



# THE CRAFT OF GIVING JUDGMENT

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REASON WRITING FOR NON-LAWYERS  
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# THREE CRITERIA FOR IMPROVING REASONS FOR JUDGMENT

- The craft of giving reasons for judgment is a skill that needs to be learned and developed.
- Developing skill in the craft of giving judgment is assisted by consideration of three criteria:
  - A. Purpose:** Why do we give reasons for judgment?
  - B. Structure:** How do we structure our reasons for judgment?
  - C. Expression:** How do we express ourselves in our reasons for judgment?

## A. PURPOSE OF GIVING JUDGMENT

- The necessity of judgment
- The nature of a judgment
- The giving of judgment publicly
- The necessity for reasons
- Purposeful preparation of reasons



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# THE NECESSITY OF JUDGMENT



The fundamental task of a court or tribunal is to adjudicate the dispute before it.



To adjudicate a dispute is to:

- determine an outcome that finally and completely disposes of the proceedings; and
- provide reasons for determining that outcome.

# THE NATURE OF A JUDGMENT



- A judgment by its nature is:
  - a. a public act and instrument;
  - b. an act of communication; and
  - c. an exercise of professional skill.

# A JUDGMENT IS A PUBLIC ACT

A judgment is a public act of an authoritative adjudicative institution by which rights are created or enforced or obligations are imposed or enforced.

A judgment thereby has consequences to the parties particularly and the rule of law generally.

The judgment therefore must be legally correct in the orders it makes and the reasons it gives.

# A JUDGMENT IS A PUBLIC INSTRUMENT

- A judgment is a public instrument whose function is to assist in the efficient, effective, timely and just administration of the law.
- In so doing, a judgment upholds the rule of law.



# A JUDGMENT IS AN ACT OF COMMUNICATION TO THE PARTIES

- A judgment communicates to the parties what the judge has done and why.
- The judgment must tell the parties all they need to know:
  - a. to understand what has been done;
  - b. to exercise the rights or perform the obligations given to or imposed on them by the judgment;
  - c. to do what is necessary consequent on the judgment; and
  - d. to appeal against the judgment.

# A JUDGMENT IS AN ACT OF COMMUNICATION TO OTHERS

- The judgment needs to be framed in a way that not merely states these matters, but *communicates* them to the relevant audience.
- The *relevant audience* will vary, depending on the case, but may include:
  - a. the parties;
  - b. the legal representatives of the parties;
  - c. the witnesses, especially expert witnesses called by the parties, whose evidence has been accepted or not accepted;
  - d. the public who may be interested in the outcome and reasoning;
  - e. the media who may be interested in reporting the outcome and reasoning;
  - f. the appellate courts which might review the decision on appeal;
  - g. other judges and lawyers to guide future legal decision-making and advice; and
  - h. academic lawyers and students.

# A JUDGMENT IS AN EXERCISE IN PROFESSIONAL SKILL

As a public act and instrument that administers the law and upholds the rule of law, a judgment is an exercise of professional skill in finding and applying the law.

The craft of giving reasons for judgment is one of the key “law jobs” that judges must perform.

Judges need to learn, and continue to improve, this craft of giving reasons for judgment.

# THE GIVING OF JUDGMENT PUBLICLY

- The open administration of justice requires that judgments are given “publicly, in open court”: *Scott v Scott* [1913] AC 417 at 473
- The reason, Jeremy Bentham explained, is that:  
“Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial”: quoted in *Scott v Scott* at 477.



Justice Michael Lee delivering judgment in Bruce Lehrmann defamation case publicly:  
Getty Images/Federal Court of Australia

# THE NECESSITY OF REASONS



Judging involves adjudication.



An essential characteristic of adjudication is its explicit rationality.



“Rationality” in that the findings of law and fact, the reasoning involved in applying the law to the facts, and the determination of the appropriate remedy or sanction, must be rational.



