Truth, Lies and Stereotype: Stories of Mary and Louis[*]

Hon Justice Peter Heerey
Federal Court of Australia

All cases are different, but they are much the same.
Anon J (descendant of the well-known poet)

On its way to the High Court of Australia *Louth v Diprose*[1] was variously described by the judges concerned as "unusual",[2] "most unusual"[3] and "curious".[4] Such descriptions seem apt, and at a number of levels. The case is unusual as a story of how a man and a woman treated each other, and in the sense that there are not many similar stories which have reached the courts. It is perhaps paradoxical therefore that much of the academic discussion which the case has generated[5] concerns the issue of whether the case was dealt with by the courts in terms of stereotypes, that is to say whether the case was treated as a familiar type of story.

The present paper will be concerned as much with the commentary which has emerged about the case as the case itself. It will be argued that much of that commentary ignores the forensic constraints which

* An edited version of a paper presented at the Law and Literature Symposium at Boalt Hall Law School, University of California at Berkeley, on 2 October 1995. The author gratefully acknowledges the comments and assistance of Justice Kevin Lindgren, Justice Paul Finn, Ms Penny Pether, Ms Anne O'Donovan, Mr David Brennan, Mr Richard Evans, Mr Simon Milazzo and Mr Neville Turner.

1 (1990) 54 SASR 438 (King CJ), (1990) 54 SASR 450 (Full Court of the Supreme Court of South Australia), (1992) 175 CLR 621 (High Court). At first instance and in the Full Court the case bore the title *Diprose v Louth*.

2 (1990) 54 SASR 450 at 451 per Jacobs ACJ.

3 Id at 454 per Legoe J.

4 (1992) 175 CLR 621 at 643 per Toohey J.

5 Dianne Otto, 'A Barren Future? Equity's Conscience and Women's Inequality' (1991) 18 Melbourne University Law Review 808 at 816-818, Samantha Hepburn 'Equity and Infatuation' (1993) 18 Alternative Law Journal 208, Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 Melbourne University Law Review 701.

necessarily restricted the way the case was presented to, and therefore decided by, the various judges at first instance and on the appeals. Further, it will be suggested that much of the criticism involves replacing one alleged stereotype with another and using litigation as a weapon for the correction of perceived injustice to classes within a society rather than justice according to law between the parties in a particular case.

The Trial

The trial took place before King CJ in the Supreme Court of South Australia over three days in May 1990. The issues in the case and the basic elements of the evidence presented to the Court appear in the judgment of the trial judge.[6] It is appreciated that a central theme of the criticism is that the wrong story was told, or that much of Mary Louth's story as an "outsider" was ignored or marginalised. But a discussion of the case has to start somewhere, and since, rightly or wrongly, the trial judge's account has a special standing in the litigation process, the paper will begin with some admittedly rather lengthy extracts and summaries.[7]

> "The plaintiff in this action claims that he is the beneficial owner of a house property which he purchased and caused to be registered in the name of the defendant and also claims the return of certain chattels which he alleges were lent to the defendant. The defendant asserts that the house and chattels were gifts to her.
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> This litigation results from a deep and persistent, albeit unrequited, emotional attachment of the plaintiff to the defendant, the plaintiff's bizarre behaviour in pursuance of that attachment and the defendant's response to that behaviour.
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> The plaintiff is now aged 48 years. He is a solicitor employed by a firm of solicitors in Adelaide. When he first met the defendant in Launceston, Tasmania, his first marriage had ended in divorce and the final separation from his second wife was imminent. The plaintiff has three children by his first marriage and at all relevant times has had custody of those children. The plaintiff and the defendant first met at a party in Launceston on 13 November 1981. The defendant was a married woman whose marriage was in trouble and about to end. Her husband in fact left shortly afterwards. There were two children of the marriage and the defendant has had custody of them at all relevant times. The plaintiff and the defendant became friendly and sexual intercourse occurred between them on one occasion shortly after their first meeting. The plaintiff immediately fell very much in love with the defendant. They went out together fairly regularly but there was no further sexual

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[6] (1990) 54 SASR 438 at 439-442.

[7] I shall refer to the parties hereafter as Louis and Mary. To avoid a plethora of bracketed insertions, extracts from the judgments will remain unchanged. "The plaintiff" or "the respondent" means Louis. "The defendant" or "the appellant" means Mary.

intercourse for some months. They then had sexual intercourse on one occasion. They are the only two occasions upon which sexual intercourse has taken place between them.

The plaintiff, who remained very much in love with the defendant, began to compose love poems which he sent her from time to time during the years which followed. The feelings expressed in those poems, which he entitled "The Mary Poems", were tender, often sentimental, sometimes passionate, and very often on the theme of unrequited love. The plaintiff acknowledged in evidence that those poems expressed the feelings which he entertained towards the defendant from time to time as they were composed.

The defendant's financial circumstances were poor following the break down of the marriage and she decided to come to Adelaide where she could expect some assistance from her sister and her husband, Mr and Mrs Volkhardt. She left Launceston for Adelaide on 23 August 1982. The plaintiff tried to persuade her to remain in Launceston and proposed marriage but was refused."

After a short visit in January 1983, when Mary refused to go out with him, Louis moved permanently to Adelaide a few months later. He sent her a partly completed volume of the Mary Poems. Mr Volkhardt told him Mary did not wish to see him. Then in May Mary telephoned him twice, talked to him but refused to give her telephone number. Shortly afterwards she rang again, said she was depressed and suggested lunch. At the lunch, Louis told her his feelings had not changed. Mary, as the judge found, said "Oh well, if you don't try and hassle me I would probably let you sleep with me occasionally, but I don't want any commitment." In November, after telephoning him a few more times, Mary gave Louis her telephone number. From then until the house transaction in June 1985, Louis called on her regularly. He made gifts of household appliances and a television set. She would leave unpaid household bills lying about and he would pay them. He paid her children's school fees.

Mary had injured herself in apparent suicide attempts, including one at the time of her divorce early in 1983.

As to their respective financial positions, Louis was living with his three children in a rented house. He worked as an employed solicitor. He had assets consisting of money lent on mortgage $91,000, an aeroplane worth $25,000 - $30,000 and a share in a house in Tasmania $15,000 - $20,000. His debts were about $15,000. Mary was living with her two children in a house owned by Mr Volkhardt at Tranmere at a rental of $40 per week. Her only income was the Supporting Parent's pension.

In September 1984 the Volkhardts separated. Mr Volkhardt told Mary that she ought to put her name on the list for public housing because she "couldn't assume she could live (at the Tranmere house) forever". In June 1985, following the discussions on which the case turned, Louis purchased the Tranmere house from Mr Volkhardt for $58,000 and had the title registered in Mary's name. He prepared the legal documents himself. The money came from the proceeds of his mortgage investment which matured about that time.

Louis arranged for first home owner's assistance by preparing an application which showed the $58,000 as a loan and the firm of solicitors by whom he was employed as the lending institution. He wrote to Mary on the day of the settlement a letter which included the sentence "You are now the proud owner of the same [i.e. the Tranmere house]". In May 1986 Louis made a will leaving his aeroplane to Mary's son and the balance of the estate to be divided between his own three children. The will made no mention of the Tranmere house. He wrote to Mary advising her of the terms of the will and saying that there was "going to be very little to divide" between his children.

During 1986 and 1987 relations between Louis and Mary continued much as before, with Louis paying household bills and school fees. In his Honour's words, Mary "was desirous of reducing the number of his visits and conveyed that impression to him by her offhand behaviour".[8]

In mid 1988 Louis purchased a house and while waiting for vacant possession he was permitted by Mary to stay at the Tranmere house for a few weeks. A quarrel occurred during which Louis demanded that Mary transfer the house to him. She refused. Louis left the house and commenced legal proceedings shortly thereafter.

