LAW OF VALUE:
CONCEPTS OF VALUE & EVALUATION IN JUDICIAL DECISION-MAKING

Word Count: 19 923

INTRODUCTION

A Aims of Thesis

This thesis examines the nature of value in law. Value is a protean concept that, while fundamental to judicial decision-making, is not well understood. We need to develop a clearer, more sophisticated understanding of value and its derivatives and cognates – eg values, value judgments, and evaluation. This thesis aims to contribute to that task by examining three broad claims.

The first claim is that two broad senses of ‘value’ exist in law: (1) value\(^1\) as a notion of the merit, worth, quality, amount, or significance of legal subject matter (eg conduct, circumstances, evidence) and (2) values as a belief about what is valuable, significant, or relevant in a particular context and, often, as a guide or reason for a particular choice or course of action. I will argue that the distinction between the two senses of value is evident in the differing uses of the term ‘value judgment’ in law. Further, the distinction also suggests a useful dichotomy between the activities of: (a) valuing (expressing why a factor, consideration, principle, or criterion should guide decision-making) and (b) evaluating (attributing an amount or degree of value – ie merit, worth, quality, amount, or significance – to legal subject matter). An example of valuing is a judge identifying that certain circumstances are relevant to the making of a decision (eg that the case involves ‘the relationships of substantial, well-advised corporations in commercial transactions’\(^2\)). An example of evaluating is a judge determining that the conduct of a party only amounted to ‘driving a hard bargain’ and did not constitute unconscionable conduct.\(^3\)

The second claim is that the sense of value (ie merit, worth, etc) encompasses two distinct concepts of value: (1) numerical value and (2) notional value. Numerical value typically

\(^1\) Terms written in italics in this section are defined in a Glossary at the end of the Introduction. The terms sometimes appear in italics elsewhere in the text; this is to emphasise the particular meaning this thesis attributes to them.

\(^2\) *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 585-586 (Kirby P).

involves a monetary amount, percentage, or other number (eg a finding of contributory negligence of 30% in reduction of the respondent’s damages). Notional value indicates the conceptual quantity of value being attributed to a subject matter. Examples of notional value appear in italics below:

It is clear that, in the present case, the statement of Khan had a high degree of probative value.4

The common law criterion of criminal negligence as negligence deserving of punishment by the criminal law was...designed to impress upon the jury the seriousness of the degree of negligence necessary to support a verdict of guilty.5

When I have regard to the conduct of the Commonwealth in these proceedings, as now known to the Court, it has been highly unreasonable and such as to warrant the Court's making its disapprobation clear by providing a special costs order.6

I will argue that the distinction between numerical value and notional value helps to explain the differing levels of appellate scrutiny that are generally applied to evaluative decisions that call for a numerical outcome (eg a quantum or percentage) versus those that call for a yes/no answer (eg was the defendant’s conduct reasonable?).

The third claim relates to evaluative judgments, which are a form of value judgment in which value (ie merit, worth, etc) is attributed to subject matter according to a legal standard. I will argue that evaluative reasoning (a process of reasoning) and evaluative judgments (a type of legal decision) have several characteristic features.

Underlying these three claims is the premise that notions of value and values (or value-based thinking) are essential to the function of modern adjudication.7 Greater attention to the nature of value and values and their applications in legal reasoning would help judges clarify the reasons for their decisions, particularly where judges must rely on values to make choices or attribute value to subject matter according to legal standards.

The High Court has traditionally been reluctant to openly recognise the role of value and values in law.8 Indeed, remnants of this reticence persist today.9 This reticence about values reflects a view of judicial decision-making that tends to see logic and legal authority as

---

6 Ruhani v Director of Police (2005) 222 CLR 489, 562 [244] (Kirby J).
sufficient to resolve any adjudicative task, to question the objective basis for ‘value judgments’, and to associate rules and logic with judicial objectivity. In contrast, Julius Stone, Sir Anthony Mason, and others have argued that, as judges must consider and apply values in order to resolve legal questions, it is better that judges be transparent about the values they apply in their decisions. This view – that transparency in value-based reasoning is necessary for effective judicial decision-making – represents a foundational assumption for this thesis. The aim of the thesis is to present a more sophisticated understanding of value and values than exists at present and, thus, to enable greater transparency and awareness about their application in law.

Justice Heydon was correct in calling attention to the source of judicial values and to caution judges against the overzealous application of values that might not be widely held. However, a key premise of this thesis is that models of judicial decision-making must recognise values and values-based thinking as integral aspects of modern adjudication. A practical and realistic account of how judges decide – or ought to decide – must consider the form and function of value and values in judicial decision-making. This thesis analyses five aspects of that form and function:

(i) value (Part I);
(ii) values (Part II);
(iii) value judgments (Part III);
(iv) evaluative judgments (Parts IV & V); and
(v) evaluative reasoning (Part V).

The thesis is set out in a logical sequence – Parts I and II (the building blocks of value and values) provide the foundation for Parts III and IV (the decision types of value judgments and evaluative judgments) while Part V integrates the earlier material into an assessment of the key features of evaluative reasoning and evaluative judgments.

B Structure of Thesis

Part I – Value in Law

Part I examines the nature of value in law. The chapter describes several features of the concept of value in law: (a) meanings of the term ‘value’; (b) kinds and gradations of value; (c) the attribution of value to subject matter; (d) value and decision outcomes; and (e) the language of value.

This chapter makes two key claims. The first is that, in law, the concept of ‘value’ encompasses two basic senses – value as notion of the merit, worth, quality, amount, or significance of something and values as a belief about what is valuable, significant, or relevant in a particular context and, often, as a guide or reason for a particular choice or course of action. The second claim is that a clear dichotomy exists between attributions of value expressed in numerical terms (e.g., as a quantum) and as a notional quantity (e.g., as a degree or amount of probative value). The legal significance of this dichotomy between numerical value and notional value is examined.

**Part II – Values in Law**

Part II examines values in law. The chapter examines: (a) the role of values in adjudication and (b) the distinction between valuing and evaluating.

The central claim of this chapter is that law cannot function without values as guides or reasons for action and choice. Certain values may be inappropriate or impermissible, but law needs values as a constitutive element in legal reasoning. Value-based reasoning allows judges to undertake many basic and complex tasks, including the attribution of value to subject matter such as conduct, circumstances, and evidence.

**Part III – Value Judgments in Law**

Part III examines value judgments in law. The chapter describes value judgments, proposes a taxonomy for value judgments in law, and assesses the role of value judgments in legal reasoning.

