Briefs

JUDGMENTS

The psalmist's foot: a parody of the art of judging

Humour aside GRAEME ORR believes there is some serious and worthwhile work to be done examining the changing nature and fashions of judgment writing.

The following is extracted *verbatim* from the first page of a recent High Court decision concerning contractual interpretation. The reasons for judgment, at a relatively brief 14 pages, form a rare example of judicial brevity from the increasingly verbose High Court. Almost as rare for that ever controversial Court, the decision comes from a case which will make little impact on the shape of the law. However, whilst in length and general importance the judgment is essentially limited, the judgment of Justice Kirby is a gem: thrown into sharp relief by the exceedingly simple, open-and-shut style of judging adopted by the majority judges.

The case goes by the reassuring name of *Johnson v American Home Assurance Company* [1998] HCA 14. The plaintiff had suffered a purely accidental, but grievous injury to his foot. By the time the matter reached court, he had recovered to the point where he could walk, but not barefoot, not for lengthy periods, not without chronic pain, and under the lingering prognosis of possible eventual amputation. He disputed his insurance company's decision that his injury was not the 'permanent, total loss' of that foot.

There is nothing inherently humorous in the case itself: the accident was tragic whilst the point of law was mundane. What renders the case both relevant, and humorous, is the contrast between the approach of the majority and Justice Kirby to their judgments. The majority simply assented to a three-page judgment of Justice Hayne, who found for the insurer on the common sense basis that the plaintiff retained some not insignificant use of his foot, as a foot, and in doing so adopted a literal approach to interpretation. The tick-a-box approach of the justices who concurred with Hayne J, whether through pressure of other work, or whether because they felt the case could be resolved so briefly and inelaborately, is a surprising, indeed exceptional antithesis to the tendencies described above. It recalls the more mechanical conception of judging that once prevailed.

Justice Kirby in dissent, however, constructs an eleven-page judgment that twists and turns over the unanswerable question of whether to interpret an insurance contract literally or to hunt for ambiguities to read in favour of the insured, and does so over a terrain of comparative United States, English and New Zealand case law. But before he does so, he embellishes his opening with a parabolic parable — a Biblical homily which makes for a highly individualistic and, ultimately, incongruously tangential opening paragraph:

> *Johnson v American Home Assurance Company*
>
> Insurance — Construction of policy — Whether 'permanent total loss' of foot — Some use of injured foot with orthotic aids — No total loss. Words and Phrases — 'Permanent total loss'.
>
> BRENNAN CJ. I agree with Hayne J. The appeal should be dismissed.
>
> McHUGH J. I agree with the judgment of Hayne J.
>
> GUMMOW J. The appeal should be dismissed. I agree with the reasons of Hayne J.
>
> KIRBY J. The ninety-first Psalm reflects the common human fear of injury to the foot. The Psalmist promises rescue from various misfortunes. The angels, we are assured, will take charge over the righteous ... : 'They shall bear thee up in their hands, lest thou dash thy foot against a stone'.
>
> Unfortunately, angels did not intervene to protect the appellant's foot. But he had an insurance policy. This case concerns his attempt to obtain earthly rescue from the insurer ...[1]

Imagine Kirby J, remembering a snatch of scripture from his Methodist youth and then having his associate comb the bible to reference the quote. One hopes he did so more with a sense of whimsical irony than piety.

But imagine the possibilities this style of judging opens up! Imagine each judge spicing up the bureaucratic language of modern judgment writing with illuminating or pretentious allusions, drawn from literature and other sources, whether inspirational or tangential.[2]

> *Multicorp Ltd v Commissioner of Taxation*
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> Income tax — use of trusts to avoid or minimise tax liability — construction of s.2468.9105(1)(a)(i) of the *Company Taxation (Incredibly Dry and Complex Bits that Even We Don't Understand) Act (Cth) 1998* — whether 'corporate trust managed by holding company with intent to advance trading or financial interests of a subsidiary'.
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> BRENNAN CJ. His Honour Christ J was quoted as saying 'Render therefore unto Caesar the things that are Caesar's' (*Matthew* 22:21). This pronouncement has been the subject of much exegisis: much more than s.2468.9105(1)(a)(i) of this Act. This is is a shame because the provision in question in this case is particularly impenetrable ...
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> GAUDRON J. This case involves a taxpayer company, which had a trust, managed by a holding company. When my associate entered all these three terms into the browse and search facility on the Austlii database, she came up with the following list of 124 cases (set out in appendix A to this judgment) ...
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> McHUGH J. There is a well-established public policy that the revenues of the nation should be fairly borne amongst the citizens and taxpayers of the nation, and that the revenue raising purposes of a tax statute should not be undermined by literal readings and subterfuge. There is also a well established public policy that taxpayers are free to order their business affairs so as to limit their tax burden. Ummm ...
>
> GUMMOW J. The principles of taxation law and their interaction with the principles of equity raise complex and insoluble dilemmas that go to the heart of both public and private law in Australia. For that reason, I will now turn to a lengthy discussion of Manx taxation law, which has grappled for some time with a problem indirectly related to that raised by the present

litigation. As Deemster O'Rourke said in *General Products v Revenue Department of the Isle of Man* (1725) Manx Rep 12 ...

