

The Chief Justice of Ontario's Advisory Committee on Professionalism

Sixth Colloquium on the Legal Profession

Law and Lawyers in Literature and Film

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Law, Lawyers and Judges in Literature

By: The Honourable Mr. Justice James M. Farley

I believe that I have been asked to speak at this Colloquium because of my writings – rather more specifically, my handwritings which have been referred to as a combination of Sanskrit and Cyrillic. However, I can testify to the benefits of having illegible handwriting: I am assisted by very able counsel who, when confronted with my scribblings, scratch their heads and reflect that, although a word may look like “x”, “x” would make absolutely no sense. They then substitute “y” which does make sense – instead of my originally intended “x”.

Much of the work in the Commercial List is “real time” litigation in which a rather immediate / instantaneous decision is required. This may be contrasted with “autopsy” litigation which has no particular time constraints and which may be heard and decided next year just as well as next week. Another difference is that with respect to the insolvency restructuring element, one must remember that this is not traditional adversarial litigation. Rather the judge must be a supervisor as well as an arbitrator. The result of these aspects is that frequently the decisions will take on an air of the stream of consciousness that pervaded Joyce's *Ulysses*.

However, if one focuses on adversarial hearings, then one is reminded that these embody the mystical transformation of two often fictional accounts being distilled into one (deemed) non-fiction determination by the judge. Often one will see that the judge has stated that someone's account does not have the ring of truth to it. How does one determine whether the bell of truth is cracked? How do we know about the world? It certainly helps to know human nature – either from direct personal experience or vicariously from works of literature, theatre, cinema and the other avenues of media.

When was the last time you picked up a non-technical legal book? We find our lives so busy with our noses pressed to the grindstone 24/7 that we tend to engage in escapism if we have a few spare moments. We go to the movies to see ultra incredible special effects which defy gravity (like some testimony in court) – or if we have a spare Monday, we'll go to Paris for a “long” weekend to sleep endless hours in lavender scented sheets before going out to stuff ourselves with 8 course meals. The young lawyers and clerks are scary bright.

But have they experienced the real world with its ups and downs, cycles, joys, tribulations, greed, kindnesses, prejudices and irrationalities? Or are they brilliantly focused on word logic games? Computerized research is for the most part devoid of context and the refuge of *faux amis*. I modestly suggest that we would all be better off if each of us knew the world a great deal more via direct personal experience and by reading. So make it a project to increase your worldliness by picking up a good book. Preferably this book should not be a dictionary to learn a new exotic word to use in the place of a perfectly good serviceable commonplace one. Would Winston Churchill have used egregious or shocking? I knew what shocking was before I, a mere solicitor, got to the bench; I had to look up egregious when I heard it in court. I will now concentrate on literature and, for the most part, let the words and ideas of the great authors speak for themselves.

The study of literature is a study of human nature and the human condition. The study of law is similarly a study of human nature and the human condition. Perhaps this might be best illustrated by the misfortunes of Harold Ballard, the star crossed owner of the Toronto Maple Leafs in the 70s and 80s, who with perhaps the best of intentions divided his kingdom amongst his children by virtue of an estate freeze, but then had second thoughts. Is this not a reprise of *King Lear*? I thought so in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Div. Ct.). I purposely put in a "Prologue" at the end of my decision citing extracts from *King Lear* since as Yogi Berra would have it: It's déjà vu all over again. Or as Shakespeare said in *The Tempest*: "What's past is prologue". Here's what that noble author had to say in *Lear* at pp. 223-4 of the *Ballard* decision:

Prologue

There were no sports pages in newspapers 400 years ago, but the aspect of human frailty of the nature we have seen in this case was described before by William Shakespeare in *King Lear*:

Lear: Meantime we shall express our darker purpose. Give me the map there. Know that we have divided in three our kingdom and 'tis our first interests to shake all cares and business from our age, conferring them on younger strengths while we unburdened crawl toward death.

...

Fool: Dost thou know the difference, my boy, between a bitter fool and a sweet one?

