



# Pacific Judicial Development Programme

## *JUDICIAL DECISION-MAKING TOOLKIT*

January 2015





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Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>.

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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## PJDP TOOLKITS

### Introduction

For over a decade, the Pacific Judicial Development Programme (PJDP) has supported a range of judicial and court development activities in partner courts across the Pacific. These activities have focused on regional judicial leadership meetings and networks, capacity-building and training, and pilot projects to address the local needs of courts in Pacific Island Countries (PICs).

### Toolkits

Since mid-2013, PJDP has launched a collection of toolkits for the ongoing development of courts in the region. These toolkits aim to support partner courts to implement their development activities at the local level by providing information and practical guidance on what to do. These toolkits include:

- Judges' Orientation Toolkit
- Annual Court Reporting Toolkit
- Toolkit for Review of Guidance on Judicial Conduct
- National Judicial Development Committee Toolkit
- Family Violence and Youth Justice Project Workshop Toolkit
- Time Goals Toolkit
- Access to Justice Assessment Toolkit
- Trainer's Toolkit: Designing, Delivering and Evaluating Training Programs
- Reducing Backlog and Delay Toolkit
- Enabling Rights & Unrepresented Litigants
- Toolkit for Public Information Projects
- Toolkit for Building Procedures to Handle Complaints about Judicial Conduct
- *Judicial Decision-making Toolkit*

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJDP aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

### Use and support

These toolkits are available on-line for the use of partner courts at <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits> . We hope that partner courts will use these toolkits as / when required. Should you need any additional assistance, please contact us at: [pjdp@fedcourt.gov.au](mailto:pjdp@fedcourt.gov.au)

### Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

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## ABBREVIATIONS

FLOPP	-	Flaw in the Losing Party's Position
HC	-	High Court
IRAC	-	Issue, Rule, Application, Conclusion
LOPP	-	Losing Party's Position
MFAT	-	New Zealand Ministry of Foreign Affairs and Trade
MSC	-	Managing Services Contractor - Federal Court of Australia
PIC	-	Pacific Island Country
PJDP	-	Pacific Judicial Development Project
RMI	-	Republic of Marshall Islands
RTT	-	Regional Training Team
TRC	-	Traditional Rights Court (Marshall Islands)
WAAW	-	Who's Arguing about What
WDWTW	-	Who Did What to Whom

## MAKING AND WRITING JUDICIAL DECISIONS: AN ISSUE-BASED APPROACH

This toolkit is primarily intended for use by PJDP's Regional Training Team (RTT) for training purposes in Pacific Island Countries. Part 4, "Writing a Judgment in Five Easy Steps" can be used as a handout for participants in introductory courses taught by the RTT. Part 6, "A Checklist for Judgments and Decisions," can be used by local participants as a guide for self-evaluation to see whether they are practicing the methods taught in the course. It can also be used by RTT as a discussion guide in follow-up sessions facilitated by RTT, or in periodic discussion groups in which the participants provide one another with comments and suggestions about decisions written after they have finished the workshops.

The underlying assumption of the method explained in this toolkit is that decision-making and decision-writing are not separate processes. Writing is not just a means of communication; it is a technology for thinking. The method proposed here requires judges and judicial officers to identify the constituent issues in each case, i.e., the points of contention that must be resolved before a verdict or judgment can be rendered. The generalized pattern of analysis, LOPP/FLOPP (losing party's position followed by the flaw in the losing party's position) is designed to produce decisions based on reasons that are clear both to the writer and the reader. It results in decisions in which the losing party is made to feel "heard."

The image of a "shotgun house," explained in Part 3, provides an overall organizational pattern that judges in many jurisdictions have found useful. A decision based on this model might be regarded as a "product"; the "Five Easy Steps" are directions for assembling that product.

Neither the method nor the product are to be taken as rigid and invariable. Judging and judgment-writing are ultimately subtle arts that cannot be reduced to simplistic formulae. But the methods and the model proposed here can serve as useful tools for producing judgments that are clear, logical, and reader-friendly.

## 1 INTRODUCTION: FOR THE REGIONAL TRAINING TEAM (RTT)

### 1.1 SO YOU WANT TO BE A TEACHER

Teaching judgment writing is perhaps more difficult and less difficult than you might imagine.

It is more difficult in that experienced teachers can make it look easy; but their easy performance hides years of preparation, collecting examples, and learning by trial and error.

It is less difficult than it might seem in that you are already an expert in evaluating judgment writing - if only you would trust your instincts. If we can agree that anyone sufficiently literate to read a local newspaper ought to be able to read and understand a judgment that affects their lives, then any judgment or any part of a judgment that you find difficult to understand is probably not well written.

The trick, then, is to be able to identify what makes a judgment hard to read and to devise solutions for the problems.

The problems generally fall into just a few categories: a judgment that is hard to read may be poorly organized; it may have irrelevant information or unnecessary repetition; it may be riddled with pretentious jargon; it may commit numerous stylistic errors - the most common of which is using too many words to say something that could be expressed more efficiently. Another common error is to narrate the proceedings in a trial or hearing, one witness after another, instead of dividing the judgment into issues and putting the various bits of evidence under headings indicating the issues to which they are relevant. Once you learn to identify the problems, the solutions are relatively simple.

Readers often complain that judgments are too long. Obviously, some judgments must be long—particularly if they involve multiple issues, multiple parties, multiple charges, or all of these.

But judgments are often longer than they need to be.

#### 1.1.1 What should a judgment include?

- Anything that influenced the decision;
- Anything the losing party reasonably thinks *ought* to have influenced the decision; and
- Anything about which a reviewing court might be curious.

#### 1.1.2 What should a judgment exclude?

Everything else. Particularly information that has no bearing on the issues. Repeated information. Phrases that could be reduced or eliminated. A good editor has a ruthless blue (or red) pencil that he or she uses to get rid of all the “dead wood” - words that you don't need. As a general principle, every word should earn its right to be on the page.

