

Appellate Review of the Facts  
The Sir Maurice Byers Lecture  
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It is an honour to be invited to deliver the 2014 Sir Maurice Byers Lecture. Sir Maurice was the outstanding appellate advocate of his generation. His unrivalled appellate practice was of the kind that rarely required him to trouble the court with the facts. So it may seem rather pedestrian to select the subject of 'Appellate Review of the Facts' in a lecture delivered in his honour.

When Sir Maurice reflected on the changes that he had witnessed over nearly 50 years of practice at the Bar, prominent among those changes was the increase in complexity and cost of litigation. He favoured radical procedural changes to reduce delays and cost<sup>1</sup>. The Hon A M Gleeson AC QC when delivering this Lecture last year identified the abolition of most forms of civil jury trial as an obvious cause of that increase in cost and complexity<sup>2</sup>. The loss of the practical finality that accompanies the jury's verdict

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<sup>1</sup> Byers, "A Living National Treasure", Speech delivered at the Bench and Bar Dinner, 17 June 1994, in Perram and Pepper (eds), *The Byers Lectures: 2000-2012* (Federation Press, 2012) 292 at 292, 295.

<sup>2</sup> Gleeson, "Finality", (Winter 2013) *Bar News* 33 at 34.

opened seemingly limitless opportunities for appellate challenge to the trial court's findings of fact. These remarks were not new to readers of Gleeson CJ's judgments in which his Honour on more than one occasion deprecated the view of the trial as merely the first round in the forensic contest<sup>3</sup>. They are remarks that direct attention to the principles that govern appellate review of the trial court's factual decisions.

Any system that lays claim to administering civil justice must make provision for the correction of error. Appellate review under s 75A of the *Supreme Court Act* 1970 (NSW) (and the equivalent provisions in the other Australian jurisdictions<sup>4</sup>) is by way of re-hearing on law and fact. The difficulty faced by the appellate court in determining that a challenged finding of fact is a wrong finding is reflected in the principles of restraint that apply to the review of fact.

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<sup>3</sup> *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 519 [2]; [2005] HCA 4; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 568-569 [53]-[54]; [2002] HCA 54; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 429 [15] per Gleeson CJ and Kirby J; [2005] HCA 62; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 334 [5]; [2007] HCA 42.

<sup>4</sup> See, eg, Uniform Civil Procedure Rules 1999 (Q) r 765; Supreme Court (Court of Appeal) Rules 2005 (WA) reg 25; Criminal Procedure Rules 2005 (WA) reg 64; Rules of the Supreme Court 1971 (WA) O 65 r 8; *Supreme Court Civil Procedure Act* 1932 (Tas) s 46.

### 3.

Appellate review of the kind provided in s 75A is traced to the *Judicature Acts 1873-1875* (UK). The principles applied to an appeal by way of re-hearing were stated in 1898 by Lindley MR, delivering the judgment of the Court of Appeal (Lindley MR, Rigby and Collins LJJ) in *Coghlan v Cumberland*<sup>5</sup>. His Lordship's statement is in language that remains familiar. In summary, Lindley MR said that it is the duty of the appellate court: to re-hear the case; to reconsider the materials before the trial judge together with such material as the appellate court may have decided to admit; to make up its own mind, not disregarding the decision below, but carefully weighing and considering it; not to shrink from overruling the decision if it is wrong; to be sensible of the great advantage of the trial judge in seeing and hearing the witnesses and, when the decision turns on which witness is to be believed, the appellate court must be guided by the impression made on the trial judge; but circumstances quite apart from manner and demeanour may show whether a statement is credible and may warrant the appellate court differing from the trial judge<sup>6</sup>.

The principle of restraint is not without its critics. It is argued that the statute conferring the jurisdiction to determine appeals on law and fact provides no warrant to confine review of the latter by deference to the trial judge's findings. Considerations of finality and

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<sup>5</sup> [1898] 1 Ch 704.

<sup>6</sup> *Coghlan v Cumberland* [1898] 1 Ch 704 at 704-705.

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of the capacity of well-resourced litigants to exhaust the reserves of less well-resourced opponents on this analysis are misplaced. It is an approach that invokes Lord Atkin's statement "finality is a good thing, but justice is a better"<sup>7</sup>. That pithy statement was made in the context of determining the appeals of a number of men who had been convicted of murder and sentenced to death following a trial at which a juror did not understand English, which was the language in which the trial had been conducted. The demands of justice were not difficult to identify in that case.

The demands of justice may take on a different complexion when considering appellate review of an action that has been determined following a fair trial at which the parties have had a full opportunity to present their respective cases and in which the trial judge has decided disputed questions of fact in a reasoned judgment that is not evidently attended by error.

Sir Thomas Bingham, writing extra-curially in the mid-1980s at a time when he was Master of the Rolls, suggested that a respectable rule would allow that "every litigant should be entitled to a full contest on the facts at one level only and that the facts should be open to review thereafter only if some glaring and manifest error could be demonstrated"<sup>8</sup>. In the event, concern about the cost and

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<sup>7</sup> *Ras Behari Lal v The King-Emperor* (1933) 50 TLR 1 at 2.

<sup>8</sup> Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues", (1985) 38 *Current Legal Problems* 1 at 11.

complexity of civil litigation in England and Wales has led to a more radical curtailment of the right to appellate review.

