Lord Neuberger at the Annual Conference of the Supreme Court of New South Wales, Sydney

Sausages and the Judicial Process: the Limits of Transparency

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Introduction

1. The title of this talk is of course based on the famous statement that "Laws are like sausages — it is best not to see them being made." The remark is generally attributed to Bismarck, although, according to Wikipedia, the idea was probably first promulgated by John Godfrey Saxe[1]. Saxe, I learn from the same invaluable source, was a man whose greatest claim to fame is that he wrote a poem based on an Indian story about six blind men and an elephant, which is a parable about religious disputes – and I may add, it's rather an amusing little ode[2].

2. Of course, eating sausages is fattening and voluntary, whereas obeying the law is neither. That is just as well because many people who have engaged in sausage-making will not thereafter eat sausages, whereas I have observed no such distaste for obeying the law among law-makers. Of course, when Bismarck, who came from a civilian law country, talked about law-making, he had in mind legislators not judges. And the political give and take can often seem pretty unedifying, involving, as it does, messy compromises, last minute amendments, sops to interest groups, half-baked concessions, crowd-pleasing sound-bites, and grandstanding provisions. Such, of course, is the price of democracy, and, when we moan about it, we would do well to remember another well-known adage, this one being attributed to

[1] *University Chronicle. University of Michigan* (27 March 1869)
[2] http://en.wikisource.org/wiki/The_Blindmen_and_the_Elephant

Winston Churchill, that "democracy is the worst form of government except all those other forms that have been tried"[3].

3. However, in a common law system law is often made by judges as much as by the legislature, and it is on judge-made law that I want to concentrate today, not least because I know more about judge-made law than I do about legislation. When it comes to judgments, the sausage analogy can be taken a little further. Sausages are contained in a transparent skin, or casing, which means that the contents of a well-made sausage are neatly packaged and are clearly visible. Like the casing of a sausage, the style and structure of any judgment should ensure that the ultimate product appears elegant and that its contents are clear. And a traditional sausage contains a well-judged mixture of meat, starch and flavouring, and the best sausages have more meat than starch and they have good flavouring - not a bad description of the best judgments. Which brings me to the important quality of transparency.

Transparency

4. The popularity of Lord Hewart CJ's oft-quoted observation that it is of "fundamental importance that justice should not only be done, but should … be seen to be done"[4] – is such that it is in danger of being seen as trite or jejune. But the reason for the unusual popularity of this phrase is that it captures something we see as an essential part of justice. The case from which it originates concerned apparent bias. McCarthy was being prosecuted for dangerous driving, and, unknown to the defendant, the justices' clerk was a member of the firm of solicitors acting in a civil claim against McCarthy arising out of the same accident. After his conviction, McCarthy discovered the clerk's connection and successfully applied to have his conviction quashed, because "[n]othing is to be done which creates

[3] House of Commons 11 November 1947
[4] *R v Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256.

even a suspicion that there has been an improper interference with the course of justice". Important as what Edmund Burke referred to as the "cold neutrality of an impartial judge"[5] no doubt is, the truth of Lord Hewart's aphorism extends beyond it.

5. It is a fundamental principle of the rule of law that justice is done in public. As I have said (at great, and some might think excessive, length) elsewhere, this carries with it the requirement that both what goes on in court and what that court decides should be open to public scrutiny.[6] And this means more than merely having court proceedings that are open to the public and issuing public judgments. A real commitment to open justice requires that the courts and the judiciary make every effort, short of undermining the paramount objective of the legal system – to ensure that justice is done – to establish not just openness but accessibility. The openness must enable the public to engage with the judicial process in a meaningful and, if necessary, critical way. It is also vital as a means of holding us judges to account. However well-intentioned and upright we are, we will soon fall into bad ways, sometimes for the best of motives, if we cannot be seen at work by all our citizens and by our media, whatever downsides this sometimes carries with it. The Court of the Star Chamber, with its summary and unjust ways, was the product of secrecy, and it is no coincidence that its demise in 1641 coincided with the date on which evidence obtained by torture ceased to be accepted in English courts[7].

