



USING CONTEXT AND STRUCTURE TO CREATE CLARITY

COBA CONFERENCE
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WRITING FOR OUR READERS

- Goal of this talk: see our writing through our readers' eyes
- What do our readers want: CLARITY
- Two kinds of clarity
 - Substantive
 - Cognitive



The need for clarity

- Many of your readers know less than you do about what you are asking them to read or listen to.
 - So you must be clearer than you think you need to be



Micro and macro clarity

- Micro: words, sentences, paragraphs
- Two suggestions:
 - Strong, active verbs, and few adjectives and adverbs
 - Vary the length of your sentences, but average 20 words or less
- Macro: the larger picture



Two keys to clarity

- Context
- Structure



CONTEXT

- Our decisions contain a lot of details
- Readers will grasp the significance of these details only if they have a context for them
- Principle: give the context before the details
- Secondary principle: write point first



What are “context” and “point”?

- Context
 - What the details are about
 - Why the details matter
 - What the are the issues to be decided
- Point
 - Finding
 - Conclusion

Context before details and point

first

- When you are about to dump a lot of details on your readers, give the context and the point of the detail first
- The combination of context and point first gives our readers the best chance of grasping detail



Example

- In *Meiorin* the SCC set out a three-part test for determining whether a prima facie discriminatory workplace rule is justified: rational connection to the job function; adopted in an honest and good faith belief it was necessary; reasonably necessary.
[CONTEXT]
- On the first part of the test, rational connection, I find...[POINT]
 - Discuss this part of the test, evidence on it, and basis for your finding etc [DETAILS]



Lawyers and cognitive clarity

- Many lawyers have been trained or are inclined not to worry about context and to write point last



Many lawyers (and judges) write like this:

- Details
- Context (if at all)
- Point or conclusion

To create clarity, write like this:



- Context
- Point (usually)
- Details
- Point reiterated or applied



Why is context a powerful writing tool?

- Cognitive psychologists tell us
- Readers absorb and retain detailed information better when they first know why it matters and how it is relevant
 - When they have a context for it
 - When they know the point of the detail



The message: context first, details later

- " Why are you telling me all this?"
- We don't read passively
- You are always introducing
 - Always create contexts or containers
- Don't write like Michael Connelly

Putting the principles into practice



- The introduction or overview
- Review of the evidence
- Legal argument
- Case specific headings (and sub-headings)
- Quotes from cases, statutes, the evidence or a report



An introduction or overview

- Biggest change in Canadian decisions in the last 25 years
- What is this case all about?
- In most cases a page or less



Why do we write introductions?

- Clarity: the big picture
 - Clarify the issues
 - Context for the rest of the decision



Help readers and writers

- For readers:
 - Make the rest of your judgment easier to follow
 - Help your next door neighbour understand the case
- For writers:
 - Help you focus on the questions you must decide
 - Help you structure the rest of your decision (using the issues)



Elements of a good introduction

- Parties
- Claim or charge
- Precise issues to be resolved
- Narrative context for the issues
 - Human or legal story
 - Facts, law or both
- Necessary procedural history
- Human voice



Example: CCB

- Dr. J, H's attending physician, applies under s. 37 of the Health Care and Consent Act to compel H's daughter M, the substitute decision maker, to authorize the withholding of treatment or be replaced
- H is 81 years old. She suffers from advanced Alzheimer's Disease and is currently hospitalized. She has a life expectancy of less than a year. Everyone agrees that H is incapable with respect to treatment.
- Dr. J and the other treating doctors do not believe admitting H to intensive care for intrusive treatments is in her best interests.



Dr. J proposes to maintain her in the hospital until she is well enough to return to a care facility, but not to treat her for cardiac arrest or septic shock should either occur.

M disagrees with the doctors. She says that her mother lived by the slogan: "where there is life, there is hope". She insists that the doctors use all available measures to keep her mother alive.

Dr. J's application raises these two issues: first while capable, did H express an applicable wish about her treatment; and second, if she did not, has Dr. J shown that intrusive treatments or heroic measures are not in H's best interests, and therefore that in refusing her consent, M has not complied with the principles under ss.21(1)1 and (2) of the Act.



Review of the evidence

- Context before details is especially important in your review of the evidence
 - You are dumping a lot of detail on your readers
- Facts have no meaning without a context for them
- As you move from section to section, topic to topic, start with context



Application under the Hague Convention: no context;

- The father applies under the Hague Convention to have his son Jalen returned from Montreal to Miami, Florida.
- Jalen was born in Miami, and after his birth lived there with his mother for seven months. During that time, Jalen's father played professional football, and although he did not live with Jalen, he visited him regularly.
- Unfortunately, Jalen's mother lost her job in Miami, and as a result, moved with Jalen to Montreal where her parents live...



Context:

- The father applies under the Hague Convention to have his son Jalen returned from Montreal to Miami, Florida. To succeed on this application he must show that Florida was the child's habitual residence. I must therefore examine the evidence and consider the two key elements of habitual residence: whether Jalen resided in Florida for an appreciable period of time; and whether Jalen and his mother had a settled intention to stay in Florida.
- Jalen was born in Miami, and after his birth...



Point last (Argument)

Counsel for the Commission has referred to *OHRC v Simpson Sears*.

