



1979

# Poetic License

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In answer to the fraud and collusion argument, the Court expressed its belief that the integrity of the adversary system could not be so easily beguiled. In addition the Court said,

[I]n suits for personal injuries the issue is not only liability, as such cases assume real proportions only if there are valid personal injuries of some magnitude. There may be those desperate couples who would conclude that the prospect of a substantial monetary recovery is worth the pain of self inflicted injuries. One can hardly imagine that the legal system will break down with cases brought by spouses who have flung themselves down cellar steps or permitted the other spouse to strike them with the family car in order to achieve the type of substantial injury that makes jury litigation worthwhile. *Id.* at 342-3.

As for the insurance companies, the Court expressed the feeling that adequate use of discovery methods would alert them to the falsity of the claim.

In *Freehe*, *supra*, the Court discussed another answer frequently found in the cases that refuse to allow suits in tort between spouses:

A third reason advanced in support of maintaining the common-law rule of disability is the suggestion that the injured spouse has an adequate remedy through the criminal and divorce laws. It has been observed that neither of these alternatives actually compensates for the damage done, or provides any remedy for unintentional (negligent) torts. *Id.* at 774.

We are cognizant of the long standing nature of the common law rule of interspousal tort immunity. But we find more impelling the fundamental precept that, absent express statutory provision or compelling public policy, the law should not immunize tort-feasors or deny remedy to their victims. *Id.* at 777.

In the future, the Court of Appeals in Maryland may eliminate the doctrine of interspousal immunity without reservation. The dicta in *Lusby*, *supra*, should aid greatly in overcoming the doctrine when raised as a defense in a negligence or less severe intentional tort injury case. That dicta combined with the precedent of cases from other jurisdictions, which have abolished the doctrine, may aid the many battered wives of today's society. A spouse should not have to wait for the occurrence of an outrageous intentional tort or have to rely on a divorce to be compensated for losses or injuries.

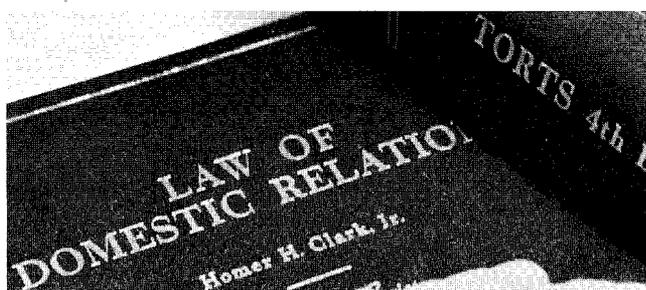


Photo by J.J.R.

## POETIC LICENSE

by Jeffrey Kluger

*"The Supreme Court will never entertain the notion of tampering with the sanctity of the application and interpretation of the nation's abundant crop of social idioms, fables and popular cliches."*

—Warren Earl Burger

So spoke the Chief Justice at last year's American Bar Association convention in Kansas City. Yet less than ten months later, the Court "tampered" indeed, and in so doing, elected to overturn one of American culture's hoarier, more entrenched cliches.

*Pippin v. Rufo*, 98 S.Ct. 653 (1979), the Court's response to long gathering judicial storm clouds, emerged as the linch-pin of a rapidly accelerating movement designed, as one activist noted, "to overthrow the vise-like tyranny of ancient platitudes." The case posed the question of whether, when the going gets tough, the tough must indeed get going.

"Not necessarily," responded the court.

The *Pippin* plaintiff alleged due process violations when his tenure as a member of a semi-professional football team was abruptly rescinded for failure to comply with the basic tenets of the motto. The Court, finding in favor of the plaintiff, held that "athletic exhortations are not of such a sacred, inviolable character that they may be exempted out-of-hand from the guarantees of the 14th amendment. Constitutional imperatives must bind uniformly both the profound and the banal." Having thus established the justiciability of the case, the Court ordered the reinstatement of the aggrieved athlete based upon the team's "wholesale failure to provide its players with notice as to the precise moment at which the going got tough and the requisite subsequent behavior sufficient to constitute the ideal of getting going."

The ruling stunned most judicial insiders. With unaccustomed suddenness, the Court discarded one of its most venerable policies, spurning in a single holding two hundred years of *laissez-faire* deference. "The flood-gates are open," remarked one senior Washington advocate, "now all that remains is to brave the people's cries of 'foul.'"

