

**Academy of Law ALJ Conference**

**THE CASE FOR CHANGE:**  
**KEEPING ONE'S OWN COUNSEL** \*

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*This paper looks at the relationship between law and literature. A fuller understanding of various literary techniques can be used to enhance forensic skills and will be useful also in subjecting the legal system to a salutary critique. Nicholas Hasluck's recent novel *The Bradshaw Case* will be used to explore these issues. The novel concerns an Aboriginal native title claim affected by ancient rock art and conflicting views as to the provenance of the art in question.*

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**Theme**

The conference theme is *The Future of Australian Legal Education*. I have called my paper: *The Case for Change: Keeping One's Own Counsel*. It will become clear that I harbour doubts about the case for change that is being voiced by various trail-blazers in the Australian legal world, from academics in law schools to managing partners in leading law firms. The title of my paper should possibly be accompanied by a question mark.

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\* This paper reflects a presentation on Saturday 12 August 2017 to the Australian Academy of Law ALJ Conference held at the Law Courts Building 184 Phillip St, Sydney New South Wales

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It emerged from Professor Nussbaum's keynote address at this conference that the broad conception of legal education is under attack as 'experts' seek to narrow the curriculum to topics 'aimed directly at legal practice.' I share her view that the law is a noble profession and should not be treated simply as a trade. I will argue that a case for change driven principally by improved technology and the demands of daily practice may lose its way. Lawyers have to be broadly educated. They must be skilled at reading between the lines and reaching their own conclusions.

The best legal advisers have always been inclined to give greater weight to their personal appraisal of the matter in hand than to current orthodoxies about the way to go or what is frequently being done by others. They are generally accustomed to keeping their own counsel and looking at the situation as a whole. They keep their thoughts to themselves. In doing so they will inevitably draw upon their own experience and upon aids to understanding from outside the law including the insights offered by moral codes or works of literature.

The habit of keeping one's own counsel is usually nourished by the sense of professionalism instilled at law school or in the early years of professional life, until it becomes an adviser's second nature – a private but deeply-rooted way of working out what needs to be done, or what has to be resisted.

For the sake of an enjoyable discussion, let me illustrate my remarks by turning to an episode of the widely-admired TV series *Borgen*. Here, the viewer is invited into the world of Danish politics and follows the fortunes of a contemporary female Prime Minister, Birgitte Nyborg. The viewer is introduced also to an experienced political journalist called Torben who is in charge of a TV newsroom and

responsible for putting on an eve-of-election debate between the leaders of the main parties.

It soon emerges that the new brash young CEO of the TV company is hell-bent on lifting the station's ratings. Torben, the experienced newsroom chief, suddenly finds himself surrounded by a cluster of the CEO's sneaker-footed, T-shirt clad, high-fiving whiz kids who set about 'updating' the usual format for debate. They line up the speakers' stands beneath an arch of pulsating lights, they have the mediator dressed up to look like an airline hostess, they equip the audience with an online wriggling worm device to chart winners and losers on a giant screen, they decree that each candidate will have ten seconds to answer each question, with provision for pre-recorded audience applause and a button to cut off any candidate who infringes the ten second rule. This is the new and best way of doing things Torben is told, and it will get the ratings up.

When one of the whiz-kids asks Torben whether he wants the cut off button to make a whistling or a derisive honking sound, the camera moves slowly inwards for a close up of Torben's hitherto impassive expression.

The viewer knows by now that Torben has compromised himself in various ways with management, and with his staff. He has therefore been obliged to keep his own counsel while the CEO's whiz-kids strut their stuff. He has been trying stoically to keep the show on the road and get through the day. But now, at last, as the camera closes in, the viewer can see that, for Torben, the whistling sound or the honking sound is too much. What was meant to be a political debate has been turned into sideshow alley. Enough is enough! He tells the whiz-kids to clear away

their bells and whistles, get rid of the lights and tinsel. He restores the stage to its usual format.

Torben is a flawed professional, but in the end he knows instinctively what he has to do. He will oppose the CEO's facile quest for ratings and face the consequences rather than abandon his innate respect for professional standards: the need for truth-telling and sensible debate in a democracy. He makes his own appraisal and accepts responsibility for what he does.

