LAWYERS AND THE ENGLISH LANGUAGE:
We didn't mean any harm, honestly…

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It is inescapable that non-lawyers (that is to say, of course, almost everybody) believe that we lawyers use language in an odd, and very bad way. We are regularly accused of prolixity, turbidity, turgidity, obscurity, technicality, and grandiloquism – and, the excessive use of polysyllabics.

But words are all we have. They are our only tools of trade. Sir Walter Scott, largely forgotten now but famous as a novelist, lawyer and judge 200 years ago (in the way, say, that John Grisham is today) had a lawyer in one of his novels[1] point to the books on his wall, and say this:

> These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses knowledge of these he may call himself an architect.

In truth, we are simple seekers after clear and precise language – for, in one of our many nice phrases, the removal of doubt. But it is the tension between those two things – clarity *versus* precision – that often seems to lie at the heart of a common accusation: that we lawyers are mad pedants, suffering from a sort of verbal obsessive compulsive disorder.

One American commentator suggests[2] that our constant search for precision in what we say means that we would, if asked to draft something careful to capture the legal effect of the phrase '*Help yourself to an orange*', produce something like this:

> I Alan Wilson give you all and singular my estate and interest, right, title, claim and advantage of and in this orange with all its rind, skin, juice, pulp and pips and all right and advantage therein, with full power to bite, cut, suck and otherwise eat the same or give the same away as fully and effectually as I the said Alan Wilson am now entitled to bite, cut, suck or otherwise eat the said orange or give the same away with or without its rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter or any other deed or deeds, instrument or instruments of whatsoever nature or kind to the contrary in anywise notwithstanding.

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1 *Guy Mannering;* the speaker is a Scottish advocate, Counsellor Pleydell

2 *The Nature of Legal Language*, Tiersma, www.languageandlaw.org (accessed 4 March 2015).

That is plainly a bad, exaggerated example; but, deep in our lawyer hearts, do we not feel a scintilla of admiration for the depth of detail achieved by the drafter? And, alarmingly, some unease – what if we wished to juice the orange, and no more? Or, throw it? Do we have a licence to do that?

In this talk I shall advance three propositions: that we are guilty of using the language badly, as charged; that it is not entirely our fault, and there are some grounds for a plea in mitigation; and that, as judges sometimes say during the criminal sentencing process, there is also some prospect of rehabilitation.

Rehabilitation will not happen overnight; we have almost 1,000 years of the legal linguistic edifice to dismantle, examine, and retain or discard.

And writing more shortly and more simply, which I will argue is our first goal, is hard work. As Blaise Pascal said over 350 years ago:

> *This is a long letter because I have not had the time to make it shorter.*

Just disgorging words into a dictating machine or importing slabs of previously written material into our letters and emails and documents is often easier than taking up a pen, or turning to our keyboards, and trying to write clearly and succinctly. But writing well (which means writing to the point, simply, and elegantly) – should be a matter of personal pride. P G Wodehouse put it like this[3]:

> In dishing up this narrative … it has been my constant aim throughout to get the right word in the right place, and to avoid fobbing the customers off with something weak and inexpressive when they have the right to expect the telling phrase. **It means a bit of extra work, but one has one's code**.

He was a novelist. Good writing was his trade. We are lawyers and not poets, novelists or literary critics. Most of us know little or nothing of the theories of narrative, and of literary criticism. When we write professionally we are not embarking on a quest after the persuasive power or beauty of language but, rather, aiming for nothing more than the clear analysis of a legal question or problem and a clear transmission of the response we are asked to provide to it.

Some commentators rightly say that it is not the work of lawyers to produce breathless prose, and sonorous writing[4]; but, as the American judge and polymath Richard Posner has remarked, beauty and sonority are not synonyms. Nor is clarity incompatible with rhetorical power. As lawyers who write, we can be as professional as we like and still, as Posner says, avoid infelicities that impair readability, but have no offsetting benefit[5].

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3 The Mating Season.

