Judgment writing

Delivered by the Honourable Justice Roslyn Atkinson, Supreme Court of Queensland, for QCAT members: 6 February 2010

To any of us sitting in judgment on others, whether as judge, magistrate, or tribunal member, judgment writing often feels like the bane of our existence 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.[1] 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 hearing and fair judgment.

A judgment therefore has 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. In tribunals in particular, litigants and their representatives need decisions to be made fairly but quickly with the reasons being clear, comprehensive and no longer than absolutely necessary to deal with all of the issues in dispute. All of us are constantly striving to write better, clearer judgments. How do we do it?

<u>The purpose of the reasons for decision</u>

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[1] R.E. Messick, "*The Origins and Development of Courts*" (2002) 85 Judicature 175 at 175.

The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written which are all to do with clarity and communication:

(1) to clarify your own thoughts;
(2) to explain your decision to the parties;
(3) to communicate the reasons 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:

Reasons for an appellate court to consider

This is the least important reason for a judgment to be written but often is one that worries new judicial officers and tribunal members 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 the accommodation. He complained to Saint Peter who told him that his only recourse was to appeal to the Small Claims Court against the very modest accommodation he had 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 the devil why appeals could be heard so much sooner in hell he was told, "We have all the appellate court 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.

Information to the public

Courts and tribunals, unlike politicians and almost every other organ of our society, do not commonly issue press releases quoting from the interesting and spicy parts of a judgment, putting the appropriate spin on it with a phone number to ring to get more background information on why the judge or tribunal member chose to make the decision the way he or she did. We communicate to the public through the judgments that we write. 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.

Communicating with the parties

The parties and their lawyers, if they have them, need to know how and why a decision has been reached. As Judge Patricia Wald then of the District Court of Columbia Circuit observed, "litigants want judgments, not rhetoric, so they can get on with lives …"[2].

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.

To clarify your own thoughts

I have left this to the last because it seems to me 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[3]. Mark Twain, that great story teller, said that most cases were "chloroform in print"[4]. 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.

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2 The Rt Honourable Lord Rodger "*The Form and Language of Judicial Opinions*" (2002) 118 Law Quarterly Review 226 at 239.

3 R. Wydick, *Plain English for Lawyers*, 4th ed (Durham, Carolina Academic Press 1998) at 3 quoted by Chief Justice Beverly McLachlin, "*Legal Writing: Some Tools*" (2001) 39 Alberta Law Review 695 at 698.

4 M. Twain, *Roughing It*, (1901) at 132 quoted by J.D. Gordon, "*How not to Succeed in Law Schoo*l" (1991) 100 Yale Law Journal 1679 at 1688.

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

Structure

I have a simple acronym for the structure of judgments. It is an acronym that is easy to remember because it is 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 transform into judge jokes or tribunal jokes once you are elevated to that position. You know the sort I mean.

> 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 Honour", the man claimed.
>
> The magistrate replied, "Clerk, enter a guilty plea. The defendant is sentenced to 30 days."

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

F for facts;
L for law;
A for application; and
C for 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.

The facts

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 facts have to be determined. It is important for the decision maker to resolve each of the facts in issue. This can be done by the preparation of a chronology as the case is proceeding. If you have computer on the bench this will be relatively straightforward. Otherwise you must consider what each witness has to say about a fact in issue and determine what in fact happened and why you have formed that conclusion. Importantly this should refer to all of the relevant documents.

At this point the judge or magistrate is telling the story of the case. They are usually inherently interesting. As Lord Denning effectively showed in many of his judgments, the recitation of the facts which are decided need not be dull. To illustrate my point, these are the opening paragraphs of the judgment of Lord Denning in *Beswick v Beswick* [1966] 1Ch 538, a case which concerned the enforceability by third parties of contracts entered into for their benefit. He sets out the facts which will be relevant to his decision as follows:[5]

> " LORD DENNING M.R. Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business.
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> In March, 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them. The business was to be transferred to the nephew: old Peter Beswick was to be employed in it as a consultant for the rest of his life at £6 10s. a week. After his death the nephew was to pay to his widow an annuity of £5 per week, which was to come out of the business."

