Fairness and Certainty In Adjudication: Formalism v Substantialism

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Introduction - and an outline

Fairness and certainty are widely perceived as antithetical in the process of adjudication. This perception leads to the assumption that the judicial task is to strike a balance between these exclusionary objectives. But the perception is at best superficial and at worst simply false.

For that reason, I have added a subtitle, "Formalism v Substantialism", to the given subject for this paper, "Fairness and Certainty in Adjudication". The true antithesis in judicial reasoning, and the one which aggravates the congenital uncertainty of the law, is the tension between formalism and anti-formalism or, as I term it in this paper, "substantialism". Contrary to the claims of legal theorists, formalism is not dead. Experience confirms that it lives and breathes a perverse vitality in the practice of the law. It is the lingering impact of formalism which provokes much uncertainty and which impedes delivery of the Justinian precept of rendering to every person his or her due in the individual case.

In developing this theme I frequently resort to my earlier writing in *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy*.[1] Further judicial experience has substantiated the views which I expressed in that Monograph. Although not a myth, certainty is largely illusory simply because the law is incorrigibly indeterminate. Judicial autonomy is inevitable and, indeed, valuable in ensuring that justice is done in the individual case and that the law develops to meet the standards, needs and expectations of the community. I will call the former fairness and the latter relevance, and hold firm to the view that the overriding goals of adjudication are fairness and relevance.

Underlying this paper is a full appreciation of the leviathan scope for judicial choice in legal reasoning. It is ever-present and all-pervading. Acceptance of this reality and the wider adoption of substantialism will arguably lead to greater certainty and predictability in the law and, without argument, to greater fairness and relevance in adjudication.

I initially touch upon the gulf between legal theory and legal practice resulting from the theorist's quest for a predetermined and impersonal law.[2] This short exposé is necessary to reduce resistance to the reality of judicial choice in legal reasoning and the sworn obligation of a judge to do justice according to law. An equally short excursion into legal theory is undertaken, principally to reassert the essential social utility of the law and, in the process, perhaps, to demonstrate that practicing judges are susceptible to personal theories of law which will bear upon the performance of their judicial task.[3]

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1 (1993) VUWLR, Monograph 5.

2 See below, pp 461-462.

3 See below, pp 462-464.

The notion of certainty is examined.[4] The quest for certainty is itself a response to an expectation prevalent in the community, but it cannot surmount the fact that uncertainty is inherent in the process of reducing the general to the particular, distinguishing one particular from another particular, or abstracting a general principle from an aggregation of particulars. Although not, as many learned writers would have it, a myth, certainty is perceived to be elusive and illusory. It is suggested that the exaggerated pursuit of certainty in the law, which is generally undertaken under the guise of formalism, results in less and not greater certainty in the law. As rules and precedents abound and become more particular in their application the scope for argument in the next and inevitably different factual situation is increased. Once its pretension as a goal of adjudication rivalling fairness and relevance is discarded, however, certainty achieves acceptance as a valid consideration, but a consideration, the applicability of which needs to be demonstrated in the particular case.

The concept of fairness - or justice - is then explored.[5] On the basis that the law is not an end in itself, fairness is identified as the basic reference external to the law. It is this reference which should guide judicial choice. Yet, it is acknowledged that fairness as an abstract concept is singularly imprecise. To meet this charge it is argued that the difficulty experienced by a judge in reflecting the sense of fairness immanent in the community is all too easily exaggerated. There are a respectable bundle of values which are readily identifiable. It is also observed that the fact fairness may be ill-defined as an abstract concept does not mean that it does not exert a real influence on the process of adjudication as the source of reference external to the law. As a rule, justice is neither elusive nor illusory in the individual case. More often than not it is then capable of prediction.

Judges who discharge their task alert to the concept of fairness are shown to exhibit certain characteristics; commitment to substance over form, aversion to absolute rules and a preference for general principles, recognition of the open-ended nature of the common law, and tolerance for judicial discretion unhampered by unnecessary rules and precedents.[6] Formalism is the substantialist judge's personal anathema, perceived to be the enduring opponent of fairness and relevance in the law.[7] The full reality of judicial choice is denied and judicial reasoning is diverted into a mechanical process which tends to exclude the rich and diverse considerations which influence the law. The belief that the law is intelligible as an internally coherent and rational phenomenon is at the core of the formalist's persuasion. Such a notion cannot be sustained. Professor Weinrib's valiant attempt to provide a theoretical formulation for formalism is discussed and found wanting. With formalism active in practice, the characteristics of a formalist judge are portrayed before turning to examine the adjudication process.

Two distinct strains of legal reasoning, the formalistic and substantialistic, are identified.[8] It is contended that both start with a premise or rule. The formalist

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4 See below, pp 464-468.
5 See below, pp 468-471.
6 See below, pp 471-474.
7 See below, pp 474-477.
8 See below, pp 477-481.

judge will adhere as closely as possible to the existing rule or corpus of rules, while the substantialist judge will be prone to question the adequacy of the rule or corpus of rules and will adopt wider terms of reference. The theory of practical reason is introduced to confirm that a judge will depart from the existing rule or corpus of rules when it would produce a state of dissatisfaction in the particular case. While this insight is accepted as approximating judicial reasoning, it is argued that there is a danger that practical reason will be captured by formalism in that it accords existing rules a weighting not conceded competing and possibly more compelling considerations.

The decision of the House of Lords in *Sevcon Ltd v Lucas CAB Ltd*[9] is selected to illustrate the points made in the paper. A close examination of that decision indicates that formalism in a number of its various manifestations triumphed over the more reasoned and principled approach which would be favoured by those of a substantialist persuasion.

The paper concludes by advocating that the North American brand of realism should be revisited and refocussed so as to provide a better understanding of judicial reasoning.[10] The impact of the two strains of legal reasoning identified in the paper can then be assessed. The contribution of academia to the perpetuation of formalism is only briefly touched upon. After contemplating that the reason why some judges are formalists and some are substantialists is more likely to be found in the field of psychology than legal theory, the paper closes with a personal endorsement of the substantialist approach and the commitment to justice which goes with it.

Justice according to law

In theory, there should be no separation between legal theory and legal practice. The theory, to be relevant, should reflect the practice. But there is a disturbing gulf between the two. Throughout the ages, and unabated in modern times, various legal theorists have sought to unearth a predetermined or impersonal law proclaiming either that the law possesses an internal intelligibility independent of its sources, contributors, or utility, or that there is a self-evident wisdom in submitting to the law independently of its merits - or unintelligibility.[11] Being incorrigibly indeterminate in practice, attempts to elaborate "the law's" internal intelligibility are necessarily misguided. Practice must prevail, and in practice the indeterminacy of the law means that "the law" cannot be divorced from the individual judge's perception of what is relevant, appropriate or just.

I would not want it thought that I am debunking legal theory. On the contrary, virtually all the main schools of jurisprudence have much to offer. Yet none can properly purport to be a complete theory of law. Each, it seems to me, contains acute insights into the working of law and the legal system. But the gulf between theory and practice remains.

The fact no one legal theory is complete in itself simply reflects the rich diversity of law and the complexity of the legal system. At once, however, and in broad

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9 [1986] 2 All ER 104; see below, pp 481-486.

10 See below, pp 486-488

11 Supra n 1, at p 73.

terms, we are confronted with the exercise of judicial autonomy, for the individual judge must determine which theory of law - or part of a theory - he or she will embrace in practice. It may be, of course, no more than a felt approach reflecting a theory of law. But there must be a selection, and that selection will inform the judge's conscience and directly influence the practical choices he or she makes in the adjudication of disputes.

A judge is required to make many general and particular choices in the adjudication of a dispute. Choice is endemic to the process. The most salutary shortcoming of jurisprudential theory is its failure to recognise the full extent of the judicial autonomy necessary to resolve choices and its essential place in the legal system. Judicial autonomy is the means by which judges give expression to the underlying premises and value judgments inherent in adjudication. It represents much more than judicial creativity or innovation. In essence, it is the process by which a judge translates the needs and expectations of the community into legal principles or the basis for legal principles and, once the facts are determined, will ultimately dictate the outcome in a particular case.[12]

It is surprising, therefore, to find so many practitioners in the law, judges as well as lawyers, wedded to a crude form of positivism which has none of the subtleties of true positivist theory, to a black letter approach which is sustained by some sort of lingering faith in the discredited declaratory theory of law, and to a rigid formalism which is dismissive of the impact of a breadth of factors and societal demands external to the formal expression of the law.[13] It is little wonder that in this climate of diversity and benightedness, some judges, or even all judges some of the time, should lose sight of the fact that their sworn judicial obligation is to do justice according to law.[14] The obligation cannot be dissolved by adopting a formalistic and essentially static approach to what is meant by law.

A personal theory of law

In the manner of a judge required to disclose a personal interest, I should indicate my personal theory of law. Necessarily, it can only be an indication; a brief sketch sufficient to eradicate the idea that judges - or all judges - can ever be reduced to automatons mechanistically applying an impersonal and preordained law.