The central claim of this chapter is that use of the term ‘value judgment’ in law encompasses two distinct (though related) concepts: (a) a value-based judgment (decisions based at least partly on values instead of upon objective information alone) and (b) an evaluative judgment (a decision involving the application of a legal standard to a set of facts). Both types of value judgment play essential roles in judicial decision-making.
Part IV – Evaluative Judgments in Law

Part IV examines evaluative judgments in law. Evaluative judgments assess the value (ie merit, worth, etc) of a subject matter by applying a legal standard (eg ‘reasonable’, ‘good faith’, ‘unacceptable risk’) to a set of facts. The chapter outlines the evolution of evaluative judgments in contemporary jurisprudence and describes the use of the term ‘evaluative judgment’. It also examines comments by Mason and Deane JJ in *Norbis v Norbis*¹³ on the term ‘discretion’ and how these relate to value judgments calling for numerical outcomes (eg a quantum).

The key claim of the chapter is that the legislative reliance on broad legal standards in statutes makes evaluative judgments an integral component of modern adjudication.

Part V – Evaluative Judgments & Evaluative Reasoning

Part V examines the nature of evaluative reasoning and the logical character of evaluative judgments. The chapter describes the logic of evaluation and the nature of evaluation in law, and proposes a scheme for the underlying logic of evaluative judgments involving a yes/no answer.

The central claim of this chapter is that evaluative judgments and evaluative reasoning have several features that, taken together, characterise them a distinct decision type and modes of reasoning: (1) they represent normative assertions; (2) they follow a distinct logic of evaluation; and (3) they are neither factually nor logically determined.

---

¹³ (1986) 161 CLR 513 (‘Norbis’).
Glossary

The definitions below indicate the meanings that are attributed to these words in the thesis.

*evaluating*: attributing an amount or degree of value (ie merit, worth, quality, amount, or significance) to legal subject matter (Part II)

*evaluative judgment*: a type of legal decision involving the application of a legal standard to a set of facts; refers to the overall decision (cf *evaluative reasoning* which refers to the process of deciding); a form of *value judgment* (Parts III - V)

*evaluative reasoning*: the process of assessing the value of a subject matter; in law, this typically involves the application of a legal standard to a set of facts (Part V)

*notional value*: the conceptual quantity of *value* (ie merit, worth, quality, amount, or significance) attributed to a subject matter; often expressed in terms of amount or degree (Part I)

*numerical value*: the *value* attributed to a subject matter stated in numerical form (eg a monetary amount or percentage) (Part I)

*value*: a notion of the merit, worth, quality, amount, or significance of a subject matter (Part I)

*values*: a belief about what is valuable, significant, or relevant in a particular context and, often, as a guide or reason for a particular choice or course of action (Part I)

*value judgment*: the term may be used in a variety of senses; see the ‘Taxonomy of Value Judgments in Part III

*value-based judgment*: decisions based at least partly on *values* instead of upon objective information alone; a form of *value judgment* (Part III)

*value-based thinking*: a generic term indicating reasoning or decision-making that involves notions of *value* or *values*

*valuing*: expressing why a factor, consideration, principle, or criterion should guide decision-making (Part II)
PART I

VALUE IN LAW

A The Meanings of ‘Value’

Value is a protean concept. Grammatically, it functions as a verb (eg *I value your input*), an adjective (eg *your input is valuable*), and an abstract noun (eg *listening to others is an important value*). Derivatives and cognates include values, valuable, valuableness, valuing, evaluating, and valuation. We make judgments about how much value something has and argue about what values ought to be applied in a given circumstance. In legal contexts, the term ‘value’ usually takes one of two meanings.

Firstly, value may refer to a belief about what is valuable, significant, or relevant in a particular context and, often, as a guide or reason for a particular choice or course of action (‘values’). Values in this sense function as ‘conceptions of the desirable that guide the way persons select actions, evaluate people and events, and explain their actions and evaluations’. In addition to guiding decision-making, values may also serve as grounds for justifying decisions. The various concepts of ‘rights’ encapsulate certain legally relevant values, as do polity-based principles relating to the separation of powers and the institutional competence of different institutions to decide particular issues. Societal values are also relevant to certain legal decisions – for example, the High Court was recently called upon to ascertain whether a person had used the postal service in a way that ‘reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive’. Values are typically thought of things that are held by people, either individually (eg personal values) or communally (eg community values). Values or ‘value systems’ that are particular to one person are sometimes described as ‘idiosyncratic’ to emphasise their subjective character. Value systems refer to the complex or architecture of values that a person has.

Although judges are meant to set aside their ‘personal’ values and draw on broadly held legal and societal values, the reality is that judges inevitably differ in the value systems they bring to adjudication. In terms of legal values, judges may, for example, value certainty and

---

predictability while others value flexibility and pragmatism. Judges also differ in their perceptions of broader societal values.\textsuperscript{19} However, even similar value systems do not necessarily lead to the same decisions being made or to the same reasons being advanced to support those decisions. As Thomas Kuhn observed: ‘(t)wo men deeply committed to the same values may nevertheless, in particular situations, make different choices, as in fact they do’. Thus, values are best considered as guides rather than as determinants for judicial decision-making.

In its second sense, value refers to the *merit, worth, quality, amount, or significance of a subject matter* (‘value’). In law, value is attributed to subject matter such as conduct, circumstances, or evidence. Value is expressed either numerically (eg as a quantum or percentage) or notionally (ie as a conceptual ‘quantity’ of value). Pecuniary value and probative value are examples of a numerical and a notional value, respectively (see further below). In contrast to science, where many phenomena of scientific interest are amenable to empirical measurement, most subject matter of legal interest (eg acts, states of affairs, oral statements) and most ways in which subject matter can have ‘value’ in legal contexts (eg as being reasonable, proper, in good faith, unconscionable) are not measurable or definable in any empirical or quantitative sense. Rather, evaluation of legal ‘phenomena’ turns upon qualitative and intuitive assessments that reflect the argument of the parties and the experience of the judge.\textsuperscript{20}

Value attributions are often characterised as being matters of impression or intuition to emphasise the subjective nature of the assessment. For example, in describing s 51AA of the *Trade Practices Act 1974* (Cth), Kirby J noted that the provision ‘involved the application to a mass of evidence of a legal standard expressed in broad statutory language and of decisional law calling forth a judicial response that is partly analytical and partly intuitive’.\textsuperscript{21} However, a subjective determination is not necessarily an idiosyncratic one, and judges clearly strive to make attributions of value that are objectively valid (ie consistent with how other judges would attribute value in that context). A number of factors discourage ‘idiosyncratic’ value attributions, including the prospect of appellate review;\textsuperscript{22} systemic disapproval of judges who

\textsuperscript{19} Eg *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 403-4 (Gaudron, McHugh, Gummow and Hayne JJ), 421-2 (Kirby J), 442 (Callinan J).


