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Book Review: The Art and Craft of Judgment Writing: A Primer for Common Law Judges

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The Art and Craft of Judgment Writing: A Primer for Common Law Judges. By Max Barrett. Globe Law & Business Ltd., 2022. Pp. 373, £95 (\$118).

Every new judge has a sense of the job going in. But for many, writing judgments and opinions is different enough from the advocacy of lawyers that they are eager for a bit of good advice from a more experienced hand.

Irish High Court Judge Max Barrett has the latest entry. His new book¹ provides a thorough and scholarly review of opinion-writing in common-law countries, with detailed review of opinions from notable judges in the United States, the United Kingdom, Canada, Ireland, India, Israel, Australia, and New Zealand. With a broad approach, Judge Barrett has a book aimed not just at judges but also at those who study judicial writing.

The book is divided into three main parts: (I) “The theory of the art and craft of judgment writing,” (II) “The practice of the art and craft of judgment writing,” and (III) “*Ex tempore* judgments.” Part I focuses on questions that apply generally, like judgment length, style, and structure. It also discusses dissenting and concurring opinions as well as opinions in cases involving children, families, and immigrants. Part II focuses on examples from notable judges. Part III considers how a judge can best deliver an oral judgment.

As an example of the way in which Judge Barrett’s chapters are put together, part I has a short nine-page chapter on the “purpose and audience” for judgments.² It’s thorough, but also a bit repetitive. He cites 9 audiences for an opinion from a 1960 survey of U.S. appellate judges, 13 audiences “in no particular order”

¹ Max Barrett, *The Art and Craft of Judgment Writing: A Primer for Common Law Judges* (2022).

² *Id.* at 29–37.

from the collected writings of Lord Bingham and Professors Robert Leflar and Nancy Wanderer, and comments about audience from former U.S. Chief Justice Warren Burger and current U.S. Supreme Court Justice Samuel Alito. No potential audience is missed, but Judge Barrett concludes that “[t]he primary audience of a judgment comprises the parties to the proceedings.”³

That reflects in part Judge Barrett’s role as a trial-court judge; the Irish High Court is the highest level of the trial courts in Ireland. Not that he ignores audiences other than the parties — he summarizes from the cited sources the need to explain the law to lawyers, other judges, the public, and even posterity. But Judge Barrett is most helpful in explaining how to craft judgments in the situations that he is most familiar with. He explains the need to focus on the losing party.⁴ In that explanation, Judge Barrett shows familiarity with both procedural justice and therapeutic jurisprudence.⁵ On the value of speaking to the loser, he cites an ancient Egyptian, Ptah-Hotep, for the proposition that “[a] good hearing soothes the heart,”⁶ something that practitioners of procedural justice and therapeutic jurisprudence would applaud.

In a separate part I chapter on children, families, and immigrants, Judge Barrett takes these ideas further by talking about an innovative practice he uses — providing plain-language summaries of his opinions. Drawing from his own experience, Judge Barrett explains that it quickly became apparent to him that “many people who come to court find the language of traditional-form judgments difficult to understand — even incomprehensible.”⁷ This was especially so in immigration and family-law cases. So Judge

³ *Id.* at 36.

⁴ *Id.* at 31, 36.

⁵ *See id.* at 31, 36, 87, 95, 132–33.

⁶ *Id.* at 36.

⁷ *Id.* at 119.

Barrett began appending a plain-English summary.⁸ For children, he concludes that this “provides texts that can be understood now and in the future by the child (including when she becomes an adult) and also the relevant legal audience.”⁹ Plain-language summaries have recently been used by at least a few U.S. federal magistrate judges.¹⁰

Part II considers what can be learned from individual judges and their opinions. Judge Barrett focuses mainly on three groups of three: (1) three “pioneering” women judges: Canadian Justice Bertha Wilson and U.S. Justices Sandra Day O’Connor and Ruth Bader Ginsburg; (2) three “great American judges”: Justices Oliver Wendell Holmes, Robert Jackson, and Antonin Scalia; and (3) three “great British judges”: Lords Atkin, Denning, and Bingham. There’s a fourth chapter with a sampling of judges from other common-law countries.

Again, a look at one of the chapters will give a fair idea of what each of them offers.

For each of the featured women, Judge Barrett has a brief biographical introduction, that judge’s comments on writing, others’ comments on their writing, and excerpts from several of their opinions. The chapter concludes with four pages of lessons learned from these judges, such as: “[a] judgment should avoid

⁸ This gained some favorable notice in Ireland. See Catherine Sanz, *High Court Judge Lauded for Use of ‘Plain English,’* Bus. Post (Ireland), Sept. 26, 2021, <https://www.businesspost.ie/news/high-court-judge-lauded-for-use-of-plain-english/>.

⁹ Barrett, *The Art and Craft of Judgment Writing* at 120–21.