KIRBY J. 'Cause I'm the taxman, Yeah, Yeah I'm the taxman / And you're working for no-one but me': *Re: The Taxman* (1966) Revolver Side 2, per Harrison, G. When The Beatles sang these words, little did they realise they would be quoted in an Australian court in 1998. But they have been. By me. Surprisingly, during the course of argument, counsel for neither party referred the court to pop music. However in tape-recorded submissions exchanged following the hearing, both sides tendered some groovy examples of late 60s British Blues musicianship. Unfortunately the taxpayer here was not familiar with the warnings of the Fab Four. But to turn to the matters raised by the pleadings in this case ...

HAYNE J. This is an appeal from a decision of the Full Court of the Federal Court of Australia, reversing a decision of a single judge of the Federal Court upholding an order of the Administrative Appeals Tribunal (Taxation Division) in part affirming and in part denying an appeal from a ruling by the Commissioner of Taxation rejecting an application by the taxpayer-appellant for a ruling under section so on and so forth &c ...

CALLINAN J. This is an impudent little tax avoidance scheme, whose main redeeming feature is that it succeeds. However whilst finding for the taxpayer, I have taken note of the lack of corporate good-citizenship evinced by the company concerned, and propose penalising it by basing my next play around its dealings ...

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References

1. The scripture is from Psalms 91:12.
2. This style of judging was more common in less hurried times, although the citation, in particular, of 'canonical texts' (typically from safe, dead, classical European authors such as Shakespeare or the gospel writers, but also, surprisingly, including Lewis Carroll) remained an occasional flourish, especially by South Australian judges: Meehan, M., 'The Good, the Bad and the Ugly: Judicial Literacy and the Australian Cultural Cringe' (1990) 12 *Adelaide Law Review* 431.

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> For almost five hours, devotees of the Afros, Queen Latifah, Kid 'n Play, Digital Underground, Big Daddy Kane and headliners Public Enemy were jerked into spasmodic movement by what seemed little more than intermittent segments of a single rhythmic continuum. It was hypnotic in the way of sensory deprivation, a mind-and-body-numbing marathon of monotony whose deafening, pre-recorded drum and bass tracks and roving klieg lights frequently turned the audience of 6500 into a single-minded movable beast.[3]

Unable to negotiate the relationship between young people and musical beat, the critic interprets the relationship as dangerous and automatic.

The manner in which the media has interpreted young people's behaviour as mindless and dangerous conveys the message and image that young audiences are threatening to the public. Of course the media can shape the images by exacerbating the behaviour to make them 'newsworthy'.[4] But in doing so, the media and the general public are prevented from understanding the appeal of popular music to young people.

Claiming psychological space through sound

The availability of walkmans has appeared as a godsend for some young people. The nature of these personal sound systems allows young people to withdraw totally into the musical beat and create psychological space. Engulfing themselves in the beat, young people can escape the pressures and lack of power which characterise their lives.

Many adults, however, have not recognised that music can contribute to the creation and maintenance of an alternative psychological reality for young people. Music can create another world, which for many youth is essential in order to cope with their problems, to question their identity and sustain emotional wellbeing. In this sense many young people experience a feeling of empowerment because they have the apparent ability to question themselves and prevailing adult norms which affect their lives. Within this space, young people can control an environment and shape it to their needs.

Young people's use of music is more complex than many adults are inclined to accept. While it is easy for some to be fearful, those who choose to ignore the moral panic and take the time to analyse musical beat will inevitably understand how young people can use sound in a physical and psychological manner to create space for themselves to understand and cope with their social exclusion. Acknowledging musical phenomenon as a youth culture would also give policy makers the opportunity to implement policies which truly reflect the issues and needs of young people. But if adults continue to invoke such panics, young people's use of music will only become demonised.

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References

1. Cohen, S., *Folk Devils and Moral Panics — The Creation of the Mods and Rockers,* MacGibbon and Kee, 1972, p.9.
2. Wheeler, E.A., 'Most of My Heroes Don't Appear On No Stamps — The Dialogics of Rap Music', (1994) *BMR Journal* 207.
3. Rose, T., 'Fear of a Black Planet: Rap Music and Cultural Politics in the 1990's', (1991) 60(3) *The Journal of Negro Education* 285.
4. Cohen, S., *Folk Devils and Moral Panics — The Creation of the Mods and Rockers,* MacGibbon and Kee, 1972, p.44.

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5. Evans, A., 'Specialised Clinical Legal Education Begins in Australia', (1996) 21 *Alternative Law Journal* 79.
6. Noone, M. A., 'Planning a Clinical Legal Education Program: What are the Issues?' (1994) 19(6) *Alternative Law Journal* 285.
7. Such as Monash, Murdoch, Newcastle, UNSW and UTS.
8. Some of this work is discussed in Giddings, J., 'Casework, Bloody Casework', (1992) 17(6) *Alternative Law Journal* 261.
9. Noone, M. A.,and others, 'Squatters' Victory — Bona Vista' (1983) 8(6) *Legal Service Bulletin* 252.