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APPEALS WITHIN THE JUDICIAL HIERARCHY AND THE EFFECT OF JUDICIAL DOCTRINE ON SUCH APPEALS IN AUSTRALIA AND ENGLAND

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The most abiding feature of the judicial system is procedure and technique. Changes in judicial doctrine in these matters can have wide ranging effects on the law as a whole. As those changes receive little academic scrutiny—which scrutiny, contrary to the theory so often espoused that what the courts do is more important than what they say, ignores their theories as to what they should do in their own processes—they are not inhibited by academic criticism, a potent stifler of legal change.

In the last twenty years, and particularly in the decade of the Chief Justiceship of Sir Garfield Barwick, doctrines have been developed in the High Court of Australia inhibiting appeals, which have changed the effective operation of the appellate system. The general drive of these doctrines is to inhibit intermediate appellate courts from exercising their appellate powers. Similar doctrines, though not entirely absent, do not appear to have been embraced with such fervour in England. The general purport of these doctrines is that appellate courts should use their powers with special restraint and in some fields treat the judgment of the primary judge as virtually sacrosanct.

There are a number of doctrines of judicial self-restraint. One is a constitutional doctrine, aimed at minimising conflicts between co-ordinate branches of government.[1] The now exploded doctrine that the House of Lords was absolutely bound by its own decisions was an extreme example of this doctrine—a decision not to trespass on the field of the legislature in law reform.[2]

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* Of the Supreme Court of New South Wales (Court of Appeal Division).

[1] Stone, *Social Dimensions of Law and Justice*, 667.

[2] Dawson, *The Oracles of the Law*, 92.

The doctrine of judicial restraint with which the writer is concerned is a set of principles recently enunciated by the High Court of Australia and directed at judges of intermediate courts of appeal. This doctrine was stated by Barwick, C.J. in *O'Neill* v. *Chisholm*.[3]

> . . . an appellate court faced with findings of fact of the trial judge which there is evidence to support in point of judicial restraint ought not to overturn those findings simply because on the same material that court would have reached a different conclusion in point of fact.

The doctrine means that an appellate court which considers that a decision is wrong has to acquiesce in that decision. Where the judgment is what is called 'discretionary', judicial restraint takes a more extreme form. In order to appreciate its impact it is necessary to consider the history of appeals in English law.

Historically, the facility for an appeal and its nature was conditioned by the means of documenting the process to be appealed.

The common law courts in their appellate capacity were not concerned with questions of fact. As Dixon, C.J. and Kitto, J. said in *Paterson* v. *Paterson*:[4]

> Indeed, facts were treated with open disdain by ultimate tribunals. The curious may find an example of this in the observation which Lord Holt, L.C.J. made in *R.* v. *Earl of Banbury* (1895) Skinner 517, 90 E.R. 231, in speaking of the jurisdiction of the House of Lords exercised by writ of error: 'all causes generally consist more of matters of fact than of law, and it is beneath the dignity of their Lordships to be troubled with matters of fact'.

The courts in which the evidence was oral and the record consisted of the initiating process, the pleadings, the verdict of the jury and the judgment, had to have different appeals from those in which the evidence as well as the pleadings were written. Courts of the latter type were originally part of the structure of the Roman Catholic Church. The canonist appeal was a full rehearing in both law and facts, and the appellate court had an extensive power of reframing decrees.[5].

The procedure of the ecclesiastical courts and the Court of Chancery was derived from that of the canon law; and in England the chancery appeal was a rehearing. Daniell, *Chancery Practice*[6] says:

> Where the appeal is against the whole decree, the cause is in ordinary cases, actually reheard: That is, the case is stated, and the cause proceeded with, exactly as if it were an original hearing.

Ordinarily in Chancery, oral evidence was not received and evidence was taken by examiners appointed by the Court.[7] Thus, a hearing as well as a rehearing, was on documents. The common law courts had retained oral evidence in trials, and when the judicial system amalgamated the common law system of taking evidence with equity pleading and appeals, a new type of appeal emerged. Modern means of recording evidence have made it possible for all appeals to be appeals on fact and law and to be full rehearings. The rehearing has thus become the basic type of appeal, though other kinds of appeal

[3] (1973) 47 A.L.J.R. 1 at 3.
[4] (1953) 89 C.L.R. 212 at 219.
[5] Dawson, *The Oracles of the Law*, 193.
[6] 4 ed., (1866), 1366.
[7] Holdsworth, *History of English Law*, Vol. IX, 353 *et seq.*

remain. For example, for many purposes, the only appeal is by case stated, the facts being conclusively found by the body appealed from, the appellate court being concerned only with the legal implications to be drawn therefrom. Appeals from jury verdicts[8] and from the District Court[9] take different forms. What are really disciplinary appeals, orders to compel the exercise of jurisdiction (orders in the nature of a writ of mandamus, orders to keep subordinate tribunals to their jurisdiction, or to correct gross misconduct in the performance of judicial or quasi-judicial duties) rarely involve disputed facts and are never rehearings, the decision having no relation to what was sought in the original hearing.

The standard form of modern appeal from a judgment in a hearing by a judge without a jury is the appeal by way of rehearing; though derived from the Roman Canonist appeal via the appeal in equity it has novel features.

The true nature of the appeal by way of rehearing was worked out in the years following the enactment of the Judicature Act and it received its final authoritative exposition in the judgment of Lord Wright in *Powell and Wife* v. *Streatham Manor Nursing Home*[10] where His Lordship said:

> Before I turn to consider the reasoning which led the Court of Appeal to reverse the conclusions of fact arrived at by the judge, it is necessary to examine what are the principles which have been established to regulate the duty of the Court of Appeal in cases such as the present. The essence of the matter is now contained in the initial words of Order LVIII, r. 1 (which has statutory effect), which are as follows: 'All appeals to the Court of Appeal shall be by way of rehearing.' These words apply to an appeal from the decision of a judge sitting without a jury. The position is different when the trial has been with a jury. Where the trial has been before a judge alone the rehearing is had on the evidence given before the judge, except in the rare cases where further evidence has been permitted to be called before the Court of Appeal: that may be done under r. 4, which enables this course to be taken on 'special grounds only, and not without special leave of the Court'. In effect, therefore, the rehearing is very different from the original hearing: it is a rehearing on documents, including the judge's notes and sometimes, as in this case, also the shorthand notes, whereas the judge who originally heard the case both saw and heard the witnesses, and during an examination and cross-examination, often prolonged and searching, has abundant opportunity of forming an opinion as to their relative trustworthiness or the reverse. A rehearing which takes place on an appeal to Quarter Sessions. . . .
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> But under Order LVIII the Court of Appeal is the judge of fact. Here, however, arises the crucial circumstance that the Court is the judge of fact with what may be a vital difference as compared with the trial judge, since the rehearing which it conducts is under the different conditions which have been explained. What consequences properly follow from that have been stated in several cases: the latest and fullest statement of the relevant principles is now to be found in the opinion of Lord Sumner (which was the opinion of the House) in *Hontestroom (Owners)* v. *Sagaporack (Owners)* (1927) A.C. 37, 40. That was an Admiralty case and

