Kali mera. It is my great pleasure to speak at this historic HAL conference, along with such impressive speakers, starting with Chief Justice Kiefel of Australia. As one of the few Canadians here, I have been embraced by the Aussie warmth and feel kinship on so many different levels. I have always been very proud of my Greek heritage. I love the Greek culture, the Greek generosity, philotimo, and the Greek kefi – the zest for life! And of course the Greek history and values; strength and courage and respect for learning, for art, for humanity – that is the Greek legacy.

Edith Hamilton, the renowned classicist, marvelled in her book *The Greek Way* at “the calm lucidity of the Greek mind … unsurpassed in [its] mastery of truth and enlightenment”. She talked about the genius of the ideas that have survived millennia and shaped the western world; we are their descendants, she says, “intellectually, artistically, and politically” and I would add, legally. We have much to learn from the ancient Greeks about our system of rational justice and the role of advocacy within it.

I will begin today by discussing the influence of Hellenism on contemporary systems of rational justice and advocacy. Then, drawing on insights from ancient Athens, I will discuss the role and limits of advocacy, and how modern concerns about access to justice impact advocacy.

I. Hellenism and Rational Justice

I start by travelling back more than two millennia to the third play in Aeschylus’ *Oresteian Trilogy*, *The Eumenides*, which features one of the earliest representations of a jury trial – and of trial advocacy – in history. The play opens shortly after Orestes kills his mother Clytemnestra to avenge his father Agamemnon’s murder. Orestes flees and is pursued by twelve Furies, those terrifying ancient gods that seek blood as retribution for his crime. The Furies follow Orestes to Athens, where he implores Athena to come to his aid. The goddess grants him sanctuary and criticizes the Furies for seeking “the form of justice, more than to be just”. Yet she refuses to

---

dismiss their claim against Orestes and orders that he be tried before a jury of twelve wise Athenian citizens, thus establishing “the perpetual court” of Areopagus.5

In the trial, Athena gives both sides the opportunity to be heard. Much as would be the case today, Athena asks the Furies to speak first: “[s]ince you are the accuser, speak[.] The court must first hear a full statement of the charge.”6 They are followed by Orestes who must “answer to [the] charge” against him.7 He states: “That I struck the blow [i]s true, I own it. But was murder justified?”8 “Whether or no[t] I acted rightly is for you to judge.”9 Then, in brief submissions, Orestes’ “advocate” Apollo pleads that murdering a man is graver than murdering a woman, and that the father is the child’s only true parent. And given the gravity of his mother’s own crime — murdering his father Agamemnon — Orestes was justified in his actions.10 Apollo concludes by promising Athens “many gifts”.11 Due either to Apollo’s arguments (sexist as they were), or possibly his bribe, the jury splits on the verdict. Athena casts the decisive, thirteenth vote . . . in Orestes’ favour.12 Orestes is acquitted.

Following the acquittal, Athena offers the Furies power and a sanctuary beneath the floors of the city’s palaces of justice.13 In this way, she harnesses the unbridled fury of human conflict to serve as the spirit of formal justice, creating a system where justice is rendered on a rational basis, with fear as the safeguard of the law.14

The Eumenides depicts and even celebrates the shift away from justice as immediate vengeance. Rather, Aeschylus’ Athens saw the development of a system of rational justice characterized by certain procedural safeguards including the ability to make one’s case.15 The blood-curdling Furies, who are ancient gods, symbolize the justice of old. They hound Orestes – “[g]ive us your blood to drink” – disinterested in anything he might have to say in his defence.16 Through Athena’s intervention, this earlier type of justice effected from above is overtaken by a form of justice that is imparted by the citizenry and in which each party is given the opportunity to persuade. As Athena told the Furies following the trial, “Let me entreat you[,] soften your indignant grief. Fair trial, fair judgment, ended in an even vote, [w]hich brings to you neither

---

5 Ibid, at p. 164. See also at p. 170.
6 Ibid, at p. 167.
7 Ibid, at p. 162.
8 Ibid, at p. 168.
9 Ibid, at p. 163.
11 Ibid, at p. 170.
12 Ibid, at p. 172.
14 The Eumenides, at p. 181; Henderson, at p. 4.
16 The Eumenides, at p. 156.
dishonour nor defeat”. And to Athens she says: “Let your state hold justice as her chiepest prize.”

