Judicial College of Victoria

Some judgement writing essentials[1]

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The giving of written reasons for judgment is central to a civil judge's function.

The purpose of this resource is to help judges prepare written judgments which are routinely structured in a way that the reasons for decision disclose the path of reasoning leading to the result on each issue in the case. The initial focus is on the overall structure of the judgment — requiring the judge to clearly identify the issues for determination and the logical order in which they should be considered. Next, the structure for setting out the reasoning process on each identified issue is considered. Finally, some guidance is provided as to ways in which judgments might be better expressed; with the aim of encouraging judges to write in a way which is accessible to the wide audience of interested persons and not just to lawyers.

This resource is aimed at judges of the Supreme and County Courts. But it can be applied in any court or tribunal where the decision-maker has reserved a decision and is preparing written reasons for decision. The resource is especially directed at recently appointed judges. But common sense and authoritative statements are to the effect that even experienced judges can and should continue to learn how to write more efficiently and better. This is because judgment writing is not an easy task and, as judges become more experienced, they deal with cases of ever increasing complexity.

It is intended that this resource will be supplemented by a two day seminar and workshop in August 2023, at which participating judges will have the opportunity to have one or more their judgments subject to review by experienced judgment writers.

(1) How and when to define the issues

The first essential of writing a good judgment is to identify the issues for determination; and then prepare a logical structure as to the order in which the judgment will consider and decide each issue leading to the result in the case. If a judgment does not do that at a minimum, it may be set aside on appeal as inadequate. This is a very serious matter, as the case may have to be remitted to a different judge for a retrial — at great expense and inconvenience to the parties and the administration of justice. This is because failure to expose 'the path of reasoning' is an error of law.[1]

Some cases involve only one or two obvious issues. But in many cases, issue identification for the purposes of structuring a judgment involves distilling the many issues that have been formally raised in the pleadings and particulars into broadly stated principal issues, some of which might contain sub issues. Although good preparation should involve isolating the main issues, they cannot be finally identified until after opening submissions in the case, both written and oral, have finished. When the issues are settled, they should be listed in logical order.

Where questions of fact are in issue, the factual issues should usually be determined first, so that the facts as found can be applied to the applicable law. Where to position the facts in a judgment is discussed further below.

How to list the legal issues in a logical order should be readily apparent from the elements of the claim or defence at issue. For example, where the existence or relevant terms of the alleged contract is in issue, that issue should be considered first. In a negligence case where the existence or relevant content of a duty of care is in issue, that issue must be considered first. The remaining issues can then be dealt with in their logical order.

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[1] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279–80, 282; *Hunter v Transport Accident Commission* (2005) 43 MVR 130, 137 [21].

Where an issue may be dispositive of the result in the case, such as whether the court or tribunal has jurisdiction, that issue will be considered first.

In every case, discuss the issues and their order with counsel. Judges should also exercise flexibility during the trial, as issues may emerge or drop away. If so, the list of issues should be amended.

Judges should make it clear that the list of issues will form the structure of the judgment and govern the way in which final submissions must be made, and that counsel should address each issue or else abandon it.

How should the issues be defined?

Sometimes topic headings are acceptable in a judgment, for example when setting out uncontentious facts or legal principles, but **wherever possible the issues should be stated in the form of a simple question.** This is because questions have energy. They require an answer and engage the reader. Topics are merely a general indicator of the kind of discussion which follows.

Structuring a judgment according to a series of questions for determination, arranged in their logical order, should be a routine or default approach to writing a judgment. If the path of reasoning in respect of each question is clearly stated, a structured judgment in this form will ensure that the purpose of giving reasons is achieved and avoid the ultimate embarrassment of later having an appeal court hold that the reasons are inadequate

(2) How to introduce the issues

Of course, the issues in any case will arise in the context of the facts of the case. A brief summary of the facts which give rise to the issues for determination should be stated at the beginning of a judgment, as should a list of those issues in logical order — which will then be headings in the judgment.

