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8. Authors and judges

In this chapter, I consider what various leading English-language authors have had to say about the art and craft of writing generally. I then seek to transpose their observations into the judgment-writing context. In doing so I proceed on the notion that: “The problem of composing good judicial writing cannot ... be so very different from the problem of composing any ... good writing.”¹ For reasons of space, I confine myself to observations made by five famous and accomplished authors: Somerset Maugham, George Orwell, Edgar Allen Poe, Mark Twain and Edith Wharton.

1. **Somerset Maugham**

Somerset Maugham is remembered today as the author of numerous works marked by elegance, restraint and a sharp eye for observation. These are all talents that a judge tasked with judgment writing can, it is submitted, usefully seek to bring to bear in her labours. In *The Summing Up*, Maugham makes various comments on writing style that repay careful consideration.

First, he writes, one should not seek to write perfect prose, for “perfection has one grave defect: it is apt to be dull”.² Likewise, unless a judge writes judgments that are engaging, reader attention is likely to wander.

Second, good writing does not require literary genius. Maugham considered that he had only “an acute power of observation ... a logical sense, and [an ability to write with] lucidity, simplicity and euphony”.³ These are abilities which most good judges likely possess and can bring to bear in their judgment writing.

1 Gibson, W, 134.

2 Maugham, 18.

3 *Ibid*, 20.

Third, there are three causes of obscurity in writing:

- negligence;
- wilfulness; and
- uncertainty as to what one means to say.⁴

These are attributes that, it is submitted, the good judgment writer should seek to avoid.

Fourth, lucidity is a more obvious merit than simplicity.⁵ It seems almost a trite observation that judges should seek invariably to be lucid, though simplicity of expression is also desirable.

Fifth, Maugham writes, simplicity “by no means comes by nature ... [I]t needs rigid discipline”.⁶ This is also true of judgment writing.

Sixth, good prose is essentially rococo in nature – that is, “the natural expression of persons who [value] ... a civilized life”.⁷ It is an approach to writing that requires taste, decorum and vigour. Judgment writing, it is submitted, is the same.

Seventh, Maugham lauds euphony – that is, the quality of writing that is pleasing to the ear.⁸ When it comes to judgments, euphony seems a quality that retains its importance whether or not the entirety of a judgment is read out in court (not least as judgments continue to be written as though they were to be read out in court). Overall, however, Maugham prefers simplicity to euphony.⁹

Eighth, Maugham is un-rigorous when it comes to grammar.¹⁰ He acknowledges that English grammar is difficult and that few writers avoid making mistakes in it. However, he cautions that “grammar is common speech formulated ... I would prefer a phrase that was easy and unaffected to a phrase that was grammatical”.¹¹ That may be good advice when it comes to fiction writing. But when it comes to judgment writing, a disregard for grammar “can only tarnish the dignity of the court”.¹²

4 *Ibid.*, 21.

5 *Ibid.*, 22.

6 *Ibid.*, 23.

7 *Ibid.*, 26.

8 *Ibid.*, Chapter 13.

9 *Ibid.*

10 *Ibid.*

11 Maugham, 27.

12 Komar, 30.

Ninth, Maugham cautions that good writing takes time.¹³ Good writing needs to be written and rewritten. In this, the judges of today have perhaps an easier time than the writers of Maugham's day. In the Information Age, the task of rewriting has become less time consuming, with what is ostensibly the 'first' draft of a judgment often being the result of hundreds of backspace deletions and retyped text.

Tenth, Maugham maintains that one should write in the manner of one's period.¹⁴ Language is alive and constantly changing. So, for a judge to try to write like an earlier generation of judges can only yield artificiality of style and remoteness of tone. Maugham even suggests that one should not hesitate to use common phrases if they give vividness and actuality.¹⁵ However, in the judgment-writing context, care is required if the dignity of the court is not to be diminished by colloquialisms. When I use a colloquialism, I tend to use the formula '... to use a colloquialism, [colloquialism stated]'. That enables the use of a colloquialism while also acknowledging that one is descending from the more heightened level of prose being deployed generally throughout the judgment.

Eleventh, although he encourages writing in the manner of one's period, Maugham suggests that: "An acquaintance with the great works of the past serves as a very good standard of comparison."¹⁶ When it comes to judgment writing, it is also beneficial to read some of the past masters of judgment writing. In Part II of this book, I consider some prominent judges and judgments of the United States, the United Kingdom and the wider common law world, and seek to identify some writing tips that can be gleaned from their judgments.

Twelfth, Maugham accepts that to digress is human.¹⁷ However, he suggests that digression must be avoided even more than saints avoid sin: "[S]in may be venial, digression is mortal."¹⁸ When it comes to writing judgments, if a paragraph commences 'In passing ...', it is probably best excised.

13 Maugham, 29.

14 *Ibid.*, 30.

15 *Ibid.*

16 *Ibid.*, 64.

17 *Ibid.*, 84.

18 *Ibid.*

Thirteenth, Maugham suggests that one should “stick to the point and whenever [one] ... can, cut”.¹⁹ This seems equally good advice when it comes to judgment writing.

Fourteenth, Maugham maintains that good judgment writing is a career-long exercise. The judge, like Maugham’s paradigm author: *learns by ... trial and error. His early works are tentative; he tries his hand at various subjects and various methods ... By a simultaneous process he discovers himself ... what he has to give and learns how to display this ... to the best advantage. Then, in full possession of his faculties, he produces the best of which he is capable.*²⁰

2. George Orwell

George Orwell – best known today as the author of *Animal Farm* and *1984* – is renowned for the sterling quality of his prose. In his essay on “Politics and the English Language”, Orwell identifies a number of means whereby English can better be deployed “as an instrument for expressing and not for concealing or preventing thought”.²¹ His observations are readily transferable to the judgment-writing context.

