

JUDGEMENT WRITING

Honourable Justice Roslyn Atkinson

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To any of us sitting in judgment on others, whether as judge or magistrate, judgment writing often feels like the bane of our exercise but it is, of course, the ultimate reason for our existence. In *The Eumenides*, the Greek playwright Aeschylus wrote in 458 B.C.:

“Fair trial, fair judgment...

Evidence, which issued clear as day...

... [Q]uench your anger; let not indignation reign

Pestilence on our soil, corroding every seed

Til the whole land is sterile desert...

... [C]alm this black and swelling wrath.

It is said that this play is the oldest surviving courtroom drama in world literature. Much of literature, as in life, deals with the tension between the desire for people to take justice into their own hands, exact revenge or engage in self-help, as opposed to the processes of the law, which, importantly from our point of view, are determined by a fair trial and fair judgment.

A judgment therefore, is a significant social and civic function. But what I am more concerned with today is the everyday task of judgment writing: something we do day in, day out. Some judgments almost write themselves. They are purely mechanical and can be dealt with quickly. Others are more complex and require deeper thought. All of us are constantly striving to write better, clearer judgments. How do we do it?

The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written:

- (1) To clarify your own thoughts;
- (2) To explain your decision to the parties;
- (3) To communicate the reason for the decision to the public; and
- (4) To provide reasons for an appeal court to consider.

May I deal with these purposes in reverse order.

Firstly, the reasons for an appeal court to consider. This is the least important reason for a judgment to be written but often is one that worries new judges and magistrates the most. Once you have been writing judgments for a while you come to welcome the clarification or expansion of the law by an appeal court or the identification of errors that you have made so that you don't repeat those errors. It takes an immense burden from a judicial officer to know that if you

get it wrong it can be corrected on appeal. This is not to underestimate the very human failing we all have of being disappointed when a matter goes on appeal or worse, is overturned on appeal.

This is probably the source of the story I read about a lawyer who died and found himself in heaven. The lawyer was unhappy with the standard of his accommodation. He complained to Saint Peter who told him that his only recourse was to appeal against the accommodation he'd been assigned. The lawyer immediately advised Saint Peter that he intended to appeal. Saint Peter referred him to one of his clerks who told the lawyer that he would be waiting at least three years before his appeal could be heard. The lawyer protested that a three-year wait was unconscionable. These words fell on deaf ears. The lawyer was then approached by the devil who told him he'd be able to arrange an appeal to be heard in a few days if the lawyer was willing to change the venue to hell. When the lawyer asked why appeals could be heard so much sooner in hell he was told, "We have all the judges".

So an important reason for writing judgments, if the least important, is so that your findings of fact and legal reasoning are revealed for an appellate court to consider.

(2)- Information to the public.

Courts, unlike politicians and almost every other organ of our society, don't commonly issue press releases quoting from the interesting and spicy parts of a judgment, putting the appropriate spin of it with a phone number to ring to get more background information on why the judge or magistrate chose to make the decision the way he or she did. In order to communicate, a judgment must be clear, precise, and say everything that needs to be said as to why a decision was reached and no more.

(3)-Communicating with the parties.

The parties and their lawyers, if they have them, need to know how and why a decision has been reached. It is particularly important that the losing party knows why he or she has lost the case. It is natural for someone who loses to feel disenchanted with the legal process so it is important that the reasons for judgment show that the losing party has been listened to, that the evidence has been understood, the submissions comprehended and a decision reached. This is particularly important in the case of an unrepresented litigant.

(4)-To clarify your own thoughts.

I have left this to the last because it seems to be the most important secret to good judgment writing. We have all read poor judgments. We can list their faults. They tend to be wordy, unclear, pompous and dull. Mark Twain, that great storyteller, said that most cases were "chloroform in print". How do we avoid those outcomes? How do we become concise, clear, interesting and accessible?

In my view the secret is clarity. If your ideas are clear then you will be able to express them clearly.

Clarity of thinking and therefore expression has two stages: first structure and then style.

Dealing first with structure. I have a simple acronym for the structure of judgments. It's an acronym that is easy to remember because it's something that all of us get in our role as decision makers and that is – FLAC. What is FLAC other than having to put up with the usual lawyer jokes, which transmogrify into judge jokes or magistrate jokes once you are elevated to that position? You know the sort I mean.

"What do you call a lawyer with an IQ of 40?" "Your Honour"

"What do you call a lawyer with an IQ of 50?" "Your Worship"; or

A red-faced magistrate convened court after a long lunch. The first case involved a man charged with drunk driving who claimed it simply wasn't true. "I am as sober as you are your worship" the man claimed.