This introduction of the issues by a 'helicopter' overview of the case is an extremely important aspect of good judgment writing. The overview must be written in plain and accessible language without wasting words on unnecessary detail. Some colourful phrases which have been used to describe the simplicity of approach which is called for include —

> "How would I say this to my next door neighbour?"
>
> "Who did what to whom?"
>
> "Whose arguing about what?"

An example of a helicopter overview appears in Schedule A below.

(3) How and where to set out the facts

Of course, an overview of this kind will leave out much of the otherwise relevant factual detail of the case. There is no universal rule as to where to detail the necessary facts which must be recorded, or where to resolve relevant factual disputes. Some experts recommend dealing with the facts relevant to each question under that heading. In some cases, this will be possible; for example, where the facts relating to each issue are discrete. However, the facts nearly always overlap between issues and it is usually preferable to have a **relevant and chronological** "factual narrative" section of the judgment after the questions for determination are introduced. Any contested issues of fact can either be resolved during the course of the narrative, or the rival versions noted in the narrative and then resolved as separate issues or under the relevant question heading to which they relate.

(4) How to structure the decision on each issue

There are a number of ways in which the decision on each issue can be analysed and decided or structured. The primary method recommended in this resource is the acronym IRAC —

> **IRAC** — Issue, Rule, Application and Conclusion.

Under this method; the **Issue** is stated; the governing statute or general law is stated or analysed (the **Rule**); the law is **Applied** to the facts by reasoning to a result; and the **Conclusion** on the issue is stated. Where the issue is one of contested facts, the Issue will be the rival facts, the law is the applicable standard of proof (which usually does not need to be stated), the reasoning will involve giving reasons why one version is more probable than the other, and the conclusion will follow.

How should the reasoning be set out or structured? Professor James Raymond[2] recommends use of the LOPP/FLOPP method as a useful default approach. Under this method —

> **LOPP** (Losing Party's Position). First, set out the position (contention/s) of the party who loses on the issue.
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> **FLOPP** (Flaw in Losing Party's Position). Then, give your reasons why the losing party's position (contention/s) are rejected — First, Second, etc …(In doing so, the contentions of the winning party which have been accepted should be acknowledged).

Another commonly used structure, which can be used in combination with the above depending on the issue, involves: (1) stating the Issue, (2) stating or resolving the applicable law – the Rule, (3) summarising the contentions/Positions of the rival parties, (4) stating the Conclusion, and (5) reasoning why the losing party's position is rejected as justification for the Conclusion already announced. Under this method, the contentions of the winning party that have been accepted can be acknowledged, or will be apparent in any case. This method is often used to decide questions of fact.

If one or more of these structures is adopted, the parties — especially the losing party — will know clearly why the decision on the issue has been reached. An example of structuring a judgment using these methods appears in Schedule B below

(5) How to state the relevant law

In nearly all cases, trial judges don't need to analyse the law, trace its history or set out quotes from the leading authorities. Where the content of the applicable law is not in dispute, trial judges need do no more than state the governing principles in plain language, with a footnote to the governing legislation or authority on each principle. That is where a trial judge's role should begin and end. Appeal judges should follow a similar method on those issues where the law is not in contest.

Where the content of the applicable law is disputed, trial judges should resolve the issue by the application of the above structures

For trial judges, analysis of the development of the law is, almost invariably, unnecessary; as there will usually be a binding principle which has been stated by a superior court – or an applicable principle by a court of equivalent standing. Exceptions include the rare cases where a party contends the law should be extended beyond existing limits, or where there is a gap in the law requiring a new principle to be stated.

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[2] For example, Professor James Raymond, *The Architecture of Argument*, The Judicial Review: Journal of The Judicial Commission of New South Wales, 7 September 2004, 39-56.

(6) Summary of conclusions

Once each issue is decided and a conclusion on that issue has been stated, it is recommended that, under a heading "Conclusion and Orders", the judgment should end with a summary of the conclusions on each of the questions and the proposed orders which follow — or a statement that the court will hear submissions as to the appropriate orders to give effect to the conclusions. An example appears in Schedule C below.