Since the advent of word-processing programs, the cut-and-paste function is often too tempting for judges to resist. They cut and paste long passages from counsel's submission - “to let them know I've understood their argument,” they say.

Actually, cutting and pasting does not have that effect at all. It merely shows that the judge knows how to cut and paste. The best way for a judge to show that he or she understands an argument is to summarize it in his or her own words.

Cutting and pasting is also responsible for long, block quotations from statutes or precedents, sometimes with a few words in italics or bold face. Often, those few words are all the judge needs to quote. The rest can be paraphrased.

Insecurity is often the motive for this practice. Even experienced judges admit they are afraid that if they summarize the law they might “get it wrong.” Of course, if they can’t get it right, if they can’t express it clearly in their own words, they should be not be using it as the basis of a legal conclusion.

When there is a good reason to quote an entire passage from a statute or precedent, precede the quoted material with a summary in your own words or an indication of what inference you expect the reader to draw from it. In this way, if your readers skip the quoted material, they will still have the benefit of your summary or analysis.

Another common problem is poorly structured sentences. It’s not that the sentences are too long. That’s a myth. A sentence can be more than a hundred words long and perfectly readable if it is properly structured. And a sentence of four or five words can be unintelligible if it is poorly structured or laden with jargon. Still, it is a good idea to be suspicious of sentences that are more than two lines long. They are not necessarily bad; they are bad only if they are hard to read. When they are hard to read, the problem can usually be solved by dividing them into two or three shorter sentences.

Traditional legal writing is often loaded with legalese - words and phrases that, in a good newspaper, would be either defined parenthetically or replaced with ordinary English. Lawyers sometimes justify this language as precise and scientific, even though not one in ten could give a precise definition of *res gestae* or explain why a will is so different from a testament that both words must be used.

People are more likely to respect the law if they understand it. They will be cynical about the courts if they lose a case and cannot figure out *why* they lost. For this reason, judges should avoid technical, foreign, or legalistic words that could easily be replaced by ordinary English.

Former Justice Ian Binnie of the Supreme Court of Canada once said that judgments were written for grasshoppers: readers have to hop on the top, then hop down to the end, and then hop around middle of the judgment in search of what they need to know.

But your readers are not grasshoppers. They are human beings, accustomed to reading left to right, top to bottom. When asked how they read judgments, judges and lawyers often admit that they read exactly as Justice Binnie has indicated. This is a symptom of poor organization. The solution is to apply the metaphor of a “shotgun house” to organize a judgment.

This toolkit will provide you with the basic information you need to become a teacher on two different levels.

The first level is as a facilitator or breakout group leader. A facilitator provides participants with a checklist for evaluating and analysing judgments - and then lets them apply the checklist to their own work. This method can be used in individual tutorials, but many people find that it works best in small groups in which the students read one another’s work and make comments and suggestions. The benefit of group sessions for writers is that they get to see their own writing through the eyes of readers who do not know in advance what the writers are trying to convey. The benefit for readers is that when they spot errors in other people’s judgments they often realise they make the same errors in their own work.

The second level is as a lecturer. This requires selecting a topic that is directly or at least closely related to judgment writing. Lectures are often most effective when they are illustrated with examples - both positive and negative - drawn from actual judgments.

## 2 THE RAYMOND METHOD

What some people call “The Raymond Method” is a set of principles, practical suggestions, and pedagogical practices gleaned from classical and modern rhetoric as well as from more than thirty years of what might be called field studies - studying judgments in the presence of the judges who wrote them to determine what they were trying to say and, when necessary, to help them to say it more effectively. Some of “the method” is original; but a great deal of it is cobbled together from teachers and philosophers who have studied the art of writing over the course of more than two thousand years.

The method has three essential components:

- A model for organizing a judgment (based on a “shotgun house” metaphor);
- A five-step process for constructing a judgment; and
- A checklist for evaluating judgments and decisions in small-group workshops or individual tutorials.

Essential to all three components is an emphasis on issue-identification and analysis. This issue-driven approach turns out to be useful not just for writing judgments, but also for conducting efficient trials or hearings. And it is as useful for counsel preparing submissions as it is for judges crafting their judgments.

To help you apply the method in your own teaching, this toolkit includes three PowerPoint presentations: “The Shotgun House,” “Five Easy Steps,” and “A Checklist.” For convenience, all three presentations are included in the same file, called “Omnibus,” where they are separated by a few blank slides and title slides. The presentations include several opportunities for application exercises in which the participants are asked to write various parts of a judgment, and then to submit what they write for group discussion. The material for these exercises should be provided by the participants themselves - either judgments they have written in the past or judgments they are in the process of writing.

The first two presentations are designed to help you develop lectures. The third is designed to help you conduct group workshops or individual tutorials. It is generally more effective to use PowerPoint slides as “talking points.” The “talk” is more effective if it is delivered informally, in a conversational manner, inviting the participants to comment, ask questions, and otherwise interact during the presentation.

As you gain experience and develop your own teaching style, you will want to add your own examples to these presentations, even change the style and language of the slides themselves. This will help you master your material and make you a better teacher.

### 3 THE SHOTGUN HOUSE: A STRUCTURAL MODEL FOR JUDGMENTS

A shotgun house is a very simple structure: it has a front porch, a back porch, and a series of rooms in a straight line between them. Shotgun houses are very common in the southern part of the United States. A floor plan of a shotgun house would look something like this:

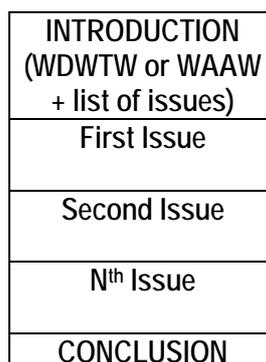


In a real shotgun house there are doors between the rooms, or a narrow corridor down one side. And there could be any number of rooms between the front porch and the back porch. But the basic structure is a metaphor for organizing 98% of judgments. Perhaps more.