4 Pierre N Leval *Judicial Opinions in Literature in Law's Stories*: *Narrative and Rhetoric in the Law*, 206 (Brooks & Gewirtz, Editors, 1996)

5 *Law and Literature*, Posner, 3rd Ed, p 333.

In other words the business we ought to have of writing clearly, and persuasively, does not prevent us from having a good style or, even, an elegant one – and, writing being the most important thing we do, it is important for us to do it well.

It's a fair cop: *or*, guilty as charged

But so much of the language we use as lawyers is convoluted, obscure, and redundant or, even, ridiculous – yet over-familiarity means that often we do not see it.

Two simple examples are enough. The phrase *last will and testament* contains two innate absurdities: first, *will* and *testament* mean the same thing. Secondly, *last* features in the introduction to almost every will ever made regardless whether it is the first, the last or somewhere in the middle. I once appeared in a case involving 23 last wills and testaments, made by one person, and have to admit that the odd usage simply never occurred to me even though that was the very question we were attempting to answer in the case (a probate action involving questions of mental capacity in which a number of the 'last' wills were dubious).

In any event the notion that when we are making any will it is our *last* will involves an absurdity, on a number of levels – how can we know? Why, in any event, should we pretend to be certain? Why are we even using language that might be interpreted as an attempt, unnecessarily, to close off the opportunity to make another one later on?

The second example concerns warnings on medicines, and the like. Most ointments, salves or unguents (there we are – three words that mean effectively the same thing) bear a prominent warning: FOR EXTERNAL USE ONLY, often accompanied by something like NOT TO BE TAKEN OR APPLIED INTERNALLY. In everyday speech *external* means *outside* and *internal* means *in one's home* or *inside a building or enclosed or confined space* (there – I've done it again!).

Fortunately most citizens are smart enough not to take lawyers' language too literally. What we mean is DON'T ON ANY ACCOUNT TRY AND SWALLOW THIS STUFF – OR, STICK IT IN YOUR EAR.

The American humourist Will Rogers said that … *the minute you read something and you can't understand it, you can almost be sure it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer*.

That last example is another instance of our determination, as a profession, not to let the common meanings of particular words, or their normal usage,

subsume the historical meanings we have ascribed to them even if the result confuses non-lawyers.

Consider *consideration*. That word is very familiar to us as lawyers and means the act, forbearance or promise by one party to a contract that constitutes the price for which the promise of the other party is bought. That is a million miles away from the ordinary meaning of the word, universally used, where it means thoughtfulness and proper behaviour towards other human beings – or animals or, indeed, the entire material world. It has nothing at all to do with promises, and the price for them. What we mean, in ordinary speech, is *price.*

Another example is *on a frolic of her own*, to describe a person alleged to be going about their own and not their employer's business when, typically, injured in some way. Nobody says 'frolic' much anymore, and certainly never in that context.

Retired Federal Court judge Peter Heerey calls this 'colonising' language, meaning that the law has captured and enslaved what were once ordinary English words and phrases. *Manifest* is a good example; criminal appeal courts say it all the time, to describe sentences that are much too high or much too low – but they don't use those phrases. No one nowadays says 'The Broncos were manifestly hopeless last Saturday.' We've made the word entirely our own; I don't think it even survives as the name given to the list of a ship's cargo, or passengers.

Then, there is our natural bent towards prolixity. Professor Peter Butt has collected some striking examples in property law, including a standard form mortgage for one of Australia's banks which contained a clause of 763 words with two commas, one semicolon, three sets of brackets and no other punctuation. That was outdone, he discovered, by a New Zealand bank's standard guarantee form featuring a sentence of 1,299 words with no internal punctuation at all[6].

Another example he gives concerns the usual requirement in a lease that the tenant repair the premises. Rather than simply say *the tenant shall repair the premises* or *the tenant must repair the premises*, the standard lease usually contains something like[7]:

> The tenant shall when where and so often as occasion requires well and sufficiently repair renew rebuild uphold support sustain and maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof and all floors walls columns roofs canopies lifts and escalators shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks systems pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever.

