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Literary references in United Kingdom common law judgments

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1. Introduction

Talking of American judges, Adam Liptak said: "The justices turn out to be a surprisingly literary bunch."[1] Many novels and plays revolve around the legal world or the legal professions. Richard Posner explains that writers:

> take law for a theme, and feature a trial ([…] The Merchant of Venice, […] The Trial […]), conflicting jurisprudential theories (Antigone, King Lear), the practice of law (Bleak House), crime and punishment (Paradise Lost, Oliver Twist) […], even specific fields of law, such as contract (Marlowe's Doctor Faustus) […].[2]

German Franz Kafka (*The Metamorphosis*), American John Grisham (*The Firm, The Juror*) and British John Mortimer (*Rumpole of the Bailey*), amongst many others, were all lawyers before they started writing. American born Harper Lee read law before she wrote *To Kill a Mockingbird*.

It is less known that common law judges have for a long time shown a keen interest in literature. For narrative jurisprudence specialist James Elkins, there is a "flirtation and deepening involvement with interdisciplinary approaches to the study of law (drawing on […] history, philosophy […], literature)."[3] Talking of

United States' senior judges, Adam Liptak explains that they often find inspiration in foreign authors:

> Justice Ruth Bader Ginsburg [...] said her style owed something to Vladimir Nabokov, the author of "Lolita". Justice Stephen G. Breyer […] said he looked abroad for literary inspiration, mentioning Montesquieu, Wittgenstein, Stendhal and Proust [...]. Justice Kennedy […] had barely started talking when he began quoting from Hamlet, and he went on to discuss Dickens, Trollope, Faulkner and Solzhenitsyn.[4]

For C. Dunlop who advocates the teaching of literature in United States Law Schools: "literature studies are an appropriate, even a necessary, part of legal studies."[5]

In his dissenting opinion to the European Court of Human Rights' case Tyrer v. United Kingdom[6] which raised the issue of the legality of the corporate punishment of juveniles, British judge Sir Gerald Fitzmaurice confessed to being conversant with classic literature:

> I was brought up and educated under a system according to which the corporal punishment of schoolboys [...] was regarded as the normal sanction for serious misbehaviour [...]. It was often considered by the boy himself as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of Shakespeare or Virgil by heart.

The purpose of this study is to show to what extent literature is present in United Kingdom judicial decisions, under what forms and to see if it exercises an influence over the judicial process. More particularly we will try to determine whether literature helps to make justice easier of access.

2. Methodology

We decided to focus on United Kingdom judicial decisions handed down by

senior courts (the Supreme Court, formerly known as the appellate committee of the House of Lords, Court of Appeal, Crown Court and High Court) over the last fifteen years. The higher the court, the more weight is attached to its decisions which may constitute precedents.

Our aim was to identify a number of decisions which contained literary quotations, references to a particular work or an author. By the word "author" we mean a person who writes novels, plays or poems not directly aimed at describing the United Kingdom judicial or political system.

We chose to identify the presence of quotations or references to British 14th- to 21st-century classic authors such as Geoffrey Chaucer (*The Canterbury Tales*), Jane Austen (*Sense and Sensibility, Pride and Prejudice*), Charles Dickens (*David Copperfield, Oliver Twist* and of course *Bleak House*), Lewis Carroll (*Alice in Wonderland*), Thomas Hardy (*Far From the Madding Crowd, Jude the Obscure, Tess of the d'Urbervilles*), Robert Lewis Stevenson (*Treasure Island, The Strange Case of Dr. Jekyll and Mr. Hyde*), Rudyard Kipling (*The Jungle Book*) and of course Shakespeare, but also less classic ones like John Mortimer (*Rumpole of the Bailey*) and J.K. Rowling (*Harry Potter*).

All the court decisions mentioned below were found on the British and Irish Legal Information Institute's website. We carried out three separate searches in the whole site's case law database. We first entered the names of the above authors, followed by the above works and we finally did a search of a number of famous expressions usually attributed to these authors. The case references which appear in our end notes are the official ones as set out on the BAILII website.

