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STORIES IN ADVOCACY & IN DECISIONS

THE NARRATIVE COMPELS THE RESULT[1]

The Honorable Justice I.D.F. Callinan AC

Theory has it that the best evidence—that is to say, the best narrative—determines the result. This theory is rarely questioned. But, what determines the narrative? The capacity of litigants for self-justification is almost limitless. That is why independent witnesses are so important. They are innocent, it is said, of self-justification. True, but only partly true: what about their attentiveness at the time; their powers of observation; their desire for relevance, or importance, or even notoriety; their delight in their day in court; their recall and ability to understand the questions and to give an unexaggerated and accurate account of what they read, saw, or heard. The judge, however, is not confined to these.

Do not forget the documents, those contemporaneous smoking guns written when litigation was not even a gleam in the eyes of the lawyers who carefully monitor every word the executives write or email now that the writs have been issued and discovery is imminent. Do even contemporaneous documents always tell the truth though? That may well be doubted in these litigious times of in-house counsel and plaintiffs' lawyers competing for the ultimate pot of gold—that great representative contingency action in the sky that will set up every partner for life. The old solicitors once told their articled clerks, "Never write a letter or a memorandum, that you would be embarrassed to see in evidence in a court." I do not doubt that in-house counsel give exactly the same advice to corporations' executives these days as a matter of course.

It is out of this great sprawl of claim and counterclaim, welter of documents, accusation and defence, avarice, human fallibility and imperfectability that the trial judge has to construct the ultimate narrative, the judgment, and the factual findings, which will determine not only the trial, but also the first and the second appeals if they are launched.

Let me at this point make an interpolation. For the last century, or effectively since the substitution of appeal for writ of error, the legal fiction has been that although the parties and witnesses may be fallible on the facts, the judge is not. This is so, even though the widow's future sustenance, the corporation's solvency, and indeed the vast preponderance of the cases will be decided, not on fine points of law, but on the facts.

1. Article presented at *The Power of Stories: Intersections of Law, Culture, & Literature* Symposium in Gloucester, England, July 2005.

I confess that when I came to the Court after thirty-three years as a barrister and five earlier years as a solicitor, I brought with me more than a mild sense of dissatisfaction with the way the appellate courts of Australia treated cases on the facts. Until recent times, only New South Wales had a permanent Court of Appeal, and it heard civil matters only. Criminal appeals in that State, and all appeals in the other States, were heard by rotating panels of trial judges.

I recall on one occasion, waiting at the back of the courtroom of the Full Court, as it was called, for my appeal to be reached and listening to the criminal appeal preceding it. The appellant seemed to have more than a reasonably arguable point about a defect in the trial judge's summing up to the jury. I was shocked to hear the expostulation of the presiding judge that he was, "sick of the Full Court being used as a forum for the criticism of trial judges." I turned to my instructing solicitor who confirmed that I had not misheard. The judges could be as defensive of one another as the chateau generals in World War I. I can recall hearing on many other occasions, occasions upon which I do not doubt that everyone in the appellate courtroom knew that the trial judge had misunderstood or misstated the facts, the Full Court's fatal incantation that the trial judge had seen and heard the witnesses and that his findings on the facts could not be disturbed.

In recent times, however, there has been a recognition in Australia of the injustices that have been perpetrated in the shadow of this incantation. The basis for it has been demonstrated to be flawed. In my country, at least, it relies for its validity upon a series of cases in the admiralty jurisdiction of the United Kingdom in which the appellate courts declined to interfere with the judgments at first instance.[2]

Without reference to the special constitution of the Admiralty Courts,[3] the Australian High Court, in a series of cases, propounded a rule which made factual findings and decisions based on them impreg-

2. *See* Bland v. Ross, (1860) 14 Moo. P.C. 210, 235–37 (A.C.); 15 Eng. Rep. 284, 293–94 (case referred to as "The Julia"); Reid v. Aberdeen, Newcastle, & Hull Steam Co., (1868) 2 L.R.-P.C. 245, 247, 252 (P.C.) (appeal taken from Eng.) (following "The Julia" precedent); S.S. Hontestroom v. S.S. Sagaporack, [1927] A.C. 37 (H.L.) (appeal taken from Eng.).

