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JUDGING: REFLECTIONS ON THE MOMENT OF DECISION

The Hon Justice Michael Kirby AC CMG

ABSTRACT

Judges make important decisions affecting individuals and society. It is now acknowledged that they often have choices to make because there may be no clear law or objectively ascertainable facts. This essay is about the moment of the judicial decision. What influences a judge to accept or reject a particular proposition of law or contestable evidence? For advocates, finding the influences is an important aspect of persuasion. But self awareness is equally important to the judge. The author traces the decline of the declaratory theory of the judicial function and the increased questioning of the capacity to tell truthful evidence by the demeanour of witnesses. But what is to be put in the place of the old rules? The paper examines some of the theories of the legal realists and finds them wanting. It mentions physiological stress and psychological forces operating on the judge. The need for self-awareness in a judge is vital. But the essay concludes with a question as to how far the process of analysis can go without undermining the deeply felt need (amongst lawyers as much as other members of society) for the law to be, or appear to be, certain and objective.

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JUDGING IN A CHANGING WORLD

"Frequently enough one thinks one has the answer; but on sitting down, it will not write".

G La Forest

For professional decision-makers who have to make important and complex decisions every day of their professional lives, it is astonishing that judges have written so little about the moment of decision, and the process through which their minds go to reach and resolve the challenge of that moment.

* Text for an address given to the Fifth National Conference on Reasoning and Decision-Making, Wagga Wagga, 4 December 1998.

** Justice of the High Court of Australia.

There are reasons for this reticence. Probably the most important is that, until a decade or so ago, the declaratory theory of judicial decision-making encouraged the view that the personal input of judges into the decision was minimal. Their role in construing the Constitution or a statute was simply that of a vector declaring the "intention" of the Parliament which made that law. Similarly, in finding the common law to govern a case, the judge was doing no more than applying logical reasoning to previous judicial authority. The result was in no way the invention of the judge. The decision grew, with a compelling logic, out of earlier holdings. By the use of the "high technique" of judicial decision-making, the new principle would emerge with efficient inexorability. Questions of judicial inclination, studies of economic and social data and reference to physiology or psychology were not only irrelevant; they were misleading and possibly improper.

A similarly convenient and mechanical theory controlled decision-making on the facts. For the better part of the history of the common law, factual decisions were made by the jury. Because the jury was "as inscrutable as the Sphinx"¹, their processes of reasoning and decision-making were not known. They could not be

¹ *Ward v James* [1966] 1 QB 273 at 301 (CA). cf *Mackenzie v The Queen* (1996) 190 CLR 348 at 365.

interrogated by the judge for their reasons². Investigation of their reasoning to their decisions was, for the most part, forbidden by law³. Only lately have scientists begun to investigate jury reasoning and decision-making in an empirical way. There is now a growing appreciation that generational factors, affecting receptiveness to long intervals of oral presentation of evidence and argument, may influence the decisions reached at the end of a jury trial⁴.

These features of reasoning and decision-making in courts have come under criticism in recent times. The view that the judge, construing the Constitution or an Act of Parliament (or other legislative instrument), merely has to look long and hard enough to find the "intention" of the relevant Parliament, has given way to an increasing awareness that talk of "intention" is liable to be misleading; that the process of construing ambiguous language is a complex one; and that the search is really one for the preferable, or more consistent, meaning which achieves the purpose of the law

² *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 57 ALJR 825 at 826. *Newbury v Bristol Tramways and Carriage Co Ltd* (1912) 107 LT 801 at 804. cf E R Sutherland, "Verdicts 'General and Special'" 29 *Yale LJ* 253 at 262 (1920);

³ *R v Wooller* (1817) 6 Mand S 366; *Boston v WS Bagshaw and Sons* [1966] 1 WLR 1135 at 1137; *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 204-205. See also eg *Jury Act* 1977 (NSW), s 68A(3).

⁴ M D Kirby, "Delivering Justice in a Democracy III - The Jury of the Future" (1998) 17 *Aust Bar Rev* at 113 at 120ff.

derived from the text and structure of the instrument stating it⁵. In many cases, particularly of legal instruments written in the English language, there is inescapable ambiguity. Somebody has to cut the Gordian knot. In our form of society, that somebody is ultimately, usually, a judge. Sometimes there is no clear, perfect and unarguable resolution of the ambiguity. The judge must simply offer the preferred result with reasons to explain why it, rather than alternatives, has been preferred.

The demise of the declaratory theory of the judicial function⁶ has been accompanied by greater candour about the process in which the judge is actually engaged. For this candour, we are indebted to a number of great judges of this century, most of them from the United States. It was Benjamin Cardozo, first a judge and chief judge of the New York Court of Appeals and later a Justice of the Supreme Court of the United States, who helped to break the spell of the mechanical conception of the judicial function in that country. In his famous book *The Nature of the Judicial Process*⁷, he

⁵ *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424; *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-273, 275, 280, 291.

⁶ M H McHugh "The Law-Making Function of the Judicial Process" (1988) 62 ALJ 15 at 16; M H McHugh "The Judicial Method" (1999) 73 ALJ 37

⁷ (1921) at 166.

wrote of how troubled he had been in his search for legal certainty "to find how trackless was the ocean on which I had embarked". It was only as time went by, and he reflected on what he was actually doing, that he came to accept a kind of chaos theory in the law. It was the theory of the inevitability of uncertainty⁸. He said⁹:

"I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire and new principles are born".

There have been great judicial teachers in the United Kingdom and Australia who have elaborated the inescapability of judicial choice in many decisions concerned with what the law is. In the United Kingdom, Lord Reid, one of the great judges of the century, gave the declaratory theory the kiss of death when he mocked it as a "fairytale"¹⁰. Australian judges have similarly explained the unavailability of choice¹¹. There is no doubt that this honesty is

⁸ W Rehnquist, "Remarks on the Process of Judging" 49 *Washington and Lee L Rev* 263 at 265 (1992).

⁹ Cardozo, above n 7, at 166-167.

¹⁰ Lord Reid, "Judges as Law-Makers" (1972) 12 *Journal of Public Teachers of Law* 22; cf M D Kirby, *The Judges*, Boyer Lectures, (1983) at 58.

