

# RHYME AND REASON (*SUB NOM. THE DREADFULEST THING OF ALL*)

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The verdict sounds worse when written in verse  
But victory's sweeter if set down in meter.

## ISSUE

"Judicial humour," asserts Prosser, "is a dreadful thing."<sup>1</sup> If so, judicial poetry must be more dreadful still, and waggish jingles in judgments the dreadfulest<sup>2</sup> of all. Yet even the great dean of torts says that "on rare occasions there are litigants deserving only of ridicule, and situations that call only for mirth"<sup>3</sup>—thankfully, he distinguishes the two—and then presents two score of such occasions in his classic anthology of bench merriment. Perhaps, then, a judicious use of rhyme,<sup>4</sup> like metaphor or other literary and rhetorical devices, has a role in the reasoned judgment after all. If law can have a place in poetry, as in Auden's *Law Like Love*<sup>5</sup> or Dickens's highly poetic description of Chancery,<sup>6</sup> then why not poetry in law?

## FACTS AND LAW

### Admiralty Law (I): The Case of the Barge Lost at Sea

The question appears to have been on the minds of judges lately, and as close to home as our own Supreme Court of British Columbia, where Mr. Justice Barry Davies prefaced his judgment in *The Koprino* with the following epigram:

*Koprino* turned south off Cape Beale  
with a Barge in tow not made of steel;  
As Barge and Ship took the Island's lee  
both travelled well on a flat calm sea;  
The voyage was easy well into the night  
with Barge and tow line always in sight;  
But off Carmanagh the wind grew stronger  
the quiet sea was no longer;  
The wooden Barge soon went down—  
but *Koprino* had not run aground;  
The question is what caused the wreck—  
The Crew, the Barge or the house on deck?  
A second query may arise—  
Who bears the loss insurance-wise?<sup>7</sup>

\* I thank Gregory S. Pun of Alexander Holburn Beaudin & Lang, who, knowing of my interest in judicial verse, sent me material on this curious genre when it would cross his desk. Mr. Pun may rest assured, though, that I take full responsibility for the views expressed herein on that material.

These lyrical lines attracted the alert eye of *Vancouver Sun* reporter Neal Hall, who duly interviewed Brenner C.J. and UVic's Professor Berry, who runs writing workshops for judges. Both expressed surprise at a Canadian judge writing his own verse in a decision, though on reviewing *The Koprino*, the chief justice is reported to have graciously commented: "The depth of talent of our judges knows no bounds."<sup>8</sup>

### The Case of the Injured Rap Artist and the Defamed Bully

In fact, Mr. Justice Davies's poetic preface is a distinctly Canadian contribution (i.e., calculated to avoid offending sensibilities) to a genre developed and honed by American judges. A recent and rawer example of that genre is the decision in *Bailey v. Mathers*,<sup>9</sup> issued by Michigan Judge Deborah Servitto six weeks before *The Koprino* and also reported in the *Sun* article. The complaint was that the defendant, a rap artist (?) who goes by the alliterative stage name Eminem, had slandered the plaintiff, a former schoolmate, in the 1999 recording *Brain Damage*. The song, apparently Eminem's effort to explain his own condition, contained the following lyrics:

Way before my baby daughter Hailey  
 I was harassed daily by this fat kid named D'Angelo Bailey  
 An eighth grader who acted obnoxious, cause his father boxes  
 so everyday he'd shove me in the lockers  
 One day he came in the bathroom while I was pissin  
 And had me in the position to beat me into submission  
 He banged my head against the urinal til he broke my nose,  
 Soaked my clothes in blood, grabbed me and choked my throat  
 I tried to plead and tell him, "We shouldn't beef"  
 But he just wouldn't leave, he kept chokin me and I couldn't breathe...

Eminem goes on to explain in his song that his "whole brain fell out of [his] skull" and that he "took it and stuck it back up in [his] head [and] sewed it shut and put a couple of screws in [his] neck."<sup>10</sup> Anyway, enough context.

