

NATIONAL BOOK COUNCIL

FIFTH ANNUAL LITERARY DINNER

THURSDAY 12 OCTOBER 1978, 8 P.M.

THE LAW AND LITERATURE

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LAWYERS AS WRITERS

The link between the law and literature needs few words from me. Our professions have long been associated. "Words" declared Lord Birkett "are the raw material of the legal profession, and the assiduous study of words and the proper use of words has always been part of the lawyer's most desirable accomplishments".<sup>1</sup>

Many judges write tediously, contenting themselves with a dreary succession of quotations concluded by an assertion that this or that result follows as an inevitable conclusion.<sup>2</sup> This style, Mr. Justice Cardozo of the U.S. Supreme Court typed as "the tonsorial or agglutinative" :

"The writer having delivered himself of this expression of a perfect faith, commits the product of his hand to the files of the court and the judgment of the ages with all the pride of authorship. I am happy to be able to report that this type is slowly but steadily disappearing".<sup>3</sup>

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1. Lord Birkett, Foreword, L. Blom-Cooper, *The Law as Literature*, 1961, ix.

2. B.N. Cardozo, Law and Literature, 14 *Yale Review* 699 (1925) reprinted in Blom-Cooper, 193.

3. *Id.*, 711.

Many judges of our tongue have been not only great masters of the law but contributors to the treasury of literature. When John Somers "broke the rod of the oppressor" in defence of the Seven Bishops, he enriched the annals of law and at the same time made a lasting contribution to literature. The greatest biography in our language, Boswell's *Life of Johnson*, was written by a lawyer. The Inns of Court of London were not only nurseries of the law. Bacon and Lamb, Thackeray and Dickens and many more sharpened their talents in the rigorous study of legal precepts.

Cardozo most admired the style he called "magisterial" : the voice of the law speaking by its ministers with calmness and assurance born of a sense of mastery and power.<sup>4</sup> In America, John Marshall; in Australia, Owen Dixon; in England, Lord Mansfield.

This style is a little out of fashion on the Bench today. It remains the man in the street's stereotype of judicial literature. When the slave Somerset, captured on the coast of Africa and sold into bondage in Virginia, was brought to England by his master, the case came before Lord Mansfield on the return of a writ of habeas corpus. Lord Mansfield intoned :

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserved its force long after the reasons, occasions, and time itself from whence it was created are erased from memory. It is so odious that nothing can be suffered to support it, but positive law ... [V]illainage has ceased in England and it cannot be revived. The air of England has long been too pure for a slave, and every man is

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4. *Id.*, 702.

free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin ... Let the negro be discharged".<sup>5</sup>

"Let the slave go free". This conclusion and this case illustrate the link of law and literature. I, least of all, come here to assert that the law is perfect, that it has no "slaves", that it does no wrong or that it is need of no reform. Of course the law (like literature) must be constantly scrutinised and submitted to fresh examination by each succeeding generation. The "slaves" of today : the underprivileged, the timid, the ignorant, those who do not command our language, our culture or our ways, must be given special protections and assistance if true justice is to be achieved under the law.

But the case of Somerset the slave does illustrate on a grand scale the daily dramas which are played out in every local court. Disputes civil and criminal, human passions and tragedies, are paraded in a public place and determined, generally in a reasoned way, by the vehicle of words.

This combination of human predicament, verbal machinery and (not infrequently) competing ideas and high ideals is inevitably a theatre in which the lawyer of the most modest talent, and the judge, plays out his part. Sleepless nights are spent by the advocate wrestling with the way a matter should be put, a personality projected, a question asked. The script constantly changes and all too often the author loses control of the direction taken by his plot. The fact remains that lawyers and *littérateurs* work a similar craft. Their business is the human drama. Their tools are words and ideas. You will not think it boastful of me to say, therefore, that I feel at home amongst you.

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5. *Somerset v. Stewart* (1772), *Lofft*, 1, 98 E.R. 499 sub-nom *Somerset's Case*.

