

Judgment-Writing: A Personal Perspective
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This is an updated version of a paper I presented at a seminar for the judiciary in the Royal Courts of Justice in December 2013 entitled “Judgment-Writing: An Academic Perspective”. As that title indicates, I was asked at that seminar to examine the question, what are legal academics looking for in a good judgment? At the time, I was Professor of the Law of England at the University of Oxford. Since then, I have written many judgments as a Deputy High Court Judge and, from June 2020, as a Justice of the Supreme Court. In so doing, I have been able to test out in practice some of the ideas that I there put forward. At least from my perspective, most of those ideas seem to have withstood the transition from academia to bench. What follows therefore is a paper that largely replicates what I said in that earlier paper but with some relatively minor modifications. So it stresses the importance of the 3Cs (clarity, coherence and conciseness) and examines why judgment-writing is a particularly difficult form of legal writing. It goes on to consider whether shorter judgments are possible and examines the thorny issue of single judgments in civil cases in the UK Supreme Court. Finally, it looks at the merits of a judge’s imposing his or her own style on a judgment. These views are mine alone and should not be regarded as the view of the Supreme Court.

1. Introduction

The essential question I am addressing is as follows: what is good judicial writing style? Clearly a good judgment has to be a correct judgment on the facts and the law and in that sense style is secondary to substance. Nevertheless, assuming that what one is saying is correct on the facts and the law, the presentation of the judgment is of considerable importance. Some judgments are better than others. But why do we think that? What are the criteria for good judgment-writing?

Although there are now a few university courses on law and literature which may touch on this,¹ it is not a topic that has received anything like the attention that I think it merits, whether in academia or in judicial seminars. So I very much welcome the opportunity to discuss this with you today. But please accept that what I am about to offer is very much a personal perspective. It should not be regarded as the view of the UK Supreme Court.

I should also stress at the outset that what I here say is in no sense intended as a criticism of judges. Some of my ideas are designed to stimulate thought and I

appreciate that some of these ideas may not be practically feasible under the current constraints within which a judge works. I would also like to make clear that underpinning all my views is huge admiration of judgment-writing in this and many other jurisdictions. I am constantly impressed by how skilfully judges put together their judgments given the limited time available and the sometimes opaque arguments presented to them.

What I have to say is primarily focussed on the appellate courts dealing with questions of law but I hope that at least some of this talk will be of interest to all judges.

2. Like all other good legal writing, the 3 Cs (clarity, coherence and conciseness) are essential for a good judgment

If we start off by treating a judgment as a type of legal writing that sits alongside other types of legal writing, such as a legal article or a law book or a doctorate or a law student's essay, then we have to ask ourselves, what is it that makes any piece of legal writing good? Taking for granted the quality of the substance, the answer I think is that the writing must be clear, coherent and concise. All great lawyers have the ability to write in that way and the best judgments are those that exhibit those qualities.

I have spent a lot of my life marking student essays or doctoral work with standard comments such as 'Rephrase, this sentence is unclear' (clarity) or 'this is inconsistent with what you said two pages back' (coherence) or 'cut out this waffle' (conciseness). You may think that, prior to publication, some judgments would benefit from that sort of comment in the margin.

In relation to clarity and coherence, one cannot overstate the importance of structure. A good structure lies at the heart of any good legal writing. It follows that headings and sub-headings are very helpful; and the headings ought to be in a logical sequence. I can often tell whether a judgment is going to be clear and coherent by looking at whether there is a sequence of headings and whether that sequence starts to explain the whole in a logical order. If it does not, one starts to worry. Therefore, I regard as a very welcome development the relatively recent use of headings and sub-headings in judgments and I would urge upon you, in any judgment that extends beyond a few pages, always to use headings and sub-headings and to develop a clear sequence. Although some judges do not like this, the clarity of the sequence of headings is

