Decision making

Delivered by the Honourable Justice Roslyn Atkinson, Supreme Court of Queensland, at the Phoenix Programme for the National Judicial College Gold Coast, 11 May 2004

Tips on delivery of ex tempore decisions, writing judgments and preparation during the course of a trial for writing the judgment

The purpose of the reasons for decision

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 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.

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 …"[1]. 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[2]. Mark Twain, that great story teller, said that most cases were "chloroform in print"[3]. 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. Today I will concentrate on structure.

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

2 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.

3 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.

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 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.

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. 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.

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.

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".[4] 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 is "Plain Language for Lawyers" by Michele Asprey published by the Federation Press. It is now in its third edition.

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

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 that is universal: the just resolution of conflict[5] which is the core business of each of our courts.

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

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