His Honour described the "crucial conversations which led to the purchase of the house property with the plaintiff's money but in the name of the defendant".[9] Louis' version was that in about May 1985 Mary telephoned him sounding "quite upset" saying that her sister and brother-in-law were seeking a property settlement and that the house "would have to be sold". She said that "she was going to have nowhere to live and she was feeling depressed about it". He went to see her. Discussions ensued over the next few days. Louis raised a succession of proposals. The first was that he might lend Mary the money to buy the house. She rejected this on the ground that she could not repay such a loan. He then suggested that he buy the house and allow her to remain as tenant on the existing terms. She rejected this on the ground that it would give him a hold over her "which, in view of his sexual interest in her, was unacceptable".[10] In the course of these discussions she spoke of the effect of the possible loss of the house upon her. She said that she had had a dreadful life with her first husband and had been carted from one address to another, always short of money. She felt very insecure about that, but since living in Adelaide at the Tranmere house she felt she had some security and stability in her life. If the house was taken away from her she could not face this prospect. She said "Look, if it comes to that I'll just kill myself. I'll make a good job of it this time".[11] Finally Louis suggested that he buy the house in her name "but that would only be on condition that you

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[8] (1990) 54 SASR 438 at 442.
[9] Ibid.
[10] Id at 443.
[11] Ibid.

agree to transfer it back to me". Mary agreed.

On Mary's version she denied ever presenting the situation to Louis as a crisis which was upsetting her. She denied any reference to suicide. She said that in the course of discussion about the future Louis had volunteered that he would purchase the house for her to give her security and that the gift would be unconditional, with "no strings attached". In clarifying the meaning of "no strings attached" she pointed out that she might marry or take a lover and Louis said that that made no difference. She denied that there had been any mention of a loan but agreed that there had been a suggestion that Louis buy the house and allow her to continue as a tenant.

Having identified the evidentiary disputes his Honour continued[12]

> "Before attempting to resolve the dispute between the parties as to those conversations, I turn to my impressions of the witnesses who gave evidence. The plaintiff is a strange romantic character who had a sustained infatuation for the defendant. When the scales fell from his eyes he bitterly regretted the transfer of the house and I think that that has influenced his evidence. I found much of his evidence as to the general relationship of the parties and the circumstances in which the subject of the house transaction arose convincing, but his demeanour was not such as to persuade me to accept evidence which I consider to be improbable or which is in conflict with other convincing evidence."

His Honour then discussed a number of witnesses including one, described as a "friend of both parties", who gave evidence of an occasion when Mary expressed unhappiness about Louis being in the house. In answer to the question "Why did you invite him in?", she replied "Well, after all it's his house". His Honour continued[13]

> "This witness was a voluble imprecise witness and whilst I am sure she was endeavouring to tell the truth, I feel unable to rely upon her for the exact words which were spoken and I feel unable to rely upon the alleged statement as a relevant admission. I do accept the evidence of this witness, however, as to the defendant's dislike, apparently concealed, for the plaintiff at the very time at which he was visiting her at her house and paying for her children's schooling. I formed the impression that the defendant was a calculating witness who was prepared to tailor her evidence in order to advance her case. In particular I found her evidence as to the circumstances leading to the house transaction quite unimpressive."

King CJ found Mr Volkhardt to be an honest and accurate witness and rejected the evidence of Louis where it was in conflict. Mr Volkhardt confirmed his wife's evidence that nothing had been said to Mary to suggest

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[12] Ibid.
[13] Id at 444.

that the house would be sold before the defendant had the opportunity to move into a Housing Trust home. His evidence was that Louis approached him about the purchase of the house for Mary and told him that he was buying the house for her because he wanted her to be happy and secure. Louis told him that he loved Mary, but accepted that she was not going to accept him.

King CJ rejected Louis' evidence as to the stipulation for re-transfer and accepted Mary's evidence that Louis told her it was a gift and there were "no strings attached". His reasons for this conclusion[14] were that the stipulation for re-transfer was intrinsically unlikely and inconsistent with Louis' own evidence as to how matters developed. Mary had rejected two proposals on the ground they would not provide her with the desired security. Obviously the final proposal, on Louis' version, would not provide her with such security either "and he as a solicitor would have realised that". Louis had told Mr Volkhardt prior to the transaction, and Mary's mother afterwards, that he was buying the house for her as a gift. His Honour placed particular emphasis on the letter referring to Mary as "the proud owner" of the house.[15] Likewise Louis' will, and the letter to Mary explaining it, neither of which made any reference to his alleged retained interest in the house, pointed to the house being a gift.

The presumption of resulting trust arising from the provision of the purchase money by Louis was therefore rebutted. King CJ then had to turn to the alternative claims that the purchase of the house was made as a result of the exercise of undue influence by Mary, or in the further alternative, that it would be unconscionable on her part to retain the benefit of the gift. His Honour cited a lengthy passage from the judgment of Mason J in the High Court of Australia in *Commercial Bank of Australia Ltd v Amadio*.[16] In that passage Mason J referred to relief on the ground of "unconscionable conduct" as referring to

> "... the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, for example, a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink."

Mason J then continued:

> "It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct. As Fullagar J said in *Blomley v Ryan* (1956) 99 CLR 363 at 405:

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[14] Id at 445.
[15] Ibid.
[16] (1983) 151 CLR 447 at 461.

> 'The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.'

Likewise Kitto J spoke of it as 'a well-known head of equity' which:

> '... applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands'.

It is not thought that relief will be granted only in the particular situations mentioned by their Honours. It is made plain enough, especially by Fullagar J, that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-à-vis another an unfair or unconscientious advantage is then taken of the opportunity thereby created."[17]

There was never any dispute that the applicable principles relating to unconscionability were those stated by Mason J.[18] King CJ applied those principles to the facts as found by him in these terms:[19]

> "I have reached certain conclusions on the basis of accepting the plaintiff's evidence in preference to that of the defendant as to the circumstances and events leading to the house transaction. I have given careful consideration to the question of the plaintiff's credibility in relation to those matters in the light of my rejection of his evidence that he stipulated for a right to have the house retransferred, but I am quite satisfied that on those matters his evidence is truthful and reliable and to be preferred to that of the defendant.
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> I find that the defendant manufactured an atmosphere of crisis with respect to the house when none really existed. There was no pressure upon her with respect to the house as the evidence of Volkhardt and her sister make clear, but she knew that ultimately she would have to go into a Housing Trust home to enable the house to be sold ... I am satisfied that she deliberately manufactured the atmosphere of crisis in order to influence the plaintiff to provide the money for the house. I am satisfied, moreover, that she played upon his love and concern for her by the suicide threats in relation to the

[17] Id at 461-2.
[18] One might speculate as to why special leave to appeal was granted by the High Court.
[19] (1990) 54 SASR 438 at 448.

house. She then refused offers of assistance short of full ownership of the house knowing that his emotional dependence upon her was such as to lead inexorably to the gratification of her unexpressed wish to have him buy the house for her. I am satisfied that it was a process of manipulation to which he was utterly vulnerable by reason of his infatuation. I disbelieve the defendant's evidence that she thought the plaintiff was a wealthy man. I find that from her conversations with the plaintiff she was aware in general terms that he had only limited assets, that the mortgage moneys were his principal asset and that he had to work as an employee solicitor for a living. Moreover she was aware that he had three children who had natural claims upon his bounty.

The outright gift of a house worth $58,000 by a man of limited assets having three children in his care, to a woman who did not return his love with whom he had no future, was a most improvident transaction and I believe that the defendant well knew that. By reason of the plaintiff's infatuation and the defendant's manipulation of it he was 'unable to make a worthwhile judgment as to what is in his best interest': *Commercial Bank of Australia Ltd v Amadio* (supra), per Mason J (at 461). The defendant was well aware of that and her manufacture of an atmosphere of crisis where no crisis existed was dishonest and smacked of fraud. To my mind, the defendant's unconscientious use of her power of the plaintiff resulting from his infatuation, renders it unconscionable for her to retain the benefit of such a large gift out of the plaintiff's limited resources.

