Borderline Judgments: Law or Literature?

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Much recent legal scholarship has devoted itself to crossing the borders between law and literature in attempting to establish some ways in which those disciplines and their discourses can be brought into significant relationship.[1] The following discussion of judicial opinions will cross, and recross, some of the borders between law and literature. I have chosen to focus on judgments, because a major contention of some scholars is that the judicial opinion is the law's most literary form.[2]

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1 For different accounts of the various configurations of Law and Literature see the following three articles in the inaugural issues of 1 YALE JOURNAL OF LAW AND THE HUMANITIES (1988): Weisberg, *The Law-Literature Enterprise* 1; Weisberg, *Family Feud: A Response to Robert Weisberg on Law and Literature* 69; and West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement* 129. Michael Meehan has used some of these configurations in Australian contexts in *The Good, the Bad and the Ugly: Judicial Literacy and the Australian Cultural Cringe*, 12 ADELAIDE L. REV. 431 (1990) and in *Stretching the Imagination: Law as Australian Literature*, 49 MEANJIN 773 (1990). Meehan concludes in his latter piece: 'Lawyers who wish to dally with the tired old humanistic minnow of literary criticism should be alert to the deconstructive shark that is now, in all areas of textual analysis, so hotly on its tail'. The aptly-named Stanley Fish may be Meehan's 'deconstructive shark', for Fish is a key figure on the Law-Literature borderline. *See* S. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 13 (Duke U.P. 1989). *See also* Post ed, *Law and the Order of Culture*, 30 REPRESENTATIONS, Special Issue (1990); and *Deconstruction and the Possibility of Justice*, 11 CARDOZO L. REV., Special Issue (1990). For further bibliographical information see Petch, *Law as Literature*, 16 SYDNEY STUDIES IN ENGLISH 121 (1990-91).

2 *See* J.B. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (U. of Chicago Press 1990). *See also* the review of White's book by West, *Performing the Law* in Times Literary Supplement, 8 February 1991 at 23.

All but one of the cases discussed here have been heard in Australian courts, and I shall first follow the literary fortunes of a first instance judgment, decided in June 1990 by Justice Carruthers sitting as a Judge in Admiralty in the New South Wales Supreme Court. The case concerned the division of a salvage award arising from the rescue of a Filipino freighter by two Sydney tugboats in 1986, and was publicised in the *Sydney Morning Herald* in October 1990 as follows:

> The rescue of the Goldean Falcon is a classic sea yarn. You can imagine it in the pages of *Boys' Own Annual*: the hurricane winds and rolling seas; the cargo ship about to hit the rocks; the arrival of the heroic Australian sailors; the brave rescue.
> Better still, it's all true and happened off the NSW coast just four years ago.
> Yet there's a problem. The ending is all wrong.
> In classic sea yarns, the heroes celebrate their victory by buying each other beers. But in this story, the heroes end up in court, surrounded by lawyers, fighting over money.
> The beginning may be *Boys' Own Annual*. But the ending is all Joseph Conrad.[3]

Richard Glover easily turns the case into two modes of literary discourse, one from popular culture (*Boys' Own Annual*), and one from high culture (Joseph Conrad). The case makes a good story, and much of the human interest of Glover's narrative is generated by the stock literary device of contrast. He strategically contrasts the personalities of the captains of the two tugs, Captain Damp and Captain Murray, and adds to this an ideological contrast between modern egalitarian ideals, and the old traditions of the sea. (The point at issue in court was how the salvage money was to be divided between the skippers of the tugboats and the members of the crew.)[4]

This article was not the first version of the story to emerge from the courtroom. The September 1990 issue of the *Australian Law News* carried on its cover a picture of a massive wave about to break, and the words 'Salvage at Sea: the Case of the "Goldean Falcon" '.[5] This cover illustration, with its caption, was the first stage in the translation of the case away from the law into more general narrative discourse. As an introduction to its article, the *Australian Law News* says that 'the exciting story of the saving of the ship from almost certain destruction was recounted by Mr. Justice Carruthers in his judgment recently in the case of the "Goldean Falcon" '; and adds in a note that its own story is taken directly from this judgment, although 'His Honour's narrative has been shortened to fit the available space'. What should also have been said is that His Honour's narrative has been edited in the direction of literature, for in addition to shortening there is some rearrangement of Justice

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3 Glover, *Heroism Wrecked by a Tug of Reward*, Sydney Morning Herald, 6 October 1990 at 75.

