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5. De Maupassant

On honesty, simplicity and other matters

The French writer, Guy de Maupassant (1850–1893), is an acknowledged master of the short-story form, his name "often associated with Tolstoy, Chekhov, Somerset Maugham, and … Henry".[1] However, de Maupassant was also a distinguished novelist. In what is perhaps his greatest novel, *Pierre and Jean* (1888), he describes the evolution of the relationship between two brothers when and after the suspicion arises that they have different fathers. For present purposes, *Pierre and Jean* is of interest because of de Maupassant's preface concerning the novel as a form of literature,[2] the substance of which is considered below and then applied in the context of legal writing.

1. Originality

All writers, de Maupassant writes, compose their works in accordance with their own sense of originality.[3] This almost expressivist concept of writing (expressivist writing involves a personal writing style that proceeds heedless of rules) has never really taken hold among teachers of legal writing who have traditionally favoured a cognitivist approach to writing (whereby writing is viewed as a complex, conscious, cognitive task).[4] Indeed, even the concept of originality has a somewhat ambiguous position when it comes to legal writing. Thus, it has been suggested that an excess of the creative in a legal text will likely be both "bad and dangerous".[5]

Reconciling the need for originality with the constraining demands of

1 Harold Bloom (ed), *Bloom's Major Short Story Writers: Guy de Maupassant* (Chelsea House Publishers, 2004), 17.
2 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), xli–lxiii.
3 *Ibid*, xliii–xliv.
4 See, eg, J Rideout and J Ramsfield, "Legal Writing: A Revised View" (1994) 69(1) *Washington Law Review* 35–100, 51.
5 Mary Ellen Gale, "Legal Writing: The Impossible Takes a Little Longer" (1980) 44(2) *Albany Law Review* 298–343, 315.

precedent is a demanding process, likely not helped by the fact that an oftentimes conservative legal profession is hesitant to embrace innovation. But law is not the only field of endeavour that wrestles with drawing on a repository of accepted knowledge and yet also proceeding in such a way that one is interpreting or even innovating. One recent review article has drawn an analogy in this regard between legal writing and hip-hop writing – hip-hop musicians also being confronted with how to borrow from earlier works and yet also managing to innovate without succumbing to 'biting' (the hip-hop term for plagiarism).[6] What is fascinating about such analysis is that hip-hop styles have radically transformed since the emergence of hip-hop as a musical genre in the 1970s. By contrast if, for example, a Tudor lawyer time travelled to the 2020s he (only men practised law in Tudor times) would not find a great deal of difference between the judgments of his time and ours.

There seems something counter-evolutionary about a writing form that has barely evolved in hundreds of years. Unless one accepts that the common law world settled early on a form of judgment writing which is incapable of improvement (which seems unlikely) the very different experiences of the legal and hip-hop worlds when it comes to innovations in style suggest that the legal profession has not yet fully resolved how to reconcile tradition with originality.

2. Expectations as to form

De Maupassant notes the tendency for critics to hold certain expectations as to the form of a novel and to reject works which do not conform to their pre-conceived notions of the aesthetically pleasing.[7] He also suggests that critics should instead seek out that which least resembles existing words and encourage young authors to go down new paths.[8]

Only a few decades into the Internet Age, these observations can be applied to modern legal writing. Thus, previous means of communication in the legal world are rapidly being overtaken by new means of communicating information. For example, whereas previously a piece of legal analysis would have been committed to a formal letter/memorandum, nowadays one is just as likely to find one or more emails taking the place of such a letter/memorandum. Yet it would be a mistake to conclude that communication by email is simply a new way of writing

6 Kim Chanbonpin, "Legal Writing, the Remix: Plagiarism and Hip Hop Ethics" (2012) 63 *Mercer Law Review* 597–638.
7 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), xliii.
8 *Ibid*.

a letter/memorandum. For example, it also replaces conversation, and it takes place in a medium that has its own rules of intercourse, proceeding like a conversation, but a conversation that is being entirely recorded in lasting form – a fact which doubtless shapes what parties are prepared to state, and how.

