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Quality in Judicial Opinions

ROBERT A. LEFLAR*

I have been reading judicial opinions since I entered law school in 1924, have written a few myself, and have worked with approximately one thousand (1000) appellate judges in seminars which devoted time to discussion of the topic "Preparation of Judicial Opinions." On the basis of that observation and experience, I have concluded that Judge James D. Hopkins has as keen an appreciation of the problems inherent in the writing of opinions as has anyone among that thousand of judges, and that he himself has been one of our better writers of such opinions.

My own evaluations are less significant in leading to these conclusions than is Judge Hopkins' own performance. It is upon the latter, necessarily, that the conclusions are based. Accordingly, the important parts of this comment, sustaining those conclusions, will be largely copied from Judge Hopkins' writings, including his opinions. He unwittingly, more than I titularly, will be the author of the essential parts of this short study.

Judge Hopkins was first a student member, then for many years a faculty member, of the Appellate Judges Seminars, which have been held at the New York University School of Law since 1956. As a faculty member he served on the panels assigned to deal with a good many different topics, including Judicial Administration, the Appellate Judicial Process, Statutory Interpretation, and Review of Decisions of Administrative Agencies. But the panel on which he regularly served as chairman was the one which always evoked the greatest interest among the seminar members. This was the panel in charge of the topic "Preparation of Judicial Opinions." His proficiency both in anal-

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ysis and in clear understandable presentation, as well as in his own writings, were quickly recognized, and resulted in his being rated as a top faculty member by his student judges. He continued to serve until the constantly increasing caseload on his court compelled him to give up this interesting though unremunerative outside activity.

It has been said that appellate judges are, by the very nature of their work, professional writers. Yet few of them have gained acclaim, even among members of the bar, for their performance of that part of the judicial task. There has been a considerable volume of writing about opinion writing, and most of it has been critical.

Dean Wigmore's comments are among those most quoted. Writing early in the century, in the first edition of his great treatise on the law of evidence, he listed six major shortcomings in the bulk of the many thousands of opinions he had read.¹ Five of the shortcomings had to do with content and form. First was the failure to exhibit knowledge of and reliance upon broad legal principles as distinguished from narrow rules. Others were disregard of controlling precedents, overemphasis on techniques and technicalities, undue bondage to the servitude of precedent, and overconsideration of every point of law raised in the briefs. The sixth, probably not in point here though now a common basis for criticism, was the one-man opinion. Mercifully, he did not dwell upon the too-frequent clumsiness of legalistic style and even grammar that more ordinary critics have often observed.

One rather obvious consideration that has bearing on how an opinion should be written is: for whom is the opinion written, for what readership?² Not all opinions are destined for posterity. The first readership quite definitely consists of the writer's fellow judges. Their preferences and special concerns, or at least those of a majority of them, have to be satisfied, else the opinion must be revised as a dissent. Apart from that, it is evident that some opinions will be of real interest primarily, or even only, to the immediate parties and their counsel. Such opinions can be

1. 1 J. WIGMORE, *WIGMORE ON EVIDENCE* § 8a, at 243-53 (3d ed. 1940); *id.* at 243 n.1 (originally published in 1914, in Second Supplement to the First Edition).

2. *Cf.* Leflar, *Some Observations Concerning Judicial Opinions*, 62 *COLUM. L. REV.* 810, 813 (1961).

written simply, without much effort expended on achievement of literary quality. A clear statement is enough. If the case is one that has excited wide public interest, the opinion should be so written that the interested public can understand it, even when they read about it in the newspapers. That requires that it be so written that newspaper reporters can understand it. The public is the employer for whom the judge is working.

If the decision is one that will, or may, have precedential significance, and especially if it involves genuine policy considerations, it is being written not only for the parties, fellow judges, and the reading public, but for the bar, for law students, and for future judges. It may even be written for members of the legislature; they sometimes attempt to straighten out mixed-up and obsolete areas of the law—both wisely and unwisely. At any rate, it is these most important opinions that commentators are concerned about, and it is to the writing of them that much critical advice is principally directed.

