WHERE DO I BEGIN? (THOUGHTS FROM A NEW JUDGE ON JUDGMENT WRITING)

Abstract: This article looks at the process of judgment writing from the perspective of a recently appointed Judge. It considers the objective criteria by reference to which judgments are selected for formal reporting in the law reports and the reasons why some judgments, which ostensibly meet those criteria, are not reported. It then examines the practical steps involved in the preparation of a written judgment and how those might be approached with a view to ensuring that the resulting judgment clearly explains the Judge's reasoning process not just to the parties but a broader legal audience.

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Introduction

This article began life as a paper which I delivered at the Superior Courts Judges Conference held in May 2021. Unlike the usual situation in specialist conferences, I was not asked to speak on the topic of judgment writing because I was the most qualified person to do so but rather because I was the least. As the newest (bar one) member of the Superior Courts judiciary at the time I was aware that I had less experience in writing judgments than virtually all of my colleagues. However, the very fact that I had come lately to the task meant that I was still consciously thinking about the process – how to approach it, how to do it and, hopefully – perhaps eventually – how to do it better.

I also come to the task with a particular interest in judgments. For three years prior to my appointment to the High Court, I was the Chairperson of the Incorporated Council for Law Reporting in Ireland, the body that is responsible for the production of the Irish Reports. All in all, I was a member of the Council on both its Outer and Inner Bar panels for about twenty years and served on its Editorial Committee for about fifteen years. Before that, as a very junior barrister I had worked as a law reporter for the Council. As a result, I am very conscious of the criteria that are applied in choosing which judgments should be reported and why judgments are deemed not to meet those criteria. Some of those criteria are beyond the control of the individual Judge, such as the importance or novelty of the point being decided. Others, such as the quality and length of the judgment, are very much in the hands of the judicial author. Over the past decade or so the increase in the number of judges, and consequent increase in the number of judgments, has meant that due to pressure of space, most judgments simply cannot be reported. In any event, now that all judgments are immediately available on the Courts Service website, the significance of a judgment being formally reported may have diminished. Nonetheless, years spent trying to identify 'good' judgments have left my inner critic sharply attuned to what I am now trying to achieve, and recent experience has taught me the difficulties in achieving it.

This article aims to do two things. The first is to explain, from a law reporting perspective, what makes a judgment reportable. I do not presume that every judge approaches every judgment in the hope or expectation that it will find its way to immortality in the Irish Reports. However, in a precedent-based legal system where the law reports are seen by both practitioners and academics as one of the main sources of law, it is useful for a Judge to understand the objective criteria that are applied to determine which judgments will be included. The second, from a more personal perspective, is to consider how to approach – or at any rate how I have approached - the task of judgment writing. I hope that, like riding a bicycle, once I have mastered the skill it will become second nature to me, and I will write

thinking only of the point of law to be decided. Not having reached that stage yet, I am still consciously de-constructing the task.

Reporting Judgments

When I first served on the Editorial Committee of the Irish Reports, we had a system whereby all judgments were circulated to three members of that committee and each committee member had to grade the judgment "A", "B" or "No". An "A" meant the judgment should definitely be reported and a "No" meant that it should not. A "B" was more complex, indicating that the judgment was deserving of inclusion if space permitted. Perhaps unsurprisingly, there was rarely unanimous agreement between committee members and the final decision often depended on how many As or Bs a judgment had received or whether any member had graded it a "No". The system was streamlined after the establishment of the Court of Appeal and the introduction of a requirement for leave to appeal to the Supreme Court. This resulted in fewer Supreme Court judgments, but far more of which automatically merited reporting to the extent that circulating these judgments to members of the Editorial Committee was generally unnecessary. Consequently, a new system was introduced under which the editorial staff (the editor and deputy-editor) pre-screen all judgments, removing those which will definitely be reported (usually Supreme Court cases) and those which will definitely not be reported (usually purely fact-based High Court judgments). The remaining in-between judgments are circulated to two members of the editorial committee for a "Yes" or "No" decision and to a third committee member if there is a disagreement between the original two. Save for obvious cases, each Superior Court written judgment is read by three and often four people before a final decision is made whether to report it or not.

