

The Art of Writing a Judgment

The crafting of judgments is an art. Neither the sheer length nor the weight of a judgment, nor its brevity, are an index of its quality. Some judgments despite reproducing the entire pleadings copiously and often repeatedly, extracting oral and documentary evidence in exasperating detail, and cataloguing or extracting precedents cited in painful and avoidable prolixity, simply conclude that some evidence is accepted, while others are not; some judgments are relevant, while others are not. They then proceed to record the conclusion(s) without an independent analysis. This serves as an example of a long and useless judgment, a waste of judicial time, an avoidable waste of paper, and a huge burden on appellate resources.

Some judges are highly technical, while others are excessively 'liberal'. However, neither approach is appropriate. The function of a judge does not extend to crafting a social policy; that is the concern and the appropriate function of the legislature in a democracy. Judges merely administer the policy as revealed by the rules framed by the Legislature. The personal predilections of the judges regarding assumed social pathologies are inappropriate in the normal task of judging. Attitudes such as being pro-landlord, pro-tenant; pro-industry or pro-worker; pro-assesse or pro-revenue; pro-women/children, and the like are not within the function of a judge. These are policy choices made by citizens through legislative instruments. Where the law takes a curve or indicates a policy choice, the judge must follow that guidance and not innovate policy at will. The great American jurist and Associate Justice of the U.S Supreme Court, Benjamin N. Cardozo, in his illuminating 'Storrs Lectures' published as the "Nature of the Judicial Process," observed: *The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspirations from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in social life". Wide enough in all conscience is the field of discretion that remains.*

Judgment Styles

In his essay "Law and Literature," Benjamin Cardozo observes that, in matters of literary style and the writing of judgments, the sovereign virtue is 'clarity'. He identifies six styles of judgment, which are as follows:

1. Magisterial or imperative
2. Laconic or sententious
3. Conversational or homely

4. Refined or artificial, smelling of the lamp, verging at times upon precocity or euphemism
5. Demonstrative or persuasive; and
6. Tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem.

If you wish to learn more about the six categories of judgment styles categorized by Justice Cardozo, you may want to refer to his 1925 essay on "Law and Literature".

The Australian Jurist, Justice Michael Kirby, in an article on the writing of judgments (1990) 64 Aus. L.J. 691, pointed out the critical value of a judgment from the point of view of the litigant, the legal profession, the subordinate courts/tribunals, and the brother Judges, the Judge's conscience. He observes that to the litigant, the duty of the Judge is to uphold his own integrity and let the losing party know why he lost the case. The legal profession is entitled to have it demonstrated that the Judge had the correct principles in mind, and had properly applied them, and is entitled to examine the body of the judgment for the learning and precedent that they provide and for the reassurance of the quality of the judiciary which is still the centrepiece of our administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgments, the lazy Judge, the Judge prone to errors of fact, etc. Reputational considerations are important for the exercise of appellate rights, for the Judge's own self-discipline; for attempts at improvement; and for the maintenance of the integrity and quality of our judiciary. From the point of view of other Judges, the benefit that accrues to the lower hierarchy of judges and Tribunals is of utmost importance - see also *Hindustan Times Ltd. vs. Union of India* -(1998) 2 SCC. 242.

At the core of the enterprise, the drafting of a judgment is an art. We are not appointed to the judicial office in recognition of our established skills or expertise in this area. We must acquire this skill through constant effort, refinement, reflection, and through setting for ourselves goals and standards for refining the art, craft and skills of judgment writing. Constant reading of superior court judgments, including those in other jurisdictions, and of renowned judges, would greatly improve our quality, and quality once internalized sustains us for the duration of the office and beyond.

Rt. Hon Sir Harry Gibbs, former Chief Justice of Australia, in an article titled "Judgment Writing," stated: "*For a retired judge to lecture about Judgment writing is to provide proof, if it were needed, of the truth of the assertion by a seventeenth-century French moralist (Francois de La Rochefoucauld - in his Maxima, 1665) that: Men give good advice when they are no longer capable of setting bad examples.*"

Some Judges whom I have known in the past would have regarded it as derogatory of their dignity to have to listen to a talk on a subject which they considered themselves to have mastered, and perhaps there are Judges today who may justifiably take the same approach. But the subject goes to the very heart of the exercise of the judicial function and for that reason, it seems worth discussing. Therefore, we are here.

The Art of Judgment

A judgment is the ultimate asset of the court as an institution. It is the most important document for the parties to the dispute. For the parties, what is critical to their concern is the ultimate decision and not so much the reasons for the decision. Reasons assume importance [as far as trial and lower appellate courts are concerned] only when an appeal or revision is filed against the judgment. For the concerned judge, however, reasons are crucial. They indicate the working of his mind, his approach, his grasp on the issues of facts and law involved in the case, his analytical skills, the depth and breadth of his knowledge of law; and his capacity to record a cogent narrative.

A judgment is the clearest index of the personality of the judge and must, therefore, be curated with care and mature reflection.