enhanced not merely by different size, font or style (bold or italics) but also by numbering the headings and sub-headings. No legal publisher would ever publish a law article or a book without a very clear sequence of headings and sub-headings. Why do they insist on that? The answer is that they know from their readership that people find material that is structured, under a sequence of headings and sub-headings, to be clearer and easier to read and comprehend. I therefore find it somewhat baffling that even today some judges, even in long judgments, prefer to try to do without a sequence of headings and sub-headings or adopt a sequence that is not numbered so that it is not easy to see or recall the sequence. The only defence I have heard given for not doing this is that (a) judges have traditionally not used (numbered) headings or (b) this tends to make all judgments look uniform and therefore dull. With respect, those are not defences at all. In particular, the content of the headings and sub-headings in itself is a creative exercise and can enhance one's own thinking as well as helping the reader. There is no reason at all why the headings have to be dull and boring although I accept that some will often follow a conventional pattern (eg Introduction, Facts, Proceedings Below... Conclusion).

Another major contributor to clarity and coherence, as well as conciseness, is editing. In my view, self-editing, preferably after a break thinking about something else, *always* improves the quality of the end product. This is particularly so, if someone else – when I was an academic this was usually the editor of a law journal - insists that you have to cut down the length of what you have written. For example, the editor of one of our foremost law journals nearly always asked me to cut down by a third any article I submitted. Editing down is a painful and time-consuming process but it invariably sharpens up the essential arguments. Many judgments cry out for editing by at least the judgment-writer and perhaps even by someone independent (eg a legally-trained judicial assistant) who might suggest where cuts could be made. But most judges do not have legally-trained judicial assistants; and, in any event, editing takes a considerable amount of time which most judges simply do not have. It follows from this that if we are really serious about improving the quality and conciseness of judgments, it needs to be impressed on the powers that be that they must give judges far more time to think about, write and edit their judgments.

3. The distinctiveness of a judgment and why it is a particularly difficult form of legal writing

Of course, a judgment is not just a law essay or a legal article. It has distinct requirements that make judgment-writing a particularly difficult form of legal writing. Top of my list as to what makes it distinctive and difficult is that the potential audience for a judgment is very wide and varied. For senior judges, one's target audience must include the parties themselves, the legal advisers to those parties, other judges, other practising lawyers, academic lawyers and students, and last but by no means least the public at large. One is always told at university training courses on how to lecture, think first of what your target audience is. Are these first years or third years or postgraduates? But in the case of judgment-writing the target audience covers every possible sector. In particular, a judgment must strive to achieve the right balance between those involved in the litigation and those not involved. And that balance will change according to the level of court one is dealing with. In very general terms, the higher the court the greater the emphasis should be on those not involved in the litigation. I would be very interested to know whether, when you sit down to write a judgment, do you ever ask yourself the question, who is this judgment for?

There are other central distinctive factors that do not apply to other forms of legal writing and again mean that judgment-writing is an extremely demanding form of legal writing. I would point to three.

First, a judgment has to be decisive. Depending on the level of court, a judgment has to make findings of fact, it has to decide what the relevant principles of law are, and it has to apply those legal principles to the facts as found. Unlike a law article, a judgment cannot, on the central questions, sit on the fence.

Secondly, a judgment may be appealed. Most judges prefer not to be overturned on appeal and therefore to some extent at least will write with an eye on avoiding being overturned. At the induction course to be a Criminal Recorder, I remember that we were advised to do what we thought to be correct without worrying unduly about the Court of Appeal. In practice, I found that advice difficult to follow and I would be very surprised if any judge (with rare obvious exceptions) were to say that they do not bother at all about the risk of being overturned on appeal.

Thirdly, and perhaps more importantly, there is the view that a judgment that is unclear or not concise and therefore inaccessible may contradict the rule of law. The great Lord Bingham – a master of judgment-writing if ever there was one – suggested this in his book, *The Rule of Law*.² Having laid down as his first concretised element of the rule of law that ‘the law must be accessible’ he went on as follows:

‘The judges are quite ready to criticise the obscurity and complexity of legislation. But those who live in glass houses are ill-advised to throw stones. The length, elaboration and prolixity of some common law judgments... can in themselves have the effect of making the law to some extent inaccessible.’³

In contrast, however obfuscating an academic article is, no-one would ever suggest that the author is undermining the rule of law.

My overall point here, therefore, is that judgment-writing is a particularly difficult exercise; and that applying the three Cs - being clear, coherent and concise – is, in the context of judgments, easier said than done.

