A Personal View of Justice

The Right Hon. Lord Justice Slade

Hamilton LJ, later Lord Sumner, once made the stark observation:

> "Whatever may have been the case 146 years ago, we are not now free in the twentieth century to adminster that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."[1]

This article is an attempt by one English judge, concerned only with civil litigation, briefly to examine the relationship of his work to man's instinctive sense of justice.

Of all human instincts this sense is one of the most deep-rooted. At a remarkably early age, a young child will have his own strong ideas as to that treatment which is "fair" and that which is "unfair". (My references to males should, most certainly, not be read as excluding females). He will regard it as his right to receive rewards and punishments which are by comparison neither smaller nor greater, as the case may be, than those which he sees meted out to his brothers, sisters and school-fellows. Few children after reaching their third birthday need to be taught the lawyers' maxim 'Equality is Equity'.

Not much later the child will come to sense other fundamental elements of justice. He will think it unfair if he is condemned without being heard, or without being given a fair hearing, or by a person whom he regards as judge in his own cause. In his earlier years, however, he will be less concerned with the fairness of the rules which govern his behaviour than with the manner of their application and enforcement; unless he is a natural rebel, he will be disposed to accept the rules themselves simply as part of the background in which he lives.

As he grows a little older, a new dimension will be added to his view of justice. He will begin to question the content of the rules themselves. Three features are perhaps particularly likely to offend him. The rules should not in his view impose liability without fault. They should not embody what appears to him a form of unfair discrimination. They should not be retrospective. The parent or teacher who attempts to impose retrospective legislation on his charges may find himself in deep trouble. He is likely to be met with the vehement protest: "No-one ever told me".

1. *Baylis* v. *Bishop of London* [1913] 1 Ch.127, at p.140.

This same keen instinctive sense of justice is likely to remain with a man throughout his adult life. Though further dimensions will be added to it as he matures, it will continue to include all the features already mentioned.

This sense will be seen to relate to two quite separate elements, first, the content of the rules by which a person is governed and, secondly, the manner in which those rules are applied and enforced. Judges in this country have only limited law-making functions. Yet the man on the Clapham omnibus is unlikely to separate these two elements in his thinking. Judges, as the persons primarily responsible for applying and enforcing the law, may well shoulder the entire blame of popular opinion in any case where a judicial decision offends the sense of justice of the litigant concerned or of the general public. They cannot expect to be a popular race.

Since the existing laws constitute the raw material with which judges work, one fundamental, but frequently forgotten, point has to be made concerning the nature of that raw material. However closely any system of law may approach perfection, it is inevitable that many of its rules will appear to conflict with man's instinctive concepts of justice.

A few elementary examples will suffice to illustrate this point. A student when first embarking on a study of the English law of contract might suppose that, surely, justice demands that no-one will be held legally bound to an agreement unless he intended to contract on the terms asserted against him. The examples given by Lord Atkin in *Bell* v. *Lever Brothers Ltd.*[2] might thus come as something of a shock:

> "A. buys B.'s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B. has made no representation as to soundness and has not contracted that the horse is sound, A. is bound and cannot recover back the price. A. buys a picture from B.; both A. and B. believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A. has no remedy in the absence of representation or warranty. A. agrees to take on lease or to buy from B. an unfurnished dwelling-house. The house is in fact uninhabitable. A. would never have entered into the bargain if he had known the fact. A. has no remedy, and the position is the same whether B. knew the facts or not, so long as he made no representation or gave no warranty. A. buys a roadside garage business from B. abutting on a public thoroughfare: unknown to A., but known to B., it has already been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A.'s garage. Again A. has no remedy."

2. [1932] A.C. 161, at p.224.

As Lord Atkin pointed out, "all these cases involve hardship on A and benefit B as most people would say, unjustly". On further reflection, however, the student will soon come to understand that in such cases, as in so many others, the law must hold a balance between conflicting interests. It may be harsh to hold A to a contract which he entered into under a genuine mistake. However, provided only that B did not know of A's mistake, it might cause greater hardship to let A evade the performance of his bargain simply by showing that he had made a mistake: "Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous."[3]

Likewise, the student first approaching the English law of Tort might perhaps anticipate that in justice, in the absence of any contract, the civil law would require a person to recompense another for the injury he had done him only if he had been in some way or other at fault. His initial approach might be the same as that expressed in *Salmond on the Law of Torts*:

> "There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of any *mens rea* on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature independent of human actions altogether."[4]