I consider that the unconscionable conduct of the defendant calls for the intervention of a court of equity and the imposition of a trust of the house property for the benefit of the plaintiff."

The Full Court Appeal

An appeal by Mary to the Full Court of the Supreme Court of South Australia was dismissed: Jacobs ACJ and Legoe J, Matheson J dissenting. The main judgment of the majority was that of Legoe J. His Honour gave some details of the evidence beyond that referred to by King CJ, and in particular the "Mary Poems". Louis gave the first volume to Mary in 1983 when he came to Adelaide to live. Poems were dated later in 1983 and 1984 which he added to make a total of 91. He gave her a second volume including poems written between 1985 and 1987. His Honour said:[20]

"The poems vary from classical reference (Greek and Latin) to some French, and finally to unequivocal sexual innuendos displaying a passionate obsession for her, for example 'Give all of love' (18-19) (Shrove-Tuesday) February 1985) —

'Take all that I can give for it is yours
My love, my heart, my body's kindly strength,'

[20] (1990) 54 SASR 450 at 457.

and the final poem 'Night dreams' concluding:

> 'I feel you biting my neck, our intertwined tongues,
> Your awakening nipples under my busy hands;
> And I take you and f... you deeply in my thoughts.'"

After an extensive review of the authorities Legoe J identified the issue on the appeal to be whether "emotional dependence" can amount in law to a serious or special disadvantage so as to justify equitable relief on the grounds of unconscionability.[21] On this issue his Honour applied the New Zealand case of *K v K*[22] where O'Regan J refused to enforce a separation agreement against a wife. In that case the judge had held

> "... the evidence discloses an unfair bargain. Indeed, as far as the wife was concerned, she ceded almost everything the marriage held for her and took but little under the deed. The evidence shows, too, that by reason of her emotional condition and her distress she was bereft of proper judgment. I think that advances the matter to a point where the burden falls on the husband to establish that the transaction was 'fair, just and reasonable'(*Morrison v Coast Finance Limited* (1965) 55 DLR (2d) 710 at 713) and that no advantage was taken."

Legoe J found that the evidence justified the conclusion of King CJ.

Jacobs ACJ agreed, although stressing[23] that "emotional dependence" of a donor was not in itself sufficient to warrant equity setting aside a transaction which was to the donor's disadvantage. But Jacobs ACJ considered the trial judge's finding of fact as to the manufactured crisis justified.[24]

In dissent, Matheson J conceded that the transaction was unconscionable in the sense that Mary had done nothing to deserve such beneficence, and in the sense that it deprived Louis' children of perhaps a substantial part of their inheritance, but that, his Honour said, was not enough. His Honour referred to a number of authorities and academic discussions of unconscionability and observed[25]

> "... notwithstanding the thorough review of the relevant case law in these discussions, no case that even roughly resembles the case on appeal is cited."

His Honour adverted to some of the undisputed facts and in particular that it was Louis' idea to buy the property, that Mary did not "importune him with promises of a closer relationship" or say that if he did not give

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[21] Id at 472.
[22] [1976] 2 NZLR 31 at 39.
[23] (1990) 54 SASR 450 at 452.
[24] Id at 453.
[25] Id at 478-9.

her the house she would kill herself. Louis knew what he was doing and prepared all the legal documents. The transaction was not done in haste or secretively. Matheson J quoted[26] a substantial passage from the evidence in chief of Mr Volkhardt relating to his discussions with Louis prior to the transfer. The evidence included the following:

"Q. You were attempting to sell the house at that time?
A. No.
Q. Did you have any intention in relation to it? What were you going to do long term?
A. No great intention, although the assumption was, I guess, that eventually it would be good if it could be sold, sometime. Certainly there was no great pressure to sell."

Matheson J then commented

"It is convenient to observe here that whatever the appellant had said to the respondent about her sister seeking a property settlement, he must have realised after his conversation with Volkhardt that the appellant was not facing an early crisis over the sale of the house."

Matheson J was

"quite unable to draw the inference that the respondent was emotionally *dependent* upon the appellant. Infatuated yes, perhaps emotionally involved, but not dependent. Nor am I prepared to draw the inference that their relationship 'gave her a position of great influence on his actions and decisions'." (Emphasis in original)

His Honour thought that on the evidence Louis knew exactly what he was doing and why he was doing it. He was not at a special disadvantage vis-à-vis Mary.

High Court

Mary's appeal to the High Court of Australia failed. Dawson, Gaudron and McHugh JJ delivered a joint judgment. Mason CJ, Brennan and Deane JJ each delivered concurring judgments. Toohey J dissented. The majority pointed out that the trial judge's conclusions were not

"... conclusions which would readily be reached in relation to persons of the same background as the parties. The respondent is a male solicitor with, presumably, some experience of worldly affairs and the appellant is a woman

[26] Id at 479-80.

> to whom he was emotionally attached and who, at the time, was experiencing financial hardship and personal difficulties. Given the ordinary expectations with respect to men of professional standing and the assumptions generally made with respect to the relationships between men and women, it may be taken that the respondent's case was one involving a substantial evidentiary burden."[27]

Their Honours thought that the evidence justified the conclusion that Mary manufactured an atmosphere of crisis, albeit that Louis

> "knew there was no *immediate* need for her to vacate the house, but the 'atmosphere of crisis' was not so much with that as with the consequences of her *eventual* need to move."[28]

After alluding to Louis' evidence of Mary's reference to her depressed feelings, her past misfortunes and threatened suicide, their Honours said

> "Given that there was no immediate need to vacate the house, the terms of those conversations — particularly in the context of her denial of their terms — clearly permitted a characterisation of the events leading to the gifts involving a 'manufactured ... atmosphere of crisis'."[29]

Mason CJ referred to the evidence of Mr Volkhardt (accepted by King CJ) that he did not tell Mary that the house would have to be sold or that she would have to move out and that it "could have been quite possible" for the house to have remained in his name for a long period of time but concluded

> "it does not appear that (Mr Volkhardt) informed the respondent that this was the position."[30]

Here there is an important textual reading of the evidence which contrasts with that of Matheson J. On Mason CJ's construction, Mr Volkhardt was still talking about his own intentions, not what he said to Louis. Mason CJ thus did not accept that the conversations between Louis and Mr Volkhardt would have led Louis to conclude Mary was under no threat of dispossession. But even if Louis had come to this conclusion

> "... he may well have thought the purchase of the house in the appellant's name was the only sure means of giving her security and peace of mind."[31]

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[27] (1992) 175 CLR 621 at 639.
[28] Id at 642. Emphasis added.
[29] Ibid.
[30] Id at 625.
[31] Id at 626.

Brennan J considered that the findings of fact of King CJ warranted his conclusions. His Honour agreed with the reasoning of Deane J in rejecting the attack on those findings.[32] Deane J stressed that the appeal was one involving concurrent findings of fact by the majority in the Full Court and the trial judge.[33] The law was clear that a second appellate court should not, in the absence of special reasons such as plain injustice or clear error, disturb such concurrent findings: *Waltons Stores (Interstate) Ltd v Maher*.[34] Deane J remarked on the rejection of Louis' evidence as to the stipulation for retransfer. His Honour said that the fact that the trial judge generally preferred Louis' evidence did not preclude him "as a matter of logic or common sense" from rejecting Louis' evidence on a particular matter in respect of which other evidence "strongly confirmed" Mary's contention.[35] Deane J thought the finding of the trial judge "not only open to him" but, in the context of the findings of fact, "inevitable and plainly correct".