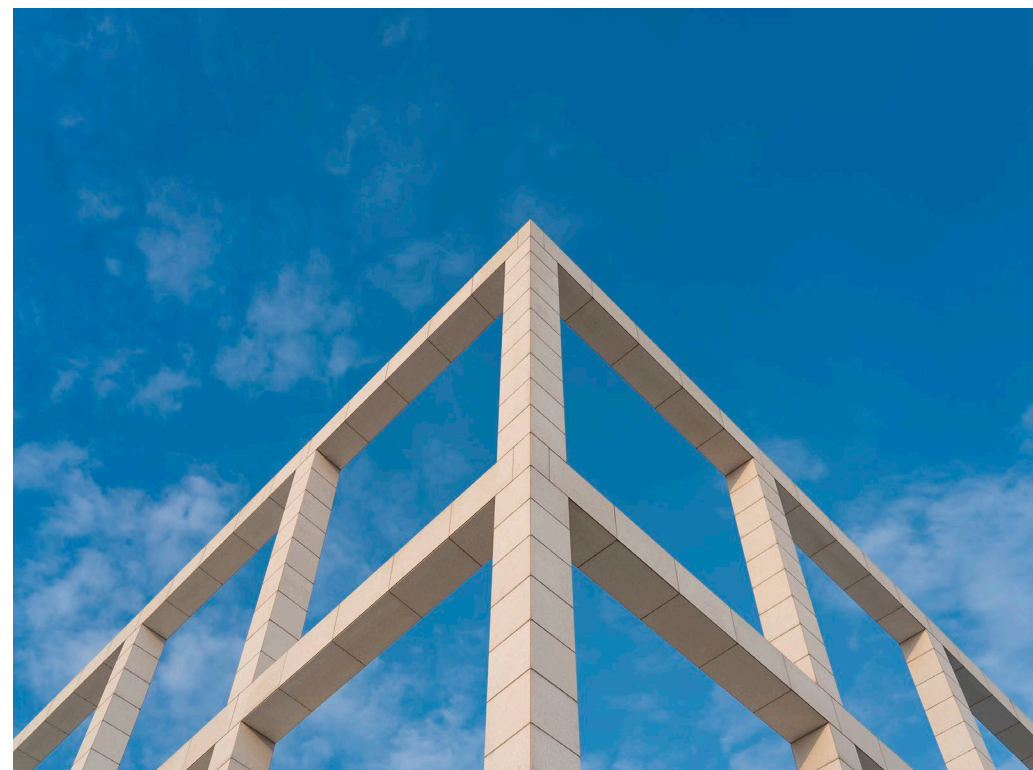
“Explicit” in that this rationality must be expressed publicly in reasons, either oral or written.

# PURPOSEFUL PREPARATION OF REASONS

- The preparation of reasons for judgment should be purposeful.
- “Purposeful” in that reasons should achieve the purposes of giving reasons, which include:
  - a. to pronounce the outcome and the orders made;
  - b. to explain why the judge has reached that outcome and made those orders;
  - c. as an elaboration of (b), to explain to the losing party why they lost; and
  - d. where appropriate, to explain the law and its application and thereby provide guidance or set a precedent for judges and lawyers to follow in deciding and advising in like cases in the future.