\textsuperscript{21} *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 86 [82] (Kirby J).

decide according to their personal opinion;\textsuperscript{23} the use of guidelines or prescribed criteria;\textsuperscript{24} the
ability to draw analogies with previous cases;\textsuperscript{25} and the requirements for judges to articulate
the reasons for their decisions.

While these two senses of value have distinct applications in law (see Part I and Part II), they
share the same conceptual foundation in that values are essentially constructs of notions of

B The Concept of Value

We deal easily with concepts of value as a measure of something’s merit, worth, quality,
amount, or significance, both in law and in everyday life. The ease with which we handle
notions of value suggests that humans have a cognitive ‘internal accounting system’\textsuperscript{26} for
perceiving and attributing and communicating about value. Several features of our ability to
use notions of value are relevant in law. Firstly, we are able to attribute value to things that
are real (eg a blood-stained knife) and to things that are conceptual (eg a risk of something
occurring). Secondly, we can conceive of value as deriving from measurable, empirical
properties of physical things and from notional, intangible qualities of things that exist only in
our minds. Thirdly, we are able to integrate different conceptions of value, such that we can
readily combine value information that is factual and descriptive (eg scientific measurements,
accepted historical facts) with information that is evaluative and subjective (eg intuitive,
impressionistic assessments about quality of X’s conduct). In short, the notion of value seems
to function as a common human currency and, in legal contexts, to function regardless of the

\textsuperscript{23} Muschinski v Dodds (1985) 160 CLR 583, 615 (Deane J); Justice Heydon, ‘Judicial Activism and the Death of

\textsuperscript{24} Norbis (1986) 161 CLR 513.


subject matter being evaluated, the method in which the evaluation is undertaken, or the manner in which the outcome is expressed.  

Studies of human cognitive psychology indicate that we think about the value of things in quantitative terms. The language of our everyday reasoning also supports this notion. For example, we talk about a state of affairs as being ‘more’ or ‘less’ just and of conduct being ‘barely’ adequate or ‘more than’ sufficient to meet a standard. This language of relative value suggests that we conceptualise value as a notional quantity occurring along a continuum containing: (i) a threshold or reference value (eg the minimum amount of conduct to be considered reasonable in the circumstances) and (ii) increments of value above or below that reference point. Even a simple binary system of value (eg just/unjust) implies a basic scheme of quantity in which a judge must determine both the value of ‘justness’ for the subject matter being evaluated and the threshold value for justness in the circumstances of the case.

Words are often the instruments for expressing gradations in notional quantity. Sometimes we give them adjectival shades (eg wholly wrong, plainly wrong, very clearly wrong, demonstrably wrong) that mean more or less the same thing or, alternatively, establish an ordinal ranking (flagrant injustice, significant injustice, minor injustice). Like the term ‘value’, other generic evaluative terms also reflect notions of amount or degree (eg ‘more merit’, ‘less worth’, ‘better quality’, ‘a great amount’, ‘little significance’).

C Value Attribution

To attribute a numerical value or a notional value to a subject matter implies that the subject matter is capable of possessing a quantity, amount, or degree of a particular property, characteristic, or concept. This is unproblematic for most subject matter of legal interest (eg the acts, omissions, or state of mind of a party, the circumstances between the parties, pieces of evidence). However, it can be difficult to attribute value to subject matters that are novel to the law or for which there is no societal consensus.

---

27 That is, the manner in which we think of numerical value appears analogous to how we think about notional value.


We can describe the value attributed to things in terms of: (i) type, (ii) valence, (iii) magnitude; and (iv) provenance.30

**Type:** In law, the value type reflects the legal question involved. Thus, for example, questions of evidence present issues of probative or prejudicial value. Likewise, statutory provisions, common law rules, and equitable principles involve legal standards such as ‘fair’, ‘reasonable’, and ‘proper’ and, thus, invoke the value ‘types’ of fairness, reasonableness, and properness.

**Valence:** The valence of a value is typically expressed as being above or below a particular reference level or threshold (eg proper or improper).

**Magnitude:** As for the magnitude of a value, there is a clear dichotomy between value expressed in numerical terms (eg monetary or percentage value) and as a notional quantity (eg probative value).31 Gradations in notional value are often described as questions of ‘degree’, indicating that gradations exist in the merit, quality, worth, amount, significance, intensity, extent, level, severity, intensity, etc of a particular property, characteristic, or concept (eg reasonableness or risk) (see further below). Below are examples of how the magnitude of value is expressed for legal concepts:

**Damages:** The pecuniary value (quantum) represents an amount of harm, ie the injury, damage, or loss that the plaintiff incurred because of a legal wrong committed by the defendant.

**Contributory negligence:** The percentage of apportionment represents an amount of responsibility, ie the proportion to which the plaintiff contributed to the incident or the harm suffered because of their failure to take reasonable care for their own safety.

**Probative value:** The notional value represents a degree of relevance, ie the extent to which evidence could rationally affect the assessment of the existence of a fact in issue.32 For example, in *R v Lockyer*,33 Hunt CJ at CL noted that the ‘probative value of evidence is the degree of its relevance to the particular fact in issue’.34

---


32 *Evidence Act 1995* (Cth) Dictionary pt 1 (definition of ‘prejudicial value’).


Reasonable conduct: The notional value attributed to the defendant’s conducts represents a degree of reasonableness that can be compared with the degree of reasonableness attributed to the reference (or threshold) standard of conduct for the circumstance.

Adequate maintenance: The pecuniary value (quantum) represents the minimum amount of support that the testator requires in the circumstances. This value can then be compared with the actual amount of maintenance allocated to the testator.

