

ON THE USE OF CLASSICAL ALLUSIONS IN JUDGMENT WRITING

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I INTRODUCTION

In the first volume of Marcel Proust's epic *Remembrance of Things Past*, the narrator mentions a certain M Legrandin, an engineer by profession, who was detained in Paris by the exigencies of his profession and only able to visit his home in Combray on weekends. He was extremely well-read, more literary in fact than many men of letters

one of that class of men who, apart from a scientific career in which they may well have proved brilliantly successful, have acquired an entirely different kind of culture, literary or artistic, of which they make no use in the specialised work of their profession, but by which their conversation profits.¹

In point of fact, M Legrandin was a snob, a man whose utterances in polite conversation were often irrelevant, out of context and overblown, the sort of chap who would charge up to you in the street asking if you were familiar with this or that line from such and such a writer, knowing full well that you weren't.² Although he was blissfully ignorant of the fact, M Legrandin palpably misused the advantage of his literary and artistic background.

A broad general reading should not of itself be considered an encumbrance for a man of science, let alone a judicial officer, much of whose day to day endeavour is frequently consumed in the writing of judgments. As with M Legrandin, much will depend upon how this storehouse of personal information is used. Judgments are not delivered in isolation in an ivory tower. An important part of their function is to communicate to various audiences, ranging from the parties and appellate courts to the wider community.³ They will generally follow a predetermined pattern, setting out the facts and the law and the relationship of each to the other followed by a resolution of the problem at hand. To this end they should be relevant and as succinct as possible. Because of the prosaic nature

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1 Marcel Proust, *Remembrance of Things Past*, Vol 1, *Swann's Way* (C K Scott Moncrieff trans, 1922 ed) 88 [trans of: *À la Recherche du Temps Perdu*].

2 Ibid 161–81.

3 The point is made by several contributors of judicial persuasion in the NSW Judicial Commission Education Monograph, *A Matter of Judgment – Judicial Decision-Making and Judgment Writing* (2003).

of the subject matters frequently involved, the classical or other literary allusion has become the exception rather than the rule in the judgments we read. So why are they included and how can they help?

An allusion has been described as a literary device used to try and bring out or increase communion with one's audience.⁴ When appropriately employed, such references assist in explaining and illustrating an issue and thus persuade the reader to the writer's point of view.⁵ In this sense, 'deft use of literature can help the judicial writer to express important ideas in ways better than they could muster unaided. Such literature becomes part of the rhetoric of judicial exposition, explanation and persuasion'.⁶ A second reason is that, since judgments are frequently directed towards the wider community, and judges themselves are of that community, utilising non-legal literature, including where appropriate classical sources, helps to ensure that the law in its written form remains in touch with literary sources outside the narrowly confined and inbred world of legal precedent and terminology.⁷ On a more deprecating level, it has been said that judges have long felt the need to resort to rhetorical forms of persuasion because their opinions can be important events in public political debates, and that High Court judges in particular see themselves as 'brushing up against immortality', because they deal with such momentous issues.⁸

Third, a deft use of literary sources beyond strict legal terminology can enhance a judgment so that that it immediately commands the attention of the reader. Thus, a memorable opening can seize the attention of the audience forthwith, set the stage for what follows, and act as a beacon during the currency of the presentation in question. Take, for example, Dickens' 'best of times, worst of times' – no elaboration needed – and also the opening paragraphs of *Bleak House*, describing the November fog blanketing London, thickest at Lincoln's Inn Hall where

4 Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson and Purcell Weaver trans, 1969 ed) 177 [trans of: *L'Empire Rhétorique : Rhétorique et Argumentation*].

5 On rhetoric used for the purposes of persuasion see Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987). On the subject of oratory which is productive of conviction as it applies to all rational beings, and persuasive oratory directed to a particular audience see Perelman and Olbrechts-Tyteca, above n 4, 20, where Kant's views on the subject are discussed. In 2007, the NSW Bar Association ran a seminar series on rhetoric, notable topics included being 'The Empty Eloquence of Fools – Plato's *Gorgias* and Aristotle's *Rhetoric*', 'Cicero's *De Oratore* and the *Philippics*', and 'Between Virtue and Fortune: Rhetoric in Machiavelli's *The Prince* and Cicero's *On Duties*'.

6 Michael Kirby, 'Literature in Australian Judicial Reasoning' (2001) 75 *Australian Law Journal* 602, 606–7.

7 Michael Meehan, 'The Good, the Bad and the Ugly: Judicial Literacy and Australian Cultural Cringe' (1990) 12 *Adelaide Law Review* 431.

8 Pierre N Leval, 'Judicial Opinions as Literature' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996) 206, 208. See also Sanford Levinson, 'The Rhetoric of the Judicial Opinion' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996) 187, 200, where Levinson opines that academics are less inclined to read the opinions of judges because they do not expect to find within 'the pages even of the federal reports what would count within the university community as first-rate discussion of serious problems'.

sits the Lord High Chancellor in his High Court of Chancery. Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth.⁹

And so the background is set for the long running Chancery suit of *Jarndyce v Jarndyce*, in which the legal costs ultimately consumed the entire estate and brought ruin on generations of naïve litigants. Some of the more positive examples of classical references in Australian judgment writing are reviewed in Part I below.

Any use of literature and the classics in this fashion must be relevant, or as Meehan would have it ‘marginally relevant but of sound aesthetic provenance, lightly inserted but suggesting vast allusive reserves’.¹⁰ An intrusive allusion can only serve as a distraction, which defeats its purpose. If the reference is ill-suited to the occasion, or overblown, it may appear that that its real purpose was only to self-congratulate the writer on his or her own erudition (or that they are possessed of a good book of quotations), and if the muse is summoned with undue frequency the whole exercise may descend into the realm of cliché which defeats its object as a technique of enlightenment.¹¹ Some examples where the references used have proved less suited to the occasion in the contexts in which they appear are discussed in Parts IV, V and VI.

Finally, it is necessary to bear in mind the audience to whom the judgment and the allusion are directed, for such techniques are only likely to be effective if the audience is reasonably familiar with the sources being used.¹² Indeed, it is the audience, often overlooked, which is the critical factor, and any speaker or exponent of the written word must always be aware of the proclivities of the audience he or she is addressing and be prepared to adapt his material accordingly.¹³ Unless internally explained, a reference or allusion may be so obscure that it passes completely over the collective head of the audience to whom it is directed. However, an allusion may be deliberately obscure for good reason as when one judge wishes to extend an insult to another but to do so in a veiled way so that the message remains hidden from all but the *cognoscenti* – untranslated Greek or Latin tags are useful in this regard – but in most cases to be effective a good argument requires the audience to understand the allusion and go along with its thrust. An instance of a veiled allusion whose true import was hidden from all but those sufficiently erudite to appreciate its true significance is mentioned in Part III, and by way of apparent paradox, Part III also contains an example of an address to a jury whose members were obviously sufficiently erudite to understand the nature and meaning of the allusions levelled at them.

The emphasis in this paper is upon the classical at the expense of other literary sources, and the allusions considered range in scope from the mere ‘apt phrase’ to references of greater substance.¹⁴ The paper is concerned primarily with

9 Charles Dickens, *Bleak House* (first published 1853, Wordsworth ed 1993) 4.

10 Meehan, above n 7, 431.

11 Kirby, above n 6, 613.

12 Goodrich, above n 5, 93–6.

13 Perelman and Olbrechts-Tyteca, above n 4, 23–4, citing Vico.

14 The distinction is made by Meehan, above n 7, 436.

allusions as they appear in judgments, and deals with submissions only in passing. The object is to assess in what way the allusion enhanced or detracted from the judgment, and there is no finer place to start than Justice Kirby's forensic skills in moulding together a curious blend of Australian legal fiction and Roman myth.

II USING VIRGIL OR HOMER TO THREAD THE FABRIC OF A JUDGMENT OR SUBMISSION

In *Grincelis v House*,¹⁵ the issue was whether a commercial rate of interest should apply to awards of damages for past gratuitous services provided to an injured person or whether the Gogic rate of four per cent should apply. The majority, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in a joint judgment held that commercial rates should apply.