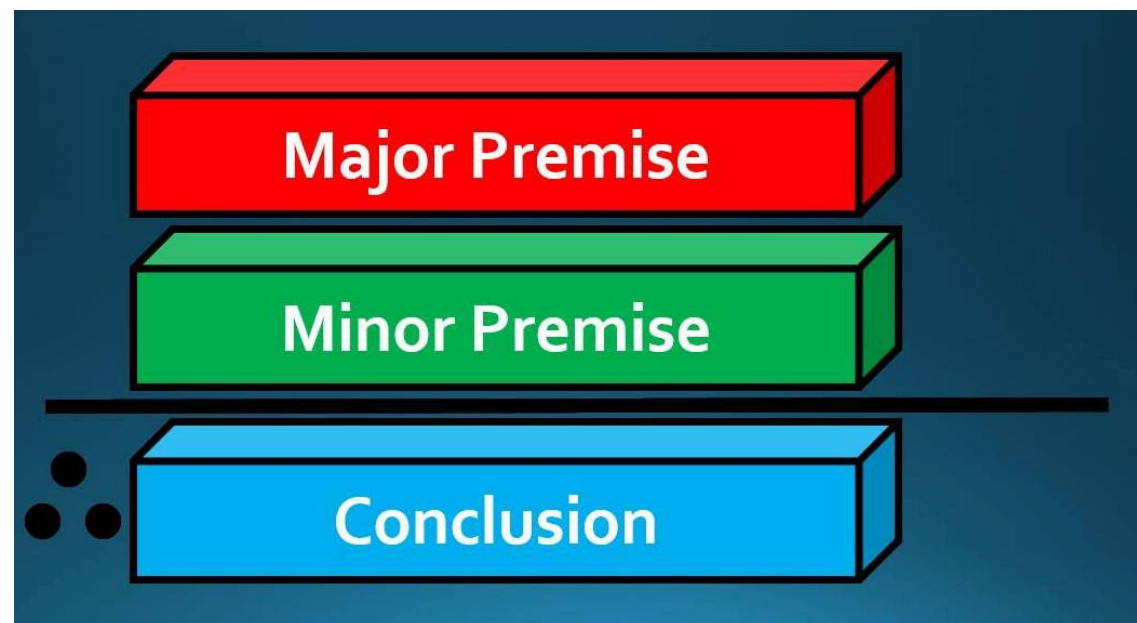
## B. STRUCTURE OF A JUDGMENT

- The syllogistic structure of adjudication
- The syllogistic structure of reasons
- A suggested structure of a judgment.



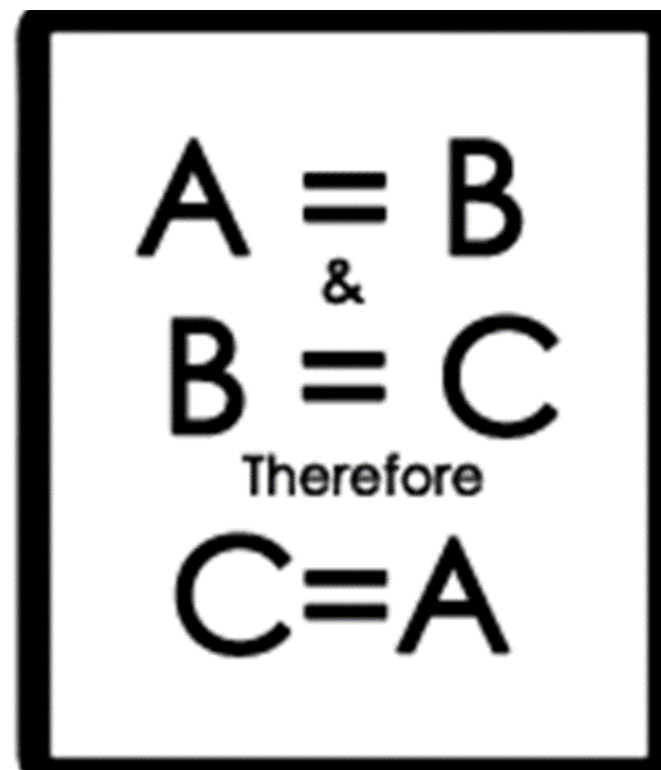
# THE SYLLOGISTIC STRUCTURE OF ADJUDICATION

- The adjudication of a dispute involves syllogistic reasoning:
  - a major premise: the law to be applied to resolve the dispute;
  - a minor premise: the facts of relevance to the dispute; and
  - a deduction: application of the law to the facts to reach a conclusion of whether a legal consequence has been established (such as a breach of law).



