

Sherlock Holmes in Australian judgments

By the Hon Leslie Katz SC

One of the characteristic functions of Australian judges and tribunal members is the drawing of conclusions of fact from evidence that's before them. Sherlock Holmes is one of the best-known fictional characters whose function it was also to do that very thing and is one who, what's more, frequently philosophised about the process of doing it. In those circumstances, it's not surprising that we find Australian judges and tribunal members referring in their reasons for judgment or decision both to examples of Holmes's engaging in that process and to examples of his philosophising about it.

A famous example of his engaging in that process, referred to a number of times in Australian reasons for judgment or decision, occurred in the story 'Silver Blaze'.¹ There, we find Holmes drawing a conclusion of fact, not from the presence of a particular act, matter or thing, but from its absence.

I'll discuss only one of the sets of reasons in which that famous example has been referred to, the reasons for judgment of Ipp J, then of the Western Australian Supreme Court, in *Entwells P/L v National and General Insurance Co Ltd*.²

I have two reasons for limiting myself for present purposes, only to what Ipp J had to say in that case.

In 'Silver Blaze', a person had been able to enter the stables in which the famous racehorse was being housed at night and to do so without the watchdog's barking; therefore, that person must've been known to the watchdog.

The first reason is simply that Ipp J is the only judge or tribunal member I've found who, in his or her reasons, actually quoted the famous passage from the story, which passage consists of an exchange between, on the one hand, Inspector Gregory, described by Dr Watson as 'a man who was rapidly making his name in the English

detective service', and, on the other, Holmes. According to Ipp J:³

The situation brings to mind the following exchange:

'Is there any other point to which you would wish to draw my attention?'

'To the curious incident of the dog in the night time.'

'The dog did nothing in the night time.'

'That was the curious incident,' remarked Sherlock Holmes.

The second reason why I mention only what Ipp J had to say is that, unlike that in any other case that I've found, '[t]he situation' to which his Honour was referring at the beginning of the passage that I've just quoted was a factual situation remarkably similar to that which had been imagined by Holmes's creator.

In 'Silver Blaze', a person had been able to enter the stables in which the famous racehorse was being housed at night and to do so without the watchdog's barking; therefore, that person must've been known to the watchdog. In the case before Ipp J, a person had been able to enter a shop at night and to do so without its burglar alarm's going off; therefore, the person must've been 'known to' the burglar alarm (in other words, the person must've known

the secret code that one had to enter in order to prevent the burglar alarm's going off).

What, I wonder, would Holmes have made of such a coincidence? Probably nothing, since, as he told Watson in the story, 'A Case Of Identity',⁴ 'life is infinitely stranger than anything which the mind of man



could invent.'

As to Holmes's philosophising about the process of fact-finding, one can find a reference to a famous example of such philosophising in the reasons for judgment of Muirhead J of the Federal Court of Australia in *Nominal Defendant v Owens*.⁵ That was an appeal from a judgment that had depended on the finding of fact that, of the two occupants of a car at the time that it had crashed, the plaintiff in the case had not been the driver. In the course of rejecting that finding of fact by the trial judge, Muirhead J said,⁶ 'In the words of Sir Arthur Conan Doyle: "It is a capital mistake to theorize before one has data" (*The Memoirs of Sherlock Holmes*).'

Conan Doyle had obviously been very enamoured of the sentiment implicit in the statement on which Muirhead J relied, because he (Conan Doyle) had put it into Holmes's mouth many more times than just the once referred to by Muirhead J. In the novel, *A Study In Scarlet*,⁷ Holmes had said, 'It is a capital mistake to theorize before you have all the evidence'. In the story, 'The Adventure of the Second Stain',⁸ Holmes had said, 'It is a capital mistake to theorize in advance of the facts'. In the story, 'The Adventure of the Speckled Band',⁹ Holmes had said, '[H]ow dangerous it always is to reason from insufficient data.' In the story, 'The Adventure of Wisteria Lodge',¹⁰ Holmes had said, '[I]t is an error to argue in front of your data.' In the novel, *The Valley Of*



Fear,¹¹ Holmes had even gone so far as to say to Inspector MacDonald of Scotland Yard, 'The temptation to form premature theories upon insufficient data is the bane of our profession.'