4 J. Fenwick & Co. Pty. Limited & Ors. v. 'The Goldean Falcon' Her Cargo Freight and Bunkers. I quote from Justice Carruthers' judgment, and thank him for making it available to me. This material is subject to Crown copyright and is reproduced with the permission of the Crown. I am also grateful to Justice Priestley, of the New South Wales Court of Appeal, and to Marie Sullivan and David Tonge, of Clayton Utz, Sydney, for suggesting cases that have been of interest to me.

5 Australian Law News, September 1990, at 14.

Carruthers' judgment. Two features of this rearrangement edit the narrative away from the judge who wrote it, and nudge His Honour to the side of his own judgment.

One is paragraphing. Justice Carruthers' words are occasionally reparagraphed to speed up the narrative movement. At one point, for example, the judge concludes a paragraph as follows: 'A question then arose as to whether "Sirius Cove" [one of the tugs] should return to port, but Captain Damp resolved to carry on'. In the *Australian Law News*, this sentence opens the *next* paragraph, with the effect that Captain Damp's resolution is given greater prominence than it has in the judicial narrative. In the judicial narrative, his resolution concludes an organisational unit; in the *Australian Law News*, it initiates a narrative advance.[6]

The second crucial feature of the editing in the *Australian Law News* is the use or absence of quotation marks. Although the narrative in the *Australian Law News* is acknowledged to be taken from Justice Carruthers, it is given without quotation marks. But the judge's discussion of the legal issues, and the judgment itself, are authorised by quotation marks. The narration of the facts both precedes and is subservient to the 'quoted' judicial authority. These two editorial practices move the narrative away from the court and away from the judge, who is now both a figure in the story of the trial as well as one teller of the story in the trial.

When Justice Carruthers handed down his judgment he said, at the conclusion of his narrative and before turning to the law: 'If I have dwelt overlong on the facts, it is motivated by a desire to record in some permanent form the splendid feat of seamanship performed by the masters and crews of the "Sirius Cove" and "Manly Cove".... The operation as a whole demonstrates that Australian seamen are equal to any in the world'. Latent in the judicial narrative is a story of heroism which the judgment prompts, but which it does not itself tell. This primary record became the basis of various kinds of literary manufacture in the *Australian Law News* and the *Sydney Morning Herald.* Richard Glover was eager to apportion roles to the personalities to keep his story moving. Justice Carruthers did not do that, for the very good reason that his job was to apportion money, although he did this in accordance with his keen sense of institutional roles, and the responsibilities of a ship's captain. To minimise costs, the evidence in the case was confined to written statements from the two captains. These statements, strictly speaking, are the primary record of the narrative, so in bringing the captains to the fore the writer in the *Sydney Morning Herald* was being true to the sources of the judicial narrative, if not to its manner.

These three texts - the judgment, the account in the *Australian Law News*, and the account in the *Sydney Morning Herald* - chart an intricate relationship of law and literature, or literary potential. As the case moves from the court, two things happen: the judge becomes less authoritative, and the frames of reference broaden. Yet at the same time, those frames of reference keep reminding us of the law. Aware

6 On this distinction, *see* B.S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE, Legal Semiotics Monographs 1 (Deborah Charles Publications 1988).

that there were no firm rules to apply, Justice Carruthers cited a number of cases to establish authoritative grounds for his judgment. Some of these cases are mentioned in the *Australian Law News*, which also includes a footnote to the judge's reference to the San Demetrio case. The footnote reads: 'The story [of the San Demetrio case] was told in the 1943 Ealing Studios Film *San Demetrio London*, featuring among others Scottish actor the late Gordon Jackson'. Apparently gratuitous, the note illustrates how the story here is kept legal even as it is allowed to spread beyond the law. Telling us of a film which is about a case cited in this case, its self-conscious movement from legal reference is signified by its mention of Gordon Jackson, who is of no possible relevance to the legal issues under discussion. The law goes to the movies while not quite letting us out of court, and we are poised on the borderline of legal citation and popular culture. In the *Sydney Morning Herald* the part of Scottish actor the late Gordon Jackson is taken by Captain Murray, who speaks in a thick Scottish brogue, and who has one of the best lines in the whole episode: 'It's plain sailing down in Phillip Street, you know. Plain sailing and lots of money'.