¹¹ See eg M H McHugh, "The Law-Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 16. For a Canadian illustration

upsetting to some members of society. Many good citizens think that the Constitution is clear, that every Act of Parliament has but one meaning and that the common law must also be clear, otherwise judges are effectively imposing retrospective legal obligations on people which were not clearly expressed and known when the conduct complained of occurred. Sometimes, the frustration that results from judicial candour and explanations about the realities of the task, lead to attacks on judges, and charges of "judicial activism"¹². Judges themselves acknowledge a "basic contradiction in a judge's role, especially in the appellate courts"¹³. Another great United States judge, Learned Hand, explained it thus¹⁴:

"[H]e must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time".

The problem of the past fifty years, as the declaratory theory has crumbled away as the explanation of depersonalised judicial

see G La Forest, "Some Impressions on Judging" (1986) 35 *Uni New Brunswick LJ* 145 at 150.

¹² M D Kirby, "Judicial Activism" (1997) 12 *Uni of WA L Rev* 1; M D Kirby, "Attacks on Judges - A Universal Phenomenon" (1998) 72 *ALJ* 599; R B Ginsburg, "Judicial Independence" (1998) 72 *ALJ* 611.

¹³ Rehnquist, above n 8 at 265; cf G La Forest, above n 11 at 150.

¹⁴ L Hand, "Mr Justice Cardozo" in *The Spirit of Liberty* (1959), 98 at 99.

reasoning and decision-making, is the lack of any agreement about what should take its place. No one (least of all the judges) suggests that a judge, in deciding the law, is a completely free agent, able to follow his or her whim, imposing this or that construction of the Constitution or the Acts of Parliament or this or that vision of the content of the common law. Such a view of the judicial role would be opposed to the conception of a judge as a person obliged to *apply* the law which pre-exists, as distinct from inventing it as the judge goes along. A judge who simply made up the substantive and procedural law, to the dictates of his or her vague feelings about morality, justice, fairness, social equity or the like, would not be a judge. We can leave such notions of the judicial role to the fictional witch doctors sitting under palm trees, the perfumed courts of the Moghuls, or the Committee of Public Safety in revolutionary France. Modern societies thirst for something more predictable called the rule of law. Judges must somehow perform their functions of choice in harmony with a much more modest notion of creativity yet with an honest appreciation that sometimes creativity is inescapable and therefore legitimate.

In the realm of fact-finding, things have changed too. Outside serious criminal trials, trial by jury has all but disappeared in modern Australia. Accordingly, judges must make decisions on factual

conflicts. They must give reasons for their decisions¹⁵. Those reasons must be effective explanations of how they have arrived at their conclusions¹⁶. This change has drawn fresh attention to the processes of judicial reasoning and decision-making.

In the past, there was a great deal of confidence about the capacity of a judge (or any other formal decision-maker) to tell the truth from the appearance of a witness and the witness's demeanour when giving evidence. There is a line of legal authority in Australia which reinforces this view of judicial gifts in resolving conflicting factual assertions¹⁷. To some extent the principles upholding this opinion of judicial talent, one not given to every person, rests upon the desirability of avoiding unnecessary appeals and retrials. But once again the illusion about judicial insights has been shattered. Empirical evidence casts serious doubt on the capacity of any human being to tell truth from falsehood from the observations of a

¹⁵ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (CA).

¹⁶ cf *Fleming v The Queen* (1999) 73 ALJR 1 at 7, par [22].

¹⁷ *Abalos v Australian Postal Commission* (1990) 171 CLR 167. See also *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Devries v Australian National Railways Commission* (1993) 177 CLR 472. See discussion in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liquidation)* [1999] HCA 3.

witness, giving testimony, in the artificial and stressful circumstances of a courtroom¹⁸. Appearances can sometimes be affected by cultural factors¹⁹. Considerations such as these have tended to undermine the judicial conviction that, with appointment, comes a capacity to discern truth from falsehood. Appellate courts encourage judges to search for truth in the contemporary materials, objective and indisputable facts and the logic of the evidence rather than basing conclusions on responses to witnesses which may be erroneous and completely unfair²⁰.

So this is the world in which an Australian judge of today operates. Things settled for a long time are now coming under fresh examination. Of course, some lament the destruction of the props which added to the confidence of the judges and the certainty of their decisions. Some mourn the passing of the theory of legislative

¹⁸ *Trawl Industries v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 (CA) at 348 citing L Re, "Oral versus Written Evidence: The Myth of the 'Impressive Witness'" (1983) 57 ALJ 679; Wellborn, "Demeanour" 76 *Cornell L Rev* 1075 (1991); J Ellard, "A Note on Lying and its Detection" (1996) 2 *The Judicial Review* at 303.

¹⁹ R P Kerans, *Standards of Review Employed by Appellate Courts* (1994) at 87-88.

²⁰ See eg *Gray v Motor Accident Commission* (1999) 73 ALJR 45 at 66, par [105]; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liquidation)* [1999] HCA 3 at [64], [93], [139]; *Chambers v Jobling* (1986) 7 NSWLR 1 at 8-9; *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

"intention" and want to restore, in constitutional cases at least, a search for the "original intent" of the founders²¹. Others, keen to remove unpredictable factors, insist on minimising the role of judicial creativity and invention. They emphasise detachment, scepticism about judicial power and self restraint²². Still others adhere to a belief in special judicial skills in determining veracity²³.

No doubt all of these old theories had practical advantages. They saved the inquisitive mind from the trouble of worrying unduly about the imponderable problems of linguistic interpretation, analogical reasoning and evidentiary elucidation. But in our legal system truth and science usually, eventually, triumph over fiction and tradition. That is why it is useful, at this stage of the evolution of the judicial process, to turn back to the moment of reasoning and decision-making. What is it that, at that moment, causes the judicial decision-maker to accept this interpretation of the Constitution or

²¹ A Scalia, "The role of a constitutional court in a democratic society" (1995) 2 *Judicial Review* 141. See also, G Craven, "Original intent and the Australian Constitution: coming soon to a court near you?" (1990) 1 *Public Law Review* 166; D Dawson, "Intention and the Constitution: whose intent?" (1990) 6 *Australian Bar Review*, 93.

²² H Shanks, *The Art and Craft of Judging: The Decisions of Judge Learned Hand* (1968) at 20; L Hand, "Thomas Walter Swan" in *The Spirit of Liberty* (1959), 158 at 165; L Hand, "The Contribution of an Independent Judiciary to Civilization" in *The Spirit of Liberty* (1959), 118 at 121.