First, Orwell observes that poor deployment of language, while it may spring from another cause, can “become a cause, reinforcing the original cause and producing the same effect in an intensified form”.²² One can see this in judgment writing when, for example, a tendency to write long and convoluted judgments becomes a habit, even though it is not necessary as a matter of form. The particular difficulty which this presents in judgments is that “slovenliness of ... language makes it easier to have foolish thoughts”.²³

Second, Orwell observes that bad writing is curable: bad habits, which spread by imitation (in the legal context, by judges following the poor example of compeers who write bad judgments), can be avoided “if one is willing to take the necessary trouble. If one gets rid of those habits one can think more clearly”²⁴ – and clarity of thought is surely a desirable end goal for any judge desirous to do right by litigants.

19 *Ibid.*

20 *Ibid.*, 123.

21 Orwell, 8.

22 *Ibid.*, 3.

23 *Ibid.*

24 *Ibid.*

Third, Orwell points to what he considers are two particular excrescences of English-language writing: staleness of imagery and lack of precision. Imagery may seem something that a judge need not be concerned with; but what is a judge doing when writing judgment facts other than creating an image in the reader's mind of the salient facts? A past master at such image setting is Lord Denning, whose best judgments offer imagery as good as any novel, employing prose that is "colourful and personal ... an exuberant celebration of a self-confident bench, unafraid of allowing the impassive judicial mask to slip".²⁵ Some of the more prominent judgments of Denning, who "few would dispute ... was the greatest English judge of the twentieth century",²⁶ are considered in Chapter 11.

Moving on, Orwell points to a number of deficiencies in the use of written English that can usefully be avoided, it is submitted, by those tasked with judgment writing. First, what Orwell describes as "operators"²⁷ or "verbal false limbs" should be avoided.²⁸ This is such a common deficiency of modern judgment writing that it is perhaps worth quoting Orwell's observations and confining oneself to the observation that they apply with equal rigour to judgment writing:

*Operators, or verbal false limbs ... pad each sentence with extra syllables ... The keynote is the elimination of simple verbs ... In addition, the passive voice is wherever possible used ... and noun constructions ... used instead of gerunds ... The range of verbs is further cut down by means of the -ize and de- formations, and banal statements ... given an appearance of profundity by means of the not un- formation. Simple conjunctions and prepositions are replaced by ... phrases ... and the ends of sentences are saved from anti-climax by such resounding commonplaces as greatly to be desired, cannot be left out of account ... and so on and so forth.*²⁹

There can be few judges who have not succumbed to some such literary ploys and it takes the sharp journalistic eye of Orwell to see this approach to writing for what it is: an excrescence. Other

25 Munday (2002a), 629.

26 Goff (b).

27 Orwell, 4.

28 *Ibid.*

29 *Ibid.*

deficiencies identified by Orwell include “[p]retentious diction”³⁰ and “[m]eaningless words”.³¹ As regards the former, Orwell suggests that pretentious diction is used “to dress up simple statements and give an air of scientific impartiality to biased judgments”.³² As regards the latter, Orwell observes that in certain kinds of writing, “it is normal to come across long passages which are almost completely lacking in meaning”.³³

Orwell’s overarching criticism of modern English (and the same criticism can arguably be made of modern judgment writing) is that, at its worst, “[i]t consists of gumming together long strips of words ... and making the results presentable by sheer humbug”.³⁴ Though one would hesitate to describe any judicial observation as ‘humbug’, it is difficult not to see, in the modern tendency of quoting extensive chunks of earlier precedents and stringing them together with a line or two of one’s own text, a form of the linguistic abuse of which Orwell makes mention. What is the solution to such abuse? Orwell suggests the following:

*A scrupulous writer, in every sentence ... he writes, will ask himself at least four questions ... : What am I trying to say? What words will express it? What image or idiom will make it clearer? Is this image fresh enough to have an effect? And he will probably ask himself two more: Could I put it more shortly? Have I said anything that is avoidably ugly?*³⁵

Orwell cautions against use of hackneyed phraseology that transforms writing into “a lifeless imitative style”,³⁶ observing that the person who succumbs to such phraseology becomes a form of machine, “almost unconscious of what he is saying”.³⁷ No doubt every lawyer has encountered a judgment where a judge with unbecoming dreariness recites the facts, the law, the issues at play, the arguments of one side and the conclusion, all in a manner that is as indigestible as it is immemorable.

Notably, Orwell does not seek to canvass in favour of some form of standard English. Rather, he canvasses for “using the fewest and

30 *Ibid.*
31 Orwell, 5.
32 *Ibid.*, 4.
33 *Ibid.*, 5.
34 *Ibid.*, 6.
35 *Ibid.*
36 *Ibid.*
37 Orwell, 7.

shortest words that will cover one's meaning ... [and] to let the meaning choose the word ... not the other way around".³⁸ To this end, he suggests the following rules, which, it is submitted, can be borne in mind by a judge tasked with judgment writing:³⁹

- (i) *Never use a metaphor, simile or other figure of speech which you are used to seeing in print.*
- (ii) *Never use a long word where a short one will do.*
- (iii) *If it is possible to cut a word out ... cut it out.*
- (iv) *Never use the passive where you can use the active. [One commentator has observed in this regard that "Lawyers love the passive voice. They think it gives objectivity to their statements. But taking the action out of writing does not add to its power. Quite the reverse."]⁴⁰*
- (v) *Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.*

This is an extract from the chapter 'Authors and judges' by Max Barrett in *The Art and Craft of Judgment Writing: A Primer for Common Law Judges*, published by Globe Law and Business.

38 *Ibid.*, 8.

39 *Ibid.*

40 McLachlin (2001), 698.

41 Poe, 1431.