3. Literature may help clarify a factual issue

The facts of a case or the evidence adduced by the parties may be so complex or so unintelligible to the lay reader that the judge may feel the need to quote or refer to literature to clarify them. Determination of the factual issues is important in that it will eventually lead the judge (or the jury in some criminal cases) to give his legal opinion or *stare decisis*.

Majorstake v. Curtis[7] is a 2008 civil litigation matter. The legal issue was whether section 47(2)(b) of the Leasehold Reform, Housing and Urban Development

Act 1993 should apply to the claimant's premises and before the findings of law, the judge had to determine in fact if the claimant's premises were normal leasehold "premises" under the 1993 Act. For the first and to the best of our knowledge the only time to date, the former appellate committee of the House of Lords (now the Supreme Court) referred to J. K. Rowling's bestselling fantasy novel *Harry Potter*. Lord Scott held:

> Harry Potter, we are told, received letters addressed to him at "The Cupboard under the Stairs, 4 Privet Drive, Little Winging". "The Cupboard under the Stairs" might have constituted "premises" for the purpose of letters from Hogwarts but for the purposes of construction of the 1993 Act a normal use of the English language must be assumed.

This reference to a factual event from the novel is daring in that Lord Scott assumes that those reading his opinion will be familiar with children's literature. For those who don't (which means those who are not aware that Harry was kept in a cupboard under the stairs by his nasty aunt and uncle and who have no knowledge of Hogwarts) the reference may still make some sense. And it will be easier to work out than the actual wording of the statutory provisions under consideration.

In Murtagh v. Minister of Defence & Ors,[8] a civil litigation case, Mr Justice Declan Budd had to resolve a dispute between a former soldier and the Ministry of Defence. Mr. Murtagh alleged that he suffered from post traumatic stress disorder from being sent to war. The judge went through a detailed consideration of the medical and psychological literature and evidence before writing:

> There has been much progress in military psychiatry's understanding of the deep effect on the psyche of exposure to extreme anxiety since Shakespeare wrote Lady Percy's lines in Henry IV Part I. Lady Percy tells Hotspur of his night terrors:-
> "In thy faint slumbers I by thee have watched
> and heard thee murmur tales of iron wars;…
> Thy spirit within thee hath been so at war

> and thus hath so bestirr'd thee in thy sleep,
> That beads of sweat have stood upon thy brow…
> And in thy face strange motions have appear'd,
> Such as we see when men restrain their breath…."

The main factual issue was to determine the nature of post traumatic stress disorder and whether the claimant had suffered from it. If so the judge had to decide if the Ministry of Defence was legally liable for it. The technical evidence adduced by the parties was so complex that the judge felt the need, probably for the sake of his readers as well as for his own, to quote Lady Percy when she expresses concern over Hotspur's nightmares. The judge seems to assimilate Hotspur's trauma to the claimant's own. The judge expressly mentioned Shakespeare's name but did not have to. Despite their age, the words speak for themselves and the reader (and the judge himself it seems) cannot help being moved by Hotspur's plight.

Literary quotations thus immersed in a complex factual description makes it easier to grasp the background of a case. This is a way of making justice more accessible and more understandable.

4. Literature may help clarify a legal issue

Some quotations of or references to literature may support or even form part of the judge's legal reasoning.

In JSC BTA Bank v. Kythreotis & Ors[9], a commercial litigation case, Lord Justice Patten quoted Lord Justice Nourse who was himself quoting Shakespeare's *Othello* when he gave his opinion of the meaning of the words "his assets" in the context of a freezing order as set out in the Commercial Court Guide:

> As a matter of ordinary language assets or funds, in reference to an individual, cannot be said to be "his" unless they belong to him or, in legal parlance, are assets or funds to which he is beneficially entitled. When Iago, affecting to prize only his good name, says to Othello: "Who steals my purse, steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands…," though a modern restitution lawyer

> might conjecture that the thief becomes a constructive trustee of the purse, Iago himself will have none of it. "Tis his". So far as he is concerned, the purse now belongs to the thief. Assets which are held by someone for the benefit of another do not belong to him and are not his. Mrs Justice Arden said that bare legal ownership is nonetheless a form of ownership. So indeed it is. But that does not make the assets "his".