Of prime importance is a common-sense requirement that the *real* reasons for the decision be set forth in such opinions. Often, neither formal logic nor interpretations of prior precedent constitute real reasons either for moving the law in new directions or for refusing to move it. The real reasons are apt to be socioeconomic or even political. They underlie all law and all legal rules, whether laid down in England in 1607 to meet the needs of that time and place, in New England to fit conditions there in post-Civil War days, or in New York in 1983 to fit whatever are thought to be the demands of the current society. Citation of 1607 or 1870 precedents, or even those of 1970, too often does not adequately explain 1983 decisions. Along with his formal analysis of precedents and restatement of applicable law, the good opinion writer must both understand what the real socioeconomic or political reasons actually are and be able to explain them clearly and honestly.

Clear and honest explanations call for more than good intentions on the writer's part, for more even than sound learning and moral integrity. Those judicial qualities, we can hope, may be assumed. Effective exposition also calls for good expository writing.

Careful organization of the materials to be presented is the first prerequisite to effective exposition. Standards for organiza-

tion of judicial opinions are not materially different from those for other writing of the same general character. No one standard can be applied to all cases. But most opinions are sufficiently similar in content and purpose that some generalization is possible. Judge Frederick G. Hamley, then Chief Justice of the Supreme Court of the State of Washington and later on the United States Court of Appeals for the Ninth Circuit, in 1956 prepared for the Appellate Judges Seminars an organizational outline³ that has come to be accepted by hundreds of judges for most opinions. It divides an opinion into five major parts.

The first part is usually short. It states the nature of the action and how it reached the appellate court. The next, also short, sets out the question or questions to be decided. Then comes a statement of the facts—not all the facts in the record, but only essential facts. If there be more than one question in the case, so that issues have to be discussed one at a time, incidental facts that are relevant to one issue only are not set out until that issue is discussed. The fourth part is an analysis of the issue or issues one at a time in an order based on their inter-relationship. This is referred to as “the meat of the opinion.” The facts relevant to each issue must be tied into the discussion of it, but facts already stated need not be repeated except as emphasis is required. Some kind of a conclusion is called for on each issue that is deemed worthy of discussion, though one possible conclusion may be that the issue should be laid aside as irrelevant. Finally, there is the disposition of the case. If the judgment below is simply affirmed, or reversed and dismissed, that is all there is to say. For other dispositions, however, more detailed directions such as the scope of a new trial, corrected instructions, allocation of costs, and the like, are necessary and should be fully anticipated. These five elements, in varying lengths but in this order, are appropriate to the great majority of all appellate judicial opinions.

Opinion writers have received a plenitude of advice to the effect that they should use good English. Most judges do not need the advice except when they are hurried or get careless. Law clerks and fellow judges usually catch common errors before

3. Published in *Internal Operating Procedures of Appellate Courts*, 29-37 (American Bar Ass'n 1961).

they come out in print. Yet dangling participles, mixed metaphors, strange punctuations, misspelt words, and dozens of other mistakes do get into the reports. It is interesting that so-called "typographical errors" rarely appear in the reports of opinions written by real masters of the language.

In the Appellate Judges Seminars, Judge Hopkins as faculty chairman of the panel on Preparation of Judicial Opinions dealt with all the matters mentioned in the preceding pages. In fact, the preceding pages constitute little more than a partial list of aspects of the topic that he discussed with the judges, members of courts from all over the United States, who attended the seminars. It was fairly early in his years of service on the faculty that he wrote up and handed out to the judges a list of 33 basic ideas applicable to judicial opinions. We still use the list in the seminars, and as "Notes on Style in Judicial Opinions," it has been published elsewhere.⁴ It is reprinted here verbatim, this time without Judge Hopkins' advance permission. It is reproduced partly because it is one of the best pieces of advice ever given to judges about their opinion-writing task, and partly because it sets forth so well the high but realistically practical standards that have guided him in the preparation of the many opinions which he has written in his long and distinguished appellate career. After his "Notes" are quoted, a few of those opinions, selected almost at random from the many years of his judicial service, will be cited briefly to show how he applied the standards set forth in the "Notes" and dwelt upon in his panel presentations to other appellate judges.