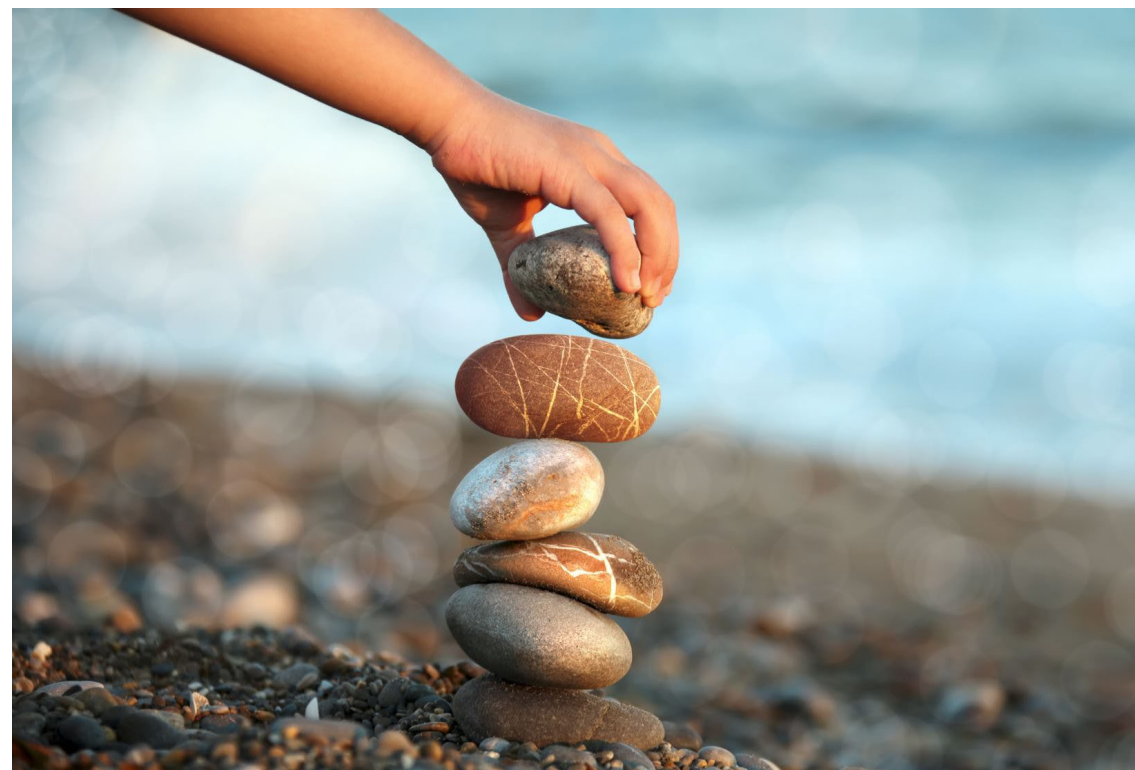
# THE SYLLOGISTIC STRUCTURE OF REASONS

- The reasons for decision will usually reflect this syllogistic structure:
  - a. identifying and interpreting the law that is to be applied to resolve the dispute;
  - b. finding the facts that are relevant to the issues in dispute and the applicable law;
  - c. applying the law to the facts to determine whether a breach of law has been established; and
  - d. if a breach of law has been established, determining the appropriate remedy or sanction for the established breach of law.



# A SUGGESTED STRUCTURE OF A JUDGMENT

- A judgment may be divided into six parts:
  - a. the introduction;
  - b. the statement of the issues to be determined;
  - c. the law;
  - d. the facts;
  - e. the conclusions; and
  - f. the orders to be made.



# THE INTRODUCTION

- The judgment should commence with a brief explanation of what the case is about, what needs to be decided and how the judge has decided it – a form of “executive summary”.
- The first page of a judgment is “prime real estate” and in a well-structured judgment, “the front page says it all”.
- The sound and clear construction of the first page benefits not only the reader (the relevant audience) but also the judge: it lays the foundation and maps the course of the judgment.

# THE ISSUES TO BE DETERMINED



Identifying the issues to be determined by the judge is an essential preliminary to giving judgment. The judge must understand, and state, what are the issues that need to be decided.



This identification and statement of the issues to be decided focuses the judicial mind upon what needs to be done and enables the parties hearing or reading the judgment to understand correctly what the judge has done.

# EARLY IDENTIFICATION OF THE ISSUES



Identification of the issues to be decided should be initiated as early in the proceeding as possible.



The originating process articulating the cause of action or claim in civil matters, charging the defendant for an offence in criminal matters, or identifying the source and grounds of appeal in merits review matters, will frame in a general way the issues to be decided.



The pleadings assist in more specifically identifying the particular issues joined between the parties.



Case management can also assist. Directions can be made for parties to file an agreed statement of the issues to be decided. These may be questions of law or questions of fact.

# IDENTIFICATION OF THE ISSUES FROM THE LAW

- The applicable law invoked by the claim will also frame the issues to be determined:
  - a. in criminal matters, the issues include the elements of the offence charged and of any defence available to that offence;
  - b. in civil matters, the issues include the elements of the cause of action or claim and of any defence;
  - c. in public law matters, the issues include the relevant grounds for judicial review of administrative decisions or conduct; and
  - d. in merits review matters, the issues include the law regulating the exercise of statutory power under review.