I am most comfortable with the jurisprudence of the American Realist movement, principally because of its forcefully expressed recognition of the social utility of law. I regard it as a truism that law is not an end in itself but exists to serve the needs of society and meet the functions society has ascribed to it. That premise dictates much of my thinking. I am less comfortable with, but nevertheless magnetically drawn to, the fundamental tenets of Critical Legal Studies. I reject, as does that movement, any underlying moral order serving as the basis for a system of natural rights or any indwelling intelligibility immanent in the law resting mysteriously on more than judicial consensus. But I pause

12 Supra n 1, at pp 51-56.

13 See McCoubrey and White, *Textbook on Jurisprudence*, (1993 - Blackstone) at p 187.

14 That is, to "do right to all manner of people after the laws and usages of this realm...".

before endorsing CLS's view, as expressed by Professor Unger, that "... just as the ambiguities of rules and precedents require recourse to imputed purposes or underlying policies and principles, so the ambiguities of these policies and principles can be avoided only by appealing to some background scheme of association ..."[15] I accept that these ambiguities require recourse to imputed purposes or underlying policies and principles but consider that any ambiguities in those policies and principles can only be resolved by a pragmatic reference to the perceived standards, needs and expectations of the community. In other words, I dismiss the notion that a "social vision" can serve to resolve what is otherwise the incorrigible indeterminacy of the law.[16] Justifying the epithet, the law's indeterminancy remains incorrigible. No matter how comprehensive or complex the framework, the law or legal determination is reducible to the particularity of judicial choice.

It follows from what I have said that I reject the fundamental tenet of positivism that decisions can be deduced from pre-determined rules without recourse to social aims, policy or morality. A "rule of recognition" may explain the rules, but it is inadequate to describe the source of rules, principles, the source of principles, and the infinite variety of considerations and influences which lead to the outcome of decisions. Any theory of law which precludes these contributing factors is ultimately superficial. What gives a rule, or the expression of a rule, its binding or compelling force is not the degree of recognition it commands as a rule, but the underlying community value which prompts the rule.[17]

I therefore endorse Professor Dworkin's perception of the law as much more than a system of rules. The notion of "principles, policies and other sorts of standards" which do not operate as rules but which nevertheless command a critical "legal" function provides a superior perspective of the law and the legal process.[18] Dworkin's most enduring contribution to jurisprudence has undoubtedly been the promotion of a concept of law which expanded and elevated principles to a position of dominance in the legal order. But I find his distinction between principles and rules, his rejection of judicial discretion, and his justification for precedent all implausible - and totally so.[19]

One could, in this manner, rummage through the inexhaustible theories of law selecting that which approximates one's own perceptions and rejecting that which does not. In the end, one is left with a personal theory of law. Although subsequently expanded and refined, the views I set out in my Monograph remain substantially intact. What is significant for present purposes, however, is not the content of that theory, much less whether it is right or wrong, but that it illustrates the fact practicing judges can and do nurture a theory of law. Their personal theories may be largely unarticulated, or incomplete, or basic, or even unsound, but they exist and dictate the judge's approach to the process of adjudication. Participation in that process brings them into close touch with

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15 R M Unger, "The Critical Legal Studies Movement", (1983) 96 Harv. LR, 561, at pp 578-9.

16 Supra n 1, at pp 48-49.

17 Ibid, at pp 33-34.

18 R Dworkin, "Is Law a System of Rules?", in *Essays in Legal Philosophy*, Summers (ed) (Blackwell, Oxford, 1968), at p 34.

19 Supra n 1, at pp39-51.

certain realities which in turn informs the judge's approach. Chief among these realities is the inevitability of choice in the process of adjudication, and the judges' personal theory of law, or the approach to the task which it engenders, will determine how they cope with that choice.

The notion of certainty

The notion of certainty is itself a response to an expectation prevalent in the community. People want to know where they stand so that they can order their affairs in advance.[20] The belief that certainty and predictability can be achieved by the application of general laws to particular circumstances is trumpeted as an article of faith. Yet, it is indisputable that uncertainty is inherent in the process of reducing the general to the particular and, with that uncertainty, predictability is necessarily impaired. It is a process which unavoidably involves an act of discretion on the part of the judge. Moreover, the historical perception that the process is one of applying the general to the particular has become an over-simplification. The general principle has tended to vanish in a mass of particulars.[21]

The public's expectation that there is, in advance, a general law which can be predictably applied to particular circumstances is understandable as it derives from the goals which I have already alluded to; centuries of legal scholarship from the natural law theorists to the positivists, and the die-hard attitude of many modern-day practitioners of the law, whether lawyers, judges or academics, who decline to forgo the remnants of the discredited declaratory theory of law or a crude version of positivism. While these traditionalists may grudgingly accept that judges make law and that the "ideal" of generality in the law must succumb to the exercise of judicial discretion in the particular case, they continue to act as if the law was still there to be declared and as if positive rules existed capable of application to virtually all situations. The practice of the law, reinforced by experience and logic, may have brought about the overt abandonment of these bereft theories, but the attitude they engendered doggedly persists. Practice has simply not kept pace with the more perceptive strains of legal scholarship. In the result, the community continues to be beguiled into believing that certainty and predictability is achievable to an extent that is clearly impossible.

The notion of providing certainty in the law is at times overtly professed in the reasoning advanced by a judge in the course of a judgment. More often than not in practice, however, the consideration is an unspoken postulate. A judge will reject an otherwise tenable proposition because it is thought that its acceptance might ferment uncertainty in the law. He or she possesses a deeply felt foreboding that it is safer to adhere as closely as possible to more or less applicable rules and precedents than directly confront the question of the law's

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20 As to be expected, this demand is more strongly expressed in times of economic individualism, so much so that it is not always apparent whether the expressed discontent is with the alleged unpredictability of the law or the existence of the law itself.

21 Notable examples of cases in which the general rule has been effectively overwhelmed by exceptions are *Foss v Harbottle* (1843) 2 Hare 261; 67 ER 189, and *Addis v Gramophone Co Ltd* [1909] AC 488.

fairness and relevance. In the result, an unarticulated presumption is raised against the application of the general rule or principle to the particular case irrespective of, or despite, the merits or justice of that case. Justice, if justice is to be served at all, will be served in a broader systemic sense. More accurately, justice in the individual case is sacrificed in the interests of achieving perceived certainty and predictability in the law. It is a sacrifice which shelters beneath the cloak of formalistic reasoning.

Apart from the possibility of injustice in the instant case, what is the outcome of this judicial reticence? A particular decision simply serves to modify or qualify the general rule. It becomes less general and more particular, and each particular, whether appearing to add to or subtract from the general rule, gives rise to scope for argument whether the rule applies. Certainty becomes even more elusive. Predictability fares no better. It can be accepted that predictability follows from a decision to treat all instances falling within some accessible category in the same way.[22] But when that accessible category is so heavily particularised as to generate argument whether any particular case falls within its increasingly ragged bounds, the application of the rule to the next and inevitably different factual situation which arises for adjudication will be uncertain and, therefore, unpredictable.

Is certainty in the law, then, truly unobtainable? Numerable eminent jurists and commentators have concluded that certainty is a myth.[23] I suspect that such a claim is hyperbolic because it approaches the question in absolute terms. The law may be inherently indeterminate, but that does not mean that certainty is not a legitimate consideration in many situations. For example, strict adherence to rules or precedents is of evident value in relation to procedural issues. The rhetoric of the rule of law is clearly applicable in such cases. In yet other cases, adherence to the requirements of form can promote the goals of efficiency and avoidance of undue cost. The prescription of the Wills Act 1837 provides an example. It is seldom necessary to look beyond the will itself to confirm that it represents the intentions of the deceased testator or testatrix.[24] But even then the requirements of form need not be absolute or rigid in order to achieve efficiency, and should not be so if rank injustices are to be avoided. Essentially, however, recourse to such rudimental examples cannot justify the application of this thinking to the vast body of the law as a whole. The extent to which certainty can be achieved is over-inflated and rules and precedents are applied without regard to their fairness or relevance in the particular circumstances of a case. Certainty then becomes an excuse to avoid the hard exercise of an available judicial discretion.

It is to be borne in mind that a current common law "rule" is itself the creation of an earlier judicial application of custom or usage to a particular circumstance. Subsequent recognition in the decisions of the courts may have given it precedential force. Yet, it remains a judge-made rule, made by the judges by the same process that calls for its application in the instant case. At some point it has been assumed that justice in the individual case can yield to justice in the abstract

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22 Frederick Schauer, "Formalism", (1988) 97 Yale LJ, No 4, 509, at p 539.

23 Supra n 1, at p1 1.

24 See D F Dugdale, "Legislating for Quasi-Connubiality", (1998) NZLJ 123, at p 125.

and, then, that the application of the abstract can yield justice in the individual case. In a case with indistinguishable facts that may be so in the sense that like has been treated alike, but in reality the facts are extremely unlikely to be the same. Experience confirms that facts are of infinite diversity. If the circumstances do not vary, the participant's perception of them will. Then, with the passage of time, attitudes and developments in other areas of the law may call for a different approach. At once the merits and requirements of justice are likely to shift, and uncertainty is encouraged by the exercise of trying to compare like with like when the comparison is between like and unlike.[25]

The question at once arises whether it can be assumed that the law would be more certain if rules and precedents were applied with greater rigidity. The answer must be in the negative. The uncertainty which exists in the practice of the law is to a considerable extent the product of the very commitment designed to reduce uncertainty. Rigid adherence to the doctrine of precedent, for example, results in every step in the evolution of a principle being open to challenge, irrespective of the justice of the individual case. Yet, experience suggests that it is much easier to discern the merits and justice of a particular case and predict an outcome based on that discernment than it is to predict the law. As Professor Atiyah has put it;[26] "it is sometimes suggested that it is actually easier to predict discretionary decisions than rule-bound decisions, which is only to say that it is often simpler and clearer to identify (and agree upon) the justice of a case than the law". In other words, untrammelled by an overly strict rule-bound approach or adherence to precedent, the judge is free to revert to fundamental principles and, still within the discipline of the law, arrive at a conclusion which is consonant with his or her sense of justice and perception of the needs and expectations of the community.

