



LITERARY JUDGEMENTS

DOING MORE HARM THAN GOOD?

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THE WRITTEN WORK OF LAWYERS has a well-earned reputation for being long-winded, overly technical, and sometimes obtuse to the point of being laughable. In the laughable department, the website “Lowering the Bar” points to a 538-word sentence written by a U.S. judge and challenges readers to find a longer sentence in legal documents. (Underhill) Despite a decades-old plain language movement in the profession, the “aforesaid” and “heretofore” and multi-phrase paragraph-long sentences persist.

But these types of complaints about legal writing are old news. What about the lawyers who labour to create written art and, in particular, what about judges who attempt to take their legal writing to witty and imaginative heights? Are these lawyers helping the profession and the law any more than those who use the overstuffed templates of yesteryear?

COURT QUIPS AND LITERARY WIT

A quip is a basic literary device which includes elements of irony and theatrical “aside”. A good quip can result in an oft-repeated, and therefore memorable, piece of writing by a judge. Quips require tight writing

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and specific timing. For instance, in the Alberta case of *Klewchuk v Switzer* Justice Moore writes:

For fourteen years, Robert Klewchuk (“Klewchuk”) and Samuel Switzer (“Switzer”) owned and operated an underground shaft gold mine. Each year the gold was distributed to Klewchuk and Switzer – not always distributed equally, but almost equally.

In October of 1996, Switzer got the mine and Klewchuk got the shaft.

While judges such as Moore produce the occasional one-liner, others are inveterate quippers. Edmonton’s Master in Chambers Michael Funduk wrote so many memorable quips throughout his career that a compilation was produced: *Fundukia: The Whimsical Wit and Wisdom of Master Michael Funduk*. (Price) One of Master Funduk’s most well-known quips occurs at the end of an explanation of judicial precedent in his decision in *South Side Woodwork v R.C. Contracting*:

Any legal system which has a judicial appeals process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder.

I am bound by decisions of Queen’s Bench judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior courts judicial ladder.

I do not overrule decisions of a judge of this court. The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.

But successful quips are not easy to create and some judges find it difficult to keep the quips relevant to the case.

Justice Quin of the Ontario Superior Court, for instance, wrote several decisions that are known for non-law related quips. *Bruni v Bruni* was a family case dealing with many heated issues including custody and parental access to a daughter. The first two sentences of Justice Quin’s decision – “Paging Dr. Freud. Paging Dr. Freud.” – are probably better known in Canadian legal circles than the issues decided in the case. Justice Quin carries on with the unnecessary and inappropriate psychology theme with the line “Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment.” And, as if suggesting clinical diagnoses that have nothing to do with law

Literary Judgements

wasn't odd enough, Justice Quin doesn't exactly instill confidence in his legal role when he calls spousal support "historically the roulette of family law (blindfolds, darts and Ouija boards being optional)."

Some of the attempted humour in this decision is harmless, some childish ridicule, and some sounds like a judge superciliously asking readers to join him in laughing at the goofy cases and dumb people he encounters.

A SENSE OF HISTORY

History plays an integral role in law. Every legal decision is related to earlier cases; judgements are based on existing law and precedent. A reference to history is often necessary to justify arguments and decisions. However, references in judgements to *literary* history, and to the traditional literary canon, can be problematic. For example, Master Schlosser in *Theaker v Public Service Alliance of Canada* calls one of the defendants "Ms. Theaker's Moriarty" – Moriarty being a reference to the villain in the Sherlock Holmes mysteries written by Sir Arthur Conan Doyle. Later in the same judgement Master Schlosser writes that the same defendant has disappeared "Macavity-like" – a reference to a cat named in T.S. Eliot's *Old Possum's Book of Practical Cats*, which is likely a nod to Holmes' Moriarty. The Moriarty and Macavity references might add entertainment value, particularly with the revival of Sherlock Homes on television and the popularity of the musical *Cats* (wherein Macavity reappears) but they are far from universal touchstones. Some readers will have to google Moriarty and Macavity in order to decide the relevance, if any, of these fictional characters to the case. Even then the references might confuse, or mean nothing to, the parties involved or to future readers looking to the judgement for guidance.

In another example of historical literary works not improving a judgement, Justice Fergus O'Donnell writes in *R v Duncan*: "Mr. Duncan provided me with an 'affidavit of truth,' a rather substantial volume that appeared to me to be the result of somebody doing a Google search for terms like 'jurisdiction' and the like and then cobbling them together in such a way that it makes James Joyce's *Ulysses* look like an easy read." In the same decision, Justice O'Donnell also references other literature: John Donne's "No Man is an Island" poem; Lewis Carroll and *Alice in Wonderland*; and "the collected works of William Shakespeare." Justice O'Donnell uses

endnotes as another place to let loose with “literary” or “funny” asides. The endnotes of *Duncan* stray far off topic by trashing reality television and calling the computer cut-and-paste function “one of the four horsemen of the modern apocalypse.” Also in the endnotes, Justice O’Donnell references Jekyll and Hyde, Aldous Huxley and *Brave New World*, Joseph Conrad and, again, William Shakespeare.

