

LITERATURE IN LAW – JUDICIAL METHOD, EPISTEMOLOGY, STRATEGY, AND DOCTRINE

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‘Why would not our Author write in rhyme? The jingle of the words would then have been a warning bell to the young student to guard against deception.’ –
Jeremy Bentham¹

The flourishing interdisciplinary field of law and literature typically takes as its focus the capacity of literary works to offer new perspectives on legal context, to supplement the law, and to speak truth to power.² For William MacNeil, whether we are talking about the nineteenth century novel or *Game of Thrones*, cultural representations stage jurisprudential arguments and illuminate socio-legal trends. Law and legal theory are critical lenses through which to understand literary and cultural texts.³ For Melanie Williams, novels and poetry provide a locus of insight into both the human condition and legal predicament, bringing home the stakes of legal argument and exposing its claims to a more sophisticated understanding. For Wai-Chee Dimock, literature is the genre that unsettles judgment and resists the kind of neat closure which law seeks. The nature of judgment, then, is not just literature’s object, but its subject. As a supplement, then, literature does not complete the project of law but challenges and pluralises it. So too in some of my own recent work, it is not the ideas or narratives of literary works, so much as their form and style, that draw us both

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1 Jeremy Bentham, ‘A Comment on the Commentaries’ in J H Burns and H L A Hart (eds), *A Comment on the Commentaries and a Fragment on Government* (Athlone Press, 1977) 121.

2 See, eg, Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton University Press, 2000).

3 Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Blackwell, 1986); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1987); Richard K Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (University of Chicago Press, 2000); William P MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford University Press, 2007); William P MacNeil, *Novel Judgments* (Routledge, 2012); Austin Sarat and Thomas R Kearns (eds), *Law in the Domains of Culture* (University of Michigan Press, 2000); Austin Sarat (ed), *Imagining Legality: Where Law Meets Popular Culture* (University of Alabama Press, 2011).

deeply and problematically into the lives of others.⁴ The monologue of the law is set against the novel's polyphony and pluralism.

At the same time, the relationship of the novel or of narrative form to legal subject formation has not been entirely a blessing or a curse. Forms of cultural representation are by no means immune to the social, political, and economic forces of modernity – indeed, they are implicated in their hegemony. These forces have driven the invention of a Western legal subject wherein discipline is internalised, sympathy is privatised, and the rewards of pity come at the cost of political action.⁵ Even literature's role in the discourse of human rights has recently come under scrutiny. The novel has not been innocent in the perpetuation of colonialism, in the evisceration of the public sphere, and in the replacement of the demand for justice with pleas for mercy.⁶ The novel, it might be said, encourages us to feel more, but to do less.

This brief article proposes to turn the focus around, and to think more about the role of literature *in* law, and the specific ways in which literary devices and references have shaped and governed legal rhetoric. This too, of course, is research with a pedigree, from pioneering work by James Boyd White in *The Legal Imagination*,⁷ to Australian work, some of which references the legal judgment discussed here,⁸ discourse analyses of legal texts,⁹ and more recent work on law as genre.¹⁰ Peter Goodrich's historical work has always insisted on the tradition of the common law as a genre of argument and action in which rhetoric assumes a primary role. This is not just a question of law's primitive days, before Blackstone, Austin, Bentham, and finally Hart brought order

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- 4 See, eg, Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge, 2012); Desmond Manderson, 'Mikhail Bakhtin and the Field of Law and Literature' (2012) 8 *Law, Culture, and the Humanities* 1.
 - 5 David Miller, *The Novel and the Police* (University of California Press, 1988); John Bender, *Imagining The Penitentiary: Fiction and the Architecture of Mind in Eighteenth-Century England* (University of Chicago Press, 1987).
 - 6 Lynn Hunt, *Inventing Human Rights: A History* (WW Norton, 2007); Sherene Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism* (University of Toronto Press, 2004); Roger Berkowitz, *The Gift Of Science: Leibniz and the Modern Legal Tradition* (Harvard University Press, 2009).
 - 7 James Boyd White, *The Legal Imagination* (University of Chicago Press, 1985); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985); James Boyd White, *Justice As Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, 1994). See also Austin Sarat and Thomas R Kearns (eds), *The Rhetoric of Law* (University of Michigan Press, 1994).
 - 8 Michael Meehan, 'The Good, the Bad, and the Ugly: Judicial Literacy and Australian Cultural Cringe' (1990) 12 *Adelaide Law Review* 431; Simon Petch, 'Borderline Judgments: Law or Literature?' (1991) 7 *Australian Journal of Law and Society* 3.
 - 9 Brook Thomas, *Cross Examinations of Law and Literature: Cooper, Hawthorne, Stowe and Melville* (Cambridge University Press, 1987); Stephen M Best, *The Fugitive's Properties* (University of Chicago Press, 2010).
 - 10 Mark Antaki, 'Genre, Critique, and Human Rights' (2013) 82 *University of Toronto Quarterly* 974; Karin Van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (African Sun Media, 2014); Honni Van Rijswijk, 'Archiving the Northern Territory Intervention in Law and in the Literary Counter-Imaginary' (2014) 40 *Australian Feminist Law Journal* 117.

and logic to the archaic medieval poesy of the law.¹¹ On the contrary, literary influences and questions of rhetoric are intrinsic to the way in which legal judgments work and are structured.¹² In many cases, the relationship between legal argument and rhetorical strategy is of vital importance in determining their outcome.