Negative evidence, of a kind, that the very doctrine of precedent sponsors disputation can be found in the way in which the general discretions vested in the courts by statute result in settlements where there is little or no rule-bound baggage to divert the dispute away from its essential core.[27] In practice, settlements are more readily achieved simply because the outcome is at once more readily foreseeable. Without empirical evidence, of course, it could be insinuated that such settlements are in fact facilitated by uncertainty, rather than vice versa, in that uncertainty as to how the general discretion will be exercised increases the risk of proceeding to court. But the suggestion would run counter to known experience. Lawyers and the courts do not find it difficult to discern where the justice of a case lies. The merits are often openly conceded. It is the overlay of precedential-based rules that deflect the parties and the court's attention from the substance of the dispute.

The suggestion that undue adherence to a rule-bound approach or rigid doctrine of precedent impedes, rather than promotes, certainty gains in strength when regard is had to what happens in real life. A person with little or no knowledge of the law sustains an injury or loss and develops a grievance. He or

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25 Supra n 1, at p 5.

26 P S Atiyah, *Law and Modern Society*, (Oxford University Press, New York, 1983), at p95.

27 Supra n 1, at pp 7-8.

she believes that the law should provide them with a remedy. The belief, rightly or wrongly, is founded on the same community values which eventually shape the law. Because of the richness and diversity of the law and legal principles it is highly probable, if not inevitable, that a tenable argument to support the claim will be shortly developed. Equally assuredly, however, that tenable argument will be met with a tenable counter-argument. The parties are likely to differ, not only on the relevant facts, but also on the law applicable to the facts.[28]

It is not always appreciated that the differences between the parties as to the facts create the greatest uncertainty in adjudication. Until the facts are determined it cannot be known which of competing versions of the law will be applicable. Even on appeal, the expression of a different view of the law by the appellate court may simply obscure what is in fact a different perception of the facts or a covert shift in the findings of fact. Consequently, in the adjudication of a dispute the facts are frequently all-important and the court's findings of fact often decisive. This emphasis is appropriate. Judicial experience confirms that a close knowledge of facts is an essential prerequisite to doing justice in the particular case. As a result, the evidence must be closely examined.[29] But the facts do not often leap up to greet the Judge. They must be probed, discerned, extracted and weighed from a mass of evidence, at times poorly organised. This inquiry is also part of a discretionary process in that the judge exercises a choice of facts to accept or reject. Notwithstanding the objective of seeking to find the facts so that they accord as closely as possible with the true facts, whatever they might be, the exercise of choice is inevitable.

It is only if the dispute is not resolved as a result of the judge's findings of fact that a legal dispute is likely to arise. One or the other of the parties, or both, will claim the advantage of proximity to an established rule or precedent and produce an authority or, more likely, volumes of authorities, to support their claim. It is here that uncertainty becomes certain. The judge must make a choice between the conflicting legal contentions. That choice will at once depend on his or her personal theory of law or approach to adjudication and, in particular, the extent to which they incline to a formalistic or anti-formalistic exemplar.

If the law is inherently indeterminate so that certainty is largely illusory, and it can be strongly argued that the very prescription designed to promote certainty has the opposite effect, should the notion of certainty be abandoned altogether? The answer must be no. It is preferable to accept that certainty is a valid consideration in adjudication. I prefer to call it a "consideration" rather than an objective or goal of judicial adjudication, but there is possibly nothing in a label. The key point I wish to make is that the impact of a decision on the community's ability to order its affairs should be taken into consideration in the context of the particular case and not applied in a blanket sense as a general goal of adjudication. Certainty, in other words, must be given a particular relevance to the case in hand. Reduced to its identifiable relevance to the particular case, it is not antithetical to the task of achieving individual justice as that task must necessarily be incomplete if regard is not had to all factors which bear on the outcome. Thus, a litigant may not validly complain that he or she suffered an injustice if

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[28] Ibid, at p 57.

[29] Ibid, at p26.

the relevance or fairness of a precedent is questioned when that precedent has been criticised by commentators, overtaken by developments in other areas of the law, or for some other reason has a question-mark over its validity as an authority.[30]

Those who pursue certainty as if it were a general abstract goal of judicial adjudication, therefore, do the law a disservice. Assume for a moment that complete certainty was achieved, individual justice would be sacrificed and, because it would be static, the law would cease to serve the needs and expectations of the community. The law would forfeit the concept of justice and abandon its social utility. Certainty is not therefore an ideal, as justice is an ideal. Nor is it a justification, as social utility is a justification. Rather, it is a concept designed to serve these ends. Its rationale lies in its ability to promote justice in the individual case and to serve the needs and expectations of the community. As such, it is an important and ever-present consideration in the administration of the law. But its relevance and applicability needs to be demonstrated in the particular case. Will it further the justice of the case? Will it assist to serve the needs and expectations of the community in that case? Consigning certainty to this particularised role prevents it from assuming an elevated and dominant appointment in the process of judicial adjudication without depriving the law of its advantage where that advantage can be demonstrated in the individual case.

The concept of fairness

The, at times, dimly-muted animosity of many academics and commentators towards judges who proclaim their indebtedness to the concept of fairness is puzzling. How can fairness be sensibly differentiated from justice itself? Law exists to do justice. Justice is its primary goal. Judges are sworn to do justice according to law.[31] It would be a futile exercise to attempt to distinguish the qualities of fairness and justice in this paper, for it is undeniably safe to hold that, at the very least, fairness is an aspect of justice. Thus, criticisms of fairness cannot be withheld from justice. If, for example, the one is incapable of a clear definition, so too is the other. But just as justice will not be denied, so too its serviceable and inseparable companion, fairness, cannot be repudiated.

Neither justice nor fairness tend to be given as reasons for a particular decision in practice. Judges may say, for example, that they do not accept a certain proposition to be the law because to so hold would be absurd or unrealistic or the like, but they do not openly reject it as the law because it would be unfair. Having given reasons for a decision, a judge may at times add a comment to the effect that his or her decision has the advantage of coinciding with the merits or doing justice as between the parties. But judges, including those who admit to a commitment to the concept of fairness, do not say that they have reached a particular decision simply because it is fair. Fairness, it seems, is a more subtle agent in the working of the law.

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30 Ibid, at pp 58-73.

31 Supra, n 14.

In contrast, relevance to the needs and expectations of the community is more openly utilised to dictate the content of the law. Judges are more inclined to adjust the law if it appears that the law as contended for by one of the parties fails to meet the needs of the commercial community. Public perceptions or expectations of what the law should be are more regularly adverted to in the course of determining a question of law. But the reasonable expectations of the parties and the community necessarily embrace underlying notions of fairness. The community expects fairness in adjudication. Often, therefore, an overt appeal to the reasonable expectations of the parties or the community to support a particular view of the law may be, in fact, a veiled appeal to the community's underlying notion of fairness.

A more open acknowledgment of the influence of the concept of fairness in determining the content of the law would bring the working of the law in closer harmony with the public's expectation of it. Many commentators tend to suggest that, when parties look to the law for the determination of their dispute, they perceive the judge as the instrument of law. Experience suggests the contrary is true. The parties seek justice - admittedly justice as they perceive it - and they expect the judge to provide that justice. They are fully aware that they are not addressing a cipher for the law. They know that it is the judge who is deciding their case, and that the judge has it in his or her hands to decide in their favour or against them. What they look for in the courtroom, therefore, is not any certainty in the law, but an impartial adjudicator possessing a judicial mind and habits trained in the judicial method to assess facts, identify the issues, and resolve the dispute in accordance with common notions of fairness. When they turn to the Bench they would rather see a Solomon than a living embodiment of *Halsburys Laws of England*.[32]

Once it is accepted that law is not an end in itself, its justification can only exist in its capacity to serve the community and meet the function which society has ascribed to it. Ultimately, therefore, its justification, and the justification for the rules and principles under its cognomen, must be found in some reference external to the law itself.[33] Lord Radcliffe's apophthegm to this effect must rank as a truism.[34] There is nothing untoward in asserting that this external source of reference is the standards, needs and expectations of the community manifesting itself in a quest for justice and a demand for relevance. References to this effect proliferate. Lord Steyn has recently observed that, because the law is simply a means of ordering a civilised society, a judge will be intensely aware that, while the rationality of the law is important, justice is even more important.[35] Lord Cooke has endorsed the notion that underlying all the prolix and diverse values within the community is the community's basic concept of justice and fairness.[36] Sir Ivor Richardson has stated that the values underlying particular legal principles need to be continually reassessed, modified, and in some cases replaced, to reflect contemporary thinking and recognise that if judges are to

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32 Supra, n 1, at p 23.

33 Ibid, at p 2.

34 Lord Radcliffe, *The Law and its Compass*, (Faber, London, 1961) at p 40.

35 Johan Steyn, "Does Legal Formalism Hold Sway in England?", (1996) 49 II Current Legal Problems, 43.

36 Sir Robin Cooke, "Fairness", (1989) 19 VUWLR 421, at p 423.

make conscious value judgments it is essential that they should have a "philosophy of life, a framework of reference against which to probe and test the economic, social and political questions involved".[37] Professor Atiyah has referred to the deeply embedded principles of justice which mould the community.[38] In similar vein, I have contended that it is the task of the judiciary to interpret and administer the sense of justice and fairness which is immanent in the community.[39]

It must be acknowledged at once that phrases such as the "needs and expectations of the community", "community values", "sense of fairness immanent in the community", and the like, are notoriously imprecise. Continuing to yearn for an impersonal law, many academics and commentators are acutely uncomfortable with the scope of the discretion such imprecision vests in the judges. The problem which they perceive is essentially one of translation. How is this sense of fairness immanent in the community to be discerned by a judge and, if it is discerned, how can his or her fidelity to that evaluation be assured?