Why does Justice O’Donnell do all this? On first read the judgement may be highly entertaining – as long as the reader has a background in traditional English literature (also sometimes known as “the old white man canon”). Entertaining or not, this judgement brings to mind the phrase “too clever by half.” More importantly, the judgement smacks of disrespect for the self-represented litigant. There is undoubtedly an issue in courts today with some self-represented litigants who, like the vexatious self-rep in this case, take up far more than their fair share of court resources. The legal system needs to find a solution to this issue. But whether or not the accused irritates the judge, and even though the legal issue was a minor traffic charge resulting in acquittal, is it appropriate for the judge to use sarcasm and literary references to mock the defendant? Mocking does nothing to solve the legal issue, and nothing to adequately represent a justice system that purports to be for all people.

SHAKESPEARE

In *Duncan*, Justice O’Donnell references Shakespeare twice. Referencing the famous playwright in a legal judgement is not as unusual as one might expect. Even though Shakespeare created the phrase “Kill all the lawyers,” lawyers love Shakespeare. (There is even a school of lawyer-thought that argues that the phrase “kill all the lawyers” – spoken by Dick the Butcher in *Henry VI, Part II* – doesn’t really mean kill all the lawyers.) Although some of Shakespeare’s plays may be based on actual court trials of his day, they are artistic, fictionalized representations, not legal precedents. Some of the Shakespearean references in legal writing are merely along the lines of uplifting collegial advice such as in the *Taming of the Shrew*, where Tranio says, “And do as adversaries do in law / Strive mightily, but eat and drink as friends.” Or the admonishment by the fisherman in *Pericles* that the poor are usually disadvantaged in legal matters: “Help, master, help! here’s a fish hangs in the net / like a poor man’s right in the law.”

Literary Judgements

Most often, though, references to Shakespeare in judgements are used unnecessarily to emphasize the importance of the case. The January 8, 2016 issue of *The Economist* blog, “Prospero,” points out that “[w]hen Oscar Pistorius was convicted of murder last month, the presiding judge described the case as a “human tragedy of Shakespearean proportions.” *The Economist* blog also points out that Shakespeare’s *Henry VIII* was referred to during Watergate and that Shakespeare’s *Julius Caesar* was quoted in a trial of one of the Boston marathon bombers. Clearly some legal writers believe that a big case requires a big literary reference. The Prospero blog concludes that “[t]hese examples illuminate and beautify, and make court proceedings user-friendly. (Sometimes it is mere ponderous showing-off)” But the blog does not explain in what way the Shakespearian references illuminate and beautify or make proceedings user-friendly. The assumption seems to be that the mere presence of Shakespearian references contributes to these aspects. And “ponderous showing off” seems to be a highly relevant comment that should not be in parentheses.

DICKENS AND JARNDYCE

A 2015 self-declared “lighthearted” study by Ami and Scott Dodson found that Shakespeare was one of the most often quoted writers by the American Supreme Court. (Dodson) The paper crowned Justice Scalia as the “most literary” judge because he made the most literary references. The assumption, even lighthearted, that literary references amount to literary skills, is a classic non sequitur. And the measure itself perhaps reveals why a judge might want to use a literary reference, i.e. to employ and exhibit their “literary skills.” Canadian justices refer to literature as often as American justices, however they seem to favour Dickens over Shakespeare. In Canada, the most commonly cited Dickens’ novel appears to be *Bleak House* and, in particular, the fictional case of Jarndyce and Jarndyce. There are several characters in *Bleak House* whose lives are ruined by the interminable waiting created by the ongoing bureaucracy and the absence of a final judicial resolution in Jarndyce and Jarndyce.

In his 1853 preface to *Bleak House*, Dickens claims that Jarndyce is based on a real case. But, as noted earlier with regard to Shakespeare, a fiction based on a true story is still a fiction. Would it be inappropriate to refer to this fictional case in a real courtroom? Evidently not.

Lord Denning, a legendary British judge, referred to Jarndyce several times, including in the 1980 case of *Buttes Gas v Hammer* in which he commented that the case before him was “outdoing *Jarndyce v Jarndyce* (see Dickens, *Bleak House*) except that these litigants are not likely to run out of money.” Denning again referred to Jarndyce in *Midland Bank v Green* where he wrote (in a judgement later overturned by the House of Lords): “The *Green* saga rivals in time and money the story of *Jarndyce v Jarndyce*.” It’s notable that in some judgements, including the Lord Denning texts, Jarndyce is italicized like a real case, although it is unclear whether that legitimizing italicization would be the choice of the writer or the publisher.