3. If matters heard by the Admiralty Court involved nautical questions, including questions of skill and experience in navigation, judges were usually assisted by two of the Elder Brethren of the Trinity House, who sat with the judge as assessors. Their function was not to decide questions of fact, but to advise the Court on nautical matters. The decision on the case may have rested entirely with the judge who was not bound to follow the advice of his assessors, but as expertise almost always informed the findings of fact and the decision in the case, it is easy to see why appellate courts in the jurisdiction would be very restrained in intervening except for error of law. *See* BRUCE ET AL., A TREATISE ON THE JURISDICTION AND PRACTICE OF THE ENGLISH COURTS IN ADMIRALTY ACTIONS AND APPEALS 441–42 (3d ed. 1902); R.G. MARSDEN, A TREATISE ON THE LAW OF COLLISIONS AT SEA 291 (5th ed. 1904); *see generally* Beryl, (1884) 9 P.D. 4.

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nable.[4] The rule was propounded in the teeth of enactments establishing rights of appeal, which universally drew no distinction between error of law and error of fact.[5]

The recognition to which I have referred came at last in *Fox v. Percy*,[6] in which I said this:

> Statements made by appellate judges about findings of fact by trial judges repeatedly emphasise the advantages attaching to an opportunity to hear and see witnesses. They tend to understate or even overlook that appellate courts enjoy advantages as well: for example, the collective knowledge and experience of no fewer than three judges armed with an organised and complete record of the proceedings, and the opportunity to take an independent overview of the proceedings below, in a different atmosphere from, and a less urgent setting than the trial.[7]

In the same case, I attempted to express myself with candour and said:

> To impose the test stated in *Devries* is, I think, to do what was said to be impermissible as long ago as 1920, to elevate as a practical matter, the decision of a judge sitting alone to the level of a verdict of a jury. This is so even though judges are bound to give reasons and those reasons are required to be able to withstand scrutiny. The value of that scrutiny will be much reduced if a statement in the reasons that the demeanour of a witness has been determinative of the first instance decision, is effectively taken to be conclusive of the outcome of an appeal by way of rehearing. The vast majority of the cases tried in this country are tried by judges sitting alone and depend upon their facts rather than upon the application of complex legal principles. To impose an unduly high barrier, and not one sanctioned by the enactment conferring the right of appeal would be to deny recourse by litigants to what the Parliament of the State has said they should have. Judges are fallible on issues of fact as well as of law; sometimes they are obliged to work under a great deal of pressure, and sometimes they are denied a timely transcript. In the days when rights of appeal were first enacted, notes and transcripts were much less complete and reliable than they now are. And today courts of first instance, in some jurisdictions at least, rely heavily on written statements, certainly of the evidence in chief, the

4. *See* Abalos v. Australian Postal Comm'n (1990) 171 C.L.R. 167, 177–79; Dearman v. Dearman (1908) 7 C.L.R. 549, 549–50, 561, 565 (Austl.); Devries v. Australian Nat'l Rys. Comm'n (1993) 177 C.L.R. 472, 479–80; London Bank of Austl. Ltd. v. Kendall (1920) 28 C.L.R. 401, 407–08; *see generally* Warren v. Coombes (1979) 142 C.L.R. 531 (Austl.).

5. Regarding appeals, for example, section 75A of the Supreme Court Act of 1970 relevantly provides that it "applies to an appeal to the Court and to an appeal in proceedings in the Court," and that "the Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires." Supreme Court Act, 1970, § 75A (Austl.).

6. Fox v. Percy (2003) 214 C.L.R. 118 (Austl.).

7. *Id.* at 163; *cf.* State Rail Auth. of New South Wales v. Earthline Constrs. Pty. Ltd. (1999) 73 A.L.J.R. 306, 331–32 (Austl.) (Kirby J. discussing credibility findings).

oral adducing of which might on occasions have been as, or even more revealing than, evidence adduced from an honest but inarticulate or nervous witness in cross-examination. Occasional errors of fact are bound to be made. No litigant should be expected to accept with equanimity that his or her right of appeal to an intermediate court is of much less utility because it goes to a factual error that can be explained away by a judge-made rule, than an appeal on a question of law: or that although the trial judge was wrong on the facts, there was no incontrovertible fact against which the judge's error could be measured. This Court recently heard an appeal which provided an insight into the disposition of one New South Wales judge at least with respect to his task of deciding a personal injuries case. During the course of an application to dispense with a jury to which one party was entitled, and had requisitioned, he said:

> "I'll tell you straight out, I would do away with all civil juries in the State, instantly and retrospectively. I think it leads to, quite frankly, perfectly obvious miscarriages of justice in these Courts every week, every single week . . . I've been astounded here in the last six weeks calling this list, how many plaintiffs seek juries. I think it's prima facie evidence of professional negligence myself, for a plaintiff to seek a jury."