In the *Sydney Morning Herald* the case is close to being on appeal in an extrajudicial court. Whereas in the trial the evidence was confined to written statements from the captains, here, in the journalistic court of appeal, everyone gets to have their say, and the adversarial method is more open: 'It was only this week, four months after the judgment in the case was handed down, that some of the participants faced each other again for the first time'.

Captain Damp had this to say to the *Sydney Morning Herald* about those who thought the salvage money should have been divided equally among skippers and crew : 'That's the frailty of human nature - when people who don't understand the legalities think that everybody should get the same. If you were the managing director of John Fairfax, would you give the tea lady the same amount as yourself? - no, you wouldn't'. Aware of speaking in a journalistic context, Captain Damp uses the employment hierarchy of a newspaper as an appropriate analogy. But it is still an analogy, and analogy is the mainspring of legal argument. The structure of a newspaper is Damp's authority, but his mode of argument is legal.

In both the *Australian Law News* and the *Sydney Morning Herald*, legal discourse is seen to have the power to invade non-legal contexts, to colonise writing that aspires, however modestly, to literature rather than to law. In the modes of its telling, the story only *seems* to get away from the courtroom. Its authors, and its characters, are still under legal constraints. Captain Murray's fine line about the legal interest in the affair was capped by Justice Carruthers, when he said: 'It is regrettable that one side had to lose. But such is the nature of litigation'. The *Sydney Morning Herald* included this remark, where it stands out as ethically reassuring, and to the credit of Justice Carruthers who felt obliged to put in a word for benefit of the losers. The *Australian Law News* omitted this remark from its account. In a legal context it may have seemed too obvious.[7] But it is a salutary reminder that, as cases have

7 In the conference at which an earlier version of this paper was given, Justice Carruthers' remark

losers as well as winners, the power of law has direct and material social consequences that literature does not. The legal journal's exclusion of these words provokes some doubtful thoughts about the law's awareness of itself as an instrument of power.

'The ending is all wrong', said the *Sydney Morning Herald*, wrongly. For we are left with something of a paradox: however undignified this squabble over money may have been, it did at least mean that the nature of the salvage was made public, that the story got told, and got told in more than one context. The litigation may have taken the shine from the sailors' heroism, but had there been no litigation, there would have been no story, and their courage would not have been recorded in the permanent form it now has. Through legal narrative, the story became history, and the judge was conscious of writing it.

A judge can never be a journalist, but in the circumstances of a first instance judgment the judge is most constrained. My authority in saying this is Justice P.A. Young, of the Supreme Court of New South Wales, in an unpublished paper delivered at a forum on 'The Writing of Judgments' in 1990.[8] Justice Young said that a first instance judge is under specific pressures which work against any impulse to literary refinement: the need to come to a decision as quickly as possible, and the need to explain both the reasoning and the fact-finding process to the satisfaction of both winner and loser. The judge needs to cover all points raised in the trial and to make plain his or her views on them. Anything he or she says may be used as some sort of precedent, so the judge must be as careful of his *obiter dicta* as of his *ratio decidendi*. And the first instance judge is also conscious that he or she needs to guard against being stabbed in the back by an appellate court.

The appeal court judge is less constrained, and the higher the court, the greater the impulse to literature. I turn now to the High Court of Australia in 1939, and a long dissenting judgment from Justice Evatt in *Chester v. The Council of the Municipality of Waverley*.[9] In this negligence case the plaintiff's son drowned in a council excavation, and his mother, Janet Chester, sought to recover damages for the injury to her health caused by nervous shock. The appeal was dismissed, but Evatt tried to use his judgment to provide a voice for 'a woman of Polish extraction', who 'found special difficulty in narrating the precise nature of her feelings, her fears, her hopes and her sufferings'[10]. To give this narration authority, in the very early stages of his judgment Evatt turned to literature. It betrayed him.