6. One of the most welcome developments to accompany the creation of the United Kingdom Supreme Court was the ability to make its proceedings "open to the public" in more than just name. Proceedings in the House of Lords took place tucked away in a room in that grand but labyrinthine building the location of which would have tested the most determined

[5] To His Constituents, "Translator's Preface" J.P. Brissot (1794)
[6] *Open Justice Unbound?,* Judicial Studies Board Annual Lecture, 16 March 2011.
[7] See *A v Secretary of State* [2006] 2 AC 221, paras 12 and 13, per Lord Bingham

member of the public. By contrast, the UK Supreme Court puts a premium on public accessibility, and welcomed its 250,000th visitor last year – and currently we are receiving around 80,000 visitors per annum. Technology also provides a new means to reach a wider public audience, and our proceedings are streamed live online. Summaries of every one of our judgments are read out and televised, and fuller printed summaries are available for anyone who wants them. We even tweet information and links to our judgments.

7. This move towards greater accessibility can also be seen in other UK courts, with the Court of Appeal last year lifting the ban on televisions cameras in court.[8] I welcome this. It may be that there are greater difficulties about cameras in court when there are witnesses and juries. We must ensure that the integrity of the trial process is maintained, and we must avoid turning the trial process into entertainment. However, we must also avoid being too precious about innovations such as cameras in court. I certainly believe that the fact that I am being filmed in the Supreme Court has not affected my behaviour or what I say. But I suppose I would say that, wouldn't I?

8. While I am strongly in favour of as much openness as possible, I would not welcome the idea of judges having their post-hearing deliberations in public, as is done in a few Supreme Courts, including the Brazilian. In order for this to be genuine, there would have to be a rule that the judges could not discuss the case among themselves privately, which would be inhibiting and unenforceable. Unenforceable because one could not stop judges taking among themselves either collectively or one-to-one. In any event, in many cases, it is very helpful to talk informally to one or two of one's colleagues, or to test one or two ideas with a colleague and it would be

[8] This is not meant to ignore or minimize the significance of current restrictions on the openness of justice in the UK, the most important example of which is the existence of closed proceedings. These are not the focus of this talk, although I have spoken about them in *Open Justice Unbound?,* footnote 6

impractical for such talks to be in public. While sunlight is indeed the best disinfectant, too much sunshine can burn.

9. So much for the hearing. I now want to concentrate on those aspects of the judicial process of reaching conclusions which goes on behind the scenes. How are judgments produced? In other words, what goes on behind the scenes? Like visitors to the sausage factory seeing the production line, the public can see the trial process, but, as in the sausage-making, there's a lot which goes on behind the scenes. I hope that my revelations are not as off-putting to an innocent member of the public as I fear revelations of what goes on behind the scenes in sausage-making may be. However, I must admit that my views about sausage-making are mere surmise, whereas what follows is, as they say so often (but rather less accurately) in some Hollywood films, based on true events.

Before and immediately after the hearing

10. Logically, I should begin with pre-hearing activity. As a first instance, or trial, judge, I read the papers in advance, at least one had the opportunity to do so. When it comes to such reading ahead, Judges are, in my experience, divided into Pre-Raphaelites and Impressionists. Judicial Pre-Raphaelites read everything, whereas Judicial Impressionists read very little – often just skimming the skeleton arguments. Pre-Raphaelites have the advantage of being better prepared and ready to ask the relevant questions. But they risk wasting much time as, once the case gets going, most of the documentation turns out to be irrelevant, and some of the points raised in writing are often dropped. Also, there is a concomitant risk of not seeing the wood for the trees, and of having a preconceived idea of where the argument should go. Impressionists run the risk of not really being on top of things until after the hearing, so that they do not have the same degree of grip over the

hearing, and intelligent questions sometimes only rise into the consciousness when it's too late to raise them. I must nonetheless confess to being an Impressionist.

11. In appeal courts, one might have thought that the documentation and issues had been pared down to make the Pre-Raphaelite approach *de rigeur*. But life is not quite like that. Pre-Raphaelites are still often faced with a mountain of papers most of them irrelevant. Impressionists such as myself may sometimes only read the parties' written cases and any judgment below. Appeal courts are different from first instance courts, not least because there is almost always more than one judge. What sort of discussion should they have before the hearing? Well, in the English Court of Appeal, at least when I was there, the presiding judge identifies a couple of weeks ahead which of himself and his two colleagues will be writing the lead judgment. In a normal appeal, the three judges will meet 15 minutes before the hearing and exchange views. In a more difficult appeal, or an appeal including a particularly keen or interested judge, there may be a note sent round ahead or even a detailed discussion a week or so ahead, or else on the morning.