However, he could soon learn that our law of Tort is founded on no such general principle. He will read of a number of instances where liability is independent of intention or negligence, set out in *Salmond on the Law of Torts*:

> "Liability in libel does not depend on the intention of the defamer, but on the fact of defamation; so too there is strict liability for damage done by a wild animal, or by the escape of dangerous things accumulated for some non-natural purpose (the rule in *Rylands* v. *Fletcher*); again, liability is strict when one is vicariously responsible for the acts of another. In cases such as these the security of the particular interest of the plaintiff is predominant over the defendant's interest in freedom of action."[5]

However, the authors point out (*ibid.*) that even in such cases liability, while strict, is never absolute; in appropriate cases, defences such as act of God or act of a third party are available. The student will thus come to appreciate that, in such instances, the common law, by a delicate process of social engineering, is doing its best to hold a fair balance between the need to compensate a plaintiff injured by another and its reluctance to impose liability on a defendant who caused the loss without intention or negligence.

3. See *Tamplin* v. *James* (1880) 15 Ch.D.215, at p.218 *per* Baggallay LJ.
4. 6th Ed., at pp.12-13.
5. 19th Ed., p.37.

A similar discrepancy will be discovered by the student in our criminal law. Justice might seem to demand that a person should not incur criminal liability unless he intended to bring about or recklessly brought about those elements which constitute the crime. Such in general is the pattern of our criminal law. Public policy, however, has made it necessary for the legislature to create many exceptions where criminal liability may arise without any moral fault.

One sees a similar anxious concern to strike the proper balance between essentially conflicting interests in many recent decisions of the House of Lords – to mention only one example, between freedom of speech and the need to protect the British Security Service in *Attorney-General* v. *Guardian Newspapers Ltd.*.[6]

The demands of practicality, as well as those of public policy, must in frequent instances transcend what might appear to be the requirements of justice as between the interested parties to litigation. Justice might appear to demand that a person with contractual rights to property should be entitled to recover in negligence from a third party for pecuniary loss carelessly caused by damage to the property. Yet a long line of authority, apparently based on pragmatic considerations, shows he can only recover if at the time when the damage occured he had either a proprietary or possessory title to the property: see *Leigh and Sillavan Ltd.* v. *Aliakmon Shipping Co. Ltd.*.[7] "The justification for denying a right of action to a person who has suffered economic damage through injury to the property of another is that for reasons of practical policy it is considered inexpedient to admit his claim": *Candlewood Navigation Corporation Ltd.* v. *Mitsui O.S.K. Lines Ltd.*.[8]

The balancing process was referred to in terms in *Official Solicitor to the Supreme Court* v. *K.*.[9] This case concerned the rights of a parent to see reports of the Official Solicitor in wardship proceedings. Lord Evershed said:

> "It follows, therefore, in my opinion, that there cannot be in circumstances such as exist or as are suggested in the present case, an absolute right on the mother's part to see the report of the Official Solicitor. On the other hand, I have equally no doubt that the judge must give very great weight indeed to the principle that he should not base a conclusion adverse to a proper party to the proceedings (and particularly a parent) upon information which that party has not seen and has had no opportunity of challenging or contesting. When a situation arises such as has in the present case arisen, there may well indeed have to be, in the language of Russell LJ, a 'balancing' of the generally accepted right of a properly interested party, particularly a parent, to disclosure of information submitted to the judge upon which he proposes in some measure to base his conclusion (on the one hand) and the paramount interest of the ward of court (on the other hand)."[10]

6. [1987] 1 W.L.R. 1248.
7. [1986] A.C. 785, at p.809 *per* Lord Brandon of Oakbrook.
8. [1986] A.C. 1, at p.17 *per* Lord Fraser of Tullybelton.
9. [1965] A.C. 201.
10. At p.219.

In considering the relationship of the functions of our judges to man's instinctive concepts of justice, one thus starts from the premise that the system of law which the courts have to operate, like any other civilised system of law, is a delicately balanced mechanism designed as well as possible to reconcile conflicting social aims and interests which are to some extent irreconcilable. The layman may not fully appreciate how accurately the emblem of the scales of justice represents the problem facing the law-makers, as well as those concerned with the enforcement of the law. Even in Utopia a precisely even balance could never be achieved.