The judge relates Iago's conversation with Othello as part of his legal reasoning. He points out the possible discrepancies between the old and "modern" construction of the law. He makes no reference to Shakespeare and even seems to forget that the plot of the play took place in Cyprus (and to a lesser extent Venice) and would not have been subject to English jurisdiction. He mixes Iago's words with his own, his reasoning is somehow repetitive and makes it sound like a tautology as if he could not find a better way to define the meaning of assets in a complex legal situation.

The judicial review of R. A's Application[10] revolved around whether the applicant (a prisoner) could get an assurance that his conversations with his solicitor or doctor whilst he was in detention would not be subject to surveillance by the state. This legal problem raises constitutional issues such as freedom of expression and the right to some conversations being covered by privilege. Lord Justice Girvan's opinion started with a quote from *Richard III* Act 5, Scene 3:

> Under our tents I'll play the eavesdropper
> To hear if any mean to shrink from me.

In the same paragraph the judge also referred to the "horrors of the snooping society in Nazi Germany portrayed in Brecht in *Fear and Misery of the Third Reich*" and the "graphic portrayal […] in the film *The Lives of Others* […] against unrestrained state surveillance." The flurry of literary and cinematographic quotations and references help to understand the judge's legal reasoning but it is not inserted in it. They are meant for the reader to remember the dangers of a George Orwell world pervaded with cameras and video systems. Literature therefore seems to be a way to either directly or indirectly influence the judge's decision.

5. Literature as a rhetorical tool to convey a message to the parties or their lawyers

Judges' knowledge of literature can sometimes be a way to express a message to the parties or their lawyers which is not necessarily related to the factual or legal background of the case. The judge will refer to an author, or an author's words, because the image or message conveyed will be clearer than what he could have said or described with his own words but this will be unrelated to the subject-matter of the litigation.

For instance, in Spiliada Maritime Corp v. Cansulex Ltd[11], a complex admiralty law case which came before the then appellate committee of the House of Lords, Lord Goff concluded his technical opinion by the following words:

> I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion. [...] even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.

The reference here is to Chaucer's *Canterbury Tales*. The judge's message is that despite their differences and the fact that any trial involves a winner and a loser, judge and "jurists" (barristers and solicitors) have a lot in common. They fight for justice. The judge found a subtle way of congratulating the whole legal team which worked on a case. The literary quote was not addressed to the parties themselves.

A similar comment could apply to Williams Corporate Finance Plc v. Holland & Ors[12], a 2001 civil case in which Lord Justice Brooke had to determine which party (claimant or defendant) should be liable to pay for the costs incurred during the litigation. The judge held:

> It is sufficient, in my judgment, to conclude that justice requires that the effect of the claimant's small success [...] should be set against the first

> defendant's success in the major issues in the case. The appropriate order, therefore, in my judgment, is that as between the claimant and Mr Holland before the judge there should have been no order as to costs. I consider that Mercutio's dying words in Romeo and Juliet, Act 3, Scene 1 more properly reflect the justice of the case than the order made by the judge.

Although they are not expressly quoted, the reader may like to be reminded of these words addressed to Benvolio:

> Help me into some house, Benvolio,
> Or I shall faint. A plague o' both your houses!
> They have made worms' meat of me: I have it,
> And soundly too: your houses!

For the judge, both the claimant and the defendant made mistakes or were negligent. This justifies the absence of any order for costs being made. The fact that the judge's literary reference is incomplete implies that the reader should be familiar with Shakespeare's work (*Romeo and Juliet* here) or else the judge's message will not be understood. The literary quotation does not make justice more accessible here. If it is likely to be understood by the lawyers involved in the case but it may make the judge's opinion even more complex to the lay reader.

In Chartered Brands Ltd v. Elmwood Design Ltd[13] Sheriff Frank Richard Crowe of the Scottish Sheriff Court held: "Gray v. Johnston is a difficult case, where the pursuer appears to have been duped and the facts read more like the plot of a Thomas Hardy novel." Only those who have read *Tess of the d'Urbervilles* or *Jude the Obscure* will understand the subtle reference made here to the extreme complexity of Hardy's plots. The reference might otherwise be confusing to the lay reader.