Before trial, Eminem's eminent counsel moved for summary judgment. The motion succeeded on the basis of uncontested affidavit evidence showing the plaintiff had committed some form of assault and battery on the defendant in their boyhood days; that the plaintiff had failed to create a genuine issue of material fact that the song's lyrics were highly offensive when compared with the uncontested facts; that a reasonable person would not take the song as stating actual facts about the plaintiff; and that there was evidence to show that, when the song was first released, the plaintiff had rather liked the ensuing attention. To put her 13-page decision in a "universally understandable format", Judge Servitto laid down this beat in a closing footnote:

Mr. Bailey complains that his rap is trash  
 So he's seeking compensation in the form of cash  
 Bailey thinks he's entitled to some monetary gain  
 Because Eminem used his name in vain  
 Eminem says Bailey used to throw him around  
 Beat him up in the john, shoved his face in the ground

Eminem contends that his rap is protected  
 By the rights guaranteed by the First Amendment  
 Eminem maintains that the story is true  
 And that Bailey beat him black and blue  
 In the alternative he states that the story is phony  
 And that a reasonable person would think it's baloney  
 The court must always balance the rights  
 Of a defendant and one placed in a false light  
 If the plaintiff presents no question of fact  
 To dismiss is the only acceptable act  
 If the language used is anything but pleasin'  
 It must be highly objectionable to a person of reason  
 Even if objectionable and causing offense  
 Self-help is the first line of defense  
 Yet when Bailey actually spoke to the press  
 What do you think he didn't address?  
 Those false light charges that so disturbed  
 Prompted from Bailey not a single word  
 So highly objectionable, it could not be  
 —Bailey was happy to hear his name on a CD  
 Bailey also admitted he was a bully in youth  
 Which makes what Marshall said substantial truth  
 This doctrine is a defense well known  
 And renders Bailey's case substantially blown  
 The lyrics are stories no one should take as fact  
 They're an exaggeration of a childish act  
 Any reasonable person could clearly see  
 That the lyrics can only be hyperbole  
 It is therefore this Court's ultimate position  
 That Eminem is entitled to summary disposition<sup>14</sup>

Bailey's attorney professed surprise at the judge's rap foray, saying: "I don't know how the Court of Appeals would look at something like that."<sup>12</sup> Yet if there was a case that called for poetic justice, this must have been it. The subject matter itself apparently dictated the form, although that conclusion is revisited later in this article.

*The Koprino* ditty is comparatively benign, almost idyllic in its nautical imagery. The poem's only violent event—the capsizing of the ship—is dealt with almost in passing: we are told the barge “soon went down”. The poetry does not purport to set out the decision or reasons therefor; rather, it merely tantalizes the reader with a hint of the interesting multi-party negligence and coverage issues to come in the tale of the barge lost at sea. Accordingly, the Court of Appeal is unlikely to concern itself over it. However, Mr. Justice Davies's careful incrementalism will require a change to the *Canadian Guide to the Uniform Preparation of Judgments*, which fails to include “Poem” among either the mandatory or optional elements of a judicial decision.<sup>13</sup> Presumably, the Legal Research Section of the Canadian Bar Association will take this up with the Canadian Judicial Council.

### Oak Tree Justice

Both *Bailey v. Mathers* and *The Koprino* can be contrasted with what may be the *locus classicus* of rhyming reason, *Fisher v. Lowe*.<sup>14</sup> While Judges Servitto and Davies appended their *ars poetica* to learned opinions otherwise written in prose, the Michigan Court of Appeals inverted that process when a three-member panel upheld the trial court's judgment against Mr. Fisher. The court's ruling was delivered in perfect iambic tetrameter by J.H. Gillis J. It reads:

We thought that we would never see  
 A suit to compensate a tree  
 A suit whose claim in tort is prest  
 Upon a mangled tree's behest;  
 A tree whose battered trunk was prest  
 Against a Chevy's crumpled crest;  
 A tree that faces each new day  
 With bark and limb in disarray;  
 A tree that may forever bear  
 A lasting need for tender care.  
 Flora lovers though we three,  
 We must uphold the court's decree.  
 Affirmed.<sup>15</sup>

Not until we reach the end of the decision do we find a prosaic footnote (not reproduced here) explaining that the trial court had correctly granted summary judgment in a claim for damages to the plaintiff's "beautiful oak tree" because the defendants were immune from tort liability under a no-fault statute.<sup>16</sup> If *Fisher v. Lowe* is still good law—or at least good form—in Michigan, it may be a full answer to the rhetorical question raised by Mr. DeAngelo Bailey's counsel.

### A Zirconium Zinger

On the other hand, courts may prefer the view of Zappala C.J. in the Pennsylvania case of *Porreco v. Porreco*.<sup>17</sup> Taking issue with a dissent written in verse by his brother justice, the chief justice stated his "grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania".

