The case of Mr Le Roux

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It was the great American jurist Oliver Wendell Holmes Jnr, appointed in 1902, by President Teddy Roosevelt to the United States Supreme Court, where he served with distinction for the next thirty years, who wrote:

"The law, wherein, as in a magic mirror, we see reflected not only our own lives, but the lives of all men that have been! When I think on this majestic theme my eyes dazzle."

There is no doubt that over the centuries the study and practice of law have fascinated many of the greatest intellects and personalities of each era, and will continue to do so. The elusive goal of reconciling the timeless dictates of the universal laws of nature with the transient imperatives of human society will continue to bewitch and confound law-makers and lawyers in all ages.

Practising lawyers are, however, less concerned with theories and philosophies of jurisprudence than with the gritty task of wrestling with real-life problems. The wealth of precedent available in our law reports, is not only of inestimable value in solving those legal problems but on another level also affords an unparalleled contemporary record of the events that befall mankind.

Last year the New York District Court in downtown Manhattan displayed fascinating documents and exhibits from some of the cases filed away in its records reflecting various personalities who had had cause to litigate in this two hundred-year-old court. These included Charlie Chaplin, Harry Houdini, Irving Berlin, Mae West, Thomas Edison and Rudyard Kipling. Even Mickey Mouse and the Lone Ranger have asked the New York court to protect their copyrights. The owners of the ocean liner Titanic, after it struck an iceberg and sank in 1912, also approached the New York court for a finding to limit their liability, which the court denied. In this court D H Lawrence's Lady Chatterley's Lover was declared obscene and James Joyce's Ulysses was exonerated. Here the Bronx beer baron and gangster Dutch Schultz was convicted of tax evasion, but murdered before he could be imprisoned. And here, too, the espionage trial of Julius and Ethel Rosenberg took place - they were convicted of passing atomic secrets to the Russians and were executed as spies in 1953.

Our own South African Law Reports also constitute a unique treasure trove recording and reflecting the activities, views and morals of persons making up our diverse society and the forces which have shaped its norms over the years. Not only can one gain valuable insights into problems facing us today from the wealth of wisdom to be...
found within the covers of our law reports, but the inherent drama of the courtroom, coupled with the sparkle of the personalities involved, often vividly brings to life even the dreariest judgment.

A single example well illustrates this. Buried unobtrusively in the 1931 Cape Law Reports is the case of Le Roux v Cape Times Ltd (316). It occupies a mere thirteen pages of the law report. According to the noter-up it has been cited only once in a subsequent reported decision, namely the unsuccessful appeal argued by Sydney Kentridge SC for South African Associated Newspapers Ltd and others against The estate of the former Minister of Justice P C Pelser, reported in 1975 (4) SA 797 (A). Le Roux's case was quoted as authority for “so-called class or group defamation”.

The Le Roux case arose out of a criminal trial which had come before Judge E F Watermeyer sitting at the Circuit Court in Paarl on 4 April 1930. Two police officers stationed at Wellington, one white and one coloured, were charged with assaulting a coloured domestic servant, Minnie Cornelis, while she was detained in the police lock-up as a prisoner awaiting trial on a charge of theft. The accused both pleaded not guilty and at the conclusion of the trial were acquitted by the jury. Hermanus Lambertus le Roux, a Klein Drakenstein farmer, was a member of that jury.

Mr Justice E F Watermeyer, the presiding judge in the Le Roux case.

On the previous day, in the same court, the same two policemen, together with two other white constables, on a similar charge of assault on other coloured prisoners awaiting trial, had also been acquitted by a jury. Mr Le Roux had, however, not been a member of that jury.