(7) Some comments on writing style and editing

By the time judges are appointed they will have developed their own writing style. To a certain extent, that default style will continue to govern the way in which they express their judgments. However, some writing styles require adjustment to fulfil the essential requirement that the decision be expressed in clear and accessible language so that it may be understood by those with a legitimate interest. Of course, the parties must be able to understand the result in their case — in particular, the losing party. Other interested parties may include professionals other than lawyers, whose conduct is considered by the court; teachers and students in various disciplines; parliamentarians; journalists; and relevant trade or industry participants such as company directors and other management personnel.

So just a few tips to make judgments more accessible.

1. Don't use Latin words or phrases. If reference to Latin is unavoidable, explain the Latin in ordinary language. For example, *ultra vires* means a lack of legal power or authority to do something — a tribunal may lack power to decide disputes of the kind in question etc.

2. Don't use legal terms without explaining them in ordinary language. For example, the legal concept of estoppel is easily explained as a doctrine preventing a party from asserting a fact, contention or claim which is inconsistent with a position they previously demonstrated

3. Don't use arcane or rare language which would cause most people to consult a dictionary. Although such language may be appropriate in some literary settings, or in academic publications aimed at lawyers — which is debateable — it has no place in judgments; where it obscures rather than reveals the clear meaning of what is said. Using ordinary language may take a few more words, or even sentences, to get the point across but that doesn't matter — as accessibility is the main aim.

4. Avoid definitions unless necessary for clarity. In particular avoid using initialisms and acronyms to define persons and events. Instead, use readily comprehensible nicknames. Of course, some initialisms and acronyms are so well known as to be part of everyday language; such as ABC for Australian Broadcasting Corporation. But even well-known initialisms may be better avoided in some cases. An example of overuse of definitions appears in a schedule below, together with a suggested re-write avoiding them, appears in Schedule D below.

5. Avoid - or at least reduce the size - of block quotes of evidence or law wherever possible. While some block quotes will be useful, it is usually best to paraphrase. Many readers skip or give only cursory attention to the material in block quotes. It is best to minimise the amount and length of block quotes and, especially in longer quotes, to emphasise the key bits in italics or bold face text. Use an ellipsis and delete those words which are irrelevant to the reason for the quote and add nothing to the reasoning. Use added words in square brackets where necessary, to assist the reader understand what may otherwise make the quote difficult to comprehend without quoting a whole slab more.

6. Edit the judgment carefully and ruthlessly once you have finished a full draft. In editing, pay attention to the above tips and make sure to avoid repetition and the inclusion of material which, upon completing the judgment, can be seen as irrelevant to the reasoning. For example, irrelevant factual findings or legal analysis.

7. Once a judgment is edited, it should be published promptly. There is always another case to hear and another judgment to write. Which leads to the final topic of this resource — "Perfect is the enemy of the good".

(8) Perfect is the enemy of the good.

All judges would like the luxury of more time to improve their judgments. But judges who constantly search for perfection either fail to do their share of the heavy caseload facing the court, or unnecessarily intrude into their leisure time. This adversely affects their health and makes them less productive. So, the search for perfection can be seen as a failure to co-operate with your judicial colleagues in the common aim to provide timely judgments to the parties and hasten other parties having their cases heard. There is never enough time. Some judgments will be better than others. Some cases will deserve more of your time than others. Exercise judgment.

(9) Conclusion

Structure in judgment writing must be routine. The structure should be set before you start writing.

A common complaint of judges is that counsel take every point, every permutation of fact and law, and often present them in a chaotic fashion. How do you write effectively and more expeditiously in this context? The answer is structure. Structure, especially where it is settled with the parties before the evidence commences, will help you stop wasting time and words on collateral points or, even worse, becoming repetitive and perhaps giving inconsistent conclusions. Without structure, the judgment writing process is more likely to lead to error, including the risk that reasons may be held inadequate on appeal.

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