I respond to this because several decades ago I was a partner in a law firm when time costing was introduced. I felt then, as Torben did in the example I have given, that enough is enough. The notion of breaking up the time spent on a client's affairs into tiny, measurable fragments was deeply disturbing. It felt foreign to my nature. In the words of the Australian poet Kenneth Slessor: *'Time that is moved by little fidget wheels is not my time, the flood that does not flow.'*

To my mind, lawyers were in the business of listening and advising for as long as the nature of the case required, and without any financial incentive to devote more time to the task than it actually needed. In the end, I suppressed my misgivings about the new way of charging fees by becoming a barrister. I was then at liberty to manage my time as I thought fit, but the general issue remained.

I have used these examples – the Torben story and a personal tale about the early days of time costing – to show how a widely-acclaimed innovation can suddenly appear, and test one's inner resolve. Put shortly, proposals for change have to be examined carefully, and on some occasions they may have to be resisted. If the pressure for change is irresistible there is a need for awareness of what it brings in its wake. But even then one should keep in mind the insight from Giuseppe Lampedusa's famous

novel *The Leopard*: 'Changes may be necessary so that things can stay the same.'<sup>1</sup>

### **The Province of the Law**

Some of the changes to legal practice that are taking place suggest that resort to law will increasingly be treated as entirely normal in a host of unexpected ways. Globalisation has led to cross-border transactional work and a need for lawyers to acquaint themselves with practices elsewhere and foreign cultures. This has contributed not only to the erosion of the traditional distinction between international and domestic law but also to the lines between law and morality as steps are taken to accommodate different practices.

There is fierce competition between law firms. Listing on stock exchanges will be accompanied by obligations to shareholders. There are ever-increasing specialty areas in law schools and boutique firms. Accountants are multi-tasking. Anthropologists and environmental scientists are playing an active role in litigation. There are now computer experts who are devising programs to provide an increased access to justice.

All of this suggests that there is a steadily expanding appetite for legal work and a tendency to characterise all sorts of advisory work as work for lawyers. Students and would-be lawyers may progressively be left unclear as to what exactly is the province of the law, and as to the nature of the advice they will be asked to provide. They will almost certainly be subject to a strong imperative to keep up to date. In times to come, if they finish up working alongside a computer, they may well be inclined, when some ethical issue arises, to reach immediately for the

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<sup>1</sup> Lampedusa, G *The Leopard* (The Folio Society, 1988) p124

keyboard instead of a professional code or some other aid to a humane appraisal of the case.

This overview suggests that students must be encouraged to pursue courses that will keep them in touch with fundamental human values. This will serve as an antidote to the potentially numbing effect of rapidly-evolving (and at times stifling) changes brought about by the appetite for new work mentioned a moment ago. It will equip them to keep their own counsel in dealing with a myriad of contemporary issues, some of which may not actually be legal issues, but capable of resolution by tact and understanding .

It follows from my earlier remarks that one way of keeping students in touch with human values and their real selves is through works of literature. Skilfully crafted stories about the workings of the legal system, or about the dilemmas faced by other professionals in the course of their daily work, can be used to reveal truths or insights about the importance of truth-telling or the erosion of professional standards in the course of rapid change that might otherwise pass unnoticed.

I will say more about this in a moment by turning to my recently-published novel *The Bradshaw Case*, for I am conscious that my invitation to address the conference is probably due more to my work as a novelist than my time as a lawyer. The book concerns an Aboriginal native title claim in the Kimberley affected by ancient rock art and conflicting views about the age and provenance of the art in question – an inquiry into the truth of the matter.

But let me first make some general observations about the nature of the relationship between law and literature. One needs to keep in mind their similarities and differences, and their respective limitations.

## Similarities and Differences

At a first glance law appears to have much in common with literature: a concern for the fate of the individual in society, an interest in the truth of any matter in contention, a familiarity with different forms of narrative and argument, an awareness of linguistic skills. There are, however, important differences between the two disciplines.

The notion of justice and the means by which a legal system endeavours to achieve a just result are usually linked to concepts of rationality and reasonableness. Lawyers view adversarial reasoning as the antithesis of the speculative style of thought employed by artists and storytellers. And yet, procedural fairness, which lies at the heart of respected legal systems, requires that an accused person be heard pursuant to comprehensible rules. The system depends upon stories being told well.