Demeanour based judgments in favour of plaintiffs following remarks of that kind are hardly likely to inspire confidence in persons wishing to defend claims against them. The test stated in *Devries*, in my respectful opinion, appears at least to go beyond some of the previous authorities in this Court. If faithful obedience henceforth to the statutory language might be seen as a departure from some other previous authorities of this Court, there would not be anything especially novel about that. This Court has made such departures in recent times on a number of occasions: examples are *Burnie Port Authority v. General Jones Pty Ltd., Trident General Insurance Co. Ltd. v. McNiece Bros. Pty Ltd., David Securities Pty Ltd. v. Commonwealth Bank of Australia, Mabo v. Queensland [No. 2], Wilson v. The Queen, R. v. L., Daniels Corporation International Pty Ltd. v. Australian Competition and Consumer Commission* and *Brodie v. Singleton Shire Council.* A test of "glaring improbability", [sic] "incontrovertible error" or "palpable misuse of an advantage" is not what the Act requires or all previous relevant decisions hold. Such a test pays, I am inclined to think, altogether too much deference to a trial judge's view of the facts and advantages, both actual and supposed. This is not to deny, however, that deference should be paid to first instance findings of credit. It is simply to prefer a test of wrongness, and to be guided by, rather than bound by findings on credit, or on the basis of demeanour.[8]

8. *Fox*, 214 C.L.R. at 165–66 (citing *Kendall*, 28 C.L.R. 401; Pettitt v. Dunkley (1971) 1 N.S.W.L.R. 376; Burnie Port Auth. v. Gen. Jones Pty. Ltd. (1994) 179 C.L.R. 520 (Austl.); Trident Gen. Ins. Co. v. McNiece Bros. Proprietary (1988) 165 C.L.R. 107 (Austl.); David Sec. Pty. Ltd. v. Commonwealth Bank (1992) 175 C.L.R. 353 (Austl.); Mabo v. Queensland (1992) 175 C.L.R. 1 (Austl.); Wilson v. The Queen

Having made that diversion, I return to my theme. It is, of course, not only the way the actual facts are narrated that determines the case, but also the order in which they are narrated and the facts that are omitted. There was a time, certainly in relation to negligence, when the chronology was all important. It is now more than 160 years since *Davies v. Mann*[9] was decided. Let me remind you of its facts. The defendant had the misfortune, whilst driving a wagon and horses at "a smartish pace," to hit a donkey and kill it. These were the days before the apportionment of liability for negligence, when courts strived for a formula to enable an injured plaintiff to recover even if he had been a substantial contributor to his own loss. It was Mr. Davies who left his donkey quite negligently unattended to graze on a highway with a pair of its legs tied. Mr. Davies succeeded in recovering for the loss of his donkey. Baron Parke's explanation for the invention of what came to be known as the rule of the "last clear chance," the "lost opportunity," or the "last clear opportunity" is not the most convincing of justifications:

> [A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischiefs Were [sic] this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.[10]

The statement of the chronology became everything. The events leading up to the accident itself faded into insignificance in comparison to the act or omission identified as the final relevant one—here, the defendant's progress down the highway. A different verdict would have resulted, however, had the chronology been stated differently, *i.e.*, identifying the final relevant conduct as the failure of the defendant to stay near or return to the donkey and remove it from the highway as the plaintiff approached or to warn him of the donkey's presence. Of course, when the apportionment legislation was introduced, the device of making the chronology of the narrative all important could be discarded. In Australia, for instance, this happened as soon as each of the jurisdictions enacted its own apportionment legislation. In short, the form of the narrative of the facts changed but not the facts themselves.