What of the criteria used to make this decision? In reality there are two separate but overlapping factors involved. The first is the importance or novelty of the legal issues decided by the judgment and the second is more amorphous, being the quality of the judgment itself. Where importance and quality coincide the decision is easy. Where they do not, a balance has to be struck. An important issue decided in a judgment that is unclear or overly lengthy will probably not be reported, whereas a less significant, but nonetheless important issue decided in a judgment that is well written and in which the legal analysis is clear is more likely to be reported. The over-riding criteria are the significance and novelty of the legal issues decided in the judgment. The object of an official series of law reports is to record and to make available those cases through which the law is developed. Novelty is key. Once a legal principle has been decided, subsequent judgments applying that principle to the facts of a particular case will rarely merit reporting. An exception may be made for a judgment which synthesises a number of earlier judgments on a particular point and coherently summarises the legal principles in a way that may be useful for future practitioners. Equally, where there are conflicting lines of authority (usually from different High Court Judges), an appellate judgment settling the issue will often merit reporting. Further, the novel approval and application in this jurisdiction of case law which may be well established in another (usually in the United Kingdom), may also merit reporting for that fact alone.

Regard is also had to the broader importance of the points decided. Some issues may be novel because they arise infrequently or in a niche area of practice. For example, most cases which turn on an issue of statutory interpretation will, in principle, involve a novel point. However, not all points of statutory interpretation are equally important; the point may not

have arisen before because the statutory provision is rarely invoked or applied. Unless the judgment is likely to have a more general application, those cases will probably not be reported. This tends to create an imbalance with judgments concerning procedural issues potentially relevant to a multiplicity of cases and often across a range of subject areas being more likely to be reported than the final judgment on the substantive issues in the same case.

For the most part, certainly in the High Court, the significance of the issues to be decided in a judgment is outside the control of the individual judge and will depend on what cases are assigned to that judge and, in turn, on the list in which the judge sits. In some lists, most notably the public law lists, cases rarely settle and will generally require reserved judgments. Others, such as the personal injury or family lists, by their nature generate few written judgments. Written judgments usually only arise on appeal or on judicial review in criminal cases. Again, this creates an imbalance with the law reports skewed towards the reporting of public law cases since there are proportionately so many more judgments produced in this area. At times a deliberate editorial decision was taken to redress this imbalance by positively seeking out cases in underrepresented areas of law that would be suitable for reporting, such as tort. In areas such as asylum law where there are a particularly large number of judgments, the Council sought external expertise to assist the editorial committee in identifying which cases were novel and important for practitioners in this field.

What is within the control of the individual Judge is the quality of the judgment. In this context 'quality' is not necessarily or entirely synonymous with the judgment being a 'good' judgment. The criteria are being applied objectively to decide how useful the reported judgment will be to people who are neither the parties in the case nor their legal representatives. A judgment which carefully records the evidence given, expresses the Judge's views on that evidence and applies the law accordingly may well be an excellent judgment from the parties' perspective, resolving the issues between them in a clear and fair manner. It will not, however, be a judgment of particular value to anyone outside the case and almost certainly will not be reported.

The real skill of the Judge in writing a judgment arises where there are legal issues in the case beyond the issues of fact disputed between the parties. The ability of the Judge to succinctly marry his or her analysis of those legal issues with the particular facts in which they have arisen is the hallmark of a quality judgment. Ideally the judgment should set out a summary of the relevant facts so that the ultimate application of the legal principles can be understood by a reader with no prior knowledge of or involvement with them. That summary should be comprehensive but not exhaustive. If a particular detail is neither disputed between the parties (in which case the Judge has to resolve it) nor relevant to the application of the law, it should be omitted. The weight of the judgment should favour the legal rather than the factual analysis. Most importantly, the Judge's legal analysis should lead to a conclusion which is in turn applied to the facts in order to determine the case. All of this should be expressed clearly and in language that the reader does not struggle to follow.