To make value attributions, judges must be able to discern gradations of merit, quality, worth, amount, or significance across a range of contexts and subject matter. To ensure uniformity in these attributions, judges must share similar capacities for discernment. Consistency is more likely when the value in question is a legal concept (eg relevance, prejudicial value) than when the value is referenced to community values or standards.35

Provenance: Finally, the provenance of a value refers to its source or origin. Generally, notions of value or values would be drawn from legal, societal, or personal sources. Gleeson, for example, suggested seven different ways in which advocates and judges ‘can and do identify and argue from values’.36 These techniques included using values drawn from within the legal system and from history, community standards, philosophy, evolutionary psychology, external sources (eg international law), and politics. Notions of legal value and values are drawn from within the legal system itself, and encompass the norms and principles indicated in legal authorities (both statutory and general law) as well as those implied by the Australian Constitution, the rule of law, and our system of government. Other notions of value are referenced to notions of the values or standards of the Australian community, either generally or of particular sectors. In contrast to legal values, whose meaning is generally stated in legal authorities, societal values are problematic for judges to discern, partly because the values themselves are not uniform within society.37

D Gradations of Value

Probative value is a useful example of a notional value because it is often expressed in terms of a notional or relative quantity, eg weakly/strongly probative, high/low probative value. The linkage between probative value and notions of likelihood aids in seeing the quantitative

character of the concept. The standard of an ‘unacceptable risk’ is analogous in this respect.\textsuperscript{38} However, the concept of notional value does not depend on any relationship with quantitative concepts such as probability or likelihood. Rather, the concept of notional values relies on the capacity of qualities, properties, characteristics, or concepts (eg abstract nouns such as ‘reasonableness’) to be expressed in terms of the degree or amount to which the quality, property, characteristic, or concept is present in a subject matter, rather than being restricted to simple claims of presence (eg X has characteristic A) or absence (eg X does not have characteristic A).

While we do describe legal subject matter as being (eg) reasonable or unreasonable, the underlying concept of reasonableness is amenable to gradations of value. Thus, when judges are asked to assess whether a party’s conduct was reasonable, they will do so by: (a) attributing a certain value to the subject matter and (b) establishing a reference (or threshold) value for ‘reasonable’ conduct in the circumstances of the case. The judge then compares the two notional quantities to decide if the conduct was reasonable or not.

For numerical value, value attributions are typically made according to a continuum of value (eg 0% to 100% for contributory negligence or $0 to $… for damages) and in simple increments of whole numbers (eg +1% or +$1). However, for some legal questions, it may be necessary to establish standard a reference or threshold value (eg the minimum amount needed to ensure ‘adequate’ maintenance for a testator).

E Value & Outcomes

For the purpose of appellate review, it is necessary to distinguish between attributions of value that: (i) occur in the process of deciding a question and (ii) are expressed as the final answer for that question. In deciding a question, a judge makes value attributions for particular subject matter. In coming to a conclusion about the question, the judge may need to distil a number of specific value attributions into a single overall value assessment, the outcome of which may be expressed as a numerical amount (eg a quantum) or as a yes/no answer.

\textsuperscript{38} Eg Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) s 9.
Campbell JA demonstrated this point in his judgment in *R v Ford*, which considered the appropriate degree of appellate scrutiny to apply to decisions about the admissibility of similar fact evidence under s 97(1) of the *Evidence Act 1995* (NSW):

There are some earlier statements that might create the impression that the appropriate standard for review of one of the questions needed to be decided in applying section 97(1) was the *House v The King* standard. In *R v Fletcher* at 317 [36], Simpson J said:

'A decision to admit or reject evidence tendered under s 97(1) must, obviously, be a decision based upon the information and material available to the judge at the time the decision is made. It is a decision involving ‘a degree and value judgment’ (a phrase drawn from remarks made in the High Court in *Fleming v Hutchinson*...Such a decision is reviewable on appeal only on the principles stated in *House v The King*...'

I do not, with respect, agree that any of the decisions involved in the application of section 97(1) involve ‘a degree and value judgment’ of any different type to that involved in, for example, a decision that a person has acted negligently...a decision whether a contract is unjust...or whether it is just and reasonable to extend a limitation period...Concerning all the types of decisions just mentioned, an appellate court exercising an appeal by way of rehearing substitutes its own view once it is convinced that the trial judge was in error. The question posed by section 97(1)(b) namely, whether the evidence will have significant probative value, is a question that is answered by a ‘yes’ or ‘no’ answer. In that respect it is not a question of degree.

The focus of Campbell JA is quite clearly on the outcome of the decision, whereas the comments by Simpson J in *R v Fletcher* suggest her Honour was more concerned with the decision-making process called for in applying s 97(1) and, specifically, the need for trial judges to make what her Honour characterised as a ‘degree and value judgment’. Thus, Campbell JA and Simpson J are really dealing with different aspects of the trial judge’s decision – one is focused upon the value attributions made by the trial judge in the process of deciding the question, while the other is focused upon the answer that the trial judge ultimately reached. This should not be taken to minimise the substantive differences between the views of Campbell JA and Simpson J on s 97(1), which relate to whether the s 97(1) decision-making process should be considered ‘discretionary’ and therefore subject to appellate review according to the principles in *House v The King*.

Decisions involving attributions of *notional value* generally call for binary/binomial (yes/no) answers (eg was the conduct unconscionable: yes/no?). There are two implications of this. Firstly, the decision-making process for these questions may involve the synthesis or balancing of multiple value attributions (eg weighing the probative versus the prejudicial value of a piece of evidence). The translation of multiple value attributions to a single yes/no answer can obscure the range and complexity of the particular value attributions that led to

---

40 Ibid 481-482.
42 *House v The King* (1936) 55 CLR 499.
the ultimate conclusion. Secondly, the restriction to a yes/no outcome limits the allowance that an appellate judge can make if she comes to a different conclusion than the trial judge.\textsuperscript{43} Generally, in an appeal by way of rehearing for a non-discretionary decision, it would be unusual for an appeal court to accept that both the yes and no answers were legitimate responses.\textsuperscript{44}

Decisions involving attributions of \textit{numerical value} may either call for a numerical answer or a binary (yes/no) answer. While these decisions must be distilled down to a single numerical answer (eg a quantum of damages), in an appeal by way of rehearing allowance is generally made for a range of acceptable numerical answers, which is sometimes referred to as a ‘zone of reasonable disagreement.’\textsuperscript{45} Allowing for a range of legitimate answers means that minor differences in dollar values or percentages, such as might constitute mere differences of opinion between the trial judge and the appeals judge rather than an error by the trial judge, do not become a reason for appellate intervention. In \textit{Norbis}, Mason and Deane JJ observed:

If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance.\textsuperscript{46}

Similarly, in deciding that an apportionment of negligence is not a finding that is ‘lightly reviewed’, the High Court observed that the issue was:

[a] question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.\textsuperscript{47}

The matrix of value attributions underlying a decision can also be obscured if judges do not articulate their value attributions within their reasons. Judges often omit the specific value attributions that led to an overall conclusion and list the facts supporting a conclusion with little or no discussion or evaluation. In \textit{Kelso v Tatiara Meat Co Pty Ltd},\textsuperscript{48} for example, Dodds-Streeton JA observed:

It is well established that impression and value judgment are highly significant to the determination of a s 134AB(16)(b) [of the \textit{Accident Compensation Act 1985 (Vic)}] application...a catalogue of the factual findings on consequences, if complete, will frequently speak for itself. In some cases, the consequences will self-evidently support the conclusion, whether positive or negative...The judge must identify the consequences and, having made the relevant comparison, decide whether or not the extent and character of the consequences

\textsuperscript{43} \textit{Warren v Coombes} (1979) 142 CLR 531.