Yet the battle to achieve this recognition must be continually re-fought. For all the value of theoretical and generic analyses, we need more close readings that explicitly *demonstrate* the presence of style and affect in the very warp and weft of the primary source material of legal study.¹³ Such an approach is constantly ignored or marginalised by the negligent positivism of the law, as it is practiced – or perhaps perpetrated is the better word – by lawyers and judges, and in the vast majority of law courses. The default position, within law faculties and in law journals, seems to me still to treat rhetoric in judicial decisions as nothing more than a facade or ‘decoration’.¹⁴ The very notion of ratio and obiter discounts rhetoric – categorically not the former and not really the latter either – as a trap against which the young student should be always on their guard. In the diagnostic apparatus of the law school, literary elements are treated as pathological where they are not just ignored.

So in this brief article I propose to illustrate as simply as possible that the question of literature is not *exterior* or subsidiary to the logic of legal judgment, but nestles at its very heart. My case study is the High Court’s judgment in the 1939 case of *Chester v Waverley Council*.¹⁵ The case was once of central importance in defining the parameters of nervous shock in Australia. After it was expressly overruled by the High Court in the course of *Jaensch v Coffey*, it was relegated to the status of a minor footnote.¹⁶ But the case staged an epic battle between opposed rhetorical principles; a battle which is emblematic of ongoing debates about the nature and workings of the law. Ultimately, the case demonstrates the relevance to the practice of legal judgment of a literary approach, understood on the one hand in terms of the general relationship of style and form to substance and reason, and on the other hand, the specific use that can be made of literary and cultural materials in developing legal arguments. ‘Literature’ as a habit of mind, thought, and expression, is not contrary to legal

11 Peter Goodrich, *Oedipus Lex* (University of California Press, 1995); Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance* (Cambridge University Press, 2015). See also Sir William Blackstone, *Commentaries on the Laws of England* (Oceana Publications, first published 1830, 1967 ed); John Austin, *The Province of Jurisprudence Determined* (John Murray, 1861); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1879); H L A Hart, *Concept of Law* (Clarendon Press, 1961).

12 Peter Goodrich, ‘Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language’ (1984) 4 *Oxford Journal of Legal Studies* 88; Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1984); Peter Goodrich, ‘Visiocracy: On the Futures of the Fingerpost’ (2013) 39 *Critical Inquiry* 498; Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance* (Cambridge University Press, 2015).

13 See Meehan, above n 8, 431.

14 Ibid 447.

15 (1939) 62 CLR 1 (‘*Chester*’).

16 (1984) 155 CLR 549, 555 (Gibbs CJ), 589 (Deane J), 611 (Dawson J).

language, but essential to how it functions and the effects it produces. This is true as a matter of judicial method, judicial epistemology, and judicial strategy. Finally, if it is not too much of a comedown, it is true as a question of legal doctrine.

I JUDICIAL METHOD

In *Chester*, the question was whether a mother could successfully claim for ‘nervous shock amounting to illness if she saw the dead body of her child where the death of the child had been brought about by the negligence of the defendant towards the child’.¹⁷ Let Latham CJ take up the story in his laconic style:

The defendant council excavated a trench in a road of which it had the control. The trench was from two feet six inches to seven feet deep and at a week-end it became filled with water. There was a railing round the trench above the earth which had been thrown out on to the road. Children could easily get under the railing. The plaintiff's son, aged seven and a half years, went out to play. There was some evidence that he accidentally fell into the trench. He was drowned. The body was not found until some hours after he had been missed by his parents. The plaintiff, his mother, searched for him and became distressed upon failing to find him. She was present when his dead body was found in and taken from the trench. There was evidence that the plaintiff thereupon received a severe nervous shock – more than a fright – more than temporary mental disturbance and distress. She sued the council for damages for negligence. ... The plaintiff must, in order to succeed, establish a breach by the defendant of a duty owed to her to take care.¹⁸

The Council had been negligent. The question was whether they owed a duty of care not only to the child but to his mother, a third party who was not present at the time of the accident, and whose distress and injury arose after the event. The majority answered *no*. There are differences of emphasis between the three majority judgments. For Starke and Rich JJ, the fact that the plaintiff was the child's mother was neither here nor there, since in legal terms any third party would be on an equal footing. Chief Justice Latham was prepared to consider whether the situation of a mother might give rise to different considerations, although ‘the question should probably be put in a form which substituted the words “persons” and “another person” for “mother” and “child”’.¹⁹ In any case, he concluded, while the child's death was regrettable, the nervous shock suffered was not a foreseeable result of the defendant's actions, mother or no. As Latham CJ goes on to explain:

In my opinion ... it cannot be said that such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child should be regarded as ‘within the reasonable anticipation of the defendant.’ ‘A reasonable person would not foresee’ that the negligence of the defendant towards the child would ‘so affect’ a mother. A reasonable person would not antecedently expect that such a result would ensue. ... Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of

17 *Chester* (1939) 62 CLR 1, 10 (Latham CJ).

18 *Chester* (1939) 62 CLR 1, 5–6.