12. So in our Court of Appeal you go into court thinking that you know what your colleagues think that they think, and knowing that your colleagues knowing what you say that you think. That was fine in many cases, but I did notice that some of my more senior colleagues found it difficult to be persuaded to depart from a view which they had confidently expressed to colleagues. I have to say that that is never a problem which I have suffered from. I positively relish being persuaded that my preliminary view is wrong: I regard it as a vindication of the oral advocacy system. I suppose others, less charitably inclined, may suggest that it is an indication of how superficial my reading and thinking have been. There was often little discussion after the appeal. Even when we had changed our minds, there was not much talk: the judgment-writer was expected to get on with it.

13. To take a slight digression, Judges are no longer seen (if they ever were) as omnipotent beings who quasi-mystically divine the 'right' answer to a case – such a view would be difficult to reconcile with the appellate process, for one. Nor should they be so viewed. Accordingly, it should come as no surprise either to the public or to the judges themselves, that judges sometimes change their minds as a case develops, and after hearing detailed oral argument from both sides. Indeed, I would suggest that the ability to be flexible and to change one's mind graciously when appropriate is one of the most important qualities a judge can possess. It is unavoidable that, when reading into a case, a judge, even an Impressionist, may form an initial view of what the right answer is, but it is nothing more than that – an initial view. One of the great strengths of our common law system, with its tradition of genuine oral argument, is that it enables a judge to consider a case, and test any provisional view and the points being presented, by posing what he or she thinks are the key questions to the advocates arguing each side. It would be strange, even worrying, if a judge did not, on occasion, undergo a change of mind through this process, and even after writing the first draft of a judgment.

14. Reverting to what happens in the UK courts, the position in the House of Lords when I went there in 2007 was very different from that in the Court of Appeal. The rule was that you did not discuss an appeal with your colleagues ahead of the hearing or even during the hearing. At the end of the hearing, everyone left the committee room while we stayed in our seats. (It was very inconvenient for lawyers and clients, as, after the clerk shouted "Clear the Bar", they had to gather up their papers and rush out of the room, while the Law Lords gazed impassively from their table). Once everyone had left, the presider turned to the junior judge and said: "David" (because it always seemed to be me), "what do you think?" One then had to give a mini-judgment expressing one's views. Some judges made full notes (they often did this during the appellant's reply, so I used to think that

counsel for appellants must often have thought that their arguments were getting a lot more attention than in fact they were receiving), and then went on at some length; others expressed their views in halting sentences. There were those who tended to give long rambling views and others who expressed short crisp opinions. As the perennial junior, I used to have two thoughts. The first was: "please, please, can at least one of you agree with me?" The second was envy of the presider who could form his view on the basis of what others had said and who could often say that all that could have been said had been said, and that either he agreed with his four colleagues, or that there was much to be said on both sides but on the whole he agreed with A and B rather than C and D. The final scene in the post-hearing Act in the House of Lords involved the presider selecting the Law Lord who would write the lead judgment. Sometimes one thought "please, me", and sometimes the opposite.

15. Well, in October 2010, as the Law Lords transmuted into Supreme Court Justices, I went back to the Court of Appeal as Master of the Rolls, and when I came back (if "back" is the right word) again to the Supreme Court three years later, I found that things had changed somewhat. In particular, the ban on discussing an appeal ahead of time had gone, and, as in the Court of Appeal, we meet 15 minutes ahead of the hearing. Interestingly, we often do not always discuss the merits of the case in any detail, or sometimes even at all. We sometimes discuss the merits quite a lot, we sometimes touch on them and we sometimes discuss how the hearing should proceed, and sometimes we avoid discussing the case. But the procedure after the hearing is the same as it was – bottom up discussion followed by a decision as to who is to write the first judgment.