References to Jarndyce are not just for Lord Denning and old British courts. This 19th-century fictional case appears in current caselaw. Sometimes Jarndyce appears with a comment or hint that it is a fictional case, such as in the 2015 case of *Padget Estate (Re)* where Master Schlosser warned: “[T]he estate is not small but the case threatens to take on a Dickensian aspect; not unlike *Jarndyce v Jarndyce*.” The fictional nature of Jarndyce might also be indicated in an endnote, such as in the 2011 case of *Lecky Estate v Lecky* where Justice Kent wrote “[T]he process for resolving disputes which I have directed counsel to develop is the first step to ensuring that this does not become a 21st century Jarndyce.” An endnote attached to this sentence simply states, “Charles Dickens, *Bleak House*” as though that is sufficient to explain the use and context of Jarndyce to all readers. And sometimes Jarndyce appears in decisions without any indication that it is a case from a novel. In *Heritage Savings & Trust Company v Unicorps International Investments*, Master Funduk writes “[S]uch a procedure introduces an artificiality more appropriate to the times of *Jarndyce v. Jarndyce* than to today.” This type of reference is doubly troubling since it expects the audience to not only know that Jarndyce is a case from a novel, but also requires those involved to know about “the times” in which the novel is set.

Still, a single reference to Jarndyce is less egregious than a litany of miscellaneous references, such as Justice O’Donnell presented in *Duncan*. Moreover, a Jarndyce reference is usually not overtly offensive because it is not intended to poke fun at the parties (although a Jarndyce reference can be employed to scold the lawyers, or the legal process, for not bringing a case to a timely conclusion). But the basic questions remain the same. Does everyone involved know Jarndyce? Do the lawyers involved know

Jarndyce? Does the judge referencing Jarndyce even know Jarndyce – like, have they ever read the novel? Context, of course, can supply meaning to literary references. But if the point of a judgement is clear communication of a legal principle, why include the reference at all? As Shakespeare's Hamlet might have said, "Aye, there's the rub."

JUDGES AS LITERARY WRITERS

There is, of course, more to law as literature than witticisms and referencing Dickens and Shakespeare. Fully-fledged literary writing requires imaginative scene construction and characterization, and a compelling narrative – and some judges happily take on all three elements. Master Schlosser, in *Theaker v Public Service Alliance of Canada*, wrote "It is at this point that a villain, Joseph Teitelbaum, enters the scene." We immediately have a picture, albeit sketchy, biased and clichéd, of Mr. Teitelbaum as "villain." Master Schlosser does not say that the villain has a pencil-thin moustache, a black cape, and penchant for saying "mwahaha." But that sort of implied stereotype is one of the dangers in employing creative writing in judgements. A decision with a villain might be more fun to write, but it undermines the kind of objectivity and seriousness that enhances judicial credibility.

Creative writing can open the door to far more insensitive writing than that found in *Theaker*. Consider a judgement by Ontario Justice David Watt in *R v Flores* that begins like a crime thriller: "Early one morning in June 2006, Melvin Flores closed the book on his relationship with Cindy MacDonald. With a butcher knife embedded in Cindy's back. Fifty-three blunt force injuries." This clear and concise opening is, if not literary, at least as brutally action-packed as a slasher novel. It's also brutally insensitive. The family and friends of Cindy Macdonald likely did not find the style of this opening entertaining or necessary.

Not every literary judgement fails in its aspirations. Lord Denning (mentioned earlier as a citer of Jarndyce and Jarndyce) often used effective and accessible story elements with respect for all involved in the case. The legal analysis behind some of his decisions has been questioned, and his racist and sexist tendencies that came to light later in his career are deplorable, but he could draw a memorable story out of basic facts. During his twenty years (1962-1982) as Master of the Rolls, he demonstrated a knack for turning openings into clear and respectful vignettes, complete with literary aspects

Barb Howard

of setting, characterization, imagery and tone. One of his more famous cases is *Hinz v Berry*. His decision begins:

It happened on 19 April 1964. It was bluebell-time in Kent. Mr. and Mrs. Hinz had been married some ten years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child. On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.

This excerpt is more descriptive and evocative than, say, “a villain enters the scene” and does it without referencing famous texts or attempting wit. The phrase about blood streaming from the children’s heads (all of them?) is gratuitous and likely not entirely factual. However, the remainder of the facts and set-up are delivered in a simple descriptive fashion. Denning has the reader hooked even though the outcome of the case is foregone. Mr. Berry is not belittled, but Mrs. Hinz has Denning’s emotional favour and legal reasoning supporting her claim for “nervous shock” comes later in the decision.

