Judgment Writing

Justice Manmohan Sarin,
Judge,
High Court of Delhi

"Law is not a Surgeon's scalpel. It is a blunt instrument, capable of inflicting crushing damage, but not of exploring fine nuances. Although it is easy for Advocates and, the Judge to explore fine legal distinctions, using scholastic logic, every law-suits ends up in a judgment and every judgment must be simple enough to be enforced without triggering a new law suit".

CM & CM
John Wirenius
1st Amendment, 1st Principles – Pg 292

Judgment writing is an essential feature of judicial functioning performed individually by a Judge. Each individual develops his own style, acquires skills to marshal the facts and evidence, determine and apply the legal provisions to the facts and then arrive at his/her conclusion. The object is to have a lucid and reasoned judgment with clear cut findings.

Need for Reasons

There are a number of good reasons for giving a reasoned judgment. These can be seen from different perspectives i.e. for the litigant, legal profession, subordinate courts and Judges' own conscience.

From the perspective of a litigant, a losing party is entitled to know why it lost a case. From the perspective of legal profession, a reasoned judgment discloses the

the profession. It contributes to development of law. From the point of view of Appellate Court, it enables it to judge and test the judgment in appeal. From the point of view of the subordinate courts, it gives them the benefit of a precedent and the rationale therefore. It also enables the Judge to satisfy his own conscience and uphold his integrity. Besides in the absence of reasons, the judgment is not transparent and parties cannot know what were the reasons for the Judge to reach the conclusion he did.z

Language and Style

A well reasoned judgment is the one where difficult, complex and even technical issues are presented in a manner so as to be generally intelligible to an educated layman. *Justice Wilson* of Supreme Court of Canada said "*You are not writing for a Law Journal nor are you writing entirely for the Court of Appeal. It is desirable that defeated litigant should be able to know on reading your judgment, why has he lost. It is desirable that your writing is comprehensible by news reporter. It is desirable that the working of the law should not be a mystery but clear to the public.*" This ideal may not always be attainable but it is always to be attempted. The above approach deserves to be commended and emulated. Litigants are the consumers of justice and the judgment ought to be com prehensible by them. It is an endeavour which must be made notwithstanding that one may not be successful and there can be misreporting and misunderstanding by the media for variety of reasons including ignorance of the very basis of law or absence of trained legal correspondents & media persons.

Language

A Judgment should be written in a simple language and the use of expressions, words and phrases that are not understood by an educated layman unless the context so specifically requires, should be avoided. The judgment is for the litigants, lawyers, the appellate court and the general public. It should, therefore, be in simple and clear language that is understood by them. Barring exceptional cases, if a judgment requires a person with reasonable knowledge of English language to look up the dictionary once for every page, the judgment does not serve its purpose. Simple short sentences easy to read avoiding surplusages are what is required. The challenge in writing a good judgment is to present complicated questions in a simple manner which can be understood by a layman too. William Strunk in his book titled '*Elements of Style*' has demonstrated the benefit of economy of words and art of eschewing surplusages in day-to-day writing. The virtues of omitting needless words and benefit of concise writing has been very aptly brought out in the book.

" OMIT NEEDLESS WORDS"

> Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentence, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell."

This book is strongly recommended for legal fraternity.

Lawyers and Judges often suffer from the malady of prolixity. Hyperbole, the extravagant use of adjectives and adverbs is to be avoided. Very often the phrases

evidence reveals". "*I have given my thoughtful considerations*". It goes without saying that judgments have to be product of careful consideration and therefore words such as "*careful or thoughtful consideration*" are to be avoided. The *American State Trial Judges Book* also discourages and advises against the use of Latin phrases. Even in England, the thinking is that by use of liberal Latin phrases not much light is obtained e.g. "*novus actus interveniens.*" which means - *a new intervening act* (**Ingram** Vs **United Automobiles Services Ltd** (1943) 2 All E.R. 71). The language should be temperate. Strong and disparaging remarks must be avoided lest it may even give an impression of bias.

Time of Judgment

Judgment writing is a divine duty to be performed without fear or favour. It should be discharged as early as possible. The Judge judges the cause and a Judge is judged by a judgment. Delay in delivering the judgment can be on account of variety of factors, like a Judge having an extraordinary heavy roster. Very often a judgment is delayed or undelivered on account of a Judge being unsure or uncertain about certain issues. There may be apprehension of the proposed conceived judgment being wrong or erroneous or possibility of its being reversed in appeal. Very often if some time passes and the judgment remains pending, there is reluctance to take up the old pending one while day to day pressure of new causes mounts up and takes precedence. As long as a Judge is bonafide attempting to do justice as per his understanding of law and facts of a case, he should not worry about the outcome. Quite often the view taken by appellate court is reversed. One must remember the words of *Robert H*