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6 *What is plain language law and why use it?* Peter Butt, Law and Justice Foundation, 12 September 2002.

7 *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* (1979) 1 All ER 929.

Lest it be thought that I am sheeting all of the blame for this plague of words home to practising lawyers, we need only look at what the judges have achieved, writing in what might be called the 'received' style of Australian judgments. This passage has been significantly altered to disguise its author, but its form and style will be familiar:

> [1] Atlantic Pacific Corporation Pty Ltd (ACN 053 339 612) ("the landlord") appeals under s 198(a)(i) of the Northern Territory Civil and Administrative Tribunal Act 2006 (NT) ("the Act") from orders 2 and 4 of the orders of the Civil and Administrative Tribunal ("the Tribunal") in CAT Reference A456/2011 ("the proceeding"). The appeal is pursuant to leave granted by an Associate Justice on 13 June 2012. The proceeding was in the Commercial Tenancies List of the Tribunal.
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> [2] Patsy Holdings Pty Ltd (ACN 112 089 634) ("the tenant") was the applicant in the proceeding before the Tribunal, which began when it filed an application ("the application") on 4 February 2012. The landlord filed a response ("the response") on 23 February. The matter was heard in the Tribunal on 14 May 2012 ("the hearing"), and the Tribunal's decision ("the decision") was handed down on 26 May.
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> [3] The landlord and the tenant had entered into a three-year lease ("the lease") of premises known as T1 and T2, Leichhardt Street, Katherine ("the premises") commencing on 12 April 2009.
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> [4] The proper description of the premises is part of Lot 7 on RP 497357, County of Ryan, Parish of Wentworth. The tenant conducted a beauty therapy business at the premises ("the business").

Not our fault

Just why we lawyers have developed such a convoluted style is, partly at least, explained by history. English legal language can be traced back to Anglo-Saxon mercenaries, Latin speaking missionaries', Scandinavian raiders and, of course, the French[8]. Around 450CE Angles, Jutes, Saxons and Friesians arrived in Britain from the continent. They spoke closely related languages which came to form what we call Anglo-Saxon, or Old English. Although they do not seem to have had a distinct legal profession they developed a kind of legal language and some of its surviving words are ones we still use today – *bequeath, guilty, manslaughter, murder, oath, sheriff, theft, witness* and *writ*.

The Vikings gave us the very word *law* itself. It comes from the Norse word for *lay* which means *that which is laid down*.

The other thing they left us is a love of alliteration. You remember alliteration – *the rippling rill runs merrily o'er the surly stones*, and so forth. Old English poets strove to have two or three words in every line alliterate – not only for poetic reasons but, importantly, to make phrases easier to remember in a

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[8] Tiersma, supra.

largely pre-literate society. Most of these phrases have disappeared but some nice ones survive – *to have and to hold*, *any and all*, and *each and every*.

Latin arrived, as a linguistic element, not so much with the Romans but, later, with the first Christian missionaries in the 6th century. It became the language not only of the church, but of education and learning. *Clerk* simply means someone who can write, and it holds the origin of our words *cleric*, and *clergy*. For centuries, English courts recognised a kind of immunity for the clergy, whose members could avoid the gallows or the block by proving that they could read a verse from the Bible – called, colourfully, the *neck verse*. Latin survives, as we all know, in all sorts of roots and gerunds in our language. The best example is a word litigation lawyers use almost every day: A *versus* B.

The major influence was, of course, the arrival of the Normans in the 11th century. At first they wrote legal documents in Latin but by 1275 statues began to appear in French. They made a rich contribution to our language including, for lawyers, some which still faintly resonate with the notion that the speaker is wearing a beret, and shrugging: *demurrer*, and *voir dire* are nice examples. The other thing they left us is their propensity for putting adjectives after the noun they modify – *Attorney General*, *court martial*, and *malice aforethought*.

