

## **2014 CLEAA Conference**

### **What Aristotle and Homer tell us about educating lawyers?**

You all have a remarkable power: the power to form the lawyers of the future. I now have a remarkable opportunity: the chance to inform you in your exercise of that power.

To do this I want to tell you a story. Telling this story between 2003 and 2006 would have been an offence under Commonwealth Law. The story was then classified TOP SECRET. Now it has been declassified. So I can tell it without fear of prosecution: a rather good thing for a judge. This story is a modern application of the genius of Homer and Aristotle that I wish to share with you this morning.

An essential test of the authority of the law in any society is its capacity to constrain executive power. The sharpest end of executive power is the conduct of war. Just over 11 years ago, in early April 2003, U.S. forces surrounded Baghdad, then being defended by the Iraqi Special Republican Guard. Coalition headquarters in Doha Qatar were directing the US Army's 3<sup>rd</sup> infantry division and the other elements of the air and ground war around Baghdad.

Just as we are again now, Australians were there. A senior Australian commander Brigadier Maurie McNairn, and an Australian

international lawyer, Wing Commander Paul Cronan, were assessing with US, UK and coalition commanders, via secure video link whether the next planned round of air strikes would comply with international law.

US commanders some of 2 star rank - admiral and generals - were then proposing to drop a very large bomb near Bagdad: a purely conventional weapon but one with explosive power similar to the nuclear weapon that destroyed Hiroshima in 1945 – the equivalent of 10,000 tonnes of TNT. The only additional legal background you need to appreciate the nuances of this story is that Australia and the UK are both parties to the 1977 Additional Protocol I to the Geneva Conventions, a treaty that limits the use of force in war to “strictly military objectives” and only authorises destruction in war that offers “a definite military advantage”. The US is not a party to this treaty.

Reconstructed from the available facts, the conversation between the Australian and the US commanders went something like this:

AUS: “Why do you want to use this large bomb?”

US: “To take out the remaining Iraqi forces”

AUS: “But they are already essentially defeated. There is a high risk of excessive civilian deaths and unnecessary military casualties. Your

own documents say the bomb is not suitable for use in built up areas. Nor will such an attack comply with the 1977 Geneva Convention - Additional Protocol 1 - Article 52.”

*US*: “But we are not signatories to Additional Protocol I”

The U.K. officers then joined with the Australians.

*AUS & UK*: “But we both are treaty signatories. We cannot take part in this.”

*US*: “Our command insists these munitions be used.”

*AUS*: “Well, we’ll put our objections in writing.”

*US*: “But what happens if your document leaks.”

*AUS*: “It won’t matter, if you don’t use the bomb.”

*US*: “How are we going to work this out?”

*AUS*: “I think we have the answer”

Brigadier McNairn then paused and reached into his pocket. He pulled out a small piece of red cardboard, two inches square. He held

it above his head and said to the US commanders: “We’re giving you a red card.”

*US*: “You’re giving us a what?”

*AUS*: “A red card. It means in Australian football you have broken the rules and can’t play any more. We are sending you from the field of play. This is our veto.”

Not surprisingly, faced with this, the US commanders sought time out.

You already know what happened next. History shows that no bomb of this massive power was dropped in Iraq in 2003. The Aussie red card worked.

And you also now know something else: you know the source of an image the Australian Defence Force, the ADF used last week, once again as it applied international law. As the ABC reported only last Wednesday evening, an Australian Super Hornet F-18A crew pulled out of, an air strike against Islamic State forces in Iraq, because of the Australian crew’s doubts that the mission was compliant with international law due to the high risk of civilian casualties. The ADF spokesman on the incident said the crew had “red carded” the mission.

What does this story have to do with Homer, with Aristotle, and with lawyers' learning and development? The answer is two themes which I hope will assist your work.

The first theme is that the simple power of narrative, or storytelling, has lasting impact in the way that we all, especially lawyers, present our ideas. My second theme is that much of modern lawyering is about persuasion: persuading others about what are the facts, about what is the law, and about what is good legal policy.

But narrative and persuading others are as old as human history itself. They were hardwired into the human psyche long before we developed the written word. The Ancient Greeks developed extraordinarily sophisticated narrative techniques, which were already evident in the 8<sup>th</sup> century BCE in Homer's epic poems the *Iliad* and the *Odyssey*. And they closely studied the art of persuasion. By the 4<sup>th</sup> century BCE Aristotle had systematized this study into his *Art of Rhetoric*.