The front porch is the introduction. It consists of a brief overview of the facts leading up to litigation - a story telling who did (or allegedly did) what to whom (WDWTW) or who's arguing about what (WAAW). It is almost always best to start with a brief narration - maybe half a page - telling the reader what happened *before anyone set foot in court*. *Not* the procedural history.

A story of this sort provides the context from which the issues arise. It helps the reader understand what's at stake. It lets the litigants know that the judge understands why they are willing to risk the expense, anxiety, and uncertainty of litigation to resolve their issues. And grounding the judgment in a concrete fact situation makes the legal analysis easier for everyone to follow. The introduction should end with a list of issues to be decided - and these issues become the major headings in the body of the judgment.

That back porch is the conclusion. The issues are analysed in the rooms between the front porch and the back porch.



There can be numerous variations on this basic structure. There is no limit to the number of issues that could be raised in litigation, each requiring a room of its own. There could be alternative issues, or alternative arguments about the same issue.

Normally it is possible to move directly from the introduction to the analysis of the first issue. Often, however, judges put all sorts of information about the history of the case (which we probably don't need) or the evidence heard, before they get around to analysing the issues.

Sometimes, however, it is helpful to add a background section between the introduction and the analysis of the issues. Background information can be justified before the analysis of issues in three situations:

- When there are facts common to more than one issue;
- When the same law applies to more than one issue; and
- When there are questions of procedure that still need to be resolved.

When any of these conditions is met, use “BACKGROUND” as a heading to separate the introduction from the analysis of the issues.

<b>INTRODUCTION</b> (WDWTW or WAAW + list of issues)
<b>Background</b>
<b>First Issue</b>
<b>Second Issue</b>
<b>N<sup>th</sup> Issue</b>
<b>CONCLUSION</b>

And sometimes it is helpful to treat the issue headings as subheadings under a section called “Analysis.” Like this:

<b>INTRODUCTION</b> (WDWTW or WAAW + list of issues)
<b>BACKGROUND</b>
<b>ANALYSIS</b> First Issue Second Issue N <sup>th</sup> Issue
<b>CONCLUSION</b>

In many Pacific Island Countries, land law is “customary” or “traditional.” The traditions are generally passed down orally from one generation to the next. They are not codified. They may vary from year to year and even from island to island within a particular country. Land is often owned in common by an extended family group (“bwij” or “jowi” in the Marshall Islands); fee simple ownership may be rare, or even non-existent.

Despite these individual and local differences, the underlying logic of the law remains the same. The judge must determine the facts and decide which law, tradition, or precedent applies to them. The judge must also determine the issues - not just the BIG issues, like who is entitled to use a particular parcel of land or to cultivate a crop on it - but the constituent issues, like whether a will has been validly attested or whether a grant of land should devolve through matrilineal or patrilineal lines, or not at all. These issues may involve questions of law or questions of fact raised by the parties or sometimes by the judge. Resolving them requires local knowledge and expertise.

The patterns of analysis in resolving these issues are no different from those that are common in conventional, western law. See below, section 4.4.

Resolving land and title issues in the Republic of the Marshall Islands (RMI) may be unique in that when a land dispute arises in the High Court, it is generally referred to the Traditional Rights Court (TRC) for resolution. The High Court asks the TRC to answer specific questions - the big issues that need to be resolved in a particular case. The High Court gives great deference to the decisions of the TRC, but prefers that the TRC provide clear reasons for those decisions.

For this purpose, a modification of the “shotgun house” outline has been devised to reflect the flow of litigation from the High Court to the TRC and back again. Although the outlines below are intended for use of the TRC in the Marshall Islands, they may well be useful for traditional courts in other island countries depending on the hierarchical structure of the local judiciary.

### I. When the High Court Asks the TRC to Answer One Question.

1. Start with a helicopter view (*Who Did What to Whom* or *Who's Arguing about What*).
2. Copy and paste the question immediately after your helicopter view.
3. Give a short answer to the question and then explain - very briefly - why you answered it that way.
4. List the “constituent issues” if any - the specific questions of fact and law that you had to resolve before you could answer the big question.
5. Turn the constituent issues into **boldfaced questions** and use them as headings.
6. Resolve each constituent issue (LOPP/FLOPP or IRAC\*).
7. Write a conclusion, adding any other matters you think are “important to be made known.”

<b>INTRODUCTION</b> (WDWTW or WAAW)
Question Posed by High Court Followed by Short Answer & Why Followed by List of “Constituent Issues”
<b>First Constituent Issue</b> LOPP/FLOPP or IRAC (Conclusion)
<b>Second Constituent Issue</b> LOPP/FLOPP or IRAC (Conclusion)
<b>N<sup>th</sup> Constituent Issue</b> LOPP/FLOPP or IRAC (Conclusions)
<b>CONCLUSION</b> Plus summary of reasons if the case is complex. Plus “Other matters the court panel deems important to be made known.”

\* For an explanation of LOPP, FLOPP, and IRAC, see section 4.4 below.

## II. When the High Court Asks the TRC to Answer *More than One* Question.

1. Start with a helicopter view (*Who Did What to Whom or Who's Arguing about What*).
2. Copy and paste each question immediately after your helicopter view.
3. Give a short answer to each question, and then explain - very briefly - why you answered it that way.
4. Turn the High Court's questions into **boldfaced headings**.
5. Under each heading turn the "constituent issues" into *italicized questions* and use them as subheadings.
6. Resolve each constituent issue using OPP/FLOPP or IRAC.
7. Write a conclusion, adding any other matters you think are "important to be made known."