16. Which brings me to the actual judgments themselves.

Judgments

17. Whenever I discuss the topic of judgment-writing, I always approach it with a certain diffidence particularly when addressing judges. First, it seems impertinent to pontificate to other judges how to write judgments. Secondly, rather like advocacy, judgment-writing is a fairly personal exercise and in any event it is rather case-sensitive. Thirdly, whenever I hear myself telling people what not to do in their judgments, I rapidly become aware that I have been guilty at one point or another of each of the flaws against which I counsel. Never have I been more diffident on this topic than when giving a talk on the topic to an eminent group of English Court of Appeal judges. The theme of that talk was very much 'do as I say, not as I do'. I know that similar events are organized here in Australia, albeit with mixed success. I understand that a two day appellate judges' seminar and workshop in Melbourne on judgment writing was to be held in October 2009, but was cancelled due to lack of demand.[9] A judgment-writing course for judges being cancelled due to lack of demand seems rather like a conference of fortune-tellers cancelled due to unforeseen circumstances.

18. It is essential that our judgments are as intelligible as possible. A common law system requires a certain consideration of previous authorities. However, as Sir Anthony Mason has said: "[s]ometimes one feels when reading an English, Canadian or Australian judgment that it is written with the object of convincing the reader that the author has read and considered all that could conceivably be relevant to the issue in hand."[10] Or as I put it in a lecture last year: "Reading some judgments one rather loses the will to live – and I can say from experience that it is particularly disconcerting when it's your own judgment that you are reading." The topic brings to mind something Lord Judge remembers from his schooldays when history essays were returned with the three letters APK at the bottom – anxious parade of knowledge.

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[9] ('Appellate Judgments – The Need For Clarity', Justice James Allsop, 36th Australian Legal Convention, Perth, 19 September 2009, 15).
[10] 'The Judiciary, the Community and the Media', Sir Anthony Mason, lecture given to the Commonwealth Magistrates' and Judges' Association in Cambridge, 2 June 1997.

19. Of course, it is possible for a judgment to be too brief. One example is attributed to the American judge J. Edgar Murdock. In response to a petitioner exclaiming that "[a]s God is my judge, I do not owe this tax", he famously replied "He's not. I am. You do."[11] It is, no doubt, begging the question to say that a judgment should be as short as possible while still properly considering the facts, the issues and any relevant previous authorities – and what constitutes a 'proper consideration' is, inevitably, something which is subject to the individual judgment and style of the judge in question. But within the limits imposed by the characteristics of the particular case before the court, as well as the idiosyncrasies of the individual judge, it is always worth asking oneself whether each section, paragraph or sentence of a judgment, and each finding or quotation is really necessary. A good general guide may be: if it's not necessary to include it, it's necessary not to include it.

20. The judicial reasoning process is like any other reasoning process. So, at one level, it is a combination of (i) the traditional approach of working through the facts and law to arrive at the right answer, and (ii) deciding on the right answer and working out whether, and if so how, you can get there. The traditional process is the Platonic ideal, but it is much more difficult. Consider the children's puzzles which involve working out which of six entrances to a maze will get you to the centre: after doing a few you realise that it is much easier if you start at the centre and work backwards. But, although as a matter of logic, the two processes are mutually exclusive, the human brain can, and judges' brains should in my view, carry out both exercises. Lord Brown-Wilkinson was unusual for being open about this approach. In his judgments, after setting out the facts, he would frequently say what answer seemed to him to be right, and then would ask rhetorically

[11] Brison v. Commissioner, T.C. Memo 1983-101 (T.C. 1983). Also referenced in *How Not to Succeed in Law School*, James Gordon, 100 Yale L. J. 1679 at 1691 (1990-91), which attributes the story to H. Weihofen, Legal Writing Style 41 (2d ed. 1980).

whether there was any legal principle, statute or case-law which prevented him from reaching that conclusion. He rarely answered that question: yes. On one of the few occasions he did, the House of Lords reversed him[12].

21. Judicial reasoning is like many other reasoning exercises in that it also involves iterative processes. For instance[13], when interpreting a document or statute, you may first look at the words and reach a provisional view; you then look perhaps at the other terms of the contract and see what they suggest and maybe arrive at a slightly different view; the surrounding circumstances may be next: you see what they indicate and there may be another change of view; and then you might look at the commercial common sense of the matter, and thus arrive at a firmer conclusion; but then back you go to the words and see how your firmer view stands up, and on you go to the other terms of the contract, and so on.