In separate dissenting judgments, Kirby and Callinan JJ opted for the Gogic rate. Essentially, their point was that the rule in *Griffiths v Kerkemeyer*,¹⁶ under which damages for past gratuitous services were assessed on a needs basis and awarded at commercial rates, was artificial enough as it was, though now too deeply entrenched in the law to be disturbed without legislative intervention. No one had submitted that the Court should reverse itself on that issue. In the opinion of the minority, all that could now be done was to try to ameliorate the most inconvenient results of this 'novel legal doctrine'. If interest on damages for past gratuitous services were also to be assessed at commercial rates, the result would be to pile windfall upon windfall and produce an unjust result so far as the defendant was concerned. Justice Kirby's dramatic opening laid the foundation for his argument:

We have it on the authority of Virgil¹⁷ that when an endeavour was made in ancient times to pile Ossa on Pelion and then 'to roll leafy Olympus on top of Ossa', the Gods scattered the heaped-up mountains with a thunderbolt. Their divine anger may have been occasioned by irritation with the logic of height being pressed too far. This appeal explores the limits of logical deduction in the legal context of compensation for the unpaid care provided by a family member to a person injured as a result of a legal wrong.¹⁸

15 (2000) 201 CLR 321.

16 (1977) 139 CLR 161.

17 Virgil, *Georgics*, Book 1, line 281. The same myth is also described in Ted Hughes, *Tales from Ovid*, 24 *Passages from the Metamorphoses* (1997) 12–3.

18 *Grincelis v House* (2000) 201 CLR 321, 331.

It was a theme which he maintained throughout his judgment:

In the present case, one would be immediately inclined to follow the logic of basic legal principles if the only criterion were the common law. Having embarked upon a path of anomalies, the logic of the common law would carry the decision-maker forward, however apparently extreme the resulting outcome. Ossa would again be piled on Pelion. Any remedy would be left to a legislative thunderbolt if the consequence were regarded as too artificial to be tolerated. Artificiality abounds
 ...¹⁹

and pursued to its logical conclusion:

It is not appropriate or just to adopt commercial rates of interest. In my view, they are not the rates which the law requires. To adopt those rates is to fall into the Olympian error of which, long ago, Virgil warned. We should heed his warning.²⁰

It was a splendid opening, relevant, seizing the reader's attention forthwith, and maintaining it throughout. Justice Kirby's summoning of the muse added clarity to his argument, gave it dramatic effect, and assisted in driving home the illogicality of an approach which piled one legal fiction on top of another. But the way he went about his task added another dimension to his argument. He opted to employ another fiction as a rhetorical device. He portrayed as a fact ('[w]e have it on the authority of Virgil ...') something which Western understanding now regards as a myth (the existence of Roman gods and their interventions in human affairs). Rhetorical fiction was piled upon legal fiction, thereby providing added thrust, though in a somewhat subtle way, to his reasoning.

Another occasion for the same Justice to vent his judicial spleen arose in *Graham Barclay Oysters Pty Ltd v Ryan*,²¹ a case in which the High Court was once again required to consider the principles underpinning the law of negligence, and in particular the circumstances which gave rise to the liability of public authorities whose breaches of duty arose from their alleged failure to properly discharge their statutory powers. Justice Kirby seized the opportunity to rail against the High Court's consistent failure to enunciate an appropriate methodology in common law actions for negligence where liability was in dispute, but on this occasion the instrument he used to illustrate his point was not Virgil, but Homer – and in the classical Greek no less: 'One day this Court may express a universal principle to be applied in determining such cases' his Honour said by way of introduction, but

[e]ven if a settled principle cannot be fashioned, it would certainly be desirable for the Court to identify a universal methodology or approach, to guide the countless judges, legal practitioners, litigants, insurance companies and ordinary citizens in resolving contested issues about the existence or absence of a duty of care, the breach of which will give rise to a cause of action enforceable under the common law tort of negligence. Courts such as this should recall the prayer of Ajax:

Zeῦ πάτερ, ἀλλὰ σὺ ῥῦσαι ὑπ' ἡέρος νῆας Ἀχαιῶν,
 ποίησον δ' αἴθρην, δὸς δ' ὀφθαλμοῖσιν ἰδέσθαι·
 ἐν δ' ἐφάει καὶ ὀλεσσον, ἐπεὶ νύ τοι εὖαδεν οὕτως.

19 Ibid 333. See also 334.

20 Ibid 337.

21 (2002) 211 CLR 540.

It is a supplication that must have occurred to many who have considered recent decisions on the subject of the duty of care: '[S]ave us from this fog and give us a clear sky, so that we can use our eyes'.²²

Ajax's prayer to Zeus is found in Book XVII of *The Iliad* when the Achaeans and the Trojans are locked in a fierce battle in the midst of a dense fog following Patroclus' death at the hands of Hector. Each side is attempting to seize Patroclus' body which is being dragged back and forth across the battlefield. Ajax (or Telemonian Aias as he is referred to in Rieu's translation) pleads for the fog to be lifted so that he can send a messenger to tell Achilles of his friend's death to galvanise the latter into action.

The modern day fog to which his Honour alluded arose from repetitive curial attempts post *Donoghue v Stevenson*²³ to refine the generality, indeed the circularity, of Lord Atkin's 'neighbour' principle in order to spell out whether a duty of care was owed and to whom.²⁴ Whilst everyone wanted to retain Lord Atkin's touchstone for defining the neighbour relationship as a unifying concept, the generality of the sub-concepts involved were often difficult to apply to specific circumstances, obliging courts across the common law world to indulge in repeated attempts to refine the manner of its application.

One such attempt in England resulted in the so-called *Caparo* test,²⁵ involving a three-pronged inquiry to determine whether a legal duty of care existed: the reasonable foreseeability of the prospect of harm to the claimant; whether there was a relationship of 'proximity' or 'neighbourhood' between the parties; and if so, was it 'fair, just and reasonable' for the law to impose a duty of care of a given scope upon the tortfeasor for the claimant's benefit. But in *Sullivan v Moody*,²⁶ the High Court rejected the *Caparo* test as tending to reduce the question of liability to a discretionary judgment based upon what is fair, just and reasonable in a particular case. Foreseeability was no longer considered determinative, and the notion of proximity had also been rejected. However, the High Court has substituted nothing useful in its stead, except a reliance based upon the vague and ill-defined 'salient features' of each case,²⁷ and the statement that the law develops incrementally by analogy with categories of case where liability had been established. Justice Kirby found himself obliged to fall in line with *Sullivan*, even though he was not a member of the court which decided it and regarded its line of reasoning as seriously flawed. He instead opted for an approach which imposed a duty of care 'when it is reasonable in all the circumstances to do so', noting that 'the 'touchstone' of reasonableness was fundamental to the way in which other members of the Court imposed a duty

22 Ibid 559. His Honour's translation is from Homer, *The Iliad* (EV Rieu trans 1956 ed) 333. His Honour also adds a footnote: '[C]f *Sorrell v Smith* [1925] AC 700, 716 where Lord Dunedin offered the translation: "Reverse our judgment and it please you, but at least say something clear to help in the future"'.

23 [1932] AC 562.

24 Ibid 580.

25 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

26 (2001) 207 CLR 562 ('*Sullivan*').

27 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253.

even if they did not explicitly say so:²⁸ ‘So after 70 years the judicial wheel has, it seems, come full circle. In this way only is Ajax’s prayer answered’.²⁹

So, the touchstone of reasonableness was Justice Kirby’s medium to dispense the fog clouding the Court’s reasoning, and thus shed some light on the duty of care issue. It was an approach which harked back 70 years to another generality in preference to legitimising a search for the ‘salient features’ of each case, a ‘methodology’ which failed to lay down any guiding principle whatsoever. If his Honour’s application of the touchstone of reasonableness in these circumstances does indeed represent daylight on the duty of care issue, it is perhaps worth noting that the sentence following Ajax’s supplication to Zeus to disperse the fog, which his Honour did not reproduce, reads ‘[k]ill us in daylight if you must’.³⁰ This does not detract from the fact that the resort to the metaphor of the fog remained a useful tool to illustrate the cloudiness of the Court’s line of reasoning on the duty of care issue, as it did when another learned author was describing the problems besetting the High Court of Chancery in England over a century before. The analogy shed light on the argument’s path and the concluding reference to Ajax provided an emphatic conclusion.