<b>INTRODUCTION</b> (WDWTW or WAAW)
Paste questions posed by the High Court. Follow each question with a short answer and why (because ...)
<b>First Question Asked by HC</b> <i>First Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion) <i>Second Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion) <i>N<sup>th</sup> Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion)
<b>Second Question Asked by HC</b> <i>First Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion) <i>Second Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion) <i>N<sup>th</sup> Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion)
<b>N<sup>th</sup> Question Asked by HC</b> <i>First Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion) <i>Second Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion) <i>N<sup>th</sup> Constituent Issue</i> LOPP/FLOPP or IRAC (Conclusion)
<b>CONCLUSION</b> Plus summary of reasons if appropriate. Plus "Decision plus other matters the court panel deems important to be made known."

## 4 WRITING A JUDGMENT IN FIVE EASY STEPS

Litigation is a messy business. In the courtroom, the decision maker often struggles to get a handle on what looks like this:



The decision maker's job is to sort through this mess, determine what is relevant and what is superfluous, and then reduce the whole thing to something as tidy as a shotgun house. Unless he or she does this, the judgment is likely to be as messy and incoherent as the trial itself.

The "Raymond Method" provides five steps for constructing an orderly, reader-friendly, issue-driven judgment:

1. Identify the issues and write a case-specific heading for each;
2. Arrange the issues in a sequence that makes sense;
3. Write a beginning, telling the story that gives rise to the issues;
4. Analyse each issue; and
5. Write a conclusion.

Although these five steps are presented in what is arguably the most logical sequence, it is not the *only* sequence. Some judges prefer to write the first paragraph first, or to analyse the issues before doing anything else. Others write the conclusion first, and then write the analysis leading to the conclusion. It is not necessary to follow the steps in the order listed, but it *is* necessary to perform them all eventually. You cannot analyse issues unless you have identified them. And a judgment would be incoherent if the issues were not arranged in an orderly fashion, and incomplete if it lacked an introduction and a conclusion.

### 4.1 IDENTIFY THE ISSUES AND WRITE CASE-SPECIFIC HEADINGS

Issues are what the litigants are arguing about. They might be arguing about the facts. Or they might be arguing about the law. Or they might be arguing about both.

At the trial level, every element in the statement of claim or every element in the statutory definition of a crime *can* be an issue. But practically speaking, the issues are those elements of the claim or the charge that the respondent or defendant contests.

There are big issues - global issues - like whether a tenant owes rent to a landlord, or whether a defendant is guilty of illegally selling beer on Sunday. But the big issues generally turn on what might be called "constituent issues." In a dispute between a landlord and tenant, the constituent issues might be whether there was a contract, or whether the landlord had for some reason forfeited his or her entitlement to rent, or whether the tenant had in fact made payments. In a case about the illegal sale of alcohol on Sunday, the

constituent issues might be whether the prosecution had correctly identified the person charged, or whether the transaction occurred at all, or whether the beer had been purchased legally on Saturday night and merely collected by the purchaser on Sunday. The constituent issues should become the headings in a shotgun house judgment.

In civil cases a judge can often discover the constituent issues simply by asking the responding party why the plaintiff is not entitled to whatever he or she is claiming. A tenant might say, for example, "That's not my signature on the contract," or might say "I did pay the rent, not in cash, but in repairs I made to the dwelling." Those would be the real issues, the points of contention raised by the responding party. They can be framed as questions to appear at the end of the introduction and used as headings, to divide the judgment into logical parts. The issues might be these:

Was there a valid contract?

Was it signed by the respondent?

What did it require?

Did it allow for alternate means of payment?

Has the respondent violated the contract?

In criminal cases, defence attorneys may be reluctant to identify the issues before the trial begins. Defence attorneys generally like to hear the prosecution's evidence before they identify the elements that have not been proven beyond a reasonable doubt. Those are the issues. Unrepresented defendants are not likely to understand this legal strategy, so asking them to state their defence at the outset may cause them to make self-incriminating statements that they would not make if they were represented by competent counsel.

In a case regarding the illegal sale of alcohol the defendant might admit to allowing a customer to collect beer on a Sunday morning, but the actual sale had occurred the night before. What happened on Sunday was merely transferring goods that had been already purchased legally. These might be the issues:

When did the purchase take place?

Does the law allow the delivery on Sunday of alcoholic beverages previously purchased?

In an introduction, issues can be expressed as "that" statements. For example, in a medical malpractice case, the issues might be stated this way:

Dr. Wong argues that his treatment of Mr. Addison was consistent with the standard of care in emergency room treatment, that his alleged negligence did not cause Mr. Addison's subsequent pain and suffering, and that therefore there should be no award of damages.

Or they may be expressed as "whether" statements:

I must decide whether Dr. Wong failed to meet the standard of care of an emergency room physician in his care and treatment of Mr. Addison, whether Dr. Wong's alleged negligence caused any damage to Mr. Addison, and if so, what would be the appropriate amount of compensation for damages.

Or they may be expressed as questions:

1. Did Dr. Wong fail to meet the standard of care of an emergency room physician in his care and treatment of Mr. Addison?
2. Did the alleged negligence of Dr. Wong cause any damage to Mr. Addison?
3. What is fair compensation for Mr. Addison's damages?

At the end of the introduction, issues may be in bullet point form, or they may be in paragraph form, as long as each issue is phrased succinctly enough to be used as a heading or subheading. As headings, however, particularly in judgments (as opposed to pleadings), issues are best stated as questions.

## 4.2 ARRANGE THE ISSUES IN A SEQUENCE THAT MAKES SENSE

In a poorly written judgment, headings, if they exist at all, have no apparent logic. They merely announce topics, not issues. Sometimes they seem to be added after the judgment has been written, in an effort to give it an appearance of order.