Although it is easy to identify a quality judgment, it can be difficult to explain why the judgment is such a good one. Conversely, is probably easier to identify the reasons why a judgment is not a good one, at least by objective law reporting standards. There are three main reasons a judgment on an ostensibly important legal issue is not reported. First, the Judge's analysis of the legal issue may be unclear or perhaps contradictory. The decision reached may be apparent but not the reasons for it. You might be surprised at the number of times a headnote simply could not be prepared because it was impossible to extract the relevant legal principles from the judgment. Second, the judgment may be badly written.

While the editorial process is designed to objectively select the most important judgments for reporting, as it is conducted by humans inevitably an element of subjectivity can creep in. A committee member, likely a busy practitioner reading piles of judgments on a voluntary basis, who has struggled through a hard-to-read and difficult-to-follow judgment is instinctively more likely to say "No" than "Yes". The third and final reason is the one most which is frustrating from a law reporting perspective. The judgment is simply too long, relative to its importance, to merit reporting. It seems that the length of judgments has increased exponentially over the last decade. This partly reflects a change in the style of lawyering, where parties no longer just identify and pursue their best points, instead they pursue every possible – and some impossible – points each backed up by phalanx of authority thereby obliging the Judge to determine all of these points. However, it is sometimes due to a practice of preparing judgments as if to a template, where the facts, each parties' pleadings and submissions, and then the relevant law are set out in exhaustive detail before the Judge even identifies what he or she believes to be the salient issues and proceeds to consider them. Unfortunately, the last two of these steps – identifying and considering the relevant issues – are quite often disposed of in a few pages which follow forty or fifty pages of recitation. The frustration arises from the knowledge that those few pages may end up being cited in numerous subsequent judgments as having decided some issue of importance, but not of sufficient importance to devote 30 printed pages of valuable space in the law reports to the remainder of the judgment. Over the years, the Irish Reports have considered the possibility of editing judgments to allow for the reporting of those final few pages with a summary of the facts and procedure in the case, but has invariably, and perhaps understandably, been met with judicial resistance.

Writing Judgments

It was perhaps my bad fortune to bring that accumulated knowledge and experience of law reporting to the bench. It has made me acutely aware of the pitfalls and conscious of how difficult it can be to write a judgment that straddles both the needs and expectations of the parties and what is required to write an objectively 'good' judgment. The difficulty arises from the fact that a judgment has two different audiences – the parties to the case, to whom the judgment is of direct relevance, and the broader legal public, whether practitioners or academics, to whom it may be of interest rather than of relevance. The parties are most invested in the resolution of the issues and the outcome of the case. The broader legal public has little interest in the outcome itself and is more concerned with the process of reasoning that has led to that outcome. This is not to say that the facts are irrelevant to this group, practitioners especially will want to either align or distinguish the facts of their own cases from those in the judgment. Within the 'broader legal public', there are also two groups, practitioners or academics in the area who will have a specialist knowledge of the subject and will be finely attuned to the nuances of the issues, and other practitioners who may need some background in order to fully appreciate the analysis on the specific issues decided in the judgment.