Such then is the nature of the raw material of the laws which our judges have to operate. The form of the judicial oath, derived from the Promissory Oaths Act 1868, binds the taker "to do Right to all Manner of People after the Laws and Usages of this Realm without Fear or Favour Affection or Ill will." The words "without Fear or Favour Affection or Ill will" speak for themselves, reflecting, as they do, fundamental concepts of the administration of justice. Judges "must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything."[11]

Up to a point, the duties imposed on a judge of first instance by the remainder of the judicial oath are equally clear. He must first ascertain the relevant facts. In this exercise he finds himself restricted by the technical rules of evidence which, as Diplock LJ (as he was then) pointed out in *R.* v. *Deputy Industrial Injuries Commission, Ex p. Moore* themselves form no part of the rules of natural justice:

> "For historical reasons, based on the fear that juries who might be illiterate would be incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion."[12]

Though this is perhaps a gross over-simplification of a complex process, it may be said that, after the facts have been ascertained, most cases which come before any judge of first instance will be recognised by him as falling within one of three categories, namely:

(A) where a statute or a Rule of Court or the common law explicitly confers on him a discretion to reach such decision as he thinks fit; or

(B) where, on the facts as found, he considers the case to be covered by authority binding on him, either in the form of a directly applicable statutory provision or of a previous decision or Rule of Court which he is bound to follow; or

(C) where no discretion has been explicitly conferred on him but the case does not appear to be covered by any authority which binds him.

11. See *Board of Education Office* v. *Rice* [1911] A.C. 179, at p.182 *per* Lord Loreburn LC.
12. [1965] 1 Q.B. 456, at p.488.

The judge's ability to reach a decision which accords with his instinctive sense of justice must greatly depend on the category into which the case before him falls.

The cases which fall into category (A) cover a very wide field. In some of them the terms upon which the relevant discretion has been conferred on the judge may themselves preclude or permit only a limited reference to concepts of justice. Thus, simply for example in deciding any questions as to the custody or upbringing of a minor, the court is required to regard the minor's welfare as "the first and paramount consideration" and must not take into consideration whether from any other point of view the father's claim is superior to that of the mother or the mother's claim is superior to that of the father.[13] Justice as between mother and father can thus play little or no part in the court's decision.

At the other extreme, rare cases may arise where the judge finds that the relevant law leaves him free to take into account not only his own concepts of justice but to pass a moral judgment. One striking example is the principle of *Ex. p. James*[14] by virtue of which the court may, in special circumstances, intervene to preclude a trustee in bankruptcy as an officer of the court from following the strict rules of bankruptcy in dealing with the bankrupt's estate. Buckley LJ defined the principle thus in *In re Tyler*:[15]

> "Assuming that he has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do."

While concepts of justice and reasonableness are very familiar and usually present judges with little difficulty, concepts of morality are another matter. Our law may perhaps be regarded as embodying merely minimum standards of morality below which the community will not allow its citizens to fall. Frequent judicial *dicta*, however, have emphasized that our courts are not courts of morals. Most judges through long training show a marked reluctance to pass a moral judgment in civil cases unless they think it necessary to do so. Scrutton LJ, though recognising that the principle of *Ex p. James* is well established, expressed his misgivings about it in forceful terms in *In re Wigzell*:

> "Now the decisions of this Court have established that though in law the money is the money of the trustee for the creditors, yet he may be restrained from enforcing his claim to it or retaining it if (and a series of phrases none of which are very definite have been used) it were not honourable – if it were not high minded – if it would be contrary to natural justice – if it would be shabby – if it would be a dirty trick for him to retain it . . . I desire to say very respectfully that it seems to me that when we have got into this atmosphere we

13. See section 1 of the Guardianship of Minors Act 1971, as amended.
14. (1874) L.R. 9 Ch.609.
15. [1907] 1 K.B. 865, at p.873.

have reached a region of uncertainty. Atkin LJ says in *Thellusson's Case* that it may be difficult to find out honesty but it can be done. Of course there is the old saying that it may be difficult to define an elephant but you will know one when you see one; and perhaps a number of people seeing an elephant may all agree that it is an elephant, but a number of people looking for honesty easily find quite different things, and yet all may be perfectly honest and high-minded in differing in their views of morality upon a particular transaction. I entirely agree with Salter J in this case that it is very difficult to call upon judges, who may be assumed to know the law, to lay down standards of high-mindedness or honour as to which perfectly honest and honourable persons may take entirely different views."[16]