The French language lingered in the law for centuries. Even as late as 1631 it was being mingled in an odd way with English in the courts. A number of commentators mention a famous case in 1631 in which a condemned prisoner threw a brickbat at the judge. The report is in a hybrid English/French language, like creole; it says that the offender *ject un brickbat a le dit justice, que narrowly mist*. The judge was not amused: he ordered that the defendant's right arm be amputated and that he be *immediatement hanged in presence de Court.*

There are a number of possible explanations for legal English, as it is spoke today. They might be put in two groups, the first of which does not reflect well upon us – that we do it because we like to cling to old habits, keep non-lawyers in the dark, and protect our monopoly. Others accuse us of doing it to justify fees.

An American academic, Peter Tiersma, has some less unflattering explanations. Sometimes, he suggests, it is the client's fault – the disclaimer notices against theft or damage in privately run car parks are a good example. They are quite long, printed very small so you have to get up close to read them and then, cleverly, put somewhere which means you would have stop your vehicle and hold up others drivers while mastering their terms and deciding whether they warrant your *consideration*.

Another plausible explanation is the adversarial nature of our work. Almost any document we create is liable at some point in its existence to be picked apart by an opponent eager to exploit a loophole or ambiguity, or find some wiggle-room. Statutes are, naturally, regularly exposed to this.

Economics may also offer another explanation – large and small corporations mass produce pre-printed standardised forms, often using older recycled language, rather than reinventing the wheel for every transaction.

Tiersma also suggests two other plausible causes: first, that the legal system endeavours to state the law in an authoritative way, and drafters are attracted to formal, archaic language which conveys an aura of timelessness, and certainty. The law is made to seem almost eternal and immutable and, thus, more credible and worthy of respect.

Secondly, he points to our continuing desire for objectivity. We much prefer the passive voice and, thereby, create the impression that our acts are accomplished without the intervention of a fallible human agent. We judges refer to ourselves in the third person, generally as *the court*. Statutes and legal rules say that *any person who does X shall be guilty of a misdemeanour*, emphasising that the law is supremely impartial and never personal.

The plain language movement, with which Professor Butt has been vigorously associated, has made some headway although it has also met with resistance. One Victorian Appeal Court judge complained in 1998 that certain provisions of the *Corporations Law* were drafted *in the language of the pop songs*[9]. His Honour's own language inadvertently resonates – the definite article ***the*** *pop songs* – with those recurring stories about the judge as fuddy-duddy: (*What is this thing you call the internet, Ms Smith?)*

The American legal writer and theorist, Bryan Garner, and David Foster Wallace, the remarkable author of *Infinite Jest*, collaborated in a book called *Quack This Way* which considered why judges and lawyers, and legal academics and their students often write in ways that are excessively wordy, overcomplicated, jargon-ridden and abstract.

They decided that, in many cases, the reason is nothing more than a belief on the part of lawyers and students (and judges further down in the hierarchy) that this is what the judges and professors further up the hierarchy want – because they are seen to write that way.

Garner says it is critical to any piece of analytical writing that it must provide three things: the question, the answer, and the reasons for that answer[10]. The better the writing, Garner continues, the more clearly and quickly these things are delivered. Instead, he argues, readers of legal judgments have to work much too hard to find out the question which the written work purports to answer.

I cannot leave this topic without returning to something mentioned earlier in the context of judgment writing. The witty retired Federal Court judge, Peter Heerey calls it *bracket creep* in his book *Excursions in the Law*. He quotes a recent decision of the High Court in 2013 called *Google Inc v ACCC* which

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9 *GM & AM Pearce & Co Pty Ltd v RGM Australia Pty Ltd* (1998) 116 ACLC 429 at 432 per Callaway JA.

10 *A Dictionary of Modern Legal Usage*, 2nd Ed (1995) at 471.

begins with the following sentence in the joint judgment of Chief Justice French and Justices Crennan and Kiefel:

> *The appellant, Google Inc ('Google') operates the well-known internet search engine 'Google' ('Google search engine') …*

The notion that we readers needs to be assisted by the abbreviation of the names of people or companies in this way assumes the most profound stupidity on our part. Heerey mentions another recent judgment in which there was a reference to the United States of America with the helpful addition *('USA')*. As he points out, without it the first time the reader came across the acronym later they would have been puzzled, and worried – *Ugandan Secret Army? United Sexologists Association?*

A glance at any newspaper – in particular the financial pages – will show how referring to a number of parties, companies and the like can easily be done.