One of your objectives is to help develop the best lawyers that you can. A better understanding the use of both narrative and rhetoric will sharpen both your lawyers' self-awareness and their performance.

Let me start with the first theme of storytelling. If you think about the court room, before a trial judge, such as I am, the trial process actually involves layer upon layer of storytelling. Each party tells a story to the Court, each giving a narrative of their version of history. And may I say, like all good stories, some of them are wonderful works of fiction. The Court then listens to those stories, tries to sort fact from fiction and then re-tells its own story of the past back to the parties in the form of a judgment, which finds the facts, and then applies the law. For understandable reasons lawyers and consequently your work, are principally focused upon the back end of this process: streamlining the application of the law to the facts. But storytelling through witnesses, advocates and judges is as essential to the law as the logical process of applying laws. Without it we would have no facts; even worse, we would have no trial judges.

A good story has its own power. It speaks directly to us conveying ideas, without argument, without stating issues and apparently even without complex analysis. Successful advocates recognise and use this in litigation. And, as I will show you, judges enjoy it too

Let me give you an example: go back to our opening story. Without any explicit logical process you will probably have already subconsciously developed from it some impressions, even some conclusions. Here perhaps are some of them. Australia strictly applies international law to restrain the use of force when involved in

coalition war operations. The US acts on the international law concerns of its coalition allies. Australian Defence Force lawyers and commanders adopted a recognisably Australian approach to encouraging allies' international law compliance by successfully deploying humour and sporting metaphors.

And what do we know of those ADF lawyers in Qatar in 2003? They graduated from our Law Schools. Their legal studies, their later legal learning and development, and their ADF training all equipped them well to give the strong, effective, analytical, ethical and ultimately lifesaving advice that they did in April 2003.

These are all ideas that this story gives us in just a whisker of time.

The importance of storytelling in the common law tradition is not surprising. From the middle ages our Courts developed out of community participation in decision-making at the village, baronial and royal level, aided by the use of juries. Even earlier legislation developed from community narratives in much the same way. For example the *Law Code* of King Alfred in the 9<sup>th</sup> century is generally expressed in the form of brief hypothetical narratives based on the concrete human events on which they are based. Listen for example to King Alfred's laws about troublesome dogs:

“If a dog tears or bites a man, 6 shillings shall be paid for the first offence. If its owner continues to keep it, 12 shillings shall be paid for the second offence, and 30 shillings for the third.

1. If the dog disappears after committing any of these offences, this compensation must nevertheless be paid.
2. If the dog commits more offences and he [its master] still keeps it, he must pay compensation for whatsoever wounds may be inflicted, according to the amount of the [injured man’s] full wergeld.”

In this code you can actually see the dogs causing mischief. It’s a pity we don’t write narrative legislation like this anymore!

Why do stories appeal to us? Let’s ask the Australian author and literary critic Gerard Windsor. He said of the art of story-telling, when speaking recently at a Sydney Grammar School speech day, “For a start stories give us profound pleasure. Apart altogether from what they narrate, they please us by their shape, they answer to a deep need in us for unity and harmony. This effective completeness is evident in short stories as well as in epic quests such as the Odyssey”. Gerard Windsor explains, “...in the overwhelming avalanche of time we make up blocks of significance or meaning and we grasp onto them. We all spontaneously create stories out of the chaos of existence”.

And that is just why stories work so well within the court room. To a judge it is a pleasure to listen to the narratives of witnesses, and the submissions of counsel, another layer of re-telling of the story, which when well-crafted can be extraordinarily effective as narrative. Through these superadded levels of narrative our imagination pictures the events, forms its impressions and starts to create some structure out of chaos.

I am not the first judge to notice this. When the landmark native title case of *The Wik Peoples v Queensland* (1996) 187 CLR 1, opened before the High Court in June 1996 Justice Kirby had only been a member of that Court for four months. Walter Sofronoff QC, opening for the Wik Peoples made a lasting impression on his Honour, who tells the story of what happened (see his introduction of the Hon. Justice Michael McHugh AC's speech *The Rise (and Fall?) of the Barrister Class*:

“A hush fell on the courtroom as he approached the central podium. He did not squander that historic moment. He opened his submissions in a most unusual way. He did so by talking in word pictures. His submissions commenced, as I recall, with a vivid description of the beauty of the Wik country in the northern part of Queensland. On 1 April 1915, in that country, he said, the Wik people were going about their daily lives as they and their ancestors had done for aeons. The men were getting their bark boats ready to fish because it was a clear day.