Again, some context. Louis Porreco, a mid-40s millionaire, had courted 17-year-old Susan while she was in high school. Louis showered her with gifts—an apartment, a car, access to a credit card, and fine jewellery, including, eventually, an engagement ring, purportedly made of diamond. Louis and Susan married when she turned 19. Before the marriage, Louis, careful in personal affairs as in business, drew up a prenup. The agreement specified that if they divorced, Susan would get \$3,500 for each year of marriage in lieu of alimony; otherwise, the parties would keep their own property. Financial statements prepared by Louis were appended: Susan's assets were shown as totalling \$46,592, including the engagement ring, valued at \$21,000; Louis's statement showed his net worth at \$3.3 million. A lawyer reviewed the agreement for Susan, but did not negotiate on her behalf. When the marriage foundered 10 years later, Susan had the ring appraised

by a jeweller, who told her it that its gemstone was a zirconium, not a diamond. In the divorce proceedings, she sought to have the prenuptial agreement set aside on the basis that Louis's misrepresentation had induced her to sign it.

The trial court accepted Susan's claim, as did the Superior Court on appeal. But on further appeal, the Supreme Court reversed 4:3 in five separate opinions. The lead opinion, by Sandra Newman J., concluded that although Louis had misrepresented the ring's value, fraud had not been made out because Susan had not justifiably relied on the misrepresentation.<sup>18</sup> Saylor and Nigro JJ. joined in a dissenting opinion. Justice Michael Eakin (pronounced like shakin') wrote a separate dissent in seven quatrains:

A groom must expect matrimonial pandemonium  
when his spouse finds he's given her a cubic zirconium  
instead of a diamond in her engagement band,  
the one he said was worth twenty-one grand.

Our deceiver would claim that when his bride relied  
on his claim of value, she was not justified  
for she should have appraised it; and surely she could have,  
but the question is whether a bride-to-be would have.

The realities of the parties control the equation,  
and here they're not comparable in sophistication;  
The reasonableness of her reliance we just cannot gauge  
with a yardstick of equal experience and age.

This must be remembered when applying the test  
by which the "reasonable fiancée" is assessed.  
She was 19, he was nearly 30 years older;  
was it unreasonable for her to believe what he told her?

Given their history and Pygmalion relation,  
I find her reliance was with justification.  
Given his accomplishment and given her youth,  
was it unjustifiable for her to think he told the truth?

Or for every prenuptial, is it now a must  
that you treat your betrothed with presumptive mistrust?  
Do we mean reliance on your beloved's representation  
is not justifiable, absent third party verification?

Love, not suspicion, is the underlying foundation  
of parties entering the marital relation;  
Mistrust is not required, and should not be made a priority.  
Accordingly, I must depart from the reasoning of the majority.<sup>19</sup>

This ode, which included a learned footnote citing precedents on the contextual aspects of reliance, has a resonance and economy of reason that should appeal to a wide audience, from lovers of Greek mythology to fans of Dr. Seuss. But the chief justice was not pleased that the gods had made Eakin J. poetical.<sup>20</sup> "The gravity of differing views is diminished," he said, "when the focus is taken away from their substance because of the form in which they are presented... The integrity of the Supreme Court of Pennsylvania should never be placed in jeopardy by actions that would alter the perception of those whose lives and interests

are affected by the decisions of the Court.”<sup>21</sup> Cappy J., as he then was,<sup>22</sup> concurred, saying that while it is “axiomatic” that “every jurist has the right to express him or herself in a manner that the jurist deems appropriate,” the danger lies “with the perception that litigants and the public at large might form when an opinion of this court is reduced to rhyme”.<sup>23</sup>

If the popular press is any gauge of public opinion, though, Justices Zappala and Cappy may be worrying for nought. The *Pittsburgh Post-Gazette*, among others, came to Eakin J.’s defence, noting he had written some opinions in verse as a Superior Court judge (only in civil matters),<sup>24</sup> and that had not barred his election to the Supreme Court for a ten-year term (they do things differently in the U.S.). The *Gazette* bitingly concluded that “we can’t have a judge saying anything clever, anything that anyone might easily understand. That’s a clear and present danger to the commonwealth.”<sup>25</sup>

What then, are the bounds of propriety in judicial poetry? Two cases, *Mackensworth v. American Trading Transportation Co.*<sup>26</sup> and *In Re Inquiry Relating to Rome*,<sup>27</sup> are instructive.

#### Admiralty Law (2): Limerick Court

*Mackensworth* was about whether a single port call by a merchant ship allowed the court to exercise *in personam* jurisdiction over the out-of-state ship’s owner in a claim for seaman’s wages. The defendant raised two legal issues in a motion to dismiss: (1) could a single act done in the state for pecuniary benefit (a ship’s loading or unloading) be used to invoke the state’s “long-arm” service rule; and (2) if so, was the rule constitutional under the controlling precedent, *Washington v. International Shoe*?<sup>28</sup> Plaintiff’s counsel had included a limerick in his responsive brief; defendant’s counsel, not to be outdone, included one in his reply. District Judge Brecker reviewed all of this and responded in kind:

The motion now before us  
has stirred up a terrible fuss.  
And what is considerably worse,  
it has spawned some preposterous doggerel verse.