These two acquittals proved too much for the editor of the Cape Times. On 5 April 1930, the day after the second acquittal, in an editorial entitled “White justice?” the Cape Times lashed out:

“The two trials this week at Paarl both ended in the acquittal of the accused, four of whom were involved in the first case and two in the second - all members of the police in one branch or another. They have been found not guilty of inflicting injuries on various natives and coloured people, male and female .... Now it must be said that these two verdicts point remorselessly to one of two alternatives. Either the jurymen who arrived at them were abnormally stupid, so stupid as to be unable to understand the meaning of evidence, though advised by the judge with exceptional lucidity and with exact impartiality. Or the jurymen had made up their minds to acquit, whatever the evidence might be. The first alternative can be dismissed, whatever the evidence might be. The second is as irresistible as it is melancholy. To believe that the judge himself had come to this conclusion when he said at the outset of his summing up of the second case, that it would not matter much what he said, would not, we think be to put too definite a construction on one of the most tragic remarks that has ever been forced - by lamentable circumstances from the lips of a South African judge. It comes to this, three out of the four accused are white men. The fourth, though coloured, is a clear subordinate of the white accused. The complainants are native and coloured. The two juries, having determined on acquittal carried out their intention in defiance of unmistakable advice from the judge that the verdict should go against all but one of the accused in both cases. The verdicts must make every decent-feeling white man shudder for his own colour; appalled that his white brothers should be so completely carried away by an ignoble prejudice, should be so lost to all sense of justice, should be so unconsciously eloquent in pronouncing judgment on their own warped minds. The applause of their fellow citizens of Paarl and Wellington was all that was needed to add a last touch of humiliation and degradation to conduct that leaves an ugly stain on the record of white justice in South Africa.”

Strong words indeed. Mr Le Roux, as a member of the seco J jury, considered himself defamed and brought action for damages of £1 000. The defendant pleaded fair comment.

At the trial in Cape Town, presided over by judges H S van Zijl and G G Sutton, the court found the words complained of to be defamatory, the comment to be unfair, and awarded Mr Le Roux £100 with costs.

In calm, measured tones, Mr Justice Van Zijl held:

“The members of the jury are the judges of the facts and not the judge. It is the duty of the judge in his summing up to help them to see the facts in their proper light, perspective and relation to one another, but the decision of the facts must be theirs and not the judge’s and to impute evil motives to them merely because their verdict is in defiance of the judge’s summing up lays the person who makes such an
imputation open to an action for damages on the
ground of defamation.”

In evidence it emerged that the interpretation
given by the editor of the Cape Times to Judge
Watermeyer’s opening remarks in his summing
up to the jury, may have been quite unjustified.
The young Cape Times reporter in court who
wrote the report on which the editor relied noted
Judge Watermeyer’s opening remark thus:

“There is not much I can say to you gentlemen and I
am afraid it would really not make much difference
what I said.”

However, the court shorthand writer, Mr Al­
cock, recorded the judge’s remarks as:

“I do not think I need say much to you. I do not think
it will make much difference what I do say.”

The court felt that there was not a very mate­
rival difference between these to versions of the
opening remarks, except that the words “I am
afraid” and “really” seemed to give the Cape
Times version “a somewhat journalistic flavour
which is absent from the other”. However, as the
Cape Times reporter gave evidence that he began
to take down the words immediately the judge
began his summing up, and Mr Alcock took up his
pen only after the words had been spoken, when
he felt they should be recorded, the court dealt
with the matter as if the judge
had used the words which ap­
peared in the Cape Times.

Nevertheless, the court did
not accept that the inferences
drawn by the editor were jus­
tified. Judge Van Zijl’s judg­
ment reads:

“These opening words of his are capable of quite a differ­
et construction. ... It seems to me it was a case in which
the presiding judge might well
have thought that the jury­
men, having seen and heard the witnesses, should be able
to make up their own minds,
and had probably done so af­
after seeing and hearing the wit­
nesses, without requiring any
help from him. It seems to me
his opening remarks are quite
consistent with such a view.”

Thus the honour of Mr Le Roux (and of the communities of Paarl and Wellington) was re­
stored. The Cape Times noted an appeal within a
week, but later in the year the matter was finally settled on the basis that the appeal was dropped,
and Mr Le Roux was paid £50 and costs. His was
clearly a test case, because a settlement on a simi­
lar basis was arrived at with all the other jurymen
who had sued on the same editorial.

It goes without saying that the fundamental
questions raised in the Le Roux case of freedom of
the press, alleged police brutality, racial preju­
dice, and the operation of the jury system, are all
still topical issues in our present-day society.

