JUDICIARY OF
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THE CRAFT OF JUDGING AND LEGAL REASONING

SPEECH TO BRISTOL UNIVERSITY SCHOOL OF LAW

BY

THE HON MR JUSTICE MOSTYN

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1 It is a very great pleasure to be addressing you 35 years after I graduated from this faculty of this great University. I am doubly pleased to see here a number of those who must take responsibility for my legal education and on setting me on the path that leads me here. Prof Nigel Lowe taught me family law, and for that he bears a heavy responsibility. His wife, Prof Brenda Sufrin was my personal tutor and had a hand in teaching me equity. I recall her letter to me in the Summer of 1978 to tell me the results of the first batch of the exams which counted towards the degree. "You have excelled yourself", she wrote, "you have achieved a third in contract, equity and land law, although getting the third in land law was a close run thing. You redeemed yourself by getting a low 2:2 in international law. Keep up the good work. I foresee a brilliant career." From time to time I have to write a judgment about land law, and it is perhaps predictable that in a recent issue of Family Law Journal a former Dean of this Faculty, and a very close friend of mine, Prof Bailey-Harris condemned a recent one of mine – *Bhura v Bhura* [2014] EWHC 727 (Fam) – as hopelessly faulty (but, with the profoundest respect, I do not agree).

2 My subject matter today is "the craft of judging and legal reasoning". Can I begin by explaining what I am not going to talk about? I am not going to talk about the constitutional role of the judge. I am not going to speak about the boundary between legitimate, perhaps even adventurous, interpretation and illegitimate judicial activism. Or about the increasingly rancorous division in the USA between loose constructionists and textual originalists. Reams have been written about this. For those interested I recommend *The Business of Judging* (OUP 2000) by the late Lord Bingham of Cornhill, and *Reflections on Judging* (Harvard University Press 2013) by Judge Richard Posner of the US Court of Appeals for the Seventh Circuit. I have recently spoken about this in the context of the interpretation of and the exercise of the powers in the Matrimonial Causes Act 1973 in a speech I gave on 8 October 2014 entitled *¡Viva El Loro!*

(see http://www.judiciary.gov.uk/wp-content/uploads/2014/10/viva_el_loro.pdf)

3. Instead, as a puisne judge of 5 years' service, who particularly enjoys first instance judging, I propose to talk about the process of judicial fact-finding in civil proceedings and how, particularly in the field of family law, the facts as found give rise to the actual result.

4. Let there be no doubt. In the field of family law we are asked to find facts of the utmost seriousness. I have tried in child protection proceedings under s31 Children Act 1989 cases where the issue is whether a parent has deliberately killed a child. In effect in such cases I have sat as a Diplock Court trying a charge of murder. In the light of such findings I have been asked to order, and have ordered, forced adoption severing the parental bond. In the

Court of Protection I try issues of mental capacity and in the light of the finding I have been asked to order, and have ordered, forcible caesareans or amputations. I have been asked to make findings as to the life expectancy and quality of life of seriously ill and damaged babies and adults in support of an application that medical care should be made palliative only and that the person should be allowed to die. In financial cases I am asked routinely to make serious findings of fraud with the most far reaching consequences.

5. If I were to ask you what was the key factor in finding facts in a trial you might reply "credibility". Who does the judge believe? The primacy of the factor of credibility has an iconic, almost canonical, status. Thus Posner writes at page 123:

"No legal catchphrase is more often repeated than that determinations by a trial judge whether to believe or disbelieve a witness can be overturned on appeal in only extraordinary circumstances. The reason is said to be the inestimable value, in assessing credibility, of seeing and hearing the witness rather than reading a transcript of his testimony, since the transcript eliminates clues to veracity that are supplied by tone of voice, hesitation, body language, and other non-verbal expressions."

6. Just such a line was taken in *Beacon Insurance Company Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21 (9 July 2014), a recent decision of the Privy Council on an appeal from Trinidad and Tobago. Lord Hodge cited the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14: "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged."

7. He cited the famous dictum of Hoffmann J, as he then was, in *Biogen Inc v Medeva plc* [1997] RPC 1, at page 45: "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

8. He cited Lord Neuberger of Abbotsbury in *Re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, para 53:

"This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

9. So you can see why this feature, credibility, has gained such high importance. It has a long and heavily backed pedigree. But is it justified? Posner has his doubts. He writes at page 123:

"This is one of those commonsense propositions that may well be false. Nonverbal clues to veracity are unreliable and distract a trier of fact from the cognitive content of the witness's testimony. Yet it would occur to few judges to question the proposition that the trial judge has superior ability to judge credibility than the appellate judge, because nothing in the culture of the law encourages its insiders to be sceptical of oft-repeated propositions accepted as the old-age wisdom of the profession, and because appellate judges (indeed all judges) are happy to hand off responsibility for deciding to another adjudicator."