Experienced advocates often achieve their best results by addressing the court at some hidden or essential level. This is probably because they know how stories should be told and can link the issues before the court to local habits and familiar ways of thinking. They set out to present a convincing account of what happened on some past occasion. They know that style and tone and other literary skills will have to be used in order to make the account convincing. The advocate has to be a skilful storyteller.

One of my early enthusiasms was for the work of the American novelist, F. Scott Fitzgerald. As the author of stories such as *A Diamond as Big as the Ritz* and *The Great Gatsby*, Fitzgerald became known as a chronicler of the jazz age in America - the Roaring Twenties. His career began brightly with *This Side of Paradise*, but descended eventually to

the dark, alcoholic ruminations of *The Crack Up* and *Afternoon of an Author*.

In his final years, while contrasting his descent into relative obscurity with the rising reputation of his old friend Ernest Hemingway, Fitzgerald said: '*Ernest speaks with the authority of success, while as I speak with the authority of failure.*'<sup>2</sup> The paradox implicit in this remark might seem unintelligible to a class of law students who did well in their exams at school and are confident of finding a niche in the legal world, but it makes sense to writers and artists, indeed to most people with a capacity for introspection. One learns from both failure and success. Personal experience is grist to a writer's mill. It is grist to the advocate's mill also.

It was said of Scott Fitzgerald's that: '*His subject was despair, but his style was hope.*'<sup>3</sup> Even in his darkest days, Fitzgerald unfailingly gave voice to a sense of wonder, a feeling for the mystery of life, a capacity to dream. A style infused with hope engages the sensibilities of an audience in a way that unrelieved gloom and pessimism never can. One usually finds in the great writers not only a profound knowledge of human affairs but also a sympathetic tone, some understanding of the way in which people, even in appalling circumstances, can change and be replenished.

Matters of the kind just mentioned – a convincing tone and a style enriched by experience – are usually reflected in the forensic art of the best advocates. Their skill in evoking the outlook of the world in their locality implies a comprehension of the wider world. To include too much in a closing address or a summing up may suggest that the speaker has a somewhat hazy notion of what constitutes an authentic response to the matters of real importance. In the words of the American poet Gary

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<sup>2</sup> Cross, K *Scott Fitzgerald* (Oliver Boyd, 1964) p111

<sup>3</sup> Mizener, A *The Far Side of Paradise* (Houghton Mifflin, 1951) p248

Snyder: '*The keen attentive mind has no meaning but that which sees is truly seen.*'<sup>4</sup>

### **Aboriginal Affairs**

I mentioned native title and Aboriginal affairs. In a comparatively new and complex field of law, the student or would-be lawyer will need more than style and tone to present a convincing case. To sound convincing the prospective advocate will have to be well-briefed about matters of substance and conversant with all sides of the question. It will not be enough to fall back on rhetoric or echo whatever is thought to be the current orthodoxy.

Historians and commentators with an interest in the past are increasingly inclined to portray Australian history as a tale of shame, without appearing to recognise, as Scott Fitzgerald recognised, that even a damaged past can offer hope. The practice in other times was to find in previous adversities a prospect of renewal. Not so now. Pioneers, once idealised, are demonised. A past that was previously the source of national pride has become a past to be atoned for.

Too often, especially in Australia, when lawyers and commentators with strong views about the present turn to the past they are inclined to look for facts that confirm the beliefs they have already formed. They read the past backwards from the present, excluding matters that might damage their cause, simplifying the tale of Aboriginal disadvantage they are determined to tell.

In *Mabo*, for example, Justices Deane and Gaudron of the High Court excused their use of 'unusually emotive language' in describing the dispossession of Australian Aborigines on the grounds that emotive

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<sup>4</sup> Hall, D (Ed), *Contemporary American Poetry* (Penguin Books, 1962) p184: Snyder 'Piute Creek'.

language was necessary to preclude certain propositions of law ‘from acquiring the legitimacy which their acceptance as a basis of the real property law of this country for more than one hundred and fifty years might otherwise impart.’<sup>5</sup> In the legal system as a whole, however, even in this new and contentious field of law, advocates and adjudicators generally recognise that preconceptions or personal passion are not enough to displace specific rules of law. Hence, pursuant to the long-established traditions of the law, submissions to the court must be prepared accordingly.