In contrast, the equally eminent, but perhaps somewhat less interesting, Lord Justice Salmon said:[6]

> " Throughout this judgment I will, for the sake of clarity, refer to A, B, and C. A is the late Mr. Peter Beswick and also the plaintiff standing in his shoes in her capacity as administratrix. B is the defendant and C is the plaintiff in her personal capacity."

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 fascinating is the

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5 At 549.

6 At 563.

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 law

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. In this part of the judgment it is important to deal with each of the contentions put forward by the parties or their representatives. Sometimes you will set out the law before the facts. The order in which you do these things depends on the nature of the case.

Application

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.

Conclusion

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

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, as most are, or in writing after being reserved.

In a particular type of case you might like to use a format that ensures that you will consider all the relevant issues in the order which best suits you. For example in sentencing which is almost always done ex tempore in my court, I have prepared a structured document which allows me to consider the information that will be given to me in the order I find most useful.

Style

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".[7] 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.

An excellent book on clear legal writing style in Australia is "Plain Language for Lawyers" by Michele Asprey. The fourth edition will be published by Federation Press at the end of this month.

An amusing and very useful book on style in general is Lynne Truss's "Eats, Shoots and Leaves: The Zero Tolerance Approach to Punctuation".

Here are some hints on style in no particular order:

1. *Avoid the use of clichés*. As one writer on the topic said, bite the bullet and avoid trite clichés like the plague[8].

2. *Be precise and to the point*. Perhaps you do not 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"[9].

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 QCAT memeber" is much better than "My first day as a QCAT member 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 QCAT member 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 QCAT member? And why? 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.

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7 W. Strunk and E.B. White, *The Elements of Style*, 4th Ed (Sydney, Allyn and Bacon, 2000)

8 J.D. Gordon (supra) at 1691.

9 J.D. Gordon (supra) at 1691, footnote 16.

4. *Be particular rather than vague or ambiguous*. As Strunk and White point out in *The Elements of Style*, clarity is not just an adornment to prose but may be a matter of life and death:

> Muddiness is not merely a disturber of prose, it is also a destroyer of life, of hope: death on a highway caused by a badly worded road sign, heartbreak among lovers caused by a misplaced phrase in a well-intentioned letter, anguish of a traveller expecting to be met at a railroad station and not being met because of a slipshod telegram. Think of the tragedies that are rooted in ambiguity, and be clear! When you say something, make sure you have said it. The chances of your having said it are only fair.

5. *Try not to use language that excludes*. Like it or not, and I assume there is no-one here who would own to regretting it, one half of the population is female. This realisation has an inevitable effect on the language we use. The objective test, for example, is no longer likely to be that of the reasonable man on the Clapham omnibus or even of the woman driving it but of the reasonable person. Judges, magistrates, tribunal members, legal practitioners, clients and witnesses are all entitled to the basic etiquette of not being addressed as if they were all of the one sex and that sex were male. Unless it be relevant, it is always preferable to use terms which apply equally to men and women rather than using terms that distinguish between them. One should also take care to use language that does not exclude or unintentionally insult other groups who may be marginalised. A useful guide is found in the Supreme Court of Queensland's *Equal Treatment Bench Book*.

6. *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 members

> 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, I think, "No".

7. *Avoid obvious errors*. Even when given orally judgments are usually expressed in formal rather than colloquial oral language.[10] It is as well to avoid obvious grammatical errors that will make others think less of your work.

8. Try to be interesting. You do not however have to entertain. A cautionary example is found in the now infamous Samuel B. Kent, who was a United States District Judge of the Southern District of Texas in Galvaston whose pithy judgements were a source of much entertainment but who but is currently serving a period of imprisonment after pleading guilty to obstruction of justice for lying to officials investigating whether he sexually harassed female court employees.

Conclusion

Most of us conscientiously try to write fair, clear, and where possible, interesting judgments. They are, after all a means of achieving an objective

[10] Huddleston and Pulham, The Cambridge Grammar of the English Language 2002, pp 6-13.

that is universal: the just resolution of conflict[11] which is the core business of each of our courts and tribunals.

[11] R.E. Messick (supra) at 181.