Toohey J, the only dissentient in the High Court, noted the submissions of Mary's counsel that King CJ

> "focused unduly on the position of the respondent and failed to pay proper regard to the overall relationship of the parties. In the appellant's submission, on a proper analysis of the evidence the respondent was not the 'weaker party' and there was a 'reasonable degree of equality between them', in the sense that those expressions have been considered in the authorities."[36]

While Mary was content to accept the many benefits she received from Louis, there could be no doubt that she made her position in the relationship quite clear. She did not mislead him or hold out any false hopes. Both were adults who had been married before. With all its limitations and apparent disadvantages the relationship was one Louis was prepared to accept and to foster over about seven years. The evidence did not support the finding of manufactured crisis. Toohey J thought there was "some ambiguity"[37] in Mr Volkhardt's evidence as to whether his statement that "there was no great pressure to sell" was continuing his account of his conversation with Louis or was only giving evidence as to his own state of mind. He thought, in the light of the whole of Volkhardt's evidence, that the conclusion reached by Matheson J was irresistible, that Louis must have realised after his conversation with Volkhardt that the appellant was not facing an early crisis over the sale of the house. Louis bought the house "in the clear realisation that she would never marry him." Toohey J concluded that Louis was not in some special situation of disadvantage because he was content to persist in a relationship which Mary

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[32] Id at 633.
[33] Ibid.
[34] (1988) 164 CLR 387 at 434-435.
[35] (1992) 175 CLR 621 at 635-636.
[36] Id at 650.
[37] Id at 652.

in no way misrepresented or disguised. He knew and appreciated the consequences of the transfer; thus he was under no special disability. He was not "emotionally dependent upon her in any relevant legal sense".[38]

The Sarmas Article

Lisa Sarmas states her thesis in these terms:

> "In this article I want to use the notion of legal storytelling to explore the official court stories in *Louth v Diprose*, that is, the particular narratives deployed by the various judges who decided the case. I hope to show that these stories are in fact stock stories about women, men and social class, and that they determined not only the specific outcome of the case but also the development of the doctrine of unconscionable dealing on which it was ostensibly based. I hope also to use *Louth v Diprose* as a basis from which to evaluate the strategy of telling outsiders' stories as a means of achieving progressive legal change."[39]

Ms Sarmas deploys competing views of the case through an imaginary classroom dialogue. Vicki Pedagogous, a lecturer in Equity, asks her class to discuss *Louth v Diprose*. The first student, Andrew Chieve, supports the majority judges. When asked by Vicki "So whose version of events was believed?" Andrew replies "Diprose's, of course".[40] Another student, Penny Edant, is for the minority judges' view. She particularly stresses the

> "real inconsistency in the trial judge's belief of Louis in preference to Mary on everything but the stipulation for a retransfer."[41]

The discussion becomes somewhat heated. A third student, Tran Scripts, intervenes. According to a footnote

> "Tran tells an alternative story based on her own reading of the trial transcript. Given the theoretical premises of this article, it is trite to say that the story is not being presented as the truth or as fact either."[42]

Tran Scripts emphasises that the stipulation for retransfer was the very basis of Louis' case. The unconscionable dealing claim was "quite peripheral" to the whole case as far as both parties and the lawyers was concerned. It does not appear until para 15 of Louis' statement of claim

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[38] Id at 655.
[39] (1994) 19 *Melb ULR* 701 at 703.
[40] Id at 708.
[41] Ibid.
[42] Id at 709.

and was expressed to be "[i]n the further alternative".[43]

Tran postulates an account different from that of both the majority and minority judges. The account stresses "verbal and physical violence" which occurred in 1988 when Louis was temporarily staying with Mary and "the possibility that [Louis] may have been sexually harassing [Mary] in the sense of subjecting her to unwanted sexual advances".[44] Reference is made to the "explicit sexual content" of one of the poems quoted by Legoe J. Tran says

> "Amazingly, in none of the judgments are these facts presented or described as sexual harassment. Instead, they are viewed as evidence that Diprose was romantic, infatuated, dependent and persistent, despite Louth's rejections."[45]

Further instances are given of sexual harassment and to Louis' "considerably superior economic condition"[46] which made him, compared to Mary, "very well off indeed".[47]

In developing her thesis on the three stories in the classroom discussion, Lisa Sarmas portrays both majority and minority judgments as "stock stories".

> "Whose story do they tell or privilege, and whose voice is missing? What does each narrative tell us generally about women like Mary Louth and men like Louis Diprose?"[48]

The first stock story is the powerful image of the "damned whore" juxtaposed with that of the "love-struck knight in shining armour".[49] The minority view is of her as a "pitiful victim", but "the stereotype is reversed rather than eliminated". Louis becomes a "benign romantic suitor" who knew what he was doing. The law allows Mary to keep her house, even though she did not really deserve it.[50]

> "The emphasis on Diprose's 'limited' assets is farcical given his position of relative social and economic privilege compared with Louth's position as social security recipient. Both narratives render gender and social class irrelevant while at the same time reproducing stereotypes based on those very categories."[51]

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[43] Id at 710.
[44] Id at 716.
[45] Ibid.
[46] Id at 717.
[47] Id at 718.
[48] Ibid.
[49] Id at 719.
[50] Id at 719-720.
[51] Id at 720.

Tran Scripts' reading of the case is "more sensitive to issues of gender, class and structural power".[52]

Lisa Sarmas argues that it was a "challenging task [for the majority] to fit the narrative into a legal category which would provide Diprose with a remedy". He was a "weaker party" only because he was emotionally dependent. But that would have "opened the floodgates" and in particular might have helped women to use the doctrine to escape transactions entered into for the benefit of their spouses. Therefore, so the argument goes, a finding in Diprose's favour was "ensured by the addition of a further element in the reasoning of the majority", the manufacture of a false atmosphere of crisis. This closed off what could be read as a significant expansion of the doctrine in a direction which might have been of considerable benefit to women.[53]

Under the heading "Stories and Tactics: Strategies for Change", Lisa Sarmas argues that Mary's case as presented at the trial "facilitated the formation of the narratives deployed by the courts". It contributed to the ultimate construction of Louis as "a benign romantic fool". The legal strategy presented on her behalf

> "did not involve making an issue out of the structural inequality between the parties. It therefore provided no counternarrative to the construction of the power relationship between them as relatively equal or as working in Diprose's favour."[54]

The strategy was understandable as meeting Louis' case of stipulation for retransfer and succeeded to that extent, but "back-fired" when the trial judge used it as a support for the unconscionable dealing claim. It served

> "to reinforce rather than challenge the stock stories which rendered her experience and her reality invisible."[55]

Lisa Sarmas concedes that

> "... to conflate Louth's own story with the story told by Tran is to impose on her a feminist and class-conscious 'voice' which she may not in fact have. Louth may not have perceived or named Diprose's behaviour as sexual harassment or as otherwise threatening; she may even have considered it to be romantic; she may not have been conscious of issues of structural power; and it is possible that she saw herself as a victim, or as undeserving."[56]

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[52] Ibid.
[53] Id at 721-723.
[54] Id at 724.
[55] Id at 724.
[56] Id at 726.

This raises a "tactical dilemma" for "advocates for outsiders":

> "To collude in the construction of outsider clients in ways which reinforce dominant stereotypes about them may increase their chance of immediate success, but it may also reinforce their negative self-image or injure their self-esteem as well as reinforce narratives which work against them and other outsiders in other ways."[57]

The only solution is to think in terms of contingent strategies. In the words of Allan Hutchinson:

> "The core idea is to act in a guerilla-like way — within a broad set of progressive objectives, to seize the possibilities of any contingent moment in order to achieve judicial decisions that heighten the status quo's contradictions and open up space for lasting political action."[58]

Facts and Storytelling — Which Postmodernist Drove through the Red Light?

Without storytelling there could be no litigation. But without facts — true, half-true or false — there could be no stories.

Two motor cars, one driven by Catharine and the other by Jacques, collide at an intersection. Each driver's story is that the green traffic light was showing when she or he entered the intersection. A case is brought. The judge wasn't at the accident. Clearly enough there was a collision and it occurred as a result of (or mainly as a result of) a "fact" — one of the drivers drove into the intersection against a red light. But which one? That fact is a pre-existing and finite event in space and time which the judge has to "find" (a use of that term in which the popular sense "to learn, attain, or obtain by search or effort" overlaps with the technical legal meaning "to determine after judicial enquiry" (Macquarie Dictionary)).