# FINALISING THE ISSUES

- The initial identification of the issues to be decided usually will need to be refined during the course of the hearing.
- The parties' evidence and arguments will evolve, narrowing or altering the issues in dispute.
- The judge needs to understand, by the conclusion of the hearing, what issues are still in dispute and how these issues are to be formulated.
- These issues as finally formulated are the ones to be determined in the judgment.

# THE LAW TO BE APPLIED

- The judgment should identify the law that is relevant to the determination of the dispute.
- This involves formulating the major premise in the syllogism.
- Identifying the relevant law involves three steps:
  - a. finding the law to be applied;
  - b. formulating that law in a form that can be applied, such as a principle of law; and
  - c. interpreting the law as so formulated.
- Identifying the law to be applied involves the exercise of **legal judgment**.

# FINDING THE LAW

- The law to be applied will include:
  - a. *the jurisdictional law*: the legislation that gives the court jurisdiction to decide the case;
  - b. *the substantive law*: the legislation or general area of law in the context of which the dispute arises;
  - c. *the procedural law*: the legislation that regulates the procedure by which the dispute is heard and determined; and
  - d. *the remedial law*: the legislation or general area of law that frames the remedies or sanctions that the judge may order.

# FORMULATING THE LAW AS A PRINCIPLE



Once the applicable law has been found, the judge needs to formulate it as a particular proposition or principle of law, which can be applied to the facts to determine the dispute.



Care needs to be taken to formulate the principle of law correctly. If the law is wrongly formulated, the decision may be appealable, as on an error of law.

# INTERPRETING THE LAW

- Once the applicable principle of law has been formulated, the judge needs to interpret it.
- Where the principle of law reflects a statutory provision, interpretation is often required.
- Statutory provisions are expressed in general language, leaving doubt as to their meaning and application to individual cases.

# THE FACTS TO BE APPLIED



The judgment needs to make findings of the relevant facts in dispute.



This involves formulating the minor premise of the syllogism.



There may be a number of syllogisms – one for each deductive conclusion that needs to be drawn.

# FINDING THE FACTS

- Finding the facts involves three steps:
  - a. evaluating and selecting the evidence to be used to find the facts;
  - b. finding the facts from the evidence that has been selected and interpreting them for their fact-meaning; and
  - c. classifying the facts for their legal significance after their fact-meaning has been found.
- The judgment needs to explain how and why the judge has undertaken these steps.
- Finding the facts involves the exercise of **intellectual judgment**.

# THE CONCLUSION TO BE DRAWN

- A judgment needs to apply the law (which is the major premise) to the facts found (which are the minor premise) to draw a conclusion.
- The conclusion will be that a claimed legal consequence has or has not been established:
  - a. in criminal matters: the offence charged has or has not been proven beyond reasonable doubt;
  - b. in civil matters: the breach of law claimed has or has not been proven on the balance of probabilities;
  - c. in public law matters: the grounds of judicial review of an administrative decision or conduct have or have not been established.
  - d. in merits review matters: the statutory power under review will be exercised in one way or another.
- The judge needs to explain why the judge has found that the claimed legal consequence has or has not been established.

# ORDERS WHERE BREACH OF LAW ESTABLISHED

- Where the conclusion is that a breach of law (criminal, civil or public law) has been established, the judge needs to decide what remedy or sanction should be ordered.
- The judge has a discretion as to what remedy or sanction, if any, should be ordered and the terms of any remedy or sanction to be ordered.



# DISCRETION TO ORDER REMEDY OR SANCTION

- The duty of the judge in matters of discretion is to exercise **moral judgment** as to what is just, fair, equitable or reasonable in the circumstances of the case.
- This involves having regard to:
  - a. the individual circumstances of the case and
  - b. society's values, attitudes and prevailing practices.

# REMEDY OR SANCTION FIT FOR PURPOSE

- The remedy or sanction should be “fit for purpose”.
- A criminal sanction must appropriately punish the offender for the offence.
- A civil or public law remedy must remedy the breach of law.
- In environmental cases, legal imagination and creativity are needed to tailor remedies and sanctions that are fit for purpose.



# REASONS FOR EXERCISE OF DISCRETION

- The judge needs to explain why the judge has decided to order a particular remedy or sanction or, if the judge in the exercise of discretion has decided not to order a remedy or sanction, why the judge has so decided.