It is conventional to justify the restraint applied to findings that are substantially dependent on the assessment of credibility by reference to the trial judge's advantage in having seen and heard the oral evidence. The assumption underpinning this understanding has been questioned for more than a quarter of a century in light of psychological research casting doubt on the ability to discern truthfulness from an individual's physical presentation<sup>9</sup>. Acknowledgment of the strength of this body of research has led some commentators to question the foundation for the application of differing standards of review of findings of fact.

Even if it were accepted that the trial judge enjoys no advantage in the assessment of the oral evidence, it would remain to consider whether the value of finality warrants restraint in any event. Sir Thomas Bingham suggested that his "respectable rule" be

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<sup>9</sup> *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479-480 per Deane and Dawson JJ; [1993] HCA 78; *Galea v Galea* (1990) 19 NSWLR 263 at 266 per Kirby ACJ; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 328-329 [88](4) per Kirby J; 160 ALR 588 at 618; [1999] HCA 3; Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues", (1985) 38 *Current Legal Problems* 1 at 5-12; Ipp, "Problems with Fact-Finding", (2006) 80 *Australian Law Journal* 667.

squarely sourced in finality and not in deference to the trial judge's supposed advantage<sup>10</sup>.

The principles stated by Lindley MR have been adopted and applied by the High Court in decisions commencing with *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)*<sup>11</sup>. Although, as the joint reasons in *Fox v Percy* neutrally observed, in the circumstances of particular cases the principles have been given differing emphasis<sup>12</sup>. The force of that observation is illustrated by the separate reasons of McHugh and Callinan JJ in *Fox v Percy*.

In that case, it will be recalled, the New South Wales Court of Appeal overturned Herron DCJ's finding, based upon his acceptance of the evidence of Ms Fox and her witness, that Ms Percy's car was on her incorrect side of the road at the point of the collision<sup>13</sup>. The Court did so because skid marks on the road (about which there was no contest) incontrovertibly established the contrary<sup>14</sup>. The fact that 11 years after the collision the High Court should have been poring

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<sup>10</sup> Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues", (1985) 38 *Current Legal Problems* 1 at 11.

<sup>11</sup> (1904) 1 CLR 243 at 277 per Griffith CJ.

<sup>12</sup> (2003) 214 CLR 118 at 128 [28] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22.

<sup>13</sup> *Percy v Fox* [2001] NSWCA 100 at [71] per Beazley JA (Handley JA agreeing at [1], Fitzgerald JA dissenting at [84]).

<sup>14</sup> *Percy v Fox* [2001] NSWCA 100 at [71] per Beazley JA (Handley JA agreeing at [1], Fitzgerald JA dissenting at [84]).

over the evidence of the skid marks, in Professor Luntz's view, is a "disgrace" to the administration of justice<sup>15</sup>. This is because, in Professor Luntz's analysis, intermediate appellate courts should not be subject to any principle of restraint in reviewing the trial court's factual findings<sup>16</sup>. Trial judges in his view are as likely to get the facts wrong as the law and restraint may occasion practical injustice.

Professor Luntz is not alone among distinguished commentators in considering that appellate courts should unshackle themselves from the restraints conventionally accepted as arising from the trial judge's advantage in seeing and hearing the evidence<sup>17</sup>. In an account of the work of the English Court of Appeal, Professor Drewry, Sir Louis Blom-Cooper QC and Charles Blake argue that the deference accorded the decision of the lower court's credibility-based findings should be understood as the product of Victorian cases decided before the invention of photocopying, word-processing and tape-recording. In the context

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<sup>15</sup> Luntz, "Round-Up of Cases in the High Court of Australia in 2003", (2004) 12 *Torts Law Journal* 1 at 7.

<sup>16</sup> Luntz, "Round-Up of Cases in the High Court of Australia in 2003", (2004) 12 *Torts Law Journal* 1 at 6-10.

<sup>17</sup> Gillies and Galitsky, "Is the Judge Sovereign in Fact?", (2006) 28 *Australian Bar Review* 192 at 206; Drewry, Blom-Cooper and Blake, *The Court of Appeal*, (Hart Publishing, 2007) at 82.

of modern litigation, in which much evidence is documentary, they suggest that this long line of authority is in need of re-examination<sup>18</sup>.

Some colour is lent to Professor Luntz's criticism of the grant of leave in *Fox v Percy* by the circumstance that, on the hearing of the appeal, there was no challenge to the principles enunciated in the Victorian cases and affirmed in the trilogy of decisions culminating in *Devries v Australian National Railways Commission*<sup>19</sup>. The High Court was unanimous in upholding the decision of the Court of Appeal given that no deference to Herron DCJ's assessment of credibility could stand in the way of the skid marks.

Justice Callinan, while content to decide the appeal in the way it had been argued, took the opportunity to state his view that *Devries* imposes an "emphatically high test" that pays insufficient regard to the jurisdiction conferred by s 75A<sup>20</sup>. The same view had been earlier expressed by Kirby J in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)*<sup>21</sup>. Justice Kirby considered Lindley MR's statement of the principles as reflective of 19th

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<sup>18</sup> Drewry, Blom-Cooper and Blake, *The Court of Appeal*, (Hart Publishing, 2007) at 82.

<sup>19</sup> (1993) 177 CLR 472; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; [1990] HCA 47; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; [1989] HCA 20.

<sup>20</sup> *Fox v Percy* (2003) 214 CLR 118 at 157 [127].