To illustrate the suffering and anxiety of Janet Chester as she sought for her child without knowing his fate, Evatt quotes William Blake and Joseph Furphy; he uses

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provoked laughter from the (mainly legal) audience. (Symposium on Law, Literature and Language, the University of Sydney, 23 March 1991).

8 Australia's first conference on Literature and the Law, the University of Sydney, April 20-22 1990.

9 (1939) 62 COMMONWEALTH LAW REPORTS 1.

10 *Id.* at 17.

them for emotional and cultural authority, and allows them precedence over the common law. Blake gives him away.[11]

> Tired and woe-begone
> Hoarse with making moan
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> . . .
>
> Rising from unrest
> The trembling woman prest
> With feet of weary woe:
> She could no further go.

The poem from which Evatt quotes is 'The Little Girl Found', from the *Songs of Innocence*. It is one of a cluster of poems on straying children; the others are 'The Little Girl Lost', 'The Little Boy Lost', and 'The Little Boy Found'. Strictly speaking, therefore, Evatt should have quoted from 'The Little Boy Lost'; the poem from which he selectively quotes fails to fit the facts of the case because it ends happily with the little girl restored alive and well to her parents. The literary authority is questionable. So is such literary pedantry; but the inappropriateness of the literary authority signals that the issue is forced from the start, as I believe it is throughout Evatt's judgment. The leverage created by the slightly askew relationship between poem and case unseats Justice Evatt and displaces the social direction of his judgment.

The issue is forced in the judgment by Evatt's desire to turn this case into a 'search and rescue' case, for in such cases the expedition of search and rescue would establish a relationship of duty between plaintiff and defendant. Most of these cases were, as he says, decided in the courts of the United States, and at this point Benjamin Cardozo becomes another, and crucial, authority for Evatt, who quotes (twice) substantially from Cardozo's judgment in a New York Court of Appeals case: 'Danger invites rescue. The cry of distress is a summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal'. Cardozo's short sentences suggest his impatience with legal formalism, and while his comments have substantial relevance to the Australian case, his authority for Evatt is as literary as it is legal, coming as it does from the power of his prose.[12]

Evatt's phrasing emulates Cardozo's social awareness, but lacks his punch: 'The law does not assume that all beings can bear a burden too great for many to suffer'; 'I think that the law is at once more civilised and more humane'; and Evatt appeals to 'principles which are not to be rejected or evaded merely because they have introduced into the law an element of humanity and common sense alike'. Evatt is commendably anxious to allude to the social as well as the legal issues involved in

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11 Michael Meehan, in his article on judicial literacy (*supra* note 1 at 438) praises the mention of Furphy 'in that it remains, after half a century, the one brave instance of the quotation of an Australian writer, and the integration of literature as "local knowledge" in an Australian legal judgment'. He makes a persuasive case, which I do not question, for the cultural force of Evatt's reference to Furphy.

12 Evatt cites Wagner's case, (1939) 62 C.L.R. 1 at 37 and 39.

this case, reminding us of the special nature of the mother-child relationship, that children of workpeople often have to play in the street, and that conceptions of right and duty are moral and social as well as legal. But to the present (non-legal) writer, this judgment is too laden with a sense of its own significance.The self-consciousness of Evatt's remarks renders them heavy-handed, and initially the self-consciousness and heavy-handedness are signalled by the use, or misuse, of Blake. Literary authority can be as dangerous, and as ambiguous, as a 'two-handed engine'.