19 *Ibid* 10.

mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.²⁰

Writing in similar terms, Starke J concludes,

[i]n my opinion the shock to the appellant is not within the ordinary range of human experience; it is so remote from the act or omission of the respondent in opening or guarding the trench that no reasonable person ought to or would foresee or contemplate the injury to the appellant.²¹

The lapidary style and language use employed by the majority intentionally distances us from the events that took place. Neither the plaintiff nor her son are granted the dignity of a name or a context. In the judgment of Starke J, for example, the boy is described as being ‘some seven or eight years of age’.²² Apparently even the child’s age is of no real interest to the court; the use of the word ‘some’ in this context further removes the judicial role from the messy particulars of life as it is actually lived. The participants are presented as merely abstract signifiers in a logic problem of legal geometry. Not only particular names, but also particular relationships are treated as irrelevant details in order to protect the abstraction of the law, and to avoid any messy emotional complications:

There appears to be no reason why [the alleged duty of care] should not extend to other relatives or to all other persons, whether they are relatives or not. If this is the true principle of law, then a person who is guilty of negligence with the result that A is injured will be liable in damages to B, C, D and any other persons who receive a nervous shock (as distinguished from passing fright or distress) at any time ...²³

According to Justice Latham CJ, the appropriate way of characterising the relationship is not that of ‘mother and son’, but simply between A and B.

The language is stripped down and affectless, attempting an objectivity which draws on Chief Justice Latham’s training in analytic philosophy, which he taught at Melbourne University. The trope of distance is part of an approach to law – and to philosophy – which seeks the application of abstract rules without regard to particular circumstances. The majority’s style and terminology express a certain vision of law as the instrument of a completely generalised equality. The decision in favour of the defendant Council follows directly from the abstraction and generality of the Court’s reasoning. Perhaps this is connected to the idea of judgment or reason as essentially masculine attributes. The majority’s disinterest in the particulars of the plaintiff’s experience suggests a way of thinking which Carol Gilligan was to term the ‘ethic of justice’,²⁴ and to associate with male approaches to problem-solving. Quoting one of her child subjects, she characterised this way of thinking about moral questions as ‘sort of like a math

20 Ibid.

21 Ibid 13–14.

22 Ibid 12.

23 Ibid 7–8 (Latham CJ).

24 Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982) 174.

problem with humans'.²⁵ In the Court's language, abstraction and masculinity mutually confirm one another's authority. Their assertion that 'it is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives',²⁶ seems to echo a culturally appropriate expression of masculinity. The notion of 'customary phlegm', to which Lord Porter referred in *Bourhill v Young*, likewise suggests a certain gendered affect.²⁷ Grown men don't cry. They don't express their feelings – and they are not compensated for them either.

The contrast between the rhetoric of the majority and Justice Evatt's enraged dissent could hardly be richer or starker. Chief Justice Latham's judgment takes about six pages. The concurring judgments are no more than a couple of paragraphs long. Justice Evatt's dissent runs for 34 pages. Its mere length is a stylistic decision which attempts to force the reader to acknowledge that there is nothing simple or straightforward about the majority's hasty reasoning. Even more distinctive are Justice Evatt's use of rhetoric on the one hand, and his references to literature on the other. These are matters which have over the years occasioned both admiring and sarcastic commentary, but little sustained analysis.²⁸ The question is whether Justice Evatt's stylistic choices *contribute* to the judgment, or merely inflate or *colour* it. A brief discussion by Michael Meehan applauds Justice Evatt's use of Australian literature, but expresses scepticism 'on the point of relevance'.²⁹ Simon Petch goes further, taking Justice Evatt to task for misquoting William Blake, and accusing him of a 'heavy-handed' and 'self-conscious' treatment of his material.³⁰ But Petch's critique does not attempt to understand how or why Justice Evatt deployed the rhetorical and literary devices in the way he did, nor how these choices related to the legal issues before the court.

Justice Evatt's approach perfectly matches his attitude to the law. Context and particularity are relevant as a matter of legal method. In this case, it is Justice Evatt's contention that the position of a *mother* is not at all the same as that of 'all other persons'.³¹ Purely from the point of view of 'reasonable foreseeability', the likelihood of a mother suffering nervous shock pursuant to the death of her son is by no means the same as the possibility of B, C, or D. In order to make this claim persuasive, Evatt J seeks to involve his readers in Mrs Chester's suffering, and to understand how and why it came about. Thus his statement of facts begins

25 'Response of Jake', quoted in Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982) 26.

26 *Chester* (1939) 62 CLR 1, 10.

27 *Bourhill v Young* [1943] AC 92, 117 (Lord Porter). The events giving rise to that case took place in 1938: *Bourhill v Young* [1943] AC 92, 93. The facts in *Chester* occurred in August 1937: *Chester* (1939) 62 CLR 1, 14 (Evatt J).

28 See discussions in Michael Kirby, 'The Literary Desert in Australian Law' (2001) 45(11) *Quadrant* 33; Meehan, above n 8, 438; Petch, above n 8.

29 Meehan, above n 8, 438.

30 Petch, above n 8, 9. The author's criticism of Justice Evatt's 'questionable' use of Blake is not made more convincing by the fact that Petch himself misattributes the poem: at 8.