Most commonly, however, where the judge is explicitly invested with a discretion at all, it is a discretion to reach such decision as he considers "just and equitable" or "just and reasonable" or expressed in some such terms. In such cases the judge of first instance perhaps finds himself as close as he will ever get to being in a position to administer justice as between man and man. While he may find the matter requires careful study and deep thought, much more often than not he will have little difficulty in reaching his ultimate conclusion. He will, of course, draw on his reserves of experience, but he will also be in a position without misgivings to draw on those fundamental instincts of justice which have grown with him throughout his life. This combination will in the end lead him to a conclusion with some confidence and with the assurance that an appellate court will only interfere with the exercise of his discretion within the limits of well-established principles. As Asquith LJ expressed the point, typically felicitously, in *Bellenden* v. *Sattherwaite*:

"We are here concerned with a judicial discretion and it is of the essence of such a discretion that, on the same evidence, two different minds might reach widely different decisions without either being appealable."[17]

If after the facts have been found a case is seen not to fall within category (A) above, the judge will then (ordinarily) have to place it within category (B) or category (C). This categorisation may in some cases prove to be one of the most testing, as well as one of the most important, of his judicial functions. If the case appears to fall within category (B) and the relevant authorities appear to lead him to a conclusion which accords with his own instinctive sense of justice and reasonableness, no difficulty arises. If, however, the authorities appear to lead him in another direction, he may be faced with a dilemma. He will have a natural reluctance to come to a decision which offends his own concepts of justice or common sense. On the other hand, he will realise that not only does his judicial

16. [1921] 2 K.B. 835, at pp.858-859.
17. [1948] 1 All E.R. 343, at p.345.

oath ultimately oblige him to comply with our rules of *stare decisis* but that these rules themselves have much to commend them.

What Donaldson LJ, as he then was, once referred to as a "portable palm-tree"[18] might enable a judge to do what he considered best justice as between litigants in any given case. On the other hand, certainty and predictability in the administration of the law are surely themselves important facets of justice. They reflect man's instinctive expectation that there should be an even-handed application of the rules which govern his behaviour, both to him and all his fellow-men. It is important the he should know or be able to ascertain in advance, if he so wishes, the probable legal consequences of what he does. If he should contemplate prosecuting or defending litigation it is important that, so far as possible, he can obtain confident legal advice as to the probable outcome. The rules of *stare decisis* can by no means be regarded as mere impediments to the proper administration of justice. They perform a valuable function. Lord Scarman put the point thus in *Duport Steels Ltd.* v. *Sirs*:

> "In our society the judges have in some aspects of their work a discretionary power to do justice so wide that they may be regarded as law-makers. The common law and equity, both of them in essence systems of private law, are fields where, subject to the increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law. The judges, even in this, their very own field of creative endeavour, have accepted, in the interests of certainty, the self-denying ordinance of "stare decisis", the doctrine of binding precedent: and no doubt this judicially imposed limitation on judicial law-making has helped to maintain confidence in the certainty and evenhandedness of the law."[19]

However, it must be recognised that the rules of *stare decisis* may be an embarrassment in the relatively rare occasions where the ratio decidendi of an earlier decision, binding on the court, appears at first sight to apply to the case before it, but that earlier decision appears to be a bad one which would produce an unjust result. The approaches of individual judges when faced with this situation will differ according to their temperaments and intellectual processes. Lord Simonds perhaps represented the most conservative. Lord Denning has been a champion of a more flexible approach. Yet he himself well recognised the merits of the *stare decisis* rules. In *The Discipline of Law* he wrote:

> "Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I

18. *Chief Constable of Kent* v. *V.* [1983] 1 Q.B. 34, at p.45.
19. [1980] 1 W.L.R. 142, at p.168.

am against is its too rigid application – a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it."[20]

Though every judge will have his own approach to authority, every judge will feel unease in reaching a decision which offends his concepts of justice or common sense and will seek an escape route before doing so. Prominent among the possible escape routes is the distinction of the earlier case on its facts. Other possible escape routes are well known to any judge. The differences in the manner in which individual judges approach the *stare decisis* rule depend in the last resort on the extent to which they are prepared to subjugate entire intellectual honesty to their desire to produce a result which both does justice between litigants and seems to accord with common sense. It must be recognised that most judges will on occasions be prepared to follow this course to some extent. It is only a question of degree.