The narrative can become different, indeed dramatically different, if facts are omitted. I know of one permanent appellate court in Austra-

(1992) 174 C.L.R. 313 (Austl.); The Queen v. L. (1991) 174 C.L.R. 379 (Austl.); Daniels Corp. Int'l Pty. Ltd. v. Australian Competition & Consumer Comm'n (2002) 213 C.L.R. 543; Brodie v. Singleton Shire Council (2001) 206 C.L.R. 512 (Austl.) and quoting Justices Kirby and Callinan in Gerlach v. Clifton Bricks Pty. Ltd. (2002) 209 C.L.R. 478, 488).

9. Davies v. Mann, (1842) 10 M. & W. 546 (Exch. Div.); 152 Eng. Rep. 588.

10. *Id.* at 549.

lia whose members debated at length, what I understand to be common practice in Great Britain and elsewhere, the allocation of the task of stating the facts that will form the basis of the judgment or judgments to one judge and the acceptance of it by all of the judges. Repeatedly, the leader of the Australian Court sought to have the judges agree to this. The arguments were powerful. Judgments would be shorter, ratios would be clearer, and the acceptance of one statement of the facts would result in fewer dissenting judgments. The proposal was always rejected. Every judge knew that the statement of the facts or omission of certain facts could be decisive of the cases.

There are many different ways in which judges may find the facts. By and large, the work of a judge is not creative work. This is so despite the explosion of the myth that judges do not make or change the law, of which I will say something a little later. But whether you think judges should or should not be creative, I do not doubt that they need to be imaginative. Imaginative about what you may ask. And, I would answer—the law, human affairs, human frailty, vulnerability, depression and exhilaration, youth, middle age, and old age. How do judges become imaginative? I would answer—by reading. That is the way to improve the narrative.

Law and literature are inextricably related. Martha Nussbaum, the North American philosopher and lawyer, theorizes that an extensive knowledge of creative literature is highly desirable for judicial work, that it is a major source of knowledge, and essential for compassion and tolerance. Justice Richard Posner of the United States Court of Appeals has reviewed her book, *Poetic Justice: The Literary Imagination and Public Life*,[11] and various papers that she has published with approbation and is of a similar opinion. In her book, she makes the point that judges deal with narratives, and that they have to try to understand the whole story, with all of its divergences and apparent inconsistencies. An acquaintance with creative literature enables a judge to extend the mind to encompass all of this detail and to deposit the case flexibly in its appropriate department of the common law. I paraphrase what she has said, but there is much in it that is, I think, irrefutable.

Justice Richard Posner has turned to Tom Wolfe's *The Bonfire of the Vanities*[12] to make the point. Although he is critical of the style, he admires the way in which the author graphically demonstrates how catastrophic an encounter with the legal process can be. The New York legal system may not always be Kafkaesque, but as with any legal system, resort to it should be a matter of last resort. Wolfe would certainly have read Kafka. I doubt whether he could have writ-

11. MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995).

12. TOM WOLFE, THE BONFIRE OF THE VANITIES (1990).

ten *The Bonfire of the Vanities* if he had not. All lawyers would do well to read both.

In his book, *Law and Literature: A Misunderstood Relation*,[13] Justice Posner said this with which I do fully agree:

> Judges can obtain insights from literature that have nothing to do with effective presentation or persuasion but have rather to do with the spirit, meaning, or values found in literature, and so in a rough sense with content rather than just form. The relevant content, however, is not necessarily or even primarily paraphrasable content, which is the focus of the moralizing tradition in criticism, whose adherents range from Plato, Horace, Augustine, Samuel Johnson, Bentham, and Tolstoy to F. R. Leavis and Yvor Winters, to Marxist critics such as Terry Eagleton, and to feminist critics. Moralistic or didactic critics hold with varying degree of emphasis that the function of literature is to edify and that the canon should be confined to those works (if any—Plato thought there were few, and Bentham though there were none) that do edify. So one can imagine these critics preparing a reading list for judges. If poets are the unacknowledged legislators of the world, should not judges, above all others, pay attention to the poets' preachments? More mundanely, should not judges look to literature for instruction in the moral principles that guide or should guide judicial decisionmaking in that large open area where text and precedent and other conventional sources of legal authority run out? Might *Buck v. Bell* have been decided differently if Holmes had been steeped in William Blake and Jane Austen?[14]

To that, I would add this: literature, fiction included, is clearly capable of instruction as to form or narrative, as well as to content.