<sup>21</sup> (1999) 73 ALJR 306 at 321 [68]; 160 ALR 588 at 608, citing *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 at 291.

century judicial disdain for the messy business of fact-finding<sup>22</sup>. He was particularly critical of Lord Sumner's restatement of the principles for introducing the concept of the "palpable misuse of the trial judge's advantage"<sup>23</sup> into the discourse. The phrase, redolent of judicial misconduct, Kirby J saw as imposing an unduly demanding requirement for the demonstration of error; a requirement not justified by the text of s 75A or the concept of "appeal" itself<sup>24</sup>.

The belief in the oracular power of the judge to divine the truth has been out of vogue for as long as I have been a judge. In my experience, trial judges are alive to the importance of contemporary materials and are inclined to weigh the probabilities in light of those materials. Nonetheless, it still occurs that in some cases disputed facts fall to be resolved by the acceptance or rejection of oral evidence. In these cases, is the appellate court right to continue to be guided by the impression made on the judge who saw and heard the evidence?

The Hon David Ipp AO QC has argued that the principle of restraint should be relaxed: appellate courts should regard demeanour-based findings, which are contrary to the probabilities, as

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<sup>22</sup> *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 322-323 [73]; 160 ALR 588 at 609.

<sup>23</sup> *SS Hontestroom v SS Sogaporack* [1927] AC 37 at 47.

<sup>24</sup> *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 324 [77]; 160 ALR 588 at 611.

raising appellable error absent adequate reasons for them<sup>25</sup>. Such a rule, he suggests, would enhance the administration of justice by setting aside the "virtually untrammelled power of trial judges" to make what amount to final decisions based on the judge's assessment of the witness' physical reactions in testifying<sup>26</sup>. The restraint currently applied is, in his view, "an anachronism in a system of justice that prides itself on objectivity and rationality"<sup>27</sup>.

This view finds support in Callinan J's analysis in *Fox v Percy*. His Honour observed that few decisions can be said truly to turn on a mere "gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence"<sup>28</sup>. No doubt most trial judges would agree that it is a rare case that turns on a mere gesture. But many might acknowledge that the impression formed by seeing and hearing the evidence plays an important part in the determination of some disputed questions of fact. David Ipp says that in his experience a judge "cannot help but develop antennae sensitive to

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<sup>25</sup> Ipp, "Problems with Fact-Finding", (2006) 80 *Australian Law Journal* 667 at 674.

<sup>26</sup> Ipp, "Problems with Fact-Finding", (2006) 80 *Australian Law Journal* 667 at 674.

<sup>27</sup> Ipp, "Problems with Fact-Finding", (2006) 80 *Australian Law Journal* 667 at 674.

<sup>28</sup> *Fox v Percy* (2003) 214 CLR 118 at 159 [132] quoting *Dearman v Dearman* (1908) 7 CLR 549 at 561 per Isaacs J; [1908] HCA 84.

*deliberate untruths*"<sup>29</sup>. The psychologists may tell us that this puts it too high. It remains that a judge, alive to his or her limitations in ascertaining truth, may nonetheless assess that no reliance could fairly be placed on a witness' account of events.

An impression that testimony is unworthy of belief will almost certainly be the subject of an express finding. However, not every impression formed by the trial judge in the course of seeing and hearing the evidence will form part of the reasons. Lord Hoffmann made the point in *Biogen Inc v Medeva plc*<sup>30</sup>:

"The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

The trial judge's conclusion as to the reliability of oral evidence based on his or her impression of the witnesses, may not be failsafe but it may not be irrational to prefer it to a conclusion based on an assessment of the probabilities disclosed in the record of the trial.

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<sup>29</sup> Ipp, "Problems with Fact-Finding", (2006) 80 *Australian Law Journal* 667 at 669 (emphasis in original).

<sup>30</sup> [1997] RPC 1 at 45 (Lord Goff of Chieveley, Lord Browne-Wilkinson, Lord Mustill and Lord Slynn of Hadley agreeing).

Mr Diprose's claim in equity to set aside his gift of the Tranmere property to Ms Louth succeeded notwithstanding that King CJ, the trial judge, rejected a critical aspect of Mr Diprose's evidence. Important to King CJ's conclusion, that Mr Diprose was subject to Ms Louth's influence, was his impression of Mr Diprose as a "strange romantic character"<sup>31</sup>. In the Full Court, Matheson J in dissent, considered that he was in as good a position as King CJ to draw inferences from the undisputed facts and that King CJ had wrongly concluded that Mr Diprose had been emotionally dependent on Ms Louth<sup>32</sup>. If one puts aside King CJ's impression of Mr Diprose's strange romantic character, it is easy to see the force of Matheson J's assessment of the probabilities. Mr Diprose was a 48 year-old solicitor of some years' standing. Applying the "Ipp rule", King CJ's conclusion, that Mr Diprose's professional qualifications and experience counted for nothing when he made the gift<sup>33</sup>, was against the probabilities and for that reason indicative of error. King CJ's assessment of Mr Diprose' character would not constitute an adequate reason supporting acceptance of his conclusion, since to find that it was sufficient would be to restore the trial judge's "untrammelled power", which it is the purpose of the rule to remove.

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<sup>31</sup> *Diprose v Louth (No 1)* (1990) 54 SASR 438 at 443.