Despite such dire forecasts, public response to the *Pippin* initiative has been generally supportive. The Veterans of Foreign Wars, electing uncharacteristically to comply voluntarily with the spirit of the decision, announced last week that it has designated January 1, 1981 as the formal expiration date of the public's responsibility for collective recollection of the historic Alamo conflict and promised a study to examine the feasibility of similar action regarding *The Maine*, *Lusitania* and Pearl

Harbor vendettas. Similarly, the American and National Baseball Leagues, conceding the increased popularity of competing athletic organizations, agreed jointly to abandon the sport's self-proclaimed status as "The Great American Pastime," and settle instead for the less ambitious but more realistic claim; "A Heckuva Way to Spend an Afternoon."

Taking their cues from such favorable public response, numerous legislatures have been quick to exploit the almost limitless possibilities of *Pippin*. Notably, the State of Louisiana, long a motherlode of backwoods, bayou idioms, recently approved a resolution to ascertain the metric equivalent of "a stone's throw" and establish the resultant quantity as a standard unit of measure on the state's highways. In a related action, Senator Edward Kennedy (D. Mass) introduced legislation in the United States Senate to clarify and define the businessman's promise of "Thursdayish" as "that period of time bounded by but not exceeding, 12:01 P.M. Wednesday and 12:01 P.M. Friday."

Many legal and social scholars argue that legislation of this nature goes beyond the original intent of the Court in *Pippin*. "Cliches are one thing," asserts Japanese born linguist Yasuo Iwaki, "but nothing in the decision indicates the Justices' desire to influence the charm of regional speech patterns or the clipped efficiency of professional jargon. I'm frankly aghast at the public's docile acceptance of such flagrant governmental overreaching."

Iwaki is apparently not alone with his misgivings and it does appear that some limits are being sought to the scope and application of *Pippin*. Leading the early discord is New York publisher Keith Marshall, owner of the re-print rights to a large body of popular fantasy literature. Among Marshall's holdings are Rudyard Kipling's famed *Just-So Stories*, enduring children's tales purporting to explain the means by which various animals acquired their unique physical characteristics. Marshall has filed suit challenging a *Pippin*-inspired Federal Trade Commission ruling requiring all future publications of Kipling's fables to delete the "misleading and speculative" *once upon a time*, and insert instead the "more commercially honest" *it has been postulated that*. FTC officials blandly dismissed the complaint and remarked that "a vast number of common, dangerous figures of speech arise from Kipling-like yarns. We're merely excising the source rather than lancing the symptom."

While the Kipling dispute has by no means kindled a public clamor to litigate *Pippin* further, it has provided encouragement for a number of suits, both supporting and damning the ruling. Prominent among these is a planned action by the American Federation of Television and Radio Artists (AFTRA) to conform William Shakespeare's famed comedy, *As You Like It*, to the require-

ments of modern labor/management practices. Principally, the group seeks declaratory and injunctive relief requiring a revision of one of the play's better known metaphors to read: "All the world's a stage and all the men and women *union* players."

Though such extensions of *Pippin* can be — and are being — freely debated, it appears that the basic premise of the holding is sound. Citizen organizations have long argued for judicial control of any number of simplistic poetic bromides which too often rise to the level of mandatory societal edicts. "It is past time," observed sociologist Kathleen Gallagher in one of *Pippin*'s seventeen *amicus curiae* briefs, "for the judiciary to assert dominion over this powder-keg of an issue. Lyrical wisdom of the type with which we're today confronted certainly has its place. But when independent moral choices become subordinated to the compulsory cadence of formula ethics, it is incumbent upon the courts to wield the sickle which slays such a serpentine menace."

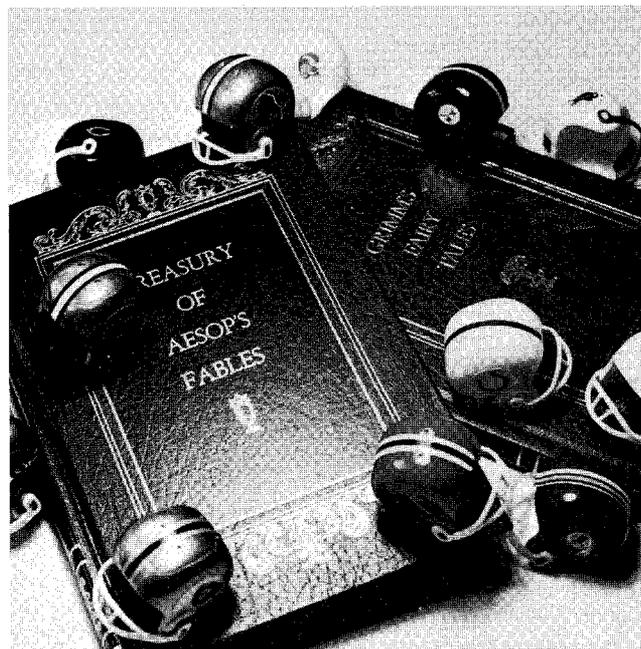


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