The House of Lords, it may be noted, relieved itself of much of the burden of this moral dilemma when in 1966 it altered its previous practice by announcing that it regarded itself as free to depart from previous decisions when it thought right to do so.[21] Not very long afterwards there followed a decision which well illustrated the dilemma in which a lower court may find itself when faced with unattractive authority. In *British Railways Board* v. *Herrington*,[22] the defendants owned an electrified line which was fenced off from a meadow where children played. The station master was notified in April 1965 that children had been seen on the line and that the fence was in a dilapidated condition. In June the plaintiff, aged six, trespassed over the broken fence from the meadow where he had been playing and was injured on the live rail. He brought an action claiming damages for negligence. The obstacle to his claim was a decision of the House of Lords in *Addie* v. *Dumbreck*[23] to the effect that a trespasser could only recover in respect of intentional or reckless injury. The injury to the boy, Peter Herrington, could not be said to have been intentional. It was very doubtful whether it could be said to have been reckless. "Yet", as Lord Diplock said in his speech in the House of Lords, "all nine judges who have been concerned with the instant case in its various stages are convinced that the plaintiff's claim ought to succeed; and, if I may be permitted to be candid, are determined that it shall. The problem of judicial technique is how best to surmount or to circumvent the obstacle presented

20. (1979), at p.314.
21. *Note (Judicial Precedent)* [1966] 1 W.L.R. 1234.
22. [1972] A.C. 877.
23. [1929] A.C. 358.

by the speeches of the Lord Chancellor and Viscount Dunedin in *Addie's* case . . .".[24] The Court of Appeal had met the difficulty posed by *Addie's* case by treating the conduct of the Board on the facts as recklessness. The House of Lords regarded it as no more than negligence, but upheld the plaintiff's claim by declining to follow its previous decision.

Some cases fall on the border line between categories (B) and (C). Here there may be the opportunity for judges of sufficient vision to derive a newly stated principle from different strands of previous authority. Lord Atkin did so in the field of negligence in *Donoghue* v. *Stevenson*.[25] Lord Denning did so in the field of equitable estoppel in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*.[26] Others will fall fairly and squarely within category (C). There, to a lesser or greater degree, the judge of first instance will be entitled and obliged to make new law. In doing so, he will be likely to draw on previous authority by way of analogy. Most of all, however, he will draw on what he regards as the dictates of common sense, justice and public policy and to seek to develop what he regards as fundamental principles of law. One sees all these elements invoked by the courts in a series of recent decisions on the question whether in a given situation a duty of care in negligence is or is not owed by one person to another.

Lord Diplock in *Dorset Yacht Co.* v. *Home Office*, while recognising the value as a guide of Lord Atkin's statement of the "neighbour" principle in *Donoghue* v. *Stevenson*, warned that it could not be used as a universal guide:

> "The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated. The very parable of the Good Samaritan (Luke 10, v.30) which was evoked by Lord Atkin in *Donoghue* v. *Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law. Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them

24. *Supra* n.16, at p.931.
25. [1932] A.C. 562.

from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee."[27]

The years following the *Dorset Yacht* decision have been marked by frequent but not perhaps wholly successful attempts to lay down a comprehensive test as to whether a duty of care exists in a given situation. The "two stage test" formulated by Lord Wilberforce in *Anns* v. *Merton London Borough Council*[28] has not received general acceptance.[29] Recent decisions of the House of Lords place a strong emphasis on justice and reasonableness. "So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so."[30] Since the categories of negligence are not closed, this leaves the judge with a wide law-making capacity where he is asked to decide whether or not A owes B a duty of care in negligence in tort in a given situation not precisely covered by authority.

This, however, is merely one example among many of a category (C) case. It is, in my view, important to recognise that when our courts at any level make new law, they are doing so retrospectively. While they are not precluded from making *obiter* pronouncements on hypothetical points of law by way of guidance for the future, their function is to decide the issues of fact and law which have arisen in the case before them. Furthermore, not only past transactions between the parties to the litigation will be affected by their decision. It may well be that their decision will have an impact on past transactions between persons not connected with the litigation. At least below the House of Lords, courts do not have the ability to limit the impact of their decision to future transactions.

Furthermore, while in theory the House of Lords or Court of Appeal in overruling previous decisions do no more than declare correctly the law which has been previously incorrectly declared, they are in practice making new law retrospectively.