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[8] Supreme Court Act, 1970, ss. 102, 106, 107.
[9] District Court Act, 1973, s. 127.
[10] (1935) A.C. 243 at 263.

the authorities cited by Lord Sumner were decisions in Admiralty appeals; indeed these questions could not have arisen before the Supreme Court of Judicature Act 1873 in cases at common law, in which the jury alone was the competent judge of fact. Lord Sumner states the antinomy which arises when the Court which is judge of fact has neither seen nor heard the witnesses and discusses how it is to be reconciled. He says 'Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LVIII, r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case'. He adds a little later: 'If his' (the trial judge's) 'estimate of the man' (the witness) 'forms any substantial part of his reasons for his judgment the trial judge's conclusion of fact should, as I understand the decisions, be let alone.' Lord Sumner quotes to the same effect earlier Admiralty authorities, both before and since the Judicature Act. . . .

Two principles are beyond controversy. First, it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' (*The Julia* (1860) 14 *Moo.P.C.* 210, 235, per Lord Kingsdown, cited with approval by Lord Sumner (1927) *A.C.* 47). And secondly, the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. . . . I think that it is difficult, if not impossible, to seek to lay down any precise rule to solve the problem which faces the Court of Appeal when it has to act as a judge of fact on the rehearing, but finds itself 'in a permanent position of disadvantage as against the trial judge.' In truth, it is not desirable, in my opinion, to do more than state, as I think Lord Sumner was stating, principles which will guide the appellate Court in the majority of such cases. The problem in truth only arises in cases where the judge has found crucial facts on his impression of the witnesses: many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation

and memory or the reverse. He will not necessarily distrust a witness simply because he finds him inaccurate in some details: he can give such inaccuracy its proper place, particularly of he sees that the witness is tired, or antagonized or confused, or perhaps impatient, and especially if the matter of the inaccuracy is of minor or collateral importance. But such inaccuracies may appear in a very different light when pointed to as isolated passages in the shorthand notes and abstracted from the human atmosphere of the trial and from the totality of the evidence. The judge will form his impression from the whole personality of the witness: he can allow for the nervous witness, standing up in a crowded Court or worried by the strain of cross-examination. The judge may be deceived by an adroit and plausible knave or by apparent innocence: for no man in infallible; but in the main a careful and conscientious judge with his experience of Courts is as likely to be correct in his impressions as any tribunal, unless perhaps, as some would say, a jury of twelve members is preferable. Yet even where the judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions may be determinant and indisputable facts, and the same may be true of some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witness.

An appeal by way of rehearing so described can be seen as an instrument by which the advantages of the disentangling of facts and the assessment of witnesses by a single judge sitting alone is combined with the opportunity for a collegiate appellate tribunal to assess the principles of law involved, and within limits review the findings of fact. That revision is limited by the nature of the record which reaches the appellate tribunal but not otherwise. It does not remove the original trial from effective scrutiny and forces the trial judge to be explicit in his own reasoning.

The difference between the doctrine so expounded and the current doctrine in the High Court can be seen from the following passage from the judgment of Barwick, C.J. in *Edwards* v. *Noble*:[11]

> I do not understand anything said in the reported cases and in particular in such cases as *Powell* v. *Streatham Manor Nursing Home* (1935) A.C. 243 and in *Benmax* v. *Austin Motor Co. Ltd.* (1955) *A.C.* 370 to deny the proposition that an appellant to succeed in an appeal against a finding of fact made by a judge sitting alone must convince the appellate court that the primary judge was wrong in his conclusion. That the appeal may be by way of rehearing does not, in my opinion, really bear on this question. The consequence of that description of the appeal is that the appeal is one on fact as well as on law and that the appellate court in deciding it may apply the law as it may then exist: further, where additional evidence has been received it may do so in the light of that evidence along with what had been adduced before the court from which the appeal is brought. A rehearing is not however a retrial of the issues. The question is not whether the appellate court can substitute its view of the facts which, of course, it is impowered to do: but whether it should

[11] (1971) 125 C.L.R. 296 at 303-304.

> do so. In any appeal against a finding of fact, whether or not by way of rehearing, however much the appellate court may be in an equal position with the trial judge as to the drawing of inferences, in my opinion, the appellate court ought not to reverse the finding of fact unless it is convinced that it is wrong. If that finding is a view reasonably open on the evidence, it is not enough in my opinion to warrant its reversal that the appellate court would not have been prepared on that evidence to make the same finding. Merely differing views do not establish that either view is wrong.

These views have been adopted despite the vigorous criticism of Menzies and Walsh, JJ. and despite the protest of Jacobs, P. (now of the High Court) in *Cashman* v. *Kinnear*.[12] It is apparent that in the guise of relying upon authority a revolution has been made. What has in fact happened is that the special rules for appeals from a discretionary judgment have been transplanted and made applicable to decisions on fact.

A class of judgments came to be recognised as presenting special features— 'discretionary judgments'. What precisely is a discretionary judgment does not seem to have been much discussed. There are instances where the legislature has, when conferring a power, at the same time provided that the exercise of that power shall be in the discretion of the judge. An example is The Testators' Family Maintenance and Guardianship of Infants Act 1916, s. 3, where it is provided that the court '. . . may in its discretion order . . .' provision for maintenance. There are similar provisions in the Acts of the other Australian States, except Victoria.

As will appear below, it is not necessary that the legislature should have called the power discretionary for the judgment to be discretionary. A judge may on proof of the facts be compelled to enter judgment; so far there is no discretion in the process—a simple action for debt is an instance. If he then, on application, grants the debtor time to pay by directing that while he pays certain instalments the enforcement of the judgment is stayed, he exercises a power vested in him. This power may be classified as a discretion in that the principles upon which he will grant an application to pay by instalments are not completely laid down in the grant of power and he can adapt the power to the exigencies of the case.

This discretion is a judicial as opposed to an absolute discretion. Thus, if the power was so exercised as in effect to nullify the judgment, for example, if having given a judgment for $100 the enforcement of the judgment was stayed while the debtor paid 10 c. per week, the exercise of the power could be attacked. Though to our minds discretion imports a kind of reservation to permit initiative by the holder, as for example, in the trustee of a discretionary trust, this was not always so. In *Rooke's Case*[13] it is said:

> and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law.