Charles Dickens' *Bleak House* is often referred to as an example of the complexities and delays of justice. Mr Justice John MacMenamin held in Roche -v- Wymes[14], a long lasting civil litigation case:

> The Tara Bula litigation, and the subsequent dispute between the main Bula promoters have now been before the courts for more than a quarter century. No recital of the facts, so redolent in length and complexity of Jarndyce v. Jarndyce in Dickens' Bleak House, can do justice to the personal cost, stress and anxiety which the events now to be summarised have had upon all those involved.

The purpose of this study is not to discuss either the "law as literature" movement (advocated by American James Boyd White) or the "law in literature" one although the classic Jarndyce v. Jarndyce case is a perfect example of the latter. Chartered Brands Ltd v. Elmwood Design Ltd is an unusual case in which the judge uses the litigation story arc of a novel to express the delays of justice in a real life case.

Just like the above cases, the reference to Dickens' classic book does not add much to the judge's factual background or legal reasoning. It seems to be more of a rhetorical exercise than an attempt to clarify an issue of fact or law.

6. Literature as common parlance in law

Robert Skilton talked about "time-worn familiar phrases." He added:

> Quoting some fine sounding words from Shakespeare, or from some other great author, to embellish a point, without giving recognition to the context, is perhaps not improper. A diamond is still a diamond, no matter what the setting.[15]

Some expressions, some references to plot situations or characters are so well known that a mere reference is sufficient to convey a setting, an idea, an impression or a feeling irrespective of who drafted the plot or invented the characters.

6.1. Quotations

In Gedeon Richter Plc v Bayer Schering Pharma AG[16], a civil litigation case, Mr. Justice Floyd explains that: "the claimant [...] seeks the revocation of two patents

belonging to the defendant," both parties being in the pharmaceutical industry (para. 1). The judge's opinion is particularly technical and one of the main legal issues raised is "obviousness of each of the patents in the light of […] items of prior art" (para. 4). To define a "matter which is part of the common general knowledge," the judge held: "The matter must be 'generally accepted as a good basis for further action,' what Jane Austen would have called 'a truth universally acknowledged,' at least within the universe of those skilled in the art" (para. 12). These words come from *Pride and Prejudice* but the expression itself is nowadays in common usage. Jane Austen's name was mentioned but it does not add anything to the role of that expression in the judge's opinion. That role is nominal and merely serves as a tautology to repeat previous words in a different way.

A similar comment could be made about Judge McCloskey's opinion in Boyd v. Department for Regional Development[17] in which the court had to resolve an issue relating to proceedings issued out of time:

> In an era where there is ever-increasing attention to, and public debate about, delays in the conduct of all forms of litigation, the conduct of this action has, regrettably, been inexplicably tardy. Unfortunately, there is nothing novel about this topic. It was specifically highlighted by William Shakespeare several centuries ago [Hamlet, Act III, Scene 1] in the celebrated pithy expression "the law's delay."

In Yorkshire Bank Plc v. Tinsley[18], a complex civil litigation case in which the question arose of the enforceability of a second mortgage after a first mortgage turned out to be voidable, Lord Justice Longmore held:

> It would be natural to expect that if, without more, an obligation incurred between two or three parties is legally ineffective in any way, any new obligation arising out of the release of such earlier obligation would be legally ineffective in a similar way. It may not be easy to find authority for such a broad proposition but, in principle "nothing will come of nothing" as King Lear observed. As far as void contracts are

concerned there can be little question that that must be the law.

The court could have dispensed with the reference to *King Lear* as this "running metaphor" (according to Shakespeare specialist Robert Feissner) is well known.[19]

Common parlance expressions extracted from literature seem to play a fairly small part in facilitating access of people to justice and judicial documents. Still the fact for judges to use fairly common expressions (even if they derive as above from classic literature) can be seen as a way to bring judges (and their decisions) closer to litigants.

