Theatre and the law: a dramaturgical analysis of *Comcare v PVYW*

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1 Introduction

Theatre and the law are inextricably linked. Unknowingly, performative techniques are used to formulate judgments within the legal system. It is of fundamental importance that the legal profession, and the people whom take part in that profession, go beyond engaging with the law as an entirely intellectual pursuit. As Calder and Cowan explain, through the use of our bodies 'we can reflect on our thinking about legal concepts and tools' (2008: 109). The understanding of the body within the legal context allows us to re-imagine, and re-apply, ingrained values that appear to be so rigid. The recognition of physicality can also play a critical role in learning the law. An 'embodied pedagogical approach makes learning the law a more fully human experience and brings to light questions ... that are often neglected or cannot be seen through traditional legal pedagogy' (Badyal 2014:5). The introduction of theatrical concepts and practices can promote more equitable outcomes in the analysis and application of the law because it reinvigorates the traditionalist discourse and practice that underlies legal judgments.

Prior to delving into the specifics, it should be understood that the theatrical analysis of the law advanced here does not relate to drama. In this case, the term theatre relates to the way we respond to the law 'through our bodies' (Leiboff 2020: 8). This is an important

distinction because the analysis will not look at the portrayal of the law in drama, but rather, the interaction between the body and the intellect in understanding the law within the frame of a legal judgment. A common misconception promoted in discussions about theatre and the law is that law and theatre are diametric opposites: the theatrical realm uses tools such as physicality, emotion and feeling to reach an understanding whereas the law tells itself it must be strictly contained within the confines of the intellectual realm (Leiboff 2020). This is not the case. In fact, the law is dependent – as theatre is – upon physicality, emotionality and feeling; as such, the recognition of theatre within the legal context is important because theatrical practice can provide new mechanisms to interpret and apply legal principles, as an application of theatrical jurisprudence.

Theatrical jurisprudence reminds us that thinking of law as a rationally crafted and broadly framed principle can miss the liveness and liveliness of judgment and the circumstances that led to the shaping of the principle. This article will work theatrically with a decision of the superior court in Australia, the High Court, which created a broad principle that limited the ability of an employee to be afforded workers' compensation, delimiting the broad scope of an earlier case, *Hatzimanolis*, that took an expansive approach towards workers' compensation protection for employees required to be away from home for work. But rather than focus on the majority position, this article will work theatrically with the judgment of a dissentient. This article will focus on Gageler J's dissent in *Comcare v PVYW*.

Let's begin like real lawyers and focus on what we are assumed to know. In this case, the respondent (PVYW) was an employee of a 'Commonwealth government agency' (*Comcare*: 1). She was required to travel to a 'regional office' with a colleague for work purposes (*Comcare*: 1). To complete this work, PVYW was required to stay overnight in a motel 'booked by her employer' (*Comcare*: 1). During the evening, the respondent 'engaged in sexual intercourse with an acquaintance' (*Comcare*: 1). Whilst this occurred, a light above the bed 'was pulled from its mount' and hit the respondent 'on her nose and mouth'

(*Comcare*: 1). As a result, the respondent claimed compensation from Comcare – a workers' compensation insurer for the Commonwealth of Australia – for the physical and psychological injuries resulting from the incident. Comcare initially accepted this argument and PVYW was awarded compensation for the damages. In 2010, however, the insurer decided to revoke PVYW's claim. This set into motion a series of cases that made their way through the court hierarchy. In 2013, the majority of the High Court of Australia reached the decision that PVYW was not entitled to compensation because 'the injury was not caused through an activity encouraged or induced by the employer' (Jessup and McIlwraith 2015: 1485). However, Gageler J concluded that the respondent was entitled to compensation. Despite the fact that '[t]he overnight stay between working hours was an interval within that overall period of work', PVYW was at the motel because 'her employer encouraged her to be' (*Comcare*: 6). Based on this assessment, Gageler J rationalised that the activity met the requirements of inducement by the employer and therefore the overnight stay fell within the ambits of the applicant's employment, following the precedent of *Hatzimanolis v ANI Corporation*, where a worker 'sustained an injury during a sightseeing journey on his day off' (*Hatzimanolis*: 1). The sightseeing tour was organised by the employer. The court held that the employer was liable because the worker 'sustained injury during an interval occurring within an overall period' of employment and because the activity was organised, and encouraged, by the employer (*Hatzimanolis*: 1).

Adopting the insights of theatrical jurisprudence and using a dramaturgical reappraisal (Leiboff 2020), this article will focus on the assumptions made by Gageler J throughout his dissent. Specifically, it will look at the discussion on the role of respecting precedent within the judicial framework; the importance of context in understanding the law; and the role of the courts in the creation and maintenance of precedence. The analysis will explore the structure of Gageler J's dissent and look at the use of precedence as narratives that contextualise the judicial decision-making process, and in doing so will reveal a very different image of the case.

It will help to know something about why I am looking at this case in this way, and as it unfolds, how it plays on me. It developed out of an elective course I took as part of my law degree, 'Theatricalising Law', run by Leiboff. As part of this course, I took a case I had studied in another context to rethink it using techniques based in theatrical jurisprudence. I chose this case and this judgment for two reasons. Firstly, it illuminates some interesting assumptions about the operation of the law, with particular focus on the development of precedent and the court's role in that process. These assumptions can be dramaturgically analysed, and embodied, which will expose how bodily experiences can change the meaning associated with different elements of the law. Furthermore, I chose this case because it demonstrates normalcy. Whilst the *ratio* is considered to be quite important within Australian common law, this case represents a very typical assessment by the judges, at least in terms of the way they each reached their own conclusions. This case has some very important legal principles, but its lexicon is relatively uniform in relation to legal text more generally. This illustrates that dramaturgical analysis can provide new insights even in the most stereotypical analyses of the law. It does not need to be a particularly rare case to show the impact that the theatre has on understanding, and applying, legal principles.