Two comments may be made. The first is that it is all too easy to exaggerate the difficulty a judge has in reflecting the sense of fairness immanent in the community. Unless it is to be thought that society is morally moribund it seems churlish to deny that there are a set of values, including a sense of fairness, rooted in the community. That sense of fairness will be reflected in its language, its communications, its institutions, its organisations and its legislative rules, and this material is available to the judge. He or she is part of that social setting. A wide range of shared values, such as notions of personal safety, national security, individual privacy, respect and consideration for the individual, the sanctity of life, the protection of property, equality, the common good, and many others form a respectable bundle of values which are readily identifiable.[40] Nor, when attention is directed to a defined set of facts, do people at large seem to experience difficulty in perceiving a just - or unjust - outcome. The particular facts concentrate the exercise, as well as the mind, and tend to provide a universal response. Where many of the critics err is in posing the question in general terms thereby seeking to identify fairness in the abstract. Once a set of concrete facts is advanced, fairness or what is fair becomes much less elusive.

The second comment stresses the need to accept fairness as a reality, notwithstanding its apparent vagueness. Even if the idea of the sense of fairness rooted in the community is vague and imprecise it cannot simply be dismissed from the process of adjudication for that reason. That which is ill-defined may nevertheless be real. Ill-defined though it may be, therefore, the reality is that this sense of fairness remains the external source of reference to the law. Irrespective of its precision or availability, it cannot be divorced from the courtroom.

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37 Sir Ivor Richardson, "Changing Needs for Judicial Decision-making", (1991) 1 JJA, 61, at p 64; "The Role of an Appellate Judge", (1981) 5 Otago LR 1, at p 9. See also "The Role of Judges as Policy Makers", (1985) 15 VUWLR 46, at p 51; and "Changing Needs for Judicial Decision-making", ibid.

38 P. Atiyah, "Judges and Policy", (1980) 15 Israel LR, 346, at p 347.

39 Supra n 1, at pp 56-58.

40 Ibid, at p 56. See also John Braithwaite, "Community Values and Australian Jurisprudence", (1995) 17 Syd LR 351.

The critic's further complaint that it may be the judge's own sense of fairness and not that of the community which does this shaping is open to the same response. Again, the concept of fairness cannot be rejected simply because it is difficult to be assured that the judge's own perception of what is fair will not intrude into the process of adjudication. Moreover, this dichotomy is more apparent than real. A shared sense of fairness is likely to be reflected in the judge's personal values. Because it is an immanent property the community's deep-rooted sense of fairness and that of the judge are more often than not likely to coincide.

It is to be acknowledged, however, that any such close symbiosis between the community and the judge cannot be taken for granted. Indeed, it is to be accepted that the value preferences inherent in judicial decisions may not conform with the beliefs, dogmas and persuasions which are prevalent in the community at any given time. Judges are not the ciphers of public opinion. Nor is the law the slave of public mood. Something more is required of judges than that they reflect the common public denominator.[41] A judge will look deeper than partisan or sectional interests and beyond that which is ephemeral and transient. As I have said elsewhere,[42] no one has suggested that this sense of justice or fairness immanent in the community is easy to discern or articulate. If it were, it would not be an immanent property. The difficulty in converting it from the abstract to the concrete is self-evident.

Ultimately, no better answer as to why a judge chooses one alternative and not another in the process of adjudication is possible than to invoke the conscience of the judge. In the proper performance of the judicial task, and working within the restraints of the common law tradition, the legal system, legal method, and judicial discipline, judges are required to express that opinion which best serves their intelligence and wisdom and best discharges their personal scruples and conscience.[43]

How, then, are judges who work with the concept of fairness likely to manifest that concept in practice? As I have said, only rarely, if ever, will the judge overtly hold a proposition to be the law because it is fair or because it would be unfair not to so hold. The concept of fairness will evince itself in a number of less direct ways, of which the following four instances are illustrative.

First, the judge is likely to have a strong preference for the substance of a matter. Form over substance is not for him or her. Form over substance is likely to be equated with appearance over reality or fiction over truth. In his or her perception it is not possible to do justice unless the court gets to the substance of the matter. The judge cannot know what is just or fair unless the substance, reality or truth of the matter in issue is revealed. It is a logical prerequisite to doing justice.

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41 Supra n 1, at p 56.

42 Ibid, at pp 57-58.

43 Ibid, at p 58. I am, of course, not the only one to invoke the touchstone of judicial conscience. Philip Bobbit, in *Constitutional Interpretation*, (1991) at pp 8-9 and 11-30, advances six "modalities" of constitutional argument. Judges agree on one or more of these modalities in the process of interpretation. Bobbit concludes that there is no "metaprocedure" for resolving conflicts between the modalities. Such resolution, he concludes, is in the end, a matter of individual conscience.

This commitment to substance finds expression in all areas of the law. Thus, in statutory interpretation the emphasis will be on ascertaining the true intent of Parliament in a manner which ensures that the statute will be fair and reasonable in its application. A purposive or contextual construction will be preferred ahead of a literal meaning. Traditional presumptions will not be permitted to obscure Parliament's true intention.[44] Similarly, in the law of contract, a judge's penchant for substance will tend to impel him or her to search for the true intention of the parties as distinct from an artificial intent as gleaned from an interpretation of the literal wording of the contract. A more generous attitude to possible aids to interpretation, such as the post-contractual conduct of the parties, is likely to follow in order that the true intention can be ascertained.[45] Again, the underlying impetus for this approach is the concept of fairness. It is unfair to enforce a contract in a way which was not intended by the parties.

Further examples abound. In crime, the judge will eschew the notion of a criminal trial as something of a sporting contest and reject technical rules and procedures. In equity the judge will prefer the fluidity and potential of equitable concepts, such as unjust enrichment, and decline to circumscribe those concepts with fixed criteria. In tort, practical justice formulated on grounds of public policy is preferred to deductive logic and the more cramped approach of incremental and analogical reasoning.[46] In administrative law the concern will be less with the exigencies of government and more with the position of the individual against the arbitrary and unfair abuse of power.[47] The formal divide between public and private law is engulfed by the more substantive task of curbing the exploitation of power, whatever its source. With liability established, rather than be inhibited by a doctrinaire or *a priori* solution, the substantialist judge will prefer to have at hand a "basket of remedies" so that he or she may more readily match the remedy to the wrong.

Secondly, the judge conscious of the concept of fairness will incline to avoid absolute rules. He or she will have a preference for broad rules or principles

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44 In *L'Office Cherifien des Phosphates and Another v Yamashita-Shinnihon Steamship Co Ltd: The Boucraa* [1994] 1 All ER, 20, e.g., Lord Mustill, speaking for all members of the House of Lords in a case in which the presumption against retrospectivity was in issue, expressed reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words. To treat all statutes in all situations to which they apply as if they were the same, the Law Lord said, is misleading as the basis of the rule relating to retrospectivity "is no more than simple fairness, which ought to be the basis of every legal rule". As Lord Steyn has subsequently observed, a noteworthy feature of that case is the emphasis on a contextual approach and the need to go back to the reason for the presumption, that is, "fairness". Supra n 35, at p 49.

45 See e.g., *Attorney General and New Zealand Railways Corporation v Dreux Holdings Ltd* (CA130/96, 19 December 1996).

46 Supra n 1, at pp 59-61, dealing with *Murphy v Brentwood District Council* [1990] 2 All ER 908 and *Caparo Industries plc v Dickman* [1990] 2 AC 605; and see Lord Steyn, supra n 35, at pp 52-53 dealing with *White v Jones* [1995] 2 WLR 187.

47 Thomas, "Administrative Law and the Rule of Law", NZLS Conference Papers, ChCh, 1987, at p172.

which admit of exceptions. It will be realistically appreciated that general rules cannot fit all particular situations. In this way, the general or abstract exposition of the law can be applied to particular cases more readily and in a way which will ensure individual justice.

Thirdly, the judge of this persuasion will be more inclined to recognise the open-ended nature of the common law. Under English law plaintiffs are not required to point to a specific rule authorising their cause of action in order to sustain a proceeding.[48] They need only point to a general rule and seek to argue that the cause of action falls within its proper scope. In determining whether a cause of action should apply to apparently new circumstances, therefore, a judge who is influenced by the concept of fairness will be less likely to succumb to the unarticulated presumption which arises from adherence to the application of the nearest proximate rule or precedent as the only acceptable legal method. A substantialist judge does not have an in-built resistance to applying a cause of action to a new set of facts if the justice of the case so requires.

A final illustration of how the concept of fairness manifests itself in a judge's approach relates to the discretion vested in the courts either at common law or by statute. Appreciative that a rule-bound approach is likely to cause injustice in individual cases, the judge is disposed to leave a greater measure of discretion with individual judges. He or she will be less inclined to circumscribe discretion with rules lest, in doing so, the deciding judge cannot avoid an injustice. A similar phenomenon exists in relation to the prospective operation of precedent. Judges, particularly appellate judges, are conscious that their decision will be treated as a precedent. Consequently, the judge alert to the concept of fairness will tend to articulate the decision or rule which is applied in reaching that decision in as general terms as possible or will explicitly allow for the possibility of exceptions not in issue in the instant case. Flexibility in the discretionary exercise of choice is seen as being as important for others as it is for the judge him or herself if fairness is to be achieved in each individual case.