III HANDLE WITH CARE! *ARCADES AMBO*, OR THE INVOCATION OF VIRGIL FOR PURPOSES OTHER THAN HE INTENDED

Some years ago, an experienced judicial officer of my acquaintance approached a friend of mine for assistance in deciphering an apparently obscure passage in one of Justice of Appeal Meagher’s judgments. The case in question was *Nationwide News Pty Ltd v District Court of New South Wales*,³¹ which considered the powers of an inferior court to make suppression orders. At issue was the significance of section 578 of the *Crimes Act 1900* (NSW), as it then stood. During the course of his Honour’s judgment, Meagher JA said:

That [section 578] cannot be used to protect the accused seems to have the support of Kirby P and Hunt CJ at CL: *Arcades ambo*. The former has expressed himself to this effect in *John Fairfax and Sons Ltd v District Court of New South Wales* (Court of Appeal, 18 August 1988, unreported). The latter has uttered to like effect in a case beguilingly entitled ‘*Re Mr C*’ (1993) 67 A Crim R 562 at 563.³²

His Honour went on to say that the difficulties of upholding such an argument were too great.³³

What was the meaning and where lay the significance of that mysterious phrase ‘*Arcades ambo*’ secreted within the interstices of his Honour’s judgment? My friend, whose classical erudition rendered him admirably suited to field this line of inquiry, resisted the instinct to say to his inquisitor ‘Well, what difference does it make? Just read on’, and was rewarded handsomely for his research. He

28 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 628.

29 *Ibid.*

30 Homer, *The Iliad* (EV Rieu trans 1956 ed) 333.

31 (1996) 40 NSWLR 486, 498.

32 *Ibid.*

33 *Ibid.*

found that the phrase harks back to an idyllic period in imaginary time in Arcadia, a mountainous district in Ancient Greece, proverbial for the simplicity of its people as depicted in Virgil's *Eclogues* (or *Bucolics*). In *Eclogue VII*, the shepherd Meliboeus described his invitation to listen to the song of his fellow shepherds Thyrsis and Corydon, they being '*Arcades ambo, Et cantare pares, et respondere parati*',³⁴ thus:

Daphnis beneath a rustling ilex-tree
Had sat him down; Thyrsis and Corydon
Had gathered in the flock, Thyrsis the sheep,
And Corydon the she-goats swollen with milk-
Both in the flower of age, *Arcadians both,*
Ready to sing, and in like strain reply.

...
I let my business wait upon their sport.
So they began to sing, voice answering voice
In strains alternate- for alternate strains
The Muses then were minded to recall -
First Corydon, then Thyrsis in reply.³⁵

Eighteen hundred years later, Lord Byron used the same phrase, though ironically: "*Arcades ambo*", *id est* – blackguards both'.³⁶ In the fullness of time, Byron's meaning overtook Virgil's and the phrase came to be used, often in a pejorative sense, to indicate two persons having similar character or common interests, both sweet innocents or simpletons.³⁷ It seems there was a none too subtle barb for his judicial colleagues in Justice of Appeal Meagher's judgment, and one made more explicit by the appeal to antiquity!

This was not the first time Virgil's muse had been invoked in a testy piece of litigation. Some 150 years beforehand in a cause célèbre in the early days of the colony, the plaintiff, who was the editor of the *Colonist* newspaper, sought to recover damages, 'laid at £1300' for assault. The defendant was a local merchant who had horsewhipped him in the colony's main street, George Street, following the plaintiff's refusal to disclose to him the authorship of a certain article defamatory of the defendant which had been published in the plaintiff's newspaper, a stance which the plaintiff maintained throughout the currency of the ensuing legal proceedings, which were tried before the Chief Justice and a special jury. At the time, the newspaper was engaged in a purported exposé of the state of disgraceful concubinage, in which many persons were (then) living in Sydney, being seen driving in gigs with their mistresses – some of them married men deserting their houses and families, cohabiting with married women, and with them visiting the Theatre and other places of public resort. In this context, the defendant's conduct came under the observation of the plaintiff's newspaper, and he became the subject of an article ironically entitled 'The Family Man'. So far as the article itself was concerned, it had been written, said the plaintiff's

34 Virgil, *The Eclogues, Eclogue VII*, 4.

35 Virgil, *The Eclogues, Eclogue VII* (37 BC) The Internet Classics Archive
<<http://classics.mit.edu/Virgil/eclogue.7.vii.html>> at 24 March 2008.

36 George Byron, *Don Juan, Canto IV* (1821) Stanza 93.

37 Eugene Ehrlich, *A Dictionary of Latin Tags and Phrases* (1987) 48; E Cobham Brewer, *Dictionary of Phrase and Fable* (1894).

counsel, to expose and censure the defendant, living as he then was with a certain Mrs Taylor, an actress of the Sydney Theatre, and a married woman, who formerly lived happily with her husband, but from whose society she had been seduced. It was, he said, only a moderate and merited exposure, the defendant being at this time connected with various religious societies. Further, it was a public disgrace that a person who was living in this state should take a prominent part in such societies, and the hypocrisy of such a connection, was a fit topic for the animadversion and censure of the Press. In assessing damages, the jury was asked to bear in mind that the defendant was a wealthy man and to award damages on the basis of 'a most wanton assault committed under the most aggravated circumstance'.³⁸

But the defendant had instructed the able Mr Therry to appear as his counsel. Confronted with the evidence of Mr Windeyer, the colony's Second Police Magistrate, an eye-witness to the assault who gave evidence as such, Mr Therry said that it would be an insult to the understanding of the jury to deny that an assault had occurred, but the defendant pleaded provocation, thereby disentiing the plaintiff to damages, or entitling him at best, only to the minimum of damages which the law would allow,

(and) if the defendant were called upon to lay down a penny, and demand three farthings change from the plaintiff, the Jury would compensate the plaintiff beyond the extent of his suffering, and punish the defendant beyond the measure of his delinquency.³⁹

The plaintiff's conduct and provocation – the greatest provocation that one man could receive from another – meant that he had forfeited his entitlement to anything but nominal damages: 'Before this assault, he had slandered the defendant; since the assault, he had slandered him weekly - and to-day again, he slandered him through the instructions given to his Counsel'.⁴⁰ Mr Therry then summoned Shakespeare as his muse, with a certain liberty in the adaptation: 'When you take the life of a man, you take that, which at some time he must have lost; but when you take his good reputation, you take that which might have endured for ever'.⁴¹

This plaintiff then having gratified his palate by a series of articles written in a spirit of the bitterest rancour, in poetry or prose, had not right to come before a jury and ask of them to put money in his purse. No! good Iago! No - you must be satisfied with the revenge which you yourself have sought, and with which you were satiated. It was no excuse to say that these slanderous articles were not written by this plaintiff - it might be, or he even supposed they were not - but he refused to give up the name of the real author, and this only could excite pity for one who could submit to the degradation of pandering to the slander of another.⁴²

Having thus compared the plaintiff with the devious Iago, Mr Therry went on to make another comparison, the circumstances of which would have been well

38 *Bull v Wilson* [1836] NSW SupC 51.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.* The actual words of Iago in *Othello* were directed to the taking of a man's purse rather than his life: Act 3, Scene 3.