31 *Chester* (1939) 62 CLR 1, 7 (Latham CJ), 41 (Evatt J).

very differently from Latham CJ, much closer to the action on that day and more engaged with the experiences of the individuals involved.

The plaintiff was a woman of Polish extraction, and found special difficulty in narrating the precise nature of her feelings, her fears, her hopes and her sufferings. But it is quite easy, I think, to perceive the order of events. It is abundantly clear that until the recovery of the body she did *not* know that her child had been drowned in the trench. Like most mothers placed in a similar situation, she was tortured between the fear that he had been drowned and the hope that either he was not in the trench at all, or that, if he was, a quick recovery of his body and the immediate application of artificial respiration might still save him from death. In this agonized and distracted state of mind and body she remained for about half an hour, when the police arrived and the child's body was discovered and removed ...³²

Justice Evatt's style does not position the reader as an abstract arbiter of objective relations between A and B. The direct reference to the plaintiff as a woman of Polish extraction, and the difficulties which that occasioned, invites to relive in their mind the particular experience she suffered. The place and the day become vivid to us.

This not only reflects a different vision of the nature of judicial reasoning, but leads us to a different understanding of the legal claim being made by the plaintiff. Justice Evatt shows us that it is not the mere *fact* of 'nervous shock' that is being sued for – a result which according to the majority was not foreseeable. What produced not just grief but 'shock' was not the bald fact of the death of the plaintiff's child, but the drawn-out trauma of indecision into which she had been thrown during the whole dreadful afternoon, while the search for her child was underway. Paradoxically, according to Starke J, her absence at the time of the accident substantially weakens her case: '[i]n the present case the appellant was not present at the accident nor was she alarmed in the happening of the accident; she only saw its consequences some hours after it occurred'.³³

But as Justice Evatt's description makes clear, Mrs Chester (the plaintiff is given her name) did not suffer mental anguish because of the 'consequences' of an act of negligence 'some hours after it occurred'.³⁴ That completely misunderstands the situation. She did not just read in the newspaper, or receive from the police the news of the death of her son Maxie (he too has a name). Maxie's death was not a *fact* which she had trouble absorbing; it was a *process* which she had to undergo. Justice Evatt's way of recounting the story makes clear to us that it was not the information but the totality of her experience that traumatised her. Justice Evatt tells the story in some detail, giving us a sense of the length and rising horror of the afternoon:

There had been a very heavy rain storm on the Thursday afternoon before the accident. This caused work to be stopped. On the next day, Friday, the water in the trench made work impossible. On the Saturday morning of the fatality, children were playing about the edge of the trench. There was evidence that the crude railing placed around the trench, supposedly to guard it, did not even extend

32 Ibid 17 (emphasis in original).

33 *Chester* (1939) 62 CLR 1, 13.

34 Ibid.

around it. Even after the accident, when the railings were placed in a more effective position, it was still possible for children to get through. On the Saturday afternoon, the trench was some 40 feet long and 4½ feet wide. For the first 20 feet of its length, the approximate depth was about 7 feet, and for the remaining 20 feet, the depth ranged from 7 feet to 2½ feet. Thus the depth of water in the trench was for the most part in excess of the height of the small children playing there. In this way the menace of death was very great and very near.³⁵

The final moment, in which, after several hours, the police dredged up from the depths of a seven-foot pit of water and mud, Maxie's sodden and lifeless body, becomes the culmination of a terrible ordeal and not simply the discovery of a 'fact' or a piece of information. Justice Evatt's attention to detail gives us a much clearer sense of the nature and intensity of the trauma undergone by Mrs Chester. Once fully imagined, it becomes harder to deny that the mental illness she endured was not only foreseeable but entirely predictable.

The difference in legal method between the majority and the dissent, which is revealed on the level of style, has real implications for the result in the case. As Evatt J puts it later on in his judgment,

So far as the argument rests upon the contention that no other parents would have suffered shock and illness from the ordeal undergone by Mrs. Chester, I think this is a mere assertion and is contradicted by all human experience. I think that only 'the most indurate heart' could have gone through the experience without serious physical consequences ...³⁶

The level of imaginative engagement at the heart of Justice Evatt's legal judgment allows him to distinguish the impact of such events on a 'mother' and on 'any other person'. The majority's decision hinges on the very impossibility of drawing such a distinction – but it is their approach to legal reasoning which renders them unable to perceive it. From a great enough distance, all plaintiffs look alike, all suffering is temporary, and death is not an infrequent occurrence. Justice Evatt, by bringing his reader much closer to the action, changes our perspective on what counts as legally relevant experience.