²³ See eg *Jones v Hyde* (1989) 63 ALJR 349.

statute and reject that? To push forward and embrace a new and applicable principle of the common law or to hold back and leave it to Parliament? To accept this witness's testimony on a ground less flimsy than the appearance of credibility? These are not illegitimate questions. The grant of power, including constitutional power, to decision-makers who hold judicial office, ought to be conditional upon the exercise of that power in a way which the people governed by it understand and generally accept. To keep in the dark those affected by the exercise of power and to disguise from them the true processes engaged in, is the way of autocracy which fears sharing the truth with the people. My thesis is that judicial candour, although initially, perhaps, unsettling to those who hanker for fairytales, is more appropriate to our times. In any case, some of the issues raised by a reflection on judicial reasoning and decision-making are puzzling to judges themselves. Hence, perhaps, the lack of many authentic explanations and expositions about how the functions are actually discharged.

THE PROBLEM

I have now sketched the background. But what is the problem? I must leave elucidation of fact-finding to a judicial officer who is daily engaged in reasoning and decision-making at first

instance. That is where witnesses and other original evidence are seen. It is a rare day indeed that a witness is seen by an appellate court²⁴. It virtually never happens in the High Court because of the preponderance of its appellate role²⁵.

Appellate reasoning and decision-making do not, of course, ignore the facts. Most appeals which come to the High Court of Australia involve factual disputes. But generally, these are in the minor key or can be disposed of by reference to the findings of fact made by the trial judge or, within their authority, by the intermediate appellate courts. For the High Court, the issues for decision in appeals tend to be those of elucidating the meaning of the Australian Constitution or of federal, State or Territory statutes or the content of a common law principle said to be unclear.

The issues of constitutional and statutory interpretation are distinct, although extremely interesting and important, given the dominance which statute law now enjoys in the expression of the

²⁴ In New South Wales charges of contempt were, in certain circumstances, required to be heard and determined by the Court of Appeal. See *Young v Registrar, CA [No 3]* (1993) 32 NSWLR 262 at 280.

²⁵ cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Mickelberg v The Queen* (1989) 167 CLR 259; *Gipp v The Queen* (1998) 72 ALJR 722 at par [56].

law. The approach of different judges to the problem of statutory construction would be a subject worthy of separate study. Where I differ from other judges in giving meaning to the Constitution²⁶ or to a statute²⁷, I am obliged to ask myself (and, if possible, to clarify in my reasons) the point of distinction and why it is sufficient to lead to a differing conclusion. In a number of cases, I believe that I have been influenced by a more whole-hearted acceptance of the so-called "purposive" approach to statutory construction²⁸ than other judges feel able to accept. Formerly, the judiciary of common law countries tended to take a narrower, more verbal approach to the meaning of words in an Act of Parliament, confining the interpretation of statutory language to the exact words which Parliament had used. Judges would explain that it was their function to give effect to the law as stated by Parliament and not a law rewritten by judges to achieve what Parliament obviously expected

²⁶ See eg *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 754ff.

²⁷ Recent cases include *Emanuele v Australian Securities Commission* (1997) 71 ALJR 717 at 731; *Sheahan v Carrier Airconditioning Pty Ltd* (1997) 71 ALJR 1223 at 1239; *Cannane v J Cannane Pty Ltd (In Liq)* (1998) 72 ALJR 794 at 811-812; *Commissioner of Taxation v Murry* (1998) 72 ALJR 1065; *Marks v GIO Australia Holdings Ltd* (1999) 73 ALJR 12 at 35, par [123].

²⁸ *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424. See also Sir Anthony Mason's comments on the "creative elements" in interpretation and the need to exercise these in a principled, orderly way. *Swearing in as Chief Justice* (1987) 162 CLR ix at x.

to achieve. Over the past thirty years, starting in England²⁹ and more recently accepted in Australia³⁰ courts have inclined away from this narrower approach. The change may, in part, arise from the belated recognition of the proper role of parliamentary law-making following the extension of the electorate; in part, from an acceptance of the superior legitimacy of parliamentary law, no longer to be viewed as an unwanted intrusion upon the principles of the common law declared by the judges; and, in part, from an endeavour to avoid the verbose, complex, detailed and unintelligible legislation enacted by Parliament in an attempt to prevent judicial frustration of its purposes.

It is wrong to stereotype judges as being "purposivists" or "literalists". But somewhere on that spectrum, most judges would, in my experience, tend to show a fair degree of consistency. One can suggest that each case depends upon its own unique facts, found in the language and structure of the document under scrutiny. One can disclaim an attitudinal philosophy. One can seek to discern different approaches, depending upon whether the statute in question concerns criminal offences, tax liability, compensation

²⁹ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-273; cf Lord Diplock, "The Courts as Legislators" in *The Lawyer and Justice* (1978) at 274.

³⁰ *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-425 (CA).

benefits or otherwise. But analysing my own differing (and sometimes dissenting) views on issues of statutory construction, I feel that there must be an explanation at a higher level of reasoning.

Doubtless in some cases I have just been wrong. At least, that is what the majority has held. But in other cases, where there is a genuine difference of view on the meaning of the words taken in their context, I suspect that the difference may (at least occasionally) be explained by reference to the more insistent demand that I feel to ascertain, and give effect to, the legislative purpose as I see it in the language under consideration. If one dug more deeply into why this should be so, it could perhaps be explained by a view, ultimately of political philosophy, concerning conceptions of the kind of polity which our federal and State³¹ constitutions create. All Australian judges would claim a fidelity to Parliament's purpose, contesting only the ascertainment and definition of that purpose which is the objective of statutory construction. But I suspect that different judges have different inclinations to ascertain and give effect to that purpose where the Act departs from traditional approaches of the

³¹ See eg *Egan v Willis* (1999) 73 ALJR 75. Cf *Building Construction and Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 (CA). For an example of a difference of view about legislative construction see *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 96-98 (Gleeson CJ); 103-105, 114-116 (Kirby P).

common law³² or contains a phrase which may suggest an impediment to the achievement of what is otherwise the apparent objective at which the legislation has been targeted³³.