4. Shorter judgments?

I now come to the interesting issue of shorter judgments.⁴ I would make four points on this.

(i) We are all used to speed reading. There are few people who read every word of a judgment. Given what I have said about the different sectors for whom a judgment is given that is unsurprising. So, for example, an academic, unlike the parties, is rarely interested in the ins and outs of the facts and will often rely on a headnote for the facts, if there is one. What the academics are interested in is the law. It makes no difference to an academic if the judgment has 300 paras on the facts or 30 paras on the facts. All that fact-finding will be skipped or quickly flicked through in any event although he or she may have to dip into it further at some stage.

(ii) No-one ought to favour returning to the very short judgments on the law that predominated in this jurisdiction at the end of the nineteenth century. The reason that judgments on the law have become longer is because we have greater transparency of reasoning and greater rigour. I noticed this very clearly when I was putting together my *Casebook on Contract*. I wrote this in the Preface;

'It is striking how much more sophisticated judicial reasoning on contract has become albeit that this coincides with ever longer judgments.'⁵

This I think reflects also the greater sophistication of the legal arguments put forward by counsel. It follows that we certainly do not want to go back to the bad old days of under-analysis – the days, for example, of quasi contract instead of unjust enrichment.

(iii) I would argue that there is some new material that ought to go into judgments. In particular, I think a little more time ought to be spent in judgments, at least involving difficult questions of law, placing the judgment in its wider legal context. And the best way of doing that is to refer to the work of academics. If I am ever faced with a legal problem that I do not immediately know the answer to, I turn to the books. That gives me an immediate feel for the answer. I would do that even before looking at any skeleton argument. And the reason for that is that the books paint a detached overall picture in the sense that they present the law free of the knowledge of this particular dispute. In my view, judges ought to insist on being shown the academic work relevant to the legal issue in the case: in my experience, one of the main reasons why counsel often do not refer to it is that its very objectivity can mean that counter-arguments are also put alongside the argument counsel wishes to pursue. Counsel does not wish to be in the position of being asked to turn the page to find the author making the best point for the other side.

(iv) Having said all that, I have already stressed that conciseness is a virtue in legal writing and it plainly would be better, in making the law more accessible, to have shorter judgments if possible. The old adage that it is harder to write a short judgment than a long judgment is true; but from the perspective of the reader the time and effort needed to produce a short judgment is well worth it. What therefore can be cut out? Perhaps surprisingly I am going to say that what needs to be cut out are the long passages cited from past cases. What the reader is interested in is a judge's analysis of the law and not a copy out of what previous judges have said (which, if necessary, can be read directly anyway by going back to the particular case). As Lord Hope said in his JSB Annual Lecture 2005 on 'Writing Judgments':

'[L]engthy quotations can be very boring, and they tend to interrupt the flow of an opinion. They should never be used as a substitute for explaining one's own process of reasoning.'⁶

In this respect, I think a useful technique, favoured by great judgment-writers such as Lords Goff, Steyn and Bingham, is the judge's own pithy summary of the law in numbered points.

One could also cut out much of the detail of counsel's submissions. Most readers are interested in the judge's reasoning not the niceties of counsel's submissions. A lot of time is wasted in judgments describing in fine detail the submissions put forward and even worse, of course, is a cut and paste of those arguments. Although I realise that one has to be careful to protect oneself against the charge by the losing party that one has not dealt with an important argument, I would have thought that, provided one has dealt fully with the central arguments as you see them, one can deal very briefly with the rest of the arguments.⁷

Linked to this is that a particular pet hate of mine is the increasing tendency of judges, after many pages of a judgment in which the rival submissions have been set out, to use the heading 'Discussion' or 'Analysis'. What that heading tends to indicate is that what the judge has been doing up to that point is simply describing submissions without first clarifying what he or she regards as the issues in the case and that it is only now that he or she is going to turn his or her own mind to what the relevant issues are and hence what the law is. I accept entirely that a judge comes to the law through the arguments put in the case and that indeed it would be frowned upon (and would be considered procedurally unfair) if a judge went off entirely on a frolic of his or her own without the opportunity for counsel to address that line of thinking. But counsel are essentially there to assist the judge in coming to the correct answer on the law and it is the judge's reasoning, and not counsel's, that almost all readers are interested in. In any event, headings such as 'Discussion' or 'Analysis' tell the reader nothing and are therefore unhelpful. The reader should be assisted by being told, in the heading, precisely what it is that is being discussed or analysed: discussion or analysis of what? One of the judges I was recently sitting with in the Privy Council responded to my suggestion that he might like to think again about the heading 'Discussion' by saying that, having thought about it, he agreed with my criticism. He neatly summed it up by saying that he now accepted that that heading is the product of judicial laziness.