Lear: No, lad; teach me.

Fool: That lord that counselled thee to give
away thy land, come place him here by me –
Do thou for time stand.
The sweet and bitter fool
will presently appear;
The one in motley here
The other found out there.

Lear: Dost thou call me fool, boy?

Fool: All other titles thou hast given away;
That thou wast born with.

...

Edgar: He is gone indeed

Kent: The wonder is he hath endured so long;
He but usurped his life.

Albany: Bear them from hence. Our present business
Is general woe. Friends of my soul, your twain
Rule in this realm, and the gored state sustain.

Kent: I have a journey, sir, shortly to go.
My master calls me; I must not say no.

Edgar: The weight of this sad time we must obey
Speak what we feel, not what we ought to say.
The oldest hath borne most; we that are young
Shall never see so much, nor live so long.

[Exeunt with a dead march.]”

If Harold had paid more attention to hockey than his slapstick brand of entertainment then Toronto might have had a Stanley Cup under his regime. Instead diehard Maple Leaf fans will have to rely upon the new owners (but why is one curiously reminded of Jimmy Breslin’s *The Gang Who Couldn’t Shoot Straight?*).

Counsel will all recall Queen Caroline’s adultery trial as to what Lord Brougham had to say about zealously defending the interests of his client. But perhaps they forget that he was talking about defending – as opposed to offending. We would all do well to remember that the lawyer has a duty and an ethical obligation to the system of justice and to the court. Lord Brougham was not advocating that counsel be a mere mouthpiece for the client. There was no element of the false patriotism of my client right or wrong, by foul means or fair, process over substance. Rather Brougham recognized that he and his truly innocent and impoverished client were up against all the autocratic powers of the King and the State. The Queen’s other counsel, Denman, quoted from *Othello* in his observing the forces of evil which were arrayed against this rather defenceless client and his wanting a delay to obtain more evidence:

I will be hang'd, if some external villain,
Some busy and insinuating rogue,
Some cogging, cozening slave, to get some office,
Have not devised this slander ...

How prophetic he was. The key witness for the King's side was a *valet de place*, one Bergami, a citizen of one of the Italian states. Bergami swore to the adultery of the Queen which he said he observed in hiding in her bed chambers. In direct, he went into great detail as to the deed and its circumstances including details of the surroundings. On cross-examination, Brougham brought Bergami to his knees when he asked about other matters on which Bergami had not been rehearsed, but which would have been known to anyone with true knowledge of the situation. Bergami was stuck; he ceased to be able to respond in English; he retreated to his native Italian and he began to repeat to every question:

Q.
A. Non mi ricordo.

Q. ...
A. Non mi ricordo.

Q. ...
A. Non mi ricordo.

How satisfying a cross-examination.

Queen Caroline prevailed. It was a triumph for her, but it was a greater triumph for the integrity of British justice as related by L.S. Stryker in *For The Defense*. Reflect on how the rule of law was paramount over the King's desire to cast off his unwanted wife; reflect on how much easier it had been for his dictatorial predecessor, Henry VIIIth, to have repeatedly executed that manoeuver some three centuries before.

It is the rule of law – an adherence to that principle – which saves us from the law of men, the law of the lupara (see Mario Puzo's *The Godfather*), the law of the jungle, the law of dictatorial fiat. We in the legal profession have a duty, an obligation and indeed a privilege to ensure that the rule of law is adhered to.

Reinhold Niebuhr in the forward to his 1944 book, *The Children of Light and The Children of Darkness*, stated:

Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary.

It is therefore necessary for those concerned with the justice system to be resolute in the defence of our democracy.