6.2. References to famous or notorious characters

By referring to a well known character or an aspect of his personality, the judge will automatically cast in the reader's mind an image which is usually associated to that character. This is potentially a great way for both the judge and the reader to save time which can otherwise be spent drafting or deciphering the rest of the judicial opinion. Therefore references to *Alice in Wonderland*, *Jekyll and Hyde* or one of Dickens' characters like Micawber may assist the judicial process.

6.2.1. Alice in Wonderland

In Wright, Re Application for Judicial Review[20], Judge Deeny had to decide whether the Inquiries Act 2005 complied with Article 2 of the European Convention on Human Rights and review the decision of the Secretary of State for Northern Ireland converting an inquiry into the death of the applicant's son under the Prison Act (Northern Ireland) 1953 into an inquiry under the Inquiries Act 2005. Counsel for the applicant quoted the judge's decision under review according to which converting the inquiry would make the relevant commission's work "an impossible situation. For example, the Minister [...] would have the authority to thwart the effects of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation."

Lewis Carroll's character and her adventures were also referred to in Clarke v Murphy & Ors[21], a civil litigation case in which Judge Huskinson had to hand down

an order relating to the possible discharge or modification of restrictive covenants affecting the applicant's land. He referred to one of the counsels' submissions which itself quoted another judge's opinion. The latter described such a complex situation as "a building scheme in Alice in Wonderland."

What matters here is not so much Alice's personality as the adventures she went through which are known by a majority of people, just like *Harry Potter* today. The first case refers to the dramatic situations Alice had to face, some of which were difficult to resolve. In the second case the judge seems to refer to the issue of disproportionality to which Alice was confronted when she went from small to big and so on.

6.2.2. Jekyll and Hyde

Robert Louis Stevenson's schizophrenic character (or characters) of *Jekyll and Hyde* is an easy way of describing split personalities without having to detail psychological or psychiatric evidence. In R. v. K, McGinley & Anor[22], Lord Justice Nicholson quoted a witness who described one of the appellants as having "an extremely Jekyll and Hyde personality." *Jekyll and Hyde* also appears in Lord Steyn's opinion in support of Regina v. Randall[23], a criminal law case in which one of the accused was said to be "a Jekyll and Hyde character who had a propensity to use violence." This has been described by Keiran McNally, a historian of medicine, as a "metaphor of split personality."[24]

6.2.3. Dickens' characters

A reference to one of the other main characters of Dickens' *David Copperfield* is made by Lord Justice Rimer in Booth v Booth & Ors[25] which revolved around a dispute over a deceased's estate. The judge held:

> As for the claimed prejudice in the lost opportunity to adduce Edward's evidence as to his intentions in relation to the transfers, that appears to me to be little more than Micawberism. Of course things do sometimes turn up (as they did for Mr Micawber himself: see David Copperfield, Chapter 63).

Micawberism now belongs to common parlance as meaning someone who is eternally over optimistic.

6.2.4. Shakespeare's characters

The range of Shakespeare's plays is so extensive, the location of his plots is so geographically varied and the personality of his characters is so diverse that any judge (or solicitor/barrister) is bound to find an appropriate match to a particular case. Judges seem to have a particular affection for Shakespeare whose work often revolved around the law and justice with which he seemed conversant.

According to specialist O Hood Phillips: "His father indulged in property deals and litigation, as did Shakespeare himself on a smaller scale."[26] This is why Daniel Kornstein pointed out that "two-thirds […] of Shakespeare's plays have trial scenes, which vary from posing serious problems of justice and mercy to mere burlesque. Several other plays have many comments on the problems of law, lawyers, revenge, equity, government [...] and contracts."[27]

In criminal case R v. A (N°2)[28], someone charged with rape raised the defence of consent. The question arose as to whether and in which conditions the court could ask the complainant to disclose if she had had "prior sexual activity with the defendant" (para. 4) in the light of section 41 of the Youth Justice and Criminal Evidence Act 1999. In his submissions, the defendant's counsel quoted an article by Professor Diane Birch referring to "the much discussed propensity to re-enact the balcony scene from Romeo and Juliet." These submissions were set out by the judge in his opinion and the reference made by the defendant to the romantic setting (the balcony) from which Romeo wooed Juliet may have distracted him from the image of violence conveyed by a rape charge.

