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# THE NARRATIVE VOICE IN LAW AND FICTION

To speak of the narrative voice in law and fiction is to be reminded immediately that the legal system is a vast auditorium occupied by a variety of voices, from the *cri de coeur* of the litigant, defiant or anguished, as the case may be, to the eloquence of an advocate or the magisterial tones of a judge. Each resembles the voice of a creative writer or historian because what is said is inevitably affected by the style in which it is a said. So let me begin by speaking of narrative in general terms.

Narrative is a means of imposing order upon or making sense of various events, irrespective of whether they are actual events, as presented in a historical work or a court of law, or supposed events, as in a literary work. The search for coherence inevitably involves a process of selection by the teller of the tale directed to matters of chronology, crucial facts, connecting threads and various underlying values.

It will never be enough to set out a mere sequence of events. A well-known example of what amounts to a narrative or story was provided by E.M.Forster in his book *Aspects of the Novel*. The king died, then the Queen died. That is *not* a story. To say instead: The King died, then the Queen died of grief. That *is* a story. The extra words ‘of grief’ not only amplify the chronology but also bring into play connective threads of causation and underlying values, a sense of what is holding the events together, the pivotal factor that gives a meaning to the story.

In *The Annals of Saint Gall* one finds a list of events that occurred in Gaul in the dark ages. *Hard winter. Duke Gottfried died. Flood everywhere. Pippin, Mayor of the Palace died. Saracens came for the first time.*

This list immediately transports the reader to what appears to be a culture hovering on the brink of dissolution, threatened by flood and famine, random deaths and invasion. Significantly, however, in the absence of a central subject or indications of a beginning, a middle and an end, the list doesn't amount to what would normally be thought of as a story, a narrative with a discernible meaning.

On the other hand, in Albert Camus' work *The Plague*, which may be thought to have some relevance to our current situation in the Covid era, the writer's presentation opens in this way: *The unusual events in this chronicle occurred in 19- at Oran. Everyone agreed that, considering their somewhat extraordinary character, they were out of place there.*

The tone is less calamitous than in the Gallic list but the reader can sense immediately, from the title, from the tone, and from what is said, that the first few words of the piece form part of a narrative. The events occur in a certain place. Details are provided by a narrator. There will be an outcome confirming the extraordinary nature of the events foreshadowed in the opening. All of this will involve getting to grips not only with the surface structure, the sequence of events, but also with the deep structure of the story, the influence of underlying values and crucial incidents.

The narrative voice in law is often complicated by the presence of ambiguities and a need for interpretation as to what values are embodied

in the operative legal norms. In *Rhetoric and the Rule of Law, P*rofessor Neil MacCormick recognised that a familiar feature of any mature legal system is an apparent tension between the 'arguable character of law' and the rule of law. Law has an arguable character because, for just about any question other than the simplest, it is necessary to think out a view of the legal issue in question that can be presented in a way that is both sound and persuasive.

The rule of law, on the other hand, requires that there be a body of identifiable and generally respected law that will govern the dealings of parties to a transaction or dispute. The rule of law within a state helps to secure the value of legal certainty, security of legal expectations and safety of the citizens from arbitrary interference by the government of the day, or by others.

The tension between these two important elements of a mature system – the arguable character of law and the need for certainty – means that acts of persuasion call not only for mastery of the legal norms and evidentiary materials but also for imagination and a certain boldness of approach, qualities accompanied by the questions addressed in this paper.

If there are gaps in the law that can be filled by ingenuity in certain cases, how should this be done? Will the quest for coherence in narrative bring with it self-deceptive consequences, as can happen with any piece of writing in which the author seeks to weave words together seamlessly, winkling out what doesn't seem to fit, striving for a pleasing harmony, until the story is reconfigured by an element of aesthetic truth?

