

Presentation

to the Griffith University Law School Writing Retreat

13 February 2017

- [1] Thank you for the invitation and warm welcome. I am here to learn as much as to impart my views and opinions. In particular, I am interested in the method of disciplined writing you are using in this workshop. Courts can be judged against the aphorism “justice delayed is justice denied”. Members of the Land Court have committed to improving the timeliness of our judgments. I am interested in how this technique might assist us.
- [2] I will start by acknowledging the traditional owners of the land on which we are meeting. I thank the Griffith University Law School for the invitation to take part today. I also acknowledge two young women who helped me put this presentation together very quickly. My Associate, Georgia Kiss, who has assisted in preparing the content and my executive assistant, Amanda Chiv, who has prepared the PowerPoint.
- [3] My topic is the good, the bad, the unprintable. Something that judges and academics most likely share is that we all think that we have written something good (presumably we had to get to the positions that we are holding); we know that we have written something bad; and in our heart of hearts we know we have written quite a lot that is unprintable.
- [4] Now this is, I think, the first point of distinction between judges and academics. An academic’s unprintable work does not get printed. You go through an incredibly rigorous and daunting process to get your work published. If we Judges are delivering a decision orally, there is an unfiltered path to the audience. We can regret that when we read the transcript later. Even when writing judgments, we tend not to put any filters between our work and its publication. Judged by literacy standards, it is fair to say much of our output could be described as unprintable. So, I come to you with that perspective; that a lot of what judges publish is good, a lot of it is bad, and some of it is unprintable. Nevertheless, there are many within the judicial community who aspire to

good writing. I will discuss the current approach to training judges in judgment writing: how we structure our judgments and what attention we could pay to the style of our writing. What judges are now taught can be adapted to your work as academics. But before talking about judgment writing training, I want to address an issue common to all writers.

[5] Let me start with some advice from a good writer:

“Your manuscript is both good and original; but the part that is good is not original, and the part that is original is not good.” – Dr. Samuel Johnson, to an aspiring writer.

This is an example of good writing; but helpful advice? I think not. The next quote from Ernest Hemmingway is just depressing:

“Real seriousness in regard to writing is one of two absolute necessities. The other, unfortunately, is talent.”

That sort of advice can lead to the elephant that sits in every writer’s room, sometimes more often or more frequently and for longer periods than others, I mean, of course, writer’s block. This quote might be more helpful:

“The trick is to start. Don’t waste time waiting for inspiration. Begin and inspiration will find you.” – Ernest Hemingway.

[6] This quote echoes the most useful piece of advice I was given when I started as a judge: Just start anywhere. It does not matter what words you use or where in the judgment you start. Just make a start.

[7] I thought I could share some of my strategies for getting past writer’s block. I have writer’s block, at some stage, with nearly every judgment I write. So my strategies have become quite structured and refined as I have grappled with this for 17 years. I think of my strategies under these categories:

- (a) Visual;
- (b) Kinetic;
- (c) Structural; and
- (d) Psychological.

[8] My visual strategies are to keep the unwritten judgment in sight, so it remains in mind. Now, I might keep it in sight by having a list of reserved judgments that sits on my desk. It might be that I keep the pile of submissions and exhibits sitting on some piece of furniture in my chambers. I try not to make my visual cue oppressive. I make sure I get my materials sorted so when I do look at it I am not overwhelmed. I know that I

have already done some filtering. But, most importantly, I reward myself with visual marks of progress. So when I finish that final draft I move the papers out of my chambers. Although it is not yet published, there is a space in my chambers that I leave sacrosanct for at least a day, so that I can look at that space with a sense of pleasure. I also use my list and cross out the one at final draft.

- [9] If visual cues are inadequate I turn to kinetic strategies. This really works for me. I have to feel that I am in the process of writing a judgment. I use “the box”. “The box” is my kinetic reminder that I have to write this judgment. I put the key documents in an archive box; just enough that if the mood does strike me at home at nine o’clock I might sit down and write. But I recognise that probably I won’t; and I’m just carrying this box around. But I do take it from my chambers to my car. I take it from my car into the house. I take it back the next day. And I keep doing it until I get so sick of carrying this box around that I do something; I start writing.
- [10] Once I get down to it, my structural strategy is my first step when I start to write a judgment. Today I am going to start to write the judgment from a matter I heard on Friday. Friday night I designed a structure for my judgment. So today I know I have a head start. My judgment design will change in the process of writing; but I have a start. So, I design it. I sequence it and I project manage the writing of parts of my judgment in whatever way makes sense to me.
- [11] My psychological strategy is rewarding myself. This is the magic of the list; the satisfying moment when you scratch something off your list; give it a tick, asterisks it; gone, done, finished, well done. I also set myself mini goals and reward progress by taking a break. I walk away from that judgment and go and do something else and come back to it later.
- [12] So they are my strategies to manage the load of reserved judgments and to get past writer’s block. If you suffer from writer’s block, it is worthwhile taking the time to identify what your strategies are. Then you can go back to them when you recognise you are stuck. At least you will get a sense of progress because you are attacking the writer’s block, if not what you’re supposed to be writing.
- [13] Now I want to turn to judgment writing. In my introduction Zoe Rathus said that judgment writing requires you to be focused and concise and clear in your expression.