<sup>32</sup> *Diprose v Louth (No 2)* (1990) 54 SASR 450 at 480.

<sup>33</sup> *Diprose v Louth (No 1)* (1990) 54 SASR 438 at 449.

Adoption of the "Ipp rule" would provide a stimulus to appellate activity. Whether that activity would result in superior decisions is another matter. Chief Justice King's estimate of Mr Diprose' character may have been wrong. However, it is not self-evident that Matheson J's assessment based on the probabilities, without the benefit of seeing Mr Diprose and Ms Louth, should be thought more likely to be right.

In the High Court in *Louth v Diprose*, Dawson, Gaudron and McHugh JJ observed in their joint reasons that King CJ's finding turned not so much on the assessment of credibility as on the assessment of character<sup>34</sup>. Their Honours said that it is precisely because different people may come to different conclusions as to character, credit and disputed matters of fact that findings as to those matters are entrusted to the trial judge in accordance with rules that guarantee a considerable measure of finality<sup>35</sup>. It is a statement that recognises the element of judgment that is inherent in much fact-finding.

Courts find historical fact by acceptance that a disputed event occurred if the occurrence of the event is more probable than not. In theory, it may be said that there is a correct answer to the question of whether a fact has been proved. Fact-finding, however,

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<sup>34</sup> (1992) 175 CLR 621 at 639-640; [1992] HCA 61.

<sup>35</sup> (1992) 175 CLR 621 at 640.

is not a science and in the resolution of conflicting evidence there may be scope for legitimate differences of view about what facts have been proved<sup>36</sup>. Findings that are substantially dependent upon the assessment of the credibility of the witnesses are no longer, if they ever were, immunised from appellate challenge<sup>37</sup>. Nonetheless, the restraint applied before overturning them has not been shown to be misplaced either by the results of psychological research or today's enhanced means of recording evidence. The measure of finality to which Dawson, Gaudron and McHugh JJ adverted is not inconsistent with doing justice to the parties.

The duration and cost of litigation were the drivers behind the Woolf reforms in England and Wales<sup>38</sup>. The need for certainty, reasonable expense and proportionality are said to have informed the

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<sup>36</sup> See Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (Clarendon Press, 1990) at 3-4.

<sup>37</sup> *Fox v Percy* (2003) 214 CLR 118 at 128 [29] per Gleeson CJ, Gummow and Kirby JJ; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 466 [21] per Kirby J (Gleeson CJ agreeing at 462 [1]), at 492 [180] per Callinan and Heydon JJ; (2006) 224 ALR 1 at 8 per Kirby J (Gleeson CJ agreeing at 3), 44-45 per Callinan and Heydon JJ; [2006] HCA 1; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306; 160 ALR 588.

<sup>38</sup> *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) Ch 3; Zuckerman, *Civil Procedure: Principles of Practice*, 2nd ed (Sweet & Maxwell, 2006) at 1; *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 at 1320 [44]-[45] per Brooke LJ (Peter Gibson CJ agreeing at 1321 [51], Lord Woolf MR agreeing at 1321 [52]); [2000] 2 All ER 801 at 811-812 per Brooke LJ (Peter Gibson CJ agreeing at 813, Lord Woolf MR agreeing at 813).

introduction of the requirement of permission to appeal to the Court of Appeal<sup>39</sup>. The decision of the "appeal court", whether a circuit judge or a High Court judge, is in most cases now final<sup>40</sup>. It is no longer possible to pursue an appeal to the Court of Appeal because the appeal is "properly arguable" or has a "real prospect of success"<sup>41</sup>. Where permission to appeal is granted the court must make its own assessment of the inferences. However, where an inference involves an element of judgment, the court will not interfere unless it is satisfied that the trial judge's conclusion lay outside the bounds within which reasonable disagreement is possible<sup>42</sup>. A more demanding standard, akin to that adopted in the

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<sup>39</sup> *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 at 1320 [44] per Brooke LJ (Peter Gibson CJ agreeing at 1321 [51], Lord Woolf MR agreeing at 1321 [52]); [2000] 2 All ER 801 at 811 per Brooke LJ (Peter Gibson CJ agreeing at 813, Lord Woolf MR agreeing at 813).

<sup>40</sup> *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 at 1321 [50] per Brooke LJ (Peter Gibson CJ agreeing at 1321 [51], Lord Woolf MR agreeing at 1321 [52]); [2000] 2 All ER 801 at 813 per Brooke LJ (Peter Gibson CJ agreeing at 813, Lord Woolf MR agreeing at 813).

<sup>41</sup> *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 at 1319 [42] per Brooke LJ (Peter Gibson CJ agreeing at 1321 [51], Lord Woolf MR agreeing at 1321 [52]); [2000] 2 All ER 801 at 811 per Brooke LJ (Peter Gibson CJ agreeing at 813, Lord Woolf MR agreeing at 813).

<sup>42</sup> *Todd v Adams* [2002] 2 Lloyds Rep 293 at 319-320 [129] per Mance LJ; *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at 580-583 [16]-[23] per Clarke LJ, 584 [197] per Ward LJ.

United States and Canada, applies to the determination of Scottish appeals<sup>43</sup>.