...

Overwhelmed by this outburst of pure creativity,  
We determined to show an equal proclivity.  
Hence this opinion in the form of verse,  
even if not of the calibre of Saint-John Perse.

The first question is whether, under the facts,  
defendant has done business here to come under Pennsylvania’s long arm acts.  
If we find that it has, we must reach question two,  
whether that act so applied is constitutional under *Washington v. International Shoe*.<sup>29</sup>

To spare the reader the entire statutory and constitutional analysis that occurs in the subsequent lines, we skip to the court’s order:

Finding that the service of process is bona fide,  
the motion to dismiss is hereby denied.  
So that this case can now get about its ways,  
defendant shall file an answer within 21 days.<sup>30</sup>

The point? If the parties consent to rhyming *ratio decidendi*, a court should feel free to render judgment in verse. Consent may be express or may arise by implication, as when parties pen their pleadings or briefs in sonnets or stanzas, or speak in chambers in mellifluous tongues. Whether consent can be implied if only one party uses poetry is a question for another day, as each case must depend on its own facts. *Bailey v. Mathers* sets a precedent for doing so when the subject matter itself is poetic. To clarify, this proposed rule is permissive: no judge should be bound to reason in rap, haiku or any other expressive form, merely because the parties do. Plain prose will suffice.

### The Case of the Hapless Prostitute and the Over-Speaking Judge

*Re Rome* is more notorious and probably represents the low-water mark of judicial verse. The accused, a young woman, came before Kansas Judge Richard Rome on a prostitution charge. The undercover police officer she had enticed (one Harris) testified at her trial. She was found guilty and given the maximum sentence possible—six months in jail and a \$1,000 fine. Her lawyer filed an appeal, which was dismissed by consent; the case was then remanded to the magistrate court, where the woman's attorney applied for probation. Judge Rome, whose original sentencing of the woman appears to have been motivated by a concern about pimping and prostitution in Kansas generally and with the woman's potential to be a repeat offender specifically, changed the prison sentence to two years' probation. But he also put a parodic "memorandum decision" in her file. The following excerpts give its flavour:

On January 30th, 1974,  
This lass agreed to work as a whore.  
...  
Formally charged by this great State,  
With offering to Harris to fornicate.  
Her arraignment was formal, then back to jail,  
And quick as a flash she was admitted to bail.  
...  
The fine she'd pay while out on parole,  
But not from men she used to cajole.  
From her ancient profession she'd been busted,  
And to society's rules she must be adjusted.<sup>31</sup>

The media picked up on this and quoted it widely. The ensuing publicity evoked complaints about the decision—not by the convicted woman, but by a feminist group who published a protest letter, circulating it to the bar association and judicial authorities. Upping the ante, Judge Rome cited three of the letter writers to appear in his court and show cause as to why they should not be held in contempt (they do things differently in Kansas). The feminists appeared on the day directed in a crowded courtroom, where, after voicing his views on the prostitution problem, Judge Rome dismissed the contempt charges. He was thereafter censured by the Commission on Judicial Qualifications. The Kansas Supreme Court upheld the censure, making the following observations:

Respondent urges that his first amendment right to freedom of speech will be infringed if he is disciplined for the form and manner of his memorandum decision... For a judge the

right to speak freely is circumscribed by the code of judicial conduct, just as that of the lawyer is subject to the code of professional responsibility... Respondent is not being subjected to disciplinary proceedings because he wrote and filed a memorandum decision in poetic form but because of the particular manner in which it was written, that is, allegedly holding out a litigant to public ridicule or scorn.<sup>32</sup>

Taking inspiration from Lord Chancellor Bacon's ancient observation that "an over-speaking judge is no well-tuned cymbal", the court said that judges

simply should not "wisecrack" at the expense of anyone connected with a judicial proceeding who is not in a position to reply. When judges do this the stage is set for an imbroglio like that which apparently occurred after respondent here cited the three objectors for contempt of court, and respect for the administration of justice suffers... Because of his unusual role a judge should be objective in his task and mindful that the damaging effect of his improprieties may be out of proportion to their actual seriousness.<sup>33</sup>

The court concluded that the accused had been portrayed "in a ludicrous or comical situation—someone to be laughed at and her plight found amusing," and that Judge Rome had disregarded "[h]er own integrity as an individual, convicted of crime though she was".<sup>34</sup> The point, then, was not that Judge Rome had written in poetry, but that he had demeaned the accused person, which runs counter to the ideal of unbiased justice.<sup>35</sup>