Benjamin N. Cardozo, a judge of the Supreme Court of the United States in the 1930s, is the patron saint of one chapter of the Law and Literature movement in the United States, and he has much to say on the relationship between substance and style in judicial writing.[13] Of the six types or methods of opinion which he lists, Cardozo foregrounds 'the type magisterial or imperative'. This, not surprisingly, is his own, and in it, he says, we 'hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power. . . .We feel the mystery and awe of inspired revelation'. Legal discourse here is authorised by the language of religion, which Cardozo uses again when he talks about the literary power of a dissenting opinion: 'The protests and the warnings of minorities overborne in the fight have their interest and significance for the student, not only of law itself, but of the literary forms through which the law reaches its expression'. This literary potential is also a liberating power, for the dissenter, in Cardozo's view, is unconstrained and free to be irresponsible, 'the gladiator making a last stand against the lions'. The dissenter in an appellate court, at liberty to speak to the future, to see beyond the particular case, is thus at the other extreme from the judge at first instance. As Cardozo rather disconcertingly puts it: 'The prophet and the martyr do not see the hooting throng. Their eyes are fixed on the eternities'.[14]

Cardozo practised better than he preached, always keeping his own eyes firmly on social realities. This is superbly demonstrated in his judgment in *Hynes v. N. Y. Central Railroad*, 1921, which *Cardozo Studies in Law and Literature* used as an inspirational preface to its inaugural issue in 1989.

> On July 8, 1916, Harvey Hynes, a lad of 16, swam with two companions from the Manhattan to the Bronx side of the Harlem River, or United States Ship Canal, a navigable stream. Along the Bronx side of the river was the right of way of the defendant . . . which operated its trains at that point by high-tension wires, strung on poles and crossarms. Projecting from the defendant's bulkhead above the waters of the river was a plank or springboard, from which boys of the neighbourhood used to dive. . . . For more than five years swimmers had used it as a diving board without protest or obstruction.
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> On this day Hynes and his companions climbed on top of the bulkhead, intending to leap into the water. One of them made the plunge in safety. Hynes followed to the front of the springboard, and stood poised for his dive. At that

13 Cardozo, *Law and Literature* in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 3 (Harcourt Brace 1931).

14 *Id.* at 10-11, 14 and 36.

> moment a crossarm with electric wires fell from the defendant's pole. The wires struck the diver, flung him from the shattered board, and plunged him to his death below. His mother, suing as administratrix, brings this action for her damages. Thus far the courts have held that Hynes at the end of the springboard above the public waters was a trespasser on the defendant's land. . .
> Rights and duties in systems of living law are not built upon such quicksands.[15]

From the moment he labels Harvey Hynes 'a lad', rather than 'the plaintiff's son', Cardozo is rolling up his sleeves and going to work for him. His prose has a sense of drama: 'Hynes followed to the front of the springboard, and stood poised for his dive'; the pause creates the poise, which itself puts us not just on Harvey's side, but in his position. Cardozo works wonders with the word 'plunge', as both noun ('his first plunge') and transitive verb ('the wires . . . plunged him to his death'); and its powerful work as a verb is prepared for by its usage as a noun. Description is given a figurative charge in 'high-tension wires', just as 'quicksands' destabilizes any secure sense of individual rights. And Hynes overwhelmed by the wires in the water is a perfect latent image for an individual ensnared by the power of an unfeeling bureaucracy. Cardozo also plays legal discourse against other ways of talking, and in such a context legalisms gain power: 'The truth is that every act of Hynes from his first plunge into the river until the moment of his death was in the enjoyment of the public waters, and under cover of the protection which his presence in those waters gave him'. 'Enjoyment', as used in law, is a serious business, and 'waters' has a biblical resonance that 'water' does not. Hynes himself would not have used such language; Cardozo is giving him a legal voice, and, as Cardozo himself said of Marshall, the thrill is irresistible.

This is a performance text in which a judgment is being enacted, and a social point is being made about the injustice of bureaucracies evading their responsibilities to individuals by hiding behind legal fictions. It is a fine demonstration of the literary capacities of legal discourse, and also a compelling argument for the judge - any judge - to keep the case - any case - in its social context rather than the eternities.