To put it another way, and more specifically for present purposes: Is the process of shaping the narrative voice in law, with a view to

providing order and coherence, accompanied by a risk that the legal norms otherwise applicable to the matter in hand will be transformed along the way, consciously or sub-consciously, to suit the demands of the narrative or the jurist's style?

Tension between the arguable character of law and the rule of law can certainly provide an opening for what is sometimes described as a robust judicial approach to the resolution of legal disputes, an assumption that doing justice according to law stands for the righting of wrongs. A robust credo of this kind has often been attributed to the famous British jurist Lord Denning. In his autobiography, *The Family Story,* Denning said: *The proper role of a judge is to do justice to the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all that he can to avoid that rule.*

In the same book, Denning added: *My judgments carry my style.* He was of the view, apparently, that in speeches or in judgments if you are to persuade your hearers: *You must cultivate a style which commands attention. No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers will not stop to listen. They will turn aside.*

Denning's credo, and his crisp but evocative style, was brought into play in *Hinz v Berry* (1970) 2QB, a case concerning damages for nervous shock. His judgment began: *It was blue-bell time in Kent.* This set the scene for the disastrous chain of events that was then described, namely, while picking blue-bells in the field opposite the lay-by where her husband was at the back of his Bedford Dormabile making tea, Mrs

Hinz turned to see another vehicle, a Jaguar, rushing into the lay-by with fatal consequences.

One can't help wondering whether the voice awarding damages to the plaintiff widow on this occasion, the voice of a robust judge, was overly influenced by style and narrative structure. Did the wistful preface to the melodrama about to be unfurled at blue-bell time in Kent – humble Dormabile devastated by flashy Jaguar – affect the flow of legal reasoning? Is there a risk that the credo of righting wrongs, and the shaping of the narrative accordingly, will tip the balance in favour of subjective rulings based on personal inclinations? A risk that the rule of law's respect for certainty and objectivity will be distorted by rhetoric? According to the jurist Thomas Hobbes in *Leviathan: Rhetoric has no role in the discovery of truth. Its only role is to spread what is thought to be the truth through vivid prose and graphic images*.

As an aid to understanding the views I have expressed to this point let me digress briefly to mention some characteristics of the narrative voice in law that I have noticed in the course of my career as a judicial officer.

While presiding at hearings of a Tribunal dealing with alleged infringements of anti-discrimination law I was frequently addressed by self-represented litigants or comparatively junior legal practitioners. A number of the self-represented litigants were shrewd and articulate, presenting their cases with assurance. Some of the junior practitioners were clearly destined to succeed as advocates in the higher courts. Others, however, understandably perhaps, being at the start of their careers, were not so impressive. Nonetheless, to my mind, the hesitant junior

practitioner was generally of more use to the Tribunal, and thus to the litigant, for the simple reason that an advocate with some legal experience was inevitably more attuned to the deep structure of the narrative, an ability to single out crucial incidents from the mere series of events and to stay focused upon the values lending coherence to the narrative; that is, the legal norms reflected in the statutory provisions or previously decided cases.

The fluent, self-represented litigant, with a mass of details drawn from his or her personal experience of the matters thought to be in contention, all too often lacked this vital capacity, an ability to construe the flurry of events, although an observer, or a court reporter, might well have thought that the confident, and at times passionate, voice of the lay person was bound to carry the day. I feel obliged to add, as a footnote to this point, that even overly emotive lay persons, who were not quite able to chart an orderly course through the matters in issue, were generally well-aware that it was not enough to charm or be liked by the members of the Tribunal. Behind the Tribunal lay ‘the law’, and it was this that would prove decisive. They knew instinctively that in this setting the narrative voice, and ultimately the process of persuasion, had to be directed to something of greater significance than personal inclinations.