Judgment writing is an art. Only to a select few, it is a natural gift. For the vast many of us, crafting a judgment is the product of long practice and persistent perseverance. The first requirement of good judgment is an adequate command over the language in which it is written. However correct a judgment is on facts and law, it conveys a poor impression if the structure is amorphous, the language inaccurate and ungrammatical, or the process of reasoning incoherent. Even poor judgment written in concise or impressive language will compensate to a small extent for the logical or forensic imperfections. The language of the judgment must be simple yet elegant and should contain phrases and expressions that convey clearly the analysis of law; of fact, and the process of reasoning. The usage of legal terms, expressions, and maxims improves the quality of the judgment. Care should however be taken not to use a legal phrase or a maxim because you like the sound of it, though inappropriate to the occasion.

The language should not be equivocal, vague or disposed to multiple interpretations. Care should be taken not to dramatize the circumstances of the case; a judgment is not a novel, though it is a narrative. Avoid repetition of facts and law. Brevity is the soul of a good judgment and prolixity a vice. However, brevity must not be at the cost of clarity. Avoid the citation of unnecessary precedents or long and irrelevant quotations from judgments. Only the relevant and the most striking and appropriate passages from a precedent should be incorporated, where it supports your decision. At all times, avoid quoting from headnotes. The headnote is not a part of a precedent.

A judgment should notice and record every argument at the Bar. However, you are not required to deal with every argument in excessive detail. If an argument is entirely irrelevant and extraneous, you may briefly mention the argument and summarily reject the same, with the observation that it is irrelevant or not in point. Before you do this, carefully consider whether the argument is wholly irrelevant.

Before proceeding to draft a judgment, you should be clear about your conclusions on facts, the law, and the outcome. Never commence writing or dictating a judgment before making up your mind about the conclusions. An exceedingly long judgment (prolixity unjustified by the issues involved), is invariably the product of a confused mind.

At the start of one's judicial career, it is advisable to adopt the traditional model of judgment writing, also known as the Calendar Model. This involves briefly referring to the pleadings, and the rival submissions, setting out the issues or points that arise for consideration and proceeding to analyses seriatim. I have not seen a Judge who has missed a single point or omitted to give findings on all the issues/points by following this method. By and by, as you gain experience and skill in drafting and analytical skills, you may innovate the crafting of judgments.

I shall now discuss the core elements of a judgment, in civil and criminal cases.

Civil Cases:

The first portion of the judgment, and preferably the opening sentence must indicate the nature of the case. For example: "This is a petition by the husband for restitution of conjugal rights," or "This is a suit for the declaration of title and recovery of possession." In the next paragraph, admitted and undisputed facts of the case which are material should be stated, such as the relationship of the parties and the background of the case. Further, all previous transactions which are not disputed and have a material bearing on the case may be stated so that the person reading the judgment will have a comprehensive view of the case before focusing his attention on the points and controversies. If there are no admitted facts worth mentioning, it is not necessary to state so in the judgment.

In succeeding paragraphs, the case of the plaintiff and of the defendant should be set out in brief. While stating the case of the defendant, it should clearly be stated who is the main contesting defendant and who is the pro forma or ex parte defendant(s) and who, if any, is supporting the case of the plaintiff. To avoid confusion in the mind of the reader and in your own mind as well, you must decide beforehand whether you would like to refer to a plaintiff or a defendant as plaintiff/defendant No. ..., or by name. Stick to the same description throughout the judgment. For example, do not use the first plaintiff in the 2nd paragraph and Mr. Wilson (the first plaintiff) in the 6th paragraph; you will create all-round confusion, including for yourself.

In drafting the judgment, ensure that the narration of facts, the framing of issues, the analysis of the evidence issue-wise, and the flow of the language is clear, logical and coherent. The judgment must present a coherent narrative and must be balanced not only in the presentation and analyses of the issues involved but also in the arrangement of the different parts of the judgment.

Emotions and sentiments must be avoided in a judgment. A judge is not a moral arbitrator and neither rewards virtue nor admonishes vice. He merely administers even-handed justice between the litigants, dealing with concrete facts and applying established legal principles.

Some judgments are considered imperfect since the judge fails to deal with, account for, or analyse certain pieces of evidence, fact situations, principles of law, or judgments cited at the Bar. Remember, every point whether of fact or law has to be decided one way or the other if in issue. When you take a view of the case and support your conclusions by analysing the evidence in support thereof or advancing reasons on questions of law, do not ignore other

pieces of evidence, relevant facts, or applicable principles of law because they do not accord with or fail to support your general conclusions. Even awkward points, difficult factual aspects, legal principles or precedents which do not support your overall view must be noticed, analysed and reconciled. Even where reconciliation is not possible satisfactorily, you must give some indication why, despite the evidence, the fact situation, the precedent(s) cited or the principle of law that you have noticed, you have come to a conclusion which is contrary to the direction pointed by such fact, evidence, judgment, or legal principle.