The Federal Rules of Civil Procedure, which govern appellate review of facts in federal courts in the United States, provide that findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous<sup>44</sup>. A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed<sup>45</sup>. The Supreme Court of the United States has rejected the division of facts into categories and, in particular, the division of findings into those dealing with "ultimate" as distinct from "subsidiary" facts<sup>46</sup>. This

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<sup>43</sup> *Henderson v Foxworth Investments Limited* [2014] 1 WLR 2600 at 2618-2620 [58]-[68] per Lord Reed JSC (Lord Kerr of Tonaghmore, Lord Sumption, Lord Carnwath and Lord Toulson JJSC agreeing); [2014] UKSC 41; *McGraddie v McGraddie* [2013] 1 WLR 2477 at 2480-2481 [1]-[5] per Lord Reed JSC (Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Wilson and Lord Hughes JJSC agreeing); [2013] UKSC 58.

<sup>44</sup> Federal Rules of Civil Procedure, r 52(a)(6).

<sup>45</sup> *United States v United States Gypsum Co* 333 US 364 (1948) at 395 per Reed J.

<sup>46</sup> *Pullman-Standard v Swint* 456 US 273 (1982) at 287 per White J.

reflects the text of the Rule and is not a rejection of the soundness of the distinction<sup>47</sup>.

The stringency of the Rule is illustrated by the statement of the Supreme Court of the United States in *Anderson v City of Bessemer City, NC*<sup>48</sup>:

"If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

White J, delivering the opinion of the Court, explained that the rationale for restraint is not limited to the trial judge's superior position in the determination of credibility. His Honour said<sup>49</sup>:

"The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much."

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<sup>47</sup> Casey, Camara and Wright, "Standards of Appellate Review in the Federal Circuit: Substance and Semantics", (2002) 11 *Federal Circuit Bar Journal* 279 at 304.

<sup>48</sup> 470 US 564 (1985) at 573-574.

<sup>49</sup> *Anderson v City of Bessemer City, NC* 470 US 564 (1985) at 574-578.

Similar observations were approved by the majority of the Supreme Court of Canada in *Housen v Rural Municipality of Shellbrook*<sup>50</sup>:

"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

The standard of "palpable and overriding error" is applied to appellate review of fact in Canada<sup>51</sup>. It is a standard that applies to all findings regardless of whether the finding depends upon the assessment of credibility, whether it is of primary or inferred fact or a global assessment of the evidence<sup>52</sup>. A conclusion that the judgment below contains "palpable and overriding error" it would seem might equally be expressed by a finding that it is "clearly wrong"<sup>53</sup>. Either formulation expresses the same idea, which is that

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<sup>50</sup> [2002] 2 SCR 235 at 250 [14] per Iacobucci and Major JJ, citing Gibbens, "Appellate Review of Findings of Fact" (1992) 13 *Advocates' Quarterly* 445 at 446.

<sup>51</sup> *HL v Attorney General of Canada* [2005] 1 SCR 401 at 438 [110] per Fish J (McLachlin CJ, Major, Binnie and Abella JJ agreeing).

<sup>52</sup> *HL v Attorney General of Canada* [2005] 1 SCR 401 at 420-421 [53] per Fish J (McLachlin CJ, Major, Binnie and Abella JJ agreeing).

<sup>53</sup> *HL v Attorney General of Canada* [2005] 1 SCR 401 at 421 [55], 426 [69] per Fish J (McLachlin CJ, Major, Binnie and

the appellate court will not interfere with the trial judge's factual findings unless it can plainly identify the imputed error and that error is shown to have affected the result<sup>54</sup>.

In the leading Canadian decision on the topic, *HL v Attorney General of Canada*, Fish J, giving the majority reasons, cited with approval Professor Zuckerman's summary of the principles<sup>55</sup>:

"[I]f the appeal court cannot conclude that the lower court's inference from the primary facts was wrong, in the sense that it fell outside the range of inferences that a reasonable court could make, the appeal court should allow the lower court's decision to stand. The nature of the appellate evaluation of the lower court's decision will vary in accordance with the type of judgment that the lower court was called upon to make. But whatever the nature of the issues and however wide or narrow is the room for disagreement, the test remains the same: was the lower court's decision wrong. ...

A decision will be wrong if ... it was based on a plainly erroneous factual conclusion. ... Put another way, as long as the lower court's conclusions represent a reasonable inference from the facts, the appeal court must not interfere with its decision."

The Canadian approach treating all findings of fact as subject to the same degree of restraint is one justified by finality expressed

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Abella JJ agreeing), citing *Housen v Rural Municipality of Shellbrook* [2002] 2 SCR 235 at 253 [22] per Iacobucci and Major JJ.

<sup>54</sup> *HL v Attorney General of Canada* [2005] 1 SCR 401 at [55].

<sup>55</sup> *HL v Attorney General of Canada* [2005] 1 SCR 401 at 422-423 [57] per Fish J (McLachlin CJ, Major, Binnie and Abella JJ agreeing), citing Zuckerman, *Civil Procedure* (2003) at 765-768.

more particularly as the need to limit the cost of litigation and to value the autonomy of the trial process<sup>56</sup>.