In his excellent *The Art of the Advocate*,[15] Richard Du Cann demonstrates how, on more than a few occasions, superior advocacy has almost certainly produced grave injustice. He demonstrates this by reference to a handful of cases, one of which is Professor Harold Laski's defamation action against a number of newspapers that published an article about a speech that he made during an early post-war election campaign in the United Kingdom.[16] Counsel for the defence was Sir Patrick Hastings QC who, incidentally, was a successful playwright some years before and, ironically, a member of an earlier Labor Government. Du Cann makes the point that Sir Patrick Hastings's devastating—some might say excessive or even grossly unfair—cross-examination of Laski was decisive for the defendants. Later, Laski wrote an elegant account of his experiences of a kind

13. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

14. *Id.* at 299.

15. RICHARD DU CANN, THE ART OF THE ADVOCATE (Penguin Books 1980) (1964).

16. *Id.* at 9–10.

which all counsel and every judge would do well to read. It sums up better than anything else I have read, the agony of the litigant and the horrors of the witness box:

> [I]f hope is a stimulant beyond any other, nothing is quite so decisive as failure. You may be beaten in a game and enjoy, nevertheless, the pleasure of combat. You may be 'plucked' in an examination and yet know that it is a temporary setback you will overcome in a month. You may even be routed in a skirmish and rest confident in the knowledge that it is only part of a larger campaign. But when you are beaten in the Courts of Law there is a kind of dumb finality about it which I can only compare with the ultimate emphasis of death.
>
> Every element in a civil trial goes to deepen this sense of finality. In the proceedings themselves you are almost bound to feel like a marionette. The speeches on both sides seem remote from the events you know; they are like blood in a test tube compared with blood in a living person. You know, of course, that it is about you the lawyers are talking, but all that they say seems to have lost its colour, its vividness, its sense of life, and to be reduced to a shadow-like skeleton which will never be clothed once more in flesh and blood. You only seem a human being when you are in the witness box and counsel on the other side is speaking about you and cross-examining you.
>
> As you listen to this speech and watch the mask-like faces in the jury box, you wonder if it is about yourself that he is talking. You remember the ardour of the incident, the enthusiasm of your effort—the devotion that sent you on a journey of hours for those seventy or eighty minutes of propaganda. Are you really that figure of evil, was your intent always so evil, did you always seem to those political opponents whom you sought to convince, an enemy so bitter and so malevolent? Did the pages you wrote over so many years, in so eager an effort to persuade, to find a common mind in which your fellow citizens could share, really read to them all the while like the effort of an Iago pouring some subtle poison into the ears of your opponents' vile conspiracy, when you thought at what you were urging was the magnanimity that gives birth to conciliation?
>
> The persona which the leader of your opponent makes with so much artifice from the complex alchemy of your character is well calculated to leave you certainly disturbed, and possibly almost stunned—but you must listen to it all with passive restraint. It is your enemies' hour, and they must have unmasked their batteries, probed all your motives, dissected with all the hostility they could muster ends and ideas that you do not even recognise as your own.
>
> And you are then handed over to that same counsel whose life has so largely been passed in pricking men until they bleed. He performs his war dance about you like a dervish intoxicated by the sheer ecstasy of his skill in his own performance, ardent in his knowledge that, if you trip for one second, his knife is at your

> throat. He makes a pattern from bits and pieces picked with care from a pattern of life you have been steadily weaving for a quarter of a century to prove either that you never meant what you intended, or that you lacked every element of skill to give the world the sense of your intent. He moves between the lines of sarcasm and insult. It is an effort to tear off, piece by piece, the skin which he declares no more than a mask behind which a man of understanding could have grasped the foulness of your propose. He treats you, not as a human being, but as a surgeon might treat some specimen he is demonstrating to students in a dissecting room.[17]

It is also true that the better the narrative, the more convincing, even perhaps enduring, the judgment is likely to be. The popular adventure novelist Alistair Maclean would have been proud, I think, to have written as good an introduction to a novel as the terse paragraph with which Denning L.J. commences his judgment in another defamation case, *Broome v. Cassell & Co.*:[18]