Headings should be logically arranged: first things first (e.g., jurisdiction, venue, identification of the accused if it is challenged); last things last (e.g., sentence, damages, costs). Although there is no universal rule about typography for headings, they should be in a font - boldface, italics, or underlined - that makes them stand out from the rest of the text.

Sometimes issues are logically independent, and therefore can be addressed in almost any sequence. For example, if the issues are whether sugar ordered by a retailer was delivered on time, whether the sugar was in acceptable condition when delivered, and whether the quantity of sugar in the shipment was what was specified in the contract - these issues are logically independent and could be addressed in any sequence. However, the judge might choose a particular sequence based on considerations other than logic - perhaps beginning with the issue or issues on which the applicant fails followed by the issue or issues on which the applicant succeeds.

Sometimes, however, there is a logical interdependence among the issues: some have to be resolved before the others can be addressed. For example, if the respondent contests the court's jurisdiction, that issue has to be decided first. Or if the defendant raises a question of identification, that issue has to be decided before the elements of the offence can be considered. There is no point in deciding the elements of a charge or the particulars of a complaint or indictment if the court lacks jurisdiction or if the prosecutor or plaintiff cannot prove that the person named is the one who committed the offence. These are called threshold issues.

Sometimes issues other than threshold issues require a particular arrangement. If for example the issues in a case between a manufacturer and a merchant are what the contract specified, what damages are due to the plaintiff, whether there was a valid contract, and whether it was breached, it would not make sense to treat them in that order:

<b>INTRODUCTION</b>
What were the terms of the contract?
What damages are due to the plaintiff?
Was the contract valid?
Was it breached?
<b>CONCLUSION</b>

A more logical sequence would be this:

<b>INTRODUCTION</b>
Was the contract valid?
What were the terms of the contract?
Was it breached?
What damages are due to the plaintiff?
<b>CONCLUSION</b>

If the first issue is resolved in the negative - that is, if the court finds that the contract was not valid - there would be no reason to address the other issues. Similarly, if the third issue is resolved in the negative - that is, if the court finds that the contract was not breached - there would be no reason to address the question of damages.

In criminal cases, the statutory elements are often arranged in a logical sequence and can be turned into headings to organize the body of a judgment. For example, if the charge is sexual assault, the statutory elements (that is, the offence as defined in the criminal code) might be turned into issues / questions like these:

- Did the accused touch the complainant?
- Was the touching deliberate?
- Was it sexual?
- Was it consensual?

The accused might admit some of the elements. Those elements are not really issues. Only the contested elements are issues. If, for example, the accused admits touching the complainant, but denies that it was deliberate (claiming, perhaps, that the touching occurred on a crowded bus making a sudden stop or turn), then the first element (Did he touch her?) is *not* an issue. But the second element is. If the prosecution cannot prove beyond a reasonable doubt that the touching was deliberate, then the defendant must be acquitted without even addressing the other questions. Sometimes a defendant will concede all the elements except the last one: the defendant claims the touching was consensual, the complainant contends the opposite. In a case like this, there would be only a single issue, and it would be up to the prosecution to prove beyond a reasonable doubt that the touching was not consensual.

### 4.3 WRITE A BEGINNING

An effective beginning does three things:

- It tells Who (Allegedly) Did What to Whom (WDWTW) or Who's Arguing about What (WAAW) *before anyone set foot in court*;
- It sets out the issues to be decided in the order in which they are to be decided; and
- It omits details (names, dates, procedural history, citation of laws or precedents) that have nothing to do with the issues at hand.

In other words, it sets out a "helicopter" view of the facts, followed by a list of constituent issues that the court needs to resolve en route to resolving the case as a whole. It does this without legal jargon and without an alphanumeric soup of citations. If possible, it refers to parties by name, resorting to their positions in court (e.g., plaintiffs, defendants) only when names are not practical (e.g., when there are multiple plaintiffs or defendants).

The helicopter view should be a brief story, composed of uncontested or stipulated facts. If necessary, it can also include contested facts, introducing them with words like “allegedly” or “Mr. Puni contends that...” to let the reader know the validity of these assertions that had to be settled at trial. The introduction should be very short, less than half a page if possible, but no more than one full page. And it should be limited to the facts we need in order to understand the issues that follow.

A conventional beginning, on the other hand - the sort of beginning we would like to avoid - starts out with a procedural history, or a copy of the charge or indictment, or reference to laws that will be applied before we have enough information to know why these laws might be relevant. A conventional beginning often includes details that have no relevance to any of the issues.

The function of a beginning is to provide a context for the issues. In a case involving the sale of alcohol on Sunday, the judge might determine that these are the issues:

- Whether by entering her canteen through a side door Ms. Tavita opened it for business as defined by law;
- Whether Mr. Motumua had in fact purchased the beer on the previous night; and
- If so, whether allowing him to collect the beer that he had purchased earlier constitutes the sale or supply of an alcoholic beverage.

The language is clear enough. But as a reader, you might wonder how these issues arose. A good beginning would satisfy your curiosity like this:

According to two witnesses, Mrs. Eseta Tavita opened her canteen on Sunday, 23<sup>rd</sup> March 2011 at about 1300hrs and sold beer to Mr. Kaisami Motumua. She has been charged with violation of Section 93(1) of the Alcoholic Drinks Act, which prohibits the sale or supply of alcoholic drinks on Sunday.

Ms. Tavita says she did not actually open her canteen for business, but merely opened a side door to allow Mr. Motumua to get two cases of beer he had accidentally left there after paying for them the night before.

This court must decide three issues:

1. Whether Ms. Tavita opened her canteen for business as defined by law;
2. Whether Mr. Motumua had in fact purchased the beer on the previous night; and
3. If so, whether allowing him to collect the beer that had been purchased earlier constitutes the sale or supply of an alcoholic beverage.

These issue statements could be turned into questions and used as headings.