Ex tempore and reserved judgments

22. Ex tempore judgments, which were the very common at first instance and in the Court of Appeal, when I started in the mid-1970s, are becoming rarer, which in many ways is a shame. A good ex tempore was a work of art, but an ill-prepared one could be a rambling mess. I think that the increase in reserved judgments has two connected causes. First, with the advent of written arguments and pressure of work, cases are argued much more quickly than they were, and so judges have much less time to prepare judgments during argument. In 1986, one case was argued over 20 days in the House of Lords[14]. That would be inconceivable today, when 4 days is the absolute maximum. The second reason is that there is such a wealth of material these days of the word processer and professional liability: neither solicitors nor barristers want to leave anything out, whether it is a

[12] *Billson v Residential Apartments Ltd* [1992] AC 494
[13] See per Grabiner [2012] LQR 41
[14] *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577

document, a witness, an argument or an authority. That makes an ex tempore judgment much more challenging. I fear that the advent of TV cameras in court will also tend to make ex tempore judgments rarer.

23. Of course, one of the secrets of the ex tempore judgment, at least in England, is that the judge gets the opportunity to "approve" the transcript of the judgment before it goes to the parties. I use inverted commas because, while some judges just improve the punctuation and the syntax, many judges use the opportunity to effect a fairly comprehensive rewriting. I have rewritten sentences even paragraphs. I have transposed paragraphs or even whole sections. I have even deleted sentences or paragraphs – sometimes because I simply could not understand what I had been trying to say. Once I added a paragraph because a brilliant new reason had occurred to me justifying my decision. In due course my decision was overturned and the Court of Appeal said that the new point was a particularly bad one – showing that cheats do not prosper. If I was going to add a point, I should have made it clear that it was a piece of *esprit de l'escalier*.

24. In almost all important cases, judgment is reserved. Indeed, the Supreme Court, like the House of Lords, always reserves, and so I imagine does the High Court of Australia. It is obvious that the more important the judgment the more accessible it should be. Given that important judgments are often long and complex, it is particularly necessary to render them accessible; hence the practice of the UK Supreme Court to provide a 2 page written press summary of any judgments we give, as well as an even more concise oral televised summary, to which I referre. This ensures that, even if the judgments themselves are long, complicated or obscure – or, indeed, long, complicated and obscure – there is a concise publicly available summary of the key elements of the decision. This might be a practice worth adopting in our lower courts, even if it is limited to certain decisions of particular importance.

Judgment discussions in appellate courts

25. There are different views as to the extent to which appellate judges should discuss and even negotiate their judgments. Some, such as Dyson Hayden, consider that such discussions are wrong in principle, as they conflict with the idea of judicial independence. I emphatically disagree. A court consisting of more than one judge has a collegiate character. It is true that, when one looks at judgments, the civilian law view appears to be one of a single court, which happens to have a number of judges, hearing a case, whereas the common law perception seems to be more like a number of judges, who happen to be sitting in one court, hearing the same case. But the common law view does not alter the fact that there is a single court and it does not justify rejecting collegiality, and by that I do not merely mean mutual respect and friendliness. I do not see why post-hearing discussions between judges is objectionable. Indeed, I think such a view is unrealistic. A judge's duty to uphold the law carries with it an obligation, in any particular case, to do her best to ensure that the court of which she is a member produces as clear and coherent a judgment or set of judgments as is consistent with each member's opinion.

26. In the UK Supreme Court I have encouraged more discussion between Justices after a hearing. Sometimes, it is pointless. For instance, two judges may have circulated judgments coming to different conclusions, and, at a subsequent meeting, each simply reverts to barrister mode and seeks to persuade colleagues that his view is the right one. However, often such meetings do produce more of a consensus or changes of mind. In one recent high-profile case, we had three full meetings, and while they did not result in agreement by any means, they did establish some common ground between judges as well as some changes of view. Almost all the resultant judgments included constructive cross-references to other judgments, including those that reached different conclusions. If approached in the

right, constructive and mutually respectful, way, such meetings lead, I believe, not merely to a more coherent and properly thought out set of judgments, but also to a happier and more collegiate court.

27. Frequently, there are, of course, oral or email discussions between only some of the members of a particular panel, for various purposes, including clearing the mind, collaborating and co-ordinating, or persuading a wavering colleague. A one-to-one discussion can have benefits which are not achievable, or so easily achievable, at a more formal five or seven person discussions.