## ANALYSIS

The poetic form has a number of features that make it unusual for use in judgment writing. Poetry was at first an oral art that came to incorporate various mnemonic devices, such as rhyme, repetition and alliteration, to help the artists remember their recitations. Such devices impart a mesmerizing power that still has a role in oral advocacy today. "If it doesn't fit, you must acquit," became defence lawyer Johnnie Cochran's mantra in the O.J. Simpson murder trial, when he set to convincing the jury of the inconsistencies in the state's evidence against his client.<sup>36</sup> However, such techniques are harder to use in writing without appearing unnatural. With work, it can be done,<sup>37</sup> but most written communication is done in unrhyming sentences; there is a premium on variation rather than repetition when it comes to the structure of those sentences; and the alliterative phrase or onomatopoeic word tends to be a pleasant accident rather than an intended effect. Also, even in written poetry, words are everything. Whereas in prose we often cut the writer quite a bit of slack and overlook a certain amount of superfluity, we presume in the poet the same precision accorded to the legislative drafter: meaning must be given to every word. There is, then, some truth in the chief justice's comment in *Porreco* that poetry tends to divert the focus from substance to form.<sup>38</sup>

Moreover, poetry is quintessentially the language of feelings. It induces an emotional response, and people rarely respond neutrally to it, as the doggerel prefacing this article implies. Encountering poetry in judgments startles us in part because of an expectation, carefully cultivated by bench and bar, that judges are paragons of rationality who rise above their feelings when delivering judgment. The reasonable man, as represented by the court, is an unemotional man.



Poetry shakes that expectation—much as a staccato-style decision by Lord Denning shakes our expectation that judgments must be in stiff and legalistic jargon—and depicts the written judgment for what it is: a mixture, in varying proportions, of reason, art and gut instinct.

Poetry is thus a powerful but dangerous tool in the writer's workshop; humour is no less dangerous, and the combination of the two can be particularly lethal. *Re Rome* teaches that, contrary to Prosser's assertion at the outset of this article, there are no occasions when *litigants* deserve a judge's ridicule, even if the cases they present and the positions they take might sometimes seem deserving of ridicule. The bench typically appreciates the distinction—at times a fine one—and knows how to use humour, whether poetic or prosaic, judiciously. The fact is that serious and distinguished judges—including chief justices—have used wit and gentle sarcasm with great effect, while maintaining respect for the parties whose case they are deciding.<sup>39</sup> Their craft recognizes that the narrative power of judgments creates a tension between opposing intellectual forces. Philosopher W.V. Quine, writing about scientific inquiry, has characterized two of these forces as the alethic and the aesthetic: the first, concerned with truth, exerts the chief pull on sciences hard and soft; the latter, concerned with beauty, is art for art's sake. Quine thus refutes Keats's dictum ("beauty is truth, truth beauty"), while acknowledging that it is all a matter of emphasis, not boundaries:

Scientists in pursuing truth also seek beauty of an austere kind in the elegance of a theory, and happily some of them seek literary grace in their expository writing. The alethic and aesthetic poles can thus join forces up to a point, but beyond that point they conflict. If in expounding some theoretical matter a scientist hits upon a literary conceit that delights him, and subsequently finds that the theoretical point ought strictly to be hedged about in a way that spoils the joke, he faces a quandary between the alethic and aesthetic poles. His decision to bite the bullet and scrap the wisecrack confirms his affiliation with the scientists.<sup>40</sup>

Although judges are not scientists, they purport to share a common goal: discovering the truth.<sup>41</sup> They are less constrained than scientists because the rhetorical force (which Quine notes is needed to complete the intellectual framework) looms larger in legal writing, both by lawyers and judges, than it does in scientific method. But like scientists, judges too usually know when to scrap, or at least modify, the wisecrack.

Seen in this light, *The Koprino* is as innocuous as previously intimated, but *Bailey v. Mathers* bears more scrutiny. The court, by adopting Eminem's own expressive idiom, albeit in a footnote, may have unwittingly given the impression of favouring the defendant. Moreover, the footnote's lyrics bump against the fuzzy line between humour about the case and ridicule of the person. Some might contend it crosses it. (Did Judge Servitto really need to say that Bailey's admission caused his case to be "substantially blown"?)<sup>42</sup> Rap, after all, is meant to be potent in form and effect, and the court appears to have assimilated its form and effect frighteningly well.<sup>43</sup>