II JUDICIAL EPISTEMOLOGY

Justice Evatt supplements his legal method with a brief reference to William Blake's *Songs of Experience*, before turning to a lengthy extract from the Australian novel *Such Is Life*.³⁷ The substantial attention his Honour pays to Australia's literary heritage makes this judgment unique in the archives of the High Court of Australia.³⁸ But again to the contrary of what is sometimes

35 Ibid 15.

36 Ibid 25.

37 Ibid 17–18.

38 Meehan, above n 8, 431.

asserted,³⁹ Justice Evatt's deployment of this material is not in any way tangential to his main argument. His literary quotations serve a vital epistemological function: they are included in the judgment because his Honour treats them as legally relevant *evidence*. Recall that the majority conclude, somewhat dogmatically, that Mrs Chester's suffering was 'not a common experience of mankind'. Four times in one short paragraph, for example, Latham CJ insists that a reasonable person could not possibly anticipate such an outcome:⁴⁰

[1] In my opinion ... it cannot be said that such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child should be regarded as 'within the reasonable anticipation of the defendant.' [2] 'A reasonable person would not foresee' that the negligence of the defendant towards the child would 'so affect' a mother. [3] A reasonable person would not antecedently expect that such a result would ensue. Death is not an infrequent event, and even violent and distressing deaths are not uncommon. [4] It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature ...⁴¹

Justice Evatt finds this kind of proof by repetition a 'mere assertion' contradicted by the 'human experience' of all but an 'indurate heart'. But Evatt J is no doubt aware that the game of assertion and, by implication at least, ad hominem abuse, could go on indefinitely. So how is the disagreement to be resolved? How is the court to come to an informed decision, in other words, as to what is or is not the experience and the response of mankind?

Justice Evatt, as opposed to the majority, has an answer to this question – by the study of the cultural patrimony of our society, including the work of its poets and novelists. These offer important documents that reveal the preoccupations and attitudes of a society. In this light, Justice Evatt's use of *Such Is Life* operates as a means of evidence that Meehan, in a gesture to Clifford Geertz, called 'local knowledge'.⁴² Joseph Furphy (writing under the pseudonym of Tom Collins) was widely regarded as the father of the modern Australian novel; *Such Is Life* (1903)⁴³ was a familiar point of reference in the emerging canon of Australian literature. Although perhaps not so well known now, Evatt J, writing in 1939 could hardly have chosen a more iconic book (by 1947, Douglas Stewart was able to refer to it as 'deified'),⁴⁴ nor one that was more generally acknowledged to

39 Note Meehan's rather disparaging remark about Justice Evatt's use of Furphy: 'The passage from Furphy ... merits a full quotation, without too close a questioning, perhaps, on the point of relevance': *ibid* 438. See also Richard A Posner, *Law and Literature: A Misunderstood Relation* (Harvard University Press, 1988); Richard Posner, 'The Ethical Significance of Free Choice: A Reply to Professor West' (1986) 99 *Harvard Law Review* 1431.

40 *Chester* (1939) 62 CLR 1, 10.

41 *Ibid*.

42 Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983); Meehan, above n 8, 433.

43 Joseph Furphy, *Such Is Life* (Claremont, 1991).

44 James Wieland, 'Furphy, Joseph,' in Eugene Benson and L W Connolly (eds), *Encyclopedia of Post-Colonial Literatures in English* (Routledge, 2005) 557.

portray the contours of Australian identity in the early 20th century.⁴⁵ Justice Evatt quotes from a central passage in that book that describes precisely the search for a child lost in the bush:

Longest night I ever passed, though it was one of the shortest in the year. Eyes burning for want of sleep, and couldn't bear to lie down for a minute. Wandering about for miles; listening; hearing something in the scrub, and finding it was only one of the other chaps, or some sheep. Thunder and lightning, on and off, all night; even two or three drops of rain, towards morning. Once I heard the howl of a dingo, and I thought of the little girl; lying worn-out, half-asleep and half-fainting – far more helpless than a sheep ...

There was a pause, broken by Stevenson, in a voice which brought constraint on us all. Bad enough to lose a youngster for a day or two, and find him alive and well; worse, beyond comparison, when he's found dead; but the most fearful thing of all is for a youngster to be lost in the bush, and never found, alive or dead.⁴⁶

Again, this quote has not been included by Evatt J for its melodramatic effect. It helps establish Justice Evatt's claim that – far from being an unexpected sequelae of her suffering – Mrs Chester's harrowing experience follows a recognisable pattern within the Australian cultural imaginary. The quote from Furphy establishes a direct parallel with the horror of her experience. As Evatt J writes:

During this crucial period the plaintiff's condition of mind and nerve can be completely understood only by parents who have been placed in a similar agony of hope and fear with hope gradually decreasing. In the present case the half hour of waiting was the culmination of a long and almost frantic searching which had already reduced her to a state of nerve exhaustion. Even after the finding of the body, an attempt at artificial respiration was made and abandoned only after expert lifesavers had worked on the child's body for some time.⁴⁷

Even more importantly, Evatt J draws on *Such Is Life* to demonstrate that all those in Australia who were familiar with the book – and it was pretty widely known and read – would recognise, understand, and sympathise with Mrs Chester's experience. The majority claims that her suffering was unforeseeable. Justice Evatt responds by citing literature as evidence that the suffering of a parent in just these circumstances chimes with Australia's cultural assumptions and accords with its stock of common sense.

III JUDICIAL STRATEGY

If somewhat overwrought, Justice Evatt's judgment attempts to arouse the outrage of his readers. Mrs Chester is described as 'tortured', 'agonized', 'distracted', 'frantic', and 'exhausted'. Quoting from William Blake's *Songs of Experience*, in a poem perhaps ironically entitled *The Little Girl Found*, the

45 See Julian Croft, *The Life and Opinions of Tom Collins* (University of Queensland Press, 1991); Frances Devlin-Glass, 'Introduction' in Frances Devlin-Glass et al (eds), *The Annotated Such Is Life: Being Certain Extracts from the Diary of Tom Collins* (Oxford University Press, 1991); Ken Stewart, 'Lawson, Furphy and Chaos' in *Investigations in Australian Literature* (Shoestring Press, 2000) vol 20; *ibid* 556–8.

