

**Hellenic Lawyers Association
International Conference
Rhodes, Greece, 9 July 2018**

“Rhetoric and Reasoning – Contributions to the Common Law”

**The Hon Susan Kiefel AC
Chief Justice of Australia¹**

Methods of logical argument and the art of persuasion through reason were at the heart of the philosophical enquiry which was founded and developed by the ancient Greeks. Aspects of them are to be found in the processes of argument and persuasion which are used in common law courts and in the methods employed by common law judges. In these respects the common law is the beneficiary of the ideas and writings of Plato, Socrates and Aristotle, amongst others, over two millennia ago.

Other influences of the dialectical methods they employed have been felt by the common law more indirectly. They would be used by three groups of scholars in Europe in the period from the 12th century to the 18th century first to shape a body of law, then to synthesise Greek philosophy and Roman law and then to disperse the resulting doctrines to the civilian and the common law.

The dialectic method

Skills of argument and persuasion were important in the times of the ancient Greeks. The nature of participative democracy in Athens and the other city-states required citizens to take part in political debate. This required the majority of citizens to listen to the speeches of orators and decide between them. They might be required to speak on their own behalf if they came before a judicial assembly,

¹ I am grateful to Professor Paul Cartledge of the University of Cambridge for his review of aspects of this speech.

which might consist of a jury of law and fact comprising more than 200 citizens². It was therefore necessary for some citizens to receive instruction in the skill of argument. It is not necessary to survey the differences of purpose which informed the methods employed by the sophists on the one hand and philosophers such as Socrates on the other.

Socrates' method of argument was reasoning through dialectic – a dialogue between the proponents of opposing views. The hallmark of this method was that it concerned a specific problem. Techniques of persuasion were employed to bring the audience to the desired point of view or, at the least, to conclude that it was acceptable. Its possible application to the adjudication of legal disputes is evident, as are the techniques which were employed.

They involved: (1) refutation of an opponent's thesis by drawing from it, through a series of questions and answers, consequences that contradict it or that are otherwise unacceptable; (2) deriving of a generalisation – again by questions and answers – from a series of true propositions about particular cases; and (3) definition of concepts by the techniques of distinction, via repeated analysis of a genus into species, species into subspecies and so on³.

It is the second, inductive reasoning, which Aristotle described as involving a passage from the particular to the universal⁴ which may be most familiar to our judges and lawyers. He considered that inductive logic is preferable to deductive logic in dialectical reasoning for the reason that it is clearer and more convincing to people⁵. This may in part account for its use by judges on occasions when seeking to make a new rule.

² Adriaan Lanni, *Law and Order in Ancient Athens* (Cambridge University Press, 2016) 11.

³ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 132-133.

⁴ Aristotle, *Topics*, Book 1, Part 12.

⁵ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 133.

Aristotle's refinement of the dialectic method involved, amongst other things, drawing a distinction between reasoning from premises which are known to be true (such as "all men are mortal") and reasoning from premises that are accepted among reasonable and reputable persons but may be debateable (such as "man is a political animal")⁶. The distinction to which he pointed is that the first may be apt to demonstrate a truth but the latter cannot, because its premises are open to dispute. Certainty, such as may be required by science, cannot be reached. In his view it was this feature which made inductive reasoning the province of dialectical argument. It also renders it suitable to the law.

Induction and deduction

In ancient Athenian democratic courts there was no concept of precedent. Whilst our system does evolve rules which are followed, it cannot provide an off-the-shelf answer to every legal problem. As Justice Windeyer observed in *Skelton v Collins*⁷, it is simply not true to think that the common law is composed of a body of rules waiting to be declared and applied in a given case. In difficult cases which present novel situations there may be no rule which applies to the particular circumstances. It might also be the case that if an existing rule is applied to the particular circumstances an unjust result would follow. In either case, a remedy might not be possible.

In situations such as this the solution may be found by the common law courts in accepted judicial methods of extending the law or creating new legal rules. The processes of induction and deduction may be utilised to that end. Recently in *PGA v The Queen*⁸, it was said that the creative element of inductive and deductive reasoning in the work of the courts includes taking the steps

⁶ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 133.