42 *Bull v Wilson* [1836] NSW SupC 51.

familiar to the members of the Special Jury. A short time before, one John Joseph Stockdale had published the memoirs of Harriette Wilson, one of Regency London's most famous courtesans, who had had sexual liaisons with many of the most prominent personages of her time. She and Stockdale had written to 100 or so of her former lovers and acquaintances giving them the opportunity to have themselves left out of the text for an annuity of £20 or a lump sum of £200. Many, including King William IV, accepted the offer and so had themselves written out of the text. Others, such as the Duke of Wellington, who is said to have responded with a 'publish and be damned' riposte, declined, thereby guaranteeing themselves special mention. The memoirs were published in nine instalments between February and August 1825, and quickly became a best seller and the talk of Regency London. As each instalment was published, Stockdale ensured a continuation of interest in the series by advertising a list of the personalities who were to follow in the next. The memoirs not only provided titillation for the members of the reading public at large. They 'caused concern at the highest levels of British government'.⁴³

Mr Therry now chose to make a comparison between Stockdale and the present plaintiff:

If this action succeeded, it would be considered as the hoisting of the standard of morals so oft inculcated in the *Colonist*. Standard of morals, indeed! Yes, but such a standard as Stockdale attempted to hoist in England, when he was prosecuted for the publication of the most infamous and obscene book that had ever been published. On the floor of the Court of King's Bench in England he insulted the Nation, by declaring that the work he had published was more calculated to advance the moral interests of England, than any book that had been published, with the exception of the Holy Volume. And what did the Jury suppose that book was? Why the memoirs of *Harriet Wilson* - or twenty years of the life of a Harlot - abounding in obscene anecdotes, such as are to be met with in the letter of Mr. Andrew Wylie, and other articles of the *Colonist*. It was to be hoped some new emigrant ship would bring out the worthy Stockdale as a co-Editor to the *Colonist*, and with the co-operation of the talents of *La belle Harriette*, it might continue to furnish for many years to come defamatory portraits after the fashion of 'Lodge's Portraits'. Stockdale would be a worthy compeer for this worthy plaintiff - '*Arcades ambo Et cantare pares, et respondere parati*'.⁴⁴

Following Therry's address, the jury retired for about 10 minutes and returned a verdict for the plaintiff in the derisory sum of £5.⁴⁵ But there was a footnote to the affair, one which may be perceived as straying a little from our theme, but which is included nevertheless in the form in which it was published 'for the sake of completeness' as they say. The day following the jury's verdict, the plaintiff chose to publicly express his disappointment in his preferred medium of communication as follows:

The case of the Editor of this paper, *versus* * * * * *, for an aggravated and brutal assault perpetrated in the public street, was tried before His Honor [sic] the Chief Justice, and a Special Jury, yesterday afternoon. The fact, and the aggravated nature

43 Frances Wilson, *Harriette Wilson: Courtesan and Blackmailer* (2006) Everything2 <http://everything2.com/index.pl?node_id=1787052> at 29 March 2008. See also Frances Wilson, *The Courtesan's Revenge: Harriette Wilson, the Woman Who Blackmailed the King* (2003).

44 *Bull v Wilson* [1836] NSW SupC 51.

45 A subsequent appeal by the plaintiff to the Full Court on the grounds of misdirection was unsuccessful.

of the assault were proved by the Second Police Magistrate; the delicate, and even dangerous, state of health of the Editor of this paper at the time the assault was committed was also proved by he [sic] testimony of Dr. Nicholson; and it was even admitted by the defendant's counsel, that at that very time, he was impressed with the belief that Mr. Bull was the author of the *jeu d'esprit*, under the title of *The Family Man*, which had appeared in this journal, and provoked the wrath of the notorious debauchee. And yet so delicate is the sense of propriety of a New South Wales Special Jury, or rather, for we must speak it out, so strange is their sympathy with all that is vile and villainous in outrageous profligacy and in cold-blooded and heartless iniquity, that they consier [sic] five pounds a sufficient compensation to the husband of a virtuous wife, and the father of a reputable family, for a grievous assault committed upon his person in open day, and in the open street of a town, by an individual whose advance in profligacy has kept pace with his success in business, and who after practising the most nefarious arts to accomplish the ruin of a virtuous female, and to destroy the peace of a respectable family, wipes his mouth, and is even applauded by the wretched creatures in the shape of ladies and gentlemen who frequent that sink of iniquity, the Sydney play-house, when holding parley with his adulteress paramour on the very boards! Talk of the Jury System after this! Oh, no; Mr. Justice Burton, an emancipist for us after all! A Jury of Moreton Bay men or Norfolk Islanders - we shall be satisfied with any Jury now! And if that worthy character, Jack the Slapper, who carries certain orders of their Honors into effect in the rear of Sydney Gaol, should be made the foreman of a Jury in our next case, we shall at least promise ourselves as good a verdict as that of the Special Jury in the case in question. If the Jury had even taken fifteen minutes to deliberate upon their verdict, we might have supposed that at least one solitary individual of their number had lifted up their voice in favour of the interests of morality, and had maintained his ground for the long period of thirteen minutes and three quarters in behalf of public virtue. But the men were of one heart and of one mind in the matter. They allowed themselves no time for deliberation; for as soon as that *worthy* Jurymen Mr. ---, who keeps at least one concubine, in the neighbourhood of Darling Harbour, and who, of course, could not but have a fellow feeling for the *worthy* defendant, had reminded the other Jurymen of the sage remark of Mr. Counsellor Therry, that what, was * * * * * case to-day might be their tomorrow, the thing was decided at once, and out came *The Patriotic Association*, with a verdict of *Five Pounds* damages! Prodigious!⁴⁶

For this 'outrageous contempt', the plaintiff (in the original action) was adjudged liable to pay a fine to the King of £100, to enter into sureties for the period of two years, himself in the sum of £200, and two sureties in the sum of £100 each, and left the court in custody of the Sheriff. All things considered, an unhappy result so far as the paper's editor was concerned: publicly horsewhipped, awarded derisory damages, convicted of contempt, adjudged to pay a fine 20 times the amount of his damages, bound over and obliged to leave the court in the custody of the Sheriff. And what started out as a well-intentioned though misguided attempt to improve the standard of the colony's morals had led to a public accusation that he was in the same league as such notorious villains such as Iago, Stockdale and Harriet Wilson. *Arcades ambo!*

This was self-evidently not an instance of judgment writing, but of the use of the classics in an address to the jury where they were well exploited. Faced with an impeccable independent witness, Mr Therry's tactics were to concede the obvious – that an assault had occurred – and to concentrate on the issue of provocation. The members of this particular jury of the defendant's peers were

46 *R v Bull* (No 3) [1836] NSW SupC 52.

convened at a time when the colony was less than 50 years old. They were obviously a well-educated lot, apparently well versed in Shakespeare's *Othello*, Virgil in the original Latin and the particular circumstances of *La belle Harriette*, for it is inconceivable that Mr Therry, whose tactics were impeccable throughout, would have resorted to the use of such rhetorical devices had he not been satisfied that the jury would have understood their meaning or at least their import. Conversely, it is less than conceivable that he would have taken the risk of sacrificing his client purely for the purpose of displaying his own classical knowledge. He knew the audience he was addressing.

IV EVER FORGET SOMETHING? DON'T WORRY – EVEN HOMER NODDED!

If your conscience is getting the better of you over the intemperate usage of *Arcades ambo* in the heat of conflict, the next time someone involved in your case – be they party, opponent or even eminent jurist you are citing as an authority – appears to have made a mistake or overlooked something, you can always let them down gently by relying on that time-honoured aphorism 'even Homer nodded'. That epic tale teller who composed the *Iliad* and the *Odyssey*, be he Homer or otherwise, was occasionally known to breathe new life into a character he had killed off earlier in the text, prompting the Roman poet Horace to write '*quandoque bonus dormitat Homerus*': 'even the noble Homer sometimes nods'.⁴⁷

Thus, on 8 September 2006, the United States Court of Appeals for the Second Circuit gave judgment in an appeal from a preliminary injunction granted in the United States District Court for the Eastern District of New York. The appeals involved the constitutionality of certain federal restrictions on local legal assistance programs that receive federal funding through the Legal Services Corporation ('LSC'). The restrictions apply regardless of whether the recipients receive non-federal funds in addition to LSC funds, and prohibit recipients from, inter alia, participating in class action suits, seeking attorneys' fees, and personally soliciting clients. Judge Cardamone, delivering the Appeal Court's judgment, commenced by saying that

47 Horace, *Ars Poetica*, l, 359 See also William Safire, 'Nodding Homer', *The New York Times* (New York), April 2 2006. Such Homeric questions also furnish grist to the mill of those who assert that *The Iliad* and *The Odyssey* were the work of more than one person: see *Homeric Questions – The Great Homer Nodding* About.com: Ancient / Classical History <<http://ancienthistory.about.com/library/weekly/aa090198.htm>> at 29 March 2008.