What we must be concerned with is justice, true justice, not the superficial justice as was demonstrated in *Breaker Morant* and *Paths of Glory* where honour prevailed over justice and the powerless were crushed underfoot. In those two cases scapegoats had to be found. These stories remind us that the bench and bar must be forever vigilant to see that there are not miscarriages of justice, neither criminally nor civilly. George Orwell warned us of the dangers of totalitarianism and prejudice in *Animal Farm* and *1984*; in his real name, Eric Blair, he cautioned us about the tragedy of prejudicial persecution and cronyism in *Burmese Days*. The rule of law and its enforcement, protect society from the lynch mob, difficult as that may be during a civil war as exemplified by Grigory Melekhov's quest for justice in *And Quiet Flows The Don* by Mikhail Sholokhov. In the introduction to that book Vasily Litvinov asks: "Was it an indestructible thirst for justice that so often threw Grigory into all his mad yet humanly understandable fights?" Was Grigory a type of Cossack in person litigant, one who has been wronged in the past and now lashes out against everyone and everything, a true believer of the conspiracy theory?

Dreyfus was condemned to Devil's Island in a gross miscarriage of justice. He languished there. No member of the French legal establishment took up his cause. That task was taken on by Emile Zola. Zola in his defence of Colonel Dreyfus sent his famous "J'accuse! ..." open letter. In it, point by point, he demonstrated the shameful way that Dreyfus had been treated, while all the while Esterhazy had been protected by the military establishment. After clearly showing the wrong committed in Dreyfus, Zola concluded by stating in his letter to M. Felix Faure, the President of the Republic of France:

But this letter is long, Mr. President,
and it is time to conclude.

I accuse Colonel du Paty de Clam ...

I accuse ...

He went on for nine direct blunt inescapable accusations against the military establishment. He concluded by stating:

In making these accusations I am aware that I render myself liable to articles 30 and 31 of Libel Laws of July 29, 1881, which punish acts of defamation. I expose myself voluntarily.

As to the men I accuse, I do not know them, I have never seen them, I feel neither resentment nor hatred against them. For me they are only entities, emblems of social malfeasance. The action I take here is simply a revolutionary step designed to hasten the explosion of truth and justice.

I have one passion only, for light, in the name of humanity which has borne so much and has a right to happiness. My burning protest is only the cry of my soul. Let them dare to carry me to the court of appeals, and let there be an inquest in the full light of the day!

I am waiting.
Mr. President, I beg you to accept the assurances of my deepest respect.

The rest is, of course, history. For a non-lawyer, Zola made pretty good counsel. We would do well to consider giving him an out-of-province call to the Ontario bar.

But the law is not all about seriousness. Witness the trial of the Knave of Hearts in Lewis Carroll's novel: *Alice's Adventures in Wonderland*. (Doesn't / didn't the CBC have an excellent courthouse serial: This is Wonderland?).

Alice had never been in a court of justice before, but she had read about them in books, and she was quite pleased to find that she knew the name of nearly everything there. "That's the judge," she said to herself, "because of his great wig."

The judge, by the way, was the King; and as he wore his crown over the wig, did not look at all comfortable, and it was certainly not becoming.

"Herald, read the accusation!" said the King.
On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:

"The Queen of Hearts, she made some tarts,
All on a summer day:
The Knave of Hearts, he stole those tarts,
And took them quite away!"

"Consider your verdict," the King said to the jury.
"Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!"

Ah yes, a reminder to us on the bench to keep an open mind – and to remember if one has to wear different hats for different reasons, it is best not to wear both hats at the same time. Then towards the end of her dream concerning the trial, Alice challenges the Queen that although process should be the handmaiden of substance, it is important to have process so as to be fair.

"Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first—verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

“Off with her head!” the Queen shouted at the top of her voice. Nobody moved.

“Who cares for *you?*” said Alice (she had grown to her full size by this time). “You’re nothing but a pack of cards!”

Thank heavens for the sake of fearless counsel like Alice (of whom Lord Brougham would have been proud) that the Queen as prosecutor did not have the draconian power of contempt in the face of the court which would have allowed that decapitation. However I may pause to observe that some days it is only by reminding oneself of Wonderland that one is not tempted to impose at least figurative capital punishment upon counsel who do not believe, protests from the bench to the contrary, that the judge has the point and it would be helpful to move on.