The Canadian and American standards of fact review are reminiscent of the standard proposed by Barwick CJ and Windeyer J in decisions that culminated in *Edwards v Noble*<sup>57</sup>. In short, it was Barwick CJ's view that, even in cases in which the trial judge's finding did not depend upon the credibility of witnesses, that finding should only be disturbed if the appellate court was satisfied that it was wrong: even if the appellate court would have drawn a different inference, were it trying the matter itself, it should not overturn the inference drawn by the trial judge absent clear error<sup>58</sup>. In *Da Costa v Cockburn Salvage and Trading Pty Ltd*, Windeyer J proposed that the decision of the trial judge on the question of negligence should be treated by the appellate court as the equivalent of the verdict of the jury<sup>59</sup>. These views were controversial at the

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<sup>56</sup> *Housen v Rural Municipality of Shellbrook* [2002] 2 SCR 235 at 250-251 [15]-[18] per Iacobucci and Major JJ.

<sup>57</sup> (1971) 125 CLR 296; [1971] HCA 54.

<sup>58</sup> *Whiteley Muir and Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506 per Barwick CJ (McTiernan J agreeing at 507, Owen J dissenting); *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 199 per Barwick CJ, 201, 207-208, 210 per Windeyer J; [1970] HCA 43; *Edwards v Noble* (1971) 125 CLR 296 at 303-307 per Barwick CJ, 312-316 per Windeyer J; *O'Neill v Chisholm* (1973) 47 ALJR 1 at 3 per Barwick CJ (McTiernan J agreeing at 3).

<sup>59</sup> *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 214.

time. Hutley JA in an article published in the *Sydney Law Review* did not take a backward step: the Barwick/Windeyer test for appellate review was an aberration<sup>60</sup>.

*Warren v Coombes* settled the controversy by affirming the principles stated in *Coghlan* and in the many of decisions of the High Court that had adopted and applied them<sup>61</sup>. The joint reasons encapsulated the principles as they apply to the review of inferential findings, stating<sup>62</sup>:

"In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

*Warren v Coombes* affirmed that it is the duty of the appellate court to form an independent judgment about the proper inferences to be drawn from established facts<sup>63</sup>. Given this obligation, a

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<sup>60</sup> Hutley, "Appeals within the Judicial Hierarchy and the Effect of Judicial Doctrine on Such Appeals in Australia and England", (1976) 7 *Sydney Law Review* 317 at 322.

<sup>61</sup> (1979) 142 CLR 531; [1979] HCA 9.

<sup>62</sup> (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ.

<sup>63</sup> (1979) 142 CLR 531 at 538 per Gibbs ACJ, Jacobs and Murphy JJ; *Fox v Percy* (2003) 214 CLR 118 at 125-127 [21]-[25], [27] per Gleeson CJ, Gummow and Kirby JJ; *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572 at 581-582 [43] per Callinan and Heydon JJ; 205 ALR 56 at 67; [2004] HCA 13; *Anikin v Sierra* (2004) 79 ALJR 452 at 458 [38] per Gleeson CJ, Gummow, Kirby and Hayne JJ; 211 ALR 621 at 629-630; [2004] HCA 64.

question arises as to the content of the respect and weight that is to be given to the conclusions of the trial judge. Some have dismissed it as little more than politesse<sup>64</sup>.

However, there is no reason to conclude from the joint reasons of Gibbs ACJ, Jacobs and Murphy JJ in *Warren v Coombes* that the injunction to give respect and weight to the conclusions of the trial judge is to be understood as an empty gesture. Before his appointment to the High Court, Jacobs J when President of the New South Wales Court of Appeal, declined to follow the Barwick CJ/Windeyer J approach to review of the conclusion of negligence in *Cashman v Kinnear*<sup>65</sup>. His Honour expressed a preference for the views of Walsh J in *Edwards v Noble*<sup>66</sup>. His analysis of the approach to review of the conclusion of negligence is extracted with approval in the joint reasons in *Warren v Coombes*<sup>67</sup>. Relevantly, his Honour's reasoning was as follows. Even though a finding of negligence is open on the evidence, the question remains whether the conclusion, that there was negligence, is right or wrong. It is at this initial stage that the appellate court applies restraint, according "great weight" to the trial judge's conclusion in deciding

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<sup>64</sup> Goodhart, "Appeals on Questions of Fact", (1955) 71 *Law Quarterly Review* 402 at 407.

<sup>65</sup> [1973] 2 NSWLR 495 at 505.

<sup>66</sup> *Cashman v Kinnear* [1973] 2 NSWLR 495 at 506.

<sup>67</sup> (1979) 142 CLR 531 at 549 per Gibbs ACJ, Jacobs and Murphy JJ.

whether it should come to a different conclusion. If, notwithstanding that consideration, the appellate court determines that the trial judge's conclusion is wrong, there is no question of further restraint; the court must give effect to its determination<sup>68</sup>. His Honour explained the difficulty of characterising the trial judge's conclusion of negligence as a "wrong" conclusion in this way<sup>69</sup>:

"If the appellate mind ultimately takes a different view of the conclusion, then, for the purposes of the litigation, that conclusion is right and the conclusion of the court below is wrong. In turn a higher appellate tribunal may find the conclusion of the intermediate court of appeal wrong, so that the conclusion of the trial judge is right in that litigation. But only in the limited sense to which I have referred are any of the judges at any level absolutely right or absolutely wrong in their conclusion, because ex hypothesi the question is one on which judicial minds may properly differ."

Jacobs P equated restraint at the initial stage of the appellate court's consideration with a lack of overweening certainty in one's opinions<sup>70</sup>. Kathryn Griffith, in her account of the work of Judge Learned Hand, tells us that he believed man's happiness was dependent upon his ability to overcome the natural instinct to suppress all ideas and opinions that differ from his own<sup>71</sup>. At each level of the appellate hierarchy the exercise of restraint in the

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<sup>68</sup> *Cashman v Kinnear* [1973] 2 NSWLR 495 at 499.