[w]hen one of the cases of this consolidated appeal was before us seven years ago, we set out some guidance on the law, which the district court [sic] either misinterpreted or missed. If the latter, such forgetfulness is understandable because we know that even Homer nodded⁴⁸ and, thus letting the District Court down lightly, then proceeded to give reasons for dissolving its injunction. However, the legal aid entities that were affected by the Circuit Court's decision were unimpressed and late last year they petitioned the United States Supreme Court for a writ of certiorari, in effect contending that it was not the District Court which had nodded, but Homer himself in the form of the Circuit Court. Whether it did so or not remains unresolved.⁴⁹

Another example occurred during the course of argument in the well known case of *State of Queensland v JL Holdings Pty Ltd*,⁵⁰ which concerned a party's right to amend a pleading in the context of case management principles. In that case, the trial judge, Kiefel J (as she then was), had refused the amendment, which if successful would have afforded the defendant a complete answer to the plaintiff's claim, on the basis that it would potentially disrupt a bloc of four months already allocated for the hearing. The refusal meant that the defendant would lose the right to litigate the issue it now wished to raise, the significance of which had but lately dawned on the defendant's legal team. But how could such a point have been overlooked by so many eminent lawyers, the plaintiff's counsel asked rhetorically? 'Points are overlooked, even Homer nodded', replied Kirby J, 'I mean, things are missed and then when the concentration for the trial is on, points are noticed. I mean, that is a common experience'.⁵¹ A similar reference to Homer's narcolepsy occurred in *Nicholls v The Queen; Coates v The Queen*,⁵² where the issue was the failure of those involved in a trial to complain at the time about the trial judge's failure to give a *McKinney* direction on the dangers of convicting on uncorroborated police testimony concerning admissions allegedly made by an accused whilst in police custody. In the High Court, Senior Counsel for one of the accused, Mr McCusker QC, said that he could

only speculate as to why the matter was not taken up. Your Honour [Hayne J] has suggested that perhaps those in the court did not consider that it raised a problem, but on the other hand, sometimes Homer nods. Sometimes after a long trial counsel simply do not pick it up.⁵³

Occasionally, the eminent modern day jurist who is alleged to have nodded along with Homer is personified with him. The question to be determined in *Coleman v Power*⁵⁴ was whether or not a particular State law offended the implied freedom of communication in the Australian Constitution which the High Court had unanimously upheld in *Lange v Australian Broadcasting*

48 *Brooklyn Legal Services Corp B v Legal Services Corporation* 462 F 3d 219, 221 (2006).

49 The petition and the full text of the Court of Appeals decision may be found at: http://www.brennancenter.org/dynamic/subpages/download_file_48299.pdf at 4 April 2008.

50 (1997) 189 CLR 146.

51 Transcript of Proceedings, *State of Queensland v JL Holdings Pty Ltd* (High Court of Australia, Kirby J, 2 December 1996).

52 (2005) 219 CLR 196.

53 Transcript of Proceedings, *Nicholls v The Queen, Coates v The Queen* (High Court of Australia), McCusker QC, 28 April 2004).

54 (2004) 220 CLR 1 ('*Coleman*').

*Corporation*⁵⁵. In *Lange*, the twin tests for determining this issue were (1) whether the impugned law effectively burdened the constitutional freedom; and (2) if so, was it a law ‘reasonably appropriate and adapted’ to achieve its ends in a manner that is compatible with ‘the maintenance of ... representative and responsible government’ prescribed in the Australian Constitution. In *Coleman Kirby J* took umbrage at the ungainly ‘appropriate and adapted’ terminology of the test commonly attributed to the eminent United States jurist Marshall CJ nearly 200 years before in *McCulloch v Maryland*:⁵⁶

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁵⁷

Justice Kirby continued, ‘[d]espite the respect properly due to that great judge and to such repeated usage, this is an instance where Homer nodded’.⁵⁸ The phrase involved a ritual incantation, devoid of clear meaning. In lieu of reasonably ‘appropriate and adapted’, it caused less offence to formulate the second limb in terms of asking whether the section of the Act under scrutiny was reasonably ‘proportionate’ to serve a legitimate end of State law-making.⁵⁹ One may well inquire whether that by now well-worn phrase describing Homer’s sleeping whilst on the job does not also involve a ritual incantation whose clear meaning might be just as well be expressed in plain language?

In similar vein, when the plaintiff Annett’s counsel, Mr Bret Walker QC, was discussing the provenance of the so-called normal fortitude rule in *Tame v New South Wales; Annetts v Australian Stations Pty Limited*,⁶⁰ he identified Windeyer J with somnambulant Homer. In *Mount Isa Mines Ltd v Pusey*,⁶¹ Windeyer J attributed the origins of the rule to Lord Wright in *Bourhill v Young*⁶². Senior Counsel said: ‘I hesitate even to think Homer nodded. However, there are antecedents before that’.⁶³ Agreeing with Justice Windeyer’s enunciation of the nature of the rule in *Pusey*,⁶⁴ Counsel further submitted that the rule was only really a question of foreseeability at the point of answering the question as to breach.⁶⁵

55 (1997) 189 CLR 520.

56 (1819) 17 US 159.

57 Ibid 206.

58 *Coleman* (2004) 220 CLR 1, 90.

59 Ibid.

60 (2002) 211 CLR 317.

61 (1970) 125 CLR 383, 405 (‘*Pusey*’).

62 [1943] AC 92.

63 Transcript of Proceedings, *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (High Court of Australia, Bret Walker QC, 5 December 2001).

64 (1970) 125 CLR 383, 406.

65 Transcript of Proceedings, *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (High Court of Australia, Bret Walker QC, 5 December 2001). See also Mr Walker’s submission as to the manner of formulation of the first limb of the rule in *Phillips v Eyre* by the judge at first instance (Willis J): ‘and that when one comes to the pronouncement of the general rule, with great respect, Homer nodded as to the way in which he expressed the first condition’: Transcript of Proceedings, *Regie National des Usines Renault SA v Zhang* (High Court of Australia, Bret Walker SC, 8 August 2001).

Nodding Homer may well remain a polite way of getting your message across, at the same time allowing you to extend due deference to your eminent erroneous source of reference. However, we have seen enough examples to be aware that an element of cliché can creep into the equation if the phrase is overworked and overused, and it is quite refreshing to find an occasion where it could be employed but the invitation is not taken up. In an article on judgment writing entitled ‘Too Many Words’ published in the *Revenue Law Journal* in 2001, the authors discuss prolixity in High Court judgments. They instance Sir Owen Dixon’s comments in *W Nevill & Co Ltd v Federal Commissioner of Taxation*⁶⁶ when he said: ‘But it is not correct to look only to the purpose actuating the expenditure in the state of facts in which it was resolved upon’.⁶⁷ And a little later on the same page: ‘On reconsideration, it appeared that the purpose would be better fulfilled by a rearrangement involving an expenditure made in commutation of that undertaken’.⁶⁸ According to the authors of the article, ‘[i]n the first sentence, the great judge meant to say: “But we do not look only at the purpose of the expenditure”. That’s all. Who knows what he meant in the second sentence?’⁶⁹

The authors are to be congratulated for *not* saying that Homer nodded!

V TWIXT SCYLLA AND CHARYBDIS

When Odysseus was making his long journey back from Troy to his homeland in Ithaca, the goddess Circe warned him of a dilemma which confronted him on the way. He would reach a point where two ways lay before him. If he took one way, the waves would take him into a sheer cliff face. In the other direction lay two rocks, the higher of which reared its sharp peak up to the very sky and was capped by black clouds that never went away. Half way up, there was a misty cave, the home of Scylla, a rather unattractive creature with 12 feet, all dangling in the air, and six long necks, each ending in a grisly head with triple rows of teeth, set thick and close and darkly menacing death. No ship had ever sailed past Scylla without loss of crew, since from every passing vessel she snatched a man with each of her heads and so carried off her prey. The other of the two rocks was lower, and the distance between them no more than a bowshot. A great fig-tree with luxuriant foliage grew upon the crag and below this Charybdis sucked the dark waters down in a turbulent blowhole. Three times a day she spewed them up, and three times she swallowed them down. ‘No’, said the goddess, ‘you must hug Scylla’s rock and with all speed drive your ship through, since it is far better

66 (1937) 56 CLR 290.