Jackson of Supreme Court of the USA that "*We are not final because we are infallible, we are infallible because we are final.*" In this regard, oral judgments delivered at the end of arguments in court have certain distinct advantages. The matter is fresh and obscurity does not set in. In case any point or argument is missed out, the counsel can always point it out. Oral Judgments are generally crisper and precise. These can be attempted relatively less complicated cases where the Judge is comfortable and does not feel the need of mulling over legal issues or facts. Once the art of dictating judgment in court is perfected, then larger number of judgments can be attempted and only those involving complicated questions requiring further deliberations and research, can be reserved. In case the Judge feels that he needs further preparation to dictate a judgment in court, he may adjourn the hearing by a day or two to enable him to seek clarification or complete his marshaling of facts so as to be in a position to deliver the judgment. In certain courts like Bombay High Court, the practice is to dictate judgments in open court. However, if complicated questions are involved or the judgment is going to have far reaching consequences, then it would perhaps be appropriate for the Judge to reserve the judgment and then deliver it.

Length of Judgments

Final judgments have recently become invariably long. Average judgment reported in Common Wealth Law Reports in the year 1935 was of 18 pages. The Privy Council Judgments were generally 1 to 5 pages long. In a few exceptional cases, it was 5 to 15 pages long and very rarely more than that. It was not as if complicated issues were not being decided or evidence were not being appreciated or analyzed. An American Judge is quoted as saying that "*the best of judgments of his*

career were written by hand on a lecture stand while standing". It automatically brought in conciseness. By automatic operation of manual labour it is at times referred to thinking through fingers. Lord Macmilan recommends preparation of a hand written draft, which should be worked on. *Lord Brandiso* is quoted as saying "*There is no such language as good writing but only good re-writing.*"

Despite the virtues of concise writing, the judgments have become long. Critics reason, "*Generally the Judges do not have to worry about sustaining the interest of readership*". They have a captive readership amongst litigants, professionals and lawyers. Some of the usual flaws of a judgment may be noticed.

The tendency to: -

(i) quote from pleadings;

(ii) reproduce submissions and contentions of both the parties with prolixity;

(iii) reproduce the depositions partly or in full of all the witnesses in trial-formal or eye witnesses or otherwise crucial witnesses;

(iv) reproduce extracts from documents;

(v) reproduce the charge(s) in extenso;

(vi) reproduce medical reports and postmortem reports in extenso;

(vii) avoid identification of issues involved and giving findings in respect thereof.

On the other hand, if the Judge has properly marshalled the facts, appreciated the evidence then he would pick up only the material part of evidence of relevant witnesses and comment upon its credibility and veracity with reasons. Similar would be his position on the issues of law.

There is a tendency to increasingly quote in extenso from judgments of the High Court or the Supreme Court to give the settled position in law. Very often the legal position is simply cited flowing from the judicial pronouncements. Quotations are given without clearly stating the proposition for which the judgment is cited and how it applies to the facts of the case. While the judgment may enable the affected parties to have a readymade reference to the judicial decisions on the subject, yet if some extra effort is put, the inference drawn or principle deductible from the said judgment could be stated in a few sentences and then applied to the facts of the cases, while referring to the judgment thereby avoiding the questions in extenso.

At times, such conclusions are sought to be clouded in the euphemism, "In view of the foregoing discussion", "In the totality of the facts and circumstances" and "Findings would subserve the ends of justice".

Approach/Attitude

At times, some Judges are branded as being hyper technical, having no mind for justice, while there are others, who are credited with a complete flair for justice over-riding the bounds of law. Again, Judges are at times branded as *pro-tenant, pro-assessee, pro-revenue, pro-labour, pro-management, pro-individual and other having community interest*. The list is endless. A Judge need not imbibe any of these predilections. He should have a single minded devotion to render justice without transgressing limits of law.

Structure of the Judgment

The first page of a judgment is often labelled as prime real estate. In a well-structured judgment the front page says it all. The first page is as much for the Judge

as for the reader. It sets the foundation and maps the course of judgment. At the beginning concisely and without unnecessary details or recitation of pleadings and the legislation of case law, the issues for determination should be succinctly stated. In criminal cases, the introductory note should give a brief description of a manner in which the offence had been committed as per the version, emphasizing the specific role attributed to the accused e.g., stabbing, giving blows or simply holding the deceased or injured. This should be followed by a brief narration of evidence against the accused, recounting the version of eye witness(es), medical evidence available etc. The witnesses should be grouped together. The judgment should thereafter examine where the defence has not been raised, how has the prosecution presented the evidence and has either proved its case or failed. In cases, where accused has raised his defence and presented the evidence, the same needs to be recorded and evaluated. In criminal cases it is a good practice also to present the points in issue under headings, like Judgment is delivered in civil cases in respect of each of the issues framed. This is an act of self-discipline. It prevents the Judge from skirting or avoiding an inconvenient point/issue on a particular plea. It has another advantage. It enables the trial court as also the litigant and the legal professionals to know how a particular point / issue has been dealt with and decided without referring to and reading the entire judgment. Besides, under each point, the legal proposition and judgment relied on can be discussed and commented upon. It provides for an easy reading and demonstrates the understanding of legal principles as also the application of law to enable the judgment to stand judicial scrutiny.