The *Porreco* dissent, on the other hand, clearly passes the *Re Rome* test. First, and respectfully, Cappy J.'s dictum is shown to be overstated, at least in its unquali-

fied form. It is far from “axiomatic” that every judge has the right to express himself or herself in the manner the judge deems appropriate. To the contrary, judges’ speech is highly constrained from the outset by the imperatives of judicial decorum, by the need to avoid creating a reasonable apprehension of bias, and by the nature of legal dialogue itself. Thus Cappy J. and Zappala C.J. too quickly conclude that rhyme alone will lower the public’s opinion of a court. Something more—ridicule or scorn—is required. Second, Eakin J. is more mindful than Servitto J. about tone, about sticking to the facts and issues, and about not deriding the husband in the case. (Yes, he calls Louis a “deceiver”, but that was acknowledged even by the majority—the issue was whether Louis’s lie had a legal effect.)<sup>44</sup> If there is ridicule in his opinion, it is the kind that appellate judges have indulged in since time immemorial—the gentle mocking of positions or conclusions taken by their fellow judges. May they ever do so.

## CONCLUSION

The poetic form, it can be seen, need not be dreaded. It has a place in the written judgment—a refreshing repose for the reasonable person, when used wisely. After all, Shelley thought poets (not judges) to be “the unacknowledged legislators of the World”.<sup>45</sup> And Pope emphasized poetry’s pedagogical power: “What will a Child learn sooner than a song?/What better teach a Foreigner the tongue?/What’s long or short, each accent where to place/And speak in public with some sort of grace?”<sup>46</sup> In other words, judge-made law, when accompanied by or put in verse, may help the masses better understand and follow that law. Thus *The Koprino* opener, though not feigning to “soar above th’Aonian mount, while it pursues things unattempted yet in Prose or Rhime”,<sup>47</sup> nevertheless signals a welcome literary shift in Canadian judgments. We can look forward to more. Finally, in the interest of making this article something more than a survey of witty judicial verse, what follows is an attempt to synthesize and restate the extant jurisprudence and learning into a workable rule of substance and procedure:

Substance, not form, doth make the decision,  
Whether judging on torts or contractual rescission.  
Limericks are fine if the parties consent,  
*Mackensworth* serves as (non-binding) precedent.

But when versifying ne’er shalt thou be cruel,  
*Re Rome* teaches courts to shun ridicule.  
For though victory may seem sweeter if set down in meter,  
The verdict can sound worse when written in verse  
(Especially if it’s “Guilty” to an offending repeater).<sup>48</sup>

Wanna rhyme? Michigan’s the place, not Pa.,  
Poetry there’s an offence *per se*.  
Eakin J., we’re sorry to say,  
Your lyrics are adjourned ’til another day.

But hey—it’s not axiomatic, it’s alethic, aesthetic,  
Mr. Q. says ya just gotta get the right metric.  
The thing to remember is to stay copacetic,  
‘Cause judicial pronouncement’s not some kind of emetic. No way!

Now we hope rhyme and humour have a home in this forum,  
 At least when delivered with judicial decorum.  
 But in keeping with venerable common law tradition,  
 This rule is subject to repeal or revision.

*Culpa tenet.*

## ENDNOTES

1. William L. Prosser, ed., *The Judicial Humorist: A Collection of Judicial Opinions and Other Frivolities* (Boston: Little, Brown, 1952) at preface.
2. I plead poetic licence.
3. Prosser, *supra* note 1 at preface.
4. In this article, I use “rhyme” and “poem” as if they were coextensive. But that is out of convenience, not correctness. A poem, of course, needn’t rhyme, and rhyming alone does not a poet make.
5. Ephraim London, in introducing *The World of Law* (New York: Simon & Schuster, 1960), opines: “I have read a very great deal of poetry about law and lawyers, and almost all of it is terrible.” But London finds that an exception worthy of inclusion in his book is W.H. Auden’s *Law Like Love*. Consider Auden’s depiction of law’s role in reflecting the tension between forces of change and conservatism: “Law is the wisdom of the old/The impotent grandfathers shrilly scold/The grandchildren put out a treble tongue/Law is the senses of the young.” For a more recent discussion of law in poetry, see Richard A. Posner, *Law and Literature* (revised and enlarged) (Cambridge, MA: Harvard University Press, 1998) at 144-147.
6. “This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man’s acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, ‘Suffer any wrong that can be done you rather than come here!’” Charles Dickens, *Bleak House* (1853) at c. 1 (online version accessed December 29, 2003, at <[www.literaturepage.com/read/dickens-bleak-house.html](http://www.literaturepage.com/read/dickens-bleak-house.html)>).
7. *Sub nom. Rough Bay Enterprises Ltd. v. Budden*, 2003 BCSC 1796.
8. “With rhyme and reason, litigants get poetic justice” (*Vancouver Sun*, December 5, 2003) I at 2.
9. *DeAngelo Bailey v. Marshall Bruce Mathers, III a/k/a Eminem Slim Shady*, No. 2001-3606-NO, slip. op. (Macomb County Circuit Court, Michigan, October 17, 2003).
10. The full lyrics, not for the faint of heart, can be found in Servitto J.’s decision, *ibid.* at 8, and at <[www.lyricsondemand.com/e/eminemlyrics/braindamagelyrics.htm](http://www.lyricsondemand.com/e/eminemlyrics/braindamagelyrics.htm)> (accessed December 7, 2003).
11. *Bailey v. Mathers*, *supra* note 9 at 13-14.
12. *Vancouver Sun*, *supra* note 8 at 2.
13. *Canadian Guide to the Uniform Preparation of Judgments*, prepared by the Canadian Citation Committee for the Canadian Judicial Council and the Judges Technology Advisory Committee. Accessed online December 7, 2003, at <[www.lexum.umontreal.ca/ccj-ccr/guide/guide.prep\\_en.html](http://www.lexum.umontreal.ca/ccj-ccr/guide/guide.prep_en.html)>. The document offers this helpful advice at paragraph 55: “A judgment document contains various data elements in addition to the main text of the judgment which are the reasons and/or disposition. Some elements are mandatory and others are optional. Most of them should be preceded by a label in order to be recognized.”
14. 333 N.W.2d 67 (Mich.App. 1983).
15. *Ibid.* at 67.
16. West’s editors rose to the occasion, summarizing both trial and appellate deci-