Allow me to now discuss a passage from *Gargantua and Pantagruel* by Rabelais on the method that Judge Bridlegoose had in deciding cases. For those of you who have ever wondered, Judge Bridlegoose did it in the time honoured judicial way of casting dice.

“Ay”, said Bridlegoose, “I do this as any good judge should, in conformance with *no. Spec. de ordinario*, III, *et tit. de offi. om. ju., fi., et de rescriptis praesenta.*, I, as Speculator, or Guillaume Durand, indicates in his repertory of canon law.

“On the end of the table in my chambers, I place all the bags containing the defendant’s plea, and I allow him the first hazard of the dice, just as you gentlemen do, according to *et est not., l. Favorabiliores, ff. de reg. jur., et in c. cum sunt eod. tit. lib. VI*, which says: *Cum sunt partium jura obscura, reo favendum est potius quam actori*, when the law is obscure, the defendant is to be favored rather than the plaintiff. This famous maxim from the *Sixte*, added by Pope Boniface VIII to the five books of Gregory IX’s *Decretals*, I interpret literally.

“This done—just like yourselves, gentlemen—I place the plaintiff’s dossier at the other end of the table, *visum visu*, face to face, for *opposita, juxta se posita, magis elucescunt, ut not. in. l. i. videamus, ff. de his qui sunt sui vel alie. juri. et in l. munerum j. mixta ff. de muner. et honor.* Then I throw the dice for the plaintiff, too.”

“But, my friend,” Blusterer asked, “how do you determine the obscurity of arguments offered by the litigants?”

“Exactly as you, gentlemen,” Bridlegoose replied. “When there are many bags on either end of the table, I use my small dice, just as you do, gentlemen, in accordance with the law: *Semper in stipulationibus, ff. de reg. jur.* and the capital, poetical law called *q. eod. tit.* which begins with a hexameter: *Semper in obscuris quod minimum est sequimur*, and which tells us, when in doubt, to take the less consequential course. This rule, moreover, has been adopted by canon law, *in c., in obscuris, eod. tit. lib. VI.*

“Of course I have other large, handsome and most suitable dice, which I use—like you gentlemen—when the matter is more liquid, that is to say, when the bags bearing the pleas are lighter.”

“But when you had done all this,” Blusterer insisted, “how did you pass sentence, my friend?”

“Just like yourselves, gentlemen,” said Bridlegoose. “I decided in favor of the party who won at the judiciary, tribonian and praetorial throw of dice. This is recommended by our laws, *ff. qui po. in pig., l. potior. leg. creditor., C. de consul., l. l., et de reg. jur., in VI: Qui prior est tempore potior est jure*, the first comer has the best legal case.”

“Very well, my friend,” said Blusterer, “but since you pass sentence by the throw and hazard of dice, why do you not settle the matter then and there, the very same day and hour the litigants appear before you? Of what use are the papers and writs in the litigants’ bags?”

“I find these documents as useful as you, gentlemen, find like documents, in similar instances. They are helpful in three exquisite, requisite and authentic manners: first, for formality; secondly, as physical exercise; thirdly, from considerations of time.”

The uninformed may see this as a mere exercise in gobbledygook. But not so – on reflection you will see that not only are there certain formalities to be observed in deciding cases, but Bridlegoose adhered to the strict requirements of an impartial neutral – for as Justice is blind, so too is a decision made with the throw of dice absolutely impartial. Could a judge so wise and practical ever be overturned on appeal?

Some of you have thought that the Rabelaisian passage was an erudite analysis of the Rules of Civil Procedure. Not so! Besides a colleague and I have determined that these Rules have an important secondary (?) function: whenever we break bread together, we have a selected reading from these Rules, preferably done in a Gregorian chant. Process should be the handmaiden of substance – but substance may turn abusive if lack of adherence to process leads to unfairness and hence injustice. Therefore strive to see the fundamental basis for each of the Rules and interpret them in context. Do not worship them as was the electrical wiring diagram discovered in the ruins after a future atomic holocaust in the science fiction novel *A Canticle For Leibowitz* by Walter Miller Jr.