¹⁰ See Michael Karlik, *Second Federal Judge in Colorado Adopts Plain English Summaries in Decisions*, Colo. Pol., Mar. 10, 2023, https://www.coloradopolitics.com/courts/second-federal-judge-in-colorado-adopts-plain-english-summaries-in-decisions/article_fdad5baa-bec3-11ed-bb31-4399aa8d9a99.html; Michael Karlik, *Federal Judge in Colorado Springs Deploys New Tool for Self-Represented Litigants*, Colo. Pol., Feb. 2, 2023, https://www.coloradopolitics.com/courts/federal-judge-in-colorado-springs-deploys-new-tool-for-self-represented-plaintiffs/article_daff024a-a30a-11ed-b3ce-3bab7614cebd.html.

intemperate denunciation of others,”¹¹ “[t]he judges we remember and admire are those whose originality makes a deep connection,”¹² and “the best judges may be ahead of their time.”¹³

One of the featured Wilson opinions comes from a 1990 domestic-violence case in which a woman had shot her partner in the back of the head. Even though she shot her partner from behind, the woman claimed self-defense. The court had to determine whether expert testimony about victim reactions in domestic-violence cases was appropriate. Judge Barrett shows how Wilson used simple language and questions to the reader to explain the decision:

Expert evidence on the psychological effect of battering on wives and common law partners must . . . be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called “battered wife syndrome.” We need help to understand it and help is available from trained professionals.¹⁴

Part III is a single chapter about oral judgments. Again, Judge Barrett surveys others’ observations and suggestions while adding his own. One particularly useful suggestion is that the judge leave the bench for at least a short period, which lets the judge make sure that all key points have been covered and avoids the

¹¹ Barrett, *The Art and Craft of Judgment Writing* at 183.

¹² *Id.*

¹³ *Id.* at 184.

¹⁴ *Id.* at 182–83 (quoting *R. v. Lavallée*, 1 S.C.R. 852 (Can. 1990)).

impression that the matter was decided in advance.¹⁵ Judge Barrett also provides a lengthy bibliography of works on judicial writing.

In a short, interesting appendix, Judge Barrett broadens the lens to consider judgments in comparison to art and poetry. He has put this discussion in an appendix “because its focus is not the mainstay of [the] book,”¹⁶ but the brief comments will resonate with judges (or writers) who deeply love their work.

For the comparison to art, he suggests that a judgment that has artistic value features some heightened power of perception, some sense of unity throughout, and a rhythm or feeling that arouses emotion.¹⁷ Those seem worthy goals for a top-notch written opinion: perceptions that cut through the dispute, a sense of unity in the facts or legal principles or both, and superior writing that satisfies.

He speculates that “[l]ikely all judges will confirm that they sometimes experience a sense of inspiration when writing a judgment.”¹⁸ He’s surely right about any judge who enjoys writing. Judge Barrett believes the source of that inspiration is “[m]ost likely truth” — revealing the great whole of the case and finding its truth.¹⁹ He may be right, but those who enjoy writing find great pleasure simply in doing that at a high level. Those who enjoy the law find great pleasure in understanding, explaining, and simplifying it. And in truly hard cases, the art of writing the opinion may require explaining why no clear truth can emerge (though Judge Barrett might respond that the lack of a clear answer is the truth of that case).

For judges wanting guidance on how to write better opinions, the book has some drawbacks. First, perhaps because he is an active judge, Judge Barrett has chosen not to “comment on the careers

¹⁵ *Id.* at 288, 299.

¹⁶ *Id.* at 303.

¹⁷ *Id.* at 305.

¹⁸ *Id.* at 304.

¹⁹ *Id.*

or judgments of any serving judges” or former judges “whose working life continues.”²⁰ By doing so, he excludes writers whose style may be the most suited to the modern reader. Second, Judge Barrett’s focus really isn’t on teaching how to write better opinions. For judges who want that, I recommend Ross Guberman’s *Point Taken*.²¹ Based on the work of 34 judges, including almost all the ones that Judge Barrett included plus current ones like Justices Elena Kagan and Brett Kavanaugh, Guberman’s book covers the mechanics — opinion openers, fact sections, legal analysis, and style. Bryan A. Garner also has a short and useful section on opinion-writing in one of his books.²²

But Judge Barrett’s use of plain-language opinion summaries is something not found in other books on opinion-writing. It’s an innovative practice worthy of consideration by other judges. I’ve long thought that the best approach is simply to write the opinion so that it makes legal concepts accessible to a lay reader (say, a high-school student).²³ Judge Barrett agrees with that (“Judges should try to write reasoning in a way that makes it accessible to intelligent lay persons,”²⁴ and “There is no such thing as ‘too simple.’”²⁵). But he also points to groups for whom that approach won’t work — children and immigrants with limited English-language skills, for example. In those cases, and perhaps more broadly, Judge Barrett’s use of a plain-language summary adds an important new way to be sure that everyone can understand the effect of a judge’s order.

In sum, Judge Barrett’s book is a useful addition to the literature on judicial writing. His scholarly approach to each topic

²⁰ *Id.* at 11.

²¹ Ross Guberman, *Point Taken: How to Write Like the World’s Best Judges* (2015).

²² Bryan A. Garner, *The Redbook: A Manual on Legal Style* 531–59 (4th ed. 2018).

²³ See Steve Leben, *Getting It Right Isn’t Enough: The Appellate Court’s Role in Procedural Justice*, 69 U. Kan. L. Rev. 13, 32–33 (2020).

²⁴ Barrett, *The Art and Craft of Judgment Writing* at 57.

²⁵ *Id.* at 59.

leaves readers with a wealth of information (and, in most cases, a summary at the section's end). The book would be especially useful in a course on the rhetoric of judicial opinions, a setting in which the book's comprehensive review of the field could be combined with an in-depth examination of some of the cases and opinions.