Therefore, while I favour making greater reference to academic work, my suggestions for shorter judgments, apart from editing and striving for conciseness, are to cut down

on detailed references to past cases, especially the citing of long passages, and to cut down on the rehearsal of counsel's submissions.

5. Footnotes

In my view, footnotes are a bad idea for judgments. This is for two main reasons. First, they are problematic with electronic reporting as they almost always become endnotes which are unhelpful because they are set out so far away from the relevant text. Secondly, the use of footnotes tends to tolerate and encourage the insertion of material that is not, strictly speaking, necessary. The present style of judgments, where footnotes are extremely rare, and all references are kept within the text, has the great merit of imposing discipline on the quantity and quality of the references used. In this respect, one might like to compare a judgment of the UK Supreme Court with, for example, a judgment of the High Court of Australia. The former does not use footnotes. The latter makes extensive use of footnotes. In terms of ease of reading, without any sacrifice in terms of depth of analysis, my own strong preference is for the style of the former.

6. Neutral case citations

Although I am not concerned in this paper to say anything about correct citation style, which can vary from one publisher to another, I cannot let this opportunity go by without mentioning the importance of the neutral citation of cases. In England and Wales, the system of neutral citation, which identifies a judgment independently of any report, was started in 2001/2002 depending on the level of court. This was at the inspired instigation of Lord Justice Brooke. For all cases decided since then, my own view is that the best practice is always to give the neutral reference of a case plus, if available, the citation of the best report. Some judges delete the neutral reference once there is a report but I would suggest that that is a mistake. It is the neutral reference that can and should stay constant and makes it less crucial to know what is the latest best report reference. Closely connected with this is that, if one is pinpointing within a judgment, it is the paragraph number (and only the paragraph number) within a judgment that should be given not a page reference.

7. Single judgments in the Supreme Court

Although a slight digression from the main theme of this paper, there is the question, closely related to shorter judgments, and vigorously debated over the last 25 years, of whether there should be single judgments, especially single majority judgments, in the Supreme Court. There is a thorough analysis of this question, which comes out against single judgments, by James Lee in his seminal article 'A Defence of Concurring Speeches'.⁸ There is also an excellent survey of this, complete with various tables, in Professor Alan Paterson's book, *Final Judgment*.⁹ He shows that the opinion of the senior Law Lord or President of the Supreme Court has had a major influence on this. For example, Lord Reid was strongly against single judgments. In contrast, Lords Diplock and Keith were strongly in favour of single judgments and, in their respective periods as senior Law Lords, it is a staggering statistic that as many as 68% and 70% of judgments in one year in the House of Lords were single. More recently, Lord Bingham was not an advocate of single judgments other than on points of criminal law. Lord Phillips was more keen than Lord Bingham on single judgments but thought that it very much depended on the type of case; and it would appear that Lord Neuberger and Lady Hale were even more keen on single judgments. There is a very neat chart showing the position until the end of 2013 at table 3.5 in Alan Paterson's book.¹⁰ Although I am not aware of any analysis of the updated statistics, the culture in the present Supreme Court (led by Lord Reed) is that, in general, if at all possible, single majority judgments should be produced (although this may be by more than one judge). In general, and although there are certainly no fixed rules, the prevailing view appears to be that it is only if a concurring judge has something significant to add – for example, a different line of reasoning leading to the same conclusion – that a judge should write his or her own concurring judgment.