So much for the merits of Le Roux’s case. But
if one for the moment were to hold aloft Oliver
Wendell Holmes’ magic mirror, a fascinating web
of personalities emerges, a veritable galaxy of
legal and literary talent whose paths crossed in
the Le Roux case.

Judge E F Watermeyer, who delivered the cryptic
summing up in the Paarl courtroom, went on to
to become Chief Justice of South Africa. He had
gone on his first circuit in the company of his
uncle, who was the supreme court interpreter, as
a thirteen-year-old boy, and was tremendously
impressed with Sir Thomas Upington, the presid­
judge. As a result young Watermeyer first
began to think of the bar as a profession.

In 1903, Watermeyer worked for his English
bar examinations and read in chambers at the
Inner Temple with Arthur Llewellyn Davies. Davies
was married to Sylvia Du Maurier, and they were
great friends of J M Barrie who wrote Peter Pan
for them. The original Peter Pan was one of the
Davies children, who was later killed in the First
World War.

Back in the Cape in 1905, Watermeyer joined
the Cape Parliamentary Debating Society. Prime
Minister John X Merriman on one occasion deliv­
ered an address to the society, when B K Long
proposed and Watermeyer seconded the vote of
thanks to Merriman. The veteran politician in his
reply congratulated the two speakers on their
eloquence and prophesied brilliant careers for both of them.

Eight years after the *Le Roux* case, and perhaps bearing it in mind, Judge Watermeyer set out his oft-quoted test of inference in *R v Blom* 1939 AD 188:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

1 The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

2 The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

Judge Watermeyer’s only son, H E P “Jack” Watermeyer, was later to become Judge President of the Cape in 1979.

The two judges presiding in the *Le Roux* case were Judge H S “Hennie” van Zijl and Judge G G “Georgie” Sutton.

Judge Van Zijl later became Judge President of the Cape in 1935 and served in that capacity for eleven years until his retirement. He was a member of the Cape Parliament and together with Sir Patrick Duncan, N J de Wet and B K Long, was one of the four law advisers to the National Convention leading to Union in 1910.

Judge Van Zijl’s son, J W “Helm” van Zijl, was also to become Judge President of the Cape in 1976.

After Judge Van Zijl’s first wife died, he married Dr Bessie Reitz, daughter of President F W Reitz, former Chief Justice and later President of the Orange Free State Republic. In this way, Judge Van Zijl became related by marriage to the other judge in the *Le Roux* case.

For Judge G G Sutton’s mother was the youngest sister of President F W Reitz, a woman famed for her beauty and charm. Another sister was married to W Schreiner KC, under whose guidance Sutton commenced practising as an advocate at the Cape Bar.

“Georgie” Sutton also went on to become Judge President of the Cape in 1946. He married Agnes Watermeyer, a sister of Judge E F Watermeyer, who thereby became literally his “brother-in-law”.

The editor of the *Cape Times* who wrote the defamatory editorial was none other than B K Long, mentioned above. He commenced practice at the Cape Bar in 1905 and became the youngest member of the Cape Parliament in 1908. He was also a member of the first Union Parliament and in 1921 was appointed editor of the *Cape Times*, a position he held for fifteen years. In 1938 he again entered the House of Assembly as the MP for Gardens. He published a number of books, including a work on South African politics entitled *In Smuts’s Camp*.

Counsel for Mr *Le Roux* were H A Fagan KC and J Herbstein.

Henry Fagan also went on to become Chief Justice of South Africa in 1957. He was a member of parliament and cabinet minister as well as a senator. He was a distinguished man of letters. In 1916 he became assistant editor of *Die Burger* under Dr D F Malan as editor. He wrote poetry, plays and short stories and in 1936 was awarded the Hertzog prize.

Judge Fagan’s son, Mr Justice J J “Hannes” Fagan, was also to become, and happily remains, a judge of the Cape Provincial Division.

Junior counsel for Mr *Le Roux* was Joseph Herbstein, later also to serve for many years as a judge of the Cape Provincial Division before emigrating to Israel. Born at Graaff-Reinet, as was Judge E F Watermeyer, he is perhaps best known for the standard textbook on *Practice and Procedure in the Supreme Court*, universally known as *Herbstein and Van Winsen*. He also made a significant contribution in the publication of Jones and Buckle on the *Civil Practice of the Magistrate’s Court*.