While *The Eumenides* is based on mythical fiction, the trial it depicts is rooted in reality. Scholars confirm the existence of a vibrant rational justice system in Athens during the Classical Period, that is, during the 4th and 5th centuries B.C. This system was comprised of large popular jury trials as well as trials and appeals before the Court of the Areopagus. In this context, the ability to make submissions before judgment is rendered was seen as a cornerstone of a fair and just legal system. As Orestes says in a different Hellenic play, Euripides’ *Andromache*, “sage counsel he gave who taught men to hear the arguments on both sides.” This still rings true. In an adversarial justice model, the legitimacy of decision-making is enhanced when parties have the opportunity to advocate their position.

II. Contemporary Advocacy Issues

a. The Importance of Resolute Advocacy – and its Limits

Despite the passing of millennia, our modern adversarial justice systems descend from the Hellenes. In a system that depends on persuasive appeals to reason, advocacy – both oral and written – plays a crucial role in advancing a just result according to law.

While the role of the lawyer as advocate has evolved through the ages, the importance of the advocate is foreshadowed in *The Eumenides*. Apollo says of Orestes: “I will stand by him and save him if I can. Fierce anger stirs to action both in heaven and earth [i]f I forsake the guilty man who turned to me . . . I am here to be [h]is advocate”. Indeed, Apollo’s advocacy may not have been as “far-fetched” as some say; Athena appears to have been quite swayed by the supremacy of “the father’s claim.” “No mother gave me birth” she says. You may recall she emerged from Zeus’ head.

In modern times, zealous advocacy has become a hallmark of our justice systems. Lord Brougham’s oft-quoted words echo Apollo’s: “an advocate, in the discharge of his duty, knows

---

19 When the play was written, the Court of the Areopagus, which met on the “hill of Ares”, had held a “dominating position in the political life of Athens” for more than a century. The scope of its jurisdiction, which had recently been curtailed, was being hotly debated: Vellacott, at pp. 18-19.
21 Euripides, *Andromache* (translated by E. P. Coleridge) (online: ebooks.adelaide.edu.au/e/euripides/andromache/), at lines 957-958; see also: Stone, at p. 223.
22 As Athena pronounces in closing *The Eumenides*, “Holy Persuasion too I bless who softly strove with harsh denial [i]ll Zeus the Pledger came to trial [a]nd crowned Persuasion with success.” (at p. 179).
23 Ibid, at pp. 155, 167.
24 Vellacott, at p. 35.
25 *The Eumenides*, at p. 172.
26 Ibid.
but one person in all the world, and that person is his client”.

The importance of resolute advocacy is particularly pronounced in the case of a defence lawyer, who advances the client’s right to make full answer and defence. As the Supreme Court of Canada recently noted, “defence lawyers are the final frontier between the accused and the power of the state.”

Lawyers’ resolute advocacy sometimes leads to public criticism of lawyers for defending their client’s conduct. One recent Canadian example occurred amidst the high-profile defence of a well-known radio host with the Canadian Broadcasting Corporation who was charged with five sexual assault offences. He was acquitted, primarily due to concerns about the credibility of the complainants’ evidence after extensive cross-examination. The trial was closely followed and the acquittal led to strong public reactions. The prominent defence lawyer was criticized by some of, quote, “betraying her gender”. In a rare interview, the lawyer said that characterizing her role in such a way was “a fundamental misconception of what [lawyers] do in the justice system”.

Indeed, given the important role of resolute advocacy in the rational administration of justice, lawyers are required to advocate on behalf of their client even in the face of public criticism. Australia is no stranger to zealous advocacy, given what I have seen of Cleaver Greene on two seasons of Rake. Indeed, by virtue of the clear cab rank rule Australian lawyers are generally expected to take on a case if they are able to do so.

Nevertheless, while lawyers must stand resolute in the face of harsh criticism, zealous advocacy is not a free for all. Modern advocacy has its limits.

As one obvious example of improper advocacy, consider Apollo’s ill-advised promise of gifts to the jury in The Eumenides. Bribing juries and witnesses was not unheard of in Classical Athens. Obviously, today, bribes, which appeal to self-interest, fall outside the proper role of advocacy. Advocates are expected to appeal to reason to make persuasive arguments on behalf of their clients.

---

27 J. Nightingale, ed., The Trial of Queen Caroline, vol. 2 (1821), at p. 8; see also: A. Smith, “Defending the Unpopular Down-Under” (2006), 30 M. U. L. R. 495, at pp. 539-40. The full quote reads: “an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expediends, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.”