The law has usually sought to subject judicial discretions to control in order to make them predictable and reviewable; the present emphasis on discretion as the basis for protection from review can only be regarded as an historical aberration.

A discretion is a power which may or may not be exercised even though

[12] (1973) 2 N.S.W.L.R. 495.
[13] 5 Co. Rep. 99b; 77 E.R. 210.

the conditions for its exercise have been established. A discretion may also take the form of a liberty to decide whether to perform a duty, the content of which is not the subject of any discretion. Thus, there may be power to give or not give judgment but, if judgment is given, it can only be for a predetermined sum. A discretion is always a power and discretions are divided into absolute discretions which are powers, the exercise of which is not controlled by any duty, and discretions whose exercise is controlled by a duty or by a complex of duties. The overtones of discretion in private law, where the grant of a discretion is associated with freedom to act, should not be allowed to conceal the fact that when one speaks of the discretion of a court one is only speaking of one kind of power. If this is so, why is the review by appellate courts of discretion on judgments put upon a special basis? In special cases a court has been given an absolutely unreviewable power. In such a case no higher court has jurisdiction to do anything about the decision, which is exempt from the operation of its appellate power. The fundamental feature of an unreviewable discretion is that it is personal to a particular judge or court. An example of an unreviewable authority is the grant of an indemnity certificate under the Suitors' Fund Act s. 6(5). Other examples are certain orders for costs[14] and orders under the Landlord & Tenant (Amendment) Act (1948) s. 70. Apart from such cases it is hard to see why on a rehearing the discretion is not transmitted to the appellate court for it to come to its own decision in the light of the material before it in the same way and on the same basis as it reviews any other factual issue.

An argument for the special position to be accorded to certain decisions in the exercise of a discretion is that the decision may be so arbitrary that it can never be said whether any decision is correct or incorrect. For example, whether $100 or $200 is the proper amount for a scratched finger. All this amounts to is that there are situations in which it is not possible to say that the judge of first instance is wrong, and this has nothing to do with the fact that he is exercising a discretion.

The use of the term discretionary in relation to judgments confuses the issue. There can be a judgment which the court has a discretion to give. The usual type of judgment is not discretionary in that sense, there being a duty to decide the issue. Then there are judgments which are discretionary in that the court, though bound to give a judgment, can annex conditions. Then there is the judgment the content of which involves the valuation of what cannot be translated into money terms in any exact way because what is being valued is really incommensurable, pain and suffering being an outstanding example. There is really nothing discretionary about such a judgment. To say, as if often said, that minds may differ, and that is its distinctive feature, is to miss the point in that there is nothing that minds may not differ about. There are still believers in the flat earth theory or that species have not evolved from other species. The real distinction is that disputes about such issues cannot be resolved by reason or by investigation. The decisions are conventional. Such a decision can never be inaccurate unless founded on inadmissible or unsound evidence, but it may affront the ordinary concepts of fairness, accepted in the community. Provided it is realised that there are large leeways open to any judge there is no superiority in the decision of a single judge beyond what comes from actually seeing the witnesses. There is in fact an

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[14] *Donald Campbell & Co.* v. *Pollak* (1927) A.C. 727 at 805.

advantage in numbers when a conventional assessment has to be made. Lumping a conventional judgment of this kind with a judgment concerning the welfare of a child and a decision whether a defendant has been negligent, and treating them as presenting a special class of judgment presenting similar problems for appellate review does not make for a constructive use of appellate power.

Historically much law, perhaps most law, has been derived from the systematisation of discretion. Equity, the body of rules derived from the way in which the Chancellors exercised their powers, arose wholly out of discretionary powers. Even though for at least two hundred and fifty years these rules which had their origin in discretions vested have become rigid, equity orders retain their discretionary nature because equitable remedies are discretionary; they are still treated as special boon.

An example of a discretionary judgment is the decree for specific performance. Because the jurisdiction to decree specific performance was regarded as extraordinary[15] the court assumed the authority to grant or withhold the decree according to its assessment of the morality of the transaction. Thus, the decree could be withheld if there was want of fairness in the transaction, even though such want of fairness did not amount to fraud. If it had amounted to fraud, the court could have decreed that the contract be rescinded, but it recognised a grey area, contracts permitted to be the subject of claims for damages but not worthy to be specifically enforced. The same discretion existed where the consideration was grossly inadequate.[16]

I have not been able to discover from an examination of the authorities which is far from complete even a suspicion of the present doctrine that the review of discretions by a higher court is subject to the current restrictive doctrines. The equity appeal was always a rehearing, so one would have expected to find it at least in the process of germination. It would seem to be a later planting of tares in the wheat.

The systematisation of the law requires that decisions in the exercise of a discretion be treated as motivated by principle or as experimental steps towards the adumbration of a principle, as contrasted with decisions which are mere Kadi Justice, without relevance beyond the instant case. The role of the appellate opinion which is the agency by which judgments are differentiated from mere fiats is thus stated by Karl Llewellyn in *The Common Law Tradition* at p. 26:

> In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability. Its preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead.

It is central to the development of the law through the courts. Restriction on opportunities for appellate review of discretions is an obstacle to this development.

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[15] Fry: *Specific Performance*, 6 ed. s. 387.
[16] *Ibid.* s. 438.

The systematisation of equity was carried out by chancellors building upon the work of their predecessors. At the present time with a large number of judges of first instance and an hierarchy of appeals, systematising falls, or should fall, upon the intermediate and final courts of appeal.

Wide and drastic discretions have been conferred upon judges in modern legislation. The Matrimonial Causes Act 1959, for example, gave to the courts unprecedented powers over the property of the spouses. There is nothing in the terms of the grant to suggest that such powers should not be used to generate concrete rules. The system of precedent which is fundamental to English law is directed to achieving just that. The way in which these powers should be exercised is of vital concern to all concerned with matrimonial causes. What the litigant and those advising him or her need is the distillation from the experiments of judges at first instance of a set of rules or principles, and one would have expected these to have begun to emerge, even at this late stage when the present act is about to be replaced. The appellate courts have shown marked reluctance to undertake this role; they are inhibited by the doctrines which have been developed in regard to discretionary judgments, but their coyness goes further. They have taken advantage of these pronouncements to abdicate responsibility.

One of the powers given to the courts administering the Matrimonial Causes Act 1959 is to prevent by injunction one of the spouses to a suit from having access to the matrimonial home pending the hearing of the suit. A large number of potential divorced persons are joint owners of the matrimonial home and both seek to enjoy their legal rights despite allegations of cruelty, adultery and other serious matrimonial offences, often pleading that this is done in the interests of reconciliation, which the law is supposed to favour. However, many a spouse bent on reconciliation has been blocked by injunctions granted by the courts—a drastic interference with the right of property to say the least, if this right has any meaning.