67 Ibid 307.

68 Ibid.

69 Jim Corkery and Duncan Bentley, ‘Too Many Words’ (2001) 11 *Revenue Law Journal* 1, 3. See also Michael Coper, ‘Concern about Judicial Method’ (2006) 30 *Melbourne University Law Review* 554, 557 where it was said that the great judge’s prose was ‘characteristically dense, the structure complex, and the style distinctly of a different era’. The authors also suggest that his utterances were often like those of the oracle at Delphi: 558.

that you should have to mourn the loss of six of your company than that of your whole crew’.

Odysseus accepted the advice he was given, and lost the six ablest hands he had on board. On the way back, he lost all his remaining men in a storm, and found himself again approaching the Straits of Scylla and Charybdis, this time alone. As Charybdis began to suck the water down, Odysseus was flung right up to the great oak tree, where he took a hold and waited for the blowhole to spew up his ship’s mast and keel. ‘My hope was justified, though they came up very late. In fact not till the time when a judge with a long list of disputes to settle between obstinate litigants rises from court for his evening meal’. When the timbers finally appeared, he dropped into the water and used them as driftwood to swim away.⁷⁰

Maybe it was the legal analogy, but the unattractive Scylla and the turbulent Charybdis have spawned a great many judicial allusions, not all of them appropriate to the occasion. Odysseus’ experience took place in a context of violent action and adventure, yet so many adoptive references appear in the most prosaic of circumstances. Consider the appropriateness of some of the following references. The author might just as easily have said that the person in question found himself on the horns of a dilemma, or caught between a rock and a hard place, or simply facing a choice between two alternatives, but was seduced instead to indulge a reference to the monster and the blowhole which so troubled Odysseus.

One of the most frequent forums for the use, or shall we say, overuse of the metaphor is in the fertile field of taxation litigation. In *Jolly v Federal Commissioner of Taxation*,⁷¹ two Justices of the High Court raised an issue which they said was ‘worthy of consideration’⁷² – the constitutionality of section 67 of the *Income Tax Assessment Act 1922–1934* (Cth), which imposed additional tax penalties for failing to include assessable income in a taxation return. In their joint judgment, Rich and Dixon JJ said that the section had only thus far escaped challenge because it penalised an offence, and to do so otherwise than by means of the judicial power was not incidental to the legislative power in respect of taxation. ‘But from setting this course away from Scylla a difficulty now appears to arise. A Charybdis exists in sec 55 of the Constitution ...’,⁷³ which relevantly provides that ‘[l]aws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. Laws imposing taxation ... shall deal with one subject of taxation only’. However, in *Re Dymond*,⁷⁴ Fullagar J was untroubled by this argument since as is Honour said it was not the Commissioner but the statute itself which imposed the penalty. Chief Justice Dixon, whose views had apparently mellowed over the ensuing quarter century, agreed, and so did Kitto J.

70 Homer, *The Odyssey* (EV Rieu trans, 1946 ed) 190–201.

71 (1935) 53 CLR 206.

72 Ibid 211.

73 Ibid.

74 (1959) 101 CLR 11.

Twenty-five years further on, the same argument and the same analogy reared their heads again in *MacCormick v Federal Commissioner of Taxation*:⁷⁵

They are said not to be laws with respect to taxation and therefore not to be within the taxation power of the Parliament (s 51(ii) of the Constitution) or, if they survive that challenge, they are said to deal with more than one subject of taxation and therefore to offend the second paragraph of section 55 of the Constitution. If, to borrow the metaphor used by Rich and Dixon JJ, in *Jolly v Federal Commissioner of Taxation*, the Acts sail away from the Scylla of the first challenge and are not pulled down by the Charybdis of the second, it is then said that they perish on the shoal of s 23 of the 1982 *Assessment Act*. That section is said to make each of the recoupment taxes incontestable, an [sic] on that account the imposition of the recoupment taxes is said to have exceeded the legislative power of the Parliament.⁷⁶

And in *Federal Commissioner of Taxation v South Australian Battery Makers Pty Ltd*,⁷⁷ on an issue involving section 260 of the *Income Tax Assessment Act 1936* (Cth), Murphy J in dissent said that '[l]iteral interpretations of the Act have allowed tax avoidance devices to succeed and have encouraged their growth'.⁷⁸ He urged a purposive construction of the legislation, as espoused by the renowned United States Judge Learned Hand in *Central Hanover Bank & Trust Co v Commissioner of Internal Revenue*:

There is no more likely way to misapprehend the meaning of language - be it in a constitution, a statute, a will or a contract - than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true: there are hazards in all interpretation, at best a perilous course between dangers on either hand: but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.⁷⁹

In a modern day setting, Justice Murphy's next sentence is of even greater significance. 'Literal compliance with the terms of an Act is not enough if the real result is contrary to the general intention of the legislature'.⁸⁰ Justice Murphy may have found himself in a minority of one on this and other occasions, but he

⁷⁵ (1984) 158 CLR 622.

⁷⁶ Ibid 648–9 (Brennan J). See also *Luton v Lessels* (2002) 210 CLR 333, 376 (Kirby J): 'When all the features of the powers and functions of the Registrar under the Assessment Act are taken into account, it is clear that the drafter of the legislation has escaped the two perils mentioned by Fullagar J in *Re Dymond*. The "Charybdis of s 55" of the Constitution has been avoided by the design of the Registration and Collection Act. And the Scylla which "might lie in wait in the shape of an argument [of offence to] ... the judicial power" has been safely negotiated by the design of the Assessment Act with the respective functions conferred by it upon the Registrar and the courts'.

⁷⁷ (1978) 140 CLR 645.

⁷⁸ Ibid 673.

⁷⁹ 159 F 2d 167, 169 (1947).

⁸⁰ *Federal Commissioner of Taxation v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645, 674.

had sounded a chord with many modern day reverberations.⁸¹ With the passage of time and a turn of the wheel, today's dissent frequently becomes tomorrow's law. It is 'an appeal to the future', and 'a beacon to a later, more enlightened, time when the errors of the majority would be acknowledged and corrected'.⁸²

Two instances where, in my view, the allusion tends to sit more comfortably are mentioned below. I cannot say precisely why that is so, but the factor of being forced to make an immediate rather than a considered decision between two alternatives whilst moving at speed when doom threatened whichever choice was made has a lot to do with the first, and the risks involved in an episode of drug trafficking undertaken in the shadow of the penalties prescribed for the offence in different countries have a lot to do with the second. A subjective judgment is involved, and the reader will make up his or her own mind, but the moral to the story is to reflect upon how you wish to use Scylla and Charybdis before calling upon them. Otherwise, like other hackneyed phrases, they will not do their work well and even Homer will not be able to help.

First, the respondent was driving along the highway when he came across an inadequately lit vehicle which had broken down because its lighting had failed. He did not notice it until the last minute, by which time a vehicle was coming in the opposite direction. Had he swerved to avoid the stationary vehicle, he would have collided with the oncoming vehicle. He was unable to avoid a collision with the stationary vehicle. Justice Rich said

81 See, eg, *Insurance Commission of Western Australia v Container Handlers Pty Ltd* (2004) 218 CLR 89; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 (all to the effect that where the legislative intention behind amendments to the Motor Accident legislation is clear, it must be followed); *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW* (2004) 60 NSWLR 558, 579 (Spigelman CJ): 'In contemporary Australian jurisprudence, a purposive approach to interpretation is to be adopted, not a narrow literalism'. This reasoning was applied by Price J in *Roads and Traffic Authority of NSW v Sparkes* [2007] NSWSC 667. In his judgment, Murphy J also cited the following passage from Lord Blackburn in *Bradlaugh v Clarke* (1883) 8 App Cas 354, 372: 'All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject matter and for the object with which that statute was made; it being a question to be determined by the Court, and a very important one, what was the object for which it appears that the statute was made': at 673.

82 Michael Kirby, 'Consensus and Dissent in Australia' (Speech delivered at the 10th Annual Hawke Lecture, Adelaide, 8 October 2007). See also Michael Kirby, *Judicial Dissent – Common Law and Civil Law Traditions* (2006) High Court of Australia
 <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_06.pdf> at 29 March 2008; Michael Kirby, 'Judicial Dissent' (Speech delivered at James Cook University, Cairns, 26 February 2005); Cf John Hollander, 'Legal Rhetoric' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996) 184.