- sions in a rhyming syllabus and head-note.
17. 811 A.2d 566 (Pa. 2002), 2002 Pa. LEXIS 2468.
  18. In the United States, “justifiable reliance” for common law fraud falls somewhere “between reasonable reliance and mere or bare reliance”: *ibid.* at LEXIS \*\*22–23. This judgment did not end the case: the Supreme Court decided only one of three issues that had been alive at the trial level and remanded the matter to the Superior Court for further consideration.
  19. *Ibid.* at LEXIS \*\*24–26.
  20. Apologies to William Shakespeare (*As You Like It*, 3.3).
  21. *Porreco v. Porreco*, *supra* note 17 at LEXIS \*\*19–20.
  22. He has since become chief justice of Pennsylvania.
  23. *Ibid.* at LEXIS \*\*21–22.
  24. See *Busch v. Busch*, 732 A.2d 1274 (Pa. Super. Ct. 1999) (upholding premarital agreement and concluding that “a deal is a deal, if fairly undertaken, and we find disclosure was fair and unshaken./Appellant may shun that made once upon a time, but his appeal must fail, lacking reason (if not rhyme)”); *Zangrando v. Sipula*, 756 A.2d 73 (Pa. Super. Ct. 2000) (upholding findings of negligence against driver who hit plaintiff’s miniature poodle, Angel—“The bill for Angel’s treatment, though, was anything but small/and appellee felt that in the end, appellant should pay it all”); *Limerick Auto Body, Inc. v. Limerick Collision Center, Inc.*, 769 A.2d 1175 (Pa. Super. Ct. 2001) (concurring opinion, vacating injunction in a trade name dispute between competing auto body shops in Limerick, Pennsylvania); and *Liddle v. Scholze*, 768 A.2d 1183 (Pa. Super. Ct. 2001) (plaintiff, having bought from defendant two emus, Nicholas and Savannah, intending to breed them, could not later recover for their inability to produce chicks as she had failed to accept defendant’s offer for reimbursement at end of breeding season, choosing instead to send them to the warmer climes of Louisiana in the hope of better results—thus “The fault’s the emu’s, not that of Liddle/or Scholze, or the court placed in the middle./Fruitless in Pennsylvania and Louisiana,/the blame’s on Nicholas and Savannah.”) The reference to “the court placed in the middle” is a witty double entendre reflecting both the interposition of the court in the parties’ dispute and its position in Pennsylvania’s judicial hierarchy.
  25. “Is rhyme a crime of judicial decorum when people implore ‘em?” (*Pittsburgh Post-Gazette*, December 8, 2002), online version accessed December 11, 2003, at <www.post-gazette.com/columnists/20021208brian1208p1.asp>. For an academic commentary on judicial poetry generally and an endorsement of the form of the *Porreco* dissent specifically, see Mary Kate Kearney, “The Propriety of Poetry in Judicial Opinions” (2003) 12 *Widener L.J.* 597.
  26. 367 F.Supp. 373 (E.D. Pa. 1973). Pennsylvania appears to be fertile ground for legal poets.
  27. 542 P.2d 676 (Kan. 1975).
  28. 326 U.S. 310.
  29. *Mackensworth*, *supra* note 26 at 374–375.
  30. *Ibid.* at 377. The parties settled, since, as the court had noted, the case in “its ultimate crux”, was worth “under a thousand bucks”. The settlement order, also in rhyme, concluded: “Having thus quenched our versifying desire/(And for fear of sinking further into the mire/Fulfilling many predictions dire)/We announce that, from opinions in rhyme we hereby retire./Henceforth, though it may cause our few readers to doze/Our judicial writings will be in prose.” This case, now 30 years old, still generates comments. For a recent treatment, see Edward Cattell, Jr., “Poetry and the Silver Oar” (2000) 31 *J. Mar. Law & Commerce* 528.
  31. Reproduced, with the accused’s name replaced by blanks, in the Kansas Supreme Court’s opinion, *supra* note 27 at 680–681.
  32. *Ibid.* at 684.
  33. *Ibid.* at 685.