That is true as an ideal but that is not what we always do. The style of judgment writing that is now being taught searches for clarity.

- [14] In my search for clarity I will start by addressing the question, who are judges writing for? Vicki Wayne says:

Even those working within the law are far from satisfied with the communication skills exhibited by their most senior courts. This situation has arisen for a number of reasons:

- a) the growth in the quality and density of the law itself;
- b) the growth in the amount of complex litigation;
- c) the exponential growth in digital documentation; and
- d) increased access to legal material from many jurisdictions.

I think the question this academic poses is a good one. Who are we writing for? Her conclusion about judges is that we are writing for other judges. So trial judges are writing for an appeal court, appeal courts are writing for trial judges. We say that we are writing for the losing party so that they understand why they have lost. Then we often write in a way that they can't comprehend. We know they will read the headnote, which is nice and precise and tells them who won. Or they might read the introduction and skip over and read the conclusion.

- [15] The same question can be asked by academics. Who are you writing for? What is your purpose in writing? What is your audience? That must be a real challenge when you are doing research with a very broad scope but you are writing a particular article or presentation, with a specific purpose. You might lose sight of your specific purpose. Your research may be opening up many avenues. When you are writing the article, though, you have to let go of a lot of detail that is unnecessary. Letting go will be aided by asking the questions who and what. Who are you trying to persuade? What are you trying to persuade them of?

- [16] I want to turn now to designing judgments. Professor Jim Raymond has spoken and written extensively on this topic. He says in jurisprudence there are only four arguments: a contest about the facts; the wrong laws being cited; the right laws being cited but misinterpreted or while the parties agree about the facts and the law, they disagree about how it is applied. I find it helpful to identify what the argument is about. That affects the structure of the judgment.

- [17] You might adapt this for the academic environment. I will hazard a translation. In your writing are you questioning received wisdom about an aspect of the law? Are you

advocating for a change in law? Are you reporting the impact of the laws' implementation? What is this article really about? Why do I want to get it published? What am I trying to achieve? It links well with the "who" and "what" questions I posed earlier.

[18] Another method Professor Raymond advocates is a seven step recipe for organisation, no matter how complex the case. The seven steps are:

1. Identify and partition the issues.
2. Prepare an LOPP/FLOPP analysis for each issue.
3. Arrange the analysis of issues like rooms in a shotgun house.
4. Prepare an outline with case-specific headings.
5. Write a beginning.
6. Write an ending.
7. Review your draft with a checklist and a friend.

[19] I will run through some of his steps which provide powerful structural advice which I try to follow. Step one is to identify and partition the issues. I do this when I am reading before the hearing. I do it during the hearing. I do it immediately after the hearing. I do it while I am writing my decision. I do it when I am editing and polishing my decision. The issues can change and can be refined. As I start writing up an issue, I may find that if I come to a certain conclusion, I don't have to address a number of other issues. So I need to consider whether I should even address those issues in my judgment. Sometimes I may, but I may not.

The second step is to use the LOPP/FLOPP formula. You state the losing party's position (that's the LOPP), and then you state the flaw in the losing party's position (that's the FLOPP). I am less wedded to this idea that the judges are writing for the losing party. However, it is a useful structure to consider.

[20] The third step is to arrange the issues like rooms in a shot gun house. Now this is an American analogy. A shot gun house starts with a porch at the front, you come in to some sort of entrance area and move down the hallway through rooms and end up in the backyard. The idea is that you can shoot a rifle from the front door and it exits at the backdoor. It illustrates taking people directly through your issues in a logical sequence, using headings that make sense. The headings can be a description of the issue. Or they might be framed as questions that have to be answered. Or they might be framed as the answers to those questions.

- [21] It is advisable to write, as either judges or academics, on the assumption that our audience will not read every word we write. Headings can take them through from your introduction to your conclusion. That might be enough for that reader. Take advantage of humankind's ability to find the quickest path to the destination, while still conveying your message.
- [22] After you have done that, Professor Raymond recommends you write the beginning. By then you know what story you are trying to tell. Professor Raymond has a couple of suggestions that I keep in my mind. One is that every word in your introduction must have earned the right to be there. So work hard on your beginning. That doesn't mean that you get stuck on it. You might write it in quickly, but when you come back and polish your work that beginning should be as crisp, as tight, as concise and as informative as it can be. Another of his suggestions is to imagine that you in the backyard and your neighbour puts her head over the fence and asks what you did in Court today. In a couple of lines you will describe the dispute. That is your beginning. That is your introduction. It explains to the reader why they are there. I think that you can use that slightly modified neighbourhood test with your work as well.
- [23] Professor Raymond's next step is to review your draft with a checklist. I have never tried that. Perhaps I should.
- [24] Getting someone else to read your work is another suggestion which I think is really important. I always get somebody to read my judgments. My Associate will always do so, but an Associate can know too much about the case to give me what I am after. It is better if you can get somebody who knows nothing at all about the case to read it. I used to get my children to do this. So they learnt a lot about the law in their teen years. Newspaper journalists write to the level of an intelligent eight year old. So I figured starting with my children in their teens, I was raising the standard. To have an intelligent young reader who knows nothing about the matter read your work and give you insight about your style is helpful.
- [25] I never argue with my reader about their feedback. If they don't understand what I have written, I have another go. When you have laboured over a sentence, or a paragraph, or many pages, it is very hard to give it up. But I would encourage you to do this. You