31 Ibid, at paras. 131-139.


33 Ibid.

34 Groia, at para. 73.

35 Smith, at pp. 500-01, 547-48.

36 The Eumenides, at p. 170.

37 Chroust, at p. 382.
Moreover, while an appeal to emotion can be an effective tool of persuasion, it sits uneasily in the rational framework of our legal analysis. Oral advocacy in Classical Athens often involved appeals to passion, piety, and prejudice. Juries were known to be partial to theatrical and highly sentimental submissions.\textsuperscript{38} For example, the defendant’s crying wife and his wailing children might be brought into court to convince the jury not to order a capital sentence.\textsuperscript{39}

Such antics were criticized by some contemporaries.\textsuperscript{40} In \textit{The “Art” of Rhetoric}, for instance, Aristotle writes that “it is wrong to warp the [juror’s] feelings, to arouse him to anger, jealousy, or compassion, which would be like making the rule crooked which one intended to use.”\textsuperscript{41} Similarly, in Plato’s \textit{Apology}, Socrates closes his defence by deploiring the “strange” practice of appealing to the jury members’ feelings at trial. He tells the jury that they should not tolerate “these pitiful pieces of acting”.\textsuperscript{42} In his trial, Socrates did not even directly deny the charges against him.\textsuperscript{43} Commentators have suggested that Socrates declined to use forensic advocacy altogether during his fateful trial because he found it deceptive. On this interpretation, Socrates pleaded the truth as he understood it based on natural justice, rather than the constructed truth that forensic rhetoric might have called for.\textsuperscript{44}

These undue appeals to emotion would clearly be inappropriate today. (Although, lawyers still sometimes bring their clients’ families to court.) Jurors in Canada are however explicitly reminded that they must “consider the evidence and make [their] decision on a rational and fair consideration of all the evidence, and not on passion, or sympathy, or prejudice against the accused, the Crown, or anyone else connected with the case”.\textsuperscript{45}

A further limit on advocacy that has emerged as especially important today is the professional obligation to be civil and courteous.\textsuperscript{46} In Canada, the propriety of civility, as a professional obligation, has been the subject of sustained academic debate.\textsuperscript{47} An eminent professor of law has argued that an obligation of politeness and courtesy may discourage zealous advocacy

\begin{itemize}
\item \textsuperscript{38} \textit{Ibid}, at pp. 344, 347, 374-375, 379-380; Zimet, at p. 492; Bertoch, at p. 1013.
\item \textsuperscript{39} Chroust, at p. 379.
\item \textsuperscript{40} \textit{Ibid}, at pp. 356-357.
\item \textsuperscript{41} Aristotle, \textit{The “Art” of Rhetoric}, book I (translated by J. H. Freese, 1926), at p. 5 (“The “Art” of Rhetoric”).
\item \textsuperscript{42} Plato, \textit{The Apology}, in \textit{The Trial and Death of Socrates Being The Euthyphron, Apology, Crito and Phaedo of Plato} (translated by F. J. Church, reprinted by Forgotten Books, 2015), at p. 67.
\item \textsuperscript{43} F. Vaughan, “The Trial of Socrates: Recent Reflections” (1976), 14:2 Osgoode Hall L. J. 407, at pp. 408-409. The charges were: not acknowledging the gods recognized in Athens, introducing new divinities, and corrupting the youth (see p. 407).
\item \textsuperscript{44} See e.g. \textit{ibid}, at pp. 408-409, 411.
\item \textsuperscript{45} Canadian Judicial Council, National Judicial Institute, \textit{Model Jury Instructions} (online: \url{www.nji-inm.ca/index.cfm/publications/model-jury-instructions}), at 8.3 (Final Instructions – Prejudice and Sympathy).
\item \textsuperscript{46} See e.g. Ontario (Canada): \textit{Rules of Professional Conduct} made under the \textit{Law Society Act}, R.S.O. 1990, c. L.8 (effective October 1, 2014 and updated January 25, 2018), at r. 3.2-1, 5.1-1, 5.1-3, 5.1-5, and 7.2-1; Australia: Law Council of Australia, \textit{Australian Solicitors Conduct Rules}, 24 August 2015, at r. 4.1.2.
\item \textsuperscript{47} See e.g. A. Wooley, “Does Civility Matter?” (2008), 46 \textit{Osgoode Hall L. J.} 175.
\end{itemize}
and inhibit the justice system’s truth-seeking function. Others have written about the role of the trial judge in dealing with incivility when it has the potential to interfere with a trial.