INTRODUCTION
Did Ms. Tavita open her canteen for business?
Had Mr. Motumua purchased the beer the night before?
Did allowing him to collect beer he had previously purchased constitute the “sale or supply of alcoholic drinks” as defined by Section 93(1) ?
CONCLUSION

#### 4.4 ANALYSE EACH ISSUE

When teaching legal writing it is impossible to avoid going into a bit of legal reasoning. The two are inseparable.

In the South Pacific, there are differences between an inquisitorial system of law (i.e., a system derived from Napoleonic or continental law) and an adversarial system. Local jurisdictions generally reflect the history of colonialism: the adversarial (or common law) system usually survives in places once colonized by the British; the inquisitorial (or continental) system usually survives in places once colonized by the French. Some jurisdictions are a mixture of the two.

In an inquisitorial system, judicial precedent is generally not binding, attorneys are not permitted to ask questions of the witnesses, and judges are required to deliver only their findings of facts and law - not the arguments advanced by the parties. In this system judges may feel free to raise questions that the parties themselves have failed to raise, whereas in the adversarial system judges, at least in theory, act as referees and they are careful *not* to raise issues lest they be perceived as advocates rather than impartial judges.

In an adversarial system, judges defer to courts above their own in applying the law or rules of procedure. In addition, in an adversarial jurisdiction judges often explain why the losing party has lost. By explaining each side's position, the court can make the parties, particularly the losing party, feel heard. This is a very important function of judgment writing, and it can be accomplished with a LOPP / FLOPP pattern of analysis.

When the litigants are arguing about the law - each side saying the other side has cited the wrong law or perhaps has misinterpreted the right law - the simple formula LOPP / FLOPP / Conclusion usually works as a pattern of analysis. LOPP stands for the losing party's position. FLOPP explains the flaw in that position.

LOPP: Mom wants a court in Australia to decide custody under the Hague Convention.

FLOPP: However, Kiribati is not a signatory to the Hague Convention.

Conclusion: Therefore, the Hague Convention does not apply to this case.

LOPP: Alliance Inc. claims its policy limits payment of hospital bills for employees to \$2,000.

FLOPP: However, that policy is at variance with the collective bargaining agreement.

Conclusion: Therefore, the employee is entitled to payment of reasonable hospital bills for a condition incurred while he was employed by Alliance.

Sometimes the conclusion is so obvious from the LOPP and the FLOPP that it does not have to be explicitly mentioned.

Notice that the "law" in question could be a statute, an ordinance, a judicial precedent, a contract, a constitutional provision. For questions of law it is usually unnecessary to put the winning party's position if that position is the same as the court's.

For questions of fact, however, it is usually necessary to summarise each party's position, and then indicate which version the court accepts.

The mother says the father left the infant child unattended for twenty-four hours.

Five unrelated neighbours testified that the father was with the child for the entire period in question.

The court finds... because...

The prosecution has presented evidence that the accused was at the scene of the robbery in Honiara.

The mother of the accused testified that he was attending a tea party with her in Rarotonga at the time.

The court finds that... because...

For findings of fact, you can arrange the allegations of each side in either sequence; it is not necessary to put the losing party's position first. An essential part of resolving a question of fact is the "because" clause in the conclusion. Writing the *reason* for accepting one version of the facts is insurance against relying on certain types of evidence that are known to be unreliable (e.g., eye-witness identification, demeanour of a witness). In addition, if a judgment is appealed, the reviewing court needs to know what evidence the court of first instance relied on in making its finding.

Even if the decision maker has no formal training in law, it is important for him or her to bear in mind a few legal principles, like "burden of proof" and "standard of proof." These terms may seem a bit technical, but they are not difficult to understand, and they are essential to making legally sound findings.

"Burden of proof" refers to who is responsible for proving the alleged facts. Normally it is the moving party - the plaintiff in civil cases, the prosecutor in criminal cases. If the party with the burden fails to provide convincing evidence for his or her version of the facts, the other party automatically wins, even if the he or she says nothing at all.

"Standard of proof" refers to how solid the evidence has to be for a judge to make a decision. In civil cases, the standard is "the balance of probabilities." This means that unless you find the plaintiff's position to be the more likely story, the respondent wins the case.

In criminal cases the standard of proof is "beyond a reasonable doubt." This doesn't mean absolute certainty - there are few things in life about which we can be absolutely certain. But it does mean that you are as sure as a person can be short of absolute certainty. This is because in an effort to avoid convicting innocent people, our laws say all accused people are presumed to be innocent unless the prosecution can prove otherwise with evidence that leaves no reasonable doubt.

The accused doesn't have to say anything at all. It is always (with a few exceptions) up to the prosecution to prove every contested element of the offence beyond a reasonable doubt; it is *not* up to the accused to prove his or her innocence.

In criminal cases, it is the prosecutor's evidence you should regard with a sceptical eye, not the defendant's. You must determine whether the prosecutor's evidence, *in itself*, proves the defendant's guilt beyond a reasonable doubt, regardless of what the defendant says or fails to say.

In addition to questions of law and questions of fact there is a whole host of questions that rely on judicial discretion: sentencing, for example, custody and visitation, damage awards, and whether someone should be released on bail. Often the law (statute or precedent) provides the judge with a list of factors to be taken into consideration when making decisions like these. The factors can be the headings or subheadings of a judgment. If the law does not specify factors, the judge does well to discover what he or she has in fact taken into consideration in reaching a decision and to make those factors clear in heading or subheadings.

When the resolution of a question depends upon the consideration of factors or tests, it may be useful to organize the analysis according to a traditional pattern known by the acronym IRAC: Issue, Rule, Application, Conclusion. The issue can be stated in the heading, followed by the rule, then the facts (application) and the conclusion. Like this:

#### **Should the Accused be Released on Bail?**

The guidelines for granting release on bail are...

In this case, the relevant facts are...

Therefore, the accused is (is not) granted release...