Notes on Style in Judicial Opinions by James D. Hopkins

Then said they unto him, say now Shibboleth: and he said Sibboleth: for he could not frame to pronounce it right. Then they took him and slew him at the passage of Jordan.

The Book of Judges: 12:6

But true Expression, like th' unchanging Sun,
Clears and improves whate'er it shines upon,
It gilds all objects, but it alters none.

Pope, *Essay on Criticism*

4. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES J. 49 (1969), reprinted with permission of the American Bar Ass'n, copyright 1969.

I.

1. Judges write opinions for an audience. The audience varies as the case varies.

2. The opinion, as an expression of judgment, is an essay in persuasion. The value of the opinion is measured by its ability to induce the audience to accept the judgment.

3. The nature of the audience is defined by the case. When the issue is essentially factual, the audience usually consists of the parties and their attorneys. When the issue is essentially legal, the audience usually consists of the parties, their attorneys, and the bench and bar. When the issue has public implications, the audience includes the legislature, public officials, the news media, and the community.

4. The focus of the opinion will be as narrow or broad as the nature of the audience. The style responds to the focus of the opinion—that is, the style is adapted to the audience.

II.

5. The style of an opinion has two aspects—the organization of the discussion, and the composition of the language.

6. The organization of the discussion means first, the approach of the author to the issue, and second, the method employed to make the discussion clear and concise.

7. The approach should always be measured, temperate, and objective. Rhetoric is best suited for the advocate; an opinion expresses a decision above the individual passions in the case.

8. The method of the discussion is not bound by any one rule. An opinion considering several issues may be divided into branches. Footnotes are useful when they inform the reader as to relevant citations and material not crucial to the decision or contain quotations at length of statutory provisions and pivotal testimony. Footnotes breed irritation when their number and proximity interrupt the flow of the discussion.

9. The operative facts should be stated in depth preceding the discussion in the opinion concerning their effect and the operative law. This is not an absolute: sometimes disparate issues arise from unrelated facts, and divisions of the discussion as to both fact and law pertinent to each issue assist understanding.

10. One cardinal rule: do not omit the facts which are stressed by the unsuccessful party or a doctrine which may be at war with the ultimate disposition. Otherwise the standing of the case both as to persuasiveness and as a precedent is impaired.

III.

11. The language of an opinion implies grammatical construction, sentence and paragraph structure, and choice of words.

12. The nature of the appeal and the relationship of the parties should appear in the opening paragraph of the opinion.

13. Simple declaratory sentences are the easiest to read. Modifying clauses, if not carefully composed, entangle the thought and deflect understanding.

14. Strong words move to persuasion. They are not many-syllabled but induce the sense of action. E.g., say "shows" rather than "provides evidence", or "distrusted" rather than "did not have confidence in."

15. Too many adjectives and adverbs weaken the movement of the sense. Nouns and verbs usually are enough.

16. Use the active voice. A person acts, sometimes a thing or a force acts. The passive voice indicates an anonymous actor, a vague thing, and an unknown force.

17. An affirmative statement is preferable to a negative one. The reader may doubt the scope of the negative.

18. A cliché cannot always be avoided—it is shorthand to evoke a response. But it should be restricted to the necessities. A cluster robs the opinion of the sudden insight which imparts persuasion.

19. Metaphors illuminate, yet may also be delusive. Be sure that they truly fit the pattern illustrated, and are not so remote in their bearing that the reader loses his way in underbrush.

20. Emphasis does not require reiteration. Once a point is expressed well, saying it a second time denotes a concealed doubt of the author.

21. Dictating an opinion invites amendment and re-writing to shorten and strengthen its structure. Time does not always allow a handwritten draft, but it usually is more effective than a dictated draft. Remember that even a handwritten draft shows

flaws when it reaches the eye in plain type.