I want you to know what will happen next. My analysis will be divided into six distinct parts. The first part will explain the dramaturgical approach utilised and the significance of this approach. The second part will establish the dramaturgical practices used to reappraise the case and the reasons behind the use of these different practices. The third part will apply theatre theory to Gageler J's dissent and expose the impact performative techniques had on understanding the law. The fourth part will provide an account of the workshopping process undertaken as I faced different problems and came to new realisations. The fifth part will reflect on this process. The last part will outline some of the important conclusions that emerged as a result of the dramaturgical analysis of the case. By the end, I want you to know, I have uncovered a great deal about Gageler J's dissent, but even more about me, which is just what the theatrical demands of us. I put my

own body on the line, and I will take you with me now.

2 The dramaturgical approach to case analysis

Through a dramaturgical approach to case analysis, I attempted to understand the way theatrical techniques assist in reading the *Comcare* case. This process involved reading the judgment whilst applying techniques such as striking out; audience perspective; spontaneity; interpretive assumptions; emotion; silence; physical barriers; and physical embodiment. The use of each of these techniques revealed both the way that theatre interacts with the court judgment and the way that legal perspective can be influenced, and improved, by applying theatrical techniques. A by-product of the dramaturgical approach is that it exposed the interrelationship between the law and the people that engage with it. The dramaturgical reading of the case and the use of theatrical techniques in the practice of case analysis is significant because it provides a practical example of how dramaturgy impacts the interpretation and understanding of the *Comcare* case – and legal cases more broadly – and also points to the way in which theatre in its various forms interacts with legal text.

This dramaturgical approach is informed by research in the nascent field of law and performance studies. Richard Schechner points out that 'human beings with our prodigious forebrains are always proposing, imagining, creating, playing, performing, and trying to bring into material existence new realities' (1994: 397). This is a result of an insatiable need to assert our 'cultural spaces' (Schechner 1994: 398) upon our reality. Theatre plays a crucial role in bringing these realities into existence. Julie Stone Peters applies Schechner's ideas to demonstrate the existence of theatricality within the law. In 'Legal Performance Good and Bad', Peters establishes Derrida and Legendre's understanding of law, which is that '[it] is (mythically) created through a performative violence' (2008: 196). Subsequently, the law's 'power to coerce' (2008: 196) comes from the theatrical rituals that underlie the performative violence. She also, however, points to the value of performance in creating new perspectives:

> [Performance] offers collective catharsis, resists formalist textualism, allows one to reconstitute one's identity free from legal strictures, and gives non-verbal language to the illiterate and inarticulate so that, in the new media age, law is at last in the hands of the people (Peters 2008: 197)

My approach is informed by this concept of performance that disavows legal strictures and utilises non-verbal and embodied methods to articulate a legal analysis. In the next section, I will explore the particular theatrical and dramaturgical practices used in this case analysis.

3 Dramaturgical practices used

I began my case analysis by examining the text, reappraising the judgment by identifying the assumptions that the judge made about the operation of the law. I first considered the judge's personal history. Gageler J grew up in a small town of about 150 people in the Upper Hunter Valley of New South Wales called Sandy Hollow. He had a very modest upbringing. He, 'his two brothers and a sister were raised on a four-hectare property that contained a sawmill and two houses, one for their family and one for their grandparents' (Feneley 2009). In an interview, he comments on the simple, but meaningful, tasks that he was exposed to from an early age. He explains having odd jobs around the sawmill and describes his time at 'Giants Creek Primary, a one-teacher shack about 3 kilometres from Sandy Hollow' (Feneley 2009). Gageler J has been described by his colleagues as 'extremely modest' (Feneley 2009). I suggest that this short biography provides something that helps us understand something of the assumptions that he makes about the law, particularly in regards to how he read and understood precedent in this particular case. So too his experience as a Commonwealth Solicitor-General, working with employees who would be required to be away from home for work, to a greater or lesser degree, likely influenced his thinking.

Throughout the judgment, Gageler J makes some broad assumptions about how the law should operate. He insists that judges play a crucial

role in creating law but believes 'a cautious, incremental approach to the law is appropriate' (Feneley 2009). He discusses the importance of precedent by analysing its development and role within the law. He also dissects the Court's role in the maintenance and enforcement of precedent. However, he also expresses an understanding that the judiciary has a function of creating law. This is quite a progressive perspective that subverts the traditional concept of the judiciary as nothing more than the interpreters of law. Understanding the biographic background of the judge-as-author is important because realising *why* we understand legal concepts in the way we do, simply observing our own assumptions, can change the way in which we understand the law and make decisions; in turn, it can invite us to re-envisage the legal principles by which we make decisions. Of course, this biographic account – a nod to the liveness of the theatrical – will not alone answer questions about why Gageler J dissented and the importance of precedent to his decision-making, but it does assist in contextualising his approach to the law.

The next step in the process was to consider the judgment's structure. When reading the dissent, it became apparent that the text is very deliberately structured. It starts off with an introduction; followed by the case law before *Hatzimanolis*; then a description of *Hatzimanolis* and the importance of its principles; and finally, the application of those principles to facts before the Court in this new case. This structure is almost *fabular* (Carpi and Leiboff 2016) in nature. Essentially, each of the precedents are a story that help define the way the law will then relate to the circumstances at hand. Marett Leiboff describes this as:

> the common law's practice of extracting law and legal principles from a vibrant and lived experience that is rendered a carapace, based on the premise that the principles contained in cases speak for themselves time out of mind (Carpi and Leiboff 2016: 34).

The lived experiences, in this case, are the precedents that shaped Gageler J's reasoning. For example, in paragraph 115, the judge begins to explain the *Hatzimanolis* principles by examining the history that preceded that case. He states:

> The pre-*Hatzimanolis* course of authority ... straddled a small but significant amendment to the definition of "injury" in workers compensation legislation in most Australian jurisdictions, which occurred around the middle of the twentieth century.