In Hudson v. Leigh,[29] a civil litigation case, the question arose as to whether a romantic ceremony which had taken place in South Africa constituted a marriage or not. Mr. Justice Bodey commented that "the 'marriage within a play' example (such as in Romeo and Juliet) [...] is a 'non-marriage' " and therefore the union contracted by the parties was null and void. In Sharp v. Anor v. Adem & Ors[30], a matter in

which the civil division of the Court of Appeal had to decide whether the deceased had had "testamentary capacity" (para. 2) when he wrote his will, Lord Justice May said: "The deputy judge wrongly looked for a 'King Lear' moment which would explain why Mr Adam disinherited his daughters."

In Forbes v. Tobin[31], a civil litigation case in which the claimant sought the equitable remedy of specific performance of a contract, Mr. Justice McCracken went through the documentation exchanged by the parties to check if they were bound by a contract and said: "this rather lengthy correspondence which took place over several months could probably be described as a comedy of errors." Here the reference is not in connection with characters, aspects of their personality or events in their lives but a famous play.

Of course, the above examples of references to characters, plots or the personality of some characters are not exhaustive. Most of them support to an extent the judge's legal reasoning and therefore have to a lesser or greater extent an impact on justice. We notice that when the judge is uncertain that the reference or quotation will be understood by everyone (implying that it only constitutes common parlance for the most educated part of the population) he does not hesitate to refer to the name of the author or the work containing the expression.

7. Conclusions

According to Benjamin Cardozo: "there can be little doubt than in matters of literary style the sovereign virtue for the judge is clearness."[32] Bentham's "lawyers' cant"[33] persisted for a long time and regularly makes a resurgence despite the work carried out in Britain by the proponents of the Plain Language Movement. Lord Woolf, who initiated the Civil Procedure Rules which came into force in England and Wales in April 1999 criticised the "sometimes archaic and impenetrable language" used in litigation.[34]

Legal or even sometimes factual issues in a case may be difficult to unravel. We have seen that common law judges have an incredible propensity to refer to or quote literature. Those references or quotations may be integrated in the factual demonstration, they can merely support it or they may be included in the legal

reasoning. They may alternatively be a way for the judge to pass on a message to the parties or their lawyers which bears no direct link to the decision itself or maybe to indulge in their passion for literature. The use of common usage expressions which originated in literature is positive if it relates to the case itself and is not just a rhetorical exercise.

Classic authors seem to be judges' favourites although the appellate committee of the House of Lords (now the Supreme Court) made an effort at being accessible (and trendy) by referring to *Harry Potter*. Judges also seem to prefer authors who like them or who like justice. In the course of our research we found no reference whatsoever to John Mortimer's *Rumpole*, no doubt because he painted such a negative picture of the judicial system to which he himself belonged when he practiced as a barrister. Conversely references to or quotations of Shakespeare are common as Shakespeare respected the judicial system. His plea to "kill all the lawyers"[35] was addressed to solicitors, not judges.

The intermingling of literature in the law (just like that of the law in literature) is not a static phenomenon but we can only praise common law judges' attempts to sometimes make justice more accessible through the direct or indirect use of literature. We will finally quote Todd Henderson for whom:

> legal opinions are often highly […] storytelling in nature, so one might expect judges to draw directly and explicitly from humanity's vast literary repository. While "facts" are undoubtedly more persuasive to some readers, references to fictional accounts, especially when they are, like Shakespeare's works, so integral to the human experience, can be a powerful tool of persuasion.[36]

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[35] Dick the Butcher's words in King Henry VI (Part II, IV).
[36] Henderson, Todd. "Citing Fiction". *The Green Bag: an Entertaining Journal of Law*. 11/2D, 171-185, pp.171-172. Winter 2008. Retrieved on 20/5/2013 from <http://www.greenbag.org/v11n2/v11n2_henderson.pdf>.