[i]t was a case of Scylla and Charybdis. Mr. Ligertwood's argument appeared to suggest that in these unexpected and difficult circumstances Dr. Watson should have possessed and exercised the prescience of Sherlock Holmes. I do not infer from the facts that the respondent was going at such a speed that he could not pull up within the limits of his vision, and I decline to interfere with the finding of the learned primary judge on the question of the collision raised by the appeal. In my opinion the appeal should be dismissed with costs.⁸³

Second, all three appellants were recruited by Miles to travel to Thailand for the purpose of importing a quantity of heroin into Australia, as couriers. Miles went there himself, purchased a quantity of heroin and delivered it in Bangkok to the appellants who each carried part of it back to Australia. En route, they passed through Customs in several countries where the penalty for heroin trafficking is death. Having passed these Scyllas safely they were engulfed in Darwin by Charybdis in the form of Darwin Customs officers.⁸⁴

VI ROLLING OUT THE GAUDY CARPET

On 23 February 1996, Burchett J of the Federal Court delivered his judgment in the case of *News Ltd v Australian Rugby Football League Ltd*.⁸⁵ In essence it was a case about TV rights to Rugby League, and loyalty agreements which the Australian Rugby Football League ('ARL') required its players to sign to freeze out News Ltd from forming a rival 'Super League' competition. In a 'colourful' judgment,⁸⁶ which Callinan J of the High Court would later describe as rolling out 'literary allusions like a rather gaudy carpet',⁸⁷ Burchett J found in favour of the ARL, a decision which was later reversed on appeal. In a judgment of almost 100 pages his Honour in fact employed three allusions: a reference to Shakespeare's *As You Like It* (Act III, Scene 5) to 'illustrate' the meaning of the words 'product' and 'market',⁸⁸ a passing reference to Thackeray's *Vanity Fair* on the morality of the market place,⁸⁹ and a reference to Book 4 of *The Aeneid* to illustrate the Court's vigilance to ensure that its remedies are not invoked for the furtherance and ultimate fulfilment of unlawful activities when the applicant's own conduct had been unmeritorious. The passage reads:

In one of literature's great passages, when Aeneas attempts to excuse his desertion of Dido by asserting that he must go to perform a God-given task, Dido exclaims with scorching sarcasm that here is a man who would make the Gods accomplices to his crime! - 'I rave, I rave! A god's command he pleads, And makes Heav'n accessory to his deeds'.⁹⁰

83 *Lee Transport Co Limited v Watson* (1940) 64 CLR 1, 5.

84 *Droullos, Metcalfe & Laver v R* (1994) 71 A Crim R 82, 83 (Kearney J).

85 (1996) 58 FCR 447.

86 Murray Deakin, 'Super League: Full Federal Court Prefers Competition On and Off the Field' (1996) 15(4) *Communications Law Bulletin* 1, 1.

87 Ian Callinan, 'Law, Culture and Language in Courts and Other Places' (Paper presented at the 8th Annual Law and Literature Association of Australia Conference, 1997) 10 cited in Kirby, above n 6, 612.

88 *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447, 476.

89 *Ibid* 481.

90 *Ibid* 534.

As the flavour of this passage makes clear, each of the allusions used was lurid and colourful, jarred with the surrounding context and dealt an aesthetic blow to the senses, but it is perhaps going a little far to describe three references in a judgment of almost 100 pages as rolled out like a rather gaudy carpet. There are more extreme examples, as we shall see, but His Honour was certainly not one to pass up the opportunity to weave his classical knowledge into the tapestry when the opportunity presented itself, and on some occasions even when it did not.

In *Commonwealth of Australia v The Human Rights & Equal Opportunity Commission*,⁹¹ the issue was whether the Commonwealth was within its rights to discharge a soldier who was HIV positive. The Commonwealth admitted that its actions were discriminatory, but said that they were lawful, as being within a statutory exception. Undaunted by Justice Callinan's criticism, if indeed he was aware of it, Burchett J began his judgment as follows:

This appeal by the Commonwealth, brought to test a ruling in relation to the Australian Army, has much to do with blood. Modern warfare may seem less brutally physical than such a struggle as that of Horatius and his companions to hold the bridge, depicted by Lord Macaulay in his *Lays of Ancient Rome*, which cumbered with corpses –

*'... the narrow way
Where, wallowing in a pool of blood,
The bravest Tuscans lay'.*

But the big and small wars of the twentieth century, the Commonwealth contends, have shown clearly enough that the science of slaughter still inflicts physical wounds, from which soldiers bleed, perhaps copiously. Realistic training exercises, too, may entail injuries. Bleeding, for today's army, involves a soldier's comrades in dangers unknown to Horatius, or to those American Indian warriors who were accustomed to seal their brotherhood in mutual blood. For the deadly viruses Hepatitis B, Hepatitis C and HIV have become prevalent, which infect through transmission of blood and other bodily fluids.⁹²

On appeal in *X v Commonwealth*,⁹³ Kirby J commented in restrained fashion that it would be as well 'if the courts were to avoid the preconceptions that lie hidden, and not so hidden' by the evocation of such images, particularly having regard to the context in which they were made.⁹⁴ One might also add that the remarks had very little if anything to do with the issues involved in the case apart from the fact that there was – blood. Although colourful and vivid, they featured 'less as information than as decoration',⁹⁵ and failed to advance the cause of the introduction or the judgment.

91 (1998) 76 FCR 513, 516.

92 Ibid.

93 (1999) 200 CLR 177.

94 Ibid 230. See also Kirby, above n 6, 612, where Kirby J refers to his criticism.

95 Meehan, above n 7, 441.

Piltdown Man, Adam and Eve, Michelangelo's David and the Afiscalopalians

I will conclude with a few excerpts from the judgments of Paul Gerber, former Deputy President of the Commonwealth Administrative Appeals Tribunal (1988 to 1999).⁹⁶ The first is drawn from a migration case and the second from a taxation appeal.

In *Yad Ram v Department of Immigration and Ethnic Affairs*,⁹⁷ the applicant sought to review a decision of the delegate of the Minister of State responsible for administering the *Migration Act 1958* (Cth) to reject a spouse visa, for his wife, Ms Sunil Lata, who was out of the country but who had borne the applicant a child who was an Australian citizen living in Australia. The delegate reached his decision after finding that Lata was not of good character, an aspect of the case with contemporary overtones. In support of his application, the applicant relied on the decision in *Minister for Immigration and Ethnic Affairs v Teoh*,⁹⁸ to the effect that Australia's ratification of the United Nations *Convention on the Rights of the Child*⁹⁹ on 17 December 1990 gave rise to a legitimate expectation that the decision-maker would exercise his discretion in conformity with the terms of the CRC, which required as a primary consideration the best interests of the child.

Deputy President Gerber commented that:

The majority decisions in *Teoh* gave rise to considerable disquiet within Government and, on 10 May 1995, the Minister for Foreign Affairs (the Hon Senator Evans) and the Attorney-General (the Hon Mr Lavarch) issued a joint statement which sought to turn *Teoh* into a jurisprudential curio, an artifact like Piltdown Man, of historic interest only, establishing nothing. Unlike the Piltdown skull, where someone (generally believed to have been a mischievous solicitor) merely filed down two of 'Mr' Piltdown's molars, Messrs Evans and Lavarch were determined to extract all of Mr Teoh's teeth.

Thus, the Ministers' joint statement claimed on behalf of the Government that the signing of an international treaty was no reason for raising any expectation that government agencies will act in accordance with that treaty unless its provisions have been incorporated by legislation ... and that [a]ny expectation that may arise does not provide a ground for review of a decision.¹⁰⁰

The judgment continued:

Whilst it is no doubt competent for Parliament to render the signing of an international convention into 'merely a platitudinous ineffectual act' (per Mason CJ and Deane J), I am not convinced that this same competence can be found in the interstices of some kind of ministerial prerogative.

96 See Corkery and Bentley, above n 67, 1, in which Paul Gerber's judgments were described as being notable for their 'clarity, precision and liveliness'.

97 [1995] AATA 381 (Deputy President Gerber, 5 December 1995).

98 (1995) 183 CLR 273.

99 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

100 [1995] AATA 381 (Deputy President Gerber, 5 December 1995) [20], [23].