Issues:

Framing of issues is a critical step in the trial of a case. Framing of appropriate issues ensures efficient trial and a right conclusion. Issues are framed at the first hearing of the suit from out of the following:

- i) Allegations by the parties or by any person present on their behalf or by the counsel of the parties;
- ii) Allegations in the pleadings or any answer to interrogatories delivered in the suit; and
- iii) Contents of documents produced by either party.

Before proceeding to frame issues, the parties to the suit must invariably be examined to narrow down the points in controversy as far as possible (Order XIV Rule 1 and Order X Rule 2 of the Indian CPC mandates this process). This is a salutary general principle.

You must consider the pleadings carefully and frame issues yourself, instead of relying wholly on draft issues filed by the counsel for the respective parties.

Issues arise when a material proposition of fact or law is affirmed by one and denied by the other; material propositions are those propositions of law or fact that a plaintiff must allege in order to disclose a right to sue or a defendant must allege in order to constitute his defence (Order XIV Rules 1 and 2, CPC). Material propositions are to be distinguished from the relevant facts on which the parties would be entitled to lead evidence at trial. Material propositions of fact comprise one or more relevant facts. However, each relevant fact by itself does not form a part of the material proposition. Issues must relate to the main questions in the suit and are calculated to direct the attention of the parties to those questions. The issues should be specific and related to the material facts. Subsidiary matters of fact on which the parties might be at variance need not be made the subject matter of an issue.

Issues are of two kinds - of fact and of law; sometimes there are mixed issues of facts and law as well. While framing issues, however, care must be taken to clearly delineate the facts and law on which the parties are at issue; and as far as possible, distinct issues must be framed on propositions of fact and law.

While framing issues, regard must be had to the question of the initial burden of proof, and the issues should be framed so as to indicate, as far as possible, which party would be required to lead evidence thereon.

Issues of facts should be framed in precise, accurate and specific language in respect of circumstances, time, place or persons wherever material; and issues of law so that the issue is capable of being understood and resolved without further explanation.

Where pleas relating to estoppel, res judicata, limitation or jurisdiction are involved, there would be certain background or underlying facts based on which such pleas are raised. Unless those facts are admitted the issues should not be framed generally; for instance, as to whether the suit is barred by res judicata. When there are disputed facts on which such pleas arise, the relevant issues should also be framed for resolution of facts leading to the pleas of estoppel, limitation etc.

Issues should be arranged in a logical sequence. Issues of facts are generally to be recorded first, then mixed questions of facts and law and thereafter pure questions of law. Issues of fact should also follow a logical sequence and where it is necessary to rely on the finding on one issue for discussing other issues, issues of the former type should find place earlier than the later issue. If you do not follow such a logical sequence your judgment will be incoherent and you will be jumping back and forth, leading to confusion.

Recording of Evidence and Findings:

The judgment must record the evidence on each issue adequately and succinctly. The recording and analysis of evidence should disclose the general nature of the case; what the evidence proposes to establish; and its credibility. In case you consider it appropriate to discuss and analyse two or more issues together, you may do so but record separate findings on each of the issues considered, or at any rate with such clarity of treatment as would enable comprehension of your conclusions on each of the issues involved.

While recording findings on the facts pleaded, the issues arising therefrom, and the evidence in respect of the issues together with the relevant law in connection with each issue must be discussed cogently and clearly, and specific findings must be recorded on each issue. Evasive or ambiguous conclusions either on questions of fact or law relevant to any issue must be avoided. Unless an issue is one of law and may be heard and decided as a preliminary issue (O.15 R. 2 C.P.C), a trial court should generally hear and decide all the issues in the decision of the case. This is to avoid a possible remand if the appellate court comes to a contrary conclusion of any one of the issues.

Drawing up the relief:

Since the decree is required to be drawn up so as to be self-contained and in accordance with the judgment, one must exercise proper care and attention in drafting the operative portion of the judgment.

In many cases, writing the operative portion would be a simple affair, and if the plaintiff drafts a relief in clear, cogent, and simple words, it would be enough to say that the suit is decreed for the relief as prayed together with costs. Where you are rejecting, you may say that the suit claim is dismissed, and costs are awarded to the defendant(s) in such and such manner or proportion.

Where the relief claimed in the plaint is complicated or has been drafted in language which would cause confusion, lead to avoidable further litigation, cause avoidable harassment to the defendant, or might be difficult to execute, or where you decide not to grant the whole of the relief claimed in the plaint, you have to draft the operative portion without relying on the language in the relief portion of the plaint and by formulating the relief consistent with the analysis and conclusions in the substantive portion of the judgment.

Where a number of issues pertaining to facts and law are analysed and adjudicated, for lending clarity and character to the judgment, it is better to sum up the different findings on facts and the conclusions drawn as a result of the cumulative effect of such findings. The general issue that is normally framed such as “to what relief, if any, the plaintiff is entitled,” provides a useful heading under which the summing up could be done.

- Justice Goda Raghuram, Former Judge of the High Court for the (composite) State of Andhra Pradesh, Former President of CESTAT, and Former Director of the National Judicial Academy, Bhopal