⁷ *Skelton v Collins* (1966) 115 CLR 94 at 134; [1966] HCA 14.

⁸ *PGA v The Queen* (2012) 245 CLR 355 at 372-373 [29]; [2012] HCA 21.

identified by Sir Owen Dixon in his well-known address, "Concerning Judicial Method"⁹. These are: extending the application of settled principles to new cases; reasoning from settled legal principles to new conclusions; and deciding that a category is not closed and that unforeseen circumstances might be included in it.

In *Home Office v Dorset Yacht Co Ltd*¹⁰, Lord Diplock described induction as the first step of the judicial enquiry towards a new rule. Paraphrasing to an extent his explanation of it:

"In all the decisions that have been analysed a duty of care has been held to exist whenever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent."¹¹

The second step of judicial analysis he said, is deductive and analytical. At this point the proposition is converted to:

"In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises."

The rule is stated. The features of the case at hand are then examined to see if they possess these characteristics and, if they do, a duty of care might be held to arise.

The process may not be quite as black and white as these statements suggest. Induction and deduction are, after all, acknowledged to have a creative element. A judge needs to have a general idea of what kinds of acts or

⁹ Sir Owen Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 472.

¹⁰ [1970] AC 1004.

¹¹ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1059.

relationships ought to give rise to a duty of care. The rule proposed will have a kind of shape. Especially is this so with respect to inductive reasoning.

This intuitive aspect of the judicial method is perhaps exemplified by the reasons given by Lord Atkin in *Donoghue v Stephenson*¹², which has been regarded as a leading example of the use of inductive reasoning. The question for the House of Lords in that case, you will recall, was whether a manufacturer should be held liable to the ultimate consumer of its product for injuries suffered by consumption of it. Mrs Donoghue had become ill after drinking ginger beer in which a snail had been decomposing. Liability at this point in English law was generally limited to the initial purchaser from the manufacturer, by reference to the contract between them. The issue was whether liability should be extended beyond that.

Lord Atkin surveyed the decided cases. He remarked that it was difficult to find in the English authorities statements of general application defining the relationships between parties that give rise to a duty of care¹³. The courts had engaged in an elaborate classification of duties with respect to property and made further divisions as to ownership, occupation and control, and drawn distinctions based on particular relationships such as manufacturer, salesman, landlord and tenant, but no general rule had been stated¹⁴. And yet, he said, logically there must be some element common to the cases where liability is established. There must be some “general conception” of relations giving rise to a duty of care¹⁵. He said that “[t]he rule that you are to love your neighbour becomes in law, you must not injure your neighbour”¹⁶. He went on, more controversially and creatively, to identify who in law might be one’s neighbour.

¹² [1932] AC 562.

¹³ *Donoghue v Stephenson* [1932] AC 562 at 579.

¹⁴ *Donoghue v Stephenson* [1932] AC 562 at 579.

¹⁵ *Donoghue v Stephenson* [1932] AC 562 at 580.

¹⁶ *Donoghue v Stephenson* [1932] AC 562 at 580.

An earlier example of this method of reasoning is Blackburn J's judgment in *Rylands v Fletcher*¹⁷. It was there reasoned that a general rule could be discerned from a variety of cases concerning the duty of owners of land. Whether things brought onto land be beasts, water, filth or stench, he said, a person is prima facie answerable for all the damage done by them if they escape¹⁸. Closer to home, in *Australian Safeway Stores Pty Ltd v Zaluzna*¹⁹, it was said that although the decided cases had given different categories of duties owed by occupiers to different types of entrants, they were merely an expression of a more general duty which applies to the particular situation.

It will be observed that inductive reasoning is used in tort law, probably for the reason that novel situations more often arise in that area of the law. The method is more readily capable of application in an area of law which deals with highly specific fact situations. It may not be so useful in an area such as criminal law.

Lord Simon of Glaisdale said as much. He accepted that whilst inductive reasoning may be utilised to develop general principles of criminal law, "special caution" is required²⁰. He considered that an "inductive, syncretic process is apt to give a special dynamism to a rule of law"²¹. But, he said, the potential of dynamism means that care should be exercised in using a process of generalisation in criminal law. Criminal law jurisprudence tends to proceed more cautiously from case to case, to define categories and state principles with a close regard for authority²². It may be observed that the method he mentions is also a reflection of the dialectical method.