\textsuperscript{44} \textit{Certain Lloyds Underwriters v Kathy Giannopoulos} [2009] NSWCA 56 (20 March 2009) [105], [108].

\textsuperscript{45} \textit{Bellenden (formerly Satterthwaite) v Satterthwaite} [1948] 1 All ER 343, 345 (Asquith LJ).

\textsuperscript{46} \textit{Norbis} (1986) 161 CLR 513, 518.

\textsuperscript{47} \textit{Podrebersek v Australian Iron & Steel Pty Ltd} (1985) 59 ALR 529, 532.

\textsuperscript{48} (2007) 17 VR 592.
impress him or her as very considerable or not.\textsuperscript{49}

The High Court has emphasised that judges do not need to document every aspect of their reasoning – their reasons must merely be adequate to explain their decision,\textsuperscript{50} particularly where value attributions must be made according to a ‘necessarily impressionistic standard’.\textsuperscript{51} Nonetheless, closer consideration of the logic of evaluative judgments suggests that the appellate task of finding error is facilitated if judges articulate their value attributions, partly because doing so can help to demonstrate the advantages held by the trial judge (see Part V). In assessing whether a value attribution was correctly made, an appellate judge will consider what advantages the trial judge might have had in making the evaluation.\textsuperscript{52}

F \textit{Scales of Wrongness}

In philosophy, the magnitude of a value is sometimes represented using a value scale, which may be continuous, ordinal, or binary in character.\textsuperscript{53} Continuous value scales may start at zero (or ‘no value’) and continue upwards in positive value increments or, alternatively, they may have a demarcation position and two continuous axes (one axis for positive values and one axis for negative values). In ordinal scales, the value increments represent rankings based on comparative descriptions (eg US academic grades: A, B, C, D, F). A binary scale, although arguably not a scale at all, consists of two fields of value – one comprising a positive valence and the other a negative valence.

Value scales emphasise the dichotomy between value as a numerical amount and value as a notional quantity. Numerical values exist along a continuous scale, starting at zero (eg no award of damages or no apportionment of contributory negligence) and continuing upwards in increments of dollars or percentages. While it is possible to conceive of notional value in terms of a continuous scale, it is difficult to construct in practice as the increments of the scale must be expressed using words not numbers. An ordinal scale for notional value is more straightforward – for example, the increments for the ‘wrongness’ of a decision could be stated as \textit{plainly wrong} – \textit{wrong} – \textit{not the preferred answer but not incorrect}. The scale can be constructed using adjectival shades (eg wholly, plainly, clearly, highly) or distinct verbal formulations (ie phrases, expressions, sentences) to describe the rankings. Though warning of the ‘danger in over-analysis’, Lord Neuberger proposed an ordinal-type scale to categorise

\begin{itemize}
\item \textsuperscript{49} \textit{Kelso v Tatiara Meat Co Pty Ltd} (2007) 17 VR 592, 628 [192].
\item \textsuperscript{50} \textit{Aktiebolaget Hässle v Alphapharm Pty Ltd} (2002) 211 CLR 411.
\item \textsuperscript{51} Transcript of Proceedings, \textit{Dwyer v Calco Timbers Pty Ltd} [2007] HCATrans 395 (3 August 2007) (Hayne J).
\item \textsuperscript{52} \textit{State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)} (1999) 73 ALJR 306, 330; \textit{Aktiebolaget Hässle v Alphapharm Pty Ltd} (2002) 211 CLR 411, 448; \textit{Biogen Inc v Medeva plc} [1997] RPC 1, 45.
\item \textsuperscript{53} Nicholas Rescher, \textit{Introduction to Value Theory} (Prentice-Hall, 1969) 63-65.
\end{itemize}
appellate conclusions about a trial judge’s findings on the issue of proportionality under art 8 of the European Convention on Human Rights 1950 (EU):

An appellate judge may conclude that the trial judge’s conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge’s view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).54

As Lord Neuberger emphasised, caution must be exercised with ordinal rankings for notional value. While ordinal distinctions offer some analytical clarity, they can lead to error if, for example, the categories become the starting point for analysis rather than the text of statutory provision.55 This is particularly applicable to the concept of ‘wrongness’. In Edwards v Noble, Walsh J warned of the difficulty in distinguishing among ordinal rankings of wrongness during appellate review, noting that he had ‘always found much difficulty in distinguishing, in a practical sense, between a conclusion that a trial judge was wrong and a conclusion that he was clearly wrong’.56 Likewise, Lord Wilson of the UK Supreme Court similarly remarked that: ‘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’. 57

In Australian courts, the question raised by Lord Wilson is relevant for evaluative decisions that, while not discretionary in the strict sense, are nonetheless reviewed on appeal according standard of whether they are ‘plainly’ or ‘clearly’ wrong (or a similar adjectival shade). These phrases are generally reserved for decisions that are discretionary in the strict sense or that appeal courts treat in a matter analogous to discretionary decisions (eg assessments of damages, apportionments of negligence).58

In Nigro v Secretary to the Dept of Justice,59 for example, the Victorian Court of Appeal considered several appeals to the making of supervision orders under s 9 of the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic). Section 9(1) provides that, to make an order, a trial judge must be ‘satisfied’ that the offender poses an ‘unacceptable risk of committing a relevant offence if a supervision order is not made and the offender is in the

55 Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390, 418 [89].
56 (1971) 125 CLR 296, 318.
57 In re B (A Child) [2013] UKSC 33 (12 June 2013) [44].
58 House v The King (1936) 55 CLR 499; Lee Transport Co Ltd v Watson (1940) 64 CLR 1; Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529; Singer v Berghouse (1994) 181 CLR 201.
59 [2013] VSCA 213 (16 August 2013)
community’. The Court of Appeal (Redlich JA, Osborn JA, Priest JA agreeing) found that although the decision was not a discretionary one, the determination under s 9(1) was ‘so much a question of value judgment based on a matrix of fact and degree that this Court should not interfere with the determination of the County Court unless it is plainly wrong’. The joint judgment went to observe that:

The decision is one as to where the risk falls within a range of like risks. It depends upon the opinion of a judge familiar with a range of risks within which the relevant risk occurs. A qualitative assessment of this kind should not be easily disturbed.