Both Evatt and Cardozo give voices to those they perceive to be victims of the law and legal formalism. So does Chief Justice Dixon, in Parker's case, an Application for Special Leave to Appeal; and, like Evatt, Dixon uses literary authority.[16] In a carefully judged cultural cross-reference, Dixon quotes twice from *Othello*, and he does so to explain the issue of provocation in a murder near the small New South Wales country town of Jerilderie. (Parker, like Othello, was a jealous husband, but one who killed not his wife but her lover, Dan Kelly.) The trial judge had refused to allow the issue of provocation to go to the jury, and Dixon takes issue with this refusal:

> Had Parker found Dan Kelly and his wife in adultery and then and there killed Kelly with his knife it seems clear enough that the jury might have held that he

15 Cardozo's judgment is quoted selectively, but more fully in 1 CARDOZO STUDIES IN LAW AND LITERATURE (1989).

16 Parker v. R., (1963) AUSTRALIAN LAW REPORTS 524.

> acted on sufficient provocation and that the crime was manslaughter only. There would in such a case be no delay in which the blood might cool and cease 'his safer guides to rule'. In the present case Parker had been engaged in an emotional attempt to prevent Kelly taking his wife away with him: it did not cease, the pursuit was but part of it. He had been insulted, taunted, he had listened to his children's prayers to his wife not to depart with his adulterous rival. . . . It is not for the court to find the facts but for the jury, and certainly on the evidence the inference was open to them that after a persistent emotional effort to prevent the success of Kelly's attempt to deprive him of his wife and his children of her care . . . the prisoner armed himself and followed them with no intermission or interval and in a completely distraught condition. We are not living in the conditions of the sixteenth, seventeenth or eighteenth century. According to the standards governing our society in the later nineteenth century and the twentieth century, the succession of events and the conduct of Dan Kelly brought a very strong provocation to an emotional nature, a provocation still in actual operation when Parker came upon Dan Kelly with his wife. That at all events is a view which the jury were entitled to adopt. They might, if properly directed, have considered that (again to use Othello's words) 'passion having [his] best judgment collied assayed to lead the way'.[17]

The seventeenth-century text has an obvious aptness to the twentieth-century case. Dixon's literary allusion has power that Evatt's lacks, because it is used climactically at the culmination of his narrative and the conclusion of his argument. Evatt is more radically ambitious because he uses Blake and Furphy to establish his terms of reference; Dixon, on the other hand, seals his judgment by merging his literary allusion with legal discourse. (The internal rhyme of 'cool' / 'rule' also blends his quotation with his surrounding words.) Othello not only has an obvious relationship to Parker; his words support Dixon's explanations of both fact *and* law, and (most important of all) are used as a potential voice for the jury, for what the jury might have said had it been allowed to test the issue. In this judgment the literary allusions are all the more forceful because Dixon, in his capacity as Chief Justice, made a statement which was authorised by all other members of the High Court (Dixon was a dissenting judge here) to say that Smith's case (an English case) should not be used as an authority in Australia. Most readers of these pages may be as ignorant of Smith's case as I am, but it is intriguing to see the Chief Justice of Australia simultaneously rejecting the authority of English law, and re-affirming the authority of English literature.

In *Federal Broom Co. Pty. Ltd. v. Semlitch*, a Worker's Compensation case on appeal by the employer to the High Court in 1964, Justice Windeyer (who had, like Dixon, dissented in Parker's case) both found a legal voice for the applicant, and appealed to Shakespeare as an authority. (The court was unanimous in dismissing the employer's appeal.) To a large extent the case turned on the meaning of the word 'disease' as used in the definition of 'injury' in the *Workers' Compensation Act*,

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17 *Id.* at 534-35.

1929-1960 (NSW), and, in particular, on whether 'disease' included a functional mental illness.[18]

Windeyer had no doubt that it did, and in support of his belief quoted from *Macbeth*, in which the Doctor of Physic says of Lady Macbeth 'This disease is beyond my practice', and in which Macbeth asks 'Canst thou not minister to a mind diseased?'. Always conscious of the meaning of words, yet also acutely aware that the case should not be reduced to semantics, Windeyer insists that the nature of the illness is not determined by linguistic labels: 'Whether on ultimate analysis there is any valid and clear-cut scientific distinction between a person who is neurotic and one who is psychotic I do not pretend to know. . . . But I can see no need for the court to put a label upon the applicant's illness, or to be concerned because witnesses labelled it differently'[19]. No-one need be bound or constrained by the language system of another, and Windeyer acknowledges that a psychiatrist's interpretation of a statute might differ from that of a lawyer, just as a lawyer, in his need to arrive at an opinion of mental illness, may draw different conclusions from expert evidence than the experts who tender that evidence.