Catharine and Jacques each has a story to tell. The legal system imposes constraints on the way their stories are told. Most of these constraints would strike even ardent reformers as reasonable, and are in any event applicable equally to all litigation, not just cases which raise sensitive class and gender issues.

The story has to be told in a formal setting, in a courtroom, on oath or affirmation, and in a witness box so that the teller is isolated from friends

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[57] Id at 727.

[58] Id at 728, citing Hutchinson "Inessentially Speaking (Is There Politics After Postmodernism?)" (1991) 89 *Michigan LR* 1549.

and supporters.[59] The story has to be told in response to questions from the teller's lawyer and then the opponent's lawyer (and sometimes the judge as well).

Then there is the storytelling of lawyer to judge. This is what the lawyer says about what has happened in the courtroom, a story about stories.

The storytelling in court resonates with another formalised storytelling — again with its own rules and assumptions — the storytelling of client to lawyer before and during the trial.

Then the judge tells a story, in his or her reasons for judgment. The judge's story is also a story about stories, what the witnesses have told him or her and what the lawyers have argued. Since there would not be a case at all unless the parties disagreed, the judge will inevitably have to accept some things and reject others.

Stories are usually told for a purpose, even if no more than amusement or passing the time of day. Stories in court however are always serious. They are told for a purpose — the winning of the case — which is important for the teller. The interests of the teller will be affected for good or ill by the judge's belief or lack of belief in the story.

The litigation story presents as truth and not fiction. Literally truth, the whole truth, and nothing but the truth. The teller explicitly promises truth and expects (or hopes) to be believed. The teller of litigation stories usually does not believe there is no such thing as objective fact — if he or she does, it is a mental reservation unlikely to be disclosed to the judge.

The Stipulation for Retransfer

Louis is not believed by the trial judge on a central part of his case, but nevertheless wins. This seeming paradox illustrates some special aspects of litigation storytelling.

While litigation involves storytelling, and indeed lawyers and judges sometimes talk of "the plaintiff's story" or "the defendant's account", the competing stories are dealt with by the judge in a way that is dictated by the law and the judging craft. It is not as though the judge goes to a theatre, watches the plaintiff's and the defendant's plays, and votes for the more appealing one. A more accurate metaphor is the mosaic made up of many different pieces. Often the judgment may reflect entirely the successful party's picture as presented, but sometimes, and *Louth v Diprose* is

[59] These procedural rules involve some Western cultural assumptions. By contrast, in Aboriginal land claims in Australia the judge conducts hearings "out in the bush", with members of the claimant group conferring with and prompting each other as the evidence is given. But Catharine and Jacques are assumed to have come from a Western background — as did Mary and Louis.

a striking example, the judge's mosaic takes pieces from both and adds some of his or her own.

As Deane J said,[60] there is no reason "as a matter of logic or common sense" why Louis could not be telling the truth for most of his story but not the truth for part, albeit a centrally important part. That is still so even if one thinks it likely that Louis was deliberately untruthful in his assertion about the promise to retransfer. It is one thing subconsciously to blot out from memory an unpleasant experience. It seems psychologically less feasible that an event which did not in fact happen can be honestly but mistakenly created in the memory.[61]

In our intersection collision case it may be that Jacques in truth had the green light in his favour but, fearing the judge may not believe him, invents a story of an admission after the accident by Catharine that she drove through the red light. Other evidence in the case (perhaps the proverbial busload of bishops who happened to be passing) may enable the judge to conclude that although Jacques was lying about Catherine's alleged admission, he nevertheless had the green light. Result: judgment for Jacques. Litigation is not a competition in which the prize of judgment is awarded to the more virtuous of the parties.[62]

In the context of Louis' credibility, it might also be mentioned that the supposed stock story was not quite what he presented to the court. Here again reconstruction, whether conscious or otherwise, may be at work. In some of Louis' evidence he seems to be rather attempting to play down the extent of his infatuation with Mary. He does not present himself as the lovesick loon — instead the rather less embarrassing figure of the kindly uncle. After his evidence about the argument in August 1988 which precipitated the litigation the following passage occurs:

> "Q. Prior to that incident, how would you describe your relationship with her?
> A. Prior to that it was a strange relationship. I regarded it [sic] as a particularly good friend. I was still very fond of her, but at that stage I had no interest in sort of taking the relationship beyond that, beyond just being good friends on a fairly casual basis. But certainly we were on good terms, we had frequently confided in each other. I think I made comments to her about various people I knew and vice versa. Certainly as I say, we were — I thought we had a very good friendship, but more particularly at the time certainly, until then I trusted her implicitly, particularly where anything like money or that was concerned."[63]

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[60] (1994) 175 CLR 621 at 635.

[61] Matheson J considered that Louis "plainly gave false evidence" on this issue: (1990) 54 SASR 450 at 480.

[62] Thus the maxim "He who comes to Equity must come with clean hands" does not require a moral assessment of the plaintiff. The impropriety complained of "must have an immediate and necessary relation to the equity sued upon": *Dewhurst v Edwards* [1983] 1 NSWLR 34 at 51, *Meyers v Casey* (1913) 17 CLR 90.

[63] Transcript at 46.

Conversely, it was *Mary's* case that his behaviour was besotted and irrational, albeit legally binding. In cross-examination her counsel asks Louis about one of the poems which commences

> "You have taken every thing I have,
> my love unlooked for, my pride, my self-respect."

and suggests that the theme of the poem is "Louis Diprose wronged":

> "Q. Didn't you hope in 1985 that if you made a gift of this house to Mary Louth she would change her attitude to you?
> A. No."[64]

Truth Telling and Stereotype

The judicial function is the decision of the particular case. It is fundamentally at odds with that function that witnesses, and in particular the parties themselves, should be believed or disbelieved depending upon their membership of a particular class or gender.

The law has not always adhered to that principle as consistently as it should have. Until abolished by statute in Australian States and Territories there was a common law rule of practice in criminal trials that judges should warn juries they should be cautious of convicting on the uncorroborated evidence of complainants in trials for rape and other sexual offences.[65] The position now is that

> "... alleged victims of sexual offences no longer form a class of suspect witnesses, but neither do they form a class of especially trustworthy witnesses. Their evidence is subject to comment on credibility in the same way as the evidence of alleged victims in other criminal cases, but to comment only."[66]

There remain some rules relating to classes or categories of witnesses which are justifiable because they do not operate on the sex or race or

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[64] Id at 70.

[65] *Kelleher v The Queen* (1974) 131 CLR 534. The rationale usually cited for the rule was that given in Hale's *Pleas of the Crown* (1682) vol 1 at 634: "It (rape) is an accusation easily to be made and hard to be proved, and harder to be defended by the party concerned, though never so innocent". See also *Reg. v Henry* (1968) 53 Cr App Rep 150 at 153. An example of the statutory abolition of the rule is s 5 of the *Crimes (Sexual Offences) Act* 1980 (Vic) which introduced s 62(3) into the *Crimes Act* 1958 (Vic). The current provision, introduced in 1991, is s 61(1) which provides that in trials for sexual offences "the judge must not warn, or suggest in any way to the jury, that the law regards complainants in sexual cases as an unreliable class of witness".

[66] *Longman v The Queen* (1980) 168 CLR 79 at 87 per Brennan, Dawson and Toohey JJ. (In Australia the judge's function in charging the jury in both civil and criminal trials includes summarising and commenting on the evidence.)

other personal characteristics of the individual but rather on the witness' particular involvement in the events with which the case is concerned. For example, accomplices have an obvious motive to exculpate themselves by inculpating others; common sense and human experience suggest that care should be taken with their evidence.[67]

Another qualification is that a witness may have a cultural background which should be no more disregarded than should his or her capacity to see or hear or speak English. Thus Australian Aborigines have a strong tradition of "gratuitous concurrence" in which respect for others, and particularly persons in authority, leads to agreement with whatever such persons might put.