<sup>69</sup> *Cashman v Kinnear* [1973] 2 NSWLR 495 at 499.

<sup>70</sup> *Cashman v Kinnear* [1973] 2 NSWLR 495 at 499.

<sup>71</sup> Griffith, *Judge Learned Hand and the Role of the Federal Judiciary* (University of Oklahoma Press, 1973) at 53.

manner suggested by Jacobs P may serve as a brake on that tendency.

In their monograph on the English Court of Appeal, Drewry, Blom-Cooper and Blake distinguish the review and the supervisory functions of appellate courts, the former function being concerned to rectify error in the instant case and the latter function with the maintenance of "systemic quality control" in the administration of justice<sup>72</sup>. It is a useful analysis. Many of the cases that consider the principles to be applied in the review of inferential findings have been concerned with the correctness of the ultimate inference of negligence or no negligence. The requirement of reasonable care is a matter about which reasonable minds may differ. Nonetheless the administration of civil justice requires that like cases are treated alike. The appellate court's determination of the correctness of the conclusion of negligence properly takes into account the need for consistency and predictability in the determination of claims<sup>73</sup>. In this respect, paraphrasing the statement of Lord Somervell of Harrow, extracted in the joint reasons in *Warren v Coombes*, the appellate court must be free to consider whether the trial judge has

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<sup>72</sup> Drewry, Blom-Cooper, Blake, *The Court of Appeal* (Hart Publishing, 2007) at 21.

<sup>73</sup> *Warren v Coombes* (1979) 142 CLR 531 at 552 per Gibbs ACJ, Jacobs and Murphy JJ.

applied the standard of the reasonable man or that of a man of exceptional care and prescience<sup>74</sup>.

In a review of the decisions of the High Court in negligence in the years to 2003, Professor Luntz detected a shift from decisions that were pro-plaintiff to decisions that were pro-defendant. He was critical of that trend. An alternative view, acknowledging the existence of the trend, is that over the course of the preceding three decades Australian courts had drawn the inference of negligence too readily with the consequence that parliaments in all the jurisdictions had been moved to legislate to address the "insurance crisis"<sup>75</sup>. With hindsight, it may have been preferable had the pro-plaintiff trend been arrested rather earlier.

Professor Luntz's criticisms were largely directed to the role of the High Court in the conduct of a second tier review of the facts in negligence cases. The correct application of principle to findings that support the ultimate conclusion, that a defendant was or was not negligent, may be controversial. Recognition of this difficulty explains the characterisation of the conclusion of negligence in

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<sup>74</sup> *Warren v Coombes* (1979) 142 CLR 531 at 541 per Gibbs ACJ, Jacobs and Murphy JJ, citing *Benmax v Austin Motor Co Ltd* [1955] AC 370 at 377.

<sup>75</sup> Spigelman, "Negligence: The Last Outpost of the Welfare State", (2002) 76 *Australian Law Journal* 432 at 433-434.

Canada as a question of mixed law and fact and causation<sup>76</sup>. Whether the High Court was being invited to conduct a second tier review of fact, or to correct a wrong application of legal principle, was one question on which opinion was divided in *Roads and Traffic Authority of NSW v Dederer*<sup>77</sup>. Another question on which opinion was divided in that case was whether the "concurrent findings principle"<sup>78</sup> is sound. Acceptance of that principle places the obligation of ensuring consistency squarely on the intermediate appellate court. That this is the proper function of the intermediate court might be thought to follow in any event having regard to the volume of appeals with which intermediate courts deal.

Gleeson CJ adhered in *Dederer* to his view that it is not the function of the High Court to give a well-resourced litigant a third opportunity to persuade a tribunal to take a view of the facts favourable to that litigant<sup>79</sup>. Kirby, Callinan and Heydon JJ all doubted the existence of the principle although there were differences of emphasis in the approach of each. Kirby J agreed

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<sup>76</sup> *HL v Attorney General of Canada* [2005] 1 SCR 401 at 424 [63] per Fish J (McLachlin CJ, Major, Binnie and Abella JJ agreeing).

<sup>77</sup> (2007) 234 CLR 330.

<sup>78</sup> *Major v Bretherton* (1928) 41 CLR 62 at 68-71 per Isaacs J; [1928] HCA 11; *Commonwealth v Introvigne* (1982) 258 at 260-262 per Gibbs CJ, 274 per Mason J; [1982] HCA 40.

<sup>79</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 334 [5], citing *Louth v Diprose* (1992) 175 CLR 621 at 634 per Deane J.

with Heydon J's reasons respecting the jurisdiction and power of the High Court to give effect to contrary factual conclusions notwithstanding concurrent findings below<sup>80</sup>. Nonetheless, in light of the functions of a final court, Kirby J considered "a clear case of error is needed for interference in concurrent findings of fact"<sup>81</sup>. His Honour's customary careful review of the advantages and disadvantages of the policy informing the concurrent findings principle included a salutary reason for caution on the part of the final appellate court: the absence of provision for further appeal in the event that errors of fact are revealed for the first time in the final court's reasons for judgment<sup>82</sup>.