The design of this small section, like many others, uses narrative elements to help frame the law. The verb 'straddled' assists in creating an image that allows the audience to relate to the way compensation law was developing at the time; the image is of a leg, perhaps uncomfortably, either side of amendment or the point in time in history when the amendment was made. The use of the narrative structure allows the law to take shape. It provides a mechanism to simultaneously contextualise and justify the dissent. The recognition of these small narratives within the judgment highlights how the law is not simply a product of rationality, but rather, a collection of lived experiences. As such, the law must be approached from many perspectives that the intellectual perspective cannot always account for. The narrative structure also demonstrates a mechanism by which the law is able to present itself. The narrative structure of the judgment is used as a way to cohesively portray ideas, as the audience is sequentially exposed to the various elements that underlie the reasoning for the judge's decision. Identifying the role of narrative in the structure of this judgment illuminates the importance of storytelling in understanding and explaining the law. The fabular structure that exists within the dissent in *Comcare* is important because it demonstrates that stories play an essential role in the formation of a cohesive legal judgment. Gageler J's ability to structure the judgment as a story, drawing from the past experiences of the law in the form of precedent, means that the judgment becomes more accessible for the audience engaging with it – and which speak to the realities of the lives of workers required to be away from home for work for extended periods of time. It creates a sense of understanding as to the process of reaching the final decision. This is not a sentimental point. It is simply identifying that there is a need for these storytelling elements to cohesively portray the decision-making process.

This textual analysis is foundational for a considered of the

dramaturgical. I now move on to the work I did to theatrically reconsider the case. For myself, and for a deeper understanding of the consequences of the new precedent created by the majority, I proceeded to read the judgment whilst applying different theatrical techniques of striking out; audience perspective; spontaneity; interpretive assumptions; emotion; silence; physical barriers; and physical embodiment.

Striking out: Following the textual analysis, I reappraised the case by striking out certain elements in paragraph 124 of the judgment, which describes the fact scenario and principles of the case. Marie-Andrée Jacob and Anna Macdonald (2019) have identified the intricacies that emerge out of the use of a strikethrough. They describe how it shows a former version of the law that is visible yet no longer applies. This points to 'the mutability of law, and to the embodied, subjective, mortal form of law-making's effect at the moment of impact' (Jacob and MacDonald 2019: 269). For the purposes of this analysis, the strikethrough was used on various parts of paragraph 124 to identify whether it had an impact on the understanding of the legal principles being described.

Audience perspective: Crawley and Tranter (2019) identify that there is a significant difference in understanding legal principles between criminal lawyers and those observing criminal trials. They describe how '[t]he familiarity of the criminal trial for lawyers obscures that it is not a familiar nor comfortable space for law's subjects' (Crawley and Tranter 2019: 621). It is easy to fall into the trap of assuming knowledge that may be perceived as common because of personal exposure to the law, but is in fact a foreign to people outside of the legal sphere. They invite the reader to look at law from the outsider's perspective, from the perspective not of the legal actors but the legal audience. With this in mind, I had a colleague, who is not involved in the law, read the *Hatzimanolis* principles articulated in paragraphs 124 and 125 of the judgment and highlight the words they thought were important. I then read the paragraphs myself and highlighted the words that I thought were important. The intention behind this

process was to identify the words in which my colleague found to be important and the words that I found to be important. This was an attempt to show that, even on a basic level, understandings of what is important to the law are determined by the way the law is perceived – and by whom it is perceived.

Spontaneity: Ramshaw (2010) argues that spontaneity is a necessary component in the deliverance of judgments. She argues that the slight differences between cases means that 'each judicial application of existing rules or past precedents to new facts creates, in fact, a new and improvised law' (Ramshaw 2010: 134). The idea of spontaneity within judgments subverts the traditional notion of precedence. It implies that, whilst in some ways limited, there is judicial discretion in how previous principles are applied to new cases. I reappraised *Comcare* by applying Ramshaw's idea of spontaneous improvisation. I took the *Hatzimanolis* principles outlined in paragraphs 124 and 125 of the judgment and compared them to the way that Gageler J applied them in the case. By doing so, I wanted to expose the fluidity of precedence and, more broadly, that theatrical techniques of spontaneous improvisation allow for the re-imagination of these entrenched legal principles.

Interpretive assumptions: In 'Theatricalising the Law in Three', Marett Leiboff (2016) comments on the role that our own perspectives have when reading, interpreting and understanding the law. She argues that the way in which we understand legal texts partly relies on the 'self and what the self expects' (Leiboff 2016: 100). I read paragraph 113 of the judgment in my head and then aloud. I noted the words that I missed when reading the text in my head to when I read it aloud. This process helped me to understand some of the 'interpretive assumptions' (Leiboff 2016:100) that I make when reading. All of us have certain biases that influence the way we intake different information. The words that I left out because I did not think that they were important may be the most meaningful words to another person. The use of this technique opened up the possibility that there are other ways to read the paragraphs.

Emotion: Jasreet Badyal stresses the importance of emotion in

making a legal experience 'more human' (2014: 14). In particular, Badyal asserts that empathy is a crucial component to the judicial decision-making process. She contends that the legal profession plays a crucial role 'in relation to individual clients but also in defining broader societal norms, especially as future legislators and leaders in ... communities' (Badyal 2014: 14). As such, empathy establishes a way for legal professionals to 'work with sufficient understanding of those who will potentially feel [the law's] impacts' (Badyal 2014: 15). The introspective effects of empathetic understanding create an environment wherein the law can 'see more than just [the legal professional's] perspective' (Badyal 2014: 15). Nicole Rogers explains a similar idea in her article 'The Play of Law: Comparing Performances in Law and Theatre' (2008). She explains the classical conception of law and theatre. She outlines that they 'are perceived as opposite terms, as a dualism closely associated with the comparable dualism of work and play' (Rogers 2008: 429). Rogers then challengers this traditionalist perspective by identifying that performance, and the emotions portrayed within performance, can remove the violence that is imbedded within the legal process. Performance can 'create a "new use" for law, and new possibilities for justice' (Rogers 2008: 443). In response, I used different tones and emotions when reading paragraphs 113, 114 and 140 of the judgment. I started by reading the paragraphs in a calm tone followed by a condescending tone and an excited tone. Each time, I noted the changes in rhythm, pitch and emphasis. The intention of reappraising the case in this way was to explore how different emotions expressed through tone create empathy, and the impact that this has on understanding legal text.