Men can lie or be honestly mistaken and so can women. Men can tell a story which is partly true and partly false, and so can women. The judge's task, often a hard one, is to "find" (in the sense already discussed), the true facts or, more accurately, the facts more likely than not to be true.

There are other reasons for thinking Louis was not a person of unimpeachable credibility. He organised an application for a government grant for first home buyers which seriously misstated the true position. The application claimed that Mary had received the funds for the purchase by way of loan from Louis' employer. Mary, who signed the application and received the grant, may have had more awareness of this scam than indicated by her evidence, but the initiative seems to have been Louis'.

Nevertheless, the trial judge saw both Mary and Louis and heard them tell their stories — an advantage which neither the judges on the appellate courts, nor commentators (including the present one), nor you, the reader, have had.

A powerful factor affecting the trial judge was his conclusion about Mary's true attitude towards Louis. Plainly Mary did not reciprocate Louis' passion, but what was the nature of her feelings towards him? Sympathetic friendship? Mild affection? Insipid neutrality? Vapid nonchalance? King CJ concluded that it was

> "... dislike, apparently concealed, for the plaintiff at the very time at which he was visiting her at her house and paying for her children's schooling."[68]

He was entitled to come to this conclusion if he accepted the evidence of Mrs Barlage-Rood

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[67] The High Court has recently held by a majority of four to three that juries should be warned on the danger of convicting on uncorroborated police evidence of admissions by an accused person while in custody: *McKinney v The Queen* (1991) 171 CLR 468. In dissenting Toohey J remarked that "(t)o treat a particular category of evidence as inherently unreliable or even to require that it be dealt with in a way that suggests unreliability is a serious step. It places witnesses whose evidence falls into the category in a special and, it may be, inferior position to other witnesses": 171 CLR 468 at 496.

[68] (1990) 54 SASR 438 at 444.

"Q. Did Mary ever confide in you as to her thoughts towards Louis?
A. Yes.
Q. What did she say about them?
A. Hated him.
Q. How often did she say that?
A. As often as you want to hear it, or didn't want to hear it. No, she just disliked him very much and that confused us, I think.
Q. Why did that confuse you?
A. Because the fact that she also — was quite open about the fact that he paid private school for her children and that he was in the house sometimes visiting her and I remember telling her 'Why don't you sell the house. Why don't you take your children out of school and put them in a public school if it is really so bad, if you dislike him so much?' We were surprised to find him at parties in her house."

His Honour:

"Q. What did she say to that?
A. That it wasn't all that easy."[69]

There was also the finding that, despite her denials, Mary had threatened suicide at the time of the discussions about the house. The falsity of that denial rather suggests her awareness that the threat was made with an ulterior motive. King CJ's ultimate findings that Mary engaged in calculated manipulative conduct and that her "motives were of a material nature"[70] seem well open. This is not the acceptance of a stock story, something taken off the shelf ready to wear. King CJ's conclusion is based on his finding as to specific events, some of which were disputed but many of which were not, and all of which were peculiar to the stories of Louis and Mary. If that conclusion looks like a familiar story found in literature or human experience, it does not follow that the latter gave birth to the former. Still less can his Honour's conclusion be treated as one based on the presumption that women, or some women, are inherently likely to act as he concluded Mary did — or that he found her to be, in the words of Lisa Sarmas,

> "... the archetype 'damned whore'. She lies, she is obviously from the 'lower classes', she is slovenly, conniving and materialistic. Her morals are suspect. Her sexuality is dangerous. She uses it to get what she wants, but she persists

[69] Transcript at 89-90.
[70] (1990) 54 SASR 438 at 447.

in denying him that which he has well and truly paid for. She is not a nice woman. She is a tease. She has power over him."[71]

Harassment, Violence and Relevance

Courtrooms are busy places. In any given case there will be issues raised by the parties for the judge's decision. It is about these issues that the litigation stories are to be told. Harsh as it may seem, judges are not interested in material which does not bear on those issues. In the Lisa Sarmas article there is complaint about Mary's counsel being shut off when he asked her to expand on her current work as a nurse.

> "This extract shows that Louth may have 'got her life together' despite her difficult past. We get a glimpse of another aspect of her identity, an aspect which could permit a construction of her as compassionate, self-reliant, and self-improving. If this line of questioning was allowed to continue, then it may have been more difficult for the trial judge to have constructed her in the negative and one dimensional way in which he did. This information also detracts from the minority depiction of Louth as a victim. This example illustrates how rules relating to 'relevance' can explicitly be used to restrict the information that is available before the courts. At a more subtle level, they may operate to restrict the type of evidence that lawyers even attempt to introduce before the courts."[72]

Nobody would doubt the importance to Mary's self-worth of her work experience. But King CJ already had to spend three days (quite expensive enough for the parties, one might think) in 1990 hearing evidence and argument about two conflicting stories, the critical events of which had occurred five years previously and at a time when Mary was unemployed.

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[71] (1994) 19 *Melb ULR* 701 at 719 (emphasis in original). For what it is worth, my personal and respectful view is that King CJ's primary findings of fact were, as far as one can tell, probably correct. However, I see much force in the arguments of Matheson and Toohey JJ that Louis was not in a position of special or serious disadvantage within the meaning of the unconscionability doctrine. But even if he was, it does not follow that he should have succeeded. The law does not seek to enforce a standard of literal equality. Nor should it. In both commercial and private transactions one party will often be at an advantage because he or she is smarter, financially stronger, better informed or under less pressure than the other party. If the first party is aware of these advantages, he or she is, I suppose, in a sense "exploiting" the other party. But it could not be rationally suggested the courts should set aside all such transactions. The Mary — Louis transaction might be seen as no more than the private and domestic equivalent of a commercial hard bargain where the better-positioned bargainer came out on top. Louis' infatuation was a self-inflicted weakness and Mary took advantage of it. That might have been unfair, but the world is not always fair. Mary's conduct did not pass over the ill-defined border into that specially reprehensible and repellent unfairness which lawyers call unconscionability — something that "shocks the conscience".

[72] (1994) 19 *Melb ULR* 701 at 726 n 157.

Mary's employment experience in 1990 would seem to be of no obvious help or relevance in resolving the issues of truth or falsity in the case. Apart from anything else, it would be hard to deny Louis equal time to discuss his feelings about his legal career, his earlier marriages, his love of aviation etc.

There is also complaint in the article (through Tran Scripts) of the fact that "(a)mazingly, in none of the judgments are these facts presented or described as sexual harassment".[73] "These facts" is a reference to the events of 1988 which "involved verbal and physical violence"[74] and to the "explicit sexual content"[75] of one of the poems.

After moving from Launceston to Adelaide, mainly because Mary had moved there, Louis makes no contact with her between February and April 1983 and then only by sending her some of the poems; Volkhardt contacts Louis to say that Mary does not wish to see him; in May Mary phones him twice but refuses to give him her number; in July she phones again to say she is depressed and Louis might like to take her to lunch; Mary phones Louis a couple of times up until November then gives him her telephone number; Mary subsequently accepts without protest substantial gifts of jewellery, household appliances and payment of school fees and household bills.

All this is undisputed factual history. Objectively considered, it does not look like a story of a harassed woman unable to control unwanted advances by a harasser. If there was also, as the trial judge found as a fact, a cheerful indication at the lunch that Louis might be allowed to sleep with her once in a while, the story is even harder to fit into such a model (or stock story).