Another well-known example of Denning’s literary judicial writing is his dissent in the “cricket case,” or *Miller v Jackson*. His opinion begins:

In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the

Literary Judgements

onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house.

Lord Denning is a cricket fan. And it's clear he is going to go looking for ways to find in favour of the cricket club, just as it was clear he was going to use legal reasoning to find money for Mrs. Hinz. Denning judgements make for easy, unpretentious reading. In a judicial decision, easy and unpretentious are admirable qualities. Memorable imagery and characterizations might even make the outcome of the case easier to understand. (It certainly makes the cases easier for law students to memorize.) So is there any harm in Lord Denning's "creative writing" approach?

Well, first, the Denning style of writing is hard to do. It would be a tall order to suggest that all judges write like Lord Denning. Many, so very many, have tried and failed. Second, and more importantly, one of the principles of our legal system is that not only should justice be done, it should appear to be done. As mentioned with respect to the *Theaker* case, when facts are presented emotionally, the legal conclusion can feel driven by emotion rather than logic. On the other hand, when facts are presented objectively, there is at least an appearance of neutrality. Unbiased language is not just a superficial gloss. While word choice and tone cannot ensure that a judge is objective (and arguably no one is truly objective), making the effort to use objective language requires a judge to re-think biased phrases and descriptions.

The final reason for not attempting literary judgements is that they always have an underlayer of "look at me." This runs counter to the role of a judge in a courtroom. The relevant law, not the style of the judge who represents it, should be the centre of attention.

The legal community occasionally provides feedback regarding literary attempts in court decisions. *Flores*, the case where Justice Watt wrote that the accused ended a relationship “[w]ith a butcher knife embedded in Cindy’s back” prompted some negative comments from lawyers.

Unfortunately, it’s not uncommon for the legal community to applaud, rather than discourage, creative writing in legal decisions. There were some detractors after Fergus O’Donnell’s reference-heavy, ridicule-loaded decision in *Duncan*, but there were many who thought the “lively page turner” actually made the law more accessible and did no harm. Lawyers should think more about the broader implications of literary judgements rather than cheering for their entertainment value. But any feedback, whether encouraging or reprimanding, and whether it is from a higher court or from the legal community, is after the fact. The case is on record and the potential harm – be it to the judicial reputation, the litigants involved, or readers – is done.

The best time to prevent creative writing in legal decisions is before they are written. When judges go to “judge school” to learn how to draft better-written judgements, surely they are told to be clear and concise. Surely they are not taught to be literary raconteurs. And yet, the recency of the cases cited in this essay shows that many judges still have no qualms about adding their own idea of wit, or adding literary references such as Jarndyce and Jarndyce, or even trying to create their own literary style. Perhaps the justices are bored, or trying to keep everyone else from being bored. Perhaps it is literary posturing or a shot at a legacy judgement. Or perhaps some judges are working under the belief that being creative and literary is an unrestrainable aspect of their personality. American lawyer-poet Wallace Stevens supposedly said: “I don’t have a separate mind for legal work and another for writing poetry.” This “just the way I am” argument suggests a surprising lack of control over a bright and critical mind. Moreover, it props up the myth that literary talent is an unrestrainable, innate phenomenon. All writers can empathize with judges who must figure out a way to explain the facts and the reasons for their decisions. Writing is hard work. But an important part of that work is knowing your genre, that is, knowing what you are writing, and why, and for whom.

The Dodson study on literary references by U.S. Supreme Court justices concluded with the disclaimer, “This study is lighthearted. We do not mean

Literary Judgements

to suggest that mere references in judicial opinions necessarily say anything about the justices. The most we hope for is to provide fodder for the parlor games of the legal elite and literary intelligentsia. Still, and in the best traditions of the liberal arts, that itself may not be clapping for the wrong reasons. After all, nothing in the world is so irresistibly contagious as good humor.” Within that conclusion is an encapsulation of the problem with literary judgements. Literary references in judicial opinions *do* say something about the justices. Literary posturing of any sort in a judgement says something about a justice. Cases aren’t parlour games; litigants are not usually part of the legal elite or the literary intelligentsia.

Some witty quips and intertextual references in a judgement may be harmless, and may induce a smile in a long day, but these literary jaunts must be balanced with the risk of putting ridicule and literary elitism ahead of serious public matters. There are many, many ways to add humanity and creativity to the court process, but creative writing in judgements is not one of them. Legal judgements should be written in a manner that is accessible and fully understandable to the highest number of readers. That is what fundamental justice requires.

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Barb Howard

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