An appeal by counsel to lay down guidelines addressed to the Court of Appeal (New South Wales) was recently rebuffed by a judge of that court in the following terms in *Earl* v. *Earl* (unreported) (26.3.75):

> We were urged by counsel for the appellant to lay down guidelines which would produce uniformity in the decisions of the Family Law Division when applications were made by one spouse to eject the other from a matrimonial home which they both owned. The prospect of uniformity holds a beguiling fascination for the legally trained mind. It is no doubt a source of dissatisfaction with the operation of the legal system if situations thought to be similar are attended with radically different legal results. But it is not in the nature of things possible to examine the multifarious situations in which a claim may arise for the interim exclusion of a spouse from the matrimonial home, to reduce them in advance to categories of factual situations, and then lay down rules which determine a priori in which category claims will succeed and in which they will fail. As no two domestic contexts are identical, such a classification would engender a profitless debate, in which the parties assert the cogency of similarities and deny the materiality of differences. This consideration is given added force by the fact that the decision here is not merely a decision of fact, but one which involves the exercise of discretion, so that not merely one, but more than one decision can be right.

Fortunately, in other days both the common law judges and the Chancellors

were prepared to seek out the common features in non-identical situations, and frame rules for the exercise of their powers, rules which on occasion have turned out to be an embarrassment, but which were better than no rules at all. Otherwise neither common law nor equity would have existed. The reliance upon discretion as an escape from assuming the responsibility for some measure of uniformity simply leaves to the individual judge to work out his own principles unless he is himself a true exponent of 'Kadi Justice', in which case he will simply rely upon a 'hunch', *i.e.*, the law will be made by the state of his liver or some other malfunctioning organ. With a large number of judges of differing approaches to the law, operating in a field in which their own histories may encourage idiosyncratic views dealing with litigants exhibiting what appears to an outsider irrationality of a high order, matrimonial causes demand a pursuit of uniformity through the appellate process: that is, the development of a 'jurisprudence'.

The English approach is different and in my private (as distinct from my judicial) opinion, my judicial opinion having to be in conformity with the judgments of the High Court, wholly superior. Lord Denning, M.R., speaking for a court of appeal of five judges, said in *Ward* v. *James*:[17]

> It is an essential attribute of justice in a community that similar decisions should be given in similar cases, and this applies as much to mode of trial as anything else. The only way of achieving this is for the courts to set out the considerations which should guide the judges in the normal exercise of their discretion. And that is what has been done in scores of cases where a discretion has been entrusted to the judges.

He then illustrated this position by reference to a number of cases in which discretions had given birth to rules. The special character of a rule born out of a power is that it does not pre-empt the field; it cannot preclude the courts adding other rules. That is what is meant by the maxim that a discretion conferred on a court cannot be fettered.

The evolution of the restrictive rules in regard to appeals in the High Court seems to have begun by the High Court erecting what are classed as discretionary judgments into a special group and this group has tended to expand.

The basis of the current authority in Australia on appeals involving judicial discretion is *House* v. *The King*,[18] where in the joint judgment of Dixon, Evatt and McTiernan JJ. is the following passage:

> But the judgment complained of, namely sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not good enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge

[17] (1966) 1 Q.B. 273 at 293.

[18] (1936) 55 C.L.R. 499 at 504-505.

> has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

It is to be noted that this was a case in which the appeal was from a sentence of imprisonment by the Federal Court of Bankruptcy.

The infliction of sentences and their review give rise to special difficulties and involve social questions of a special order, in that the court is concerned with the maintenance of order generally and not with the particular appellant's individual worth. The court was faced with a special problem, in what circumstances would it allow an appeal as to sentence from a Federal court when it has not been given the powers of a modern court of criminal appeal. It adopted the current English authority relating to appeals from exercises of judicial discretion. This has provided the basis for subsequent development in Australia, but it is a curiosity in the genealogy of legal concept.

The next decision of the High Court which dealt with the question in an emphatic way is *Lovell* v. *Lovell*.[19] This concerned the custody of a female child aged three. The trial judge gave custody to the father, his decision was reversed by the Full Court of the Supreme Court of Victoria, and from it an appeal was brought to the High Court. The award of custody was classified as an exercise of a discretion, which it was, but the real juristic problem, namely, why it should be treated as presenting a special problem, was not explained. The court is by statute enjoined to treat the welfare of the child as paramount, and though it involves the weighing of many diverse factors and engages the judge's emotions to an unusual degree (something he is supposed to struggle against, not simply yield to) welfare is an objective fact or is at least as objective a fact as the courts have usually to pronounce on. What is welfare may involve a value judgment of a peculiarly intractable kind, but this is not a reason for leaving the decision to the individual judge, but the opposite.

A passage from the judgment of Kitto, J. has provided the foundation for future development:[20]

> The decision of this appeal appears to me to depend upon an appreciation of the function of an appellate tribunal in reviewing a judgment given in the exercise of a discretion. It may be, as Jordan, C.J. said in *Re Will of Gilbert* (1946) *S.R.* (*N.S.W.*) 318 at p. 323, that the restraint to which a court of appeal should submit itself is less stringent where the exercise of discretion is determinative of legal rights than it is where the discretion relates to points of practice or procedure. But even in the former case the court of appeal must guard against reversing a discretionary decision merely because it would itself have decided the matter differently; it is not justified in substituting its own judgment for that of the primary judge unless it is clearly satisfied that his judgment was erroneous.
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> If the judgment is affected by an error in point of legal principle, of course the error may be corrected. But leaving on one side mistakes of law (for it is conceded on all hands that the learned primary judge

[19] (1950) 81 C.L.R. 513.
[20] *Ibid.*, 532-533.

> made no such mistake in this case), it is true to say of any appeal (other than one which is a re-hearing in the Quarter Sessions sense of the term) that the onus of showing that the decision under appeal was wrong lies upon the appellant: *Powell* v. *Streatham Manor Nursing Home* (1935) *A.C.* 243 at pp. 249, 255. The onus is particularly heavy where an attack is made upon findings of fact made by a judge who had the advantage of seeing and hearing the witnesses; in such a case each judge of the appellate court must put to himself the question: 'Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong?': *Watt or Thomas* v. *Thomas* (1947) *A.C.* 484 at 488. And the onus is similarly heavy where the appeal is against an exercise of a discretion. 'A clear conclusion that the judge . . . was plainly wrong' is the sole justification for a reversal of his decision.