22. Humor has a dubious place in an opinion. It is not an universal commodity and the decision of the rights of the parties is a serious matter. Irony may be an effective tool of expression, when sparingly used, but sarcasm directed toward the parties is seldom in good taste.

23. All rules of organization and language have exceptions. The objectives always in mind are clarity, conciseness and movement. If the rules must be violated to accommodate the objectives, violate the rules.

IV.

24. Do not quote at length from citations. One or two sentences, suitably culled, promote the movement; more impedes it.

25. One or two citations to support a general rule are sufficient. If more are needed or comment is relevant, put them in a footnote.

26. At some point in the opinion appears its fulcrum. That is where the author ends his discussion of the operative facts and law and begins his explanation of the decision. The value of the opinion largely hinges on this section. Make sure that it expresses the intent of the decision fully and clearly.

27. The statement of the relief granted should be sharply defined. Otherwise the preparation of the judgment (or order) to be entered becomes difficult and subject to mistake.

28. Distinguish between opinions which end a case and opinions which decide preliminary questions. The latter may entail instruction to the parties as to future procedure and therefore may be more discursive. Only in the rare case of a new statute or a question of public importance should an opinion ending a case expand beyond the limits of the question presented for decision, and then only to instruct as to future behavior which appears inevitable.

29. Put the decision on a major ground. Recall that the opinion loses worth as a precedent if the decision rests on alternative grounds. Sometimes this cannot be helped: the grounds are equally significant and each is necessary to the proper disposition of the case. But generally the opinion should determine the issue on only one major ground.

30. Be sure that a precedent distinguished is truly distinguishable. The reasoning of the opinion is suspect if the distinction fails.

31. An opinion construing a statute gains little by reliance on a rule of construction. For each rule favoring a certain construction another rule can be cited favoring a different construction. Give effect to what you believe to be the spirit and intent of the statute, even though you legislate.

V.

32. Brevity is the soul of wisdom. Yet, do not be so brief as to be cryptic. The audience may not always appreciate the author's desire to shorten the opinion to the irreducible minimum.

33. Everything said here has its exceptions. Be certain that the exception is justified.

A good Hopkins opinion with which to start a quick look at the merits of his judicial writing is *Pagan v. Goldberger*,⁵ handed down seven years ago. On the frontier of growth in torts law, it involved an action against a landlord for injury suffered by tenant's three-year-old child. The first sentence identified the parties, their relationship, and the nature of the injury. Four more sentences set out the facts. A second paragraph in three short sentences stated what was done in the lower court (complaint dismissed on stated grounds), that "[w]e reverse and grant a new trial" (no pretense of suspense requiring one to read to the end to learn the outcome), and the legal issue ("proximate cause and foreseeability"). The opinion then proceeded to sum up the New York background on that troubling area of law, briefly explained the relevance and irrelevance of four cases that had been relied upon in argument, outlined under five headings the "helpful guidelines" that had emerged in New York, and then, in a final paragraph, applied the guidelines to the facts and restated the conclusion. A clearer, simpler or more scholarly treatment would be difficult to imagine.

Another opinion, in *Ellish v. Airport Parking Co.*,⁶ dealt

5. 51 A.D.2d 508, 382 N.Y.S.2d 549 (2d Dep't 1976).

6. 42 A.D.2d 174, 345 N.Y.S.2d 650 (2d Dep't 1973), *aff'd*, 34 N.Y.2d 882, 316

with equally simple facts leading to a superficially opposite conclusion. A plaintiff's automobile left in the defendant's airport parking lot was gone when she returned to reclaim it. Again, the basic facts, the judgments in both the trial court and the appellate term, and the appellate division's affirmance of judgment for the defendant, were set forth quickly, in less than sixteen lines at the beginning of the opinion. A reader could have no doubt as to what the case was about. The technical legal issue was clearly stated: Was this a bailment from which bailee liability might ensue, or only a "license to occupy space" in the parking area? Next was a thorough six-part practical analysis of the socioeconomic factors inherent in airport car-parking arrangements generally. This hinted at but did not explicitly state that the real contest might be between automobile insurance carriers (not just owners) and airport parking lot operators.⁷ A marginal precedent was firmly distinguished. Social policy and technical legal theory were carefully coordinated. The result was effectively explained.