Silence: Sean Mulcahy suggests that silence can help to 'contour' meaning 'incapable of being captured' (2019: 192) in plain text. As I read the judgment, I inserted longer pauses at various points in paragraph 142. By doing so, I wanted to determine whether the implementation of silence allows the reader to be more reflective on the subject matter and how this practice of pausing creates meaning when reading, and understanding, the text. More broadly, I wanted to assess whether the use of silence has a role in actually changing the

meaning of legal concepts because of its reflective capacity. What I found was that silence forces a reader to comprehend the implications of what has been said because the legal terms in the judgment cannot be quickly glossed over; the pause slows down the comprehension process.

Physical barriers: I also incorporated some of the elements Oddbird Theatre developed in their production of Danish Sheikh's play *Contempt*. Namely, I attempted to recreate the second courtroom scene in this production, wherein the lawyer is trapped within four walls whilst addressing the Judge. The design of this scene was to intended bring 'the audience as close as possible to what it meant to be in the courtroom' (Sheikh 2019) and to show how the judges had arrived at their conclusions. To recreate similar conditions, I read paragraph 139 of the judgment to a colleague whilst I was in the same room. I then closed the door to the room and repeated the reading from outside. I wanted to explore how my colleague interpreted the information, comparing reading the text from inside the room to outside.

Physical embodiment: Finally, abandoning the text, I attempted to physically represent some of the core ideas mentioned in the *Comcare* case. The use of this technique was inspired, in part, by the work done by Leiboff. Leiboff reinvigorates the ideas of theatre-maker Jerzy Grotowski, claiming that it was his work that 'grounds theatrical jurisprudence' (Leiboff 2020: 8). Grotowski pushes the law to move beyond an imagined ideal grounded in Aristotelian drama and tragedy, and turns to the formation of the legal interpreter as fundamental to understanding what's "noticed" or not noticed in law (Leiboff 2020). Leiboff uses Grotowski's concepts to advance an idea of "noticing" as a method to expose the legal situations in which injustices occur and improve upon them. This is not, however, simply a practice of reading and noticing. Interestingly, Leiboff points to a greater purpose of theatricalising the law. Theatre uses the body. The body instinctually reacts to different situations; its response exists prior to the intellectual perspective. Bodily response is 'that "step before" that helps us to notice because no amount of thinking can bring liveliness and life-world into play' (Leiboff 2020: 138). Leiboff concludes that it is this

instinctual reaction of the body that provides jurisprudents with fresh perspectives to re-assess their understandings of the law. With these ideas in mind, I tried to physically embody the concepts of *precedence, court hierarchy* and the *Hatzimanolis principles*. Once I had created a movement for each concept, I took a photo. This process allowed me to explore the components of these ideas that I realised spontaneously in my body without thinking critically. I was able to explore how my body reacted to the thought of these ideas, and what this might mean for my understanding of these important principles that underlie the law.

This has been a brief overview of the dramaturgical practices used to explore this judgment, ranging from conventional textual analysis to radical physical embodiment. In what follows, I will analyse the findings from these dramaturgical practices as they apply to the case.

4 Analysis of theory and practice applied to the case

The textual analysis of the dissent exposed the way precedents act as stories to contextually justify the decisions that the judge has made. In this section, I explore dramaturgical and theatrical techniques that can provide a deeper understanding of the judgment.

124 The precise question asked and ~~affirmatively~~ answered in *Hatzimanolis* was whether a worker who was employed to work ten hours a day six days a week at a mine at Mt Newman in Western Australia, ~~near where he lived in employer provided accommodation within a camp~~, was in the course of his employment when he was involved in a road accident on an 800 kilometre round trip sightseeing tour to Wittenoom Gorge on his day off. The ~~affirmative~~ answer was explained in the joint reasons for judgment on the basis that the injury was sustained "during an interval occurring within an overall period or episode of work and while [the worker was] engaged, ~~with his employer's encouragement~~, in an activity which his employer had organized"[199].

Figure 1.

I chose the word 'affirmative' because it qualifies the sentences that it is a part of. For example, in the first instance of its use it characterises the principles in *Hatzimanolis*. I also chose to strike out the phrases 'near where he lived in employer provided accommodation within a

camp' and 'with his employer's encouragement' because, as they are independent clauses, they provide contextual information for the rest of the sentence. As a result of this process, the meaning of the text significantly changed. There was no qualification of the answers provided by the *Hatzimanolis* case and there was less contextual information to support the deduction of the principles. Whilst the strikethrough technique was used in a different way to the analysis of Jacob and Macdonald, it demonstrated some important elements embedded within legal text. It supports the use of storytelling within the production of judgments. Without contextual information, the meaning of the principles becomes less impactful because they have no point of reference. The contextual elements in this passage help to ground the principles in reality. It also shows the importance of different words within the legal lexicon. It is difficult to understand just how impactful individual words are until they are taken away. In this case, the removal of the word 'affirmative' markedly changes the perception of the answers provided in the *Hatzimanolis* case. Without context and qualifiers, judgments have lesser meaning. This was, however, a selective process. I was striking through text that I, as a person trained in law, deemed unnecessary. It was necessary next to consider how a legal outsider might approach the text.