¹⁷ (1866) LR 1 Exch 265.

¹⁸ *Rylands v Fletcher* (1866) LR 1 Exch 265 at 280.

¹⁹ (1987) 162 CLR 479 at 487; [1987] HCA 7.

²⁰ *R v Withers* [1975] AC 842 at 868.

²¹ *R v Withers* [1975] AC 842 at 867.

²² *R v Withers* [1975] AC 842 at 867-868.

Rhetoric

Of course judges have only reached the point of reasoning to a conclusion after hearing and reading arguments put by the parties. The method of adjudication in common law courts involves, in the first instance, an argumentative process. In a novel case the advocate for the person claiming the remedy seeks to persuade the court that the existing law should be extended or developed; the advocate for the defendant seeks to dissuade the court from taking that course by pointing up difficulties in the plaintiff's argument or consequences which might make its acceptance unattractive. To an extent they are involved in rhetoric, at least as that word was originally understood.

Dialectic argument produces persuasion, Aristotle said. He may not have been the first proponent of the art of rhetoric, but he is regarded as the most systematic and complete in his approach. He compared "artful" to "artless" proofs in argument. Rhetoric he defined as the ability to see the available means of persuasion and then to employ them²³.

The first method of persuasion which he identified seems admirably suited to the courtroom. It involves the credibility of the speaker. It is well known that a barrister is more likely to be effective if the court takes the view that he or she is reliable and therefore more likely to be correct. In what some have called the golden age of the English Bar, Sir Edward Marshall Hall is said to have been amongst the greatest of its advocates. He was by all accounts a tall, handsome man with a melodious voice. He was able to instil in jurors the conviction that he actually believed the case that he was presenting to them²⁴. Therefore, to reject his argument was tantamount to saying that he was dishonest and they felt unable to do so.

²³ Aristotle, *Rhetoric*, Book 1, Part 2.

²⁴ Charlie Broad, *Advocates of the Golden Age* (John Long, 1958) 17.

The second method of persuasion is sensible. It requires the person putting the argument to take account of the emotional state of the audience. This might be approached in a number of ways in a courtroom setting. Experienced counsel will be aware that judges expect argument and the examination of witnesses to be conducted with tact and courtesy. It is also to be expected that counsel will be alert to the concerns which judges convey about aspects of the argument. This requires judges to participate in the dialogue.

Sir Rufus Isaacs, later Lord Reading, was said to have no equal at the bar for persuasive reasoning²⁵. He was unerringly courteous and fair. Therein lay his success. An example is given of a controversial case which he was prosecuting as Attorney-General. The evidence given by the accused was of critical importance. Isaacs' cross-examination was described as deadly. During what was a lengthy cross-examination it is said he never once raised his voice, never argued with the accused, never interrupted him and scarcely put a leading question. A strong case became a conclusive one.

Murray Gleeson, who is acknowledged as having been a great advocate, had a similar style. He has often counselled the Bar that the art of persuasion requires sensitivity, tact, objectivity and selectivity. He described sensitivity as awareness of the considerations likely to influence the person sought to be persuaded. Tact he explained as requiring an appreciation of the likely response of the audience to particular levels of argument²⁶.

Which brings me to the third method of persuasion which is effected through the argument itself. The proposition in question is rendered acceptable by persuading the audience that it is a view held by all, or at least the most wise. This is a technique barristers commonly deploy to persuade judges.

²⁵ Charlie Broad, *Advocates of the Golden Age* (John Long, 1958) 147.

²⁶ Murray Gleeson, "Advocacy" in Hugh Dillon (ed), *Advocacy and Judging: Selected Papers of Murray Gleeson* (Federation Press, 2017) 11 at 13.

In the early years of the High Court, Justices Isaacs and Higgins were the subject of criticism by a newspaper about the rhetorical language with which they “thought fit to clothe their dissenting judgments”²⁷. Professor Sawyer has suggested²⁸ that Justice Isaacs was given to rhetoric and to repetition.