It is submitted that the Court of Appeal was correct in emphasising the advantages of the trial judge in a determination of this kind and to recommend that, before an appeal court reaches a conclusion as to whether such a determination is wrong, it gives careful consideration to those advantages. The use of term ‘satisfied’ also introduces an ‘element of subjectivity’ that has, in other contexts, supported the application of principles of appellate restraint analogous to those applied to discretionary decisions. However, the Court of Appeal did not consider the implications of the term ‘satisfied’, electing instead to rely upon its characterisation of the decision as a ‘qualitative assessment of this kind’ to support its conclusion that the decision should be interfered with on appeal only if it is ‘plainly wrong’.

The difficulty with this approach is that, having determined that the s 9(1) decision was not discretionary and having failed to comment on the element of subjectivity afforded by the statutory text, it is not clear why the decision merits the ‘extra level of generosity’ indicated by the adverb ‘plainly’ in addition to the deference that ought generally to be afforded to evaluative decisions in which a trial judge maintains significant advantages over the appeal court. The implication of using a standard of ‘plainly wrong’ is that it is possible for an appeal judge to decide that a trial judge was ‘wrong’ to find that an offender presented an unacceptable risk but not so ‘plainly wrong’ as to warrant interference by the appeal court. This is an uncomfortable possibility given the liberty interests at stake for the offender.

A better approach, given the Court of Appeal’s focus on the nature of the s 9(1) decision and the advantages held by the trial judge, would have been to characterise the advantages held by

---

60 Ibid [41].
61 Ibid.
the trial judge and then, taking these into account, to decide whether the decision was incorrect. As Campbell JA observed in *Certain Lloyds Underwriters v Kathy Giannopoulos*: 65

What the appellate judge needs to do is to consider whether the particular case in front of him or her is one where the trial judge had an advantage, if so in what did it lie; and whether, taking account of that advantage, the appellate judge comes to the view that the trial judge’s decision was wrong. If, in those circumstances, the appellate judge comes to the decision that the primary decision is wrong, that is in itself justification for correcting it. 66

G The Language of Value

In *Dwyer v Calco Timbers Pty Ltd* 67 (which was the subject of a successful High Court appeal), Maxwell P of the Victorian Court of Appeal commented on the use of ‘adjectival language’ in statutes and the emphasis it places on intuitive, non-quantitative evaluations:

The statutory language which governs the ‘serious injury’ question is the language of impression. For better or for worse, the legislature has chosen to adopt adjectival language, the language of description and comparison. The court must be satisfied that the relevant consequence - in this case, the pain and suffering consequence - when compared with other cases in the range of possible impairments or disfigurements, ‘can be fairly described as being more than significant or marked and as being at least very considerable.’ …A phrase like ‘at least very considerable’ does not allow of any quantification. Rather, it requires the judge to make a judgment, based on an overall evaluation of the evidence…It does seem to me to be unfortunate, from the perspective of injured persons, that what is obviously regarded as a very significant opportunity - that is, to sue at common law - should have been made to depend on such imprecise, impressionistic, adjectival criteria. 68

While we can characterise the difference between value as a notional quantity and value as a numerical amount in broad philosophical terms, in law the truly salient difference is a matter of language. Simply put, for questions involving value as a numerical amount, judges can state the value they attribute to particular facts and to an overall assessment of value with precision (eg as an exact quantum or percentage). Verbal expression lacks the precision and specificity of numbers – words simply cannot express a quantitative concept with anything near the exactness of numbers. As French J observed of the word ‘likely’ in *Australian Gas Light Co v ACCC (No 3)*: 69

The meaning of ‘likely’ reflecting a ‘real chance or possibility’ does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. 70

In general, gradations of notional value must expressed through some form of grammatical or rhetorical technique. These techniques include:

66 Ibid [108.
68 *Dwyer v Calco Timbers Pty Ltd* [2006] VSCA 187 (8 September 2006) [40]–[42].
70 *Australian Gas Light Co v ACCC (No 3)* (2003) 137 FCR 317 [348].
(a) the selection of words with similar but subtly different meanings (eg marked, substantial, severe, serious, considerable);
(b) adjectival or adverbial modification (eg ‘plainly’ wrong vs wrong);
(c) the use of analogies; (eg conduct X in circumstance Y is no less reasonable that conduct X in circumstance Z)
(d) classification schemes (eg ‘situational’ vs ‘constitutional’ disadvantage); and
(e) multiple descriptions using slightly different wordings.

Another technique is to use well-recognised verbal formulations such as a ‘wholly erroneous’ estimate of damages, which former High Court Justice Michael Kirby referred to as belonging to the ‘banal jurisprudence of damages appeals’.

While it is straightforward to conceptualise how a range of acceptable dollar values or percentages might be attributed to a subject matter, it is typically difficult to envision – and then to articulate – how a range of acceptable values might exist for value attributions stated in terms of a notional quantity. Even a statement such as the ‘the evidence had a high degree of probative value’ differs relevantly from (eg) a finding of special damages for $50 000 or an apportionment of negligence of 25%. Statements often do not allow for partial agreement. For example, consider the following judicial conclusion:

In my opinion for the owners to insist…upon the Roberts abandoning their rights to proceed with bona fide litigation in relation to their rights under their existing lease was to engage in unconscionable conduct

How does one disagree with an expression such as this except by disagreeing entirely with it? It is not a statement with which another judge could find a ‘zone of reasonable agreement’.

However, although attributions of numerical value are expressed with greater precision than for notional value, they also rely on the subjective determination of the judge and, thus, may be no less a matter of intuition and impression than attributions of notional value. As Mason J observed regarding the valuation of property:

As with the assessment of damages, especially in personal injury cases, the valuation of property by a court has many of the characteristics of a discretionary judgment. Valuation is a matter of estimation, not of precise mathematical calculation. It certainly involves the making of a value judgment in the metaphorical as well as the literal sense.