Determining which traditional form of communication a particular email replaces can be a useful pointer as to what form an individual email ought to take.[9] Other more immediate and casual messaging systems may also be used in place of email, for example, SMS texts, Facebook Messenger®, WhatsApp® and (for business users) Microsoft Teams® and Slack®, all of which have their own rules of social etiquette and their own advantages/drawbacks. In this brave new world, de Maupassant's observations point to the need for open-mindedness as to the expected nature and form of communications, with younger legal writers to be encouraged to try the new, though without altogether eschewing the old.

As one commentator has observed in this last regard, many of today's legal students (as well as more recently qualified lawyers) are "digital natives"[10] accustomed to online exchanges but perhaps, as a consequence, less used to face-to-face conversations. As a result, as much as contemporary students need to be able to converse (and converse appropriately) online, they also need to know how to speak out loud (and speak appropriately) in real-life situations.[11]

3. The pursuit of truth

De Maupassant notes the school of thought which holds that a novel comprises truth.[12] This is a conception that holds true of good legal texts also. That does not mean that the law comprises (or can be reduced through legal texts) to a finite number of universal propositions that apply unfailingly in all instances like scientific truths: "law is contextual".[13] What it does mean is that each legal text is, or ought to be, engaged in the identification of the legal truth of whatever situation it is concerned with.

De Maupassant then proceeds to consider the novelist who alters truth[14] and the novelist who seeks to depict life accurately.[15] The former

9 Jennifer Will, "Call It an E-Convo: When an E-Memo Isn't Really a Memo at All" (2020) 24 *Legal Writing: The Journal of the Legal Writing Institute* 269–314, 298–299.
10 *Ibid*, 312.
11 *Ibid*.
12 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), xliii.
13 David Romantz, "The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum" (2003) 52(1) *University of Kansas Law Review* 105–146, 105.
14 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), xlvii.
15 *Ibid*.

type of novelist: "manipulate[s] events … [yielding] a series of ingenious combinations."[16] In short, he or she engages in selection and manipulation that is aimed at a particular end and is disrespectful of truth and the reader. If such an approach were deployed in the legal writing context it might yield a persuasive text but (I submit) it would be a flawed text. Persuasive legal writing demands accuracy and truth.[17]

Notably, when it comes to the writer who seeks to depict life accurately, de Maupassant suggests that this writer too may be guilty of falsity. Why so? Because he or she cannot tell the reader everything that makes up the truth: that would be too long and cumbersome a thing to do.[18] So there must be some selection of relevant incidents. But if such a choice must be made (and it must) this deals a blow to the theory that a novel could ever represent the whole truth of a subject.[19] The novel that purports to depict the whole truth (and likewise the legal text that purports to depict the whole truth) cannot be the whole truth. This is why it is so important to seek to be as honest as possible in the process of selection and statement, for if the legal writer proceeds dishonestly, he or she (and his or her text) can no longer be believed.[20]

4. Detachment

As to the potential for objectivity in a text, de Maupassant considers that writers necessarily bring something of themselves and their worldview to their writing.[21] Lawyers, by contrast, have long been taught to believe that in legal writing objectivity reigns supreme,[22] that it should be the law which shines through a legal text and not the author. This is a very ancient concept. Cicero, a lawyer, philosopher, and politician of the late Roman republic, wrote in the 1st century BCE that "[I]t can truly be said that the magistrate is a speaking law, and the law a silent magistrate".[23] (In other words, the magistrate's voice is simply the law made vocal.) Two millennia later, we know that voice in many guises *can* creep into a legal text. In a consideration of voice, self and persona in legal writing,[24]