And then he makes this very obvious point:

"No longer, however, are they technologically constrained to do so. Witnesses' testimony could be video-taped and the tapes of their testimony made available to an appellate judge who thought demeanour important in assessing the truthfulness of testimony."

10. This convincingly undermines to my mind the argument that first instance judges somehow have some numinous exclusive power to assess credibility perfectly. But is oral testimony about an event the best source of evidence about that event? Invariably the testimony depends on the memory of the witness. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) (15 November 2013) Leggatt J had some very potent things to say about testimony based on memory at paras 15 – 21:

"An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth."

11. One of Lord Bingham's essays in "The Business of Judging" is "The Judge as Juror: The Judicial Interpretation of Factual Issues". There he quotes an extra-curial speech by Lord Justice Browne, who makes the same argument as Leggatt J, but more laconically:

"The human capacity for honestly believing something which bears no relation to what actually happened is unlimited."

12. I was reading over the weekend the review in the 4 December 2014 edition of the New York Review of Books of the latest work by the masterful storyteller Aleksandar Hemon "The Book of My Lives". In an interview Hemon said this:

"If I try to tell you what happened to me in '91, I'll have to guess about certain things, I'll have to make up certain things, because I can't remember everything. And certain memories are not datable. You and I might remember our lunch, but some years from now we won't remember it was on a Friday. I will not connect it with what happened this morning because they are discontinuous events. To tell a story, you have to—not falsify—but you have to assemble and disassemble. Memories are creative. To treat memory as a fact is nonsense. It's inescapably fiction."

In my opinion a trier of facts should bear this firmly in mind when weighing a witness's memory.

13. Lord Bingham also points to a further obvious pitfall in the path of the assessment of credibility, namely the very plausible but dishonest witness:

"The ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness, is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages."

13. Not infrequently it is shown that lies have been told out of court. That is by no means determinative. It has been said that in the assessment of core credibility in a fact finding inquiry it would be as well for the court to give itself the famous direction in *R v Lucas* [1981] 1 QB 720 where it was stated by Lord Lane CJ:

"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family."

Again, in my opinion this is a highly important observation for a trier of facts to have in mind.

14. Therefore Lord Bingham argues that the better approach is, when finding facts, to look first, where possible, at contemporaneous documents and undisputed facts and to draw conclusions primarily from those sources. He cites the dissenting speech, now almost forgotten, of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, HL: "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, it is so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

15. In similar vein in the *Gestmin* case at para 22 Leggatt J states:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

16. If this is the more reliable approach to fact-finding then this gives rise to a paradox, or at least an irony. I refer again to Lord Hodge's opinion in the *Beacon Insurance Company* case. He cites at para 17 Lord Bridge of Harwich in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:

"[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

And Lord Hodge concluded:

"Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

17. Thus, the more reliable the technique of fact-finding, the more it is susceptible to appellate review!

18. Time does not permit me to explore the role of the expert witness in helping the judge to find the relevant facts. In the field of Family Law the movement now is inexorably in the direction of the Single Joint Expert rather than allowing the parties to use their own experts - see *J v J* [2014] EWHC 3654 (Fam) where I said at para 8:

"One reason why so much forensic acrimony was generated, with the consequential burgeoning of costs, was that the Deputy District Judge at the first appointment on 9 November 2012 permitted each party to have their own expert to value the husband's business interests, notwithstanding the terms of Part 25 FPR which clearly stated then (and even more strongly states now – see PD 25D para 2.1) that a SJE should be used "wherever possible". Not "ideally" or "generally" but "wherever possible". In this case the forensic accountants have filed a total of no fewer than six expert reports and have prepared a joint statement setting out their extensive disagreements. They have charged a total of £154,000 in fees. The husband has been permitted during the course of the case to ditch his expert and to instruct a new one."

And at para 24:

"It can be seen how the failure to appoint a SJE resulted in extremely partial and partisan positions being adopted by the experts who seem to have forgotten that their first duty is to the court and that, notwithstanding the large fees they are paid, their role is not to act as a gladiator on behalf of their client."

19. Posner puts it rather better at p294 where he says:

"A lawyer is not allowed to pay a lay witness to testify; the potential for corruption is obvious. But he may pay an expert witness – and the potential for corruption is obvious."

And at p298:

"Lawyers resist a judge appointing an expert even if both sides are satisfied that the expert is neutral and competent and can communicate with a jury, as academics (and not only academics) can. For the lawyers aren't interested if the judge or jury understands their case; they're interested in winning, and so they hire experts (and pay them very well) whom they think a judge or jury will find persuasive."

And earlier at p296:

"A further problem with expert witnesses is that for many of them litigation is their ordinary, even their only, work. Their technical skills may be minimal, their real skill being theatrical – the ability to charm or dazzle a jury."