The magistrate replied, “Clerk, please enter a guilty plea. The defendant is sentenced to 30 days.”

So I am not talking about that kind of FLAC, I am talking about the structure of a judgment.

F for Facts
L for Law
A for Application, and
C Conclusion.

That basic structure of a judgment, modified to suit a particular situation, will ensure that you order your own thoughts in reaching a just, and indeed one might say, often inevitable conclusion.

F for facts, of course, refers to the resolution of facts in issue in the case. In a civil case the facts in issue are determined by the pleadings. The pleadings will reveal what facts are not in dispute and what have to be determined. It is important for the decision maker to resolve each of the facts in issue.

At this point the judge or magistrate is telling the story of the case. As Lord Denning effectively showed in many of his judgments, the recitation of the facts, which are decided, need not be dull. It is the facts that have brought the parties to court, the facts they have been unable to resolve for themselves. What makes our work so interesting is the variety of facts that are brought to us to resolve, the working and private lives of citizens into which we have a brief but deep insight. This makes our work interesting and important. There is no reason why we can't communicate our decisions on the facts in an interesting way.

The second aspect of FLAC is the law. It is important to the resolution of any legal dispute that we set out the relevant statute and case law. We set it out because in clarifying for ourselves the right decision to come to we have to know what the law is and to be able to state it clearly and persuasively.

The third task is to apply the law to the facts. The parties and the public will accept the decision much more willingly if they can see that the decision is the result of the objective application of law to the facts that have been found.

This leads, of course, to the conclusion. The conclusion should be the inevitable result of the application of the law to the facts.

When considering the facts and the law and the application of the facts to the law it is important to clarify in your own mind exactly what it is that you have to decide. This will save you a lot of time and energy and probably over a lifetime of magistrates, many forests.

Within this basic structure it is useful, before you deliver the judgment to write down each of the points in the judgment in summary form so that you can structure the judgment in a clear and logical way. This is so whether the judgment is going to be given orally, immediately or soon after the hearing of the case, or in writing after being reserved.

As well as the structure that I have discussed there are a number of basic rules of good writing, which is as much an element of the skill of judgment writing as the force of your legal reasoning. I use a simple book on style by Strunk and White called “The Elements of Style”. It informs you as to the correct rules of grammar, syntax and punctuation, when you are in any doubt. It also sets out elementary principles of composition, matters of form, words and expression, expressions commonly misused and an approach to style. Here is a list of them in particular order.

1. Avoid the use of clichés. I always think a good way to remember this one is to say to yourself to bite the bullet and avoid trite clichés like the plague.
2. Be precise and to the point. Perhaps you don't have to be as concise as Judge Murdoch sitting in the US Tax Court. It is reputed that a taxpayer testified, “As God is my judge, I do not owe this tax”. Judge Murdoch replied, “He is not, I am; you do.”

Another example is *Denny v Reader Industries*. The opinion in the case contains very few words beyond the following:

“The appellant has attempted to distinguish the factual situation in this case from that in [a prior case]. He didn’t. We couldn’t affirmed.”

3. Use the active voice rather than the passive. The active is usually more direct and vigorous than the passive: “I shall always remember my first day as a Magistrate”. This is much better than “My first day as a Magistrate will always be remembered by me”. The latter sentence is less direct, less bold and less concise. If the writer tries to make it more concise by omitting “by me”, “My first day as a Magistrate will always be remembered”, it becomes indefinite: is it the writer or some undisclosed person or the world at large who will always remember your first day as a Magistrate? This rule, like all others, is not an invariable rule of practice but whenever you use the passive you should consider the use of the active voice instead.

4. Be particular rather than vague. In his *Philosophy of Style*, Herbert Spencer gives two sentences to illustrate how the vague and general can be turned into the vivid and particular:

“In proportion as the manners, customs and amusements of a nation are cruel and barbarous; the regulations of its penal code will be severe.”

“In proportion as men delight in battles, bull fights, and combats of gladiators, will they punish by hanging, and the rack.”

5. Use simple and direct prose rather than abstruse wording. We are all familiar with the scenes from “Yes Minister” where Sir Humphrey puts a proposition to the minister, Jim Hacker, which, while technically correct, is incomprehensible. For example, in one episode Sir Humphrey said:

“If there had been investigations, which there haven’t or not necessarily, or I’m not at liberty to say whether there have, there would have been a project team, which had it existed, on which I cannot comment, would not have been disbanded, if it had existed, and the member returned to their original departments, if indeed there had been any such members.”