---

72 NOM v DPP [2012] VSCA 198 (24 August 2012); Nigro v Secretary to the Dept of Justice [2013] VSCA 213 (16 August 2013); In re B (A Child) [2013] UKSC 33 (12 June 2013) [38], [44], [91], [110], [137]–[141], [203].
73 ACCC v C G Berbatis Holdings Pty Ltd (2000) 96 FCR 491 [129].
76 Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336, 381.
Similarly, it is generally neither permissible nor desirable for judges to attempt to ‘quantify’ attributions of notional value using (eg) formulae or algorithms – Allsop J remarked, for example, on the ‘danger of searching for quantitative answers to a relative and judgmental analysis’.  

77 ACCC v Liquorland (Australia) Pty Ltd [2006] FCA 826 (30 June 2006) [782].
PART II

VALUES IN LAW

A Values in Adjudication

The modern, post-legalist view is that values play an integral role in judicial decision-making. However, while there is broad acceptance that ‘we are all realists now’ and that judges rely upon values to guide choices in addition to their reliance on logical argument and analysis of legal authority, the underlying adjudicative ideal in Australia still favours certain aspects of the formalist/legalist approach that prevailed during the Dixon-era of the High Court. In the formalist/legalist model, a judge reaches a valid legal conclusion by following a closed chain of reasoning between the relevant legal rules (located in authoritative legal materials) and the particular factual circumstances. In essence, the legalist/formalist model reduces adjudication to a matter of logic and fact finding, meaning that the ‘determination of what the law is requires no value judgment’. Rules, in this model, are desirable because – in marked contrast to broad legal standards – they prescribe the circumstances required for the application of a law and therefore constrain the field of permissible considerations and shield judges from charges of judicial subjectivity.

There is, however, a clear legislative trend towards greater use of broad statutory standards rather than precise legal rules, which suggests that while the formalist emphasis on logic and authoritative legal materials may persist, the legalist preference for rules is fading (see Part IV). For legalists such as Sir Dixon, a key advantage of rules as laws was the extent to which they excluded the intrusion of values, which were associated with subjective judicial preferences. As precise rules could be applied through logical deduction – coupled with judicious use of analogical reasoning – values had little role in judicial decision-making. The continued integration of broad legal standards into statutory law means that notions of value and values are becoming an increasingly integral aspect of modern adjudication, both in terms

---

of the reliance of judges on values as guides for their decision-making but also in terms of the assessments of value (ie evaluations) judges must make when applying a legal standard to a set of facts (see Parts III and IV).

Judicial decision-making is not, of course, ‘value-free’ even for the most basic adjudicative tasks. Values influence, for example, the selection of certain facts, precedents, and chains of reasoning as relevant or applicable. Likewise, in analogical reasoning judges must make evaluative judgments about the similarities and differences of facts and circumstances to the present matter and, thus, whether to distinguish or follow a precedent. Even straightforward deductive reasoning about whether the facts are sufficient to satisfy a clearly defined legal rule (as opposed to a vague standard) requires some measure of evaluation. In adjudication, as in other evaluative fields, the interpretation of facts is always permeated with values and with value attributions, whether this is stated or not.

There are a number of reasons why judges might need to resort to value-based thinking rather than rely solely upon logic and legal authority. Firstly, difficulties in analogical reasoning arise when cases have unusual factual circumstances that limit comparisons with previous cases. It is difficult to determine relevant similarities or differences when cases are strongly circumstantial and ‘fact-specific’. Further, novel or recently modified doctrines may have few relevant factual scenarios. As Sir Anthony Mason remarked while discussing the difficulties posed by the expansion of equitable doctrines involving concepts of unconscionability: ‘(t)he problem is that unconscionability is very much a matter of fact, degree and value judgment, so that greater guidance will only come from an array of decisions on particular fact situations’. Secondly, difficulties in deductive reasoning arise when statutory terms and general law principles involve legal standards that have a broad or ‘open texture’ and lack settled technical meanings. Thus, resort to considerations of value may sometimes be necessary, as Deane J observed in relation to the concept of unconscionable conduct:

the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a ‘real process of consideration and judgment’…in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are

---

applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present.90

Thirdly, a strict logical approach may yield unsatisfactory results and therefore require value-based thinking as a supplement or guide. For example, Mason CJ observed that the results from ‘but for’ test for causation in tort ‘must be tempered by the making of value judgments and the infusion of policy considerations’.91 Fourthly, textual interpretation requires value-based thinking, as it is ‘unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to fundamental values’.92 Finally, judges differ in both their intuitive assessment of facts and in their positions on the limits and appropriateness of equitable or legal intervention.93 These differences are ultimately based on values, even if judges are not conscious or expressive of this. Julius Stone and others have emphasised that when judges engage in value-based thinking, they should acknowledge the values they are taking into account, otherwise the value choices underlying decisions are obscured.94 Lack of transparency about values unnecessarily complicates the task of appellate review – as Sir Anthony Mason observed:

When the judge takes values into account, he should acknowledge and identify them. They are then an element in his reasons which he should disclose. Unless disclosed, the decision cannot be correctly evaluated on appeal, in later cases or even contemporaneously by the public. The decision will have force as a precedent without anyone appreciating that its force depends upon hidden values.95

B Valuing and Evaluating

In philosophy, a distinction is sometimes made between the processes of evaluating and valuing. Evaluating assesses the extent to which something possesses a given characteristic or property, while valuing addresses why we should value a property or characteristic as an attribute of something.96 McMullin described the difference this way:

Assessment of characteristic values can take on two quite different forms. One can judge the extent to which a particular entity realizes the value. We may be said to evaluate when we judge the speediness of a particular antelope or the heart-beat of a particular patient. On the other hand, we may be asked to judge whether or not (or to what extent) this characteristic really is a value for this kind of entity. How much do we value the characteristic? Here we are dealing, not with

90 Commonwealth v Verwayen (1990) 170 CLR 394, 441 [16].
95 Mason, ‘Future Directions in Australian Law’, above n 11, 159.
particulars, but with the more abstract relation of characteristic and entity under a particular description. Why ought one to value speed in an antelope, rather than strength, say? How important is a retentive memory to a lawyer? [underlining in original text]\(^\text{97}\)

In a legal context, we can say that **evaluating** refers to the activity of *attributing an amount or degree of value* (ie merit, worth, quality, or significance) to legal subject matter. The notion of **evaluating** therefore parallels that of **value**. In many fields, evaluating can be done using only empirical information and, if all the criteria, standards, and procedures of evaluation are prescribed, without little subjective element. This sort of ‘objective’ evaluation is an ideal (and quite reliant on conventional deductive logic), and one rarely achieved in law, mainly because of the complexity of legal subject matter and the difficulty of measuring abstract qualities such as reasonableness (Part V). Rarely can law boast of the ease and objectivity with which value can be attributed to certain scientific subject matter.

