# Judgment Writing under Pressure

***Delivered by the Honourable Justice Roslyn Atkinson, Supreme Court of Queensland, to the Local Courts Annual Conference, July 2003, Sydney***

To any of us sitting in judgment on others, whether as judge or magistrate, 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 trial 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 local courts 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?

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;

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

(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 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 herself in heaven. The lawyer was unhappy with the standard of the accommodation. She complained to Saint Peter who told her that her only recourse was to appeal to the Small Claims Court against the very modest accommodation she had been assigned. The lawyer immediately advised Saint Peter that she intended to appeal. Saint Peter referred her to one of his clerks who told the lawyer that she would be waiting at least three years before her 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 her 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 she 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, 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 magistrate 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 Wald of the District Court of Columbia Circuit has 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.

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

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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.

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 magistrate jokes once you are elevated to that position. You know the sort I mean.

> "What do you call an 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, 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.

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.

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 fascinating 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.

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:[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."

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

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5 At 549.

6 At 563.

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.

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

*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. Here is a list of them in no 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[8].

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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.

2. <u>*Be precise and to the point*</u>. 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].

   Another example comes from *Denny v Radar Industries*.[10] The judgment 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. <u>*Use the active voice rather than the passive*</u>. The active is usually more direct and vigorous than the passive: "I shall always remember my first day as a Magistrate" 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? 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.

4. <u>*Be particular rather than vague*</u>. 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.[11] His example of the vague and general is:

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

   How much more vibrant is the particular, although gender specific:

   > "As men delight in battles, bull fights, and combats of gladiators, so will they punish by hanging, burning, and the rack."

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

10 184 NW 2d 289 (Mich. Ct. App. 1971) quoted by J.D. Gordon (supra) at 1691.

11 Quoted by W. Strunk and E.B. White (supra) at 22.

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 and magistrates, 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.

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, "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 channels of communication and culminate in a condition of organisational atrophy and administrative paralysis which will render effectively impossible a coherent and co-ordinated 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?"

7. *Avoid obvious errors*. Even when given orally judgments are usually expressed in formal rather than colloquial oral language.[12] It is as well to avoid obvious grammatical errors that will make others think less of your work.

8. Try to be interesting. I shall return to that. Let me first refer to some common errors.

   A number of frequent errors can be seen in the following rather amusing list:[13]

   1. Subjects and verb always has to agree.

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

13 Robert Leflar "*28 Matters that Writers Ought to be Appraised Of*" in Robert Leflar, ed., *Appellate Judicial Opinions* (St Paul, West Publishing, 1974) at 194-195 quoted by Chief Justice McLachlin (supra) at 699.

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. [Unfortunately you will find a confusing use of double negatives in the legislation to reform personal injury law]
8. Mixed metaphors are a pain in the neck and ought to be thrown out the window with the bath water.
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 she is writing something should not get accustomed to the habit of making use of too many redundant unnecessary words that she does not actually really need in order to put her message across to the reader of what she 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*.

8. <u>*Try to be interesting*</u>. Clear thinking is the key to clear writing. A clearly expressed judgment demonstrates 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 States District Judge of the Southern District of Texas in Galvaston. His many decisions can be found on the internet. In *Bradshaw v Phillips,*[14] 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

[14] 147 F. Supp. 2d 668 (S.D. Tex. 2001).

of a statute of limitation. Having set out the facts his Honour went on to say:[15]

> "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 Galvaston, 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 pleadings 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.
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> 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 edge 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:[16]

> "After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the court has endeavoured, 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."

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15 At 670.

16 At 672.

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:[17]

> "[I]t 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 timers even spin yarns of an 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 stubs of his crayons for what remains of this heart stopping, spine tingling action. In either case, the court cautions 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 fair, clear, and where possible , interesting 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[18] which is the core business of each of our courts.

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17 At 672.

18 R.E. Messick (supra) at 181.