Works of fiction about professional life and the nature of the law in action can be of use in acquainting students and observers with the traditions of the legal system. Skilfully-crafted stories can be of use also in challenging preconceptions and in prompting newcomers to reach their own conclusions about controversial matters, and about the best way to present a case.

### **The Case at Broome**

This brings me to the novel I mentioned earlier: *The Bradshaw Case*.<sup>6</sup> The book takes the reader to some controversial issues about the origin of rock art in the Kimberley region of Western Australia and the handling of native title claims in the aftermath of *Mabo*. It follows from my earlier observations that, in my view, fiction is a way of talking freely about current orthodoxies and matters that are sometimes thought to cause ‘offence’. As it was in theatre of old: give a man a mask and he will tell the truth.

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<sup>5</sup> *Mabo v Queensland* (1992) 66ALJR 408 at p456

<sup>6</sup> Hasluck N *The Bradshaw Case* (Australian Scholarly Publishing/Arcadia, 2016)

In *The Bradshaw Case* the tale is told by a fictitious young lawyer called Colin Everett, a newcomer to the Kimberley, who is drawn into a fierce dispute about native title being heard in a courthouse at Broome. The disappearance of a key witness on the eve of trial points to threats of blackmail, or even worse. To win the case for the Aboriginal claimants, Colin and his fellow lawyers have to find the witness, get the better of their opponents, and probe the origin of rock art situated on the so-called Ngerika peninsula. Success or failure will depend on evidence given by an elderly anthropologist called Jack Otway, who has been close to the Ngerika claimants for many years.

What facts and real events frame the story? Since the High Court's decision in the *Mabo* case and the enactment of related legislation, it has been open to Aboriginal litigants to put claims for native title based on a long connection to the land in question and evidence of ancestral practices, including rock art. Claims are resolved in courts and outdoor sittings in real places such as Broome or other towns in the Kimberley.

There is another layer of fact in *The Bradshaw Case* which some readers may not be entirely familiar with, but which will gradually be made clear to them by the inexperienced narrator, Colin Everett, for he is on a learning curve also.

The reader learns from Everett and other lawyers involved in the case that as to the various images found in the Kimberley region there were two principal forms of art.

The first to be discovered were the Wandjina images chanced upon by Lieutenant George Grey in 1838. Typically, the head of each figure is surmounted by a halo of bright red rays, beneath which appears a face painted vividly white, with the eyes thick blobs of black, but no mouth or chin.

The second form, being images of an entirely different kind, were those discovered by Joseph Bradshaw 30 years later, at the end of the 19<sup>th</sup> century.

Bradshaw is described early on as ‘an explorer, adventurer and fellow of the Royal Geographical Society.’ On the first page of the novel, as a preface to all that follows, the reader is provided with a short excerpt from his diary dated 16 April 1891 to this effect: *‘In the afternoon Fred and I rode out and found that the river at this place emerges through a gorge in the sandstone range and forms a large rocky pool. Further on there was a great pile of rocks on the far side of the river. In the secluded chasms of these rocks were numerous Aboriginal paintings which appeared to be of great antiquity.’*<sup>7</sup>

Joseph Bradshaw’s opinion was shared by the anthropologists who followed him. They characterised the slim, ornate figures represented on the cover of the novel as being many thousands of years older than the Wandjina art.

The unique form of the Bradshaw art has engendered controversy from the time of its first discovery to the present day, for no one can speak definitively as to where it came from.