Unfortunately, in making his statement, Muirhead J appears to have made the capital mistake of theorising before he had data or, in other words, of giving an attribution for the quotation without actually looking it up. It had not appeared in *The Memoirs of Sherlock Holmes*¹² (any more than had any of its variants that I've found). In fact, Holmes had made the particular statement quoted by Muirhead J in the story, 'A Scandal In Bohemia', which story appeared in *The Adventures of Sherlock Holmes*.¹³

Still, as Holmes himself acknowledged in the story, 'The Adventure of the Sussex Vampire',¹⁴ 'One forms provisional theories and waits for ... fuller knowledge to explode them. A bad habit...; but human nature is weak.'

Because Holmes is so familiar to us, equally familiar are some of the physical tools of trade that he used in his detecting, for instance, his magnifying glass. However, I've only been able to find one reference to any such tool of trade of his in Australian reasons. That reference occurred in the reasons for decision of the Administrative Appeals Tribunal in *Re National Trust (NSW) and Minister of Industry and Commerce*.¹⁵

The question in that proceeding was whether the National Trust was entitled to a book bounty in respect of certain of its publications. Paragraph 3A(1)(c) of the *Bounty (Books) Act 1969* (Cth) provided

that a bounty was not payable in respect of any book that was 'a directory, guide or timetable or similar publication relating, in whole or in substantial part, to Australia or place or places in Australia'. In construing the reference in the provision to 'a directory, guide or timetable', the tribunal decided that the words had been used according to their ordinary understanding and gave, as a typical example of a 'timetable' within the meaning of the provision, "Bradshaw" (beloved of Sherlock Holmes)'.¹⁶

Despite that comment by the tribunal, when one examines the Sherlock Holmes canon¹⁶ for 'Bradshaw'¹⁷ references, one finds surprisingly few of them. In fact, I've been able to find only two. Notice that it's only in the first of the two that a Bradshaw is actually used and used for its intended purpose and that, on that occasion, it's identified as belonging to Watson.¹⁸

First, in the story, 'The Adventure of the Copper Beeches',¹⁹ Holmes receives an urgent summons to the city of Winchester. According to Watson:

The telegram which we eventually received came late one night, just as I was thinking of turning in, and Holmes was settling down to one of those all-night researches which he frequently indulged in, when I would leave him stooping over a retort and a test-tube at night, and find him in the same position when I came down to breakfast in the morning. He opened the yellow envelope, and then, glancing at the message, threw it across to me.

'Just look up the trains in Bradshaw,' said he, and turned back to his chemical studies.

The summons was a brief and urgent one. Please be at the Black Swan Hotel at Winchester at midday tomorrow (it said). Do come! I am at my wits' end. - HUNTER.

'Will you come with me?' asked Holmes, glancing up.

'I should wish to.'

'Just look it up, then.'

'There is a train at half-past nine,' said I, glancing over my Bradshaw. 'It is due at Winchester at 11.30.'

'That will do very nicely.'

Secondly, in the novel, *The Valley Of Fear*,²⁰ Holmes is trying to decipher a coded message that he's received. He's satisfied that deciphering the code requires knowledge of the contents of a book, but which one? He's convinced that it must be large, printed in double columns, in common use and printed in one edition only. He discusses the matter with Dr Watson as follows:

This is clearly a book which is standardized. He [that is, the author of the message to be deciphered] knows for certain that his page 534 will exactly agree with my page 534.

But very few books would correspond with that.

'Exactly. Therein lies our salvation. Our search is narrowed down to standardized books which any one may be supposed to possess.'

'Bradshaw!'

'There are difficulties, Watson. The vocabulary of Bradshaw is nervous and terse, but limited. The selection of words would hardly lend itself to the sending of general messages. We will eliminate Bradshaw.'²¹

In light of the two extracts that I've just set out, the only ones in the entire Sherlock Holmes canon in which, so far as I can tell, Bradshaw is even mentioned, a serious question must arise about the intensity of the amatory relationship that had been perceived by the tribunal to exist between Holmes and Bradshaw.²²

Finally for present purposes, I'll mention three sets of reasons in which Holmes's remarkable detective skills have been referred to as a standard which it would be either unreasonable or unnecessary to require others to reach.

First, in *Stateliner v Legal & General*,²³ White J, of the South Australian Supreme Court, was considering the standard of

defect-checking of its vehicles that an insurer was entitled to expect from an insured bus company. According to White J,²⁴ 'An objective and balanced standard of detective care is called for, not the standards of a Sherlock Holmes....'

Secondly, in another case, the driver of a car had been very seriously injured when, at night, he ran into the back of an insufficiently-lit truck. The truck had been parked at the side of a highway, though it protruded onto the highway to some extent. At the time the driver had happened upon the truck, another car was coming from the opposite direction, so that if the driver had swerved to miss the truck, he would have collided with the oncoming car. An appeal to the High Court of Australia by the trucking company and its driver against a judgment for damages in favour of the very seriously injured driver was dismissed, Mr Ligertwood having appeared on the appeal for the trucking company and its driver.