### **4.5 WRITE A CONCLUSION**

In simple cases - cases that take up more than, say, five pages in a judgment - the conclusion can be simple:

For the reasons above, the court finds (or I find) that... and orders that...

In explaining findings and orders, judges should be careful not to retreat into legal terminology that is well known to the lawyers, but baffling to other readers. A phrase like "Costs to the applicant," for example, is generally clear to people trained in law - but meaningless to litigants who are not legally trained.

Many readers skip to the end of judgments because all they care about is the result. If you want them to see your reasons as well, summarise them at the end, just before the conclusion orders.

Here is an example of an ending that summarises the judge's reasons in an Australian case in which young people were accused by a neighbour who observed them from some distance smoking what she alleged was marijuana:

Given the serious consequences for the respondents, the Court must carefully consider the quality of the evidence received, particularly as the complainants cannot be subjected to cross-examination. Many of the allegations are lacking in sufficient detail to establish that the alleged activity occurred at the premises at 2318 Retallack Street.

There is very little detail about the involvement of the respondents in the alleged activity; there is insufficient detail to rebut the respondents' submission that the teenagers seen smoking were smoking cigarettes and not smoking marijuana; and, finally, there is little evidence to contradict the respondents' submission that the complaints have been exaggerated at the instigation of their next door neighbours.

For these reasons, I am not satisfied that an inference, on the material before me, can be properly drawn that 2318 Retallack Street is habitually used for illegal drug activity.

Accordingly, the application is dismissed.

Sometimes a judgment can be made stronger by adding a "to-rule-otherwise" argument. This means telling the readers what bad things might happen if the court were to rule the opposite way.

Here is an example of a to-rule-otherwise argument. The case involves a claimant in Palau who was seeking title to land he says was once owned by his clan, but he has no evidence to support his claim.

If the Court allows this Plaintiff to prosecute this action based on its single unsupported claim to "ownership," it would invite scores of similar suits against the Republic. Individuals and clans will see that they can bypass the established mechanisms for the return of public lands, or get a second bite at the apple, simply by filing an action to quiet title based solely on some unsupported claim of "ownership." The amount of resources the Republic would have to expend to defend these cases—including the discovery necessary to try to divine the bases for such unsupported claims of "ownership" - and the burden on the courts in shepherding this litigation, would be unfathomable.

Arguments from consequence are not necessarily "legal" arguments - but they can make a decision seem fair and reasonable.

Sometimes an ending can be used to educate the public or the press. If a notorious crime goes unpunished because the prosecution has been unable to provide evidence beyond a reasonable doubt, it may be wise to explain how the rules of evidence protect everyone from government repression or overzealous prosecution.

## 5 USING THE CHECKLIST

Lectures can illustrate common problems and practical solutions in judgment writing. But lectures alone are never sufficient in a writing course, any more than lectures would be sufficient to teach rugby or dance or violin. To learn any skill - including writing - students must attempt to put the principles into practice and then have a teacher or coach review their work and, if necessary, make suggestions for improvement.

An essential part of "the method" is to have participants submit writing samples a week or so before the course. Usually one sample per participant is sufficient. Study these samples in advance, looking for both good and bad passages that you can discuss with the writer. Sometimes you can use these passages as examples in your PowerPoint presentations. If you find examples of good writing, there is no harm in identifying the author; but make sure examples of bad writing are presented in a way that the writer's identity cannot be detected. Be prepared: when participants send you writing samples in advance, they expect you to read and respond to them - either in a personal conference or by way of comments and suggestions written on the sample itself. You may find this easier to do if the samples are submitted in an electronic format.

Another essential part of the method is to have the participants write during the course itself, and to discuss their work with one another and with their breakout group leader. The writing assignments can be based on the samples submitted in advance, or if the participants prefer, they can write about any case they know well - a judgment they have written in the past or one they are currently drafting.

When critiquing what the participants write, be honest but diplomatic. People are sensitive to criticism of their writing. We don't mind being told that our knowledge of nuclear physics or Egyptology is lacking. But our writing is so much a part of ourselves that we feel personally attacked if someone criticizes it. In addition, whatever we write generally looks good to ourselves, in part because we already know what we're trying to say. Consider making your suggestions in the form of questions. "Do we really need to know the names of counsel?" "Could we eliminate this repetition by putting the information once, in this place?" "Would it be more helpful to start with the facts leading up to the case instead of with the procedural history?"

Let the participants talk first. Make your own comments and suggestions after everyone else has had a chance to provide theirs. Expect that members of a breakout group will hesitate to say anything about the writing submitted by other members of the group. Part of this hesitancy is polite respect for the writers but part of it may be insecurity based on a belief that writing is a mysterious craft that ordinary people do not know how to evaluate.

Participants are not likely to succeed completely at first. This is normal. We call the method "Five Easy Steps," but in fact the steps are not easy. Judgment writing is an art, not a simple process that can be reduced to a recipe.

A "Checklist for Judgments" is provided in this toolkit in two forms: Microsoft Word and a PowerPoint presentation. You can use either form, or both, to focus the discussion in one-on-one tutorial sessions or in a breakout groups.

The checklist can be used as part of a writing workshop, but it also can be used to conduct follow-up sessions conducted by members of the RTT either in person or with distance learning technologies. Follow-up of this sort is essential if the lessons learned in workshops are to have any lasting effect.

## 6 A CHECKLIST FOR JUDGMENTS AND DECISIONS

### Read the First Page

- Does it say who (allegedly) did what to whom (WDWTW) or who's arguing about what (WAAW) *before anyone set foot in court, in a nutshell, without legal jargon*?
- Does it include names, dates, procedural history, and citation of laws or precedents that have nothing to do with the issues at hand?
- Does it announce the issues in a predictive sequence, *without clutter but not too abstractly*?