In addition to the passage I quoted a moment ago Bradshaw’s 1891 diary contains a later passage as follows: *‘I do not attribute (these drawings) to the present representatives of the black race. .... Some of the human figures were life-size, the bodies and limbs very attenuated and represented as having numerous tassel-shaped adornments appended to the hair, neck, waist, arms and legs; but the most remarkable fact in connection with these drawings is that wherever a profile face is shown*

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<sup>7</sup> Bradshaw, J. Journal of Joseph Bradshaw from January 31<sup>st</sup> 1891 to June 6<sup>th</sup> 1891, Mitchell Library B967, Microfilm copy held by Battye Library, Acc 1271A

*the features are of a more pronounced aquiline type, quite different from those of any natives we encountered. Indeed, looking at some of the groups, one might think himself viewing the walls of an ancient Egyptian temple.'*<sup>8</sup>

One of the anthropologists who followed Joseph Bradshaw was Professor A.P Elkin from the University of Sydney. In 1930, after field work in the region, Elkin said that there were certain images in the Kimberley which seemed to owe their origin to 'external influence, if not agency.' He added: *'This would seem to be the case with the strange paintings found in a cave along the Prince Regent River by Bradshaw.'*<sup>9</sup>

This brings me to a passage from a book written by a leading Australian anthropologist, the late Grahame Walsh.<sup>10</sup> *'Agnes Schulz the highly-skilled chief artist accompanying the 1938 Frobenius Institute Expedition worked under adverse conditions on site to complete many large scale copies of art panels ... (She) made lengthy trips by mule to visit the widely separated sites, at times travelling with the Aboriginal guides .... The now accepted term 'Bradshaw paintings' seems to have been first introduced in the published works of Frau Agnes Schulz, largely due to the absence of any Aboriginal name or term by which they could be referenced.'*

Thirty years after the research undertaken by Agnes Schulz from the Frobenius Institute, a widely-respected anthropologist from the West Australian Museum, Ian Crawford, drawing upon fieldwork from five expeditions in the 1960s, summed up in this way: *'Although Wandjina paintings are impressive because of their massiveness, size and their colour, they lack finesse and movement. In complete contrast are the*

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<sup>88</sup> Bradshaw, J (Ibid). See also *Proceedings of Kimberley Society* 27 March 2010 p127

<sup>9</sup> Elkin, A.P: *Rock Paintings of North West Australia, Oceania* Vol 1 No 3 December 1930 p258

<sup>10</sup> Walsh, G *Bradshaw Art of the Kimberley* (Takaraka Nowan Kas Publications, 2000) p14

*'Bradshaw' figures, small red paintings which show people busy dancing and hunting .... The origin of these paintings presents a mystery ... Unlike the majority of the paintings in the Kimberley, the Bradshaw figures are of no importance to the Aborigines, who simply regard them as the work of a bird. What man they say would bother to paint the pictures: such a man would gain no prestige for wasting his time in this way. The paintings are 'rubbish paintings' illustrating nothing of interest or value. This attitude is in marked contrast to the respect paid to the Wandjina and the paintings which are associated with myths and songs.'*<sup>11</sup>

The anthropologist I mentioned earlier, the late Grahame Walsh, studied the works of Bradshaw, Elkin, Schulz and Crawford, and embarked upon extensive field work of his own. He came to the conclusion that the Bradshaw images had not been created by Aboriginal artists but were the work of an earlier or different race.

Walsh's findings were said to verify the view expressed by Billy King, an elder of the Kupungarri Aboriginal Community in the West Kimberly: *'I think what the old people told me is true, they were done by different people to us, not from any of our tribes, maybe long before we existed.'*<sup>12</sup>

There is, of course, a wide range of other books and opinions about these matters, many of them (especially since native title was introduced in the 1990s) directed to refuting the view held by the late Grahame Walsh. Steps have been taken to put dates on the two forms of rock art, but no final conclusions have been reached. There seems to be a loose or informal consensus that the Wandjina art could be up to 5000 years old,

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<sup>11</sup> Crawford, I.M, *The Art of the Wandjina* (Oxford University Press, 1968) p81

<sup>12</sup> Walsh, G (supra note 10) p425

but the Bradshaw images probably first came into existence about 17,000 years ago.

A number of recent works draw attention to an aspect of the matter that Ian Crawford touched upon; that is, some Aboriginal groups in the Kimberley see the paintings as the work of a bird: a small bird known as ‘Gwion Gwion’ The term Gwion Gwion is increasingly being used by tourist guides and others to describe the paintings, although I see from my last visit to the National Museum in Canberra that the works are still being described by the museum curators as ‘Bradshaw’ images.