The reasoning which sees any real analogy between the position of a trial judge who sees and hears witnesses and can therefore assess the quality of the whole performance, and who is therefore in an entirely different position from an appellate court, for whom there is only the cold print, and the position of an appellate court in deciding what His Honour classified as the ultimate discretionary issue is to say the least, uncompelling. The words 'plainly wrong', far different from the formulation in *House* v. *The King*, have come to haunt Australian courts. *Lovell* v. *Lovell*, was a case in which the advantage which the trial judge had of seeing the competing claimants for custody did give him a decisive advantage. It was unfortunate that the decision was not put solely on this basis.

The reasoning was applied by the High Court in *Rodgers* v. *Rodgers*[21] to protect the orders of the Full Court of the Supreme Court of New South Wales in an appeal to it. The Full Court held that an order for maintenance in divorce proceedings had been made on inadmissible evidence. Excluding this evidence, it made its own orders without any benefit of the view of the witnesses usually relied on to explain reluctance to review the decision of judges of first instance, and the High Court held that this discretionary appellate judgment was entitled to be treated in the same way as a discretionary judgment of a judge of first instance.

Under the Matrimonial Causes Act 1959 almost every order which is made by the court is discretionary. Though the party who establishes a ground for divorce is entitled to a decree[22] there are numerous discretionary bars. The power of the court over maintenance and settlement of matrimonial property is discretionary. The same applies to custody proceedings.[23]

The concept of discretionary judgment has been extended from its original base, decisions in exercise of a power given to the court by statute, to judgments involving an evaluative element, particularly cases involving proof of negligence and damages. This Barwick, C.J. said in *Edwards* v. *Noble*:[24]

> But in deciding whether its own view is right and that of the primary judge wrong, the nature of the 'fact' found by the primary judge is a matter for consideration. Many of the 'facts' within the province of the

[21] (1964) 114 C.L.R. 608.
[22] S. 69.
[23] S. 85 (1).
[24] (1971) 125 C.L.R. 296 at 304.

> jury involved elements of judgment, some evaluative aspects akin to an exercise of discretion. Perhaps the 'fact' of negligence or no negligence is of this kind.

When it is realised that the bulk of civil litigation involves these concepts and that from the point of view of the ordinary litigant and indeed the economy this is the most important part of the common law the consequences of limitation on appeals become a significant matter.

This was a case arising out of a motor accident, in which the trial judge had dismissed the action, the Supreme Court of South Australia had allowed an appeal and entered judgment for the plaintiff and the defendant appealed to the High Court. His Honour referred with regret to the loss of:

> The singular advantage of the complete finality of the verdict of a properly instructed jury.

The nostalgia for other days as a reason excites suspicion, as does the attempt to give to the necessarily reasoned judgment of a judge the unchallengeable character of the unknown verdict of a jury, and to give to the finding of negligence which ordinarily involves the setting of standards the quality of an ordinary primary finding of fact by a jury I find difficult to accept.

The relationships between law and fact are multifarious and subtle, but one thing is clear, that adjudications on questions of fact ultimately generate propositions of law. That certain relationships, for example, master and servant, or manufacturer and consumer, were held to give rise to duties of care was the result of courts deciding cases with similar features by analogy with others already decided. When judges decide both law and fact the process of characterisation is more speedy and by means of law reports the judges are pressed into more consistent courses than can be done with juries. The paths of the law become more speedily predictable. To go back to the isolated doom of the soothsayer is not calculated to help the law. However, the protests of both Menzies and Walsh, JJ. against this course have been overwhelmed, and the High Court has rivetted this upon the intermediate appellate courts. Why matters of evaluation should be put in a preferred position is a mystery. The question of value needs the levelling effect of more than one mind.

The contrary position was summarised in the same case by Menzies, J.:[25]

> In *Paterson* v. *Paterson* (1953) 89 *C.L.R.* 212 pp. 218-224 Dixon, C.J. and Kitto, J. undertook a recapitulation of the case law relating to what were described as 'the settled rules governing the manner in which a court of appeal should deal with appeals on questions of fact'. Since then other judges have made other recapitulations. However, as I read the cases, the rules have remained very much as they were established over seventy years ago. They are: (1) upon such an appeal the task of the court of appeal is so different from its task in considering motions for new trials after a verdict that it is wrong to use in relation to one the language appropriate to the other; (2) a court of appeal does not supplant the trial judge by trying the case afresh on the record; (3) a court of appeal, while having regard to the judgment appealed from, is under a duty to make up its own mind as to the facts; (4) special weight ought to be given to the judgment appealed from if anything turned upon the credibility of witnesses or any other matters as to which the judge hearing the case would have an advantage over the court of appeal; (5)

[25] *Ibid.*, 308.

> in any case, even those within (4) where a court of appeal is satisfied of error on the part of the trial judge it will correct that error, even in cases where, although the reasons for the judgment of the trial judge do not themselves disclose any error, the result satisfies the court of appeal that there was undisclosed error.
>
> Although in some cases greater refinement may be necessary it is sufficient in most cases for a court of appeal to inquire whether, despite the advantages of the trial judge, his judgment was in error.

It is apparent that this makes it possible for a court of appeal to play a real contribution to the systematic development of the law.

The English approach to questions of discretion has moved in the opposite direction. There, an exercise of a discretion is treated just like any other decision of a judge. Thus in *Ward* v. *James*[26] Denning, M.R. speaking for a Court of Appeal consisting of five judges in a matter involving procedure, a field in which the primacy of the individual judge's power is traditionally recognised, said simply:

> This court can and will interfere if it is satisfied that the judge is wrong.

There does not seem to be any list of discretionary judgments but in Australia they cover a wide range of the law: the whole field of punishment in criminal law (*House* v. *The King*),[27] all orders for ancillary relief in Matrimonial Causes, all orders under The Testators' Family Maintenance and Guardianship of Infants Act 1916, most orders under the Companies Act 1961, assessment of damages for personal injuries and all other torts, some parts of the law of damages in contracts, most of equity as orders in equity are usually discretionary, and no doubt many others. If the dicta of Barwick, C.J. in *Edwards* v. *Noble* quoted above became accepted (as they appear to be), all cases where a court is required to evaluate the evidence by reference to standards will result in a discretionary judgment. If this is accepted, there will be few non-discretionary judgments.

In England, those judgments called discretionary seem to be mainly procedural decisions, as contrasted with final determinations of substantive rights. The relevance of the distinction is slight as at least in theory the appeal from a discretion has no distinctive features.

In these immensely important fields of law, there are two contending philosophies, to use the term in a loose way. One is that the legal process should as far as possible promote uniformity and consistency, the other that the individual judge's reaction to situations presented to him should be paramount. Uniformity and consistency can only come through appellate courts, and in so far as they are inhibited in their review of decisions by courts of first instance, these objectives are frustrated.