### Read the Headings

- Have the issues listed in the introduction been turned into questions and used as headings?
- Would the headings make sense to a non-lawyer?
- Are they arranged in a sequence that makes sense?
- If there are additional headings, are they necessary, logical, and helpful?

### Read the Background Section (If There is One)

- If it provides procedural history or names of counsel, do we really need this information?
- Is it justified because it contains facts or law relevant to more than one issue?

### Read the Analysis of the Issues

- If it is a question of law, does the analysis include an impartial statement of the losing party's position followed by its flaw, clearly stated?
- Is the controlling law or principle cited?
- If it is a question of fact, does it summarise each party's evidence?
- Does the evidence justify the finding?
- Are the standard and burden of proof correctly applied?
- Has the writer made the mistake of narrating the trial or hearing instead of dividing the evidence according to the issues?

### Is It Written for Grasshoppers?

- Does the reader have to jump from beginning to end to middle?

### Read the Conclusion

- Is the order written in language that would be clear to your next-door neighbour?
- If appropriate, is the analysis succinctly summarised?
- If appropriate, are the consequences of the ruling explained?

### On the whole...

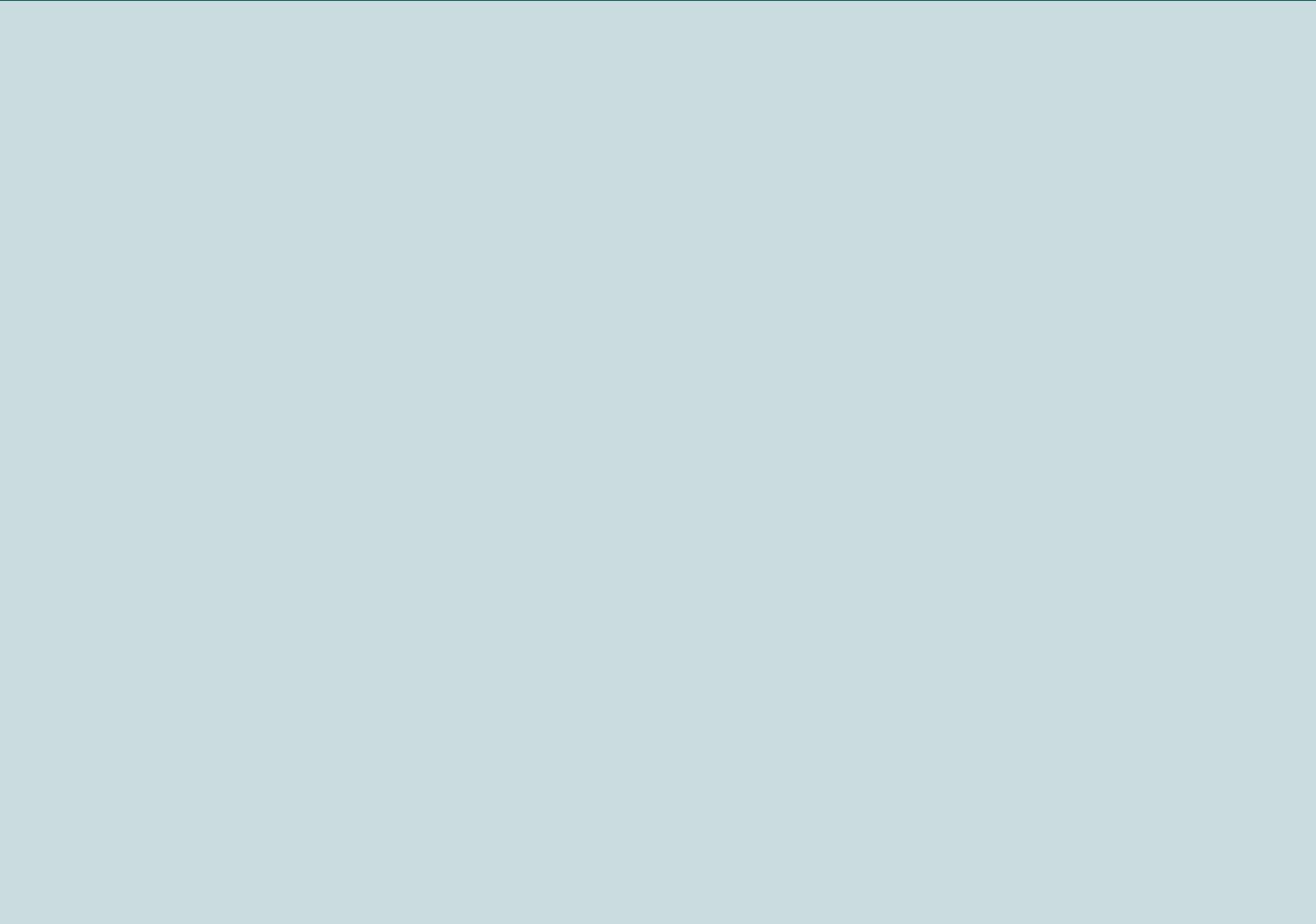
- Are there any words or phrases (e.g., jargon, Latin, or legalisms) that would seem out of place in a good newspaper?
- Are there any sentences more than two lines long that should be broken up?
- Is there any repetition that could be eliminated?
- Does it contain huge patches of cutting and pasting from the parties' submissions (instead of succinct summaries)?
- Does it contain block quotations that are not preceded by summaries?
- What, if anything, could be left out?
- What, if anything, should be added?
- What, if anything, is repeated?
- Will impartial readers feel that the losing party had a fair hearing?
- Will impartial readers be persuaded by the result?



# *JUDICIAL DECISION-MAKING TOOLKIT - ADDITIONAL DOCUMENTATION*

Available at:

<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Decision-making-toolkit-AD.pdf>









# Pacific Judicial Development Programme

## *JUDICIAL DECISION-MAKING TOOLKIT*

PJDP toolkits are available on: <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>