The shaping of the narrative voice in law may well be affected by the nature of the forum. This in turn may lead to an interleaving of narrative forms according to the exigencies of the moment. I found, as a judge presiding at jury trials, that the voice of the advocate, prosecution or defence, was usually directed essentially, and very understandably, to the facts of the matter, and to the jurors. In this context, as evidence was admitted and the story unfolded, the surface structure of the narrative, and

the orchestration of various factual details, albeit conditioned to a certain extent by legal norms, seemed vital, for a sequence of graphic details, even if only marginally related to the main issue, might be enough to sow the seeds of doubt that could lead to an acquittal.

If, however, in the course of the trial, or in closing addresses some comment or item of evidence was the subject of an objection, obliging the trial judge to press counsel as to how the evidentiary issue should be resolved, most counsel were sufficiently adroit to change their tone and present the narrative in a different and somewhat deeper form. I have to say in passing, with a wry smile, that some counsel, when pressed for clear grounds in law supporting an objection, were left floundering in the shallows of the surface narrative. *In my experience, your Honour, it isn't usually done that way, but never mind, I'll withdraw the objection.* I am well-aware, of course, that a strategic retreat of that kind, if done with a glance at the jury, and the slightly indignant air of a sturdy citizen put upon by obtuse officialdom, could at least be useful in sweetening the shallows, jury trials being what they are.

It emerges from discussion to this point that the tension between the arguable character of law and the rule of law allows for change. Adjustments to the legal scene can be effected by robust judicial rulings, within the traditions of the common law, quite apart from explicit reforms backed by governments or law reform commissions which are carried into effect by statutory provisions. Consideration of the narrative voice in law as a vehicle for change brings me to a fine, thought-provoking work by the well-known writer, Gideon Haigh: *The Brilliant Boy. Doc Evatt and the Great Australian Dissent.*

Haigh's biography covers the life and times of Dr Herbert Vere Evatt (1894-1965) as a scholarship boy, a talented barrister in the 1920s, a member of the New South Wales parliament, a High Court judge for a 10 year period from 1930 to 1940, Attorney-General and Minister for External Affairs in the Curtin/Chifley governments in the war years, a leader of the Labor Party in Canberra in the 1950s, and eventually a short term as Chief Justice of New South Wales. The focus of Gideon Haigh's book, however, is on the way in which Evatt's personal and political inclinations are arguably reflected in a number of his judgments.

It emerges from Haigh's appraisal that Evatt, like Lord Denning, harboured a robust view of the judicial role. He saw a place for himself in the righting of wrongs. The biographer draws attention to some remarks made by Evatt upon stepping down from the High Court as follows: *There are many problems of legal right and wrong in which precedent or authority must coerce the court, so that no legal development is possible. But there are very important branches of jurisprudence which are not to be regarded as closed legal systems, and which I myself have always regarded as capable of further development and adjustment to the changing needs of modern society.*

Cases chosen by the biographer to explore this theme include *Chester v The Council of the Municipality of Waverley* (1939) 62 CLR. In that case the High Court held, by majority, that the respondent local council was not liable in negligence for the nervous shock suffered by a mother as a result of seeing the body of her 7 year-old son recovered from a water-filled trench which the Council had dug in a public street and negligently failed to render safe. To a mother, of course, the death of a son, and related grief, means more than the death of a Queen.

The Chief Justice of the High Court, Sir John Latham, dismissed the plaintiff's claim in a judgment expressing views shared by other members of the majority. His statement of the facts was brief and moved quickly to the moment when the boy's body was found and taken from the trench. The Chief Justice said: *There was evidence that the plaintiff thereupon received a severe nervous shock. She sued the Council for damages for negligence. The plaintiff must, in order to succeed, establish a duty owed to her to take care.*

As this paper is directed principally to the nature of narrative, I will pass lightly over the somewhat complex issues concerning relief for nervous shock in circumstances of this kind. Let me simply say, very broadly for present purposes, that in a society where freedom of action and speech is acknowledged as a legitimate goal, the closest the common law has come to providing a general remedy in respect of conduct causing injury is the modern law of negligence.