As to verbal and physical violence, there was certainly on Louis' own account quite offensive language used in the course of the argument in 1988. According to Mary, Louis

> "got pretty nasty and in front of my son he called me a whore and he called me that I slept with everybody in Adelaide, why couldn't I sleep with him, and hurt my son and me."[76]

Louis' version was that he raised the question of the re-transfer, Mary refused to talk about it, and then there was an incident in which Mary said

> "'Look, let's not argue about this, let's be friends.' She came over to me, put her arm around my neck, I kissed her and then she attempted to knee me in the groin. I turned sideways and was kneed in the side of the leg and then she tore off into the bedroom."[77]

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[73] Id at 716.
[74] Id at 715.
[75] Id at 716.
[76] Transcript at 110.
[77] Id at 45-46.

(Mary's version was "I kneed him because he got hold of me, that's all I could do".)

Louis then knocked on the door and said

> 'Look, Mary, we have to talk about this thing.'

Mary said

> 'You don't want to talk about that, you only want me.... You don't want the house.'

Louis' response was

> 'I'm not into fucking wrinkles.' [sic — presumably 'wrinklies', slang for old people].[78]

What Louis admitted saying seems quite possibly more offensive than Mary's version.

How would such evidence of sexual harassment and/or violence help Mary's case? Remember, she is resisting a claim that she hand over a house, the title to which is in her name, because she had allegedly (i) agreed to transfer it to Louis or, alternatively, (ii) unconscionably exploited his disadvantage flowing from his emotional dependence. As to physical violence, such as it was, the only incident suggested comes three years after the critical events and partly, if not mainly, involved acts of Mary herself. Louis may have had his faults, but does not seem to have been a basher of women.

As to harassment, it is hard to see any forensic advantage to Mary presenting Louis as a sexual harasser rather than "romantic, infatuated, dependent and persistent" and thus less likely to have stipulated for a re-transfer. Certainly this is the way the case was conducted by Mary's counsel, and in particular by his use of the poems.

Lisa Sarmas complains

> "... Diprose was allowed enormous scope and leeway to discuss his poetry before the Court. At no stage during the presentation of her case was it suggested as a possibility that she might have felt threatened or harassed on receipt of the poems."[79]

This is expanded in a footnote:

> "In cross-examination, Diprose was permitted to express the meaning of the poems and how they related to his feelings for Louth at the time. The trial

[78] Id at 45.
[79] (1994) 19 *Melb ULR* 701 at 724.

transcript shows that Diprose was given a lot of time and space in which to do this. Pages 52-5 and 65-70 of the trial transcript are dominated by Diprose's comments on the poetry. The following is an example of the nature of Diprose's comments (trial transcript 68): "That was a eulogy ... The idea came to me from Shakespeare's sonet [sic] ... basically the words within it are reasonably true. At the same time I think I set them to lute music as well.""[80]

However, Mary gave no evidence herself as to any adverse reaction to the poems. She never wrote or said to Louis "Please Louis, no more poems". She did not destroy them, but kept them. Perhaps she liked them. Perhaps she thought they might come in handy one day, as indeed they did.

The poems were put in evidence by Mary's counsel. He used them in cross-examination in support of Mary's basic case of unqualified gift. He asked Louis

"Q. Is it fair to say that a lot of the poems in the book before you could be said to be about unrequited love?
A. Yes, I suppose so, I suspect most love is actually."[81]

Counsel then asked about a number of the poems, suggesting in each case that the theme is one of Mary's rejection of Louis.[82] In the case of some poems Louis agreed; as to others he did not. The poems are integrated by the cross-examiner with the general thrust of Mary's case.

"Q. Right up until May of 1985 this general rejection of your more intimate advances continued, didn't it?"[83]

As already noted, the conclusion put is

"Q. Didn't you hope in 1985 that if you made a gift of this house to Mary Louth she would change her attitude to you?"[84]

It is difficult to see how any competent counsel acting for Mary could have used the poems differently. Since the case turned very largely on disputed accounts of conversations in a private and domestic setting, any documentary evidence was likely to be of critical importance. And since Louis' poems were put to him in cross-examination, as had to be done if they were to be relied on against him,[85] it does not seem undue indulgence that he was "permitted" to say what he meant by them.

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[80] Id at 724 n 147.
[81] Transcript at 66.
[82] Id at 67-68.
[83] Id at 69.
[84] Id at 70.
[85] *Browne v Dunn* (1893) 6 R 67.

Gender, Class and Structural Power

The attempt to reconstruct *Louth v Diprose* in terms of class struggle, with Mary at "the bottom of the class hierarchy",[86] is not convincing. Without doubt, Mary had had a tough life. She was down on her luck, as the saying goes.[87] Nevertheless the stories of Louis and Mary do not present as a meeting across class boundaries, like Professor Higgins and Eliza Doolittle or Constance Chatterley and Mellors the gamekeeper, to cite a few stock stories.

Mary had qualified as a nurse. Louis was a lawyer, although not a particularly distinguished one — by his mid forties he was working as an employee solicitor having terminated a rather unsuccessful practice in Launceston.[88] In Australia it would be totally unremarkable for a lawyer or doctor to marry a secretary or nurse. The social circles of Louis and Mary were not mutually exclusive. Louis and Mary first met at a social function at the opening of a restaurant in Launceston. They had friends who were aware of their relationship. In answer to cross-examination about one of his poems which begins

> "You have taken everything I have,
> My love (unlooked for) my pride, my self-respect"

Louis said

> "At the time I was getting — as children these days say — paid out unmercifully by my friends, to say nothing of Mary's friends ..."[89]

How did they appear at the trial? In a discussion with the author, counsel for Louis, Mr Richard Evans, described Mary as "well presented", somebody who "could speak for herself".[90] Louis he described as having an "educated Australian accent" but there was "no obvious difference in backgrounds". Mary's mother, he said, had "a bit of presence" and a "bit more of the old school". Mary's counsel, Mr Simon Milazzo, said that class was "not a big thing, both presented very much as middle class people", although Mary was "a mess" and "had been through the mill".[91]

One of the most tangible, and therefore effective, badges of class membership is speech. Reading the transcript, there is nothing in the language

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[86] (1994) 19 *Melb ULR* 701 at 721.

[87] Although she was fortunate in her friends. Mr Volkhardt said that "[l]ots of us had done a lot of things to help Mary" (transcript at 203) and it would seem that Mr Volkhardt — a teacher and presumably not of great means — bought the Tranmere house in 1982 as a place for Mary to live at a low rent on her moving to Adelaide.

[88] Transcript at 10.

[89] Id at 70.

[90] 3 February 1995.

[91] Discussion with author 10 March 1995.

used by Mary herself particularly indicative one way or the other as to social class. However her mother, Mrs Kathleen Webb, gave the following evidence of a meeting at the time of the house transaction when Louis came with his mother to Mrs Webb's house. Mrs Webb said[92]

> "I spoke to him away from his mother. When they arrived I said to Louis — he had a big cake or something in his hand — I said 'I will see you in the kitchen' — an older house we had — and I went in and said 'Now, what have you done, you and Mary have made this transaction without telling us. I know you are quite old enough, but it would have been a lot more polite to have told us'. I said 'I think you didn't tell us because you knew we would say no, we would be against this transaction.' It wasn't what I would have called the sort of thing that happens in our type of family, anyway, and he spoke to me very nicely and said that he wanted to give this present to Mary because he knew that she had had a lot of strife and a lot of trouble and that it would make her feel [sic], give her safety and it was a gift from him and there was nothing attached to it, he didn't want anything back; because I told him that Mary had got out of a difficult marriage and she was not going to marry either him or anybody else, and he quite realised that."

Mrs Webb was described by King CJ as "... a voluble lady but ... an honest and essentially accurate witness".[93] The passage just cited makes it clear that she considered herself at least Louis' social equal. There is explicit claim to a certain level of social and ethical conduct to which her family *and families like hers* aspired ("our type of family"), and to middle-class values -that it would have been "a lot more polite" for Louis to have told the family. Louis is given credit for speaking to her "very nicely".