The women were sitting with the children, teaching them about their traditions. Some older children were running off into the bush. At the very same moment, in the Land Titles Registry in Brisbane, the representatives of the Mitchelton Pastoral Holding were registering a pastoral lease under the Queensland Act. In the old measurements, it laid claim to an area of 535 square miles, approximately 1385 square kilometres.

Sofronoff took our minds up to the Holroyd River district. The Wik people continued to live after their traditions. They went about their daily lives, untroubled and unconcerned by the happenings under white man's law in the Land Titles Office of which they had no knowledge. They rarely came into contact with the leaseholders. A vivid picture was painted of two communities, each with legitimacy according to its own perspective and laws. But could their legal claims live so quietly together?"

Advocates can set the legal scene with pure narrative. But judges are narrators too. The greatest exponent of the art of judicial story telling within my legal lifetime was Lord Denning. Some of you may be familiar with the opening paragraph of his celebrated judgment in *Miller v Jackson* [1977] 3 All ER 338. It is always a pleasure to hear it. Some of you may remember it from Law School. But as I read it to you now be conscious of just how it is working on you. Can you stop his images flooding into your mind? Here it is.

“In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much

against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.”

You can infer the result without going much further. The injunction was dissolved. Again ideas and conclusions are being conveyed without explicit argument – simply by telling the story well and telling it first.

Walter Sofronoff, Justice Michael Kirby and Lord Denning are all using ancient techniques, as they deploy their narrative in these passages. They draw on a powerful tradition of storytelling that is intertwined with the origins of Western culture itself, a tradition which we first recognise in the epic poetry of Homer.

And Homer’s Iliad is a compelling metaphor for litigation, which after all is a kind of controlled warfare between members of our society, played out according to a set of rules. Like the characters in the Iliad in which the Greeks besieged Troy for ten years the parties to litigation can often fight one another to exhaustion. The ancient story of the Iliad plays itself out in the court room as the narrative unfolds before me more often than I would care to say. Simply to read the tight economic poetry of the Iliad is an illuminating resource for

understanding some of the characters we meet as lawyers. I have often seen these character types. The talented and god like and self-absorbed Achilles bent on destroying all before him, not only his Trojan enemies, but quarrelling ferociously with his Greek allies. Hector the responsible family man defending his Trojan society, his very existence imperilled by forces arraigned against him. Cassandra, a somewhat powerless and a disordered female character who warns everyone exactly what is going to happen; and, it does happen exactly as she says, except the problem is - no one believes her.

The Iliad records a terrifying time of conflict, a conflict between men, but conflict which the Gods play a part that puzzles the human actors. There is an engaging scene in the Iliad Book 3 in which King Priam of Troy is standing on Troy's walls looking at the Greek Army with Helen, who as we know has caused all the trouble by leaving her Greek husband, King Menelaus and eloping to Troy with Priam's son, Paris. The Trojan population are naturally murmuring discontent against Helen, whose conduct has brought all this upon them. But then Priam does something marvellous, as Homer says in *Iliad*, Book 3, lines 195-200:

“They murmured low but Priam, raising his voice, called across to Helen, ‘Come over here, dear child. Sit in front of me, so you can see your husband of long ago, your kinsmen and your people. I don't blame you. I hold the gods to blame. They are the ones who brought this war upon me, devastating war against the Achaeans-’”

Much of litigation too is about the allocation of blame. Amidst the mutual finger pointing and recriminations that are common in court rooms, I don't have the advantage of being able to blame the Gods. But by reading the Iliad I can be reminded that even the Gods like humans can start disputes for trivial reasons. After all, it was the judgment of Paris who decided that Aphrodite was more beautiful than Hera or Athena, that turned the Gods into factional warriors for Troy or Greece: like the origins of most litigation, this was hardly an adequate reason for so much destruction. So take comfort most of the dramas in which you and your lawyers are involved with in the law have been played out before.

How can you use this? A mastery of such storytelling is immensely useful for any advocate of an idea. For example, from time to time each year I run a busy Equity Duty list. Barristers and solicitor advocates crowd the bar table at 10.00am in a scrum vying for priority in judicial attention. The Court must triage available judicial resources to deal with a press of urgent cases. The talented advocate who can compress all her ideas into a tight economical and interesting story has a huge advantage in securing the Court's attention. What does that advocate do. She stands confidently at the lectern, takes the initiative and says "Your Honour, this is what it's all about". I know I am going to enjoy what's coming next: she's going to tell me a story.