The law in question comes from the decision of the House of Lords in *Donoghue v Stevenson* – the famous 'snail in the ginger-beer bottle' case. Lord Atkin declared that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your 'neighbour', namely, persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you direct your mind to the act or omission called into question.

Put shortly, a duty of care is owed not to the world at large but to your 'neighbour' as restrictively defined by Lord Atkin. This principle was enunciated by Lord Atkin in 1932, seven years before *Chester's*

*case.* This meant that the new principle had not yet been fully explored when Mrs Chester's claim was dismissed by the majority.

In Chief Justice Latham's opinion: *A reasonable person would not foresee that the negligence of the defendant towards the child would so affect a mother. Death is not an infrequent event, and even violent and distressing deaths are not uncommon. 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 those close relatives who see the body after the death has taken place.*

Latham's statement of the facts, albeit brief, amounted to a story because, in addition to the sequence of events, various details and connecting threads were provided as to place, characters, values and consequences. However, upon turning to the style and structure of Justice Evatt's powerful dissenting judgment, a deeper structure is revealed, a bolder approach that was highly persuasive and had a lasting effect.

Evatt began his judgment with what some scholarly lawyers later described as 'an elaborate and dramatic recitation of the facts.' He was obliged to do so, he contended, because the facts were insufficiently set out in an earlier judicial statement concerning the plaintiff's reaction.

Evatt continued: *This statement takes no account of (a) the plaintiff's long agony of waiting when she feared that her son had been drowned but certainly did not know it, or of (b) the effect upon the plaintiff of the actual removal from the water of her child, especially as the circumstances suggested at least to her and her husband that even at that moment life was not quite extinguished.*

In Volume 62 of the Commonwealth Law Reports Evatt's judgment runs from page 14 to page 48. The passages early on, which were characterised by certain legal scholars as 'an elaborate and dramatic recitation of the facts' focus initially upon Maxie, a boy of seven years, the allure of the trench, and 'the 'irresistible combination of sand and water' that 'brought the children in the neighbourhood to play at the side of the pool.' The judge then unfurled a remarkable descriptive passage in which he sought to enter the mind of the mother, Golda Chester, a penniless Polish-Jewish woman with limited English.

*Late in the afternoon … it was suggested by someone … that Maxie, the plaintiff's child, might have fallen in the water. Coming with her husband to the side of the trench the plaintiff was at once beset with fear at the sinister significance of the trench, especially when one of the searchers was unable to plumb the depth of the water … She was tortured between the fear that he had been drowned and the hope that he was either 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 …*

*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 … 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.*

Evatt's biographer says of these passages that the judge offered Golda Chester the voice she was denied by having to speak in her second

language, thus uniting her with other mothers, perhaps even Evatt's own mother, who had lost sons at the battlefront in the Great War, in the experience of the 'agony of hope and fear' occasioned by a child in peril.

To universalise Golda Chester's predicament, Evatt next did something even bolder, deploying lines of verse by William Blake – *the trembling woman prest / with feet of weary woe* – to portray suffering of this kind. Evatt went on to cite several passages from the novel *Such is Life* by the Australian writer Joseph Furphy in which the horror of a child's disappearance is skilfully evoked.

In the end, not surprisingly, Evatt found that the plaintiff's claim to an award of damages was sound in law. His dissenting voice, of course, wasn't sufficient to dispose of the majority's reasoning that led to a dismissal of the claim. Evatt's biographer sums up by saying that some observers remained critical of Evatt's approach, characterising his literary references as obtrusive and unnecessary. Gideon Haigh then proceeds to a very careful analysis of the precedents and legal principles concerning nervous shock claims. Time and the space available to me weigh against a full review of his analysis. Suffice it to say, that the High Court, in *Jaensch v Coffey* (1984) 155 CLR 549, many years later, revisited the relevant issues.