TWO MUTUAL CRITICS

This is not to say that the relationship, though close, is always a warm and congenial one. Lawyers have become used to being the "butt end" of the jests of writers. Shakespeare put in the mouth of one character a solution that has occurred to more than one revolutionary since : "First, let's kill all the lawyers".<sup>6</sup> Dickens, from the inside as it were, lampooned the tardy procedures of the courts and made a real contribution to the social movement for reform of court procedures in the 19th century. Lewis Carroll in *Alice's Adventures in Wonderland*, struck a regular theme :

'In my youth' said his father, 'I took to the law;  
And argued each case with my wife;  
And the muscular strength which it gave to my jaw  
Has lasted the rest of my life'.

More lately W.H. Auden in *Law Like Love* had this to say about people like me :

"Law, says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is The Law".

Occasionally we judges can get our own back. George Bernard Shaw wrote a will which was a long and complicated document, fatally composed by the combined hands of a legal draftsman and a vigorous critic of the law. He sought to set up a trust for a new alphabet but the trust failed on the ground that it was not charitable and that its terms were uncertain.

Shaw anticipated the waywardness of the law. In clause 40 of the will he made alternative provisions for his estate

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6. *King Henry VI*, Part II, IV., ii., 86.

should "such trusts fail through judicial decision". In the Court of Appeal Harman L.J., himself an Irishman, had (as judges are prone to do) the last word. His celebrated judgment opens thus :

"All his long life Bernard Shaw was an indefatigable reformer. He was already well known when the present century dawned, as a novelist, critic, pamphleteer, playwright and during the ensuing half century he continued to act as a kind of itching powder to the British public [and] to the English-speaking peoples ... Castigating their follies, their foibles and their fallacies, and bombarding them with a combination of paradox and wit that earned him in the course of the years the status of an oracle ... It was natural that he should be interested in English orthography and pronunciation. They are obvious targets for the reformer. It is as difficult for the native to defend the one as it is for the foreigner to compass the other ..."<sup>7</sup>

After striking down the trusts, the judge could not spare himself a reference to the artist's jibe in his alternative gift :

"The ... alphabet trusts ... must fail. It seems that their begotter suspected as much, hence his jibe about failure by judicial decision. I answer that it is not the fault of the law, but of the testator, who failed almost for the first time in his life to grasp the legal problem or to make up his mind what he wanted".<sup>8</sup>

But though we often have the last word, I will be letting out no judicial secrets if I confess that more judges than one

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7. *In re Shaw deceased; Public Trustee v. Day*, [1957] 1 W.L.R. 729, 731.

8. *Id.*, 746.

feel frustrated that their pearls are too often locked away in legal books or that their training in the strict syllogistic mode limits the flights of fancy to which their pen can take them. A frank admission of this frustration is found in the judgment of Holmes J.A. in describing a case of gross injustice which later led to the removal from the Bench of a New South Wales magistrate :

"The picture is one which shows how the poor, sick and friendless are still oppressed by the machinery of justice in ways which need a Fielding or a Dickens to describe in words and a Hogarth to portray pictorially. What happened that day ... to the applicant was only the beginning of the terrors which were to confront him before the proceedings before this stipendiary magistrate were completed".<sup>9</sup>

Words, ideas, emotions, people. These are our common concerns.

#### REFORMING THE LAW

One of the reasons for a tension in the relationship between lawyers and writers of literature is the legal minefield of dangers and traps which the author must tread. I leave aside the laws of copyright and obscenity, the criminal law generally, the law of contract and the law of contempt. One subject which has brought the Law Reform Commission into contact with authors is the law of defamation. The Commission received a reference from the Commonwealth Government aimed at modernising and simplifying, but above all unifying, Australia's defamation laws. At the moment every author must tread cautiously for fear of offending not only the defamation laws of his own State, or the State of publication, but also the publication laws of any State into which his work is distributed. Effectively, in Australia, this means the search for the lowest common denominator of permissible publication.

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9. *Ex parte Corbishley*; Re Locke [1967] 2. N.S.W.L.R. 547, 549.

The lack of a uniform law governing publications is a monstrous blight upon free speech in our country. Whatever else we do in defamation law reform we must search for an acceptable uniform law. We have no constitutional guarantee, as the Americans do, of free speech and the free press. These are merely traditions in our country which can be undone if they do not have their defenders.

After two years of the most thorough consultation in all parts of the country and with all interested groups, including the public, the Commission has now committed its report on *Unfair Publication*<sup>10</sup> to the printer. I hope that it will be tabled in the Commonwealth Parliament before the end of the year and that it will lead to action for reform. There have already been more than enough words.