In another episode a frustrated Jim Hacker says to Sir Humphrey:

“When you give your evidence to the think tank, are you going to support my view that the civil service is over manned and feather bedded, or not? Yes or No? Straight answer!”

Sir Humphrey replies:

“Well minister, if you ask me for a straight answer, then I shall say that, as far as we can see, looking at it by and large, taking one thing with another in terms of the average of departments, then in the final analysis it is probably true to say, that at the end of the day, in general terms, you would probably find that, not to put too fine a point on it, there probably wasn’t very much in it one way or the other as far as one can see, at this stage.”

In other words, “No”

In the end Jim Hacker is promoted to Prime Minister and becomes more adept at understanding what Sir Humphrey means:

“Prime Minister, I must strongly protest in the strongest possible terms, my profound opposition to a newly instituted practice which imposes severe and intolerable restrictions upon the ingress and egress of senior members of the hierarchy and which will in all probability, should the current deplorable innovation be perpetuated, precipitate a constriction of the channel of communication and culminate in a condition of

organizational atrophy and administrative paralysis which will render effectively impossible a coherent and coordinate discharge of the function of government within her Majesty's United Kingdom of Great Britain and Northern Ireland".

Hacker replies, or rather translates:

"You mean you've lost your key?"-

6. Avoid obvious errors. A number of frequent errors can be seen in the following rather amusing list:

1. Subjects and verb always has to agree.
2. Make each pronoun agree with their antecedent.
3. Just between you and I, case is important too.
4. Being bad grammar, the writer will not use dangling participles.
5. Join clauses good, like a conjunction should.
6. Don't write run-on sentences they are hard to read, you should punctuate.
7. Don't use no double negatives. Not never.
8. Mixed metaphors are a pain in the neck and ought to be thrown out the window.
9. A truly good writer is always especially careful to practically eliminate the too frequent use of many adverbs.
10. In my opinion, I think that an author when he is writing something should not get accustomed to the habit of making use of too many redundant unnecessary words that he does not actually really need in order to put his message across to the reader of what he has written.
11. About them sentence fragments. Sometimes all right.
12. Try to not ever split infinitives.
13. Its important to use your apostrophe's correctly.
14. Do not use a foreign term when there is an adequate English quid pro quo.

7. Try to be interesting. Clear thinking is the key to clear writing. A clearly expressed judgment allows the interest of the subject matter and the exposition of legal reasoning. As for being entertaining, not all of us can aspire to the wit and directness of by now famous Samuel B. Kent, United State District Judge of the Southern District of Texas in Galvaston. His many decisions can be found on the internet. I Bradshaw v Phillips, his Honour first sets out the facts. It was an ordinary personal injury case where the plaintiff was injured in the course of his employment while working as a seaman. The defendant applied for summary judgment because of a statute of limitation. Having set out the facts his Honour went on the say:

“Before proceeding further, the court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, and which leads the court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact complete with hats, handshakes and cryptic words to draft their pleading entirely in crayon on the backsides of gravy stained paper placemats, in the hope that the court would be so charmed by their childlike efforts that their utter dearth of legal authorities and their briefing would go unnoticed. Whatever actually occurred, the court is now faced with the daunting task of deciphering their submissions.

With big chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor’s edger sense of exhilaration, the court begins.”

The court then went on to set out the law in relation to summary judgment, what the arguments of the parties were and then the application of the law to the facts. Finally the court concluded that the statute of limitation applied and summary judgment was granted. His Honour concluded:

“After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the court has endeavored, primarily based on its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayons seen in both parties briefing (and the inexplicable odour of wet dog emanating from such) the court believes it has satisfactorily resolved this matter. Defendant’s motion for summary judgment is granted.”

The judge went on however, to sound a note of caution. There were two defendants in this matter so the plaintiff retained a cause of action against the remaining defendant, Unity Marine Corporation. The plaintiff’s lawyer was cautioned against treating this defendant too lightly, as his Honour said:-

“It is well known around these parts that Unity Marine’s lawyer is equally likable and has been writing crisply in ink since the second grade. Some old times even spin yarns of ability to type. The court cannot speak to the veracity of such loose talk, but out of caution, the court suggests the plaintiff’s lovable counsel had best upgrade to a nice, shiny number 2 pencil or at least sharpen what’s left of the Stubbs of his crayons for what remains of this heart stopping spine tingling action.

In either case, the court caution plaintiff’s counsel not to run with a sharpened writing utensil in his hand-he could put his eye out.”

Conclusion

Most of us conscientiously try to write clear, if slightly less entertaining, judgments. They are, after all, as Aeschylus shows in *The Eumenides*, a means of achieving an objective that is universal: the just resolution of conflict.