Windeyer's opening sentence establishes an open-minded context for his own judgment: 'The dualism of Cartesian philosophy, its inveterate distinction between mind and matter, continues to influence our ideas of illness and disease'. Neither frivolous nor pretentious, this acknowledges that the actions and judgments of human beings must be placed in a context of reflection, and that this context includes the workplace just as it includes courts of law. The nature of the relationship between mind and body is always under consideration in this judgment; and it is considered in the full knowledge that the lawyer is neither a doctor nor a philosopher, but that he must make his own judgments about the applicant's disease:

> The applicant succeeded before the Workers' Compensation Commission, and on appeal to the Supreme Court, on the ground that there had been, as a result of her employment, an aggravation or exacerbation of her disease. Her employer now appeals to this Court. The argument for the appellant was attractively presented; but *it seemed to me to depend upon ideas that I think are erroneous. As I understood what was said,* it was that in the case of a mental disease, functional and not organic in character, the disease is to be regarded as something apart from, and as it were producing, its manifestations. An analogy was suggested with a specifically organic disease . . . . But even in relation to purely somatic disorders . . . the assumed absolute distinction between the pathological condition, the disease, and its regularly occurring signs and symptoms may, *it seems to me, in some cases be of doubtful validity.* To regard bodily symptoms as always the product of an ailment, rather than of its essence, may be to treat concomitance as a consequence. Some physicians might see the matter in one way; some in another. *It seems to me to depend upon concepts of philosophy as much as on medical knowledge.* A rigid separation of a disease from its symptoms is difficult in the field of psychosomatic and neurological

18 (1964) 110 C.L.R. 626.

19 *Id.* at 636 and 639.

> ailments. In the field of purely functional mental disorders *I think it is impossible.* . . . [T]o go from the idea that irrational beliefs and behaviour betoken an underlying disorder of the mind to thinking of the mind as an entity, a disorder of which may manifest itself in symptoms that are apart from rather than a part of the disease itself, *seems to me a mistakenly simple view of a complex phenomenon. As I cannot conceive of the mind apart from its functioning, I cannot conceive of it as being disordered or diseased apart from its manifestly disordered functioning. I therefore find it impossible to conceive of the malady as distinct from its manifestations. They are, it seems to me, of its essence. That view may be the result of the limitations of my knowledge.* (emphases added)[20]

Windeyer confronts the legal issues in the knowledge that meaning is negotiable rather than fixed, and his language, particularly in the italicised passages, creates the powerful sense of someone (who happens to be a lawyer) working out a problem beset with philosophical issues which cannot be ignored any more than they can be definitively explained. Windeyer speaks consciously as a lawyer, as a member of his profession; and he is careful to stress the limitations of his knowledge, without allowing those limitations to prevent him from making his judgment to the best of his ability. His assertions are frequently statements of his own limitations, and the institutional passive voice of the law is well balanced by the active voice of the lawyer. Phrases which in other contexts might be no more than empty fillers - 'it seems to me', 'I think', - here indicate both Windeyer's awareness of his limitations, *and* his willingness to take responsibility for his judgment. They are as integral to the progression of the judgment, to its constantly qualifying activity, as are the relationships between words and concepts established by sound: 'apart / a part'; 'concomitance / consequence'; 'mind / malady / manifestation'.

The lawyer's engagement with language here is responsibly conscious of its human and social context, and the activity of the judicial mind is the use of language to work out a human problem. Whether or not this is literature, or can or should be regarded as literary, raises a number of open questions to do with the nature of literature and the literary.[21] 'I've measured it from side to side: / 'Tis three feet long, and two feet wide': are these notoriously laboured lines from the least laborious of English poets literary? Wordsworth himself would emphatically have said not, for his literary theory was itself radically anti-poetic and anti-literary. This question is further complicated by its social ramifications; for Wordsworth, like the judges quoted above, was trying to provide a voice to those denied one by the discursive context in which he wrote. The poet's context is literature, the judges' context the law; but the principle remains the same.