So you can use this immediately to empower the lawyers whose careers you are seeking to develop. You can add it to those regulated and substantive law subjects you must of course include in your curriculum: everything from client development, to limiting liability for misleading and deceptive conduct, to construction contracts, to in house legal professional privilege and to regulation 176 lectures. Ask your lawyers to imagine their cases, their submissions, and their presentations to clients and counterparties, conveyed simply as a story, before they begin to structure the detail of their arguments and just see what happens. If the story can be told first, followed by the argument they will add special power to everything they present to a client, to an adversary, or to a Court.

Run an in-house competition. Take a brief you have already sent to counsel of two lever arch files plus; any brief – however boring. Ask your young solicitors to read it and turn it into a story they must stand up and tell in public in just two minutes. Give prizes for economy in storytelling whilst delivering legal accuracy. But also reward humour, sheer inventiveness and the simple pleasure of hearing them tell their stories well.

Who will teach this to your people? Australia is full of talented novelists, critics and authors. But as you can see the law is also full of dedicated storytellers at every level. But I am confident you will unleash within your own lawyers some amazing storytelling talent

that you will stand back and admire; and importantly they will enjoy it too.

That brings me to rhetoric, our second theme. Here the path is clearer.

All written and oral submissions are a form of rhetoric. Understanding the wider principles of rhetoric will always improve lawyers' written submissions. Aristotle wrote the first complete *Art of Rhetoric* in 332BCE, defining rhetoric as “capacity to discover the possible means of persuasion in each situation”. For every advocate who is caught with what seems like an impossibly difficult case this is an inspiring definition. Aristotle is really telling us that the means to persuade already exist, like the statue hidden in the unsculpted marble, they only have to be discovered.

The *Art of Rhetoric* is really about the very wide range of choices available to the speaker, the persuader. Rhetoric schools date from about 500BCE. In ancient times rhetoric was the art of survival. Rhetoric was used to promote or resist ostracism, or exile, from the Greek city state, in criminal prosecutions and in the election of generals in Greek Armies. Every Greek citizen had expertise in the subject.

Now is not the time to give a dissertation on the *Art of Rhetoric* other than to describe it in bare profile and explain how you can use it.

Aristotle essentially divided the process of communication into three parts: ethos the speaker's character; logos the content of the argument and pathos, the audience and its emotions. An understanding of this division separates the best advocates from the others. The speaker's character or ethos is as important in the court room as it is in politics or anywhere else. By written and oral submissions an advocate shows character by taking only meritorious points, by making appropriate concessions, by clearing arranging and sifting material, dealing with the other side's best points and fairly representing the other side's case.

Logos is in reality the very stuff which you teach, the law and the argumentative process that leads to legal conclusions.

Pathos is an understanding of the speaker's audience, their emotions, their feelings and their reactions. A jury, for example, is a very different audience from a judge. But an understanding of the aim of much judicial decision-making particularly in the exercise of discretion is an exercise in pathos. Even minimising emotional appeals for judges shows a correct understanding of an advocate's judicial audience. The other thing that advocates need to know about their judicial audience is that judges already know much of their subject and time poor must decide fairly quickly, and so expect material to be tailored accordingly.

Perhaps the finest speaker in pure classical oratory using Aristotelian methods these days is President Barrack Obama. If you have not

already seen it I commend your attention to his address to the 2004 Democratic Party National Convention.

Rhetoric is a welcome addition to learning and developing courses. The New South Wales Bar Association tried an experiment in 2007 and taught six lectures on the subject. The room in which you now sit, which was a little larger then, was packed with over 300 people for each one of these lectures. The series was immensely successful, attracting interest from classics scholars and lawyers and speech writers alike. Justice Kirby, Justice Michael McHugh, Justice Dyson Heydon and Mr Grahme Freudenberg, Gough Whitlam's speech writer all spoke to wrapped audiences.

When I asked Michael McHugh whether he thought such a series would be a good idea, he explained that he had often consulted Aristotle's *Art of Rhetoric* during his career as a barrister: so his answer "yes". Organised by Justin Gleeson and Ruth Higgins it was later published in a book called Gleeson, J & Higgins, R. eds. (2008) *Rediscovering Rhetoric: Law, language, and the practice of persuasion*, Sydney: Federation Press, which I commend to your attention.

In the end I hope you now take away with you this morning some ideas from the classics and I expect that you can apply them directly. And if you do I am sure you will enjoy watching the results.

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