It will have become apparent from what has been said that the real contest is not between fairness and certainty, as such, but between formalism and anti-formalism or substantialism. No one can readily quibble with the attempt to do justice in the individual case. The qualification is that justice must be done according to law. The critical difference, then, lies in "the law" to be applied. To a black letter lawyer, for example, it is justice according to black letter law; to a natural law theorist it is justice according to fundamental rights; to a crude positivist it is justice according to fixed rules; to a more refined positivist it is justice according to open textured rules which have passed the test of recognition, and so on. Reformulated, the contest is between formalism, which forbears individual justice, and substantialism, which embraces individual justice. Certainty may remain the banderole, but a formalistic approach is introduced in order to narrow the judge's choice in adjudication and inhibit the aspirations of fairness and relevance. Formalism in judicial decision-making today must therefore be addressed.

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48 John Smillie, "Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand", (1996) NZ Law Rev. 254, at p 255.

The bugbear of formalism

No greater solecism mars the working of the law than blind unthinking adherence to formalism. Formalism is the real and enduring opponent of fairness and relevance in the law. It masks the choice facing the judge. Judicial reasoning is diverted into a mechanical process in which the reality of choice is denied or an explanation as to why the choice is summarily rejected in favour of a nominated rule is denied to others.[49] The distinctive feature of rules, of course, lies in their capacity to be formal. They necessarily exclude from consideration factors whose exclusion has been determined without reference to the particular case at hand.[50] Judicial reasoning is at once stilted in its breadth and its capacity to deliver fairness and relevance. In this way, legal formalism detracts from rather than adds to the judicial process.

In endeavouring to reconstruct legal formalism in 1988, Professor Weinrib observed that in the last two centuries formalism has been killed again and again, but has always refused to stay dead.[51] Most legal scholarship today, however, would regard its death as irreversible.[52] The truth is that, although it has long since been divested of any sound philosophical or jurisprudential foundation and deserves to be dead, formalism is alive and well. Its lineage may have been discredited, but it remains imbedded in the judicial consciousness vaguely perceived as being part of the discipline of the law. Thus, all too often, it is practiced mechanically after the manner of a conditioned response to the presentation of a stimuli, the stimuli being the choice of tenable alternative premises or propositions open to the judge in any particular case.

Formalism, of course, does not have exactly the same meaning to everyone. But although the term may be used in different ways, the notion that it represents decision-making according to rule is common to its usage.[53] "Rule" in this context implies the language of rule formulation - its literal mandate is to be followed. Because of this rigidity the range of factors a judge would or might take into account are restricted. Deductive reasoning is then necessarily preferred.[54] While this brief description, which is all space will permit, may indicate its methodology, its undoubted polestar is a belief that law is intelligible as an internally coherent or rational phenomenon. To the formalist, law has a content which is not imported from without but elaborated from within.[55] It possesses an internal coherence and logic which makes it decisive for the understanding of juridical relationships.[56] This fundamental article of faith that the law possesses an internal

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49 See Schauer, supra n 22, at pp 516-519.

50 Ibid, at p 544.

51 Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law", 97 Yale LJ, No. 6, (1988), 949, at p 951.

52 E.g., Edward L Rubin, "Law And and the Mythology of Law", (1997) Wisc LR, No. 3, 521, at p521. Rubin observes that ever since legal scholarship dismantled its formalist home it has been traipsing from door to door looking for a methodological refuge.

53 Schauer, supra n 22, at p510, see also ft 1 at p 510.

54 Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution", 37 Case W Res. LRev., 179, at pp 181-182.

55 Weinrib, supra n 51, at pp955-956.

56 Ibid, at 952.

validity underlies the formalist perception that a more narrow approach to adjudication will promote certainty and predictability. It precedes and sustains the unquestioning acceptance and application of rules to particular cases.

Responding to their critics, adherents of formalism assert a false respectability for their creed by contrasting the rationality of legal analysis with the perceived irrationality of political contests. But it is no answer to assert a pinchbeck rationality or lay claim to a bogus internal intelligibility. Legal analysis cannot divorce itself from policy considerations and politics is not inherently irrational. Nor can formalism find its justification by seeking to be equated with legal method and analysis. No judge, formalist or substantialist, is free from the adjudicative discipline to which the judiciary is subject.[57] But that adjudicative discipline is properly to be seen as the framework for judicial reasoning and not a substitute for it. Legal method and analysis does not require a rule or precedent to be applied without re-evaluating its utility or fairness. What it requires is that the process of re-examination be a reasoned process openly articulated by the judge. The fact it must be a reasoned and open process itself operates as a constraint on judicial power in that the reasoning in the later decision, to be effective and accepted, must be superior to that of the rule or precedent. Restrictions, not always easy to define, hedge and circumscribe the judge's action without curbing his or her creative freedom in exercising a choice and without placing them outside the proper ambit of legal method and analysis.[58] "There is" as Cardozo has said, "a wide gap between the use of the individual sentiment of justice as a substitute for law, and its use as one of the tests and touchstones in construing or extending law".[59]

The notion of law as an internally coherent phenomenon cannot be sustained. To accept such a proposition is to accept that law is an end in itself. The external sources of law are constantly being excluded. Moreover, formalism's claim to a distinctive logical coherence is an unwarranted pretension. Certainly, logic and coherence are the hallmarks of legal reasoning.[60] Judges, lawyers and legal scholars necessarily bring logic and coherence to bear on the question in issue. But this property does not dictate the conclusion that this logic and coherence are intrinsic to the law itself any more than it could be pretended that those qualities are exclusive to the law. I have asserted elsewhere that articulate consistency is an undoubted virtue.[61] But it is a virtue for any discipline and not just the law. Consistency in its most pure form is an attribute of logic, and logic can be harnessed so as to enhance judicial reasoning without purporting to find it in the law itself or, more accurately, in the historical formulation of the law.

The point can be illustrated by referring to Professor Weinrib's last ditch attempt to resuscitate a respectable theoretical foundation for formalism. Weinrib attributes to the law an "immanent intelligibility" which extends to its content and regards the notion of form as the way to draw out that intelligibility. The

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57 Supra n 1, at pp 54-56.

58 Benjamin N Cardozo, *The Nature of the Judicial Process*, (Yale University Press, New-haven, 1921), at pp 114-115.

59 Ibid, at p 140.

60 "Logic in a broad sense plays an essential role in legal reasoning;" Steyn, supra n 35, at p 46.

61 Supra n 1, at p 10.

intelligibility it yields is one which is internal to juridical relations and those relations are to be understood by reference to themselves and not by reference to something else.[62] It is to be noted that Weinrib does not seek to vaunt certainty as a consequence of this process. He accepts that indeterminacy, as the critics understand it, follows from formalism's conception of the relationship between the general and the particular.[63] The distinctive feature of form, in his theory, is that it denies the primacy of the particular by claiming that particulars are intelligible only through conceptual categories. Particulars, considered directly on their own as particulars, are regarded as unknowable — forms of the general patterns through which these particulars are understood as juridically coherent.

But what is this immanent intelligibility? It cannot be anything other than the law as made by judges in the past. If a conceptual category or general pattern has emerged through which particulars can be understood, it is because judges of an earlier time have perceived that category or pattern from the myriad of factors of which they have been cognisant, many or most of which have been external to the law. Law derives from the community and develops to serve the community. That is the law's dynamic, and there can be no basis for suggesting that in this process the law at some magical or mystical time obtained an immanent quality of intelligibility separate and distinct from the logic and coherence which judges vested in it. Nor can there be any basis for describing the process of applying the general rules to the particular circumstances as formalism when that process must occur irrespective whether the law has an immanent intelligibility or not. Moreover, Weinrib's theory of legal formalism suffers the inevitable flaw of formalism generally. It ignores the justification underlying the rule or the underlying community value which prompted the rule. It proceeds on the assumption that internal coherence or intelligibility are superior to other values.[64]

The judge who subscribes to formalism will to a greater or lesser extent exhibit a number of characteristics. He or she will tend to be rule-bound and to pursue the application of a relatively strict doctrine of precedent. To quote Lord Steyn again, "...formalism inculcates an intense respect for the doctrine of *stare decisis* whatever the lessons of experience and the force of better reasoning".[65] Accepting that the law is rational they will not feel inclined to rationalise the law which they apply.[66] With faith in the inner logic of the law, therefore, their own reasoning will often appear mechanical, literal and cramped. In order to support a particular interpretation, for example, an internal "logic" may be found in an Act of Parliament by punctiliously comparing the precise wording of various sections when it would be a bizarre pretence to think that Parliament, or the law draftsperson, went through the same exercise — or even addressed the point at all. Again, because "the law" is perceived to have its own coherence and intelligibility, the community is thought to be served by applying that law without

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62 Weinrib, supra n 51, at pp963-966.

63 Ibid, at pp 1008-1012.

64 Dennis Patterson in "Why Should the Law be Immune from Superior or Possibly Superior Values?" *Law and Truth*, (Oxford University Press, 1996), at pp 22-42.

65 Steyn, supra n 35, at p 46.

66 Ibid.

due regard to the new and changing needs of society.[67] The rule, rather than the underlying justification or reason for the rule, is likely to be more important in the reasoning which is adopted. Unwilling to reassess the justification or reason for the rule, the formalist's ability to respond to change is retarded. In the result, rule-based adjudication is necessarily conservative. It reflects a generally positive view of the status quo and a belief that any radical change from past practice is likely to produce worse rather than better outcomes.[68] It follows that the formalist judge, shunning the re-evaluation of rules, is not overtly concerned with the rationality of the law either in general or in particular. To quote Lord Steyn yet again, "...the formalist judge is likely to say that it is not the duty of the court to rationalise the law of England".[69]

In large part, the formalist judge's characteristics will be the converse of those exhibited by a judge who is prepared to acknowledge his or her indebtedness to the concept of fairness.[70] They will be inclined to accept form over substance even though this may be at the expense of reality and mean that justice is not done in the particular circumstances. Then, the formalist judge will have little compunction about proclaiming absolute or near-absolute rules. Hard cases, which may mean cases of real injustice, are to be accepted in the fixed view that this is achieving certainty. Notwithstanding the lesson of two centuries, it is thought that the dynamic of the common law can be fettered. Further, the judge treading the formalistic treadmill will manifest a distrust of judicial discretion and seek to curtail or inhibit it with rules. Statutory discretions to do "as the court thinks fit" will be circumscribed by precedential fiats. Finally, Lord Steyn's point may be endorsed to the effect that, above all, formalism fails to do justice in accordance with law in keeping with the judge's judicial oath.[71] The sense of justice, which all judges would overtly manifest a wish to administer, does not burn as brightly in the breasts of the formalist judge as it does in the pit of the stomach of others. Yet, justice can only be assured if judges are prepared to question the content of rules and re-evaluate the manner in which they are applied. The judicial impulse which drives that questioning and re-evaluation is necessarily suppressed by the formalistic approach.