One sees the vesting in the judiciary of a discretion, *i.e.* a power to decide within limits, as the opportunity to experimentally formulate concrete rules. The other sees it merely as a field for instant decision without continuing effect. One consciously aims at producing a body of rationally articulated doctrine which is available in advance for litigants and their advisers, the other deprecates the restriction on the individual judge's freedom of action which is inherent in the formulation of concrete rules.

Another field in which the competing viewpoints appear most acutely is the use which can be made of comparable awards of damages in accident

[26] (1966) 1 Q.B. 273 at 293.

[27] (1936) 55 C.L.R. 499.

cases. One of the advantages expected to follow from the exclusion of juries for assessment of damages in motor accident cases was the attainment of a measure of uniformity in awards. Though it is axiomatic that no two personal injuries are identical, uniformities do occur. As the sum to be given for pain and suffering is not commensurable objectively, unless, whatever the judge or jury came up with is unreviewable, there must be some accepted range within which an award is right and proper. The law, however, has not pursued a consistent course. Because of the capricious way in which juries exercised their power to award damages, the courts assumed a supervisory control, and this control extended to cases involving pain and suffering, damages for defamation and to all types of damages.

If what is proper is merely a matter of choice, conventions must be established if the supervision is not to be as arbitrary as what is reviewed. These conventions could be expected to arise out of individual assessments supervised by the appellate courts. For such a system to work, there must be available to the assessment tribunals information as to what has been the reaction of other tribunals in reasonably comparable cases.

In England and Australia books have been published classifying various types of injury and collating the awards which courts have either made or held to be correct, and these have been used by judges in England, assisting them in particular cases. There is need for uniformity as far as possible between awards; large variations promote suspicion of the courts. Under modern conditions with numerous courts staffed by single judges who are responsible for deciding both the law and the facts, some sort of cataloguing and classification one would have thought would be regarded as essential. It is hard to see why, if the comparable decisions are reasonably close, they should not be available to judges concerned with the problem. They can, of course, always use compilations surreptitiously, but the surreptitious use of material is destructive of the respect which courts need to perform their functions. One would have expected that this type of classification would have been regarded as an appropriate aid to achieve reasonable uniformity in a field of law in which the only uniformity which can really exist is to be found in convention.

It is true that the onset of major inflation, both in England and Australia, has wrought havoc with all conventional scales, and what is felt proper today was certainly excessive two or three years ago and unheard of a decade ago. This has limited the value of compilations. It is not only because of inflation that the use of comparable awards has been resisted and condemned in trenchant terms in the High Court. The use of comparable awards and appellate co-ordination of awards within limits based upon them runs absolutely counter to the theory that in assessing damages the judge is exercising a discretion which should be, if not involving wrong principles, beyond scrutiny. In *Planet Industries Pty. Ltd.* v. *La Rosa*[28] in a joint judgment, Barwick, C.J., Kitto and Menzies, JJ. said:

> There is, however, one submission made by Planet's counsel to which reference should be made. It was submitted that in deciding whether or not the award of general damages was excessive, we should seek out a norm or standard in the decisions of this Court for the assessment of general damages, by comparison with which it was claimed that it would be seen that the award of $40,000 for general damages was dispropor-

[28] (1968) 119 C.L.R. 118 at 124.

> tionate . . . We would emphatically reject this submission. It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be dervied from a consideration of amounts awarded in a number of other specific cases. We cannot think that the passage cited from *Chulcough* v. *Holley* (1968) 41 *A.L.J.R.* p. 338 should be understood as expressing a contrary view. The principle to be followed in assessing damages is, in our opinion, not in doubt. It is that the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused. It is to be proportionate to the situation of the claimant party and not to the situation of other parties in other actions, even if some similarity between their situations may be supposed to be seen. What was sought to be done in this case by the appellant's counsel, namely, to derive a norm or standard from a group of judgments of this court reviewing awards of damages on appeal is erroneous. The same would be true if the same course were sought to be pursued in relation to awards of a Supreme Court or of a County or District Court. The judgment of a Court awarding damages is not to be overborne by what other minds have judged right and proper for other situations. It may be granted that a judge who is making such an assessment will be aware of and give weight to current general ideas of fairness and moderation. But this general awareness is quite a different thing from what we were invited by Planet's counsel to act upon in this case. The awareness must be a product of general experience and not formed ad hoc by a process of considering particular cases and endeavouring necessarily unsuccessfully, to allow for differences between the circumstances of those cases and the circumstances of the case in hand.

With all due respect to the very distinguished judges, what is propounded is impossible of realisation. It may be true that judges regularly concerned with particular types of damages get sufficient experience to assess various types of injury on a reasonably consistent scale so that there is a basic fairness in their own judgments, but experience, particularly at the appellate level, shows that judges do not give effect to current general ideas of fairness because, in fact, there are none. They do not necessarily bow to the ideas of their brethren and, in any case, if they follow the injunctions of the High Court they would have little or no knowledge of them. There are generous judges, there are mean judges and there are judges whose individual experiences have made them particularly sensitive to certain types of injury. Though there must be a range of permissible awards because of the conventional nature of the assessment, the working out of a range is impeded by the positive discouragement of the co-ordination and classification of types of damages which has been proclaimed by the High Court.

It is not without significance that Sir Garfield Barwick, C.J. has been a determined critic of rational calculation of damages in accident litigation. Though what is to be allowed for pain and suffering is absolutely incommensurable, other factors such as loss of earning capacity and future medical expenses, can with the help of actuarial tables, be calculated with some

accuracy. This compartmentalising of damages has been condemned in favour of the selection of a 'global' sum (*Arthur Robinson (Grafton) Pty. Ltd.* v. *Carter*).[29] The High Court has condemned the efforts of the N.S.W. Court of Appeal to stabilise the rate of discount when a lump sum is awarded for loss of earning capacity (*Hawkins* v. *Lindsley*).[30] It has thus injected another indeterminacy into an impossible task.

The system has only been made to work by disregard in practice of the principles enunciated by the High Court. As Luntz, *Assessment of Damages*[31] says:

> But the existence of a tariff for non-pecuniary elements of damages, allowing for individual variations by providing a range or 'brackets' between which awards may fluctuate and moving overall upward from time to time, is the only explanation of how a legal adviser can recommend a settlement to a party, of how a judge without a jury can award a given sum, of how an appellate court can set aside a verdict as inadequate or excessive and why publications such as the *Australian Legal Monthly Digest* continue to set out each month details of awards.