Counsel for the defendant, Cape Times Ltd, were equally formidable: B Upington KC, W H Mars KC and T Reay.

Beauctlerk Upington KC was one of the most brilliant figures ever to have graced the Cape Bar. His father, Sir Thomas Upington KCMG, who had inspired the young Watermeyer, became leader of the Cape Bar, Attorney General in three cabinets, Prime Minister of the Cape and a judge of the supreme court.
of his was that solitary and enigmatic writer Lawrence Green.

W H "Wally" Mars KC, who appeared with Upington, was another real character of the Cape Bar, perhaps today best known for his standard work *Mars on Insolvency*, first published in 1917. He was chairman of the Western Province Cricket Club for more than 25 years. On his death in 1966, the Judge President of the Cape Mr Justice Beyers, paid him this tribute:

"Of all the advocates against whom and with whom I ever worked, Wally Mars was the greatest. When I came to the bar, he was the king of his profession."

Junior counsel for the defendant was Tom Reay, who had appeared as the crown prosecutor before Judge Watermeyer and the jury in the Paarl Circuit Court when the policemen were acquitted. He had distinguished himself in the First World War, being awarded the DSO and twice being mentioned in despatches but was severely wounded in April 1917, leaving him with a permanent limp. He became a specialist in banking law, and counsel to the Institute of Banking Law. In 1943 he left the bar to join the old Cape firm of Fairbridge Arderne and Lawton where he enjoyed a successful career as an attorney until his retirement in 1957. His son, John Reay, was to be a partner of that firm for more than thirty years.

Like Judges Watermeyer, Van Zijl and Sutton, Tom Reay was a graduate of Cambridge. B K Long was an Oxford man. Henry Fagan had studied at London University and Beau Upington at Trinity College, Dublin.

Yet, despite this formidable array of talent and character, perhaps the person involved in the *Le Roux* case who was to achieve the greatest fame was none other than the young 24-year-old reporter who had sat taking notes in the hot Paarl courtroom. He was described by his editor, B K Long, as his best reporter at the time and as bilingual. Asked by Mars KC whether anything struck him before leaving the court in Paarl and travelling back to Cape Town, after the conclusion of the case, he answered:

"Yes, naturally the judge's remarks made a deep impression on me."

This young reporter went on to become a world renowned writer, scholar, philosopher, explorer and soldier. Awarded the CBE by King George VI and knighted by Queen Elizabeth in 1981, he has been a trusted confidant of British Prime Minister, Margaret Thatcher, and mentor of the Prince of Wales, who named him godfather to his eldest son.

Yes, that reporter was none other than Laurens van der Post, author of *The Lost World of the Kalahari* and many other books, authority on the Bushmen, disciple of the philosopher Carl Gustav Jung, and trustee of the World Wilderness Foundation. He is perhaps one of the few prophets honoured in his own country, with honorary doctorates in literature from not only a host of foreign universities, but also Rhodes and Natal.

Sir Laurens van der Post's father, C W H van der Post,* was not only a respected member of the Free State Volksraad and supporter of F W Reitz, but a highly successful attorney and writer of short stories, poems, historical novels and translations from Tennyson and Longfellow. He was a member of the Vereniging van Nederlandsche Letterkunde of Leyden and it is, therefore, not surprising that his son Laurens (one of twelve children of his father's second marriage) inherited the gift of writing well. One can only speculate as to the influence his pivotal role in this case had on the development of his fine mind and character.

*Le Roux*'s case is only one of tens of thousands which are recorded in our law reports. There are no doubt many others of equal fascination, all contributing to the moulding and shaping of the morals, norms and beliefs of the parties involved, the observers and recorders of such cases, and of society as a whole.

Perhaps Oliver Wendell Holmes was enchanted by the law because he relished life itself.

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* C W H van der Post is the grandfather of Chris van der Post of the Bloemfontein firm McIntyre & Van der Post. Chris van der Post, a past president of the ALS, is a present a member of the Law Society of the Orange Free State council (see 1989 DR 317) - Editor.