The more common problem for judicial reasoning and decision-making arises in the appellate courts in the area where judges have a wider scope for their opinions. I refer to the statement of the principles of equity and of the common law. This is where one sees, over a judicial life, the most powerful differences of view between those who would push forward, abandon or re-express a rule stated in earlier times and those who would adhere to the old rule, passing the buck to Parliament if it wishes to effect a change; yet well knowing that, in most cases, Parliament will not have the time or inclination to rise to the occasion.

Statements of restraint are penned by great judges from the wisdom of their experience. Thus, Judge Learned Hand, who never sat on the United States Supreme Court but spent a long career in the federal courts of that country, was one of the foremost expositors of caution. He dissented from an attempt of his colleagues to

³² See eg the discussion of common law analogies in *Marks v GIO Australia Holdings Ltd* (1999) 73 ALJR 12 at 42, par [150].

³³ See discussion in *Cramer v Davies* (1997) 72 ALJR 146 at 149.

anticipate developments of the law in the Supreme Court of the United States writing³⁴:

"[It is not] desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant".

He constantly urged detachment so that the judge would decide the case without passion and always "as though it weren't your fight"³⁵:

"There are those who insist that detachment is an illusion; that our conclusions, even when their bases are sifted, always reveal a passional foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crises, as any other bias"³⁶.

For Learned Hand, "the price of [the judiciary's] continued power" was a strong "self-denying ordinance"³⁷.

In Australia, we have had notable advocates for judicial restraint. Foremost among them in my youth was Chief Justice

³⁴ *Specter Motor Services Inc v Walsh* 139F 2d 809 at 823 (2nd cir 1944) per Hand CJ.

³⁵ H Shanks, above n 22, at 20.

³⁶ L Hand, "Thomas Walter Swan", above n 22, at 165.

³⁷ L Hand, "The Contribution of an Independent Judiciary to Civilization" above n 22, at 121.

Dixon and Justice Kitto. In more recent years, Justice (later Chief Justice) Brennan argued eloquently for restraint in his dissenting judgment in *Dietrich v The Queen*³⁸

Dietrich was the case which effectively reversed an earlier decision of the High Court of Australia³⁹. It held that courts have a power to stay criminal proceedings which would result in an unfair trial because an indigent accused, charged with a serious offence, was, through no fault, unable to obtain legal representation, and would otherwise be forced to trial without a lawyer. Justice Brennan was unconvinced that the Court should re-express the common law⁴⁰:

"The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values. ... Most significantly, there are limits inherent in the very technique by which the courts develop the common law ... In this case, the legitimacy and the scope of the judicial function of changing the common law call for consideration. There is no common law entitlement to legal aid. Should there be? How can such an entitlement be enforced? Who is to pay for it? The issues to be considered go beyond the question of an

³⁸ (1992) 177 CLR 292.

³⁹ *McInnis v The Queen* (1979) 143 CLR 575 (Murphy J dissenting).

⁴⁰ *Dietrich v The Queen* (1992) 177 CLR 292 at 320-321 (citations omitted).

entitlement to legal aid; they touch the legitimacy of judicial legislation".

A similar problem had arisen a short time earlier when I was President of the New South Wales Court of Appeal. The case was *Halabi v Westpac Banking Corporation*⁴¹. The issue was whether the common law felony tort rule (whereby a civil action based on a felony is automatically stayed until conviction, acquittal, or the establishment of a reasonable excuse for not instituting criminal proceedings) was superseded by the inherent jurisdiction of the Supreme Court to stay civil proceedings based on felonious conduct where to do so, on a proper evaluation of all relevant considerations, would prevent abuse of process and achieve justice between the parties. It was my view that the Court of Appeal could declare a rule or principle of the common law as obsolete. It could do so where the legal reasons for the rule and the social conditions upon which it depended had changed so fundamentally that it was no longer apt to maintain the rule. However, the majority of the Court of Appeal (Justices Samuels and McHugh) found that the Court had no power to refuse to apply such a settled rule of the common law. The majority views were not dissimilar to those expressed by Justice Brennan in *Dietrich*.

⁴¹ (1989) 17 NSWLR 26.

I tried to explain the contrary view, which sustained my reasoning and decision, in these terms⁴²:

"There is no suggestion that the judicial function of developing the common law is confined to the High Court of Australia. That Court is not a part of the legislative branch of government, as the House of Lords is. Like all other Australian courts, it is independent of the legislature. Indeed it is constitutionally separate from it. Since special leave is required for all appellate jurisdictions of Australia to the High Court, only a small fraction of cases are now reviewed there. None are reviewed as of right. It would be cause of disjointed development of the common law in Australia if it could be refined and restated only in the High Court. Obviously, some matters long entrenched will be left by courts such as this to that Court, sometimes with a suggestion of the need for judicial development. ... If the authority of a binding decision of the High Court stands in the way, this court has no warrant to reformulate the law. It must conform to the holdings of the High Court. ... But if, as here, there is no such binding rule and if this Court considers that an earlier stated rule of the common law is obsolete ... it is open to the Court to say so. It will stay its hand if legal principle, the state of authority and considerations of policy suggest that the change should be left to Parliament, properly advised. ... [I]n this field of the law where the Court is concerned with superintending the integrity of legal process commenced in the Supreme Court, and where there is an entirely appropriate alternative principle of the law which can be invoked to achieve that end, the Court may, in my opinion, restate the common law as I have proposed. No legislative enquiry is necessary for it to do so".

You will observe here much common ground between the judges who would develop the law and those who would not: an

⁴² *Ibid*, at 40-41. Citations omitted.

acknowledgment of the primacy of parliamentary law. An acceptance of the need to consider the consequences of a particular decision. An appreciation that there are limits in judicial creativity. My own decision was affected by perceptions of the obligations of candour, of refashioning principles on a higher plane and of the special legitimacy of the judiciary to do so in areas of procedural law⁴³:

"[T]he more candid course to take is to acknowledge that the rule is no longer part of the law. It has now been replaced by a general judicial discretion which is more flexible and sensitive to the facts of the particular case. In this way the common law has frequently developed to a higher stage of a more general principle. That is, in fact, the way of our system. When the higher principle is established, earlier historical efforts, pointing generally in the same direction, can be cut away by the judges just as surely as they were first made. They can be removed unless, in the meantime, the rule in question is taken on such an authority that it is impervious to, or inappropriate for, later judicial clearances. ... This is not a case of altering the substantive law. What is invoked is a matter of procedure. This is precisely the kind of rule which judges may clarify, elaborate, change, refine and abolish to serve the differing needs of the administration of justice. ... Far from altering the substance of the law, the recognition that the felony-tort rule is now obsolete involves a simplification of the law. It removes a now artificial category whose origins, justification and elaboration can be left to legal historians. It does so without encumbering the common law with new, unhistorical and artificial 'modifications', lately 'discovered'".