> Early in July 1942, a large convoy of 35 merchant ships—it had the code number PQ17—was sailing in the Artic seas lade with materials of war for Russia. They were between North Cape and Spitzbergen, near the icefields. At that time of the year there was no nightfall. It was light all the time. The convoy was approaching the most dangerous part of the voyage. The German battle fleet had come up swiftly and secretly. It was lying in wait in Alten fiord, just by North Cape. It consisted of the most powerful warship afloat—the *Tirpitz*—with the cruisers *Hipper* and *Scheer*, and six destroyers. Nearby, at Banak, was an airbase whence the German aircraft could make sorties of 400 miles to bomb the convoy. Under the sea there were German submarines watching through their periscopes for a chance to strike. The convoy would seem an easy target. It could only make eight knots. It had to steam at the pace of the slowest. But it was in good hands; it was guarded by the Royal Navy. The close escort was under the command of Commander Broome, R.N., the plaintiff, in the destroyer *Keppel*. It consisted of six destroyers, which were very fast, and several converted merchantmen as naval escorts, which were much slower. In support was a cruiser covering force under Rear-Admiral Hamilton in *The London*. It consisted of four cruisers and three destroyers. Further behind, ready to do battle, was the Home Fleet under Admiral Tovey in the *Duke of York*.[19]

That brilliant introductory paragraph was clearly not good news for the defendant.

In a lighter vein, but equally brilliantly, Vice Chancellor Megarry created a genuine piece of literature when he wrote these poetically rhythmic sentences in *Flynn v. Flynn*:[20]

17. Harold Laski, unpublished papers.
18. Broome v. Cassell & Co., (1971) 2 Q.B. 354 (Eng.).
19. *Id.* at 371.
20. Flynn v. Flynn, (1968) 1 All E.R. 49 (Ch.) (Eng.).

Errol Flynn was a film actor whose performances gave pleasure to many millions. On June 20, 1909, he was born in Hobart, Tasmania, and on October 14, 1959, he died in Vancouver, British Columbia. When he was seventeen he was expelled from school in Sydney, and in the next 33 years he lived a life which was full, lusty, restless and colourful. In his career, in his three marriages, in his friendships, in his quarrels, and in bed with the many women he took there, he lived with zest and irregularity. The lives of film stars are not cast in the ordinary mould, and in some respects Errol Flynn's was more stellar than most. When he died, he posed the only question that I have to decide: where was he domiciled at the date of his death? . . .

. . . .

. . .During the last year and a half of his life, Errol (as I shall call him) wrote an autobiography which in England was published shortly after his death under the title of "My Wicked Wicked Ways." He wrote this in collaboration with an American journalist and author named Earl Conrad, who spent some ten weeks with Errol in the Titchfield Hotel, Port Antonio, Jamaica, in the autumn of 1958 working on the book. Ungoed-Thomas J. directed that this book was to be admitted as evidence subject to Mr. Conrad verifying the statements in it made by Errol; and this Mr. Conrad duly did. I have been referred to a number of specific passages in the book and I have also looked through the book as a whole. Errol would, I think, have been the last person to claim that it was a serious study. It is plainly a book intended to entertain and to sell; and I do not doubt that it has done both. I am not covertly suggesting that what is said in the book is untrue; but truth is many-sided, and a wrong impression is perhaps more often conveyed by what is omitted than by what is said. Nor is it unknown that, in the telling, a story intended to entertain should grow and be refined. The resemblance between a tombstone and an autobiography may not be very close; but just as in lapidary inscriptions a man is not upon oath, so may autobiographies, even though verified by the oath of a collaborator, fail accurately to convey the truth, the whole truth, and nothing but the truth, as the author knows it.