It follows, in my view, that courts at all levels should be cautious in making new law, whether by deciding to follow previous decisions or in any other manner. The need for *predictability*, which is itself such an important element of justice, so demands. In his 1987 Maccabean lecture in Jurisprudence the Lord Chancellor, Lord Mackay of Clashfern, spoke of the problems of reconciling the desire for certainty and stability with the need for change and referred to certain principles which the House of Lords has applied to limit the ambit of its powers to make new law by overruling its previous decisions. First, the power to overrule such a previous decision is used sparingly, on the ground that it would otherwise weaken

26. [1947] K.B. 130.
27. [1970] A.C. 1004, at p.1060.
28. [1978] A.C. 728, at pp.751-752.
29. See *Yuen Kun Yeu* v. *A-G of Hong Kong* [1987] 3 W.L.R. 776, at p.785 *per* Lord Keith of Kinkel.
30. *Per* Lord Keith of Kinkel in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210, at p.241.

existing certainty in the law. Secondly, the House has indicated that only in rare cases should it be prepared to overrule its previous decisions concerning the construction of statutes or other documents. The Lord Chancellor pointed out that the overruling decision must be given full retrospective effect even if it causes injustice by disturbing reasonable expectations and reliance placed on earlier decisions.

Generally, in the context of judicial law-making at all levels, an important distinction, in my view, falls to be drawn between those cases where persons are likely to have acted in reliance on the supposed existing state of the law and those where they probably have not done so. Typical of the second class of case are cases where the court is asked to decide whether A owes B a duty of care in negligence. By the nature of such a case, it is unlikely that the careless A was in any way influenced in his acts or omissions by any assumptions as to the state of the law. Typical of the first class are cases where persons are likely to have attempted to discharge particular statutory obligations in reliance on judicial interpretations of the relevant statute; or where persons are likely to have arranged their financial affairs in reliance on decisions relating to our fiscal legislation; or where persons are likely to have entered into agreements relating to the occupation of property in reliance on decisions indicating whether the effect is or is not to create the relationship of landlord and tenant.

I would venture to suggest that, in the first class of case, the courts at any level should be particularly hesitant before overruling a long established line of authority or even before departing from a view of the law which has been long held by the profession. Ordinarily in such a case the broader interests of justice would seem to me to demand that the situation be dealt with by prospective legislation by Parliament rather than by retrospective law-making by the courts.

Any discussion of the relationship between the functions of judges and justice would be incomplete without a passing reference to the wide and generally welcome powers of the court, as it were, to go back to nature by way of interfering on judicial review with the decisions of public bodies or officials who, in reaching an administrative decision, have failed to observe the basic rules of natural justice – which, as Harman LJ put it in *Ridge* v. *Baldwin* "after all is only fair play in action".[31]

Fair play in action is surely, within the restrictions of their obligations and the raw material with which they are dealing, what all judges ultimately seek to achieve. In the conduct of their business one particular difficulty with which they are faced is that of ensuring reasonable expedition, while at the same time attempting to ensure that justice is not only done, but also seen to be done. When a case is presented by a litigant in person or incompetent advocate, it may prove a formidable task to strike the right balance between these two objectives. Few judges, I think, would be confident that they are wholly successful in achieving it.

31. [1963] 1 Q.B. 539, at p.578.

As to the content of their decisions, Lord Macmillan once went so far as to write: "In almost every case except the very plainest, it would be possible to decide the issue either way with reasonable justification."[32] This was thought-provoking exaggeration. Sir Nicolas Brown-Wilkinson VC found himself possessed of no such option in the recent case of *In re T. H. Knitwear Ltd.*, saying:

> "I would like to be able to hold in favour of the commissioners. It is to my mind manifestly wrong that the contributories should receive a windfall because the VAT, which would otherwise have indirectly depleted the assets available for them, has been remitted by the commissioners to the suppliers under a statutory relief. But I must decide in accordance with legal principle. I must not distort legal principles in order to produce what, to my mind, would be a just result."[33]

However, if in any case judges find their intellectual processes pulling them in one direction and their sense of fair play pulling them in another, it must be time for them, at very least, to consider whether they may not be misinterpreting the relevant law. Much more often than not our law avoids being an ass.

Members of appellate courts, while less rigidly fettered by precedent than courts of first instance, may find themselves more restricted in other ways. Indeed, in those cases where the decision at first instance has involved the exercise of a judicial discretion or depended on an apparently surprising finding of fact, they may find their powers to do what they personally consider would amount to best justice as between man and man singularly circumscribed.

Nevertheless, for practical purposes, judges at any level frequently have the choice of a number of different routes leading to their final conclusion. The conscious thinking of most of us tends to run more along pragmatic than abstract lines. However, it may do no harm if from time to time we attempt to analyse the basic instincts which have grown with us from early childhood and for better or worse influence us in deciding which signpost to follow.

32. *Law and Other Things*, p.48.
33. [1987] 1 W.L.R. 371, at p.375.