Counsel has also referred to *Meiorin and Grismer*

Finally counsel referred to *Vancouver Rape Relief Society v Nixon*

[After slogging through these four cases]

On the basis of these four decisions the Commission contends that the Supreme Court's analysis in *Law* should not be applied to discrimination complaints under the *Code*. I disagree...



Context and point first

Counsel for the Commission has referred to four appellate decisions, three from the SCC. She contends all four decisions show that the analysis in *Law* should not be applied to discrimination complaints under the *Code*.

[CONTEXT] I disagree with her contention.

[POINT]

I will briefly discuss each of these cases...

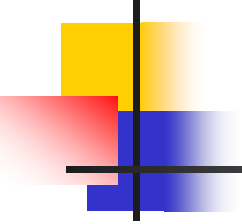
[DETAILS]

I therefore do not accept the Commission's contention...[POINT AGAIN]



Case-specific headings (and sub-headings)

- Informative
- Use case specific headings for the evidence
 - The police investigation of the alleged theft
 - What the videotape showed
 - The evidence of racial stereotyping

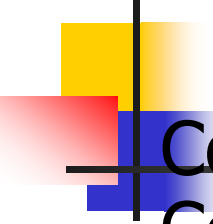
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- Also use case specific headings for the issues
 - Try the question form of a heading: Did the police investigation discriminate on the ground of race?
 - Or, the rhetorical form: the Commission is entitled to a systemic remedy.



Quotes

- Before quoting, ask yourself two questions:
 - 1. Is the quote really necessary?
 - 2. If it is, how much of it is necessary?
- If you do quote, tell your readers why they should read the quote
 - Context
 - Point of the quote

Quote from a case--not this:



Counsel referred me to *Wigle v. Allstate* where Cory J.A. said at p. 116:

It is difficult to conceive of an individual bargaining with a general insurer, either as to the terms of a standard policy of automobile insurance or with regard to the standard form of an endorsement added to that policy. Can it really be said that the average individual is capable of understanding the provisions of such a contract himself or is likely to engage his solicitor to review the terms, advise him of the dangers and complexities of the contract, what is included and what excluded from the coverage, and to then submit an amended contract to the insurer?...

MEGO



But this:

In *Wigle v. Allstate* at p.116, Cory J.A. emphasized that any ambiguity in a standard form insurance policy should be construed against the insurer:

It is difficult to conceive of an individual bargaining with a general insurer...



Even better:

Equality of bargaining does not exist in a standard form insurance policy. In *Wigle v. Allstate* Cory J.A. affirmed that any ambiguity in this kind of policy should be construed against the insurer.



STRUCTURE

- Introduction
- Evidence (including findings of fact and credibility)
- Analysis (including law and legislation)
- Conclusion



Getting started

- Clear writing comes from clear thinking
- Outlines
- “Madman” → reverse outlines



Your tasks

- Raw materials
 - Mass of evidence
 - Many authorities cited
- Sift and sort
 - Decide what to leave out
 - Organize the rest



Organizing the evidence

- The hardest, but most important task in decision writing
- Reasons as storytelling



Three ways to organize the evidence

- Witness by witness
- Chronological
- Issue-driven



Witness by witness

- For simple cases
- Might be the easiest way to show different accounts of what occurred
- Often ineffective: sign of laziness



Chronology

- Standard way to organize the evidence
- Useful when sequence is important
 - What happened when?



Chronology is not always effective

- Chronology may not directly relate to the issues
- If you use chronology:
 - Make it a conscious choice
 - Edit ruthlessly



Issue-driven

- Organize the evidence around the issues in the case
 - Topics related to the issues
 - Chronology within each topic
- Criteria in a statute or the case law
- Use headings



Two structures

- Lane and OHRC v ADGA (modified)
- Issues:
 - Prima facie case of disability discrimination?
 - Duty to accommodate?
 - Remedy
 - General and mental distress damages
 - Special damages
 - Public interest



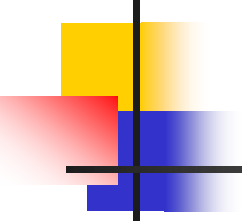
Structure A: chronology

- Introduction (issues)
- Evidence (chronological order)
 - Findings of fact and credibility
- Relevant legislation
- Analysis of issues
 - Has the Commission established a prima facie case of discrimination on the ground of disability?
 - Has ADGA shown that it cannot accommodate Lane without undue hardship?
 - Remedies
 - Is Lane entitled to general and mental distress damages?
 - Is Lane entitled to special damages?
 - Is a public interest remedy appropriate?
- Conclusion



Structure B: issue-driven

- Introduction (issues)
- Evidence (including findings)
 - Lane's background and education
 - Nature of Lane's bipolar disorder
 - Lane's employment with ADGA
 - Dismissal and basis for it
 - ADGA's efforts at accommodation

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- Lane's condition after dismissal
 - Lane's efforts to find other employment
 - ADGA's attitude toward persons with disabilities
 - Legislation (separate section or in the analysis)
 - Analysis (as in A)
 - Conclusion



How much evidence?

- The tension: brevity vs. detail
- Don't be a court reporter
 - Important evidence for each party
 - Don't be afraid to leave some things out
- Test: every fact, every piece of evidence must have a purpose



A final suggestion on structure

- Experiment
 - No one structure works in all cases

■ John Laskin