16 *Ibid*.
17 Mark de Forrest, "Introducing Persuasive Legal Argument via 'The Letter from a Birmingham City Hall'" (2009) 15(1) *Legal Writing: The Journal of the Legal Writing Institute* 109–164, 136–137.
18 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), 1.
19 *Ibid*.
20 James McElhaney, "The Art of Persuasive Legal Writing" (1996) 82(1) *ABA Journal* 76–82, 78.
21 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), lvi.
22 James Elkins, "What Kind of Story is Legal Writing?" (1996) 20(1) *Legal Studies Forum* 95–136, 113.
23 Cicero, *De Re Publica, De Legibus*, T Page (ed) (William Heinemann, 1928), 461.
24 J Christopher Rideout, "Voice, Self, and Persona in Legal Writing" (2009) 15(1) *Legal Writing: The Journal of the Legal Writing Institute* 67–108.

Rideout points, for example, to the professional (objective) voice, the personal (individual) voice, the social voice (which reflects the context in which the writer is embedded), the discoursal voice (deployed within the context of a discourse), and (in the context of judgment writing, the typified (standard), monologic (composite), and self-dramatising (writer as judge, advising lawyer, etc) voice). When matters are viewed so, the potential for complete objectivity seems less than convincing – and in truth presents with a number of problems, for example, it ignores that language has its own life,[25] and in idealising the objective it may struggle to recognise subjective concepts such as hope, candour and love.[26]

In learning to write 'legal writing' a lawyer acquires a legal writer's voice,[27] which is not a personal voice in the way that a literary author such as de Maupassant might understand it, but neither is it wholly impersonal. Confronted with the reality that writers necessarily bring something of themselves and their worldview to their writing, de Maupassant maintains that the skill of the author in this context consists in not revealing him or herself to the reader.[28] In the legal context, this is typically achieved through the manifestation throughout a legal text of the so-called 'professional voice'. (Whether this professional voice is the desirable quantity that some of the academic literature in this area considers it to be is a separate question. Thus, it has been suggested, eg, that the pursuit of a professional voice excludes the voices of 'outsiders', ie, those who have traditionally been or felt excluded from the practice of the law.)[29]

5. Exactness and carefulness

Turning next to the use of language, how, in practical terms, can a legal writer deploy language in such a way as to define and distinguish matters exactly? And exactness is important in the legal context, not just because in any legal text the law should be stated exactly as it is but also because clarity is usually a product of exactness.[30] That said, there can be a tendency to what has been described as a 'cult of precision'[31] on the part

25 James Elkins, "What Kind of Story is Legal Writing?" (1996) 20(1) *Legal Studies Forum* 95–136, 119.
26 *Ibid*.
27 J Christopher Rideout, "Voice, Self, and Persona in Legal Writing" (2009) 15(1) *Legal Writing: The Journal of the Legal Writing Institute* 67–108, 105.
28 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), lvi.
29 Kathryn Stanchi, "Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices" (1998) 103(1) *Dickinson Law Review* 7–58.
30 Eugene Gerhart, "Improving Our Legal Writing: Maxims from the Masters" (1954) 40(12) *ABA Journal* 1057–1060, 1058.
31 Matt Keating, "On the Cult of Precision Underpinning Legalese: A Reflection on the Goals of Legal Drafting" (2018–2019) 18 *Scribes Journal of Legal Writing* 91–122.

of legal writers, that is, a tendency to write to such a rarefied degree of exactness that what results is impenetrable to all but the initiated.

Two fundamental problems with the 'cult of precision' have been identified. First, that it fails to understand that precision and clarity can co-exist (indeed precision can be a predicate for clarity). Second, that it proceeds on the notion that exactness should necessarily trump clarity, whereas the modern view is that clarity is something of a paramount virtue.[32]

De Maupassant offers some practical tips on exactness, suggesting, for example, that there is only ever one noun/verb/adjective that expresses precisely what a writer wishes to say and that he or she should take the time to find the right word, rather than settling for a word that is good but not quite right.[33] The type of writing tips of which de Maupassant makes mention have previously been considered by me in *The Art and Craft of Judgment Writing*[34] and are not replicated here. (As the title suggests, that book is focused on judgment writing. However, its observations have a resonance as regards legal writing more generally.)