I have probably said enough to show the nature of the ongoing controversy concerning the origin of the Bradshaw art, and to give prospective readers of *The Bradshaw Case* a sense of what the novel is about – the struggle for control of the purported Ngerika peninsula, and of its past. As in many courtroom dramas, real or imagined, where the twists and turns of the plot depend upon disputed facts and the production or suppression of crucial exhibits, the evidence in the Bradshaw case is open to various interpretations.

It was this feature of the situation – the ambiguity of the evidence in actuality – plus a long-standing interest in anthropological issues that aroused my interest in the Bradshaw controversy some years ago.

Needless to say, I am not qualified to offer a final judgment, or even a firm opinion, about the nature of the contest at the heart of my novel. What the characters say and do is for readers to ponder. My novel is simply a way of encouraging people, students and would- be lawyers in particular, to keep an open mind about controversial matters in the course of reaching their own conclusions.

I hold firmly to the view – a view doubted in some quarters – that any person with an interest in the pre-history of Australia and the

heritage of humankind should feel free to talk about an intriguing issue of this kind, an issue about the origin of the so-called Bradshaw or Gwion Gwion art that the anthropologist Ian Crawford, over fifty years ago, characterised as ‘a mystery.’ It is only by looking into the mysteries around us that we can arrive at what we need to know. Indeed, as one of the characters in the novel is heard to say towards the end of the book: *‘If truth is a value it is principally because it is true, not because it takes courage to say it aloud, although that is important.’*<sup>13</sup>

### **The Expert Witness**

The nature of the contest in *The Bradshaw Case* can be illustrated briefly by turning to a passage in the novel in which Jack Otway, the elderly anthropologist, is being questioned by the presiding Judge, who insists that the rock art in question be called Gwion Gwion.

*Justice Saypol put down his pen. ‘Your opinion about an earlier and different race seems very bold,’ he said.*

*Jack shrugged. ‘Not to me. It is an opinion I have held for many years. Throughout my adult life, in fact. Which means I am not inclined to abandon it too easily.’*

*‘I hear what you say. But the law generally looks to what can be seen or touched. Tangible evidence. It is wary of opinions. Even from experts who claim to know what they’re talking about.’*

*‘I understand, your Honour. That has been explained to me. But if asked I must surely be entitled to express my opinion. Especially when it bears upon the history of the place in question, and the matters in issue.’*

*‘In a case like this, the law provides the test of what is in issue, and the law is above us all.’*

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<sup>13</sup> Hasluck N (supra note 6) p211

*‘With respect, your Honour, research and the pursuit of scientific truth are even higher. They have always gone wherever they wish to go.’*

*‘Not in my court. We are bound by the statute and the rules of evidence. They are the rules I intend to apply. The court in this case isn’t interested in unsubstantiated opinions or fanciful theories. It is interested in ancestral practices on Dumont Island and the Ngerika peninsula. The heritage of the various language groups. The link between one phase and the next.’*

*‘The heritage of the language groups!’ Jack agreed. ‘Of course! But I am interested also in the heritage of humankind. How far back it goes, and what lies behind the twists and turns that followed. In the Kimberley region rock art is the key to it. As it was in the caves of Lascaux in France. As it was for Galileo when his telescope revealed a vast new sky, previously invisible to the naked eye. So I am not to be prised loose too easily from the opinion I have held for so long. The Bradshaw paintings are the work of an earlier race. They are the way in to a greater understanding of human creativity.’*

*The bespectacled Judge, his bookkeeper’s face unimpressed by what was being dumped in his tray, came back at the witness sharply. ‘Way in or way out? One way or another we seem to be losing our bearings with all this high-flown talk’*

*He picked up his pen and leaned forward. ‘Let us come to the point. You seem to be in favour of the claimants’ case, but for some reason I don’t quite understand you won’t say that the panel of rock art on Dumont Island was created by their ancestors. I am beginning to wonder how much time we can spend on all this theorising. I must have evidence upon which to base a finding. Tangible evidence. Without it I will be left with no option but to dismiss the claim. And that would be*

*very disappointing to all those who have laboured so hard to bring this case to court.'*

*The judge checked his notes before adding a further thought. 'And let me remind you that the art we are speaking of is called Gwion Gwion. I would like to hear more about that and less about Joseph Bradshaw. In the end, his so-called "discovery" is probably incidental to what matters most. The claim to country and a way forward for those who think of it as their homeland.'*

