presents no problem, but of course it may happen that immediately before trial a Division finds it better that an action set down as a "Five-man Case" be dealt with by seven judges—or the other way round. The reason why "Five-man Cases" preponderate is simply that not even Supreme Court cases are all in the legal heavyweight class.

How, then, do Supreme Court decisions compare with those made by the courts below? An analysis of the 118 "Seven-man Cases" (here and in the following text understood to comprise seven or more judges) shows that the

[16] *UfR* 1979 B, p. 84.
[17] *Op. cit.*, pp. 20–4.
[18] Cf. Henrik Tamm in *Juristen* 1965, pp. 184–5.

judgments appealed against were upheld in 81 cases—of these in 4 cases with a slight modification (of for instance the amount of damages or computation of interest), while in 37 cases the judgments were varied. Thus, 72 per cent of the judgments were upheld. In the 193 "Five-man Cases", 147 judgments were upheld (17 with modification), while in 46 cases the decisions were varied—in other words: 76 per cent of the judgments were upheld. These high percentages will hardly surprise—but rather perhaps please—our two High Courts and the Maritime and Commercial Court.

As to the important question of the grounds given for judgments that are upheld without modification, I distinguish as follows:

1. Affirmation on (entirely or essentially) the same grounds as those given in the judgment appealed against; subdivided into:
   (a) The naked affirmation *in terminis;*
   (b) Affirmation of the essence of the grounds given in the judgment appealed against; and
2. Affirmation giving new (independent) grounds.

Re 1(a). The affirmation *in terminis* reads as follows: "The judgment shall be upheld on the grounds already given".

If new evidence has been produced before the Supreme Court, the following words may be added: "... as the evidence produced before the Supreme Court cannot lead to other result, ..." or "... the correctness of which is supported by the evidence produced before the Supreme Court ...".

This latter addition will hardly be understood to encourage the appellant —nor does the Court mean it to.

The judgments referred to show that these formulations of grounds were used in 9 of the 77 "Seven-man Cases" that were upheld without modification (12 per cent), and in 44 of the similar 130 "Five-man Cases" (34 per cent).

Re 1(b). Grounds given by the Supreme Court where affirmation is not simply *in terminis* but is based on the essence of grounds given in the judgment appealed against may begin with the following words: "This Court agrees that the appellant ...", or "As set out in the judgment appealed against, the respondent is found to ...".

This phrasing may be naturally applied where the case has been presented somewhat differently before the Supreme Court—part of the dispute may have been left out, or representations made before the court below and dealt with in its grounds may not have been repeated before the Supreme Court. It may be applied also where the grounds of the judgment appealed against cannot be fully accepted—are found to be incorrect or lacking in precision, perhaps in respect of a single count only, so that the Supreme Court finds it best to extract the quintessence of what was said by the court below. Distinction as against

affirmation solely *in terminis* may here be difficult—I think I may say that we try to improve only where we feel compelled by our legal conscience, and not simply for the sake of improvement. Only recently, we had a case where grounds were drafted in, if I remember correctly, five different ways—and we ended up by affirming *in terminis*.

In 22 of the 77 "Seven-man Cases" (28 per cent), and in 37 of the 130 "Five-man Cases" (28 per cent), the phrasing of Supreme Court grounds was based on the above points of view.

Re 2. Of course, the transition from "1(b)" to the giving of independent grounds is far from clear-cut. New grounds are often explained by new evidence produced before the Supreme Court,[19] or by proceedings having taken a course different from that followed in the court below. But they may of course be used also where the Supreme Court arrives at the same conclusion along different lines of reasoning, or where the Supreme Court cannot accept the phrasing of grounds as given in the judgment appealed against. Such situations do not, of course, prevent Supreme Court reasoning from moving in extension of something stated in the judgment appealed against.

Independent grounds were given in 46 of the said 77 "Seven-man Cases" (60 per cent), and in 49 of the 130 "Five-man Cases" (38 per cent).

It will thus be seen that in the "Five-man Cases" almost equal use was made of all three patterns of grounds, while in respect of "Seven-man Cases" relatively few (12 per cent) affirm *in terminis* and relatively many (60 per cent) affirm on new grounds. No doubt this is because the "Seven-man Cases" are more complicated—"more difficult".

It remains to be seen in how many cases dissenting opinions were given in respect of the conclusion. (In respect of grounds, dissenting opinions were given in three "Seven-man Cases" and in one "Five-man Case".)

Majority – Minority	Number of Cases
12–1	1
6–1	5
5–1	1
10–2	1
5–2	16
8–5	1
6–3	1
7–6	2
4–3	6
	34

[19] Cf. Henrik Tamm in *UfR* 1978 B, p. 155.

The analysis gives the following figures: In the 118 "Seven-man Cases", 84 judgments (71 per cent) were unanimous and dissenting opinions were given in 34 cases (29 per cent). Opinions were distributed as in the table on p. 92.

In the 193 "Five-man Cases", 157 judgments (81 per cent) were unanimous and dissenting opinions were given in 36 cases (19 per cent). Opinions were distributed as follows:

Majority – Minority	Number of Cases
4–1	18
3–2	18
	36

Thus, out of 311 cases only 26 (8 per cent) were decided with a majority of one.

CONCLUDING REMARKS

As the reader will be aware, a prominent feature of Supreme Court history is the permanency of the Court's functions since 1661. But, as described by Thøger Nielsen in his detailed exposition,[20] the presentation of Supreme Court judgments has been the subject of century-long, exhaustive debates. Under the rules in force, judges' names are now given together with their opinions—something that I and presumably all my fellow judges find both natural and satisfactory. But we must admit that this arrangement was arrived at only after much and strong opposition to innovation on the part of the Court itself. Whether Supreme Court judgments are nowadays felt by people at large to be fully satisfactory is obviously not a question for me to decide. There is no doubting, though, that grounds are now given in much more detail than they were twenty—not to say fifty—years ago.

[20] *Op. cit.*, pp. 521–38.