1. Family law is now less about sex and more about money. But laws about sex remain on the statute book. A ground for nullity (of a different sex marriage) is incapacity or wilful refusal to consummate the marriage: see section 12(a) and (b) Matrimonial Causes Act 1973. In theory expert medical evidence may be needed to determine this issue.

2. Rule 7.27 of the Family Procedure Rules 2010 is entitled "Medical examinations in proceedings for nullity of marriage" and provides that:

"Where the application is for a decree of nullity of a marriage of an opposite sex couple on the ground of incapacity to consummate or wilful refusal to do so, the court must determine whether medical examiners should be appointed to examine the parties or either of them."

I have never heard in over 30 years of the court appointing medical examiners, although it certainly was in bygone days (see, for example, *Russell v Russell* [1924] AC 687 where Lord Dunedin with barely concealed revulsion stated that "Fecundation *ab extra* is admittedly, by the medical testimony... a rare, but not impossible, occurrence; but its accomplishment will depend, not only or exclusively on the proximity of the organs, but on certain other potential qualities of the particular man"). I had assumed it was a bizarre and barbarous relic that somehow had found itself reiterated in the 2010 rules. But it would seem that expert evidence to this effect is alive and well in India. I draw your attention to the not very well known case of *Kalsie v Kalsie* (1975) DLT 92, [1975] RLR 52, decided on appeal by Avadh Behari J in the Delhi High Court on 23 August 1974. The petitioner wife alleged that he husband was impotent at the time of marriage and continued to be so until the institution of the proceedings. She prayed for a decree of nullity. The petition was dismissed, the Additional District Judge finding that:

"All this shows that it was a made up affairs and the respondent does not suffer from impotency organic or psychological qua the petitioner...

I am of the considered view that the petition has been filed by the petitioner in collusion with the respondent."

In para 9 of his judgment on the appeal there is this startling statement by Avadh Behari J:

"It may be stated here that the husband was examined by a board of doctors on two occasions. Their reports are on the record. In one of the reports the doctors found that the husband was unable to produce erection when asked to masturbate. On the second occasion they found that there was nothing which could prove that he was impotent. These reports were not tendered in evidence on behalf of either side and, therefore, they do not constitute proof in the case."

Had the reports been adduced and the doctors produced for questioning, it is easy to guess what lines the cross-examination would have taken.

However, Avadh Behari J was doubtful whether this would have been useful expert evidence anyway: he held at paras 28 and 29:

"Thirdly there may be cases where a person may have invincible repugnance to the act with a particular individual, though generally capable of having sexual union with others. Where owing to psychological or mental reasons a person is impotent quoad hanc it is not necessary to show universal impotency. In these types of cases the impotency arising from that fact would be within the exclusive knowledge of these spouses and it would be difficult to test it by medical evidence.

I do not think that the learned Additional District Judge was right m drawing an adverse inference because of the non-examination of the doctors by the wife. In view of the admission of the husband himself I think no further evidence was called for. It is not possible for the doctors, I think, in all cases to find out whether a certain person has a sexual aversion to a particular woman or the wife. The doctors can find out whether there is malformation or structural defect in the genitals of a man."

The appeal was allowed and the wife was granted a decree of nullity.

22. So, the facts are eventually found. What happens next? In many fields the law then vests the court with what is described as a "discretion". Sometimes it is a true discretion; sometimes the use of the word is a misnomer. In the field of crime, for example, the verdict of the jury gives the judge a true discretion as to sentence: his powers are bounded only by sentencing guidelines and statutory maxima.
23. A true discretion exists in most financial proceedings, particularly where the award is being made by reference to the principle of need rather than the principle of sharing. It is obvious that the decision whether to award £15,000 per annum in spousal maintenance, or £20,000 or £25,000 is quintessentially one of discretion. So too if the dispute is about the quantum of contact to a child: it is a pure exercise of discretion whether to allow the father to have contact on 2, 3 or 4 days a fortnight.
24. But even where the decision is fundamentally discretionary it must be exercised consistently and predictably. As Deane J stated in the High Court of Australia in *Mallett v Mallett* (1984) 156 CLR 605 at p 641: "It is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances. Otherwise, the law would, in truth, be but the "lawless science" of "a codeless myriad of

precedent" and "a wilderness of single instances" of which Lord Tennyson wrote in his poem "Aylmers Field"'

25. Or as Lord Bingham put it in his in his book "The Rule of Law" (Allen Lane, 2010) at page 51: "The job of the judges is to apply the law, not to indulge their personal preferences. There are areas in which they are required to exercise a discretion, but such discretions are much more closely constrained than is always acknowledged."