One such occasion involving the use of rhetoric concerned the question whether an action which was available to a husband for the loss of his wife’s affections should also be made available to a wife for the loss of her husband’s. In each case the defendant would be the person who stole the spouse away. Justice Isaacs appealed to the common experience and modernity of his reader in arguing that there was no logical reason to deny the action to a wife. After quoting some passages from *The Taming of the Shrew*, he said:

“There is no need of antiquated reasons springing from a primitive state of civilisation originally impressed into service to attain justice, later abandoned in favour of better reasons, and today utterly repugnant to the present conditions of society. Still less is there any justification for rummaging among the ruined and abandoned structures of the past to find materials for erecting a barrier against the wife’s claim for redress, when a clearly recognized principle of law admits it.”²⁹

Hardly any lawyer would be unfamiliar with the use of rhetoric by Lord Denning in the opening paragraph of some of his judgments, usually in tort cases:

“It was bluebell time in Kent. Mr and Mrs Hinz had been married some 10 years, and they had four children, all aged nine and under. ...

²⁷ *The Argus* (Melbourne) 26 October 1912, 18.

²⁸ Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 130.

²⁹ *Wright v Cedzich* (1930) 43 CLR 493 at 503-504; [1930] HCA 4.

... Mrs Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr Hinz and the children. Mr Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs Hinz, hearing the crash, turned round and saw this disaster.”³⁰

This is, unashamedly, an appeal to the reader’s emotions.

It might be thought that in more recent times courts rarely use rhetoric of the kind employed in these cases. However, in *Mabo*³¹, Justices Deane and Gaudron openly acknowledged that the language used in their reasons was “unusually emotive for a judgment in this Court” and sought to explain that it was necessary to describe “the dispossession of Australian Aborigines in unrestrained language”. It was necessary, they said, because “the full facts of that dispossession are of critical importance”.

The original conception of rhetoric in dialectic argument was not an appeal to emotion. It was an appeal to reason. It may be, in part, that because rhetoric has come to be understood as emotive that the term now carries negative connotations. It did for Plato too who despised some sophists, would-be teachers of rhetoric, as mere charlatans and likened even eloquent and persuasive orators such as Pericles to a mere pastrycook stuffing the masses with sweetmeats, which is to say, appealing to their baser emotions. Rhetoric is now defined in the Oxford Dictionary not only as “the art of effective or persuasive speaking or writing” but also as language which is “often regarded as lacking in sincerity or meaningful

³⁰ *Hinz v Berry* [1970] 2 QB 40.

³¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 120; [1992] HCA 23.

content". The prevailing view, it is said, is that rhetoric is "largely a trick to be exposed and shunned"³².

The authors of these remarks are members of the New South Wales Bar who are editors of a recent collection of essays the purpose of which is to encourage the rediscovery of rhetoric in advocacy in the courts. The rhetoric of which they speak is the technique employed by the ancient Greeks. There may yet be hope for its recovery.

The further legacy

Professor Harold J Berman³³ explains that dialectic reasoning was imported into Rome by the Stoics in the republican period, in the second and first centuries BC. However, their view of its use differed from that of Aristotle. They saw it as a method of analysing arguments and defining concepts by distinction and synthesis rather than as a method of arriving at first principles. It was used in Roman legal institutions but not as part of Roman law.

Cicero is said to have admired the Greek methods³⁴. He, like many well-educated persons of his time, was familiar with Aristotelian philosophy and methods of argument. In fact he studied in Rhodes³⁵. He considered Roman law to be too focused on individual cases and to have rules of narrow application. He argued for a more complex system of law with broader, more abstract rules. But

³² Justin Gleeson and Ruth Higgins, "Introduction" in Justin Gleeson and Ruth Higgins (eds), *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion* (Federation Press, 2008) xv at xix.

³³ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 134-136.

³⁴ James Gordley, "The Method of the Roman Jurists" (2013) 87(4) *Tulane Law Review* 933 at 945.

³⁵ Richard Enos, "The Art of Rhetoric at Rhodes: An Eastern Rival to the Athenian Representation of Classical Rhetoric" in Carol Lipson and Roberta Binkley (eds), *Rhetoric before and beyond the Greeks* (2004) 183 at 193

he was an orator and he was unable to influence the jurists. His suggestions were apparently met with polite silence³⁶.

