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LAUNCESTON, TASMANIA, 17 OCTOBER 1986

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'LITERARY DINNER'

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The Hon. Justice M.D. Kirby, CMG*

LAWYERS AS WRITERS

The link between the law and literature needs few words from me. These two 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".[1]

Judges quite tediously, content themselves with a dreary succession of quotations concluded by an assertion that this or that result follows as an inevitable conclusion.[2] This style, Justice Cardozo of the U.S. Supreme Court types 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."[3]

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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,Thackerey 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.[4] 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 postive 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

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".[5]

"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 writers, even journalists!

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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".[6] 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 ..."[7]

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".[8]

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".[9]

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 committed its report on Unfair Publication[10] to the printer. Sadly, after a long debate the report was shelved. After all that effort I would have hoped that it would lead to action for reform. There have already been more than enough words. Seemingly, action is far off.

In the course of preparing the report on defamation for the Attorney-General 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.

> 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.[11] 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 emphasised from the beginning of its project that the road to defamation law reform lay chiefly in the reform of defamation procedures.

It was the hope of the Law Reform Commission that writers and poets in Australia would 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. One day the report may be revived.

Lord Brabazon once said that if a person cannot say what he has to say in twenty minutes, he should write a book. I have no intention of reading a book to you tonight. However, I intend to close with a number of illustrations of the law as literature. Necessarily, these can be no more than a sampling of some of my favourites - taken at random.

LEGAL WRITINGS - ON THE JUDICIAL PROCESS

The history of our legal system is replete with famous stories of courageous litigants, assertive jurors and judges, defensive of freedom. Of course, it is not always so. Even today, there are troublesome litigants and witnesses; perverse juries and over bearing judges.

The Australian legal system traces its origins directly to the common law of England. In this way, it has a legal history of 800 years. From the Great Charter, which is still part of our law, to the present day, our liberties and our rights have largely been fashioned in courts of law - although nowadays they are increasingly mapped out by Acts of Parliament.

Even today, in our courts, it is frequently necessary to refer to ancient cases. This is often done to remind ourselves of the basic principles of our legal system which must be followed today, just as they have been followed for hundreds of years in the past.

One such case recently arose in my Court.[12] An experienced trial judge had made an order in proceedings in which a solicitor had been named as a party. The judge ordered, in effect, that the name of the solicitor, his firm and employees should be suppressed. A similar order was sought from the Court of Appeal. This order was refused unanimously. In my judgment, I referred to the fact that the courts of England were open from the earliest times. This is a feature that is not universal in courts of justice around the world. The early practice grew out of the history and procedures of the English courts, rather than a principled decision of conscious policy. In Saxon times, courts were created by the attendance of people who gave their verdict. In Norman times, the jury of 12 neighbours perpetuated the open tradition established before the Conquest. Even the Star Chamber heard cases publicly. Indeed, even proceedings for high treason and other great crimes and misdemeanours were held in public. I cited the record of the trial of Lieutenant Colonel John Lilburne in

12. Raybos Australia Pty Limited v Jones (1985) 2 NSWLR 47.

1649. In the reports of the State Trials there is contained Lilburne's plea:

> "That by the laws of this land all courts of justice always ought to be free and open for all sorts of ... people to see, behold and hear, and have free access unto; and no man whatsoever ought to be tried in holes or corners, or in any place where the gates are shut and barred, and guarded with armed men: and yet, Sir, as I came in, I found the gate shut and guarded, which is contrary both to the law and justice."

The presiding judge, Richard Keble, Lord Commissioner, satisfied Lilburne that the doors stood open, by inference accepting that this was necessary. This principle can be traced, as it was in my judgment, through decisions from those early, dangerous times right up to the present. The famous words are handed down to us from earlier case. They support and reinforce the principle of the open administration of justice. It is a principle which ensures that judges, whilst they are judging, are themselves constantly being judged. Judged by the parties, by the legal profession, by scholars and by the general public who can observe their conduct.