⁴³ *Ibid.*, at 39. Citations omitted.

Just to prove that it is wrong to attempt to stereotype judges into categories, such as conservatives and activists, creationists and applicators, I commend a reading of the decision of the High Court in *Mabo v Queensland [No 2]*⁴⁴ where Justice Brennan, in a bold opinion, reversed 150 years of settled understanding of Australian land law in respect of the title to land of Australia's indigenous peoples⁴⁵. It was this decision, obviously with enormous financial, economic, even political implications, that set in train the legal events which have since unfolded by which native title rights of Aboriginals and Torres Strait Islanders have been recognised in Australia. Only Justice Dawson dissented in that case.

Or take more recently the decision of the High Court in *Northern Sandblasting Pty Ltd v Harris*⁴⁶. That was a case where a young girl was profoundly injured when she was electrocuted on touching a garden tap which was electrically active. The landlord to her parents had previously engaged a licensed electrician to repair any electrical defects. The law forbade the landlord personally from itself interfering in electrical wiring. The traditional rules of the

⁴⁴ (1992) 175 CLR 1.

⁴⁵ The authorities are collected in *Milirrpum v Nabalco Pty Ltd* ("Gove Land Rights Case") (1971) 17 FLR 141; cf *Wik Peoples v Queensland* (1996) 187 CLR 1 at 205.

⁴⁶ (1997) 188 CLR 313.

common law were that a landlord was not liable to a tenant, or a tenant's child, in such circumstances. By the common law landlords enjoyed a large measure of legal immunity⁴⁷. One of the questions which arose in the case was whether the law should move in one leap from immunity to the imposition of a "special duty" so as, in effect, to render the landlord liable for the electrical fault and so that the landlord could not escape liability because it had left the electrical repair to a licensed electrician. Most members of the Court⁴⁸ held that the landlord was not liable for breach of a non-delegable duty of care. But Chief Justice Brennan⁴⁹ found that the landlord was liable for failing to have the qualified electrician inspect the switch boxes before the tenants and their child went into occupation of the premises. A majority amongst the Justices was thus built to uphold the judgment below in favour of the injured girl.

Naturally, a case such as that elicits great sympathy for a profoundly injured child and her family. However, I did not feel entitled to push the boundaries of legal liability forward. In my reasons, I explained why⁵⁰:

⁴⁷ *Cavalier v Pope* [1906] AC 428.

⁴⁸ Brennan CJ, Dawson, Gaudron, Gummow and Kirby JJ; Toohey and McHugh JJ disagreeing on this point.

⁴⁹ Gaudron J agreeing.

⁵⁰ *Ibid*, at 635.

"It is true that, occasionally, the common law takes bold steps when 'layers of sentiment which may have accumulated' need to be overcome. However, normally, it moves forward by modest steps relying upon analogous reasoning. Although views may differ on the point, I would not regard the expansion of the law on non-delegable duties by the creation of a new category of landlord and tenant to be an incremental step. Against the background of the previous, long held understanding of the scope of the duties owed by landlords to their tenants at common law, and the wide diversity of landlord and tenant relationships that would be affected, such a step would not be within the limits of permissible judicial law-making. To advance from immunity to strict liability within so short a time and without warning would ordinarily require the sanction of legislation".

At the end of my reasons I gave a further, explanation⁵¹:

"Such consequences would clearly include the potential costs of imposing new duties of inspection; of withdrawing some low cost accommodation from the market; and of obtaining liability insurance to meet the relatively rare case where the insurance of a qualified contractor, engaged by the landlord, proved insufficient for the peculiar risk of the particular case".

My purpose here is not to reargue *Halabi*, or *Sandblasting* or to enter the lists over *Dietrich*, *Mabo*, or any other case. By convention, judicial opinions stand or fall on the reasons which judges give to support the orders they propose. Today, those reasons are much more detailed than they were a hundred years

⁵¹ *Id.*, at 637.

ago. At that time the judge operated under a mesmeric illusion that he was largely a mechanic of the law, giving effect to an inevitable conclusion laid down by clear authority. We are now working in a more sophisticated age where no one doubts that legal principle and legal policy legitimately influence decisions on the law in particular cases⁵². Even a judge such as William Rehnquist, Chief Justice of the United States, often classified as a legal conservative, accepts the power of legal realism and the absurdity of the notion that judges simply "find" the law and have no influence on its content⁵³. But once this point is passed, we are truly upon an untracked ocean of decision-making, just as Cardozo recognised⁵⁴. Then the problem for the judge is avoiding the shoals and the rocks of too much invention whilst escaping the stagnant doldrums of too little principled development. Unless the ocean is truly "trackless", and the judge (especially of the ultimate court) set free to go where he or she will, our conception of the rule of law requires that there be lighthouses and maps and compasses and other established equipment to make sure that the ship does not founder but reaches its proper destination.

⁵² *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252 per Deane J.

⁵³ Rehnquist, above n 8, at 263.

⁵⁴ B N Cardozo, above n 7, at 166.

This is the background against which I now address the issue which I have chosen. It is one upon which I have puzzled many times when writing an opinion. Impression, you see, is not enough. Instinct, hunch and "feelings" must be kept in tight rein. Why is it that, after the hearing of a case, one can leave oral argument in the courtroom with an impression that this side or that must succeed yet ultimately come to a conclusion that the opposite result must flow? There is no universal answer to this question. In Australia, the reason is rarely, if ever, that the judge reaches one conclusion but that the opinion is written by a clerk, with a different life's experience, inclinations, philosophy, call it what you will⁵⁵. Because in Australia judges, with very few exceptions, still write all their own opinions and reach their own conclusions, for good or ill, the opinion published is that of the appointed decision-maker who has read the papers, heard or seen the evidence and the argument, and proceeded to reach a conclusion.