Indeed, the Supreme Court of Canada this past month released Groia v. Law Society of Upper Canada, dealing with the high-profile decision of a law society finding a defence lawyer guilty of professional misconduct for his uncivil courtroom behaviour and attacks on the integrity of opposing counsel. During the course of a criminal trial, Mr. Groia engaged in “what can fairly be described as ‘petulant invective’”, repeatedly alleging prosecutorial misconduct. The Supreme Court divided, with the majority quashing the Law Society’s finding of professional misconduct. That said, it was unanimously of the view that resolute advocacy has certain limits, one being civility. The Court noted that uncivil advocacy is prejudicial to the client, is a distraction from the real issues to be adjudicated, and jeopardizes the courts’ ability to impart justice in a rational, peaceful, effective and efficient manner. This compromises the administration of justice and public confidence in the justice system.

So, zealous advocacy yes, but with modern limits. The Advocate’s role is to appeal to reason, not self-interest or emotion, and to do so in a civil and respectful way.

b. Access to Justice

Obtaining the services of a professional advocate to assist in accessing justice can be challenging, both today and in antiquity. In ancient Athens, it was common for parties to be self-represented at trial. Initially, litigants were forbidden to secure the services of an advocate. Eventually, it became possible for parties to obtain permission for another person to present their case for them. Yet it was not necessarily beneficial for them to do so. Athenian juries generally believed that parties who represented themselves likely had a stronger case. They are also said to have been distrustful of legal experts. That is why parties sometimes commissioned a speech-writer, a logographer, to help them prepare the address which they would recite for themselves at trial. Socrates himself is reported to have had a speech prepared by a logographer before his trial, though he is thought not to have used it in the end. Others compromised; they spoke only briefly for themselves and asked advocates – syndics – to then speak on their behalf. This is what Orestes appears to have done in The Eumenides. That said, for a time, the law prohibited the remuneration of persons who appeared in private law suits to advocate for others.
Today, for different reasons, it is also not uncommon for litigants to be self-represented before Canadian courts. Access to justice problems have become so prevalent that, in 2014, the Supreme Court of Canada stated that “ensuring access to justice is the greatest challenge to the rule of law in Canada today.” I understand that the same concerns exist in Australia, where many are worried that the civil justice system is too slow, too expensive, and too adversarial. As I wrote in that 2014 case, called *Hryniak v. Mauldin*, “Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial.” In light of this reality, some people opt for limited scope retainers; they hire a lawyer only to help them build or prepare their case, but not to represent them in court – they are today’s *logographers*. For a great number of other litigants, however, even the limited scope retainer is not a financially viable option.

These modern access to justice challenges require concerted efforts across the justice system, including by the judiciary. But access to justice concerns also have implications for advocacy, both as to what and how lawyers advocate. Our Court noted that “counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice.” We also recently stressed that even defence counsel have an obligation to ensure the accused’s right to trial without unreasonable delay.

The role and nature of advocacy must respond to this challenge. Great advocacy is depicted in popular culture through figures such as Atticus Finch and Perry Mason prevailing in exciting courtroom dramas. But in reality, most cases get settled and most advocacy today takes place outside the traditional adversarial trial. In Canada, the vast majority of criminal trials result in a guilty plea, and perhaps as few as two percent of civil cases go to trial. Taking access to justice seriously may move the role of advocacy away from a predominantly adversarial approach. Indeed,

---

61 At para. 1.
62 For a definition of limited scope retainers, see e.g. Ontario: *Rules of Professional Conduct*, at r. 1.1-1.
63 Obviously, courts have an important role to “play in curtailing unnecessary delay and ‘changing courtroom culture’”: *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 37 (internal reference to *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 114 omitted). They may also improve access to justice by increasing the transparency of their processes, and the intelligibility of their decisions through the use of plain language. The Supreme Court of Canada has recently taken steps to be more accessible to the public. Since February 2009, members of the public can view videos of most hearings online. This year, the Court introduced plain language summaries, known as Cases in Brief, which are “short summaries drafted in reader-friendly language, so that anyone interested can learn about the decisions that affect their lives” (online: www.scc-csc.ca/case-dossier/cb/index-eng.aspx).
64 *Hryniak*, at para. 32.
65 *Cody*, at para. 1; see also para. 36.
some academics have criticized adversarialism as the guiding principle in Canadian legal ethics.\textsuperscript{67} A recent government report on access to justice in Australia similarly suggests that adversarial litigation can sometimes hinder the resolution of disputes and actually exacerbate them, to the disadvantage of the client.\textsuperscript{68} Today, advocacy often means finding an informal and cost-effective solution to a client’s problems. Thus, good advocates frequently cooperate and advocate towards settlement, for example through mediation.