And so - the adjudication process

The quest of legal theorists to characterise the decision-making process of judges appears insatiable. A universal theory or model is sought. No such ambition is pursued in this paper. Rather, it is accepted that different judges will have different approaches, but it is contended that, broadly speaking, because the judicial phalanx can be divided into formalists and substantialists, there are two distinct strains of legal reasoning. These strains may coalesce in many cases and arrive at the same result, but the difference remains below the surface. In other cases the different approaches may be manifest at once or meld tolerably for a time before diverging and leading to different outcomes.

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67 Ibid.

68 Smillie, supra n 48, at p258.

69 Steyn, supra n 35, at p 46.

70 See above, pp 471-473.

71 Steyn, supra n 35, at p 46.

Once it is accepted that judges face a multiplicity of choices in resolving a dispute, including more particular choices within broader choices, the problem becomes clearer. As choices are inherent in the decision-making process, the key question is how those choices are to be made.

It has already been noted that a close examination of the facts is essential to adjudication. But the approach of a formalistic judge and that of a substantialist judge may at once diverge in that the former will instinctively tend to seek to fit the facts to an existing rule and assume or hope that justice is achieved in the abstract; the latter will first find the facts and then seek to fit the law to those facts so as to do justice in the particular case. A fresh set of facts hitherto unknown to the law does not hold the same apprehension for the substantialist judge adopting a more creative approach as it does for the formalist judge seeking to adhere to what has gone before.

When confronted with a legal issue, the judge must obviously start with a premise. It may be a rule. While rejecting formalism, I can accept Wittgenstein's demonstration that rule following is innate. It is a form of human behaviour or practice.[72] If the rule applies and it is relevant and fair in the particular case, that will be the end of the matter. Why should it be otherwise? Life and the law, however, are seldom so simple. Sheer complexity relegates this basic model to the "land of never never". More often than not, more than a rule is required; the rule may not be adequate or apt to cover the situation; the rule may have been shown not to work in practice; there may be a conflict between two apparently applicable rules; or there may be no rule at all. Again, the approach of the formalist and substantialist judges will diverge. The formalist judge will adhere as closely as possible to the pre-existing corpus of rules. The inevitable value judgment will emanate from a narrower base. The substantialist judge will assume wider terms of reference. While not rejecting past cases as a source, the judge will have regard to a more extensive range of factors, fundamental principles, the underlying justification or reason for the rules or principles, and the relevant contribution of other disciplines such as economics, psychology, political science, sociology, behavioural sciences in general,[73] and social, ethical and philosophical considerations which may bear upon the question in issue. A "community of considerations" reflecting the needs and expectations of the community, including relevance and fairness, will inform the substantialist judge's thinking in reaching his or her decision.

The difference in approach is stark, and necessarily so. Working deductively with the basic building blocks of legal argument the formalist judge is likely to arrive at a different conclusion from the judge working with general principles and terms of reference which subjugate legal form to the objectives of fairness and relevance. Even where their conclusions coincide their reasons are likely to differ. While stark, this difference in approach in many cases must, of course, be a question of degree. No judge is entirely immune from the influences of his or her judicial colleagues. But the fact the differences may appear to be differences

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72 James Penner, "The Rules of Law: Wittgenstein, Davidson, and Weinrib's Formalism", (1998) Vol 46, No. 2, Tor LR, 488, at p 491.

73 See e.g., *R v H* [1997] 1 NZLR 673; and *Ruka v Department of Social Welfare* [1997] 1 NZLR 154.

of degree cannot be allowed to obscure the actuality of the basic difference in the respective judges' perceptions of the law and the court's role in adjudication.

Professors Hart and Sacks' view of the court's role can be taken for the purpose of argument. The distinguished professors perceive the court's role as one anchored by the pre-existing body of rules, standards, policies, and principles from which the courts move by a process of "reasoned elaboration".[74] Such a perception is elementary but not complete. While the starting point for both the formalist and substantialist judge may be the pre-existing body of rules, standards, policies and principles, it is what follows that really counts. The formalist judge will work deductively to a conclusion. The substantialist judge will accept those rules as both the starting and finishing point if they meet the tests of relevance and fairness. But if he or she considers that they do not do so, that judge will look further. It is this potential for dissatisfaction which sets the formalist and substantialist judge apart. Faced with choices, the formalist judge may deny the choice, or fail to explain his or her choice, or concentrate on precedential-based or narrow conceptual arguments. The substantialist judge will acknowledge the choice and seek to explain his or her decision having regard to the broader implications of the case and the substantive arguments leading to an evaluation of what would be the best legal solution.[75]

Much the same observations may be made about the commendable analysis of judicial reasoning passing under the name of "practical reasoning". In general terms, practical reasoning is normally contrasted with deductive reasoning. It involves the ability to recognise suitable abstractions from particular instances. In a sense, it is the reverse of the traditionally perceived task of applying the general to the particular in that argument proceeds from particular instances of facts to general conclusions. It has been described as that capacity to choose between rules or to decide that no rule works well. It occurs when and where the courts deal with a lack of sense or intelligibility. Practical reason indicates that the instance connects with all the other instances of the rule, which it fits better than it connects with the instances of any other rule, or indicates that there are no such connections. In the latter case practical reason allows the court to develop a new rule.[76]

The emergence or re-emergence of this line of thinking owes much to Professors McIntyre and Wellman.[77] Professor McIntyre takes the view that the capacity of practical reason is not simply the capacity to follow rules but, rather, the capacity to act "with virtue" when rules do not precisely define the right decision. In his thinking, as in mine, the virtue primarily represented in the decisions is "justice".[78] Professor Wellman examines the question of the dynamics of such a process: what leads to the development of a new rule? He considers that the answer lies in the perception of an "unsatisfactory" result. He characterises the

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74 H Hart and A Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, (10th Ed., 1958) at pp 162-68.

75 Steyn, supra n 35, at 54.

76 Penner, supra n 72, at 519.

77 See Alasdair McIntyre, *After Virtue*, (2nd Ed., University of Notre Dame Press - 1984); and Vincent Wellman, "Practical Reasoning and Judicial Justification: Towards an Adequate Theory", (1985) 57 Colo L Rev 45.

78 McIntyre, supra n 77, at 152.

results of practical reasoning as "fiats" which must satisfy a criterion of satisfactoriness rather than a criterion of truth.[79]

Professor Penner seeks to illustrate this view by referring to Davidson's "holism of beliefs".[80] A judge is presented with a situation where the prospect of applying the existing rules produces a state of dissatisfaction. A new rule occurs to the judge which produces a state of less dissatisfaction, or perhaps satisfaction. The new rule is then applied. Holism is introduced to make sense of the notion of satisfaction. A state of satisfaction arises where a firm, complex, interlocking "web of beliefs" produces a solid support or meaning for the particular rule in question. Dissatisfaction occurs where a rule's meaning is less well supported by connections than other meanings. Once a new rule is recognised its validity is justified by the connections it has with this "web of beliefs".

Practical reasoning may explain how judges progress from the existing rule or corpus of rules - or connections or "web of beliefs" - to a position of dissatisfaction and from there to a new rule or a new application of a rule, but it does not explain why some judges will feel dissatisfaction and others not. Complacent acceptance of the existing rule or corpus of rules may never or only rarely produce this dissatisfaction. Dissatisfaction with the existing law as it is perceived to be will be more likely to arise with the judge who shuns a formalistic approach and is driven by a conscious recognition of the external sources of reference in the law. Notions of fairness and relevance must intrude at an earlier point in the reasoning process to produce a state of dissatisfaction.

There is a danger, therefore, that practical reason will simply be captured by formalism, as indeed it has been in Penner's case.[81] While practical reason recognises the scope for judicial interpretation, existing rules obtain a weighting not accorded competing and possibly more compelling considerations. The process is essentially historical in the sense that it creates for the judge a presumption in favour of the status quo; the existing rules apply, subject to defeasibility. For that reason it is also essentially conservative and will not respond as readily to change as the community has a right to expect. A conception of the legal process which perceives development evolving at the point where a rule or precedent ends will not be as relevant or fair as it should be to meet the needs and expectations of society. Such an approach is much too confined. What is required is an approach in which the existing rule or corpus of rules is seen as the starting point but at the same time is critically re-evaluated against the objectives of fairness and relevance. Other considerations, such as certainty may, of course, bear upon the instant case, but from the outset fundamental conceptions need to be clearly analysed, basic values explicitly examined, and irrelevant rules excised from consideration. The existing rule or corpus of rules will not suggest a reason for dissatisfaction if they are vested with an internal intelligibility thought to be immanent in the existing law.

There is also a risk that practical reason will inadvertently exhibit an analytical foible; the assumption that the existing rule or corpus of rules can be determined and will be generally acknowledged. More often than not the existing rule or

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79 Wellman, supra n 77, at p 504.