B Audience perspective

The idea that there are clear distinctions between the way legal professionals and people outside the law interact with legal proceedings (Crawley and Tranter 2019) was another important tool used to reappraise this case. To explore this idea, I had a colleague of mine, not involved in law, read paragraphs 124 and 125 and highlight the words that she found important when reading. I followed the same process. Below, Figure 2 represents the words that my colleague found to be important in the text and Figure 3 are the words I thought were important within the text.

employment. The difficulty identified in the joint reasons was in articulating a "principle or standard" by reference to which those considerations were to be evaluated: for "[w]ithout the assistance of an organizing principle, a tribunal of fact cannot know which of them is or are determinative"[200].

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125 The structure of the reasoning adopted to arrive at that answer repays close attention. The joint reasons started with an acceptance of the explanation given by Dixon J in *Whittingham*: that an injury, to be in the course of employment, must occur while the employee is doing something which is "part of" or is "incidental" to his employment; that the sufficiency of the connection between the employment and the thing done by the employee to found a conclusion that the employee was doing something "incidental" to his employment is one of degree; and that for the purpose of determining the sufficiency of the connection between the employment and the thing done by the employee in a particular case, considerations of time, place and circumstance, as well as practice, must be taken into account together with the conditions of the

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Figure 3.

Following this process, I asked my colleague a very simple question: why did you highlight those specific words within the text? My colleague gave me a very structured answer. She said that the words that she highlighted in paragraph 124 were contextual. They allowed her to understand the facts surrounding *Hatzimanolis* and this provided a starting point to isolate the legal reasoning in the subsequent paragraph. She then explained that the words 'incidental', 'employment', and 'considerations of time, place and circumstance' in paragraph 125 established the reasons why Hatzimanolis has the ability to claim compensation.

Similarly, in my own reading, I found that the specific facts in paragraph 124 were helpful to understand the meaning of *Hatzimanolis*. However, taking the facts for granted, I highlighted what I thought to be the crux of the paragraph – that workers' compensation can be claimed if 'the injury was sustained "during an interval occurring within an overall period ... of work and while ... engaged with [the] employer's encouragement …"' In paragraph 125, I immediately identified the elements that constitute a workplace injury and the considerations that create the incidental connection between the injury and the person's employment.

The most identifiable difference between the highlighted sections in these paragraphs is the understanding of the principles and how they are constituted. Whilst my colleague recognised that there were some elements necessary to constituting 'injury … in the course of employment', she did not recognise how the overriding principles were applied. I have only developed the skill to be able to coherently recognise and apply these principles because of my exposure to the law. This process identified two important facts. First, it identified that the law can be perceived very differently according to the audience. Obviously, those exposed to its peculiarities more frequently begin to learn how it operates and the *legalese* becomes almost mundane. For those not so accustomed, it can be a disorienting. Perhaps by realising this and by understanding that the perception of the law is heavily dependant on the subjectivity of its audience, we can strive to make the law more accessible

to outsiders. Second, however, this process identified a commonality between my colleague and myself: that facts are always important. These stories are what constitute precedent and, subsequently, the principles used in the judgment. They are important for contextualisation as well as understanding how and when certain rules are applied. As such, we should recognise the power that narratives have within the law and respect their impact on understanding, interpreting and applying these complex rules. Narratives are not limited to the fictional. They can play an important role in explaining even the most complex legal ideas. Framing the judge as a storyteller that weaves narratives from the stories told during proceedings in one way to think through the act of judgment; another is to see the judge as a creative spontaneous improviser, moulding precedent to the scenarios of the case.

C Spontaneity

Using Ramshaw's (2010) concept of 'spontaneity', I reappraised the case by exploring the difference between the *Hatzimanolis* principles and how they were applied in *Comcare*. In paragraph 124, Gageler J explains that the *Hatzimanolis* principle states that a person can claim compensation if:

> [t]he injury was sustained "during an interval occurring within an overall period or episode of work and while [the worker was] engaged, with his employer's encouragement, in an activity which his employer had organised."

In paragraph 159, Gageler J further explains that the claimant is entitled to compensation in accordance with the *Hatzimanolis* principles. He describes that PVYW is entitled to compensation because she 'was at a place (sufficiently identified for the purposes of the case as the motel) at which her employer had encouraged her to be.' This is a fairly straightforward application of the principles to the case at hand.

However, spontaneity does play a small, yet important, role in the judgment. The application of the rules has been tailored to the case. In the final line of paragraph 159, Gageler J states that: '[t]he particular

activity in which the respondent was engaged at the time she was injured does not enter into the analysis.' This is an important statement because it expands the scope of the *Hatzimanolis* principles in a way that the majority was unwilling to. By simply comparing the *Hatzimanolis* principles to how Gageler J applied them to the case, spontaneity within this judgment became apparent. This improvisation by Gageler J would not have come about without the controversy surrounding PVYW's conduct in this case. Thus, the specifics of each case slightly alter the application of the principles each time they are applied. This idea of the judge as a spontaneous improviser shows that precedent is somewhat fluid and partly relies on a judge's impulsive discretion. Against the idea of precedent as rigid, spontaneous improvisation promotes the idea that the applicant of precedent necessarily includes an element of flexibility to maintain the law's relevance, especially as the law is applied to different situations at, in some instances, very different periods of time. It provides a mechanism to maintain the law's relevancy. This is a re-imagination of the idea of precedence, and it shows the importance of dramaturgical or theatrical techniques in reading and applying legal text. It also invites the attention to the way that audiences to the law and readers of legal judgments interpret these improvisations.

D Interpretive assumptions

To test Leiboff's thesis that the way in which we understand legal texts partly relies on the 'self and what the self expects' (2016:100), I read the text of the judgment aloud and identified words that I skipped over when reading it in my head. In paragraph 113, I noticed that I missed 'rather' in the last line. The full paragraph reads:

> *Hatzimanolis* has stood for over 20 years. It has been applied on countless occasions by courts and tribunals throughout Australia. There is no challenge to its continuing authority. The appeal turns rather on the nature, content and application of the principles it expressed.