# ORDERS WHERE BREACH OF LAW NOT ESTABLISHED

- Where the conclusion is that a breach of law has not been established, the appropriate order will be to dismiss the proceedings (criminal, civil or public law).
- There may be a consequential order as to the costs of the proceedings – who should be ordered to pay whose costs.
- The judge needs to give reasons for making these orders.



## C. EXPRESSION OF REASONS FOR JUDGMENT

- To achieve the purpose of giving reasons for judgment, the judgment needs to communicate effectively with the relevant audience.



# EFFECTIVE COMMUNICATION

- Effective communication in a judgment involves:
  - a. separating the people from the problem;
  - b. identifying and speaking to the relevant audience;
  - c. using plain language;
  - d. being clear and concise;
  - e. being parsimonious and precise;
  - f. being readable;
  - g. adopting a logical structure;
  - h. using descriptive headings;
  - i. using reader-friendly type size and styles; and
  - j. using correct spelling, punctuation and grammar.

## SEPARATING THE PEOPLE FROM THE PROBLEM

- In crafting reasons for judgment, there is a need to “separate the people from the problem.”
- The “problem” is the issues in dispute, not the parties who raise the issues.
- The judgment needs to decide each issue impersonally.
- Although a decision on an issue may involve rejecting one party’s argument and upholding another party’s argument, the reasons should be based on the relative strengths of the arguments, not matters personal to the parties.
- To this end, reasons should avoid ad hominem attacks – “play the ball, not the person.”

# SPEAKING TO THE AUDIENCE



As a judgment is an act of communication, it needs to be effective in communicating information to the audience.



Effective communication depends on how the audience receivers understand and use the information communicated in the judgment.



The receivers of the information in the judgment are different, and have differing capabilities to understand the information communicated.



The judge needs to adopt a language, structure and style that communicates effectively with all receivers of the information in the judgment.

# USING PLAIN LANGUAGE

- Plain language is language that is easier to understand by ordinary people.
- Plain language involves:
  - using plain, everyday words and phrases;
  - avoiding legal jargon, technical language, terms of art, and acronyms;
  - avoiding turning verbs into nouns (nominalisation) or nouns into verbs (verbing);
  - using short words and sentences and avoiding long words and sentences (more than 25 words); and
  - preferring the active voice to the passive voice.

See <https://insidegovuk.blog.gov.uk/2014/08/04/sentence-length-why-25-words-is-our-limit/>

# BEING CLEAR AND CONCISE

- A judgment needs to say what it needs to say as clearly and concisely as possible.
- Explanations of the obvious should be eliminated.
- Repetition should be eliminated.
- Writing a clear and concise judgment may take time. Mark Twain is attributed with saying: “I didn’t have time to write you a short letter so I wrote you a long one”.
- Judges need to take time to write shorter reasons for judgment.

# BEING PARSIMONIOUS AND PRECISE

- A judgment should say only what needs to be said and no more.
- The law of parsimony should be applied: “The simplest explanation is usually the best one”.

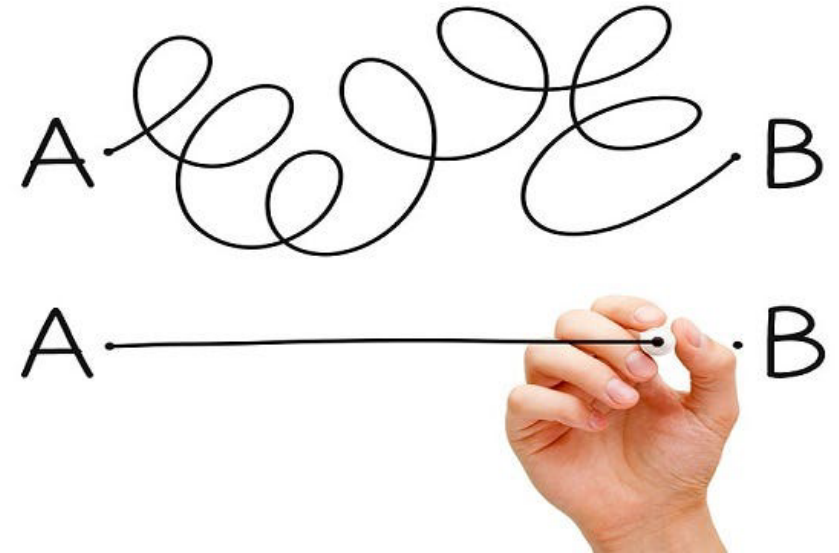


Image from: <https://hackernoon.com/code-simplicity-a-language-independent-perspective-756cf031c913>

# PARSIMONY IN THE LAW

- In the discussion of the law:
  - a. avoid lengthy quotations from legislation or decided cases;
  - b. if quotation is necessary, minimise the length of the quotation and introduce it by a short statement of the point being made;
  - c. paraphrase where possible the proposition or principle of law;
  - d. state the authority for the proposition or principle of law, either immediately afterwards or in a footnote; and
  - e. avoid discursive narration of the history and ambit of the general area of law.