might think your expression is perfect, but if it doesn't convey what you are trying to convey it is useless.

[26] That's enough about structure. What are judges told about writing well? Most of what I am going to say or refer you to now comes from American or Canadian Guides prepared for judges. Although there is plenty of training in Australia, I am not aware of any formal style guides. Most of what is here is obvious and I don't want to labour it too much.

[27] Ross Guberman has some advice for judges about writing. Again, he makes seven points:

- Easy Listening *orient your reader*
- Time Travel *strip unnecessary details*
- Order Out of Chaos *bullets and numbers for clarity*
- Take Me by the Hand *precise and varied transitions*
- Lighten Up *short and fresh words, not stale and stodgy*
- I'm Only Human *aim for the impure*
- Spice Girl *punctuate and vary sentence structure*

[28] "Easy listening" is important. When you are orienting your reader, you want to draw the person in. There are so many judgments I read, and many that I have written, that start with: this is an application that was filed on 10 February 2017 by the applicant, blah blah blah. Nobody is going to bother with that. They will scan past it to try find the real beginning of the judgment. We do an awful lot of procedural or background briefing. We work very hard, all of us, in preparing our articles, our speeches, our judgments. But the reader doesn't have to take that same journey. Let's spare them that. If they don't need to experience our torturous path to our opinions and decisions why should they be dragged along it?

[29] "Time travel" means take out unnecessary details. Once again it is directed at judges who put dates documents were filed and other time markers that are irrelevant to the issues.

"Order out of chaos" is essential. I like the idea of identifying in summary form how I am going to address an issue, for example using criteria that I must apply, before going into detail. If you think about the hierarchy of information on websites, this is how

information is presented. You have a front page which has the headlines. You click on a headline to go into the detail. If you headline issues this way those who just want the overview can get it; those who want more detail can read on. The other advantage is it gives you a checklist that you can use before closing off your argument.

[30] The rest of the advice is about the style of writing. Vary the way you transition from one topic to another. “Lighten up” relates to the formality of language. There are some examples I will refer you to as I think they are helpful. Say “after” not “subsequent to”. Don’t say “moreover” or “additionally”, say “also”. “With respect to”, “with regard to”, “regarding”, can be replaced with “as for”. “Assuming” can be replaced with “even if”. “In the instant case”, “in the present case”, can be replaced with “here”. “Demonstrates” can be replaced with “shows”. “Therefore”, “consequently” and “thus” can be replaced with “so”. “Such” and “said” can be replaced with “those”. “In order to” can be replaced with “to”. “Pursuant to” can be replaced with “under”. These are all examples of formal and complex language that we don’t need to use. Calvin Trillin said “as far as I am concerned ‘whom’ is a word that was invented to make everyone sound like a butler”. The tendency must be as great in academia as it is in judgment writing to make your work sound very important by using those phrases; but they get in the way of comprehension.

[31] “I am only human – aiming for the impure”. I want to dwell on this for a moment. Judge Posner, an American jurist, has written about the way in which judges think, decide and write. He categorises judges’ writing styles into pure: lofty, formal, imperious, impersonal and impure; direct, informal, frank, direct and forthright, even racy. Well I think racy is a little bit dangerous for a judge, but certainly informal and frank and definitely direct and forthright are sound goals. I try to write like Churchill spoke. He was a brilliant orator. His language was old Anglo-Saxon. It was simple. It was action oriented. It was direct. If you look at Churchill quotes you will see how deliberate he was in his use of language. In a similar vein, Steven King said “the road to hell is paved with adverbs”.

[32] My last point relates to punctuation and varying sentence structure. Use colons if you want to explain. Use semicolons if you want to contradict. Use dashes if you want to emphasise.

[33] There are lots of techniques we can use to improve our style. The important message is to be careful about how we express ourselves. We will all write badly sometimes. This advice from Kingsley Amies is apt, “a bad review might spoil your breakfast but you shouldn’t allow it to spoil your lunch”.

[34] I will end with this advice from Lili St Crow:

“Discipline allows magic. To be a writer is to be the very best of assassins. You do not sit down and write every day to force the Muse to show up. You get into the habit of writing every day so that when she shows up, you have the maximum chance of catching her, bashing her on the head, and squeezing every last drop out of that bitch.”

[35] Thank you for your attention I am looking forward to spending the rest of the day with you.