The last point mentioned by Luntz is fundamental. Decisions of the courts must provide bases for settlement. Unless the legal system is going to collapse only a small portion of legal contests can be fought out to the end. The decisions of the courts should not only seek to be uniform but decisions should be such that in areas of conflict and dispute they promote consensual settlement of disputes. The situation in the field of damages is close to the situation in matrimonial causes discussed above, where the doctrine of individual discretion has also been used to frustrate co-ordination of the ways in which the courts interfere with family property.

Section 3 of the Testators' Family Maintenance and Guardianship of Infants Act 1916 provides that the court may make orders in its discretion and this is included in the Testators' Family Maintenance Act legislation except in Victoria. Orders made under the Testators' Family Maintenance Act are therefore by statute discretionary orders. What the words 'in its discretion' contribute has never been elucidated. In their field there has been a change in the approach of appellate courts. The Full Court of New South Wales in *Re Ryan*[32] said:

> The jurisdiction under the Act is given to the Supreme Court in its Equitable jurisdiction and in cases which are brought on appeal to the Full Court that court must exercise its discretion, and should not hesitate to reverse the decision of the judge at first instance, if it is satisfied that the discretion has not been exercised in the way in which its own discretion would be exercised.

This approach was rejected by the Full Court in *The Will of Gilbert*,[33] which was expressly approved by the Full High Court in *Ellis* v. *Leeder*[34] where Dixon, C.J., Williams and Kitto, JJ. in a joint judgement said:

> Normally the appellate court will not interfere with the exercise of the judge's discretion except on grounds of law, but it has an overriding duty to intervene to prevent a miscarriage of justice.

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[29] (1970) 123 C.L.R. 649.
[30] (1975) 49 A.L.J.R. 5.
[31] S. 1. 210.
[32] (1923) 23 S.R. 354.
[33] (1946) 46 S.R. (N.S.W.) 318.
[34] (1951) 82 C.L.R. 645 at 653.

Though the decision of the High Court was upset in the Privy Council,[35] the correctness of this principle was not disputed, the Privy Council deciding that on these principles it was not a proper case for the High Court to set aside the judgment of the trial judge.

In fact, the law reports are full of cases in which orders made at first instance in Testators' Family Maintenance applications have been set aside, and principles have emerged. In the important case of *Pontifical Society for the Propagation of the Faith* v. *Scales*[36] Dixon, C.J. said:

> Perhaps this court and other courts of appeal have attached too much significance to the discretionary aspects of orders under appeal and have accordingly allowed orders to stand which no member of the Court of Appeal would himself have made, had he sat at first instance.

It cannot be said, however, that this confession by that great jurist has had much effect upon practice, and the courts of first instance have used to the full the latitude conferred upon them by the principles laid down. This has meant that orders under the Testators' Family Maintenance Act have to a remarkable degree depended upon the individual idiosyncrasies of the judges.

If the statement of Jordan, C.J. in *Gilbert's Case* that there was a difference between discretion in matters of procedure and discretion in matters of substantive law, which was approved by the High Court in *Ellis* v. *Leeder*, had been given effect to, there would have been greater uniformity in awards under the Testators' Family Maintenance Act. The independent discretion of the trial judge means that it is impossible to introduce real uniformity, even of general principle, in this field, a field in which despite all the difficulties in dealing with individual cases, uniformity is much to be desired.

The principles upon which the English courts entertain appeals from orders made under the Family Provision Act 1966, the analogous Act to the Testators' Family Maintenance Act 1916, are somewhat similar. They apply the general principle which has been laid down for the review of orders made in the exercise of judicial discretions, stated by Lord Wright in *Evans* v. *Bartlam*:[37]

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he is wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise by way of review a discretion which may reverse or vary his orders.

(*Thornley* v. *Palmer & Ors.*[38] per Edmund Davies, L.J.). Appeals are not readily entertained interfering with awards. (Tyler, *Family Provision*, p. 92). The powers of the court under the English Act are more limited, so that the consequences of non-uniformity are less serious to those taking under the will.

A field in which both English and Australian courts have interesting tendencies is where they are sitting as courts of Criminal Appeal. The statutes governing criminal appeals in the Australian States are derived from the Imperial Criminal Appeal Act 1907, and the powers of the Court in England and in New South Wales are for practical purposes very similar. The court

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[35] (1952) 86 C.L.R. 64.
[36] (1961-62) 107 C.L.R. 9 at 19.
[37] (1937) A.C. 473 at 486.
[38] (1969) 3 All E.R. 31 at 35.

is concerned with two kinds of question—the correctness of the conviction, which in most cases depends on the verdict of a jury, and sentence which is the function of the judge alone. The Imperial Act was in large part the result of dissatisfaction with existing procedures for the review of criminal convictions, the deficiencies of which had been revealed by the Adolf Beck case—a case of mistaken identity.

The Act required that the Court of Criminal Appeal set aside the verdict of the jury *inter alia* on the ground that it is unreasonable or cannot be supported, having regard to the evidence.

Having regard to the origins of the Act, it is clear that the purpose was to give to the Court a supervisory role over the performance of juries. This purpose has been wholly frustrated. There may have been cases, though none has been reported in Australia, where a verdict has been upset on this ground. In England they were few and far between. The perusal of the reports of applications in which the ground was relied upon and which failed is a devastating experience, and one is left with the feeling that no case will ever occur when the jury's verdict will be set aside on this ground. Though in *Plomp* v. *The Queen*[39] Menzies, J. said of the ground:

"This is not a narrow question."

and surveyed the evidence in detail, the dominant line of approach is that of Jordan, C.J. in *R.* v. *Patmoy*,[40] a case of false pretences. The Chief Justice said that perusal of the evidence of the three witnesses for the Crown gave him the strong impression that they were all very unsatisfactory witnesses and it was surprising that the jury accepted their evidence but that it

> . . . does not entitle a Court of Criminal Appeal to substitute trial by three judges who have not seen the witnesses for trial by twelve jurymen who have.[41]

(See also *R.* v. *Crookes*).[42] Of course, for good or ill, that is what the legislature said the court should do.

The history of the provision in England and Ireland is given in Knight, *Criminal Appeals*, Ch. 5, where the consequence of the undue deference to the jury's verdict is illustrated by many examples.

The Act has been amended in England by the Criminal Appeal Act 1968, so that a verdict has to be set aside if it is 'unsafe or unsatisfactory'. This amendment has been applied so as to set aside a verdict in *R.* v. *Cooper*.[43]

The Criminal Appeal Act 1912, s. 6(3) sets out the powers of the court when reviewing a sentence, and is as follows:

> On an appeal against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

A sentence, according to received views, is a discretionary judgment (*House* v. *The King* [*supra*]). If the doctrines which have been applied to such discretionary judgments had been applied to the court when dealing with appeals against sentence (a difficult task in the light of the terms of the Act), appeals would have different treatment than they have.