There is of course no single right or wrong way to write a judgment. From the point some 40 years ago in the library in UCD when I first opened a law report, I realise that I must have read hundreds if not thousands of judgments on many different subjects, from different jurisdictions, in varying styles and of varying length. In circumstances where there is no single right way to do it, I have consciously attempted to find a good way for me to do it, which may not be the best way or even a good way for anyone else. One of the things I did at an

early stage was to choose someone whose judgments I admire, to look at their judgments and to try to work out why I admire them and to attempt to model myself on their style. The person I chose was Mary Laffoy, not least because she spent so much of her High Court career in the Chancery list to which I found myself assigned last October, but also because her judgments are pithy, pragmatic, and erudite – qualities I would like to be able to emulate. She delivered a remarkable number of judgments which, without exception, comprised straightforward and clearly written analyses of the issues presented to her, often issues of considerable complexity. As a practitioner, I recall being on the receiving end of her judgments and not always on the right side. It was often impossible to tell from the judgment what her personal view was of the case she had just decided. She rarely either praised or criticised the parties or the practitioners. Instead, her judgments presented the facts, identified the law, teased out the issues and reached conclusions in a manner that seemed to be entirely impartial and objective.

Even before I had been sworn in, I received some advice from a colleague which resonated with me. This was to always bear in mind that a judgment should be written for the loser in a case. The winner may be flattered by the judgment but will not actually care that much: they have won the day and will not be troubled by how elegantly or inelegantly that victory is expressed. The loser on the other hand will care very much. Therefore, it is important that on reading the judgment the loser is made aware, first, that the Judge has heard and understood their argument and, second, why the Judge did not agree with that argument. The judgment should be not only a statement of why the winner has won but mainly a statement of why the loser has lost. It is easier for a party to accept defeat if they understand the rationale behind the outcome. That piece of advice helped me focus on the task of writing my first judgments in a more pragmatic way than might otherwise have been the case.

One preliminary issue for the Judge to consider is whether the case actually needs a written judgment. As cases are increasingly presented with written legal submissions and booklets of authorities and other materials, it can be difficult for a Judge to absorb everything that has been presented to him or her so as to provide an *ex tempore* ruling immediately on the close of argument. If this material has not been fully opened inevitably it will be necessary to reserve judgment simply to have an opportunity of examining all of the materials. Some cases, particularly if they have run over a number of days, clearly will require judgment to be reserved and a written judgment prepared. However, many cases do not really require a reserved, written judgment and delivery of an *ex tempore* judgment will ensure that the parties get a result more quickly and will often reduce their legal costs in doing so.

The parties can obtain a transcript of any *ex tempore* ruling from the audio recording on the DAR (Digital Audio Recording) system should they wish to appeal. As I am conscious that my exact words may be scrutinised rather than just the general thrust of the ruling, if I am going to deliver an *ex tempore* judgment, I generally rise for 30 minutes (or more if necessary) to allow myself prepare a note of what I am going to say. This helps me to put some structure on what I say and ensures that the judgment will cover all of the relevant issues. If more time is needed, the Judge can ask the parties to return to court the following morning and deliver the *ex tempore* judgment then. So far I have delivered *ex tempore* judgments when the outcome of the case or application was, to me at least, fairly obvious; where the issue netted down to an 'either/or' situation that simply required a judgment call to be made and on one occasion where I felt that the delivery of a written judgment could serve to exacerbate the already poor relationship between the parties pending the final resolution of their dispute (a request for an interlocutory injunction in a neighbour dispute).

Obviously the first and over-riding principle for any Judge is that they want to get the decision right. The following discussion assumes the Judge has done his or best to ensure that the decision is legally correct and so the focus is on style over substance. Although legal writing is sometimes seen as an omnibus skill, there is in fact a huge difference between writing a legal opinion for a client and writing a judgment. The former involves identifying the relevant legal principles and then conducting a risk analysis from the client's perspective before recommending a course of action. The legal principles will often be uncertain, and the recommendation may carry a health warning to the effect that a given interpretation or outcome may be 'judge dependant'. As the Judge writing the judgment, our task is to bring certainty to the legal principles, at least insofar as they apply to the particular case, and to do so in a manner which is objectively sustainable and not 'judge dependant'.