Rehabilitation? Is it too late?

In quite a number of cases judges have taken the lead in condemning legal drafting that is convoluted and unclear. Professor Butt mentions some in which judges have described legal documents as *botched, half baked, cobbled together, doubtful, archaic, singularly inelegant, and incomprehensible gobbledegook*[11].

It is almost 15 years since I drafted anything except a judgment. I can only speak of what the judges are doing about their writing style. The national and state judicial colleges have, since the turn of the millennium, been regularly presenting courses led by an American English Professor, Jim Raymond, encouraging judges and magistrates to avoid both historical and modern stylistic pitfalls and speak and write as simply and as clearly as possible.

Our judgments are not getting any shorter, across the board, but I think they are a becoming a little easier to read and understand. Raymond urges us to apply a new form of *neighbour* test, different from the one in torts: as we are writing, he suggests, we should think about the language we would use to describe the case and the legal issues being addressed in it as if we were simply talking to our neighbour about our day, over the back fence.

There are strong reasons to improve our writing. As Peter Butt says, surely no one can argue that the laws that bind us *ought* to be obscure, or incomprehensible, or that the documents we sign in everyday life like contracts and wills should be impossible to understand. As he points out, the adage *ignorance of the law is no excuse* holds true even if the law is cast in such dense and impenetrable language that the ordinary person simply cannot understand it.

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[11] See these and other examples in *Modern Legal Drafting*, Butt and Castle, Cambridge University Press 2011, Ch. 2.

There are other sound reasons too. For the judges, I think it does nothing but good if the public can understand what we have done and why, through the medium of reasons for judgment which are (to use the modern popular word) *accessible*.

Because it is appropriate to end on a happy note I'd like to give just two examples of great judicial writing, and great writing by a lawyer. They are quite old, but none the less compelling or relevant for it.

This is the famous American judge, Oliver Wendell Holmes, writing in 1920 in an important case[12] about the meaning and effect of a phrase in the US Constitution. It remains relevant because of the influence of 'originalists' like Antonin Scalia on the US Supreme Court. Holmes wants us to understand that the Constitution was not delivered whole, perfect and immutable like the tablets given to Moses by God, but was the best effort of human beings working, at a much earlier time, with the imprecise tools that words are; and, that meanings can change with time:

> When we are dealing with words like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.
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> It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.
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> The case before us must be considered in the light of our whole experience, and not merely in what was said a hundred years ago.

And this is the great lawyer, politician and orator Daniel Webster talking about something that is central to what we do – crime, and punishment:

> The criminal law is not founded in a principle of vengeance. It does not punish that it may inflict suffering. The humanity of the law feels and regrets every pain that it causes, every hour of restraint it imposes and, more deeply still, every life it forfeits.
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> But it uses evil as the means of preventing greater evil. It seeks to deter from crime, by the example of punishment. This is its true and only true main object. It restrains the liberty of the few offenders that the many who do not offend may enjoy their own liberty. It forfeits the life of the murderer that other murders may not be committed.

As a judge I have struggled for many years with the principles, enshrined in statute, of *general* and *specific deterrence* and, in particular, the critical question: what evidence is there that any person is deterred from committing a crime because others have been punished for that, or other, crimes? I am

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12 *Missouri v Holland* (1920) 252 US 416.

not sure that Webster is right but we have to concede that this is the best and most effective exposition of the principles that we may ever expect to see.

For the students here, remember that one sure path to better writing is good reading. Most lawyers have the innate ability to write clearly. With a little effort, and some help from masters of a good clear style like Katherine Mansfield, George Orwell or William Trevor, we can write well. I urge you to try.