Because the report has not yet been delivered, you will understand it if I do not disclose the Commission's conclusions. A number of submissions were made to us urging that there should be a general defence to defamation and privacy actions if it could be established that the relevant publication was contained in a work of literary, artistic, historical, scientific or educational merit. Inevitably, the creative writer draws upon material from his own experience. This is scarcely surprising. Somerset Maugham in his preface to *Cakes and Ale* described it thus :

"When the book appeared, I was attacked in various quarters because I was supposed in the character of Herbert Driffield to have drawn a portrait of Thomas Hardy. This was not my intention ... I am told that two or three writers thought themselves aimed at in the character of Alroy Keir. They were under a misapprehension. This character was a

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10. The Law Reform Commission (Aust), *Unfair Publication* (A.L.R.C.11), 1978. (publication expected December 1978).

composite portrait : I took the appearance from one writer, the obsession with good society from another, the heartiness from a third, the pride in athletic prowess from a fourth, and a good deal from myself. For I have a grim capacity for seeing my own absurdity and I find in myself much to excite my ridicule. I am inclined to think that this is why I set people ... in a less flattering light than many authors who have not this unfortunate idiosyncrasy. For all the characters that we create are but copies of ourselves. It may be of course also that they really are nobler, more disinterested, virtuous and spiritual than I. It is very natural that being godlike they should create men in their own image".

*Esquire* magazine described Arthur Miller for writing his book *After the Fall* following the death of Marilyn Monroe, his former wife, as "blabbermouth of the year". But submissions to the Law Reform Commission asserted that the fine line between malice and creative imagination, fact and fiction should not be disciplined by the law of defamation.

Creative writers have always had to contend with the rigours of defamation law. Yet, so far as we were informed, only two Australian cases, both rather special, actually came to proceedings before a court.<sup>11</sup> No doubt this is because a plaintiff has to prove that the matter about which he complains actually refers to him. Because like Somerset Maugham authors

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11. One is the criminal prosecution of Frank Hardy, the author of *Power Without Glory*. The issue tendered in that case was identification; - whether John West in the novel was the real-life John Wren. The jury acquitted Hardy. The other case was an action brought in respect of a poem which was published referred to a family identifying the chief protagonist as "my ex husband's wife". The daughter of the family was described as "autistic". The poem referred, in disparaging terms, to each member of the family and his or her personal habits. The writer's "ex husband" had, in fact remarried and had a mentally retarded (though not autistic) daughter. The case was settled. The moral may be that it is not unreasonable to expect creative writers to make some attempt at disguise.

are generally careful to blend the characteristics of a number of people (or do so subconsciously) it is usually quite difficult to say that this or that character represents a particular person.

There is also the problem of the innocent victim. A novelist or playwright could, in entire good faith, create a character with a particular name and occupation who is a vicious bank robber. Should this work gain general currency, it would be rather hard to deny an actual person of that name who shared certain characteristics with his fictitious namesake, an opportunity of establishing that he was not the basis of the portrayal. Accidental defamation should clearly be cheaply and quickly disposed of. The Law Reform Commission has emphasised from the beginning of its project that the road to defamation law reform lies chiefly in the reform of defamation procedures.

I hope that authors, when they see the report and its recommendations, will find the reforms suggested, and especially those relating to procedural change, acceptable. No country gives a blanket defamation defence to artistic and literary works. Were we to do so, the most scurrilous attacks could be dressed up as literature. Even where they had literary merit they would be all the more damaging for that reason. But the blight on artistic writers that arises from the "pot of gold" syndrome of current defamation laws must be removed. Striking the fair balance between the vindication of honour and reputation, on the one hand and free speech and creative literature on the other is a difficult task. Time will tell whether the Law Reform Commission has got it right.

Lord Brabazon once said that if a person cannot say what he has to say in twenty minutes, he should write a book. I am not sure that the National Book Council would endorse this lordly thesis. I have spoken for the prescribed time. I have no intention of writing a book upon the theme of this address. I congratulate the National Book Council upon organising this Fifth Annual Literary Dinner. Shortly I will have much pleasure in congratulating the authors who have been judged worthy of the awards for Australian literature 1978.