28. Where it looks as if an appellate court may be divided, a keen, convinced or proselytising judge may very occasionally use his draft judgments to try and persuade his colleagues to come round to his views. Thus, a judge other than the appointed lead judge may occasionally pre-empt the lead judge by sending round a draft which is intended to change minds. Other judges wait for the lead judgment and then try and persuade others by sending round a draft which is aimed at undermining the lead judgment in a way calculated to drum up support. Either tactic can be counter-productive, particularly if it is obvious what the judge is doing or he expresses himself too forcefully: many judges are counter-suggestible.

29. Of course, judgments normally go through more than one draft. After circulating her judgment, a judge may have further thoughts off her own bat, she may have productive discussions with other judges, she may have realised that her first draft included mistakes, or she may wish to react to a colleague's subsequent draft judgment. Sometimes judgments are altered very substantially and it is by no means unknown for as first draft to allow the appeal and the second draft to dismiss it – or vice versa. Keeping track of which version of whose judgment is the current one can be quite difficult and an effective joint filing system is necessary.

30. Appellate judgments should avoid rudeness, whether about the judge below or about fellow judges. It achieves nothing save the creation of bad feeling and a bad impression of the judiciary as a whole. Sometimes, of course, it may be necessary to criticise the judge below, but it should be more in sorrow than in anger.

Multiple and joint judgments in appeal courts

31. There is much debate around the issue of whether it is better to have a single judgment or multiple concurring judgments. At one extreme is the EU, Luxembourg, Court civilian law model, where the court must produce a unanimous, somewhat anonymous, judgment, with all the internal inconsistencies, unsatisfactory compromises, frustrating obscurities and irritating evasions which it so often involves. At the other extreme is the traditional UK House of Lords model, reflected in past Australian High Court cases, with the multiple, idiosyncratic, judgments, with all the mutual inconsistencies and resultant confusions they so often involve, and the endless pages they so often take up in the law reports. I am on record as having discouraged multiple judgments, and that remains my view in many cases, but it is an over-simplification.

32. I do think that what I have called a "vanity judgment" should be avoided. By that I mean a judgment which is intended to agree with the lead judgment, but not to add anything other than saying "I have understood this case" or "I think I can express it better" or "I am interested in this point" or simply "I am here too". Such judgments, of which virtually every appellate judge, not least myself, has been guilty, are at best a waste of time and space, and, at worst, confusion and uncertainty – although they are popular with academics. Further, in some cases, such as judgments giving guidance to courts below, it is positively undesirable to have more than one judgment. However, if you do not agree with all the reasoning in a judgment, it may be your duty to write – at least on the point or points you

disagree with. And in some cases, eg where one is extending the scope of tort law in an area, it is often positively helpful to have more than one judgment to take the debate forward.

33. I also acknowledge that there is some force in the notion that, if all the other judges simply agree with the judgment-giver, some people may think that they were little more than passengers in the case. Additionally, sometimes a leading judgment can be so convoluted, so incomprehensible that a short concurring judgment may help any appeal court or any party appreciate the court's reasoning. However, often such short judgments do not add much in my view. More strongly I believe that, when the court is split, the judge with the decisive vote owes it to all concerned, including to itself, to write a reasoned judgment explaining why he has decided the appeal the way he has. Such a judgment need not be long.

34. Connected with this aspect is the question whether one should have encourage appellate judges to write a joint judgment. In my view, there is much to be said for it. Unless you are a saint, however much you put into someone else's judgment, it's never as much as you put into a judgment in your name – so a judge can be expected to put more into a judgment of which he is a joint recorded author than into a judgment which is another judge's name. Joint judgments also encourage a court internally to be collegiate and help make a court look collegiate externally. And, if you want to cut down the number of concurring judgments, there will be fewer judgments to write, so joint judgments are a good way of making up for that aspect.

Circulating draft judgments

35. In the UK Supreme Court, as in most other courts of England and Wales, we normally circulate the draft judgments, on a confidential basis, to the advocates primarily for them to suggest small corrections ahead of formal

handing down. (This does not happen in cases involving price-sensitive aspects or, unless the litigant in person agrees to the draft going to the other side's counsel and not to him). In the Supreme Court, we circulate on Thursday on the basis that the advocates will get their comments to us the immediately following Monday, and we then hand down the immediately following Wednesday

36. But sometimes, counsel come back with larger complaints, such as suggesting that the point on which we were proposing to decide the case had not been argued, or that a suggestion that a particular argument had not been properly understood. I think that this a useful development, provided that it is not misused by the losing party's lawyers to try and re-argue the case. That would be an abuse of the system, and I am glad to say that it very rarely happens.