But even in romanticized popular depictions of trial advocacy, the trials are succinct and the arguments are to the point. Good advocates are clear, brief, focused and selective in the use of details. This makes their advocacy effective, but it also promotes access to justice. I don’t find it helpful when lawyers advance a long unfocussed shopping list of arguments. I call this the Wikileaks School of Advocacy. Dump all the data in front of the judge and leave it to her to rake through it to find something valuable. From the perspective of a judge, this distracts from the main issues. From the perspective of access to justice, this can unnecessarily increase the length of a trial and costs to the client. Although the one-day trials of ancient Athens may not always be feasible or appropriate, there is a lot to be said for a short, focused trial.\textsuperscript{69}

Reconciling advocacy with access to justice imperatives also means using plain language when possible. But clarity and simplicity (and brevity!) are just as crucial to written advocacy as they are to oral advocacy. While there was a limited role for written advocacy in the courts of Classical Athens, today, it plays a crucial role in introducing the judge to the case and is often the silent advocate, before, during and after a case is heard.\textsuperscript{70} Aristotle emphasizes the importance of plain language when he explains that “that which is written should be easy to read or easy to utter, which is the same thing.”\textsuperscript{71} Edith Hamilton tells us that “[t]he Greeks wrote on the same lines as they did everything else. Greek writing depends no more on ornament than the Greek statue does. It is plain writing, direct, matter-of-fact . . . The Greeks liked facts. They had no real taste for embroidery, and they detested exaggeration.”\textsuperscript{72} I find this clear and concise style of advocacy the most persuasive. In \textit{The Eumenides}, Athena urges both the Furies and Orestes to “be plain in speech.”\textsuperscript{73} As the well-known inscription from Apollo’s temple at Delphi says: Nothing in excess.\textsuperscript{74} \textit{“Pan metron ariston.”}

That is not to say there is no room for art or imagination in simple and effective advocacy. Take for example the story of Sophocles, who “in his extreme old age was brought into court by his son who charged him with being incompetent to manage his own affairs. Sophocles’ sole defense was to recite to the jurors passages from a play he had recently written.”\textsuperscript{75} Incompetent,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{67} See e.g. Farrow, at p. 93.
\item \textsuperscript{68} Australia Productivity Commission, \textit{Access to Justice Arrangements}, at pp. 2, 16-17.
\item \textsuperscript{69} Chroust, at pp. 368-69.
\item \textsuperscript{70} \textit{Ibid}, at pp. 343-344.
\item \textsuperscript{71} \textit{The “Art” of Rhetoric}, book III, at p. 373.
\item \textsuperscript{72} \textit{The Greek Way}, at pp. 56, 59.
\item \textsuperscript{73} \textit{The Eumenides}, at p. 162.
\item \textsuperscript{74} \textit{The Greek Way}, at p. 25.
\item \textsuperscript{75} \textit{Ibid}, at p. 90.
\end{itemize}
\end{footnotesize}
really? The case was dismissed; the complainant was fined; and the “defendant departed honoured and triumphant”.76

Good advocacy takes its shape from the context and its objective. It is an appeal to reason, yes. But it is also an art.

III. Conclusion

In conclusion, a rational justice system, ruled by laws and structured around the parties’ advocacy is our legacy from Classical Greece. In *The Eumenides*, when Athena admonishes the Furies for their focus on vengeance, the Furies respond, “then try [Orestes] fairly, and give judgement on the facts.”77 Today’s legal advocacy finds its roots and borrows from ideas that have come down to us, from the Hellenes, through millennia. And as we tackle contemporary issues in advocacy, we have much to learn from Hellenism about its crucial role within our justice systems. The miracle that was classical Greece, unlike all that had gone before, has moulded Western thought. One more quote from Edith Hamilton: “Greece has a claim upon our attention because we are by our spiritual and mental inheritance partly Greek and cannot escape if we would that deep influence which worked with power through the centuries, touching [us] with light of reason and grace of beauty.”78

---

77 *The Eumenides*, at p. 162.
78 *The Greek Way*, at p. 2.