80 Penner, supra n 72, at pp 504-505.

81 Ibid, at pp512-521.

corpus of rules will be indeterminate or in conflict and subject to dispute. The wider "web of beliefs" and "connections" may be only dimly perceived and, if and when comprehended, differ from one judge to another. Consequently, whether or not a judge develops a sense of dissatisfaction in a particular case is likely to depend on his or her appreciation of the existing corpus of rules, web of beliefs, or connections. The scope for differences to emerge before the judge turns to consider (if he or she so chooses to consider) whether the outcome is satisfactory dispatches a neat and tidy theory.

While the theory of practical reason is immensely useful, therefore, I do not consider that it embraces the whole truth or the reality of judicial reasoning. It seeks to encompass in the one theory strands or methods of judicial reasoning which are in conflict with each other, the one essentially inward and backward looking, the other essentially outward and forward looking. While the starting point may be the same and only shortly removed from the problem in issue, practical reason does not explain why one judge regards a particular result as unsatisfactory, or why one judge and not another reaches a state of dissatisfaction in regard to an existing rule or, why the web of beliefs and connections of one judge are defined narrowly and yet those of another defy systematic delineation. In each case the reasoning process is innately different. It reflects not so much the choices which are made as the personal approach or attitude of the individual judge in making a choice, for it is that approach or attitude which will dictate his or her response to the choices. The formalist and substantialist judges will quickly follow their different paths.

A case study

There are any number of cases which could be selected to illustrate the points made in this paper.[82] I propose to take the decision of the House of Lords in *Sevcon Ltd v Lucas CAB Ltd.*[83]

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82 A sharp contrast between a formalistic and substantialistic approach is evident from the decision of the Supreme Court of Canada in *Ikea Ltd v The Queen* (1998) 98 DTC 6092 and the decision of the Privy Council in *CIA v Wattie & Lawrence* (No 20/98) 29 October 1998. The question in issue in both appeals was whether an inducement payment paid by the landlord to a tenant to enter into a lease was capital or revenue for tax purposes in the hands of the tenant. In both cases the rent fixed in the lease was well in excess of the market rent. In substance, the inducement payment offset the inflated rental. The Supreme Count of Canada declined to ignore the fact that the inducement payment bore directly on the annual rent to be paid and held that it was therefore on revenue account. The Privy Council took the opposite view. It assimilated the inducement payment with a premium paid by a tenant to a landlord to obtain a lease (which is on capital account) and therefore held that the inducement payment was capital (a "negative premium"). In form there may be a comparison; in substance there certainly is not. The premium paid by a tenant to a landlord provides consideration for the grant of the lease. There is no consideration for an inducement payment paid by the landlord to the tenant where the rent is inflated and the payment is amortised in the rent over the period of the lease.

83 Supra, n 9. Considered and approved in *Pacific Coilcoaters Ltd and Ors v Interpress Associates and Ors* (CA 73/96, 76/96, 18 February 1996) per Richardson P, Henry and Tipping JJ (Thomas and Keith JJ dissenting).

The question in issue in that case was whether the sealing of a patent is an integral part of the cause of action for infringements occurring after the date of publication of the complete specification but before the patent is sealed. Section 13(4) of the Patents Act 1949 (UK) reads:

> After the date of the publication of a complete specification and until the sealing of a patent in respect thereof, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the publication of the complete specification: Provided that an applicant shall not be entitled to institute any proceedings for infringement until the patent has been sealed.

Two tenable interpretations competed for the support of their Lordships. One was that, as the subsection conferred on an applicant for a patent the like rights and privileges as if the patent had been sealed, the cause of action accrues when those rights are infringed. The proviso merely postponed the applicant's right to take action until the patent has been granted. The alternative argument was that the right to initiate proceedings for infringement is dependent on the grant of the patent to the applicant and that, as a result, unless and until the patent is sealed, the applicant could not assert an essential ingredient of the cause of action. That ingredient is the identification of those claims in the complete specification which remain in force as part of the patent. The former interpretation prevailed. Their Lordships unanimously held that the cause of action accrued when the acts of infringement were committed and the proviso was merely a procedural bar to commencing an action.

It was common ground that the merits or justice of the case were in Sevcon Ltd's favour. The complete specification had been published in June 1971. Lucas CAB Ltd had then undertaken and pursued opposition proceedings under the Patents Act for ten years, as a result of which the patent was not sealed until 1982. Invoking the limitation period in the Limitation Act 1980 (UK), Lucas contended that Sevcon could not recover for infringements committed between 1974 and 1977 as its cause of action arose at the date of the infringements and was therefore statute barred. If correct, a patentee who, as the applicant for the patent, had disclosed its invention to the world at large as required by the Act would be prevented from obtaining damages for the infringements of the patent at a time it was not in a position to institute proceedings in respect of those infringements. The injustice might be thought to be aggravated as this situation had been brought about by the protracted opposition proceedings pursued by Lucas. Having obtained the grant of a patent, the patentee was denied the benefit of the grant.

Apart from the choice between these broad competing arguments, their Lordships faced a number of other choices; whether a literal interpretation would in itself resolve the question when a cause of action arose; how the proviso should be read in relation to the body of the subsection; whether and to what extent the purpose or object of the subsection was relevant; whether and to what extent the scheme of the Act should influence the question in issue; whether and to what extent policy questions should be taken into account; whether other sections of the Act were relevant; whether the reasoning in a prior decision of the House of Lords should be adopted, and so on. Their Lordships opted for a narrow and

formalistic approach. In the result, many of these choices were denied or an explanation as to why they were rejected was denied to others.

The formalistic approach is evident in the preemptive ascendancy given the words "the applicant shall have the like privileges and rights as if a patent for the invention had been sealed" over the proviso. By conferring ascendancy on the body of the subsection, it is thought that the proviso precluding the applicant's right to institute any proceedings for infringement until the patent has been sealed can be relegated to the status of a procedural bar serving only to delay the bringing of the proceeding. The structure of the subsection has been allowed to dictate its meaning. But as any number of critical commentators have pointed out, there is no inherent reason why the proviso should not be construed as derogating from the existence of the rights rather than merely affecting their exercise.[84]

I agree that there is no inherent reason why the proviso should not be given substantive effect so as to delimit the rights conferred on the applicant. Such an interpretation makes good sense and is clearly viable. Indeed, Oliver LJ, in a judgment agreed to by Mustill LJ, in the Court of Appeal had indicated that, if the matter had been *res integra*, there would be a great deal to be said for the view that, in an action for infringement, it is not possible until the patent is sealed to plead the essential fact upon which the action depends.[85] But notwithstanding the viable choice open to them, the House of Lords chose not to opt for the construction which would have resulted in justice in that and similar cases. Why, then, was a tenable and just argument, which could have been accepted without offending reason or precedent, rejected? The answer can only be that the formalistic approach was so firmly entrenched that it took precedence over any desire to do justice.

In pursuing this formalistic approach, their Lordships also had scant regard to the logic of the matter. Their reasoning is flawed in two critical respects. First, the question whether the sealing of the patent is an integral part of the applicant or patentee's cause of action cannot be resolved by a linguistic or textual analysis of s 13(4). The literal meaning of that section is quite clear; it is that the applicant is to have all the like privileges and rights as if the patent had been sealed from the date the complete specification was published, other than the right to commence any proceedings for infringement until the patent had been sealed. Consequently, the plain meaning in itself simply does not answer the question in issue, that is, whether the proviso derogates from the rights conferred on the applicant or is to be regarded as a procedural barrier to the enforcement of those rights. Secondly, in order to complete the plaintiff's cause of action it is essential that the grant of the patent be pleaded for the very good reason that the grant confirms, not just that the patent has been sealed, but that the claim or claims in the complete specification which the infringer is alleged to have infringed subsist at the time the proceeding is commenced. In other words, the plaintiff must plead and prove the grant of the patent in order to establish that the critical claim or claims which are alleged to have been infringed remain extant.

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84 E.g., McGee, "Patent Nonsense", (1986) 49 MLR 650, at pp 652-653.

85 *Sevcon Limited v Lucas CAB Ltd* [1985] FSR 545, at 549.

Their Lordships were also influenced by a prior decision of the House of Lords. In *General Tire & Rubber Co v Firestone Tyre and Rubber Co Ltd*,[86] the House had held that interest could be awarded under s 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (UK) on damages for infringement from a date before the sealing of the patent pursuant to the statutory prescription reading "between the date when the cause of action arose and the date of judgment". Their Lordships considered that, on the true construction of s 13(4), the sealing of the patent was not a condition precedent to the accrual of the cause of action under s 3. As the provision was contained in a different statute from the Limitation Act in the ***Sevcon*** case, it was not binding on the House, but it clearly had a marked influence on their Lordships' thinking. Their Lordships did not question the reasoning in that case or seek to reevaluate it on the grounds of fairness or relevance. Ironically, while the decision in the *General Tire* case produced a just result in that case, adhering to the same reasoning in *Sevcon* produced an unjust result. One cannot be denied the thought that the law developed on the arbitrary basis of which case happened to come first.