46 *Chester* (1939) 62 CLR 1, 18 quoting Joseph Furphy, *Such is Life* (Claremont, 1990).

47 *Ibid* 17.

child's parents are described as '[t]ired and woe-begone/ hoarse with making moan'.⁴⁸ The majority, Evatt J seems to suggest, have 'indurate heart[s]'.⁴⁹ And perhaps the majority would not even disagree. Their styles set out to disengage our feelings, to ensure that we approach the matter with a hardened and clinical heart. Justice Evatt sets out to undo that alienation, which is to say, to rouse the heart. Such a self-conscious use of rhetoric and emotive language is not just related to this case; it reflects a broader approach to the nature of judgment. Martha Nussbaum has often insisted that our emotional involvement with the world is not the negative of reason or the opposite of justice, but the very thing that gives it a basis on which to operate.⁵⁰ But long before this, the relationship between affect and reason was the object of intense study in the work of English philosophers of the 18th century – David Hume, Adam Smith, and others;⁵¹ not to mention, at least in some respects, in the German philosopher Immanuel Kant's *Critique of Judgment*.⁵² In this literature, the Cartesian mind–body distinction was radically rethought. For 18th century scholars of 'sympathy' and 'sensibility' and their successors,⁵³ the careful cultivation of affective engagement has not been thought to jeopardise the operation of reason, but to give it access to an expanded field. In Laurence Sterne's famous novel *A Sentimental Journey*, and in Friedrich Schiller's *Naïve and Sentimental Poetry*,⁵⁴ the perspectives and experiences of others were understood as the very basis of human judgment. Sentiment was not the juvenilia of reason but its maturity. The majority in *Chester* might be thought to be attempting to embody that fictitious icon of the common law, 'the reasonable man', who thinks of others before he acts. Against this, Evatt J proffers the 'sensible man', whose psychological knowledge and sympathies inform and enrich rather than contaminate that thought.

Justice Evatt's rhetorical energy therefore does not merely indulge an unanchored fury; he advances by means of form and style a broader debate about

48 Ibid.

49 *Chester* (1939) 62 CLR 1, 24.

50 Martha Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford University Press, 1990); see also Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press, 1995).

51 David Hume, *A Treatise of Human Nature* (Oxford University Press, first published 1739, 2000 ed); John Mullan, *Sentiment and Sociability: The Language of Feeling in the Eighteenth Century* (Oxford University Press, 1988); James Chandler, *An Archaeology of Sympathy: The Sentimental Mode in Literature and Cinema* (University of Chicago Press, 2013). See also Francis Hutcheson, *Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense* (Oxford University Press, first published 1742, 2000 ed); Adam Smith (Knud Haakonssen, ed), *The Theory of Moral Sentiments* (Cambridge University Press, first published 1757, 2002 ed); David Raphael, *The Impartial Spectator: Adam Smith's Moral Philosophy* (Oxford University Press, 2007).

52 Immanuel Kant, *Critique of Judgment* (J C Meredith trans, Oxford World's Classics, first published 1790, 2008 ed); see Paul Crowther, *The Kantian Sublime: From Morality to Art* (Oxford University Press, 1989); A B Dickenson, *Kant on Representation and Objectivity* (Cambridge University Press, 2003).

53 Petch, above n 8, 28.

54 Laurence Sterne, *A Sentimental Journey Through France and Italy* (PF Collier & Son, 1917); Friedrich Schiller, 'On Naïve and Sentimental Poetry' in H B Nisbet (ed), *German Aesthetic and Literary Criticism: Winckelmann, Lessing, Hamann, Herder, Schiller, Goethe* (Cambridge University Press, 1985).

the nature of good judgment. Some attention, often rather unflattering, has been paid over the years to the rhetorical style of Justice Evatt (not to mention Lionel Murphy and Michael Kirby in later years). But this strategic indirection has drawn our attention away from the *real* rhetorical sleight of hand, which is (and always is) performed by the majority.⁵⁵ It is the majority who conceal their own judgments under the copious dispassionate mantle of the law. It is the majority who carefully attempt to distance themselves and their readers from the implications of their argument.