34. *Ibid.* at 685–686.
35. Actually, the court was generous to Judge Rome. His poetry makes extensive use of the anapest, a three-beat rising rhythm (as in “Tennessee”), typically used for comic poems. See Carl E. Bain *et al.*, eds., *The Norton Introduction to Literature*, 5th ed. (New York: W.W. Norton, 1991) at 625. Thus the poem’s anapestic form (back to jail/admitted to bail; out on parole/used to cajole), whether used consciously or unconsciously, reinforces its comic or scornful substance.
36. “If it doesn’t fit, you must acquit”—Defense attacks prosecution’s case; says Simpson was framed” (CNN, September 28, 1995), accessed December 18, 2003 at <[www.cnn.com/US/OJ/daily/9-27/8pm/](http://www.cnn.com/US/OJ/daily/9-27/8pm/)>. For a fascinating account of the history and impact of poetry, alliteration and talismanic or formulaic phrases on law from Saxon times on, see Peter M. Tiersma, *Legal Language* (Chicago and London: University of Chicago Press, 1999).
37. Justice Cardozo did it, writing many opinions “in which the words not only fix the opinion in our memory but also help persuade us that his chosen result is preferable”. See Andrew L. Kaufman, *Cardozo* (Cambridge, MA: Harvard University Press, 1998, 2000) at 449 *et seq.*, also citing Richard Weisberg’s description of Cardozo’s distinctive combination of form and substance as “poetics”. Some candidates these authors present for the judicial hall of fame (citations omitted): “The antics of the clown are not the paces of the cloistered cleric.” “Not lightly vacated is the verdict of quiescent years.” “Danger invites rescue.” “The assault upon the citadel of privity is proceeding in these days apace.”
38. But see Kearney, *supra* note 25 at 614 (noting that the use of poetry can secure a broader audience for an opinion that might otherwise languish in obscurity, thereby elevating, rather than diminishing, the importance of the subject matter).
39. See, e.g., *Murphy v. Steeplechase Amusement Co., Inc.*, 250 N.Y. 479, 166 N.E. 173 (1929) *per* Cardozo C.J., and *Babner v. Marwest Hotel Co. Ltd.*, (1969), 6 D.L.R. (3d) 322 (B.C.S.C.) *per* Wilson C.J.S.C.
40. Willard Van Orman Quine, *Quiddities: An Intermittently Philosophical Dictionary* (Cambridge, MA: Belknap Press, 1987) at 17.
41. Some would quibble that an appellate judge’s role is to discover error, not truth.
42. She certainly didn’t need to replace “urinal” with “john.” Even Eminem knows better than that.
43. But see Hon. Ruggero J. Aldisert, *Opinion Writing* (St. Paul, MN: West, 1990) at 196 (“Literature, poetry, popular culture and other art forms can be worked effectively into opinion writing. Not only are they expressive and engaging, but they reflect the mores and customs of the culture of which they are a part.”).
44. See also Kearney, *supra* note 25 at 613.
45. Percy Bysshe Shelley, “A Defense of Poetry,” in Harold Bloom, ed., *The Selected Poetry and Prose of Shelley* (Toronto: New American Library, 1966) at 448.
46. Alexander Pope, “Satires and Epistles of Horace Imitated,” in Douglas Grant, ed., *Pope* (London: Penguin, 1985) 185 at 197.
47. John Milton, *Paradise Lost* (1667) (online version accessed December 29, 2003, at <[www.literaturepage.com/read/paradise-lost.html](http://www.literaturepage.com/read/paradise-lost.html)>).
48. I hope to heed Pope and not “ring round the same unvaried chimes/With sure returns of still expected rhymes.” See Alexander Pope’s “An Essay on Criticism” in Grant, *supra* note 46 at 14, 23. Pope’s monumental statement of neo-classical principles of literary criticism, first published in 1711, is written entirely in verse.