The reasons for a change of mind may be many and varied. Often they will involve discovering facts given in evidence or found

⁵⁵ cf P Wald, "Some Real-Life Observations About Judging" 26 *Indiana Law Rev* 173 at 177 where the function of Law Clerks in the District Court of Columbia Circuit is described. For a controversial insider's account, see E Lazarus, *Closed Chambers* (1998). Contrast P Jamieson, "Of Judges, Judgments and Judicial Assistants" (1998) 17 *CJQ* 395 where the practices in England, Australia and Canada are described.

by the trial judge, which had not earlier been noticed and which compel a different conclusion from that earlier provisionally arrived at. Sometimes it will be the discovery of a statute or a legal decision which is either clear and meets the point in issue or which is not sufficiently unclear or inapplicable as to warrant an endeavour to distinguish it or avoid the compulsion of its authority or logic. Sometimes it will merely be the result of adding up, in the privacy of the judge's own mind, the factors which favour one party over another. Sometimes it will be the power of expression of the reasons of the judge below or of reasons of a colleague which demand the allegiance of one's own judicial opinion⁵⁶.

There is very little research on the process of judicial reasoning and decision-making that goes beyond the analysis of the formal reasons once published. Judges are reticent because bound by convention to leave their inner thought to the words written in their published opinions. Yet it is impossible to give all of one's reasons in the manageable space available for published reports. The time of the judges does not permit it. The law publishers would be most upset by even lengthier reasons. Practitioners and law students already complain of the burdens under which they labour.

⁵⁶ cf M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964 at 966 fn 11 where reference is made to the author's change of mind in a particular case.

Ultimately, published reasons can only be an outline of the main factors which have led to the judge's conclusion. In the next part, I will explore the considerations which may influence the process of decision-making but which are rarely, if ever, referred to in published reasons.

LEGAL REALISM REVISITED

Of breakfast and other basic things: As we move away from the view that the decision of a judge, whether on facts or law, is preordained by logic, and face the fact that this highly important decision-maker has choices to make, where do we draw the line? Where do we rule out choice-affecting factors by reference to the supposed gift of judges to shake off every extraneous influence, to expel all immaterial attitudes and prejudices and to make the decision by reference only to the evidence proved and the applicable law?

In the heyday of the declaratory theory, law lecturers tried to shock students of my generation with the proposition of the legal realists that a decision might be influenced by what the judge had for breakfast. Obviously, the same startling lesson was given to Chief

Justice Rehnquist. He referred to it in his "Remarks on the Process of Judging"⁵⁷:

"The advent of the Legal Realists School disabused us of that notion [that judges simply 'found' the law necessary to decide a particular case]. Few would now argue against the proposition that judging involves creating law, at least to some extent. But if it does, what provides the source of the judge's creative inspiration? Legal realists - so-called because they were said to believe that what a judge had for breakfast made more difference in how he would decide a case than what he knew about the existing precedents - were at pains to point out that a judge's background might have as much to do with the way he went about deciding a case as would his legal education. And I suppose that the large measure of truth that adheres in this view is generally accepted today. Judges, whether at the trial or appellate level, are not fungible. Each one of us brings to the Bench a mind imprinted with previous experience, and that experience undoubtedly influences, to a certain extent, how we go about the process of deciding cases".

One obvious influence in an appellate court are the opinions of one's colleagues. Lenin taught that the person who wrote the minutes of an organisation would end up running it. The judge who produces his or her draft opinion first can often influence, profoundly,

⁵⁷ Rehnquist, above n 8 at 263-264. On the influence of temporary mood on decision-making, see J P Forgas, "Sad and Guilty? Affective Influences on the Explanation of Conflict in Close Relationships" (1994) 66 *Journal of Personality and Social Psychology* at 56; J P Forgas, "Mood Effects on the Fundamental Attribution Error: On being Happy and Mistaken" in press in *Journal of Personality and Social Psychology*; J P Forgas, "Affect and Social Judgments: An Introductory Review" in J P Forgas (ed) *Emotion and Social Judgments*, Pergamon Press, Oxford, 3, 18f.

undecided colleagues. But does the influence of judicial colleagues go beyond that? Generally, judges do not breach the walls that exist around their court relationships. In Australia, in my experience, such relationships extend from the strained to the civil and correct to the warm and friendly. But it has not always been so⁵⁸. In the United States, Chief Judge Richard Posner⁵⁹ talks of his experience:

"[Judges] rarely level with the public - and not always with themselves - concerning the seamier side of the judicial process. This is the side that includes the unprincipled compromises and petty jealousies and rivalries that accompany collegial decision-making and indolence and apathy that life tenure can induce".

It seems that Posner's experience is not unique in the United States. Judge Patricia Wald describes her experience⁶⁰:

"Real friendships are rare on the court. Heartfelt differences of philosophy and ideology militate against them. Powerful egos often impede them, even among philosophical allies. Judges are like monks without the unifying bonds of a common faith. They are consigned to one another's company for life. They cannot speak about their work outside the walls of the monastery. Lingering resentment and hostilities may be kept under wraps - and a bottle of *Mylanta* at hand - to preserve the image of the court that is impartial and neutral enough to decide other people's disputes".

⁵⁸ See C Lloyd, "Not with Peace but with a Sword - the High Court under J G Latham" (1987) 11 *Adelaide L Rev* 175.

⁵⁹ *The Problems of Jurisprudence* 458, 490 (1990).

⁶⁰ Wald, above n 55, at 179.

In such a hothouse, the influences of colleagues on the process of decision-making may not always be rational, objective, principled. Realising the risk that this can be so should enliven the self-awareness of the judge to endeavour to put such unworthy considerations out of mind, should ever they present themselves. It would take expertise which I do not have to say whether such mental gymnastics are truly possible in a middle-aged human being. Certainly, the judge who is aware of such considerations is much more likely to avoid the influence of them than the judge who is ignorant of such forces or adamantly denies their existence.

Legal realists may have gone too far in suggesting that judicial decision-making could be influenced differentially by the judicial breakfast. But the value of their insights over this century has been to require judges, particularly of the common law tradition, to face up to the fact that they make choices and therefore must be alert to the need for differentiation between the considerations which may permissibly affect the choice and those which are irrelevant, prejudiced and otherwise inadmissible. This change in the conception of judicial decision-making itself adds new stresses to the judicial life - such as what policy factors to take into account in a particular decision, what sources may be used to derive those factors and whether they should be acknowledged in writing a judicial opinion.