As Tambling has pointed out, our notions of what constitutes literature are shaped by cultural forces which are never constant, and ideas about what is and is not literature are always changing. So, it is pertinent to ask, why is legal discourse in

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20 *Id.* at 536-37.

21 These questions are considered in detail in J. TAMBLING, WHAT IS LITERARY LANGUAGE (Open University 1988).

general, and the judicial opinion in particular, now being considered as 'literature'? One pragmatic answer to this question has been offered by Michael Meehan:

> "Law and Literature" courses had been established in the late 1970s as a well-intentioned gesture towards a renovated legal humanism, and sometimes as a reassuring exercise in legal apologetics, only to be invaded in the early 1980s by ambitious literary doctoral graduates excluded by job shortages from their first field of inquiry.[22]

This is surely correct, and such graduates applied expertise acquired in their primary discipline to the law. A more general answer to the question is provided by the changing nature of 'literary criticism' in the past two decades. What used to be thought of as literary appreciation has developed into a form of cultural analysis, and its practitioners have become acutely conscious that the borders and demarcation lines between different forms of discourse as they operate in society are less rigid than has previously been thought, or taught; and they have become conscious too that in the interests of knowledge, responsibility, and social justice such borders should be crossed. Many literary academics have set out for fresh woods and pastures new with a changed mind-set, wherein that which was previously portioned off as 'literature' is now seen as continuous with other forms of discourse, such as the law, which in turn is seen as too important to be left to lawyers.

To the subsidiary question of the special status of the judicial opinion, two answers may be offered, one coming from critical legal studies, and one from liberal humanism. The critical legal studies answer is that the judicial opinion is a form of power which disguises the social codes on which it rests, by translating ideology into legal authority which is offered as neutral.[23] The liberal-humanist answer is that the judicial opinion is a form of cultural poetics which expresses the discursive imagination of the law, through which society constitutes and declares its most deep-seated values.[24]

Whether the focus is on law or on literature, the issue is clearly one of a cultural politics, or a cultural poetics, which includes both. Similarly, both law and literature involve consideration of common theoretical issues concerning language as a form of human behaviour. 'Intention' is just such an issue, about which Windeyer, in Parker's case, has this to say: 'In every case where intent is in question the question is what did the accused - the man before the court - intend. Of that, the acts he did may well provide the most cogent evidence. In some cases the evidence that the acts provide may be so strong as to compel an inference of what his intent was, no matter what he may say about it afterwards'[25]. Windeyer's assessment of retroactive speech

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22 MEANJIN, *supra* note 1 at 774.

23 *See* R.M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (Harvard U.P. 1987). Kelman's book is critically reviewed in Genovese, *Critical Legal Studies as Radical Politics and World View*, 3 YALE J. of LAW AND THE HUMANITIES 131 (1991).

24 *See* WHITE, *supra* note 2; and White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life* in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (U. of Wisconsin Press 1985).

25 The "locus classicus" for the literary scholar is Wimsatt and Beardsley, *The International Fallacy*

acts as evidence is a powerful dismissal of the intentional fallacy, a dismissal which applies as strongly in literary criticism as it does in legal procedure.[26] It exposes 'intention' as both a way of doing things with words and of being undone by them, a way of organising past and present experience in language that may become a way of being organised by language, a way of story-telling that may become a telling way of being narrated. In acknowledging intention as a narrative trope whose own authority is questionable, in ranging it for consideration among the several levels of language which constitute evidence, Windeyer focuses the crucial question of discursive authority that takes us across the border between law and literature. Speaking sympathetically of evidence offered by the applicant in *Federal Broom Co. v. Semlitch*, Windeyer can have the last word: 'It is by considerations of that sort, partly the results of observation of conduct and demeanour and partly elicited from what the patient says, that the question must I think be answered, whoever has to answer it'[27]. And someone always does.

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in THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY (U. of Kentucky Press 1964). But see also White, *id.* at 81-82, 100-102; and Patterson, *Intention* in CRITICAL TERMS FOR LITERARY STUDY 135 (F. Lentricchia and T. McLaughlin eds. U. of Chicago Press 1990).

26 (1963) A.L.R. 524 at 549.

27 (1964) 110 C.L.R. 626 at 637.