The central debate can I think be narrowed down. Few would seek to deny that lead judgments are a good thing. Similarly, few would advocate that Supreme Court Justices should be dissuaded from dissenting if they feel that they should. Again few would dispute that in criminal law a single judgment is particularly valuable; and indeed it is laid down in s 59 of the Senior Courts Act 1981 that, unless the senior judge decides to the contrary, there shall be a single judgment only in the Criminal Division of the Court of Appeal. The real disagreement therefore is whether, outside the criminal law, there should be judgments concurring with the lead judgment or a single lead judgment.

On this issue I have modified my thinking. I was previously of the view that, provided that one is not merely repeating what is said in another judgment, it is valuable to the development of the law to have more than one concurring judgment. What I previously said on this (at the seminar in 2013) was as follows:

“[A] single judgment can lead to an unclear compromise but ... more fundamentally ... the development of the law crucially turns on reasons not outcomes; and different reasoning leading to the same outcome enhances our understanding of the law. In any event, it diminishes the role of great judges if they are merely contributors to a majority judgment. I wanted to know - and subsequent generations of judges, charged with applying and developing the law, are entitled to know - what Lord Goff and Lord Bingham and Lord Hoffmann and Lord Steyn and Lord Nicholls individually thought.¹¹ One does not want that diluted into a single lead judgment. So provided concurring judges exercise discipline in being relatively short and focus on their own analysis, and do not repeat facts and extracts from statutes and past cases that have already been set out in the lead judgment, my own view is that concurring judgments should be encouraged not discouraged.”

While I still think there is force in that view, I now accept that there is difficulty where several judges, expressing themselves slightly differently, all write full judgments. The essential difficulty is that sometimes it is extremely hard to ascertain the ratio of the decision. This was brought home to me when hearing the case and writing the single joint judgment, with Lord Sales, in *TW Logistics Ltd v Essex County Council*¹² (which concerned the law on town and village greens). In so doing, it was of some importance to be clear as to the ratio of the Supreme Court’s decision in *R (Lewis) v Redcar and Cleveland BC (No 2)*¹³ but that was extremely difficult to work out because of the number of different judgments and views expressed even though all the Justices came to the same conclusion. In any event, it is time-consuming and off-putting for a reader to have to wade through several judgments instead of a single definitive judgment. In general, therefore I now accept that the production of a single (unanimous or majority) judgment is a worthwhile goal albeit that there will remain cases where that is not possible and may not even be desirable.

8. Make the judgment interesting

There is a wonderful article by the late Lord Rodger entitled, 'The Form and Language of Judicial Opinions'.¹⁴ The main theme of that article is that the character of judgments has changed from being essentially a record of the oral proceedings, usually given *ex tempore*, to being a written piece of work more akin to an academic article. Lord Rodger went on in typical style:

'One therefore waits with a certain fascinated horror for the moment when judges choose to follow another, nauseating, academic habit and begin by thanking their "partners" and "kids" for tolerating their absence during the long hours needed to produce the opinion. Most self-respecting children would, I believe, regard such sentiments as good grounds for leaving home.'¹⁵

However, a subsidiary theme of Lord Rodger's article was that judges should stamp their own personality on judgments to make them interesting and memorable. This is where style comes in to play. We are all familiar with the style of a Lord Denning judgment and its distinctive openings from 'It was bluebell time in Kent'¹⁶ to 'In summertime, village cricket is the delight of everyone'¹⁷ to my own particular favourite, 'It all started in a public house'.¹⁸ From the same era, Lord Wilberforce had a great ability to capture an idea with a particular turn of phrase as, for example, in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* where he said, 'no contracts are made in a vacuum; there is always a setting in which they have to be placed'.¹⁹ How much easier it was to read and understand Lord Denning and Lord Wilberforce than it was to absorb dry sub-clause after sub-clause of a Lord Diplock judgment. More recently, Lord Hoffmann wrote with great style and was not afraid to use purple prose. For example, in *Chartbrook Ltd v Persimmon Homes Ltd*²⁰ we are told that 'Among the dirt of aspirations, proposals and counter-proposals may gleam the gold of a genuine consensus.'²¹ And he later talked of the difficulty of distinguishing statements 'drenched in subjectivity'.²²

Lord Hope in his JSB Annual Lecture 2005 on 'Writing Judgments' superbly summed this up when he wrote as follows:

'In the hands of some judges their style is so distinctive that it has become their voice or their signature. The contrast is between those on the one hand who burden their

opinions with factual detail, quote heavily from previous judicial opinions, prefer the familiar to the unfamiliar and stick rigidly to all the conventions and current norms of political correctness, and those on the other who prefer to converse with their audience, leave out unnecessary details and avoid too much quotation so that what they have to say seems new and fresh. Judges in the latter category are those who seem to enjoy writing – although in truth it may take just as much effort, and perhaps more, for them to create their opinions than the rest of us.’²³

I come back finally to Lord Rodger. His judgments were peppered with distinctive references to classical literature as well as popular culture - Kylie concerts, exotically coloured cocktails and the like.²⁴ In the 2002 LQR article, he recounts the story of Lord Hailsham in the House of Lords in a case in 1976 reportedly laughing with scorn at a purple passage in a judgment of Lord Cameron given in 1782. Lord Rodger concluded: ‘one moral might be that, in judgments as in most other literary endeavours, the safest thing to do with purple passages is to cut them out. But then life would indeed be dull if we only did what was safe.’²⁵

¹ For the ‘law and literature’ movement, see, eg, Richard Posner, *Law and Literature* (revised edn, 1998); and *Law and Literature Current Legal Issues 1999 Vol 2* (eds Michael Freeman and Andrew Lewis). One can divide the subject-matter covered by ‘law and literature’ into (i) law in literature (eg *Bleak House* by Charles Dickens) (ii) law as literature (eg judgments as literary texts) (iii) law about literature (eg the tort of defamation). The analysis of judgment-writing falls within the second of these categories.

² (2010).

³ At pp 42-3.

⁴ See, eg, Dame Mary Arden, ‘Judgment Writing: Are Shorter Judgments Achievable?’ (2012) 128 LQR 515; Peter Butt, ‘Judgment Writing: an Antipodean Response’ (2013) 129 LQR 7.

⁵ (7th edn, 2020) p x.

⁶ Judicial Studies Board Annual Lecture 2005, at p 9.

⁷ Although perhaps referring to an extreme case, Simon Brown LJ said the following in *Richardson v North Yorkshire CC* [2003] EWCA Civ 1860, [2004] 1 WLR 1920 at [80]: ‘I am conscious that ... this judgment leaves unaddressed a number of [counsel’s] disparate arguments... Where, as here, a challenge or appeal is pursued in a somewhat scattergun fashion, it is simply not practicable to examine every pellet in detail.’

⁸ (2009) PL 305. See also, eg, Lady Hale, ‘Judgment Writing in the Supreme Court’ September 2010 which can be viewed on the Supreme Court’s website. Her conclusion is that ‘there are good reasons for short, separate concurrences in appropriate cases.’

⁹ (2013) pp 99-120.

¹⁰ *Ibid* at p 106.

¹¹ Lord Hope concluded his JSB Annual Lecture 2005, at p 10: ‘How fortunate we are however that, in our legal tradition, the character of our judges can live on through their opinions. Each volume of the law reports contains, in this way, a portrait of each of the judges whose work is reproduced in them. This is how the common law is made. It is our gift to posterity.’

¹² [2021] UKSC 4, [2021] 2 WLR 383

¹³ [2010] UKSC 11, [2010] 2 AC 70

¹⁴ (2002) 118 LQR 226.

¹⁵ *Ibid* at 237.

¹⁶ *Hinz v Berry* [1970] 2 QB 40, 42.

¹⁷ *Miller v Jackson* [1977] QB 966, 976.

¹⁸ *Heywood v Wellers* [1976] QB 446, 453.

¹⁹ [1976] 1 WLR 989, 995.

²⁰ [2009] UKHL 38, [2009] 1 AC 1101.

²¹ *Ibid* at [32].

²² *Ibid* at [38].

²³ At p 7.

²⁴ See Lord Reed, 'The Form and Language of Lord Rodger's Judgments' in *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (eds Andrew Burrows, David Johnston and Reinhard Zimmermann, 2013) pp 121-131.

²⁵ (2002) LQR 226, 246.