When reading judgments, the text is quite dense. Often, I will leave out words that I unconsciously do not deem necessary. I viewed 'rather' as nothing more than an adverb to indicate preference. It does

serve this function, but by missing it, the meaning of the sentence is significantly altered. In this instance, the term is very important because the word 'rather' helps bind the judge's view on the absolute authority of *Hatzimanolis*, and stresses that the issue before the Court is distinct and focused on the context of the present case. This is an important distinction that I missed because of my own assumptions about the importance of certain words. I also noticed in this reading that my understanding of the paragraph was clearer when I read the text out loud. The full stops and the syllabic flow of the phrases became more apparent and this assisted me in understanding the meaning of the paragraph. Verbalisation is an important tool for understanding text because it makes you read every word. It exposed ideas that I did not properly understand because I could not just gloss over them in my head. I also started to pick up on how the tone of my voice impacted my reception of the text.

E Emotion

Continuing on with the reading aloud of the text, I found that the use of varying emotions and tones when reading paragraphs 113, 114 and 140 changed the way the information in these paragraphs was perceived. I read the paragraphs calmly then condescendingly and then excitedly. When I read the paragraphs condescendingly, I found that my rhythm became disjointed and this affected my concentration and understanding of the text. Conversely, when I read the paragraphs in an excited tone, my pace increased and my pitch elevated, but despite this, the text was more approachable because it was as if I was convincing myself that it was important. It was as though the condescending tone turned me away and the excited tone invited me to the text. Reading with emotion also had a profound impact on the way I empathised with the text. For example, I felt as though I was more inclined to consider the implications of the text when I was excited because I was more engaged with it, whereas I felt more disengaged from the text when reading it in a condescending tone. The joy in the excited delivery provided a more empathetic connection with the

text. The emotions were manufactured and not the actual experience of calmness, condescension or excitement. However, the use of this theatrical technique of the read through suggests the possibility of empathy promoting a new understanding of the law – one that does not view emotion as the law's antithesis. Simply accepting the fact that emotion plays an important role within the delivery of legal judgments reveals the possibility of understanding and delivering the law and legal text in new ways and through different emotions.

F Silence

I continued my read-through, and began to explore the use of silence. In paragraph 142, following the phrases ending in 'law' and 'reasoning', I implemented a pause of 4-5 seconds, as follows:

> Appeal or review of the application of a statutory standard or criterion to the facts of a particular case in the context of workers compensation legislation is now, and almost always has been, limited to appeal or review on a question of law. [*Pause*] Whether a particular evaluative judgment is reasonably open on the facts of a particular case is a question of law. [*Pause*] So too is whether a particular evaluation judgment has been reached by a legally permissible process of reasoning. [*Pause*]

The added pauses had an interesting effect on the way the text was presented. It broke up each sentence into its own small part and the few extra seconds meant that I could understand what was being said. It added a kind of structure to the paragraph by making each of the discussed aspects more identifiable. The pauses also forced me to think about each specific part of the paragraph. The extra time for consideration assisted my understanding of the paragraph because it forced me to consider what I had just read. As discussed by Mulcahy, silence acted as a way of contouring meaning within the paragraph. Though on a smaller scale, pausing assisted my comprehension of the paragraph because it forced a kind of self-reflection at various points in the paragraph.

G Physical barriers

I continued on with my read-through, now exploring how physical separation affected how the information was interpreted. I read paragraph 139 of the judgment to a colleague whilst I was in the same room and then closed the door to the room and repeated the reading from outside. The purpose of this exercise was to compare how reading the text from inside the room versus outside affected my colleague's interpretation of the information, as well as to explore the impact of the physical barrier created by the door. This technique, although in a crude way, was an attempt to show the exclusivity of the law. Sheikh (2019) points out that the door being shut represents the 'tangles of legal discourse that [lawyers find themselves] having to wade through.' An unfortunate aspect of the law is that, in some instances, it can be inherently exclusive because of the complexity of its ideas. The door being shut symbolises some of these barriers and physically embodies some of the issues that people outside of the legal sphere face when confronting the law and legal text. Interestingly, my colleague noted that it was actually easier to understand the information without the distraction of my facial expressions. I also wanted to see whether my reading changed as a result of being, or not being, in company with my audience. Again, interestingly, I found the text easier to read out aloud when not in the presence of company.

This might point to some assumptions that we make about the presentation of law. Perhaps, when in company, there is an assumption that the law needs to be presented in a particular way to convey its importance, which creates acute pressure on the legal performer. From my colleague's perspective, perhaps it was the performative elements of my presentation of the judgment, including my facial expressions, which distracted from the dialogue and the information that it conveyed. The experiment also demonstrated the effect of live presence on legal performance – and the way that the legal performer and the audience respond to bodily co-presence.

H Physical embodiment

Finally, continuing on my exploration of law through the body, I adopted a more abstract technique of physically embodying the concepts of *precedence*, *court hierarchy*, and the *Hatzimanolis principles*, which changed the way I viewed these concepts. For this section of the exploration, I spontaneously embodied each of these concepts, drawing from Leiboff's (2020) idea that the body instinctually reacts without knowing – and that this instinctual reaction can be revealing. The photos below are the results.

Figure 4, below, shows the physical representation of *precedence*.

Figure 4

The straight arms represent a timeline and each of the hands is a case. The previous case is shadowing the present. This process broadened my assumptions about precedence because the bodily experience meant that I had to think about it from a different perspective that grounded the idea within physical reality. It made me consider the reasoning behind the choice of the pose. This was an instinctual, spontaneous reaction to the thought of precedence. The conclusion that I reached

was that I view the role of precedence as a narrative tool that builds on itself to maintain the law's effectiveness and relevance when being applied. Previous case law shadows the current case being decided. It is through this process that the law is able to develop in a cohesive – and, as my arms suggest, linear – way.