To get the decision right, a Judge has to first ensure that the both the legal issues and the facts to which the law is to be applied are correctly identified. In my view this requires more than simply reciting the facts, pleadings and arguments as presented by each side. It involves the Judge ascertaining what the facts are and extracting the core issues from the pleadings and submissions. I have taken to identifying the central issue as a theme in the introductory paragraphs of the judgment and following that with a statement of the facts and circumstances, which in some cases may involve setting out the procedure followed by the parties to get to the point of the judgment. I have found that preparing a summary of the facts that is comprehensive but not exhaustive can be very time consuming, but that is time well spent if those facts do not then have to be repeated or clarified in the balance of the judgment.

At this point, I give some thought as to how I am going to structure the balance of the judgment. There may be a logical sequence in which the issues fall for determination. Alternatively, the decision that I intend reaching on one or more of the core issues may determine the relevance of the remaining issues and whether they require to be determined at all. Even if they do not strictly require to be determined, I try to form a view at the outset of the extent to which I will nonetheless reach a conclusion on them especially if it is likely that there will be an appeal. This ensures that no matter what the outcome of any appeal may be, at least the case will have been fully decided. I find it useful at this early stage to take an overall view of all of the issues to ensure that the approach I intend adopting is consistent throughout.

In principle, a judgment can be written from back to front (where the Judge forms a clear idea of the conclusions that will be reached and writes the judgment in order get there) or front to back (where the Judges teases out the issues before reaching any conclusions, even in his or her own mind). In my view either approach is fine, but it is probably useful for a Judge to be aware which approach he or she is adopting as it will undoubtedly affect the writing process. In the latter case, writing the judgment is itself part of the thought process and, consequently, as the likely outcome becomes clearer to the Judge, earlier parts of the judgment may need to be revisited. In the former case, the Judge needs to be careful not to let his or her advance knowledge of the outcome affect the way in which the facts and the issues are framed. Going back to the notion of writing the judgment for the loser, it is one thing to explain to the loser why s/he has lost, it is another if the judgment makes him/her feel that the Judge regarded his/her case as hopeless from the outset.

I have noticed that some of my colleagues have developed a practice of including a summary of the judgment, including its outcome, at the very beginning. This could be characterised as the Judge preparing the headnote to their own judgment, ensuring that what the Judge

sees as the central issue(s) and the Judge's reason for determining that issue in a particular way is clear. I have not yet adopted that practice, not necessarily because I disagree with it but more because I have not really considered its implications fully nor how best to go about preparing such a summary should I decide to include one.

One strategic decision I have made is not to set out either the pleadings or the submissions of the parties under separate headings at the outset of the judgment. In fact, I generally do not set these out at all. The salient elements of the pleadings can be incorporated into the description of the case and, of course, will be central to identification of the legal issues. Where there are multiple issues, I prefer to treat the submissions made by each side on any point as part of my analysis of that issue rather than in a separate part of the judgment. This, I feel, is easier for the reader and more useful for the broader legal public as it groups parts of the judgment likely to be of interest together rather than spreading them throughout the judgment. Exceptionally, if there is only a single issue to be decided, I might set out the submissions of each side before engaging in legal analysis.

I then deal with each of the issues which I have identified as arising. I try to ensure that the focus is on the legal analysis rather than merely reciting the parties' submissions. However, if I am disagreeing with a specific argument, I will record that argument as having been made and try to explain why I do not agree with it. I often have to take a step back in order to plot my way through the legal analysis, especially if the parties have opened a large volume of case law and materials. Unless I have to decide between apparently conflicting authorities, I find it unnecessary to recite lengthy passages of the judgments which have been relied on by the parties. It is usually sufficient to state the principle and cite the authority for it. However, if the parties are relying on conflicting authorities or drawing contrary conclusions from the same authority it may be necessary to quote the relevant passage(s) in order to explain the conclusion I have reached. If there is an authority which sets out the relevant principles to be applied to the issue it can be useful to quote that statement of principle, especially if the balance of the judgment entails the application of those principles. Where the principles are well settled, it may not even be necessary to do this. I am conscious in this regard that lengthy quotations from what are probably themselves long judgments just add to the length of the judgment I am writing.

