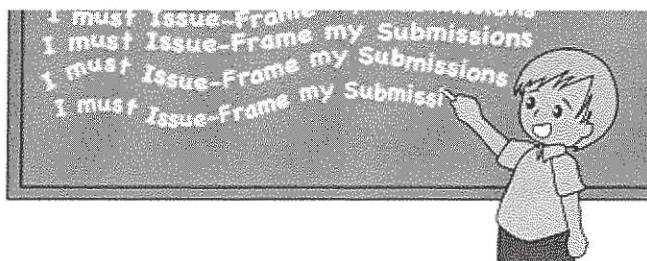


The Books I didn't read last Summer: Garner on 'Issue-Framing'



*In this article, **Peter Applegarth SC** of Bracton Chambers introduces us to Bryan Garner and "issue-framing", and bemoans a vacation trifled away on recreation and other non-legal pursuits.*

The lost quest for self-improvement

A couple of years ago, Justice Hayne commended to a Brisbane audience Bryan Garner's work on "Issue-Framing". I rushed out and bought a couple of Garner's books. I still haven't read them. With briefs to work on, why waste time reading *The Winning Brief*? Come Summer vacation, there were unread works by Amis and Balzac to enjoy. Why take Garner's *Legal Writing in Plain English* to the beach when you could take the latest Shayne Maloney novel about the adventures of Murray Whelan – an accident-prone apparatchik on the fringe of Victorian ALP politics. Plus, I feared that Garner's works might be the legal equivalent of those horrible self-improvement books by Dr Phil and snake oil salesmen about secrets to success. So Garner's works sat in my room, unread and unloved.

Spill the beans on the first page

A recent discussion with a colleague about submissions for special leave applications in the High Court made me recall Garner and "Issue-Framing". I flicked through his works. I should have read them years ago. They are not full of psycho-babble as I feared. They have plenty of practical advice about techniques for analytic and persuasive writing. Mind you, some of the advice seems obvious, for instance, that a piece of legal writing should have an introduction, a main body and a conclusion. Yet Garner says very few lawyers write this way. All we write is "the middle". Garner says an ideal introduction concisely states the exact point at issue, stripped of all extraneous matter. Yet legal writers rarely do this. As a result, our written work is described by Garner as "often diffuse, repetitive and poorly organised". The reader has to work hard to find out the question the written work purports to answer.

Garner says that any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer. The aim is to lead the reader to have those things in mind within 60 second of picking up a document, whether it is an outline of submissions, an opinion or a judge's reasons for decision. In order to do, this the work has to open with a factually specific issue that captures the essence of the problem. This is called "issue-framing".

Framing the issue

It may be possible to frame the issue in one sentence. But Garner says that typically this method ruins the chronology, forces the writer into over-long sentences and makes the issues unduly abstract. He offers the following tips:

- Put the issues first.
- Never – never – begin with Whether or any other interrogative word.
- Break each issue into separate sentences.
- Keep each issue under 75 words.
- Weave in enough facts, and arrange them chronologically, to show how the problem arises.
- Forget about whether the answer is yes or no.

Typically the format is: statement, statement, question.

Deep and surface issues

Most of us frame issues in the abstract, or what Garner calls “surface issues”. This requires a reader to know things about the case before the issue can be truly comprehended. For instance, a “surface issue” is “Can Jones maintain an action for fraud?”. This issue is easy to frame, but not very helpful to the reader in a specific legal context, such as where the defendant is moving for summary judgment. Garner presents the same question in a way that sums up the case in a nutshell, and makes it easier to understand.

“To maintain a cause of action for fraud under California law, a plaintiff must show that the defendant made a false representation. In his deposition, Jones concedes that neither Continental nor its agents or employees made a false representation. Is Continental entitled to summary judgment on Jones’s fraud claim? [49 words]”

As Garner observes, the longer version asks the reader to do considerably less work. The shorter version requires the reader to go elsewhere to learn what, precisely, the issue is. The “surface issue” says little about what the Court is being asked to decide. The “deep issue” explains it.

Persuasive and analytical issues

Some of our written work, like submissions, is intended to persuade. Other analytic writing, such as opinions, has a different purpose. An analytic issue at the start of an opinion will have an open-ended question.

By contrast in framing an issue for a persuasive work, the question should suggest the answer you want. The great legal scholar, Karl Llewellyn in a lecture on appellant advocacy, said that the *first* art is framing the issue so that, if your framing is accepted, you win.

“The first art is framing the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently And third, you have to build a technique of phrasing your issue which not only will help you capture the Court but which will stick your capture into the Court’s head so that it can’t forget it.” *A Lecture on Appellate Advocacy*, 29 U Chi L Rev 627, 630 (1962)

Garner points out that framing an issue is far more persuasive than a mere statement of the conclusion. The advocate is asking the Court to address a straightforward question. He

offers the following example of the persuasive framing of an issue:

“Liability-insurance coverage for directors and officers of financial institutions is universally required to recruit well-qualified directors and officers. When the Trew Group acquired First Eastern from the FDIC in 1987, the FDIC agreed to pay the ‘reasonable and necessary’ operating costs of First Eastern. Is the FDIC obligated to pay the cost of directors’ and officers’ liability insurance for First Eastern?” [62 words]

Analytic issues are different. Unlike persuasive issues, they are open-ended and the reader is not led to the answer upon reading the question. But the reader wants to know the answer. Therefore, an opinion that frames an analytical issue in its introduction ends with a question to which the reader does not know the answer. The answer should immediately follow the question. In this way, the question and the answer constitute, in effect, an executive summary. The reader understands the upshot of the issue and the answer given to it by the writer.

Here are two examples of analytical issues that appear in the second edition of Garner’s work *A Dictionary of Modern Legal Usage*:

“Section 273 of the Immigration Act makes it a crime to bring an undocumented alien to the US. Meanwhile, section 2304 of the Maritime Act makes it a crime for the master of a vessel to fail to rescue persons aboard a vessel in distress. Does a master commit a crime under the Immigration Act when he rescues illegal aliens aboard a ship in distress and brings them to the US? If so, what are his defenses?” [75 words]

“Mr and Mrs Zephyr were killed in a crash of an airplane negligently piloted by Mr Zephyr. Their daughter, Kate, has sued the estate of her deceased father for the wrongful death of her mother. Does the doctrine of interspousal immunity bar Kate’s recovery when there is no marital harmony to preserve?” [52 words]

Issue-framing in our daily work



When we write submissions in applications for special leave to the High Court, we are *required* to frame the special leave issue at the start of our written submissions. In other Courts, we are not *required* by rules to frame the issue(s) at the start, and so we usually don’t do so.

From watching American courtroom dramas on the TV and from reading briefs and judicial opinions from the USA, it is easy to think that American lawyers are genetically engineered to perform “issue-framing” as a matter of course. But Garner says that very few American lawyers frame their issues well. Instead, like us, they tend to do one of two things.

First, they build up to the question with pages of facts and, in doing so, badly over-

particularise the facts. I know that newspaper editors call a similar style of writing by journalists “burying the lead paragraph”.

The second, and different error, is to assume that the reader knows about the facts, and, instead of referring to them, the writer goes straight to the “issue” with an abstract or “surface” issue like:

The issue in this matter is whether the plaintiff is entitled to recover damages for contravention of s.52 of the Trade Practices Act?.”

Very few lawyers avoid these traps. The first is over-particularisation that hides the issue from the reader. The second is to frame an issue in a vague and unhelpful way.

I am guilty of both. In fact, I am a repeat offender. But I don’t feel alone. I should have read Garner’s books last Summer.

Peter Applegarth SC