Figure 5, below, shows the physical representation of *court hierarchy*.

Figure 5

The triangular shape of my arms indicates the structure of the court system. It starts with the local courts, which is the wide base of the triangle, and works its way up to the High Court. As you move up the triangle, the space gets progressively smaller; just as when you go up the court hierarchy, the number of courts gets smaller. The shape of the triangle also represents the importance of different courts, with the High Court, sitting at the top of the court hierarchy, holding the most power. The shape of the triangle also indicates a top-down effect wherein the top trickles down to each of the lower levels, reflecting the operation of precedence in a hierarchal court system. What

this embodiment demonstrated was the assumed importance that I instinctually place in the High Court as the highest court in the land, sitting at the apex of the triangle, and handing down judgments that set a precedent for the courts below, and how this legal learning has trained its way into my body.

Finally, figure 6, below, is the physical representation of the *Hatzimanolis* principles.

Figure 6

This image is a bit more complex because of the various elements of the *Hatzimanolis* principles. The clasping of my arm with my right-hand is to indicate an injury. The left-hand reaching out is to symbolise me reaching out for something, something being offered, and me taking that offer. It was an attempt to show a kind of encouragement or inducement on the part of the employer. Obviously, there is a temporal component to the *Hatzimanolis* principles, namely that the injury must be sustained 'during an interval occurring within an overall period or episode of work.' However, due to the complexity of the temporal

element of the principles, I found it difficult to embody this element. What this demonstrated more broadly is that complex legal principles are difficult to embody. It is seemingly simple to represent injury and, to lesser extent, the idea of inducement by an employer; however, it is more difficult to represent the temporal connection to work required under *Hatzimanolis*. The challenge with embodying this aspect of the *Hatzimanolis* principles may indicate that there is a challenge in explaining and applying the principles in practice.

The process of physically embodying these esoteric concepts produced a profound impact. It made me re-consider the way that I viewed these ideas because it grounded them within physical reality. It made me understand the law through *feeling*. All of these concepts have been constructed, and here they have been re-constructed through the body and made human. Moreover, creating these poses was instinctual. Whilst it was difficult to determine the meaning behind the poses, and why my body moved in the way it did, it was as though my body understood these ideas before my mind could explain them.

In summary, I applied a variety of dramaturgical and theatrical techniques to analyse and explore the case in question. In what follows, I will offer a critical account of this workshopping process, reflections, and then conclusions on what was uncovered through the dramaturgical and theatrical approach to the case.

5 Account of the workshopping process

The workshopping process exposed some issues, and complexities, that I had not properly considered at the outset of this case analysis. In this section, I will consider issues and complexities raised by some of the dramaturgical and theatrical techniques utilised.

Another difficulty that I encountered was during the emotional reading of paragraphs 113, 114 and 140. I intended to dramaturgically analyse these paragraphs by reading them with different emotions based on Badyal's (2014) work on the importance of emotion in creating empathy amongst those in a position to impact the application of law. It was, however, difficult to produce genuine emotions of condescension

and excitement. Subsequently, the reading felt forced. I was not really feeling those emotions, only imitating them in my tone and pitch. This meant that the impact that the emotion had on the text was not genuine and, therefore, it was difficult to objectively determine the impact that these emotions might have on reading the text. Further, complexities arose when striking out and highlighting elements of paragraphs 124 and 125. Both methods of dramaturgical analysis required considerable thought when determining why certain parts of a paragraph were highlighted or changed. Sometimes, it was difficult to determine whether there was genuine meaning behind the act of highlighting or striking through in the analysis of the alterations. In some ways, the *ex post facto* analysis of the act of highlighting or striking through also moved away from the intention of this article. It required critical thought and relied less on my bodily reaction. On this, while I was reappraising paragraph 142 by adding pauses, I noticed an interesting pattern. I was naturally placing the pauses at the end of sentences. Doing this helped me to understand the sentences and gave me more time to consider what was being said. Conversely, placing pauses randomly may have an adverse impact on understanding because the text would become disjointed. My instinctual bodily reaction of pausing at particularly times revealed how silence can give space for contemplation.

Similarly, the physical embodiment of *precedent*, *court hierarchy*, and the *Hatzimanolis* principles was another section of the reappraisal that was successful. It compelled me to understand abstract ideas in a physical way. It showed me that the body could go beyond the intellect in understanding and representing complex matters. However, it was very difficult to physically embody concepts that had a multitude of moving parts. For example, I managed to create a physical representation of injury and inducement but I found it difficult to incorporate the temporal element of the *Hatzimanolis* principles. This was for two reasons. Firstly, I am limited by the physicality of my body. Since I am using both of my hands in Figure 6, I do not have any more tools to embody any more of the elements; my body could only convey so much. Secondly, time is a vague concept. I could not come up with

a definitive way of showing it in a single movement captured in the still frame of a photo. Perhaps, if I were to conduct this reappraisal again, I would take multiple photos or incorporate less still and more fluid movements. This would shift the physical embodiment from developing *a* movement to instead developing *a pattern of* movement to embody legal concepts and ideas.

Having considered the issues and complexities raised by different theatrical and dramaturgical techniques, in the next section, I will provide some reflections on the process.

6 Reflections

As a student of the law, I seldom saw the value in looking at the law beyond the words on the page – of the judgment, the statute, or some other legal text. This dramaturgical process instead allowed me to experience complex ideas of law through my body. This challenged my assumption that the law can only be understood through an intellectual perspective. It highlighted the importance of bodily experience in understanding and interpreting the law and it forced me to expand my understanding of the law beyond what I was being told in the text. It also made me question some of the preconceived understandings that I had about different legal concepts; concepts that are almost always portrayed as being objective and ruled by rationality. This process proved to me that humanness – the human body – plays a pivotal role in the functioning of the law.