Take the consideration of insurance. Legal authority says that it is generally irrelevant to the liability of the insured⁶¹. Yet who can seriously doubt that the expansion of the scope of the tort of negligence in the fields of employment and motor vehicle compensation has been influenced profoundly by the unmentioned fact (as judges would well know) that any verdict awarded will commonly be picked up not by an ordinary citizen but by an insurer, possibly a compulsory statutory insurer⁶². Lately, there have been indications of greater candour about the influence of insurance upon particular legal developments⁶³. Yet the orthodox rule requires the rather difficult feat of mind of completely ignoring the existence of insurance and deciding the case upon assumptions almost certainly known to be false. Some unquestioning jurists are untroubled by such dilemmas. Problems are presented, and stresses introduced, when the judge's conscience and sense of honesty require the revelation of influences beyond established legal authority, which help to shape the decision.

⁶¹ *Davie v Newmerton Board Mills Ltd* [1959] AC 604 at 627. cf *Morey v Woodfield* [1963] 3 All ER 533n.

⁶² Discussed in *Cogotno v Lamb [No 3]* (1986) 5 NSWLR 559 and *Lamb v Cotogno* (1987) 164 CLR 1. See also *Gray v Motor Accidents Commission* (1999) 73 ALJR 45 at 51, 58-59 at paras [32], [37], [80]-[83], [131]. See also J Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus" in P Cane and J Stapleton, *The Law of Obligations*, (1998) 59 at 65, 92.

⁶³ See eg *Kars v Kars* (1996) 187 CLR 354 at 378; cf *Northern Sandblasting Pty Ltd v Harris* (1997) 71 ALJR 1428.

Physiological stresses: It is increasingly appreciated (despite some judicial denials)⁶⁴ that judges, especially trial judges, "occupy one of the more stressful jobs in contemporary society"⁶⁵. This is because they must constantly make decisions which cannot be delegated, must do so in public and often in dramatic circumstances, are subject to appellate review and criticism and are obliged to discharge their functions with "impeccable honesty, resolute even-handedness, conspicuous humanity and a high degree of judicial wisdom"⁶⁶. Stress is a physiological phenomenon. It is a fact of life. All animals experience presence of stress. No species is more prone to it than human beings⁶⁷. According to experts on the subject, it is a fundamental biological law that animal organisms submitted to stress will respond with a reaction of either fight or flight⁶⁸. Many judges of the past responded to stress by denial - which is a kind of flight. The physiological forces continued to effect

⁶⁴ J B Thomas, "Get Up Off the Ground" (1997) 71 ALJ 785.

⁶⁵ A Watson, "Some Psychological Aspects of the Trial Judge's Decision-Making" 39 *Mercer L Rev* 937 at 938 (1988).

⁶⁶ *Loc cit.*

⁶⁷ *Ibid*, at 940; cf T Ellis and C Showalter, "Work-Related Stress in American Trial Judges" 22 *Bulletin of the American Academy of Psychiatry and the Law* 71 (1994).

⁶⁸ W Cannon, *The Wisdom of the Body* (1939); S Rado, *Adaptational Psychodynamics* (1969) at 25-47.

their bodies and thinking processes for despite their offices, they could not escape the physiological forces which stress releases.

Judges faced by ever increasing case loads and, generally, no way to deflect them, are placed under enormous physiological pressures to get decisions completed as quickly as possible so that more and new decisions can be tackled. The most common complaint of the legal profession about judges in the United States is of delay in handing down opinions⁶⁹. It may be the same in Australia. Yet most judges, out of necessity, learn quickly that pain is diminished by tackling decisions as soon as possible. It is only increased by delay. Reassuringly, Lord Justice Ormrod of the English Court of Appeal observed⁷⁰:

"Most judges are, I think, surprised at first to find how much less difficult it is in practice to make decisions on fact than it appeared to be from the Bar. My old pupil master, Lord Pearce, assured me when I was first appointed, that, in his experience, every case would decide itself, if one gave it enough time! Sooner or later something would emerge that would make the decision quite obvious. To my surprise, because I received his advice rather sceptically, it proved to be true. This is just as well because, if it were otherwise, the burden on the judges would be insupportable".

⁶⁹ Watson, above n 65, at 946-947.

⁷⁰ R Ormrod, "Judges and the Process of Judging" in *Jubilee Lectures*, University of Birmingham (1981) 181 at 187-188 cited Watson, above n 64, at 947.

This candid insight into the thinking of two experienced and distinguished English judges suggests the importance of intuition - what might be called old-fashioned judgment. We should not be too surprised that this plays a part for it is simply the application to a particular case of the accumulated experience of professional life. Yet intuition may itself be the product of unrecognised psychological forces, cultural assumptions and social attitudes. Working under the pressure of constant decision-making, the average judge does not have a great deal of time to pause and clarify, in his or her mind, the myriad of influences which are at work. What will be known is that, unless the list is cleared and the cases promptly disposed of, physiological forces of stress will create enormous discomfort and disturbance which the judge realises it would be better to avoid. Most judicial officers do not enjoy the luxury of selecting most of their cases, hearing the majority of them well argued and enjoying a time for reflection and decision. The average magistrate in Australia must get through a crushing workload disposing of each case in a matter of minutes. Rarely will there be time for lengthy cogitation.

Psychological forces. One of the leading judges of the realist school in the United States was Judge Jerome Frank. In his book *Law and the Modern Mind*⁷¹, he suggested that the process of

⁷¹ J Frank, *Law and the Modern Mind* (1930) cited Rehnquist, above n 8, at 267ff.

judicial reasoning and decision-making was founded on a central myth in the law. This, in turn, was derived from the eternal quest of human beings for certainty. Being a realist, Frank attributed this myth to a universal fantasy of childhood in which infants attribute omniscience and omnipotence to their parents. He believed that much lawmaking was derived from this fantasy and that human beings had a great reluctance to accept the truth: that life is filled with uncertainty⁷².

Frank, the realist, attributed much of the intellectual activity of judges to "rationalisation"⁷³. I lack the expertise to engage with him in his diagnosis or to update his theories of psychology. But there would seem to be little doubt that, however much a judge might try to escape psychological forces, their dynamics can be important in the process of reasoning and decision-making. Advocates understand this. They regularly seek to play on the intellectual and emotional susceptibilities of the judges before whom they appear⁷⁴.