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[39] (1963) 110 C.L.R. 234 at 250.
[40] (1945) 45 S.R. (N.S.W.) 127.
[41] *Ibid.*, 134.
[42] (1944) 44 S.R. (N.S.W.) 390.
[43] (1969) 1 All E.R. 3.

It is recognised by the court of Criminal Appeal that it is engaged in setting bench marks for sentences. The court has, in relation to sentences and ancillary matters such as non parole periods, laid down a wealth of guiding principles; it has functioned in the manner which the English Court of Appeal has envisaged as the way in which an appeal court should function in damages cases. Its work shows that discretions can and should be supervised.

The wide acceptance of these doctrines which appear to run counter to the intent of the statutes requires explanation. To find judges adopting doctrines which diminish the need for appellate judges by restricting their own power is an intriguing antithesis to the ordinary processes of government, where public servants seek to multiply their kind.

The English tradition has been to restrict the number of judges of higher courts. Compared with the U.S.A. and Australia their numbers are very low, with the Continent, miniscule. This has been possible because of the high quality of the Bench and Bar, the restricted numbers leading to high monetary rewards and social prestige. The expansion of the Bench since the end of the Second World War has caused apprehension that the quality and its social prestige will decline. This apprehension is strong in Australia.

This expansion has had a secondary effect, summed up in the cry—'The Bar is being raped for the Bench'. The analogy is far from exact as there is no lack of consent, but the rush to the Bench has led to an overall decline in the quality of the Bar. This has led to greater burdens on the Bench and pressure for its expansion. An incompetent legal profession is one of the potent forces working for the expansion of the Bench. An incompetent first instance Bench requires an expansion of the appellate Bench.

The fields in which the new doctrine has its most potent impact is motor car litigation, the lifeblood of the Bar, but boring to the appellate Bench. There has been no similar desire to limit other fields of growth such as the declaratory jurisdiction, in fact expansion in this field has been actively encouraged (e.g. *Forster* v. *Jododex Pty. Ltd.*).[44]

It is not without significance that the new doctrines have emerged, not in the intermediate courts of appeal (it is their activities that the High Court has condemned), but in the High Court itself. The High Court of Australia is peculiarly oppressed by ease of appeals. As there is an appeal to the High Court as of right where the sum of $3000 is in issue and the judgment is final, an appeal to that court is possible if litigants are determined in almost every claim for damages in a State Supreme Court. In discouraging appeals to all courts it is seeking to protect itself. The House of Lords, to which an appeal can only be brought by leave of the Court of Appeal, or the House itself, is under no such pressure (Supreme Court Practice 1973).[45]

It is reasonably clear that the burden of appeals will increase. Now that the provision of opportunity for litigation has become a recognised social service, the State often providing the means for both parties to fight, lack of means or even a reasonable assessment of the value of victory in economic terms is ceasing to be a restriction. The litigant, so exasperating to theoretically minded lawyers, who would not appeal to establish a nice point because it had little monetary importance to him, will disappear. In an interesting transformation of social preferences, our national government prefers appeal books to guns, and this preference will have consequences for the whole appellate

[44] (1972) 127 C.L.R. 421.
[45] S. 2532 *et seq.*

structure. Unless they are carefully limited, the absence of economic restriction on appeals will have serious consequences.

The restriction on appeals is a defence mechanism by the higher courts seeking to protect themselves and the judiciary as a whole from real threats to their traditional position. These restrictions operate most clearly in the field of accident litigation and are clearly intended to limit it.

Disregarding the special interests of the judges, what should be the approach to appeals in a modern legal system?

Appeals, it is often said, are great evils, and much fun has been made of the indecision of judges, different results being reached at every stage of the ascent upwards of a case until it reaches the final court of appeal. Appeals are seen as a threat to the certainty of the law and the failure to attain certainty is regarded as a sign of imperfection, perhaps even vice, in lawyers. The pursuit of certainty in the law as a goal is like the pursuit of peace, a futile activity and merely a means of cloaking other aims. The proper consideration of the place of appeals and of the judicial attitudes to them begins with the recognition of the inevitability of conflict in the law and that the profound differences amongst lawyers as to the way in which a particular case should be resolved may be the effect of differing attitudes in the community to change.

Besides appeals involving fundamental differences in legal philosophy, there are innumerable appeals of no general significance, and it might be suggested that they are to be deplored—that finality is such a virtue that all appeals except such as are the result of fundamental conflict extending beyond the instant case should be if possible done away with. The finality of the instant decision is so valuable and any decision is so arbitrary that any one decision is as good or bad as another; therefore, appeals should be discouraged and despite what the law says, frustrated. The difficulty is that no one can, in advance, detect what will be important. Novel principles often crystallise slowly out of apparently insignificant decisions.

There is, of course, a contrary view. As Pratt, L.J.C. said in *R.* v. *Chancellor etc. of the University of Cambridge*:[46]

> It is the glory and the happiness of our excellent constitution, that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment.

The value of appeals can best be emphasised by the behaviour of courts from which there is no appeal. The absence of accountability in my experience encourages amongst judges and others in authority an intolerance of argument calculated to challenge their general view of things, caprice in the selection of relevant facts and the assessment of witnesses. The ever present threat of an appeal is chastening. There must be restrictions on the availability of appeals, particularly from decisions given during interlocutory stages, in order that some decision can be reached, and there are matters so trivial as not to merit appeal at all, but in the main the creation of areas of unreviewable decision is to be deplored. The possibility of an appeal is a powerful counter to shoddy thinking by a judge, who is forced to look carefully at his own handiwork before he lets it go. In the highest courts the exposure to public scrutiny and to the criticism of the learned in the universities performs the

[46] (1720) 1 Str. Rep. 557 at 564; 93 E.R. 698 at 702.

function of the appeal.

However, the judicially devised restriction of appeals said to involve a discretionary element is calculated to frustrate the objective of making law more concrete and predictable and at least in my opiinon is a retrograde step. The other device, to require that the decision should be held to be clearly wrong, involves a court having to distinguish between wrong and clearly wrong. Walsh, J. confessed to finding difficulty in doing so (*Edwards* v. *Noble*).[47] Where he declined to venture it is dangerous for others to try. A court, which after due consideration and giving full weight to the advantages possessed by the trial judge, concludes that he is wrong but not clearly wrong, is in a strange position not calculated to win the confidence and respect of litigants.

[This paper is a revised version of a paper presented to the Canberra Seminar in the History of Ideas: A Revolution in Our Age: The Transformation of Law Justice and Morals, held 2-4 August, 1975, at the Australian National University.]

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[47] (1971) 125 C.L.R. 296 at 318.