26. There is obviously a tension between consistency and flexibility. The judicial dilemma was well illustrated by Ribeiro PJ sitting in the Hong Kong Court of Final Appeal in *LKW v DD* [2010] HKCFA 70; (2010) 13 HKCFAR 537; [2010] 6 HKC 528. He stated at paras 50 and 51:

"However, as Ormrod LJ observed, (*Martin v Martin* [1978] Fam 12) the courts' pronouncements on a provision like section 7 "can never be better than guidelines". This is because, as Gibbs CJ explained (*Mallett v Mallett* at 609), the courts "cannot put fetters on the discretionary power which the Parliament has left largely unfettered."
Dealing with the natural tension existing between the need for flexibility on the one hand and the desire for consistency on the other, Brennan J stated:

"The only compromise between idiosyncrasy in the exercise of the discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so -- guidelines which are not rules of universal application, but which are generally productive of just and equitable orders." (*Norbis v Norbis* (1986) 161 CLR 513 at 538).

As his Honour pointed out, Lord Denning MR addressed the problem of guiding the exercise of an unfettered judicial discretion in *Ward v James* [1966] 1 QB 273 at 295 in the following terms:

"The cases all show that, when a statute gives discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart.

Nevertheless, the courts can lay down the considerations which should be borne in mind in exercising the discretion, and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised, and thus ensure some measure of uniformity of decision. From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process."'

27. Sometimes the nature of the dispute and the facts that are found will to all intents and purposes determine the exercise of the supposed discretion. In such a case the court is not really exercising a discretion at all, but is forming a value judgment about the outcome. This will be so in public law proceedings under section 31 of the Children Act 1989 where the fact finding will have determined whether the threshold of significant harm has been crossed. If so, the findings will effectively determine whether a care order, a supervision order or no order should be made. In private law proceedings the process will be the same where the dispute is as to which parent should be the primary care-giver. It is so in the stark and difficult case which is a relocation application. It is certainly the case in abduction proceedings where a ground of defence is successfully mounted under Article 12 or 13 of the 1980 Hague Convention. Proof of the ground of defence of, for example, the child's objections to a return order only opens the door to the exercise of discretion, but that exercise will almost invariably be in favour of a non-return.

28. In *Re LC* (Children) [2014] UKSC 1 one of the issues was whether a child should have been joined to the proceedings under FPR rule 16.2 FPR which provides that "the court may make a child a party to proceedings if it considers it is in the best interests of the child

to do so." Lord Wilson stated at para 45: "If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens upon a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion."

29. The fallacy that an actual discretion is being exercised in such a case had been conclusively demonstrated (to my mind) by the Supreme Court of New Zealand in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884, a relocation case. In the judgment of the majority (Blanchard, Tipping and McGrath JJ) it was stated at para 32:

"But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court"

And at para 35: "These and other concerns … are inherent in the exercise in which judges administering ss 4 and 5 of the Act are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for individualised attention to be given to each case. As we have seen, the court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme."

28. In *Re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, and appeal in a care case, this analysis was described by Lord Wilson as "interesting". He stated at para 38:

"G v G [1985] 1 WLR 647 was a dispute between parents as to which of them should have residence of the children. Lord Fraser gave the classic exposition of the role of the appellate court in reviewing a trial judge's order in a dispute between members of a family about arrangements for a child. He described the order, at p 649, as having been made in the exercise of the judge's discretion. This classification, which was not controversial, is hard-wired into the mind-set of family lawyers in England and Wales; and, although in *Kacem v Bashir,* [2011] 2 NZLR 1, the Supreme Court of New Zealand made an interesting suggestion, at para 32, that the decision in such a case was evaluative as opposed to discretionary, this is not the moment to consider whether – subject to para 45 below - to depart from the conventional classification or the consequences, if any, of doing so."

29. To my mind the reasoning of the Supreme Court of New Zealand is irreproachable. The consequences of the classification in New Zealand are very significant – a discretionary judgment requires permission to appeal; other judgments entitle an appeal as of right. Here the only consequence is whether the appellate test is "wrong" or "plainly wrong" which to my mind is hardly of any consequence for as Lord Wilson points out at para 44:
"What does "plainly" add to "wrong"? Either the word adds nothing or it serves to treat the determination under challenge with some slight extra level of generosity apt to one which is discretionary but not to one which is evaluative"

30. What the categorisation debate does point up is that, once the facts are found, then for certain types of cases the so-called discretion is virtually extinguished and is replaced by the

function of evaluation, and that it is of pivotal importance for the judge to be aware of the difference. Evaluation is a very different exercise to making a choice between a number of different outcomes, none of which can be said to be wrong. In fact, in the evaluation category there is not much further judging to be done at all, for as Lord Wilson says "the threshold conclusion will almost always drive the exercise of the resultant discretion."

31. When I was first appointed a wise old hand said cryptically to me "find your facts carefully". It has taken me nearly five years but I now think I know what he meant!

32. Thank you for listening to me. It has been a bit of world tour. I hope I have given you some food for thought.