I have found that the adversarial system where the parties address the issues from extreme positions does not always promote my understanding of the arguments, especially in areas in which I had not previously practiced. Consequently, I often ask my judicial assistant to prepare a research note on discrete areas of the argument. This may involve cross referencing the parties' arguments on particular issues or checking the references in academic texts which have been opened to the court. Sometimes I just want to be sure that some legal proposition is or is not correct before I make an assumption that may be central to the judgment. As a matter of principle, I do not ask my judicial assistant to prepare draft judgments, although I frequently incorporate her research into the final product.

The process of actually writing the judgment is a lengthy one. I tend to make handwritten notes, which can be quite extensive, before dictating the first draft of the judgment. I then substantially re-work the typed draft, adding or changing about a third of the original. It can be useful to revisit the summary of the facts and the identification of the legal issues in light of where the legal analysis has ended up. In this phase, I pay particular attention to my use of language – I try to cut out unnecessary words, to avoid the use of 'legalese' (unless it is absolutely necessary), to simplify sentence structure and to ensure consistency in the terminology I have chosen to describe the parties, for example referring to the decision

maker in a judicial review as either "the respondent" or "the Minister" throughout the judgment. Either is correct, but switching between the two may be confusing for readers. I also de-personalise the judgment, removing the names of counsel and solicitors and insofar as possible the names of people who are not central to the narrative. I remove from the narrative details, particularly personal details, which are not relevant to the legal issues. I pay attention to the tone of the judgment. When dictating I find that my own views, which are not always considered, can sneak through. I try to neutralise any criticism bearing in mind that the judgment may be read by people who are not parties to the case. I try to bear in mind that my personal views are not relevant whether as to the issues, the parties, or their representatives.

I then ask my judicial assistant to proofread and review the draft, checking all references and citations. She will make sidenotes, particularly if she finds something difficult to follow. This is a useful weathervane. She is already familiar with the case so if the point I am making is not immediately clear to her then it is likely not going to be readily understood by the broader legal public either. She returns the draft to me, and I do a further review. In addition to considering any notes she has made, I will often make further alterations to the text, generally for the purposes of clarity, but sometimes to add points or comments which have occurred to me since the original dictation.

All in all, between myself and my judicial assistant, there are five iterations of the judgment before it is finally delivered. This may be excessive as, in addition to getting the decision right and writing a 'good' judgment, Judges are under pressure to get the judgments delivered in a timely fashion. As a practitioner, I well recall the frustration of finishing a case and waiting upwards of a year or more to get a judgment. At the same time, my first thoughts on a case are rarely the same as my last thoughts and for myself at least I am not sure that instantaneously rushing to write the judgment will produce the best outcome for the parties. Returning to the papers, the submissions and my own notes after a short interval can add perspective so that by the time I write the judgment I have a clearer idea of the bigger picture detached from the detail of the argument. Of course, waiting too long to write the judgment can be counterproductive. The benefit of counsel's argument may be substantially lost if I have no recollection at all of its eloquence by the time I sit down to write the judgment.

Conclusion

Although writing judgments comprises only part of the work of a Judge, for those of us on the civil side, it is in many ways the most visible and certainly the most permanent. It is a task for which there is no formal training and for which the previous professional experience of some Judges will be undoubtedly of more assistance than others. Nonetheless, in my view judgment writing is something at which we can improve if we approach the task consciously, focusing not just on the legal issue which we are asked to decide but on the way in which we propose framing and expressing that decision. Striving for clarity of thought and of language will assist the reader of a judgment involving even the most complex legal issues. I do not claim to have mastered the art of writing judgments just yet. Reverting to the analogy of learning how to ride a bicycle, I think have worked out the mechanics of what is required and I am ready to remove the stabilisers. However, I am still wearing a crash helmet as I anticipate that the road ahead may not be entirely smooth.