This is perhaps the greatest tactical weakness of dissent. Since it must always expose itself as a *choice*, an alternative, the dissenting voice is unable to adopt the untroubled aura of inevitability which the majority very often cultivates. Such an approach, which is systematically designed to repress the *possibility* of a choice, is not open to it. But if there is a tactical disadvantage in the adoption of a linguistic register that necessarily draws attention to its own difference, there can sometimes be a kind of strategic advantage. The tone of Justice Evatt's dissent was ultimately important in the long debate over the principles of 'nervous shock'.⁵⁶ The power of his rhetoric highlighted the injustice of the decision and helped fan the flames of public discontent. Amidst letters to the editor and under parliamentary attack, the High Court's decision led to the enactment, shortly afterwards, of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). The amendment specifically addressed the question raised by the case and specifically permitted a claim in nervous shock to be brought by 'a parent or the spouse of the person so killed'.⁵⁷ In *Bourhill v Young*, decided just a few years later, Lord Wright acknowledged that Justice Evatt's dissent must 'demand the consideration of any judge who is called on to consider these questions'.⁵⁸ By the time of *Jaensch v Coffey*, the High Court had been forced to concede that the majority judgments had 'not worn well with time'.⁵⁹ Justice Evatt's judgment was 'plainly to be preferred'.⁶⁰ It is hard not to conclude that these remarks reflect not only the more expansive vision of responsibility in Justice Evatt's judgment, but the urgency provoked by his rhetoric. In comparison to the cool indifference of the majority, the emotional 'demand' behind Justice Evatt's words compels an answer. The emotional force of his language intensified the controversy, raising the stakes and focusing the mind in a way that ultimately forced the direct judicial repudiation of the majority's position, rather than simply leaving *Chester* 'confined to its own facts', as Dawson J did.

The language of the court in *Jaensch v Coffey* is of course from a different era than *Chester*. Justice Deane's leading judgment is carefully couched in terms

55 The fact that the majority judgment is equally though differently rhetorical is ignored in the earlier brief discussions of the case in Meehan, above n 8; Petch, above n 8.

56 See Michael Kirby, 'Judicial Dissent – Common Law and Civil Law Traditions' (2007) 123 *Law Quarterly Review* 379.

57 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4(1)(a).

58 *Bourhill v Young* [1943] AC 92, 110 (Lord Wright).

59 (1984) 155 CLR 549, 590–1 (Deane J) ('*Jaensch*').

60 *Ibid.*

of the legal issues at stake – in 1984, that specifically concerned the question of the meaning and function of the word ‘proximity’ in establishing a legal duty of care. It is not until the 14th paragraph of the judgment that the specifics of the case before the court are even mentioned.⁶¹ But at the same time, Deane J, like Evatt J before him, is careful not to focus on the mere fact of nervous shock, but on the experience of the plaintiff, over the whole course of the day of the accident.⁶² Nervous shock is understood as a condition brought on by a process of suffering. Indeed, as has been argued elsewhere,⁶³ the notion of proximity appears to be a way of giving some sort of legal recognition to the psychological or emotional closeness between persons.⁶⁴ Irreducible to a rule and expressive of the ethical bond between human beings, proximity is Justice Deane’s effort to connect the *moral* imperative of the neighbour principle (the starting point of the judgment) to its legal expression.⁶⁵ In his attempt to bring together two kinds of discourses – in order to shore up the legitimacy of the entire legal framework – Justice Deane’s legal theory shares a great deal with that of Evatt J

While it is easier to see a philosophical or ethical dimension than a literary one in Justice Deane’s judgment, the impulse away from a narrow legalism and towards a wider, *affective* discourse of justification, indicates a kinship and perhaps even an influence stretching from *Chester* to *Jaensch*.

Dissents are often criticised for their stylistic distinctiveness, with the implication that this makes them legally spurious. But these same elements can sometimes make them strategically compelling. The ‘different voice’ of dissent – whether it is the naïve populism of Lord Denning, or the passion of Justice Evatt, or the social and political consciousness of Lionel Murphy – is always a fine risk to be run. It exposes the dissenter to caricature, and even ridicule. ‘It was bluebell time in Kent’, we say, and roll our eyes.⁶⁶ But sometimes running that risk is the only way to keep the legal discourse alive for the future. The afterlife of *Chester* demonstrates that sometimes the risk can pay off in stunning fashion.

IV LEGAL DOCTRINE AND THE LITERARY IMAGINATION

The point of this article has not been to propound a theory of legal judgment. All judges have such a theory – a set of background assumptions as to what counts as legitimate interpretation, relevant argument, and the relationship between legal and social legitimacy. But theory is the bowels of judgment; it is considered bad manners to talk about it on the bench. The purpose of this article has been to demonstrate that these theoretical assumptions and working

61 Ibid 588 (Deane J).

62 Ibid 588 (Deane J).

63 Desmond Manderson, *Proximity, Levinas and the Soul of Law* (McGill-Queen’s University Press, 2007); Desmond Manderson, ‘Proximity: The Law of Ethics and the Ethics of Law’ (2005) 28 *University of New South Wales Law Journal* 698.

64 *Jaensch v Coffey* (1984) 155 CLR 549, 584 (Deane J).

65 Ibid 578–9 (Deane J).

66 *Hinz v Berry* [1970] 2 QB 40, 42 (Lord Denning).

hypotheses nevertheless manifest themselves in their rhetorical strategies and stylistic choices. Given a general judicial reluctance to explicitly address these questions, it may be that an analysis of rhetoric, metaphor, and style may be the very *best* way of disclosing those underlying questions.

No doubt, legal judgment constantly requires us to mediate between law as the application of an abstraction, and law as the representation of an experience. These two elements are best understood not as opposites but as complementary perspectives. In *Chester*, the majority attempt both in their style and their reasoning to exclude the latter from consideration altogether. In this case – and in many cases – they present a partial theory of the process of judicial reasoning, in such a way as to convince us that it is the only approach possible. One senses that the *indirection* of this strategy is what provoked Justice Evatt's literary outbursts. The majority judgments made a choice about the balance between universal rules and particular experiences, while attempting to conceal the fact that there was a choice to be made. The minimalism of their judicial style – the judges' 'songs of innocence' – reflects a minimalist approach to judgment. What we might call Evatt's own 'song of experience' endeavoured to force his readers to take account of the elements the majority studiously tried to ignore, and to throw into relief what would otherwise remain in the shadows – a bravura *chiaroscuro* effect.