Callinan J took issue with the thinking that links finality with equality before the law. In his Honour's analysis, the duty of the appellate court is not to deny any litigant, whether rich or poor, the recourse to the court that the Constitution and the relevant legislation say the litigant should have<sup>83</sup>. As neither the Constitution nor the *Judiciary Act* distinguish between questions of fact and law in appeals to the High Court, his Honour favoured the view that an

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<sup>80</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 378 [163].

<sup>81</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 379 [165]-[166].

<sup>82</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 379 [165].

<sup>83</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 404 [267].

error of fact is just as amenable to correction by the High Court as an error of law<sup>84</sup>. His Honour observed that an error of fact is as capable of causing an injustice whether it is characterised as "plain", "manifest" or "gross"<sup>85</sup>.

The association between finality and equality before the law was made by Deane J in *Waltons Stores (Interstate) Ltd v Maher*, in which his Honour observed<sup>86</sup>:

"In a context where the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal."

Deane J reiterated these views in *Louth v Diprose* and he identified three propositions embodied in the concurrent findings principle: the principle applies to findings of primary fact and

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<sup>84</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 404 [267].

<sup>85</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 404 [267].

<sup>86</sup> (1988) 164 CLR 387 at 434-435; [1988] HCA 7.

inferences drawn from those facts<sup>87</sup>; the principle applies regardless of whether the conclusions are based on different reasoning<sup>88</sup>; and the principle applies regardless of whether there has been a dissentient in the first appellate court<sup>89</sup>.

Heydon J was critical of the two last-mentioned propositions in his discussion of the concurrent findings principle in *Dederer*<sup>90</sup>. His Honour pointed out that a difference in reasoning supporting an inference is apt to undermine any assumption as to its correctness<sup>91</sup>. And he queried why the principle should apply in a case in which the dissentient judge sits in the intermediate appellate court and not where the dissentient was the trial judge<sup>92</sup>. The likelihood that the judges below have reached a correct conclusion is greater where they are unanimous and reduced if there is a dissentient<sup>93</sup>. The

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<sup>87</sup> (1992) 175 CLR 621 at 634, citing, eg, *Commonwealth v Introvigne* (1982) 150 CLR 258 at 273-274 per Mason J, cf *Willmot v Anglo-American Oil Co* (1923) 67 Sol J 678.

<sup>88</sup> (1992) 175 CLR 621 at 634, citing *Devi v Roy* [1946] AC 508 at 521 per Lord Thankerton (Lord du Parc and Sir Madhavan Nair agreeing).

<sup>89</sup> (1992) 175 CLR 621 at 634, citing, eg, *Warren v Coombes* (1979) 142 CLR 531 at 552 per Gibbs ACJ, Jacobs and Murphy JJ.

<sup>90</sup> (2007) 234 CLR 330 at 411.

<sup>91</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 411.

<sup>92</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 411.

<sup>93</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 411-412.

interests of the administration of justice, in his Honour's analysis, are that judges reach correct conclusions and if their conclusions are wrong that they are corrected on appeal<sup>94</sup>.

Concurrent findings of fact that are plainly wrong may justify the grant of special leave having regard to the interests of justice in the particular case<sup>95</sup>. Absent demonstrable error of that kind, consideration of a litigant's entitlement to have the High Court pass on the correctness of fact-finding below may rather overstate matters.

The duty of finding the facts is conferred on the trial judge under a hierarchical system that provides for appellate review. The concept of "appeal" including by way of re-hearing is of a procedure that is concerned with the correction of error<sup>96</sup>. The intermediate appellate court when reviewing challenged conclusions of fact is required to give respect and weight to the conclusions of the trial judge. That process, where it results in a majority of the appellate court agreeing with the trial judge's conclusion, is to be

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<sup>94</sup> *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 411.

<sup>95</sup> *Judiciary Act* 1903 (Cth), s 35A.

<sup>96</sup> *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [14] per Gleeson CJ, Gaudron and Hayne JJ; [2000] HCA 47; *Warren v Coombes* (1979) 142 CLR 531 at 538-539 per Gibbs ACJ, Jacobs and Murphy JJ, citing *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 255 per Lord Atkin.

distinguished from the outcome of the same process where the appellate judges agree that the trial judge's conclusion is wrong. That is so notwithstanding that in each case only three of four judges were agreed in the conclusion.

In the context of appellate review of fact, the concept of justice to the litigants has more than one dimension. Some members of this audience might consider there is force to Thomas J's observation that<sup>97</sup>:

"Most experienced counsel will on one or more occasions have endured the experience of having had an appellate Court 'remake' the facts of the case on appeal and felt distinctly uncomfortable at the outcome, a discomfiture which may be shared with the parties. Such a reformation of the facts on appeal can lead to an inherently unfair situation in that ... there is no effective appeal on any point of law based on the 'new' version of the facts as found by the appellate Court."

Consistency and predictability of decisions are important values in the administration of civil justice. Those values may be promoted, as *Warren v Coombes* explains, by the appellate court taking no narrow view of its function in correcting a conclusion that a defendant was or was not negligent<sup>98</sup>. In other contexts they are values that are served by appellate courts at each level of the

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<sup>97</sup> *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 199.

<sup>98</sup> (1979) 142 CLR 531 at 552 per Gibbs ACJ, Jacobs and Murphy JJ.

hierarchy paying appropriate respect to the findings below. Litigants and their advisers should not be encouraged to view the trial as a preliminary round with the prospect of successfully recrafting the case on appeal.