⁷² *Id.*, at 3, 13.

⁷³ *Id.*, at 30, 31; cf Watson, above n 65, at 938.

⁷⁴ Watson, above n 65, at 938; cf J J Rachlinski, "A Positive Psychological Theory of Judging in Hindsight" 65 *Uni of Chicago L Rev* 571 (1998).

Psychological studies of law students in the United States have discovered that they display certain attributes in greater abundance than the average citizen⁷⁵. They have more aggressiveness, but also more concern about orderliness and social altruism than the average fellow citizen. Because, in Australia, all judges are lawyers, it would be safe to say that, if the same features were found in the average class of Australian law students, the same tendencies would ultimately find their way into the judges. There seems no good reason to assume that Australian lawyers would be different, in this regard, from their equivalents in the United States. The features of a desire for orderliness and a concern about social altruism appear somewhat antithetical. Perhaps in them we see, already at law school, the forces of conservatism and dynamism that are the abiding characteristics of the common law system itself. Resolving those competing forces is a constant challenge for judges, particularly when faced with novel legal and factual problems. Doing so, the judge will seek to display, and to feel, confidence. Psychological experts who tell the judge that this is an illusion⁷⁶

⁷⁵ J Bartlett, "The First Year Class of the Saskatchewan College of Law" (1974) 39 *Sask L Rev* 137; A Diamond, "Psychological Problems of Law Students" in S Gillers (ed), *Looking at Law School* (1976). Cited Watson, above n 65, at 939.

⁷⁶ Watson, above n 65, at 946.

receive an answer from experienced judges in the terms which Sir Roger Ormrod offered⁷⁷:

"From time to time it happens that a man who has been a most successful advocate is raised to the Bench, only to find himself a prey to doubts and anxiety, wondering what actually happened and whether 'he has got it right'. I comforted myself and reduced my anxiety to bearable limits, by reflecting that, while I might have my doubts about what actually happened, I was confident that the conclusion I have reached was the right one on the evidence put before me. If one cannot achieve this degree of confidence, nervous breakdown is almost inevitable".

Lord Radcliffe suggested that the process was rather more complex⁷⁸:

"There was a time ... when I believed that a man possessed a separate intellectual or logical power, his reasoning faculty, independent of his other powers or his dispositions, and that it was his highest duty as a man to accord pre-eminence to that power ... That belief has not persisted with me. It seems to me that thinking is a function of the whole of one's personality, with all the interplay of emotions and experiences that in time claim and receive recognition from one's reason; so that reason either becomes a term so comprehensive that it embraces everything that conditions one's thought, or else remains an isolated analytic or deductive faculty which does not in practice determine by any means all one's opinions or views".

⁷⁷ Ormrod, above n 71, at 187-188.

⁷⁸ Lord Radcliffe, Introduction to *Radcliffe, Not in Feather Beds* (1968) at xvi.

For every jurist like Radcliffe brought, ultimately, to the realisation of the complex forces working on his mind and every one like Frank urging judges to express their values and preferences more openly, others propound the wisdom of the traditional view of reticence, silence and the depersonalisation of decision-making. Certainly, this is the approach which prevails in most civil law countries where judicial decisions are much less discursive, dissent is impermissible, policy is banished from public revelation and decisions are written in a dogmatic style as if the conclusion stated was the only one which the law permitted. In a sense, the declaratory theory which formerly held sway was a common law reflection of this aspiration for certainty and predicability of the law⁷⁹:

"By tradition, and often by temperament as well, judges usually choose to remain as close to invisible as possible. Many of them believe that their role precludes acknowledgment of their own humanity. To them, a judge is a personification of law, and thus an instrument. He decides by code or statute or precedent, by an accumulation of weight on one side of the scale or the other, in his own character, values, experiences and prejudices are sublimely irrelevant".

Is this self-delusion? Most experts in psychology would say that it is. If honesty is the hallmark of a judicial life, the ancient injunction of the Temple of Delphi, "Know thyself", is supremely

⁷⁹ D Watson, *Judges* (1974) at 17.

important for the judicial decision-maker. I agree with Andrew Watson's conclusion⁸⁰:

"At the very least, judges should work conscientiously to become intuitively and then cogitatively, sensitive to the kinds of issues that cause them emotional conflict with all of its potential for stress ... Then, and only then, can judges face the multitude of contradictory and contesting values encountered in judicial deliberations and retain those values within reach of cognition and rational resolution. ..."

CONCLUSION

I have reached the final point of this analysis. Decision-making in any circumstances is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker be only partly aware.

The most important decisions in society are commonly taken by those who head large corporations, who shape the media that we receive and which influence public opinion and attitudes. The decisions of leading politicians and senior officials, of political staffers, party *apparatchiks* and their advertising advisers are probably next in importance. Further down the hierarchy of

⁸⁰ Watson, above n 65, at 958.

significant decisions are those of the courts. Yet important they are, not only for the parties and their lawyers who come before them but also for the standards which are set by them for society and the rules that are laid down for the future. Sometimes they are absolutely vital.

In these circumstances, it is surprising that so little has been written about the moment of judicial decision. Sometimes the decision may emerge, with pure logic, from the application of clear and settled legal principles to simple and uncontested facts. But the problem for judges is that often the applicable principle (if any) is not clear. The Act of Parliament is unclear. The facts are disputed and uncertain. Choices must be made.

Tracking those choices and recognising the considerations which may influence them is a newly acknowledged and additional obligation which judges, especially of appellate courts - and particularly of ultimate courts - must accept. Inescapably, their written reasons can reveal only part of the journey to the moment of decision. But should we dig deeper or will doing so merely cast doubt on the certainty and objectivity of the law which Jerome Frank said is a deeply felt, but child-like, human need? Such empirical studies as have been attempted are said to produce "a sobering

splash in the face with cold reality"⁸¹. When the declaratory theory of the judicial function was overthrown, it left us, the judges of the new age, with many uncertainties. Those uncertainties will not disappear merely because we turn our backs on them.

⁸¹ G C Sisk et al. "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning" 73 *New York Uni L Rev* 1377 at 1498 (1998). This article reports on a study of the introduction of the *Sentencing Reform Act* and Sentencing Guidelines in hundreds of United States District Courts. The study involved an "unprecedented empirical study of judicial reasoning in action".