Scrutiny of the conduct of judges is a topical subject at present. Some idle readers of newspapers might be deceived into believing that it is a subject that has just burst upon the scene. This is not so. The appeal process, in which I take part, is regularly engaged in scrutinising the professional conduct of judges and making them accountable to the law. A great writer of judicial prose this century is Lord Denning. He had to preside in a case where there was a complaint about the loquacity of a fellow judge, Sir Hugh Hallett. Sir Hugh's judicial career began quietly enough. But he became very talkative. So interested was he in every case, that he dived deep into every detail. The climax came in a widow's claim for damages. The widow appealed on the ground, amongst others, that the judge's interruptions had made it impossible for her counsel to put her case properly. The Court of Appeal reserved

its decision, realising that it might lead to the end of the judge's career, as indeed it did. The Court took special care in framing its words. This is what Lord Denning said:

> "We much regret that it has fallen to our lot to consider such a complaint against one of her Majesty's judges: but consider it we must, because we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the judge on a fair trial between the parties. ... No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the Board, and to see whether they were well founded or not. Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives upon which judges daily intervene in the conduct of cases and have done for centuries.
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> Nevertheless, we are quite clear that the interventions taken together were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigations or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "how's that?" His object, above all, is to find out the truth and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, LC

who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question"? See Ex parte Lloyd (1822) Mont 70 at 72 n. And Lord Greene, MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict". See Yuill v Yuill [1945] P 15, 20.

> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the "nicely calculated less or more" - but the judge at the end decides which way the balance tilts, be it ever so slightly. ... The judge's part in all this is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the point that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Such are our standards."[13]

In the end, a new trial was ordered; a widow secured justice; a trial judge's career ended in humiliation. But it was all done in powerful magisterial language.

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13. Jones v National Coal Board [1957] 2 QB 55.

LEGAL WRITINGS - WRY WIT AND VERBAL ELEGANCE

This language, and use of words, is not confined to the judges of England. The tradition has been inherited in this country. And no-where has the style been more sharply refined than by the succeeding generations of the Justices of the High Court of Australia. Most of them have been strong personalities. Many of them have had experience in public life before ascending to that Bench. Of those who came up through the Bar or from other Courts, the refinement of ideas in the clash of intellect and will, fought out in daily battles in the court room have contributed to a sharpness of prose. Even a tax case can be made interesting by a master of succinct English. Thus, Sir Hayden Starke writing in 1928 administered a sharp rebuke to leading barristers, one of whom was Owen Dixon, KC, later himself to become a Justice of the High Court, Chief Justice of Australia and one of the finest expositors of our law. This is how Justice Starke opened his judgment:

> "This is an appeal from the Chief Justice which was argued by this Court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involves two questions, of no transcendent importance, which are capable of brief statement and could have been exhaustively argued by the learned counsel in a few hours."[14]

Perhaps you will see in this comment a tongue in cheek criticism, deftly administered, not only to the barristers at the Bar table but also to his brother judges who had argued the case amongst themselves over days, to the obvious impatience of the sharp minded Starke.

One of the most elegant penmen of the early days of the High Court of Australia was Sir George Rich. In an important case in 1930, he had to grapple with that well known provision of section 92 of our Constitution which promises that trade,

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14. Federal Commission of Taxation v Hoffnung & Co (1928) 42 CLR 39, 62.

commerce and intercourse between the States shall be absolutely free. How could such simple, collequial language be made to operate realistically in a national polity with inevitable commercial links and necessary national commercial regulations?

> "The rhetorical affirmation of section 92 ... has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high sounding words "absolutely free", the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion, for which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the eliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the every day practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct interstate trade, obliged this Court to accept the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the Constitution."[15]

There are many other illustrations of the elegancy of the style of Justice Rich.[16]

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15. James v Cowan (1929-30) 43 CLR 386, 422-3.

16. See eg 63 CLR 383, 455.

LEGAL WRITING - SIR OWEN DIXON

I have mentioned Sir Owen Dixon. A worthy illustration of his written style can be seen in a joint judgment, written with Justices Kitto and Taylor concerning literature and censorship. The case involved the Literature Board of Review of Queensland. Certain publications were held to be, within a statutory definition of objectionable literature, on the ground that they unduly emphasised matters of sex. Here is how the Justices approached their conclusion - writers of one special form of literature, describing another:

> "In the present case it happened that owing to the course the argument took in this Court we did not turn to the actual publications in question until we had listened to a discussion of the Act, the judgments of the Supreme Court and parts of the evidence, where the terms that are commonly employed with reference to impure literature constantly recur ... When we did turn to the publications their actual character proved quite unexpected and produced almost a sense of contrast. The theme of them all nearly is love, courtship and marriage. Virtue never falters and right triumphs. Matrimony is the proper end and if you are not told that happiness ensues it is the constant assumption. They are, of course, intended for feminine readers (sic). The pages contain nothing purient, lewd or licentious. The tone is the complete contrary. The vehicle for this romance and sentiment is the only too familiar crude drawing with the inset print of dialogue usually issuing from the lips of the figures. Needless to say, there are adventures, hazards, threats of violence and escapes to excite the apprehensions of a found reader. Whatever sensations are aroused by the narrative must be short lived. For a story seldom occupies more than a dozen pages. There are, of course, bad men and they are sometimes wealthy. But invariably the heroine escapes from them by the aid of the strong, embracing arm of a good young man upon whom fortune is yet to smile. Why

then has this literature been considered unduly to emphasise matters of sex and exhibit a tendency to deprave? It is because the lovers are depicted as loving passionately. They embrace and they embrace closely. Their kisses, though pure and full and perhaps prolonged. Their feelings for one another are intense and joy and happiness are represented as coming from a love that is as deep and passionate as it is devoted. Moreoever, the eyes of the heroine are drawn with lids either drooping or unusually raised and her lips, though drawn in black and white, are obviously rosy as lipstick can make them. There is, too, an evident though crude attempt to infuse the subject with glamour in the modern technical sense of that term. Another element frequently recuring is love at first sight; and love at first sight is at times aided by the tacit acceptance of the "pick-up" as an ordinary social practice. The convention that requires formal introduction seems safely to be ignored by the heroines and there is no need to suppose that it is observed in the circles in which they and their expected readers move. The stories and pictures bear every mark of American origin. The drug store and the campus may be the place of meeting and the scenes through which the story takes the lovers thence are American and so is the idiom of the simple speech in which it is told. The whole atmosphere resembles that of the American cinema. The reason why these otherwise virtuous narratives have been held unduly to emphasise matters of sex and to be likely to be injurious to morality is because again and again they depict or describe love scenes in which the parties kiss and embrace and display an ardent passion one for the other."

As may be anticipated, the Justices (by a majority) quashed the orders of the Literature Board.

The human drama, love and sexuality are constantly in evidence in our courts. In one recent case coming before me it was suggested that a patient who complained of sexual advances

by her doctor ought to have been sent by him earlier to a psychiatrist, seemingly to cure her love of the doctor. I rejected this argument, reminding the parties:

> "[N]ot every infatuation warrants psychiatric attention. There would not be sufficient psychiatrists to attend to such cases; nor would they generally have much to offer the wounds of rejected love, for which time is usually the only healing potion."[17]

But modesty and prudence restrain me from offering you more contemporary legal literature. It must remain locked away in the lawbooks.

LAW AND THE DRAMAS OF LIFE

The dramas of life are fought out in the courts. Whether they are about property, tax, the Constitution, open trial, love and passion - the whole canvas is laid bare. Judges record and resolve these disputes in their judgments. Such is the pressure of work today that often there is insufficient time to refine, with eloquence, the judgments of the courts. But at least we have not, in Australia, yet come to the position in the United States where law clerks are said to write the judgments. One distinguished American judge has complained that this feature of the present scene, generated by the pressure of caseloads, has led to long winded judgments, lacking brevity, clarity and elegance.[18] However that may be, the gift of capturing, in a few sentences, the crises that have brought parties to a neutral decision maker in the hope of resolution, is a special gift. Judgments, properly written, can often be in the nature of a short story: unfolding the facts, recounting the applicable law, applying the law to the facts and thereby reaching a logical and rational conclusion which commands understanding if not assent.

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17. Stewart v Secretary, Department of Health & Anor, unreported, Court of Appeal, 6 August 1986, 22.

18. R.A. Posner, "The Federal Courts: Crisis and Reform", Harvard, 1985, 62-5.

Not every judge (let alone every lawyer) has the gift of clear writing. Many are long winded, obscure, muddled. Some even border on the unreadable. I do not pretend that the judgments in the law books can often be counted as first class literature. There is little risk that a judge will win the Nobel Prize for Literature. Just the same, if you want to see real theatre, you can do worse than to visit our courts, which are open, free of charge, daily to display the human drama. And if you want to read good writing, I can give you a few names in the law books, ancient and modern - including in the Australian law books, where legal literature can be found by the intrepid reader.