The philosophy and methods of dialectic reasoning could have been entirely lost as interest in the ancient Greeks waned over the centuries. The bringing together of Roman law, as later developed and codified, and Greek philosophy was not to occur for over a thousand years in the universities of western Europe.

Maitland called the 12th century “a legal century”³⁷. Others consider that it marked the beginning of a Western legal tradition³⁸. At this time there was no body of rules called the law and little thought had been given to values or concepts which might inform any kind of system of law. Scholars of this period set about creating a whole set of rules which could be used to interpret each part of the whole.

Three ingredients are identified as then present and necessary for the creation of this body of law. The first was the rediscovery in an Italian library of Justinian’s Digest, written six centuries earlier. This provided an extensive body of Roman law as a basis for the second ingredient – the scholastic method of analysis and synthesis. The third was the context in which this took place: the universities which had now been established and at which law was being taught³⁹.

Professor Berman explains that the scholastics presupposed the absolute authority of some texts, such as the Bible and the Digest, but at the same time acknowledged gaps and contradictions in them. They proceeded to summarise the

³⁶ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 139.

³⁷ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 120.

³⁸ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 120.

³⁹ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 123.

texts, close the gaps and resolve the contradictions. The method was called “dialectical” in the 12th century sense, which was to seek the reconciliation of opposites.

The scholastics differed from the Greek philosophers in their belief not only in there being universal legal principles but also in the nature of those principles. Nevertheless they carried Aristotle’s dialectics over into the body of law, achieving a level of synthesis⁴⁰.

A further synthesis was to be achieved in the 16th and 17th centuries by the late scholastics. Professor James Gordley⁴¹ says that the traditions of Greek philosophy and Roman law were then united more closely than they had ever been or ever will be. By this time the writings of Thomas of Aquinas had become influential. Questions which they raised about justice and Aristotelian principles were applied to Roman law. In this way Roman law was organised and presented as a commentary on the Aristotelian and Thomastic virtues of justice.

The conclusions of the late scholastics were in turn disseminated throughout Europe in the 17th and 18th century by the northern natural law school, founded by Hugo Grotius. This occurred even though interest in Aristotelian philosophy was in decline. The members of the school may have been vague about the philosophical underpinnings of these conclusions, but they nevertheless drifted on over time and place⁴².

Professor Gordley suggests that the late scholastics’ conclusions, which had been informed by Aristotelian thinking, were imported into the common law. The

⁴⁰ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Harvard University Press, 1983) vol 1, 140-141.

⁴¹ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 1991) 69-71; see also James Gordley, “The Method of the Roman Jurists” (2013) 87(4) *Tulane Law Review* 933 at 948.

⁴² James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law* (Cambridge University Press, 2006) 45.

English treatise writers borrowed doctrines from the natural lawyers such as Grotius and Pufendorf and from French jurists whom they had influenced, such as Domat and Pothier, who were influential in the drafting of the French *Code Civil*. The doctrines the treatise writers borrowed were then, in turn, borrowed by common law judges⁴³. He gives as an example Blackstone's definition of a contract as "an agreement upon sufficient consideration to do or not to do a particular thing" and says that there was nothing novel about it⁴⁴. Blackstone was not in fact describing English law, but rather natural law, informed by much earlier thinking.

Conclusion

Western civilisation owes much to the ancient Greeks and their philosophy of persuasive argument and rational reasoning. Their methods inform much of the approach of common law courts to adjudication.

Here today in Rhodes, where Cicero studied, we can reflect upon the possibility he saw of its wider influence on substantive law. We can be grateful that later scholars would return to those methods of reasoning in creating bodies of law which in turn have shaped some of our legal doctrines. More broadly, we might agree with the observation that the legacy of the Greeks to Western Philosophy was Western Philosophy⁴⁵.

⁴³ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 1991) 134.

⁴⁴ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 1991) 136.

⁴⁵ Bernard Williams, "Philosophy" in Moses Finley (ed), *The Legacy of Greece: A New Appraisal* (Oxford University Press, 1981) 202.