Justice Linda Dessau (Family Court of Australia) and Justice Tom Wodak (Country Court of Victoria) in an essay under the heading, '*Seven Steps to Clearer Judgment Writing*' have illustrated the following seven steps for writing a judgment:

Seven Steps to Clearer Judgment Writing

Step 1 Start before the Beginning.

The process of judgment writing begins in practical terms before the end of the case. It entails reading and study of all documents/pleading, the statement of issues by the counsel and notes taken by the Judge. Judges, who during the course of hearing start dictating their notes, either summarise their arguments or present their own understanding of the case.

Step 2 Use of the first page

The beginning of a judgment should be interesting. *Lord Denning* never subscribed to the conventional opening. For instance, "This is an application under section.... of the Limitation Act". It was neither interesting nor the most effective way to inform the reader of what is to follow. The Judgment should seek to bring clarity. A claim for damages in an accident case, where the wife had seen her husband lying on a road was put in the following manner:

> "It happened on April 19, 1964. It was bluebell time in Kent. Mr. And Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Beerry out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the Children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turning round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs. Hinz by reason of the loss of her husband has been found by the Judge to be some $ 15,000' but there remains the question of the damages payable to her for nervous shock – the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about."

Not all legal writers have the stature, the skill or the ability of Denning LJ.Certainly, to copy him is not necessarily a good idea. But one can learn from gifted writers and emulate the finer points of their judgment structure.

If old habits are hard to break, or "writer's block" set in, a practical tip is to start the judgment as if talking to a colleague in chambers or an intelligent but non-legal neighbour.

Step 3 Deal with the history and the facts.

Traditional Judgments begin with the description of the litigation to date including a recitation of the pleadings and application etc. It is not necessary to recount every step in litigation. Only the history relevant to what is to be decided should be included. Especially in Family Law, the history of litigation i.e. from very cradle need not be given. The facts may be discussed in three paras of the judgment.

(i) In the introduction to identify issues or to add context or colour;

(ii) General narration to establish time, place or order of events; and

(iii) In deciding the issues of fact or law, including credibility.

Step 4 Set out the law.

The legal principles applied in arriving at the decision can be stated. When citing from a decided case, passages should be chosen carefully and frugally. Often paraphrasing rather than direct quotation best states a legal principle.

Step 5 State the conclusion.

The conclusion should resolve each of the issues identified at the beginning. Majority of the Judges choose to announce the result at the end of the judgment.

Step 6 Choose an appropriate style.

Use Plain Language: Every judge must develop his or her own style of expression.

Original: The argument as applied in an instant case is, in essence, that prior to and at the time of the rezoning application the nature of the project was clearly understood to be a condominium development.

Plain language rewrite: Counsel argues in this case that both before and at the time of the rezoning application, the project was clearly understood to be a condominium development.

Original: In this context I am of the opinion that the evidence that Mr. Harris has given is somewhat conclusive.

Plain language rewrite: Mr. Harris's evidence is inconclusive.

Use paragraph numbers, heading and sub-headings.

Use active rather than passive voice:

Passive Voice: "He was acquitted by the Jury."

Active Voice: "The Jury acquitted him."

Passive Voice: "It was reported by the engineer that the bridge was structurally sound and safe."

Active Voice: "The engineer said that the bridge was structurally sound and safe."

Avoid Latin expressions and legalese.

Avoid expressions, such as, "the said", "hereinabove mentioned", "it is therefore ordered", "adjudged and decreed."

Avoid redundancy

After reviewing all of the evidence and weighing carefully the competing arguments advanced by the parties, I have decided that…"

Step 7 Edit the judgment.

Using a checklist of topics or issues, checking the names, dates, figures and other data for accuracy, eliminating repetition, excluding irrelevant findings of fact, pruning lengthy quotations, removing and replacing Latin expressions, jargon or outmoded expressions, eliminating explanations of the obvious, using the active voice rather the passive voice, simplifying lengthy complex sentences and adopting short sentences, where appropriate, checking punctuation and scrutinizing the length and content helps in preparing a good judgment.

The essay under the heading '*Seven Steps to Clearer Judgment Writing*' is recommended for developing and improving style of writing and the manner of presentation in judgments.

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