37. I have so far been concentrating on what may be characterised as procedural aspects of the judicial decision-making process. Let me end by dealing with a couple of more substantive aspects.

Beyond the judgment

38. On a different, but related, topic, the extent to which a judge should depart from previous case-law or vary existing principles depends, of course, very much on the circumstances. A judge's role is not merely interpretative, it is also capable of being creative. Particularly in a common law system, the role the judiciary plays in developing the law is now an accepted one for which they have lawful authority. And the highest appellate court in a common law system has the authority, when appropriate, to change that common

law by moving away from pre-existing legal norms and precedent when justice requires.[15]

39. The difficult question is when it is appropriate. The endless and inevitable tension between the need to ensure that the law is certain, simple and clear and the need for the law to keep up with societal, moral, commercial, and technical developments has never been more acute. As the world gets smaller and more international, as commercial concepts and contracts become ever more sophisticated, and as electronic developments come at an ever-increasing rate, both the need for simplicity and certainty and the pressure for change and complexity have never been greater. Furthermore, there is another familiar factor which militates against maintaining the law in a clear and simple state, namely the desire to produce a fair result in a particular case. The pressure on judges to produce a fair result is particularly strong at a time when the media are ready to pounce on every apparently unfair result. But the clearer and simpler the law the more likely it is to produce results in individual cases which can fairly be said to be unfair, if viewed on their own. So judges should not be too ready to change or complicate legal principles simply to achieve a fair result in individual cases, but in some cases one can properly conclude that the unfairness is indicative of a general problem in the state of the law, which often results from a change in moral, societal, commercial or technological circumstances, and which justifies a principle being abandoned, created, or varied.

40. But judges have to be very careful about taking such a course. We are normally deciding a single case on particular facts, and, while the consequences of a decision to change the law may seem entirely sensible by reference to the circumstances of that case and such other circumstances as we can think of, we are constrained by the submissions and the limits of

[15] *The Limits of Judicial Fidelity to Law: The Coxford Lecture,* Jeffrey Goldsworthy, Canadian Journal of Law and Jurisprudence, Vol. XXIV, No. 2 (July 2011), p. 308.

our own experience. Unlike the legislature we are normally not able to survey the whole landscape. New principles which seem to be well thought out and safe to develop sometimes turn out to lead to all sorts of unexpected and intractable problems. After forty years in the legal world, the only law in which I have complete confidence is that well-known piece of virtual legislation, the law of unintended consequences.

41. Connected with this is the trial judge's role in making findings of fact and analyzing the effect of the law, which are, at least in principle, entirely separate issues. Logically, you ought to decide what the facts are and only then turn to the legal consequences – ie the law. However, it is tempting sometimes to seek to change one's findings of fact if the original findings do not produce the answer one wants. I have no doubt that some judges have given into this temptation: it is all too human a thing to do. But I have no doubt that judges ought not do it. When tempted to do so, and whenever one is tempted to be a bot naughty, it does no harm to remind yourself of your judicial oath – it may perhaps sound a bit priggish, but the integrity, commitment and impartiality which it embodies represent the reason for the judicial oath – and one of the main reasons judges attract real respect in the common law world.

42. The need for public confidence in the judiciary remains vital to every society that respects the rule of law. Sir Anthony Mason has talked of the nostalgia of the UK and Australian judges for a Victorian age in which 'the authority and majesty of the law [was] reflected in the ceremony and the ritual of the courts' and enabled judges 'like high priests in the temple' to reveal the law to, presumably, a worshipping public.[16] While this may paint the picture of the past through rose-tinted glasses, the public's attitude towards the judiciary has undoubtedly changed. Lord Reid famously observed, when referring to the view that judges declare the law rather than

[16] 'The Judiciary, the Community and the Media, Sir Anthony Mason, revised version of lecture delivered to Commonwealth Magistrates' and Judges' Association in Cambridge, 2 June 1997.

play any role in making it, that "we do not believe in fairy tales any more"[17]. And a world in which it is acknowledged that judges do more than just reveal pre-existing law, is one in which they are rightly subject to greater scrutiny.

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[17] As discussed in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349