A more complex problem was presented in *Musco v. Conte*.⁸ The facts were that M's hand was badly injured due to the negligence of C while M was helping C to park his automobile. While the injured hand was being operated on, the negligence of Ds (hospital and anaesthetists) in administering anaesthesia caused M's death, for which M's administratrix brought action for wrongful death against C. The case did not come on for trial until nearly seven years after M's death. C then, and not until then, filed a third party complaint against Ds for indemnity to cover that part of the plaintiff's claim attributable to Ds' negli-

N.E.2d 715, 359 N.Y.S.2d 280 (1974).

7. Should New York law allow open discussion of the ultimate concern with subrogation of insurers to owner's claims? See *Kelly v. Yannotti*, 4 N.Y.2d 603, 608, 152 N.E.2d 69, 72, 176 N.Y.S.2d 637, 642 (1958) (recognizing that insurance companies as third party defendants may be prejudiced by jury's cognizance of plaintiff's insurance coverage and therefore granting severance); *Simpson v. Foundation Co.*, 201 N.Y. 479, 490-91, 95 N.E. 10, 14-15 (1911) (holding that it was reversible error for plaintiff to introduce evidence that defendant was covered by insurance).

8. 22 A.D.2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964). This case is cited and followed in many later decisions. See, e.g., *Bay Ridge v. State*, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978); *Melodee Lane Co. v. American Dist. Tel. Co.*, 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966). *Musco* is a leading case not only on the principal issue decided in it but on preliminary issues as well.

gence. The trial court dismissed the third party complaint, primarily on statute of limitations and laches grounds. The appellate division reversed that order, and reinstated the complaint.

As in the other cases cited, Judge Hopkins' opinion first set out the facts, the procedural status of the case, and the issue on appeal, all stated tersely but clearly. He then summarized the law on joint and successive tortfeasors, in concise language that has been much quoted since. Finally, in one page that another writer might have expanded to five, he explained that the statute of limitations begins to run, as does laches, only when a cause of action comes into existence which, in the case of a claim for indemnity against a successive tortfeasor, is when the claimant as a joint tortfeasor pays the tort claim. It "accrues not at the time of the commission of the tort for which indemnity is sought, but at the time of the payment" The statute had not yet begun to run when the third party complaint was filed. A short explanation, showing that fairness to all parties permits, even requires, this rule of law, was added, thus establishing that the result not only complied with formal law but with common sense as well. A final paragraph defined exactly the status of the case as it was placed again on the trial court docket.

*Zarcone v. Perry*¹⁰ was a difficult case involving a complex and unique set of facts adroitly handled. The plaintiff brought a common law cause of action against a New York State judge who had badly mistreated him in the course of a dispute over the quality of a cup of coffee the plaintiff had sold for the judge's use. The complaint sought damages for false arrest, defamation, intentional infliction of physical injury and mental distress, malicious interference with the plaintiff's business, and other related tortious wrongs. Judge Hopkins began his opinion by stating the problem, which was whether this action was barred by a prior federal district court action¹¹ in which this plaintiff suing this defendant had recovered a judgment, possibly not yet satisfied, for \$140,000 for violation of his civil rights as protected by 42 United States Code § 1983. The mistreatment relied upon as

9. *Musco v. Conte*, 22 A.D.2d at 126, 254 N.Y.S.2d at 595.

10. 78 A.D.2d 70, 434 N.Y.S.2d 437 (2d Dep't 1980), *aff'd*, 55 N.Y.2d 782, 431 N.E.2d 974, 447 N.Y.S.2d 248 (1981), *cert. denied*, 102 S. Ct. 2248 (1982).