In his reasons for judgment, Rich J said:

The respondent met in an unexpected place a large stationary vehicle not properly lighted. At the same time he had to pass an oncoming car. If he had swerved, he would have crashed into that car. It was a case of Scylla and Charybdis. Mr. Ligertwood's argument appeared to suggest that in these unexpected and difficult circumstances Dr. Watson should have possessed and exercised the prescience of Sherlock Holmes.

Yes, it's true; the very seriously injured driver's name was Watson and he was a doctor!

Nonetheless though Rich J was in favour of dismissing the appeal against the judgment in Dr Watson's favour, I can't help but regard his introduction of the name of Sherlock Holmes into his reasons for judgment as a joke in very poor taste.²⁵

Finally, in his reasons for decision in *Gaculais and Minister for Immigration and Multicultural Affairs*,²⁶ Chappell DP said:²⁷

It does not require the skills of a Sherlock

Holmes or Dr Watson to discern the nature of the systematic pattern of immigration fraud and abuse emerging from these cases. It is very disturbing, however, to realise that it is a pattern which appears to have been allowed to continue over a substantial period of time without effective actions being taken to investigate and prosecute those responsible. It would appear that rather than Holmes and Watson at the investigative helm, Inspector Clousseau [written thus] is the person who has been in charge of any activities which may have been conducted to detect and deter what appears to be gross misconduct on the part of certain persons who have been allowed to practise their professions as migration agents.

As to the passage just quoted, one may respond that it doesn't require the skills of a Sherlock Holmes to discern that Chappell DP wasn't much of a Sherlock Holmes aficionado. He made that perfectly plain in what he said by equating the detective skills of Dr Watson with those of Mr Sherlock Holmes!

Endnotes

1. From *The Memoirs of Sherlock Holmes* <<http://www.gutenberg.org/etext/834>>.
2. Unreported as to the part of the reasons relevant for present purposes; 19 July 1991.
3. At pages 12-13.
4. From *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>.
5. (1978) 45 FLR 430.
6. At page 447.
7. <<http://www.gutenberg.org/etext/244>>.
8. From *The Return of Sherlock Holmes* <<http://www.gutenberg.org/etext/108>>.
9. From *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>.
10. From *His Last Bow* <<http://www.gutenberg.org/etext/2350>>.
11. <<http://www.gutenberg.org/etext/3289>>.
12. <<http://www.gutenberg.org/etext/834>>.
13. <<http://www.gutenberg.org/etext/1661>>.
14. From *The Case-Book of Sherlock Holmes*, of which I haven't been able to find an electronic copy.
15. <<http://www.austlii.edu.au/au/cases/cth/AATA/1984/146.html>>.
16. <http://en.wikipedia.org/wiki/Canon_of_Sherlock_Holmes>.

17. <http://en.wikipedia.org/wiki/George_Bradshaw#Bradshaw.27s_railway_timetables>.
18. It's plain, incidentally, that each of the two references is to the version of Bradshaw that was devoted to the trains of the United Kingdom. There was also a version of Bradshaw devoted to the trains of the Continent. There were even guides carrying the Bradshaw name that were devoted to the trains of parts of Australia.

Although one finds no reference in the canon to any Continental or Australian version of Bradshaw, in the story, 'The Boscombe Valley Mystery', from *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>, set in the late 1880s, one does find Holmes using 'a map of the Colony of Victoria'. Could that map have been abstracted from *Bradshaw's Guide to Victoria*? That that monthly publication contained such a map and had done so since at least the 1870s is confirmed by, among other things, uncontroversial evidence given in litigation involving the publication: see *In re Bradshaw's Guide, Ex parte Stillwell* (1903) 29 VLR 415, at pages 415-16.

19. From *The Adventures of Sherlock Holmes* <<http://www.gutenberg.org/etext/1661>>.
20. <<http://www.gutenberg.org/etext/3289>>.
21. Obviously, Holmes was not very impressed with the vocabulary of the then-current issue of Bradshaw. That issue was from the end of the 80s, according to Watson's dating of his conversation with Holmes, which dating occurred elsewhere in the novel's opening chapter.

Holmes's attitude to Bradshaw is reminiscent of that of Charles Dickens: 'No book, no newspaper! I left the Arabian Nights in the railway carriage, and have nothing to read but Bradshaw, and 'that way madness lies''. (A Plated Article, *Household Words* <<http://www.archive.org/stream/householdwords05dicklond#page/118/mode/2up>>, APR 24 1852).