Life does not change that much. The cautionaries of Aesop’s fables with the hare, the tortoise, the dog and the frog amongst others are as true today as they were two and a half millennia ago. Not that they had much recognition in Aeschylus’ *Oresteia*.

There are lawyer jokes; there are fewer judge jokes (because lawyers have to appear before judges). *Jarndyce and Jarndyce* tends to give lawyers a bad name; however who could forget the heroic Sidney Carton in *A Tale of Two Cities* when in the best of times, the worst of times simultaneously, he decided: “It is far, far better thing that I do”.

Imitation is said to be the sincerest form of flattery. So too, it may be said when a profession is satirized. But is there the equivalent of a legal *Slaughterhouse Five* (Kurt Vonnegut) or *Catch-22* (Joseph Heller)? My friend Joey Slinger, the *Toronto Star* columnist, has distinguished himself with his first published novel *Punch Line*, the story of a revengeful assassination squad made up of the inhabitants of a seniors home, written in the amalgam style of the previous two off the wall novels. I thoroughly enjoyed reading *Punch Line* in its entirety one day in Florida in between conference calls (including an hour in the parking lot of a gas station) to determine what the outstanding issues then were in the *Stelco* case; that day the poignancy of *Punch Line* helped me keep whatever residual sanity I had. But each of these three novels has a firm foundation in fact: ask any person who has had experience dealing with an elderly relative. Joey knows lots of lawyers and judges; I challenge him to come up with the definitive legal satire keeping in mind that pathos and bathos are the two sides of a coin, sometimes the same side.

Let me now turn to a serious vein. Here we have Robert H. Jackson, a judge in America but a prosecutor at the Nuremberg Trial, saying in his last words of his closing address:

Besides outright false statements and doubletalk, there are also other circumventions of truth in the nature of fantastic explanations and absurd professions. Streicher has solemnly maintained that his only thought with respect to the Jews was to resettle them on the island of Madagascar. His reason for destroying synagogues, he blandly said, was only because they were architecturally offensive. Rosenberg was stated by his counsel to have always had in mind a "chivalrous solution" to the Jewish problem. When it was necessary to remove Schuschnigg after the *Anschluss*, Ribbentrop would have had us believe that the Austrian Chancellor was resting at a "villa." It was left to cross-examination to reveal that the "villa" was Buchenwald Concentration Camp. The record is full of other examples of dissimulations and evasions. Even Schacht showed that he, too, had adopted the Nazi attitude that truth is any story which succeeds. Confronted on cross-examination with a long record of broken vows and false words, he declared in justification:

I think you can score many more successes when you want to lead someone if you don't tell them the truth than if you tell them the truth.

This was the philosophy of the National Socialists. When for years they have deceived the world, and masked falsehood with plausibilities, can anyone be surprised that they continue the habits of a lifetime in this dock? Credibility is one of the main issues of this trial. Only those who have failed to learn the bitter lessons of the last decade can doubt that men who have always played on the unsuspecting credulity of generous opponents would not hesitate to do the same now.

It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this trial as bloodstained Gloucester stood by the body of his slain King. He begged of the widow, as they beg of you: "Say I slew them not." And the Queen replied, "Then say they were not slain. But dead they are. ..." If you were to say of these men that they are not guilty, it would be as true to say there has been no war, there are no slain, there has been no crime.

His address and the quote contained therein were many centuries apart, yet the truth of the past is no less potent as the human condition than the very horrific situation with which those at Nuremberg had to deal with.

The bench and the bar stand as bastions in the defence of justice. We are one in that pursuit; we are brothers as Shakespeare observed in *Henry V* when the young prince said on Saint Crispin's Eve:

From this day to the ending of the world,
But we in it shall be remembered;
We few, we happy few, we band of brothers;
For he today that sheds his blood with me
Shall be my brother ...

Oh Brother, Where Art Thou? But no, that is the title of a very good movie, one that I enjoyed very much. But cinema is the subject of another panel. And besides, I liked the book even better.