# PARSIMONY IN THE LAW

- The law of parsimony should be applied in dealing with the facts.
- In discussing the facts:
  - a. avoid reciting the history of the litigation – “the story so far”;
  - b. avoid setting out all of the evidence – the purpose of a judgment is not to provide a transcript of the oral evidence adduced at the hearing, an exhibit list, or reproduce the affidavit or documentary evidence;
  - c. avoid lengthy quotations from the evidence;
  - d. if quotation is necessary, minimise the length of the quotation and introduce it by a short statement of the point being made;
  - e. paraphrase the evidence where possible;
  - f. explain which evidence is accepted and why;
  - g. only make findings of facts from the selected evidence that are necessary for the determination of the dispute and eliminate irrelevant facts;
  - h. formulate the findings of facts as clearly and concisely as possible.

# BEING READABLE

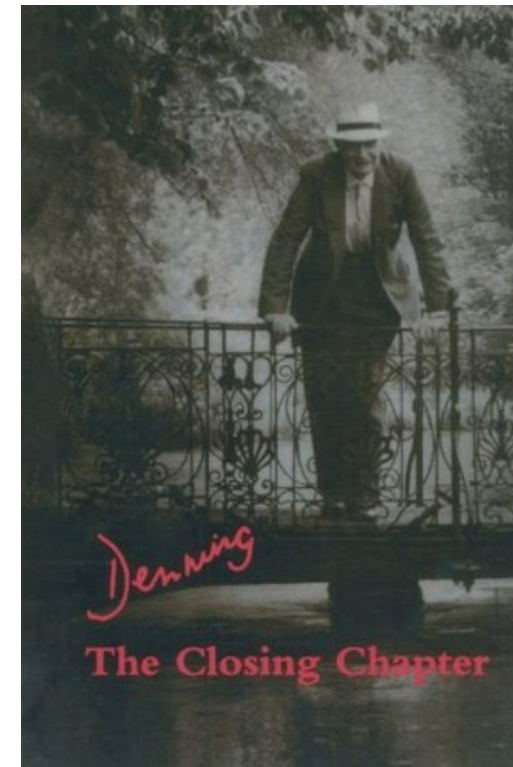
- The text of a written judgment needs to be split into readable and understandable paragraphs.
- Lord Denning criticised:  
“a massive, unbroken page of print is ugly to the eye and repulsive to the mind”.



# HAVING A LOGICAL STRUCTURE

- A judgment should be logically structured. This often follows the syllogistic structure of finding the law, finding the facts, and applying the law to the facts to reach a conclusion.
- Lord Denning explained his format and structure for judgments:

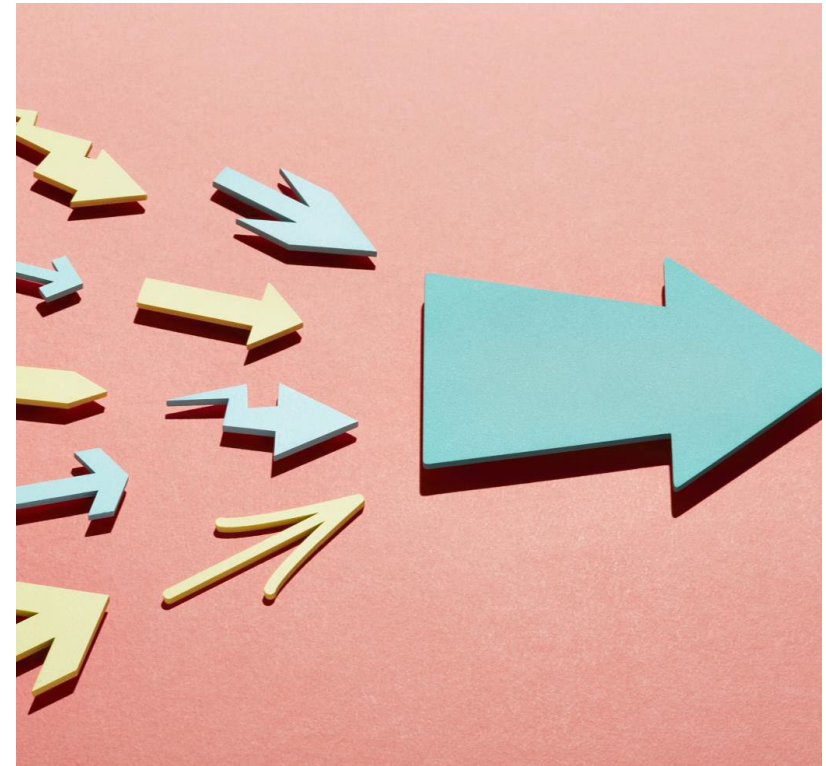
“I divided each judgment into separate parts: first the facts; second the law. I divided each of those parts into separate headings. I gave each heading a separate title. By doing so, the reader was able to go at once to the heading in which he was interested; and then to the passage material to him.”: Lord Denning, *The Closing Chapter* (Butterworths, 1983), p 64.



Source: Goodreads

# USING DESCRIPTIVE HEADINGS

- Headings structure a judgment and act as guideposts to the development of the reasoning in the judgment.
- To do this effectively, the titles of the heading should be descriptive of what is said in the part of the judgment under the heading.
- Generic and formulaic headings are unhelpful and should be avoided, eg the evidence, the submissions, or consideration.



# USING READER-FRIENDLY TYPE

- Readability is improved by using type size (at least 11 point) and styles (such as Times New Roman and Arial) that help the reader to read and understand the judgment.

**Arial**

**Times New**

**Roman**

**Stylus**

**Gothic**

**Courier**

*Script*

**Tahoma**

**Helvetica**

**ONYX**

**Revue**

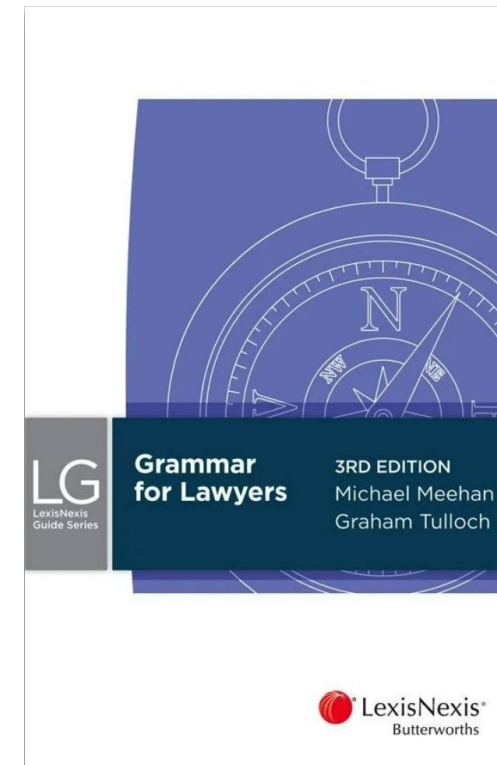
**Nyala**

**broadway**

CASTELLAR

# USING CORRECT SPELLING, PUNCTUATION AND GRAMMAR

- A judgment should be carefully checked to ensure:
  - words are spelt correctly;
  - appropriate punctuation is used; and
  - conventional grammar and syntax are used.
- This avoids ambiguity and assists understandability of the reasons for judgment.



# THE CRAFT OF JUDGING

- The adjudication of disputes before the courts or tribunals is *a*, perhaps *the*, fundamental “law-job”.
- Adjudication involves “juristic method”, which Karl Llewellyn refers to as “the ways of handling ‘legal’ tools to law-job ends, and the on-going upkeep and improvement of both ways and tools”.
- The legal tools are the substantive and adjective laws applicable to the dispute.
- The craft of judging the dispute involves ascertaining the best ways of handling those legal tools to the law job end of adjudication of the dispute.
- Skill in the craft of judging can be improved by understanding the purpose, structure and expression of reasons for judgment.



Source: VectorStock