PG Wodehouse made Lancelot Mulliner, a character in his story, *Came The Dawn*, from *Meet Mr Mulliner* <<http://www.archive.org/stream/meetmrmulliner00wodeuoft#page/162/mode/2up>>, express a different view of Bradshaw. Lancelot, who seems to have been speaking in 1927, described Bradshaw as being 'more eloquent than Shakespeare, the book of books, the crown of all literature'.

Law Council awards President's Medal to Bret Walker SC



In September 2009, Bret Walker SC was awarded the Law Council's highest honour, the President's Medal. He was nominated for this award by the New South Wales Bar Association for his outstanding contribution to the legal profession and the wider community in his various capacities as a community lawyer, barrister, senior counsel and philanthropist.

Speaking at the presentation ceremony, during the Australian Legal Convention,

in Perth, the president of the Law Council, John Corcoran said: 'Mr Walker is held in high regard for his sharp legal mind and his advocacy skills, as well as his strength of character and integrity. His contribution to social justice and the rule of law in this country has been extraordinary. He is often involved in matters in which the more disadvantaged in our community come face-to-face with the law. Both his practice at the bar and his time spent giving pro bono assistance to a wide range of causes reflect both his incredible legal skill and deep understanding of people from all walks of life. His commitment to social justice and his ability to interpret and apply the law at the highest level make him an invaluable member of the profession, as well as of the wider community. On behalf of the Law Council and the wider profession, I congratulate Mr Walker on this award. It is formal recognition of his substantial contribution to the law and the community.'

Bret Walker SC has been a practising

barrister for nearly 30 years, and was appointed senior counsel in December 1993. He regularly advises the Australian Government on a wide variety of constitutional issues. He has also been appointed by the NSW Government to conduct inquiries into Campbelltown and Camden hospitals, the management of Kosciusko National Park in the wake of the Thredbo landslide, and the Sydney Ferry Service. He was president of the Law Council of Australia from 1997-98, and president of the NSW Bar Association from November 2001 to November 2003. He is the primary author of the New South Wales Barristers rules, the Australian Bar Association's Model Conduct Rules and the Law Council of Australia's current Model Conduct Rules.

In December 2003 he was made a life member of the New South Wales Bar Association, in recognition of his exceptional service over many years to the Bar Association and the profession.

Sherlock Holmes in Australian judgments (continued)

In an attempt to test Holmes's theory about the limited nature of Bradshaw's vocabulary, I searched the *OED* (2d) electronically for words or phrases whose meaning was illustrated by quotations taken from pre-1890s Bradshaws. I found only six such words or phrases: express (as in 'express train'); mixed (as in 'mixed train'); parliamentary (as in 'parliamentary train'); second-class (as in 'second-class railway ticket or compartment'); slip (as in 'to slip a railway carriage'); and third-class (as in 'third-class railway ticket or compartment'). Not much Shakespearean-style eloquence in that lot!

Incidentally, the book that Holmes correctly concluded had been used to create the coded message was *Whitaker's Almanack* <http://en.wikipedia.org/wiki/Whitaker's_Almanac>.

22. Completeness dictates that I mention here two references that I've found in the Sherlock Holmes canon to a railway timetable, with no mention of whether or not that timetable was one that had been produced by Bradshaw. In the story, 'The Adventure of the Bruce-Partington Plans', from *His Last Bow* <<http://www.gutenberg.org/etext/2350>>, a question arose as to the first train that someone could've taken from Woolwich to London Bridge after a certain time. According to Watson, 'A reference to the timetable showed that the 8.15 was the first... In the story, 'The Adventure of the Dancing Men', from *The Return of Sherlock Holmes* <<http://www.gutenberg.org/etext/108>>, Holmes asks Watson whether there is a train to North Walsham that night. According to Watson, 'I turned up the timetable. The last had just gone.'

23. (1981) 29 SASR 16.

24. At page 33.

25. The case was *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 and the quotation from the reasons for judgment of Rich J is at page 5. At pages 5-6 in my paper, *Homer in Australian reasons for Judgment or Decision* <<http://papers.ssrn.com/abstract=1322208>>, I mentioned, without providing examples, that one could find in such reasons reference to someone's being between Scylla and Charybdis. The passage from Rich J's reasons for judgment that I've quoted in the text provides an example of such a reference.

26. <<http://www.austlii.edu.au/au/cases/cth/AATA/2000/959.html>>.

27. At paragraph [64].