Accordingly I accept the book both as giving a general impression of an unusual man and as containing the self-portrait which Errol wished the public to see. I accept it as containing many true statements of fact and intention, even if at times these are somewhat flamboyant and highly coloured. I would not, however, not accept it in toto without corroboration. As a sexual athlete Errol may in truth have attained Olympic standards; but the evident probability that this was part of the public image which the book was intended to foster (an image perhaps accentuated rather than weakened by his overt denials) inevitably induces reservations in the reader. On the other hand, in many matters there seems to be no reason for not accepting the substance of what is said, subject to due allowance being made for the style and nature of the publication and for the frailties inherent in the human recollections of a man who had lived a life such as his. At least in the sphere of intention and state of

> mind, an autobiography written near the end of a man's life may be of assistance in resolving discrepancies between statements of intention which he is alleged to have made to different people at different times; and I do not forget the perils which lie in seeking too zealously for consistency of statement and fixity of intention in one so mercurial as he.[21]

Judicial creativity on the other hand has its dangers. It may be all very well for Lord Reid to explode the fairy tale that judges declare the law and do not make it,[22] but his Lordship was a Lord of Appeal in ordinary. The problem with acknowledgment of the myth and its explosion is the encouragement that it may offer to judges at lower levels to ring the changes: other judges do it, why shouldn't I? It might have been better for Lord Reid to have added the caveat that although judges may do it, they should only do it infrequently, with great care and restraint and at high levels—in accordance with the great precedential system of the common law. Despite what he proclaimed, Lord Reid himself was generally careful to avoid the role of legislator.

The narratives of the law and the narratives of literature also have this in common: both are published and become a public thing, exposed and open to disagreement and criticism. Judges do public work. They are aspects of public life. Neither judges nor authors can afford the luxury of sensitivity. We are spared for the most part, fortunately, the violent criticisms that authors attract.

I have never read any description of a judge as brutal as that written by Bernard Levin, the English critic and polemicist. In his critique of actor Denis Quilley, who performed in a musical version of *Blithe Spirit*, Levin stated that "Denis Quilley played the role with all the charm and animation of the leg of a billiard table."[23]

When Michael Redgrave played the lead in *Hobson's Choice*, the poison pen critic Kenneth Tynan said that although some critics had "seen overtones of Lear in his portrayal," he thought "a somewhat bad tempered Father Christmas would have been nearer the mark."[24]

When Terrace Stamp played Dracula, the *Times*'s dramatic critic said that he had "nothing to offer except a noble profile, his entrances were insignificant, his voice without menace or mystery, and his physical tricks consisted largely of flapping his cloak like a bat failing to take off."[25]

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21. *Id.* at 50–51.

22. Lord Reid, *The Judge as Law Maker*, 12 J. SOC'Y PUB. TCHRS. L. 22 (1972).

23. Bernard Levin, *Denis Quilley as Charles Condamine in* High Spirit (1965), *reprinted in* No Turn Unstoned: The Worst ever Theatrical Reviews 41 (Diana Rigg ed., 1982) (hereinafter NO TURN UNSTONED).

24. Harold Brighouse, *Michael Redgrave in* Hobson's Choice (1964), *reprinted in* NO TURN UNSTONED, *supra* note 23, at 42.

25. Irving Wardle, *Terrence Stamp in* Dracula (1978), *reprinted in* NO TURN UNSTONED, *supra* note 23, at 44.

One of the most damning criticisms of all was of a play by J.B. Priestley called *When We are Married*, of which one critic said: "It would make an ideal treat as a night out for your despicable in-laws. Send them a couple of tickets and then meet them later at the Theatre restaurant for a blazing row."[26]

I have so far said nothing directly about the need for the narrative to be truthful. It may readily be acknowledged that absolute truth is often difficult to find, and that truthful people may honestly believe that their differing versions, sometimes differing in nuance only, are true. But, it would be a mistake for a judge or any fact finder to approach the task of constructing the narrative on the basis that the truth is in the eye of the beholder. Absolute truth may not be achievable, but judges are appointed and paid to come as close to finding it as humanly possible. To think or speak lightly about different truths and to believe that the text, the narrative, belongs to all of its readers—however they may choose to construe it—not to its author, is to disparage the search for truth and truth itself, and, therefore, to treat the judges' task as futile and of little value or importance. I would conclude by saying that because the narrative determines the result, it should always be as complete and true as humanly possible. After all, in our adversarial system, judges do enjoy the advantage—I think it is an advantage—of not only hearing both sides of the story, but also of having both sides tested.

26. When We are Married *by J.B. Priestley* (1979), *reprinted in* NO TURN UNSTONED, *supra* note 23, at 89.