The Chief Justice of the Court in *Jaensch's case,* Sir Harry Gibbs, made some observations that bear upon a central characteristic of legal reasoning mentioned earlier, that is, the tension between the arguable character of law and the rule of law, and the need for balance in responding to the respective considerations.

Chief Justice Gibbs said this: *In forming its judgment in such a matter the court is not at large, or free to indulge its own individual notions, but must be guided by existing legal principles and by analogies that may be drawn from decided cases. On the other hand, the court is not necessarily constrained to follow earlier decisions when they appear to be out of accord with contemporary principles. For example, the decision in* Chester, *which cannot be justified either on the ground that the shock in that case was not reasonably foreseeable or on the ground that the requisite proximity was lacking, should no longer be followed.*

Justice Deane was equally direct. *The judgments of the majority in* Chester's case *have not worn well with time. The proposition upon which those judgments is based is no longer, if it ever was, acceptable. It is simply out of accord with medical knowledge and human experience to deny that it is reasonably foreseeable that the shock suffered by a mother on seeing the body of her infant child, whom she was seeking, raised from the bottom of a water-filled trench might well be such as to cause psychoneurosis or mental illness. It must now be accepted that the conclusion of Evatt J. is, on the facts in* Chester, *plainly to be preferred to that of the majority.*

There were a number of issues to be determined in *Chester's case* and various ingredients in the legal mix. Nonetheless, with the benefit of hindsight, one is inevitably left with the impression that the time Evatt devoted to unfurling what might be described as the deep structure of the narrative in that case, underpinned by appeals to human nature and related literary sources, proved to be time well spent. By carefully shaping style and structure, the narrative voice in that case was rendered memorable with an enduring effect.

It is apparent from Gideon Haigh's biography that the author isn't blind to some of Doctor Evatt's faults, temperamental shortcomings that surfaced dramatically during his time as Leader of the Labor Party, including various ill-fated appearances before the Petrov Royal Commission. Haigh closes the biography, however, by speaking very highly of Evatt's accomplishment in *Chester's case.*

*He was able to place himself alongside Golda Chester at the side of that trench without abandoning the analytical faculties necessary to wring justice from an unfeeling world. In that respect it is an achievement to rank with the best of literature as well as law. By being so evidently personal, it reveals to us the greatness of a forgotten Australian. By reaching us as people, it reinforces faith in justice.*

This is a powerful ending to a well-researched book. But judicial officers and practising lawyers will still be left with some crucial questions of the kind mentioned earlier as to the nature and influence of the narrative voice in law.

Is there a danger, in emotive cases, that the balance between the arguable character of law and the rule of law will be tipped in favour of rulings shaped by a robust credo? That a persuasive style may open the way not only to acceptable changes in the law inspired by advances in medical knowledge but also, in controversial cases, to the introduction of contested values drawn from contemporary social or political agendas? Is there a risk that the cautionary words of Chief Justice Gibbs in *Jaensch's case,* weighing against the use of 'individualistic notions' in the doing of justice according to law, will be diluted or displaced by rhetoric as to

what must be done by the judiciary in order to meet the demands of changing times?

There have been recent cases in Australia which bring the issues canvassed in this paper into sharp focus, cases in which courts are being urged to follow a lead supposedly provided by prominent voices in the media, cases in which a clamour of moral outrage in the wake of sexual allegations is followed by a search for guilty parties, or even scapegoats.

In some of these cases, in which initial outrage, 'investigations' of one kind or another and various legal proceedings seem to be jumbled up in the public mind, advocates and judicial officers will have to use greater than usual care in reviewing the style in which claims are presented to and resolved by the courts. My review of the robust approach favoured by certain judges suggests that the structure and style of the narrative voice in law can sometimes affect not only the outcome in the particular case but the shape of the legal norm in question. Time will tell whether the changes made are for better or for worse.

I deal with issues of this kind at greater length in my recently-published work about the challenges and vagaries of judicial life, *Bench and Book.*

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