Closely related to exactness is the attribute of carefulness. Curiously, while brevity, clarity, and simplicity are the 'triple crown' of legal writing,[35] carefulness seems almost like the 'Fourth Musketeer' of the legal writing world, that is, a somewhat underrated presence (perhaps because it will be assumed that a legal writer will be careful in *what* he or she states of the law, though that, of course, is separate from *how* he or she states it). In the introduction to his book, *The Careful Writer*,[36] Theodore Bernstein identifies a number of merits to carefulness. These might be stated as follows: it enhances the chances that one will produce a high-quality written work; it fosters clarity, logic, originality and good phrasing; and it enables the writer to communicate effectively with his or her reader yielding a product that is a pleasure to read (and in which the writer can take pride in his or her writing).

Bernstein sees there to be three principal writing styles which he conceives of as overlapping glass doors (as shown in the boxes below),

32 *Ibid*, 91.
33 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), lxi.
34 Max Barrett, *The Art and Craft of Judgment Writing* (Globe Law and Business, 2022).
35 The importance of brevity seems sometimes almost forgotten in a legal world where, eg, some writers revise a text by increasing its length, rather than aiming for conciseness (see Ross Buckley, "Legal Scholarship for New Law Teachers" (1997) 8(2) *Legal Education Review* 181–212, 200).
36 Theodore Bernstein, *The Careful Writer: A Modern Guide to English Usage* (Atheneum, 1982).

specifically a narrow door (marked 'Formal'), a wider door marked 'Reputable', and a third, much-the-widest door (marked 'Casual'):[37]

Casual	Reputable	Formal

Bernstein's view is that over the course of the 20th century, formal language retreated behind the 'Reputable' doorway (with legal writing being at the most formal end of reputable).[38] Bernstein also sees 'Reputable' writing to have expanded into much of the 'Casual' space, such that once purely casual English had come to be seen as reputable.[39] From the perspective of legal writing, this suggests two things. First, that excessive formality in legal English runs the risk of placing it at the esoteric end of reputable. Second, that to an increasing extent, the use of casual English in formal contexts is reputable.

It seems to follow from the foregoing that even for the most careful/exact of legal writers, there can be a legitimate move from the extreme end of formal into reputable and even on into the casual without running any risk to one's reputation as a careful writer – and of course with the advantage that what one is writing is likely to be more accessible and comprehensible to all. The problem for legal writing, if it insists on remaining at the esoteric end of formal, is that lawyers will become like the Cabots and the Lowells of old Massachusetts, "Where the Lowells talk[ed] only to Cabots,/And the Cabots talk[ed] only to God",[40] that is, they will produce legal texts that are less accessible/comprehensible to non-lawyers despite the fact that law (unlike many technical disciplines) requires frequent communication with a non-professional audience who neither wish for nor will necessarily understand the "dense jargon"[41] characteristic of professional-to-professional dealings in other technical disciplines.

6. Using simple vocabulary

When it comes to vocabulary, de Maupassant is an apostle of simplicity, writing that there is no need for an unusual vocabulary comprising

37 *Ibid*, xiv.
38 *Ibid*.
39 *Ibid*.
40 For the full verse, see William Perry, "The Lowells of Massachusetts … They talk to the Cabots, but also to the World", *The Berkshire Edge*, 6 December 2020, https://theberkshireedge.com/anyone-for-tennyson-the-lowells-of-massachusetts-they-talk-to-the-cabots-but-also-to-the-world/.