Through the process of reading through the judgment and letting the words play off my tongue, I noticed the significant difference in my understanding of the text from reading it to myself compared with reading it aloud. When I read the text out loud I could feel the rhythm and syntactical structure, which helped establish meaning. What I also found was that emotion plays a significant role in the delivery of the law, despite my initial belief that the objectivity of the law is 'antithetical' (Ramshaw 2010) to emotion. It became clear that the presentation of the law can be intimidating or inviting simply based on the kind of emotion you use to read and deliver the text. With this in mind, the way

we deliver the law must be empathetic (Badyal 2014); that is, it must understand the feelings of others. A lawyer has a responsibility to ensure that their client feels heard for, without fostering this relationship, the lawyer is failing their client. Equally important is the realisation that the law has the ability to impact everyone. Empathy can act as a bridge between the esoteric concepts of the law and those who are affected by its application; emotion can act as a passage to humanise the law and ground it within its social context.

This made me reflect on the type of law or legal text that is being assessed. In this analysis, it is a judgment. This means that it is designed to be presented to other people through the act of reading. It is very different from the way that legislation is structured; it has a narrative flow to it. Throughout this process I have reflected on the importance of storytelling in the law. Precedent, and the construction of judgments, relies heavily on narratives – the story is set up in a chronological fashion to justify the conclusions that are made at the end. Legal practitioners need to be aware of the power that narratives have in the law and to use them effectually to serve justice. Without realising their importance, and the gravity that stories carry within the legal process, serious injustices may occur. Lawyers also need to be able to actively look beyond their own experiences to be able to truly understand the effect of the law. Bodily experiences of the kind practiced here personalise the law and develop the capability to perceive outside perspectives. Without this process of bodily experience, the 'conditions of injustice' (Leiboff 2018: 363) proliferate as legal practitioners become disconnected from the real effect of the law.

7 Conclusion

To conclude, this dramaturgical and theatrical approach to case analysis has uncovered some interesting realisations about the law. Factors such as emotion, physicality and storytelling are all involved in the legal process. Therefore, to comprehend the law, various perspectives need to be used that go beyond the intellectual and into the body. Whilst the intellectual perspective has been important for the development and

practice of the law, it is through these alternate perspectives that we can realise new mechanisms that change the way that we think about the law. To practice law as a purely intellectual exercise detaches law from its primary audience – society. Whether it be through overly prolix language or esoteric ideas that riddle legislation and judgment, the law has become so complex with so many barriers to its effective use by outsiders that it seems, over time, the law has forgotten that, ultimately, it is a function of society. Theatre theory and practice catches the, at times, superfluous complexity of the law and grounds it in a reality that we can all understand. It is not the antithesis to the law. As this analysis has shown, alternate theatrical ways of thinking and doing law may lead to greater justice because theatre acts as a counterbalance to some of the barriers to law created by the intellectual perspective. To draw on an example, the physical embodiment of legal concepts has significant benefits in re-imagining legal concepts. Although embodiment is a personal interpretation, it creates new perspectives that the intellectual perspective cannot conceive. More importantly, it challenges the rigid conceptions that are imposed by the intellectual. All legal practitioners are taught the same meaning for the elements of the law. For example, precedent is a case that has achieved a binding status in the common law. Theatre theory and practice allows practitioners and thinkers of the law to challenge these ideas and it is through challenge that change is affected. This kind of change can lead to a better application of the law in society. This not only serves the legal system itself, but also, the people that engage with it.

Endnotes

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References

Badyal J 2014 '*Perry v Schwarzenegger*: An Opportunity to "Do" Law Differently' *Appeal* 19: 3-20

Calder G and Cowan S 2008 'Re-Imagining Equality: Meaning and Movement' *Australian Feminist Law Journal* 29/1: 109-131

Carpi D and Leiboff M eds 2006 *Fables of the Law: Fairy Tales in a Legal Context* De Gruyter Berlin

Comcare v PVYW [2013] HCA 41

Crawley K and Tranter K 2019 'A Maelstrom of Bodies and Emotions and Things: Spectatorial Encounters with the Trial' *International Journal for the Semiotics of Law* 32: 621-640

Feneley R 2009 'The boy from Sandy Hollow' *The Sydney Morning Herald* (10 January) <https://www.smh.com.au/national/the-boy-from-sandy-hollow-20090110-gdt998.html>

Hatzimanolis v ANI Corporation [1992] HCA 21

Jacob MA and Macdonald A 2019 'A Change of Heart: Retraction and Body' *Law Text Culture* 23: 262-275

Jessup B and McIlwraith C 2015 'The Sexual Legal Geography in *Comcare v PVYW*' *University of New South Wales Law Journal* 38/4: 1484-1506

Leiboff M 2016 'Theatricalising Law in Three, 1929-1939 (Brisbane)' *Law Text Culture* 20/6: 93-135

- 2018 'Theatricalizing Law' *Law and Literature* 30/2: 351-367

- 2020 *Towards a Theatrical Jurisprudence* Routledge Oxon and New York

Mulcahy S 2019 'Silence and Attunement in Legal Performance' *Canadian Journal of Law and Society* 34/2: 191-207

Peters JS 2008 'Legal Performance Good and Bad' *Law, Culture and the Humanities* 4: 179-200

Ramshaw S 2010 'Jamming the Law: Improvisational Theatre and the "Spontaneity" of Judgement' *Law Text Culture* 14/9: 133-159

Rogers N 2008 'The Play of Law: Comparing Performances in Law and Theatre' *Queensland University of Technology Law and Justice Journal* 8/2: 429-443

Schechner R 1994 'Response to Bailey and Ford's "Of Methods and Metaphors"' *The Journal of Applied Behavioural Science* 30/4: 397-401

Sheikh D 2019 'Performing Contempt' *Indent: The Body and the Performative* 2 <https://www.indent.in/present-continuous/2019/11/13/contempt>