It will be noted that the decision in the *General Tire* case, notwithstanding that it was a decision of the House of Lords, failed to produce certainty. Labouring under a grievance that Lucas's tactics had delayed the sealing of the patent and that, notwithstanding the infringements, it could not initiate proceedings until the patent had been sealed, Sevcon persisted in pressing its case to the House of Lords. Obviously it, or its advisers, considered that the logic and justice of their case would prevail over a decision which, although relevant, was not binding on the House of Lords.[87]

Their Lordships also described as forceful an argument based on the effect of another section of the Patents Act. Section 59(1) provides that, in proceedings for infringement of a patent, damages cannot be awarded if the defendant proves that, as at the date of the infringement, he or she was not aware of, and had no reasonable ground for supposing, that the patent existed. Their Lordships did not rely upon the argument because the section did not exclude an account of profits. But their readiness to give credence to the section is indicative of the formalistic approach. It would be unrealistic to attribute to the legislature an intention to create a cause of action in an applicant pursuant to s 13(4) by virtue of the wording of s 59(1) when, in truth, the provisions "grew like Topsy". A definitive coherence between the respective provisions would be coincidental in that neither Parliament nor the law draftsperson will have addressed the point. It means no more than that the Act may have a lacuna, and it is even then a *non sequitur* in that the lacuna exists irrespective of whether the cause of action arises prior to the sealing of the patent or is completed by the sealing of the patent.

The state of dissatisfaction identified by practical reason seemingly does not take hold. No dissatisfaction with a literal construction or the reasoning in the *General Tire* case is expressed and no dissatisfaction with the outcome is apparent from a reading of the judgment. Their Lordships were content to adopt a formalistic approach and accept the result as the outcome, not of reason or logic, but of "the law".

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86 [1975] 2 All ER 173.

87 Nor did the *Sevcon* case prevent Pacific Coilcoaters instituting proceedings in nearly identical circumstances in New Zealand. See supra n 83.

The substantialist judge would undoubtedly have approached the question in issue quite differently. He or she would have had regard to the thrust and object of the subsection. Since the applicant was required by the Act to publish details of the invention, the subsection was introduced to protect the applicant's invention pending the grant of the patent. Those who might be inclined to copy or use the invention thereby do so at their own risk knowing that the applicant will be able to recover damages in respect of any infringement if and when the patent is sealed. This object is defeated if the applicant or patentee is ultimately unable to recover damages because of an unavoidable delay in obtaining the grant of the patent. Moreover, reference to the purpose of the subsection confirms that it was not drafted as a limitation provision or for the purpose of limiting the applicant's right to recover damages for any infringement. Neither Parliament nor the draftsperson's mind was directed to the question whether, and when, the subsection would confer a cause of action on the applicant or patentee. For the purposes of the Patents Act the subsection says all that it need say to protect the applicant pending the grant of the patent. Appreciating, therefore, that a literal interpretation does not answer the question as to when a cause of action accrues, the substantialist judge would be more inclined to read the section as a whole and vest the proviso with substantive force. It would not be reduced to a procedural right relevant only to the question of enforcement.

The scheme of the Act would also be important. In general terms, the Act vests the patentee with the monopoly rights conferred by the patent. These rights are retrospective. Taking the view that the cause of action does not accrue until the patent is sealed is in accord with this overall scheme. Moreover, regard should be had to the equivalent of s 30 which provides that, once the patent is sealed, a patentee, as patentee, can retrospectively sue for infringements prior to the sealing of the patent.[88] The prerogative basis of Letters Patent is then fully recognised. Once this is done, it can be seen that the cause of action under s 13(4) accrues to the applicant as applicant. An applicant, once the patent is sealed, can bring proceedings for past infringements, and may wish to do so, for example, where the patent has been assigned to a third party. The substantialist judge would acknowledge that monopoly rights in a patent or pending patent have always been highly tradeable, and that s 13(4) would therefore have a substantive function or effect for applicants who assign their rights prior to the sealing of the patent, or assignees of those rights, who do not become the patentees.

Nor would policy considerations be excluded; the patently unjust consequences which follow from holding that the cause of action accrues before the patent is sealed do not reflect well on the law; it is contrary to the policy of the Limitation Act itself, and it is wrong in principle that time should run against a plaintiff at a time when he or she cannot bring the action; it is unsound and contrary to principle to separate the plaintiff's cause of action from the plaintiff's "right" to bring an action and seek the judgment of the court; the Limitation Act relating to persons under a disability indicates that it is the policy of the legislature to defer the "right" to bring an action until the plaintiff is in a position to sue;

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[88] Keith J makes a most persuasive case for this viewpoint based on the equivalent section, s 68, in the New Zealand Patents Act 1953, in a dissenting judgment in the *Pacific Coilcoaters* case; supra n83.

and, finally, by analogy with tort, time should not start to run until the plaintiff is in a position to sue.

As the *General Tire* case was not binding on the House, there would have been no impediment to reexamining that case and reevaluating its validity. The reasoning would, for the same reasons as applied in the *Sevcon* case itself, be found wanting. Not being persuasive, *General Tire* would not be accorded precedential force.

A different outcome seems inevitable when the basic approach is determined. No dissatisfaction with the result emerges once the judge begins to tread the formalistic path. The merits or justice of the case, as well as any wider considerations, do not impinge upon the judge's reasoning. Thus, the possibility of dissatisfaction is effectively excluded from the outset. The judge who adopts a substantialist approach, on the other hand, must experience a sense of dissatisfaction almost at the outset having regard to the injustice to the applicant and others in the applicant's situation in holding that the cause of action accrues at a time when they cannot sue for its breach and when the reason for that disability is more often than not the delaying tactics pursued by the alleged infringer. Wider terms of reference will at once apply; the subsection will be read as a whole without giving any particular weighting to the structure of the subsection or any particular part of it; substantial regard will be had to the object of the provision; the scheme of the Act will be extremely important; policy considerations will be canvassed and taken into account; certainty would be taken into account as a consideration having regard to the circumstances of the particular case, and relevant case law would be re-examined and re-evaluated. The underlying criteria would be the fairness and relevance of the law.

Fiat justitia et ruant coeli[89]

A sound theory of judicial reasoning must encompass a more realistic appreciation of how judges deal in practice with the choices inherent in adjudication. The North American brand of realism needs to be refocussed. It should not allow itself to be intimidated by CLS. With realism revisited, I would anticipate that the full extent and range of choice facing a judge in the process of adjudication and the role of judicial autonomy in determining which alternative to choose will become the received wisdom. But the inquiry needs to go further. I believe it will confirm that the way judges exercise that autonomy depends to a large extent on whether they are formalists or substantialists. The exercise of autonomy by a substantialist judge will be patent; that of the formalist judge much less so. Finding comfort in hugging the warm outskirts of the status quo, the formalist judge will nevertheless be exercising a choice. Deciding not to apply a general rule or principle to a new set of facts is as much an exercise of choice or discretion as deciding to apply that principle to the new situation. Even where the justice of the case or need for relevance is such as to persuade the formalist judge to modify or extend the pre-existing body of law, the modification or extension is likely to be covert as the judge works the law to make it appear that no such modification or extension is involved.

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89 "Let justice be done though the heavens fall", *Quodlibets of Religion and State* (1602) William Watson.

Adjudication is primarily a practical activity as judges work the present space between the past and the future.[90] They work that space in accordance with their formalistic or substantialistic bent or commitment. Save for such noble attempts as Professor Weinrib's atavism of a decade ago, legal formalism is universally discredited and it is the gulf between that theoretical demise and its persistent influence on the process of adjudication which creates the perceived rivalry between certainty and fairness. In this paper I have sought to demonstrate that fairness would be advanced and certainty would not suffer if formalism was eradicated from the practice of the law and consigned for good to the basement shelves of history. Nor would the law's coherence, consistency, and stability be impaired by resorting to general principles and working, still within the framework of those principles and the discipline of legal method, to achieve justice in the individual case.[91]

I can give no particular guidance as to why formalism persists both within the legal profession and the judiciary notwithstanding its theoretical demise. Legal tradition and inertia are one possible explanation. But the more likely explanation rests with legal education. Possibly, the academic distaste for judicial discretion and the craving for an impersonal law is reflected in the teaching of the law. Possibly, students who come to the law with expectations based on a primitive form of positivism are never properly disabused of their beliefs. Possibly, many students do not undertake a course in jurisprudential theory at all. Possibly, the perpetuation of legal formalism, seen as a conditioned response to the choices inherent in the law, is the final fusty endeavour of the more academic theorists to shackle the law to the past and thereby stave off recognition of the full extent of judicial autonomy.

Nor can I provide an answer as to why some judges are formalists and some are substantialists which would not invite effete antiphonal responses. Intuitively, I accept that the answer lies in the sphere of psychology rather than legal theory. When we know why it is that some people are conservatives and others liberal, or some people are libertarian and others fatalistic, or some people are religious and others atheistic, or some people are libertine and others altruistic, or why some people are doctrinaire and others pragmatic, we may perhaps know why some judges are formalists and others are substantialists. What we do know is that once the intellective direction of the law student, lawyer and future judge is set, the divide between the formalistic and substantialist approach is destined to introduce further uncertainty into an already inherently uncertain law.

I would not want it thought that I am suggesting that formalist judges do not seek to do justice according to law. With rare exceptions, judges are conscientious servants of their judicial oath. The essential difference lies in their perception of justice as an abstract product of an inherently intelligible law or justice as a virtue to which an inherently indeterminate law must respond with fairness and relevance in the circumstances of the individual case. As both the content

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90 Allan C. Hutchinson, "The Reasoning Game: Some Pragmatic Suggestions", (1998) 61 MLR 263. The author advances an unnerving account of legal reasoning or adjudication as a way of playing the game of life. There is, he says, no final or privileged way to play law's game that explains and grounds all others that is not itself a game (at p 264).

91 Supra n 1, at pp 58-73.

and language of this paper evidences, I acknowledge a commitment to the latter cause. Judges are not mechanics dealing with the repair of things, but rather social craftsmen dealing with the affairs of people.[92] In the resolution of these affairs, let justice be done though the heavens fall.

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92 Supra n 1, at p76.