Mrs Webb's vocabulary is that of a reasonably well educated person — note the word "transaction" — and her grammatical construction is correct and sophisticated — "it would have been a lot more polite to have told us", "what I would have called the sort of thing that happens". She had been used to authority; at the time Louis first appeared on the scene, she was "in charge of the Health Department" on Cape Barren Island.[94] Mrs Webb's version of the same conversation in cross- examination is to the same effect — and style — although to some extent expressed in different terms.[95]

> "I told him that we strongly disapproved of the transaction, that 'You don't give young women houses. It is just not on'."

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[92] Transcript at 207.
[93] (1990) 54 SASR 438 at 444.
[94] Transcript at 205.
[95] Id at 212.

As to the parties' ages, Mary in fact was 41 in 1985,[96] Louis was 43.[97] Part of the demonised picture of Louis in the Lisa Sarmas article is that of a "middle-aged, middle-class, male lawyer".[98] Yet if Louis was middle-aged, so was Mary. And, for the reasons here argued, she was also middle class — or at any rate certainly not from the "lower classes".[99]

Material possessions aside, there is no hint of Mary having abandoned her social class to become, like George Orwell, down and out in London, Paris and Wigan. She remained close to her mother and sister. The retention of social class despite financial decline is a recognisable phenomenon, perhaps even a stock story.[100]

A story in which any emotional and sexual power Mary might have had over Louis is negated or mitigated by Louis' membership of a superior social class would be a reconstruction of the most synthetic kind. That is to say, it would be untrue to the facts — and not obviously helpful to Mary's case. If Mary were of a distinctly lower social class than Louis, it might be thought the *less* likely that he would have made an outright gift of the house to her — amongst other things, to the disadvantage of his own children, who belonged of course to his own class.

As to money, how did Louis having more money than Mary give him power over her, as Lisa Sarmas argues?[101] Power involves the ability to have others act as the holder of the power desires and, if need be, as those others would prefer not to act. Power as between two individuals can be formal and law-backed, like the lecturer's power to pass or fail a student or the judge's power to uphold or dismiss a plaintiff's claim. What however is in issue here is power that is suggested as flowing in an informal and social setting from the personal attributes and advantages or lack thereof — money, class, gender, sexual and emotional attraction, strength of personality, harassment or violence.

Just what was it that Louis was able to get Mary to do, or not do, because he had more money than her? Nothing, it is suggested. As has been noted, she positively disliked him. She had the choice of putting up with the annoyance he caused her or getting rid of him, but then ceasing to receive the material benefits he provided.

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[96] Id at 93.
[97] Id at 2.
[98] (1994) 19 *Melb ULR* 701 at 722.
[99] Id at 719. Although used in the article with inverted commas, the phrase does not appear in any of the judgments. It seems to be part of the author's description of what is said to be the stock story.
[100] As in the "penniless aristocrat" or the Australian "remittance man" — a disgraced or otherwise embarrassing member of a noble family sent out to the colonies and supported by a small remittance.
[101] (1994) 19 *Melb ULR* 701 at 720.

The Ethics of Reconstruction

After her criticism of the case presented on Mary's behalf, and in particular the use of Louis' poems and the lack of emphasis on sexual harassment, Lisa Sarmas poses two questions[102]

> "If a different strategy was employed, if Louth's story was told differently, could this have influenced or changed the official court stories which prevailed? If so, what sort of story would prove most effective from Louth's point of view?"

A response to these questions calls for a little closer attention to client to lawyer storytelling. The client tells the lawyer what happened. Again, this is storytelling for a particular purpose. The client wants to win the case; Louis wants to obtain title to a house bought with his money and Mary wants to resist that claim. Each of Catharine and Jacques want the other to pay for the damage to their car. The telling of the client's story to the lawyer is the first step along the way to the client's goal.

The client tells the lawyer the story, emphasising facts which seem important to the client. There may be other facts which have a legal significance but are not so immediately apparent to the client and these the lawyer may have to enquire after. (The client may have never heard of unconscionability.) Then through the exchange of various documents such as pleadings and particulars the respective lawyers learn what the other side's story is and ask their own client what they say to these allegations. The process assumes there *is* such a thing as historical fact, that as to some critical facts there may be dispute, and that the lawyer will attempt to persuade the judge that his or her client's version of these facts is the true one.

Sometimes forensic facts are rather imprecise and even conclusionary — "What were your feelings about the defendant over this period?" Others are hard nuggets of information, central to the story. "Was anything said about a re-transfer?" "Was there a threat of suicide?" If those facts are disputed, the issue is joined.

The lawyer has the same objective as the client, that is to say winning the case. There is obviously a direct financial benefit in this, even in jurisdictions like Australia where contingency fees are illegal. Winning cases is the best possible way to professional advancement and the monetary benefits that brings. And winning cases is a lot more fun than losing.

However, there are constraints on the lawyer's retelling the story (and assisting witnesses in telling it) to the judge. First, there are laws bearing on relevance and admissibility which the lawyer has to apply in deciding

[102] Id at 724.

what facts to present to the court. There is nothing particularly "subtle" in this.[103] The rules of evidence are part of the lawyer's professional stock of knowledge which, for a fee, he or she puts at the client's disposal. Very often there will be room for argument as to the relevance or admissibility of evidence and the lawyer should attempt to do the best he or she can[104] but it is no help to the client to attempt to put before the court material clearly inadmissible.

Secondly, the lawyer does not personally vouch for the truth of what the client says. One of the occupational hazards of being a lawyer is the cocktail party question "How can you defend somebody you know to be guilty?" Dr Johnson's explanation has probably never been improved upon. Boswell asked him

> "whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty. JOHNSON: 'Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge.' BOSWELL: 'But what do you think of supporting a cause which you know to be bad?' JOHNSON: 'Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion.' BOSWELL: 'But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?' JOHNSON: 'Why no, Sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.'"[105]

Thirdly, and in some ways the other side of the coin to the second rule, the lawyer does not manufacture facts or suggest to the client that the existence of such and such a fact will help the client's case and that the client should give evidence of its existence. Breaches of this rule could

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[103] See p 22 supra.

[104] See *Re Knowles* [1984] VR 751 at 768-769, a case where counsel was held to have erred seriously by not trying to adduce evidence, even though there was respectable authority that it was inadmissible.

[105] Boswell's *Life of Johnson*, (1953 Edition, RW Chapman, OUP, London p 389) Aetat 59.

occur often with little risk of detection and with great personal benefit to lawyers. Because it is so fundamental the rule is not often explicitly discussed. But breaches would be very destructive of any system of justice and certainly of any legitimate role for the legal profession.

Fourthly, it is the client's case. The client as an individual seeks the professional skill and integrity of the lawyer. The case can be, as was *Louth v Diprose*, of major importance for the lives of the clients. The client is entitled to be treated as an individual whose story deserves attention and skilful presentation. The client's supposed ignorance of wider political and sociological issues should not result in him or her being patronised and treated as guerilla-fodder.

To return to *Louth v Diprose* itself, what would have been the result had the vagaries of the listing process resulted in Matheson J conducting the trial and King CJ joining the Full Court? Matheson J may have formed the same personal impressions of the parties as King CJ, but it is perhaps more likely that his fundamental view that there was no emotional dependence and no special disadvantage in the relevant sense would have resulted in a judgment for Mary. The weight given to the evidentiary findings of the trial judge would in all probability have resulted in the judgment being upheld. Likewise with the High Court — if Louis got special leave to appeal, which seems unlikely.

A lawsuit is a process full of hazard and uncertainty. The importance of sheer luck is perhaps not given sufficient weight in jurisprudential analysis.[106] In the words of Australia's greatest jurist

> "Experience of forensic contests should confirm the truth of the common saying that one story is good until another is told ..."[107]

[106] D Kornstein 'Kill All the Lawyers? Shakespeare's Legal Appeal', Princeton University Press 1994 provides a fascinating discussion on legal themes in Shakespeare. At 77-78 the author shows how the casket game in the Merchant of Venice is a metaphor for the uncertainty of litigation.

[107] *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20 per Dixon CJ.