complex or strange words.[42] De Maupassant's 'prayer' when it comes to vocabulary is: "Give us fewer nouns, verbs, and adjectives … and let us have a greater variety of phrases … full of sonority and … rhythm. Let us strive to be admirable in style, rather than curious in collecting rare words."[43] It is difficult enough, de Maupassant maintains, to get a sentence to state what one wants it to state without using all manner of antiquated or novel expressions.[44] That said, law is a discipline that places a particular focus on words and meaning and so a certain richness of vocabulary is a necessary attribute in a competent lawyer so that he or she can express thoughts precisely and with subtlety.[45] Law is also a technical discipline, so there will always be a disjunction between legal language and ordinary English because legal writers will sometimes need to use technical terms that just cannot be avoided.[46]

Bringing de Maupassant's observations to bear in the legal context what he might be contended to point to is the need for a legal text to deploy a vocabulary that is as simple as possible in all the circumstances but no simpler. This is hardly controversial. Nor does it mean that writing must be dull in order to be simple: a writer as talented as de Maupassant would be unlikely to suggest dullness to be somehow desirable. In truth, in legal writing (as in literary writing) the text that uses the fewest and simplest words possible 'sticks in the mind' more than any amount of complex writing.[47]

Key propositions

- All writers compose works in accordance with their sense of originality; however, the potential for originality in legal writing is under-appreciated.
- When it comes to judgments there seems something counter-evolutionary about a writing form that has barely evolved in hundreds of years.
- De Maupassant notes the tendency for critics to hold certain

41 Matt Keating, "On the Cult of Precision Underpinning Legalese: A Reflection on the Goals of Legal Drafting" (2018–2019) 18 *Scribes Journal of Legal Writing* 91–122, 117.
42 Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), lxii.
43 *Ibid*.
44 *Ibid*.
45 Edward Re, "Legal Writing as Good Literature" (1985) 59(2) *St John's Law Review* 211–227, 214.
46 Douglas Litowitz, "Legal Writing: Its Nature, Limits, and Dangers" (1998) 49(3) *Mercer Law Review* 709–740, 711.
47 Thomas Spahn, "The Art of Legal Writing" (1989) 9(2) *Journal of the National Association of Administrative Law Judges* 137–152, 137.

expectations as to form and to reject works which do not conform to those expectations.[48] He suggests that critics should encourage young authors to go down new paths.[49] In a similar vein, in the Internet Age, historical expectations as to writing form may need to change.

- Each legal text is or ought to be engaged in the identification of the legal truth of whatever situation it engages with.
- Honest persuasive argument requires dedication to accuracy/truth.
- When it comes to writers who seek to depict life accurately, they may be guilty of falsity because they cannot tell the reader everything that makes up the truth: there must be some selection of relevant incidents. The same is to some extent true of legal writing; however, if the legal writer proceeds dishonestly, he or she (and his or her text) can no longer be believed.
- 'Voice' in many guises (eg, professional, personal, social and discoursal) can creep into a legal text.
- In learning to write 'legal writing' a lawyer typically acquires a professional voice (albeit one that belongs to the individual writer). This may not be an altogether good thing.
- Legal writers may seek to be detached in their assessment of the law, but they cannot detach themselves from the text that they write.
- The skill of the author consists in not revealing him or herself to the reader. In the legal context, this is often achieved through the acquisition/maintenance of a professional voice.
- In a legal text the law should be stated exactly as it is, thereby yielding clarity. That said, there can be an unhealthy temptation to indulge in the 'cult of precision', that is, to write so exactly as to be incomprehensible.
- Law is a words-focused discipline, so a certain richness of vocabulary is necessary.
- Law is a technical discipline, so legal writers will sometimes need to use technical terms.
- A legal writer needs to deploy a vocabulary that is as simple as possible in all the circumstances – but no simpler.

This chapter 'De Maupassant' by Max Barrett is from the title *Great Legal Writing: Lessons from Literature*, published by Globe Law and Business.

48 See Guy de Maupassant, *Pierre and Jean* (PF Collier & Son, 1902), xliii.
49 *Ibid.*

Great Legal Writing

Lessons from Literature

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