11. *See Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978).

constituting the common law torts now complained of was essentially the same mistreatment proved in the earlier federal action for deprivation by purported state authority of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. The legal characters of the two causes of action, however, were quite different. The Hopkins' opinion in the second and third paragraphs went straight to the heart of the matter:

The questions thus presented are, first, whether the principles of *res judicata* resting on a judgment in a Federal court in an action to recover damages for the deprivation of civil rights under section 1983 apply to bar a State court action to recover damages for common-law torts and, second, whether a recovery in the State court action is banned because a double recovery for the wrongs suffered would thereby be permitted.

We hold that the doctrine of *res judicata* bars the subsequent State court action and that a recovery in the State court action would constitute a double recovery.¹²

The opinion then set out (1) the full facts asserted and steps taken in the state action, (2) the nature of civil rights claims under section 1983, (3) the *New York, Restatement (Second) of Judgments*, and federal authority on the scope of *res judicata* doctrine, (4) the unwisdom of double recoveries, and (5) the relevance of newly developing rules of collateral estoppel to this case. That ended the discussion. The result seemed inevitable. The other three judges concurred. So, it seems, would just about every other appellate judge in the nation.

One other opinion will be noted. It is one that has not been much quoted, much less followed, because a decision in another state (California) rendered it moot. The Hopkins' opinion, handed down in 1971, was in *Pahmer v. Hertz Corp.*,¹³ a conflict of laws case. A New York guest (wife) sued her New York host (husband) for injuries suffered because of his negligent driving of a rented automobile in California while they were temporarily in that state. California had a host-guest statute that undertook to bar recovery in such cases; New York had no host-guest stat-

12. *Zarcone v. Perry*, 78 A.D.2d at 71, 434 N.Y.S.2d at 438.

13. 36 A.D.2d 252, 319 N.Y.S.2d 949 (2d Dep't 1971), *aff'd*, 32 N.Y.2d 119, 296 N.E.2d 243, 343 N.Y.S.2d 341 (1973).

ute. The decision, based on thoughtful interest analysis in the light of relevant choice-influencing considerations, was that New York law governed. Affirmance on appeal,¹⁴ however, was on the new but clearly correct ground that the California Supreme Court had in the interim declared that state's host-guest statute to be unconstitutional,¹⁵ so that California's law was actually the same as New York's and there was no longer any conflict of laws question in the case. About all that can be said now is that if *Pahmer* had not become moot and if the New York Court of Appeals had accepted the choice-of-law approach that Hopkins' opinion so clearly and persuasively presented, the New York law of conflict of laws would be much less uncertain and probably less criticized than it is today.

On some state intermediate courts, the judges have a sense of frustration. They do not get the really big and important cases; these go directly to the top court. To compensate, because they want to see their opinions in print and want to see them cited, they overwrite. They treat minor issues as though they were major ones, or pull in incidental problems for learned analysis even though these are not really necessary or even clearly relevant to the decision. Judge Hopkins did not do that sort of thing. He disdained it. Perhaps he as well as his appellate division colleagues were aided by the fact that their court always had more cases, both important and less important, than just about any other court in the nation, so that they had little time to devote to superfluous matters. The fact remains that Judge Hopkins' opinions attached importance only to real issues. Consequently, he attached importance to his opinions only when the inherent significance of the issues deserved that evaluation.

The vagaries of public life, as they operate on any individual, are incalculable. At least they cannot be calculated until the individual's public life nears its end. If James D. Hopkins had been elevated to the New York Court of Appeals, as was once a real possibility, where he might even have become Chief Judge, or if he had been named to the United States Supreme Court, a more remote yet not impossible possibility, he would have come,

14. *Pahmer v. Hertz Corp.*, 32 N.Y.2d 119, 296 N.E.2d 243, 343 N.Y.S.2d 341 (1973).

15. *Brown v. Merlo*, 8 Cal. 3d 855, 882, 506 P.2d 212, 231, 106 Cal. Rptr. 388, 407.

like Cardozo, to be more widely publicized and his outstanding abilities, known to us who have worked with him, would have been nationally recognized. He would be hailed throughout America today as one of the nation's great jurists. We who are acquainted with his work and his career know that such a reputation would be genuinely justified. With us that is his reputation.