One might ask why Justice Evatt's contextual, psychological, and cultural immediacy is to be preferred to the abstractions of the majority. Is not their judgment, if lacking in compassion, more 'correct' simply as a matter of black-letter law? Perhaps their judgments 'have not worn well with time'. Perhaps even in 1940 their Honours were out of touch. But perhaps their Honours were right to repudiate this socio-political agenda. As Sir Owen Dixon later argued, judges are not concerned with 'justice' and 'society', but only with preserving a 'strict and complete legalism'.⁶⁷ In the great social debates of Australian society, said Sir Owen, the Court does not take part except as a neutral umpire.

In some ways this puts a rather generous construction on the judgments of the majority. A large part of the short judgment of Justice Rich, for example, consists of the following observation:

But the law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side. The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its progress towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen entirely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries.⁶⁸

67 *Speech at the Swearing-In of Chief Justice Sir Owen Dixon* (1952) 85 CLR xi, xiv.

68 *Chester* (1939) 62 CLR 1, 11–12 (Rich J).

In this passage we might interpret Rich J as criticising precisely the law's tendency towards social pity, with his Honour defending the 'settled standards' of the law, while refusing to extend any further its 'present amorphous condition'. But simultaneously, his Honour appears to defend these rules *not* as an exercise in logical reasoning but, on the contrary, in terms of the 'social consequences' of too generous a standard of liability, 'which ought to be weighed on the other side'. Justice Rich does not appear therefore to pit legal rules against social expediency, but one set of social consequences against another. Perhaps he simply favours a social policy of less liability over a social policy of more. That is surely not, in Justice Dixon's terms, a strictly *legal* argument.

Be that as it may, let us assume for the sake of argument that the decision of the majority rests on maintaining the 'settled standards' of the law. This brings us to the final and perhaps the most important vindication of the role of literature in the law. The majority and the dissent agree that the legal question concerns the 'reasonable foreseeability' of the harm suffered. In the words of Justice Starke:

Some relationship of duty on the part of the municipality towards the appellant must be established. Negligence in the abstract or in the air, as has often been said, is not enough. It is a question of law whether any duty to take care exists and what standard of care is required ... 'To fulfil this duty' the municipality 'is not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience'. 'People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities'. It is a question of law and not of fact in each case whether there is any evidence of a breach of the duty to take care.⁶⁹

In other words, the legal question hinges on what the defendant – those individuals responsible for what the Council did and did not do – should have 'foreseen'. Already it can be seen that what we *should* expect or anticipate in consequence of our actions is not in any practical sense 'a question of law not of fact'. It is determined by the habits and norms of a particular group of people, and it will vary from time to time and from place to place; what William Blackstone called the *lex non scripta* and tried very hard, in his *Commentaries*, to show was the necessary bridge between social customs and legal principles.⁷⁰

Such a thought experiment is unavoidably hypothetical. This is particularly so in relation to the law of negligence, which asks us to turn our mind to the consequences of our actions in relation to a chain of events that flow from things we have not actually done and indeed hope we never do. So at the heart of the duty of care is a legal obligation to imagine ourselves in other people's shoes. Every day we must conscientiously imagine the consequences of our actions, including possibly careless actions, on those around us; and we must go so far as to imagine the effects those consequences will have on other people's physical and psychological lives, far into the future. In other words, we can *only* exercise

69 Ibid 12–13 (Starke J; footnotes and references omitted).

70 Blackstone, above n 11; Richard A Posner, 'Blackstone and Bentham' (1976) 19 *Journal of Law and Economics* 569.

legal foresight by using our imagination. The law of negligence is nothing but a complicated exercise of pretending, for which reading a novel might be the closest parallel we have.

The law of negligence is a fiction. How are we to engage in such an imaginative endeavour without drawing on exactly the kind of creative resources, both personal and cultural, that Justice Evatt employs in his judgment? His choice to rely on literary and psychological insights into human behaviour and feeling, along with his choice to position himself at the site of a terrible accident and in the skin of a mother, was not merely arbitrary or idiosyncratic. It reflected *exactly* the kind of imaginative sensibility that the law itself demanded and still demands of defendants. Justice Evatt only did what the law required the Council and its members to do: to imagine what might happen if they left that trench unfenced, who might be injured, how, and with what consequences to others. Justice Evatt employs our sympathy in exactly the way the law itself expected the Council to employ theirs. The approach, style, and affect of the majority, on the other hand, was not just heartless or unfashionable or unpersuasive or ignorant or cruel. It was incoherent as a matter of law. Chief Justice Latham, Rich and Starke JJ abrogated the very responsibilities of judgment which the law itself required of them. The duty of care *demand*s of us the cultivation of a literary imagination. We cannot properly satisfy that duty without engaging in the kinds of literary practices which Evatt J exemplified. The proper home of law and literature is within the law itself.