*'I am with your Honour in that regard, but the fact remains that the term Gwion Gwion is of comparatively recent origin. The reasoning behind my opinion starts with Bradshaw, and the ornate human figures he discovered, which are completely unlike all the other forms of rock art. His name appears in all the writings on this subject and I fear we will become confused if his name is simply wiped out.'*

*'Mr Otway. I have done what I can to be reasonable, but I sense that you are trying to draw me in. You are seeking to commit the court to another round of abstruse discussion about matters of interest to you, but of little relevance to the main point. I have to tell you frankly, I won't have it.'* The judge pointed his pen at the witness. *'It is often better all round if a person holding a strong opinion, especially an opinion that might strike some as slightly odd, can see his way clear to take account of the realities around him, and re-examine his position accordingly. Do you follow what I say?'*

*The Judge glanced at his notes again. 'I have some evidence from you concerning ways of life and practices on the peninsula, but no evidence I can act on concerning the offshore islands. And to some extent, I have to say, your evidence about the mainland is clouded by certain doubts I am beginning to have about your general credibility .... So*

*please just plain get on with it, and tell us what you know about Wandjina and Gwion Gwion art and the ancestral practices of the various language groups. Do I make myself clear?’*

*Jack was clearly affronted by these remarks. He seized the rail of the witness box. ‘I am surely entitled to my opinion? To speak the truth as I see it?’*

*‘The court will decide what the truth is, and once that decision is made, that will be the truth!’*

*‘But there are so many queries to be dealt with about this art! Can we really assume that these ornate human figures, with their tassels and sashes and headdresses, spread throughout the sandstone outcrops of the Kimberley, were created by a small bird with a beak dipped in blood? Is it no longer possible to ask such a question?’*

*‘You are challenging what people have come to believe,’ the Judge snapped. ‘Do you go so far as to challenge matters of faith?’*

*‘I do. As Galileo did. And as Charles Darwin did many years later. And I challenge also the pretence that the language groups likely to be affected by any ruling made by the court – named absurdly in the list as “groups A, B and C” – have the common features attributed to them. A proper respect for the realities of this region demands that crude generalisations of such a kind be resisted.’*

*This was greeted with an icy judicial glare. ‘Let me ask you again. Do you persist in this fanciful notion that the Kimberley was once inhabited by an earlier and different race?’*

*‘That has been my opinion throughout my adult life and I hold it still. One has only to look at the Bradshaw figures to know that they come from somewhere beyond our present understanding. Far back.’*

*The Judge came smartly to his feet and bowed abruptly. 'The court will stand adjourned for a short period.'*<sup>14</sup>

## **Overview**

In summary, then, for the sake of an enjoyable discussion I have employed various examples to suggest that literary works can be used for insight and as a teaching aid. They are a means of testing certain underlying assumptions in the legal system. They will be of use to advocates also in presenting persuasive arguments to courts of law and in keeping their own counsel in response to change.

My argument proceeds from the premise that the concept of justice is bound to vary from place to place in regard to substantive matters but a need for procedural fairness lies at the heart of most widely respected legal systems.<sup>15</sup> The precept that a litigant should be heard in regard to any contentious issue brings with it, by necessary implication, a requirement that those charged with the task of presenting and ruling upon matters in contention should underpin their legal skills with an understanding of how stories are constructed and expressed, and of the way in which the inevitable differences between adversarial and imaginative renditions of the story in question may affect the outcome.

An understanding of this kind will ensure that procedural rules are applied in a constructive manner, bearing in mind that on some occasions the rules of evidence, with their insistence upon immediate relevance and verifiable fact, may have the effect of excluding complexities and subtle truths about human behaviour, truths that are set out persuasively in various works of imaginative literature.

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<sup>14</sup> Hasluck, N (Ibid) pp196-198

<sup>15</sup> Hampshire, S *Justice is Conflict* (Duckworth, 1999) p18

The presence of such works, and a determination not to ignore the small, personal voice of the litigant will give rise to an ongoing critique of the law and tend to have a salutary effect upon those within the legal system who are charged with the task of doing justice in particular cases and appraising change in popular culture.

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