The above ukase¹⁰¹ clearly was not intended to - nor could - curtail the judicial power of the courts to determine what constitutes a ground of appeal. Nor do I believe that the two Ministers (both lawyers) intended to interfere with the merits review process which vests in this Tribunal. Indeed, I am satisfied that I would be derelict in my duty if - post-*Teoh* - I refused to review an administrative decision which failed to give a consideration to the welfare of an Australian child which results in that child leaving Australia, to be brought up in foreign country where, on the evidence, it was destined to become a member of a social underclass with bleak prospects for its future. The Ministers' ukase, regarded as a political statement, is unexceptional, although possibly giving rise to a cynical view that Australia's attitude to signing international conventions is governed more by expediency - to be applied when it is convenient and to be ignored whenever it is not - than by any genuine desire to be bound. If, on the other hand, the Ministers intended their joint statement to have the legal consequence of removing from this Tribunal the right to consider the merits of a ministerial decision whenever it involves the future of an Australian child, then I find myself placed between Scylla and Charybdis - a rock on one side and a dangerous monster on the other. If I have chosen the 'rock' of the High Court in preference to the 'monster' of two eminent Ministers telling me to take the opposite view, I am comforted in the knowledge that if I am wrong, I will be corrected on appeal.¹⁰²

Deputy President Gerber went on to find that the delegate did not consider the fate of the parties' child in reaching his decision to refuse Ms Lata a permanent visa to return to Australia; further that, giving the child's future 'a primary consideration ... there was every reason to permit this family to be reunited in this country ...'.¹⁰³

The second case, *Re Taxation Appeals Nos WT85/28*,¹⁰⁴ involved the changing interpretations of section 260 of the *Income Tax Assessment Act 1936* (Cth). The excerpts from Deputy President Gerber's judgment speak for themselves:

Section 260 has bedevilled the law almost from the time of its enactment. A decade ago, in Case K50 78 ATC 471, 489, I was moved to observe that whilst the provision might once have been intended to cover the whole body of deliberate tax avoidance, after being washed by *Casuarina* 71 ATC 4068, *Mullens* 76 ATC 4288, *Slutzkin* 77 ATC 4076, *Patcorp* 77 ATC 4225 and *Cridland* 77 ATC 4538, the fabric had shrunk to an extent where there was not enough cloth left to protect Michelangelo's David from a charge of indecent exposure. It is fair comment to observe that sec. 260 had, by the end of the 70s, become the Adam and Even [sic] of the *Income Tax Assessment Act*, in the sense that there were the creationists who believed in the literal interpretation of the section and worked hard and tithed, albeit at 60 cents in the dollar. Dogmatically opposed to these fundamentalists stood the afiscalopalians who regarded sec. 260 as merely symbolic and neither spun nor toiled. Instead, they worshipped the 'choice principle' and hitched their wagons to the silk merchants who went forth into the world opening new trade routes and erecting shrines to this art nouveau on exotic islands.

And behold, there came Three Wise Men from the East called Gulland, Watson and Pincus who steered a narrow course between the Scylla of Newton and the Charybdis of *Slutzkin* with jurisprudential seamanship denied to lesser mariners.¹⁰⁵

101 *Macquarie Dictionary* (1985): 'Any absolute or arbitrary order, regulation or proclamation [or] an edict or order of the Tsar of Russia, having the force of law.'

102 [1995] AATA 381 (Deputy President Gerber, 5 December 1995) [24].

103 *Ibid* [29].

104 [1988] AATA 264 (Deputy President Gerber, 2 September 1988).

105 The Privy Council decision in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1, 2 posed a predication test in order to determine whether the particular arrangement fell foul of s 260:

As I read the various views expressed by their Honours of the majority, it seems that section 260 does not provide a taxpayer with the choice of entering into an arrangement which has the effect of diverting income derived by him to another by resorting to a trust or other device, such as a contract of agency.¹⁰⁶

Michelangelo's David, Adam and Eve, afiscalopolians, the three wise men, Scylla and Charybdis, not to mention Piltown Man's molars – they roll out like Justice Callinan's gaudy carpet. None of these ideas are developed, they contain mixed metaphors, many of them are mutually self-conflicting, and in most cases and certainly in their cumulative effect they serve only to distract which defeats their purpose. One may think they constitute the very kind of indecorous over-dramatisation which Kirby J cautioned against as a sure way of losing any hope of persuasion, which is after all the ultimate objective of judicial writing.¹⁰⁷

VII CONCLUSION

The examples in this paper indicate that predictions of the demise of the use of classical allusions in judgment writing have been sorely exaggerated. They are alive and well and in reasonably good health, bearing in mind that they have always been used but sparingly in any event. The object in each instance of usage should be to inquire whether the allusion is appropriately and enlighteningly used. Does it or do they they enhance the judgment?

From time to time, we hear the trumpet call for more Australian literary sources to be utilised, notably by Kirby J himself.¹⁰⁸ Yet at the very time he was an advocate for this cause in 2001, he was busy utilising Virgil and Homer in 2000 and 2002 in the examples given in this paper. Presumably, this was because they best suited the point he wished to make, and he could not bring to mind any Australian source which was appropriate to the individual circumstances he was describing, and is this not indeed the crux of the matter? It is all very well to call for greater utilisation of Australian literary sources to aid better judgment writing

In order to bring the arrangement within the section you must be able to predicate – by looking at – the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

Slutzkin was one of a series of cases (including also *Mullens v Federal Commissioner of Taxation* (1976) 135 CLR 290, and *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330) which enshrined the choice principle in taxation law: it was perfectly permissible for the taxpayer to choose 'that form of transaction ... which will not subject him to tax, or subject him only to less tax than some other form of transaction might do': *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314, 319 (Barwick CJ). Gulland, Watson and Pincus comprised a trilogy of cases commonly referred to as the 'Doctor's cases' heard together by the High Court and reported as *Federal Commissioner of Taxation v Gulland*; *Watson v Federal Commissioner of Taxation*; *Pincus v Federal Commissioner of Taxation* (1985) 160 CLR 55. They concerned income splitting by the diversion of income into trusts. It was held (Deane J dissenting) that s 260 operated to render the arrangements void for income tax purposes, the arrangements being not capable of explanation by reference to ordinary business or family dealing without necessarily being labelled as a means to avoid tax. In other words, the avoidance of tax was an essential feature of the arrangements.

106 [1988] AATA 264 (Deputy President Gerber, 2 September 1988) [9]–[10].

107 Kirby, above n 6, 613. See also Meehan, above n 7, 441–2.

108 Kirby, above n 6, 608; Michael Meehan, above n 7, 446–8.

but the relevant citations must be appropriate in the context in which they are being used and not contrived or forced or they will lose their appeal. It may be unlikely that an Australian reference will simply come to mind to assist in making precisely the point which the writer wishes to make.

I have conducted a search on the Austlii site, which I do not presume to be exhaustive, against the names of the Australian writers mentioned by Justice Kirby in his 2001 article – Douglas Stewart, James Maccauley, A D Hope, Judith Wright, Manning Clark, Geoffrey Blainey, Kath Walker (Oogeroo of the Nunuccal), Thea Astley, Les Murray, David Malouf, Peter Carey, John Bray – and found a negligible number of references to their works which had been utilised for illustrative effect in judgments. The name of Kath Walker (Oogeroo of the Nunuccal) did appear in Justice Kirby's speech on the occasion of his swearing in as a High Court Justice on 6 February 1996, and Patrick White's name appeared in the Refugee Review Tribunal decision N93/00563,¹⁰⁹ in the context of an applicant for refugee status who had pretensions concerning his status as an artist. Musing about the great burden he had to bear as a writer, White is quoted as saying '[e]very day as I sit down at my desk I struggle to overcome a revulsion for what I am doing. But it had to be done'.¹¹⁰ I'm sure many judges feel exactly the same thing when sitting down to write a difficult judgment particularly when the muse will not appear. There being at this stage no viable alternatives on the horizon, I anticipate that the classical muse will continue to make its appearance in the judgments we read for some time to come, and so far as its replacement by Australian sources is concerned, I would venture to suggest that it is for those who make the call and who are best in a position to do so to start the ball rolling.

109 [1994] RRTA 1460 (Member Hardy, 15 July 1994).

110 Ibid (Member Hardy quoting Patrick White, *Flaws in the Glass*, 1981).