This thesis uses the concept of **valuing** in a slightly different sense. Here **valuing** refers to the activity of *expressing why a factor, consideration, principle, or criterion should guide legal decision-making*. The notion of **valuing** therefore parallels that of **values**. This sense of **valuing** replaces the notion of arguing about whether a particular trait or property ought to be a ‘characteristic value’ of a particular ‘entity’ with the notion of reasoning about whether particular ‘values’ ought to guide the making of a particular decision. The focus is therefore on whether something is valuable, significant, or relevant to the selection of a particular choice or course of action.

---

PART III

VALUE JUDGMENTS IN LAW

A Value Judgments in Law

Since 1980, High Court justices have referred to ‘value judgments’ in many areas of law (eg torts, administrative law, family law, constitutional law, corporations law) and in extrajudicial commentary. However, within an Australian context, there is surprisingly little judicial or academic discussion about the nature of value judgments in law and what sort of decision-making process they require. Among philosophers, the current view is that a value judgment involves ‘an opinion, assessment, estimate, or claim about the value, worth, quality, merit, or desirability of something’. This definition accords with the definition suggested for an ‘evaluative judgment’ presented in Section B below.

The term ‘value judgment’ has appeared in 114 High Court cases, comprising: three cases in the 1970s, 16 in the 1980s, 39 in the 1990s, 44 in the 2000s, and nine between 2010 and mid-2013. The first four appearances of the term were in negligence cases. The term was first used by Windeyer J in two negligence cases in 1970, both relating to his claim that a court’s ‘evaluation of conduct in terms of reasonableness is a value judgment upon facts rather than an inference of a fact’. The third appearance of the term (in the seminal 1979 case Warren v Coombes) was a citation from Windeyer J’s judgment in Da Costa. In 1980 Aickin J used the term while distinguishing between how judges and juries decide the issues of damages, noting that with juries the ‘result emerges as a combination of items some of which are exactly calculable, some of which are capable of estimation and some of which represent no more than a value judgment, such as pain and suffering or loss of amenities of life’.

---

100 Norbis (1986) 161 CLR 513.
107 Cullen v Trappell (1980) 146 CLR 1, 36.
References to value judgments increased in the 1980s, with Barwick CJ and Aickin, Deane, and Mason JJ all using the term in decisions between 1980 and 1984. Three notable developments occurred in how the High Court used the term during the early to mid-1980s.

Firstly, the term became associated with evaluative-type decisions that called for: (a) the application of a legal standard to a set of facts and (b) a numerical outcome (eg a quantum). The assessment of what constituted ‘adequate’ provision for family members in testator maintenance is an example of this decision type.\(^{108}\)

Secondly, the High Court considered the role of value judgments in establishing the factual preconditions to the exercise of a statutory discretion. In *White v Barron*,\(^{109}\) for example, Barwick CJ observed that ‘the jurisdiction to make an order under the Act does turn on the existence of a state of fact…[yet] embedded in that question of fact is a value judgment as to what in all the circumstances is adequate maintenance’.\(^{110}\) Similarly Aickin J observed that the ‘first of these questions is one of law in the sense that it involves the application to the facts of a legal criterion, notwithstanding that it involves a value judgment by the court’.\(^{111}\) The interest in such ‘jurisdictional’ questions led ultimately to the Court’s decision in *Singer v Berghouse*.\(^{112}\)

The third development – which also occurred in the context of adequate provision in testator maintenance and the issue of ‘jurisdictional’ questions – was the explicit linking of value judgments and discretionary judgments. In *Goodman v Windeyer*,\(^{113}\) for example, Aickin J observed:

…the determination of applications under this legislation involves two stages, the first of which is the determination of the adequacy of the provision made in the will, a process which is not discretionary in the ordinary sense even though it does, or often may, involve a value judgment. Thus the two stages overlap to some extent because a conclusion that the provision in the will is inadequate will often, though not always, involve a comparison between what is given and what ought to have been given. If it is determined that adequate provision was not made for an applicant, then the amount of the provision to be made by the court does involve the exercise of a judicial discretion, the review of which on appeal is subject to well-recognized limitations.\(^{114}\)

\(^{108}\) *Goodman v Windeyer* (1980) 144 CLR 490.
\(^{109}\) (1980) 144 CLR 431.
\(^{110}\) Ibid 435.
\(^{111}\) Ibid 449.
\(^{112}\) (1994) 181 CLR 201.
\(^{113}\) (1980) 144 CLR 490.
\(^{114}\) Ibid 510.
In *Norbis*, Mason and Deane JJ expressed these three developments in a passage that intermediate courts of appeal often cite as legal authority for a broad view of discretionary power (see Section D below).

### B A Taxonomy of Value Judgments

While a number of philosophers have proposed classification systems for value judgments, four forms of value judgments are relevant to legal contexts:

1. **Decisions that are ad hoc, expedient, or intuitive (extemporary judgments).** Choices made in the spur of the moment and with incomplete information are sometimes described as value judgments.

   Example: Alone and in the dark, the defendant believed there was an imminent threat to his life and acted accordingly. In retrospect, he was mistaken but we must evaluate his conduct according to the value judgment he made in the circumstances.

2. **Decisions that are mere expressions of preference (preference statements).** In philosophical approaches like emotivism, value judgments amount to mere expressions of individual tastes and personal preferences and, therefore, are made without objective evidence or rational justification. Less formally, the term ‘value judgment’ may be used in a pejorative sense to imply that assessments of value are inherently subjective and idiosyncratic.

   Example: Justice Antonin Scalia of the US Supreme Court advocates an originalist approach to constitutional interpretation. His Honour would undoubtedly conclude that the ‘Living Constitution’ approach advocated by former High Court Justice Michael Kirby was a mere front for judicial activists to implement their personal value judgments.

3. **Decisions based at least partly on values instead of upon objective information alone (value-based judgments).** Values may provide the legal or moral authority, policy basis, or epistemological ground for judicial choices. Examples of values are polity principles (eg separation of powers), a ‘common sense’ approach to causation in tort, and ethical

---

concerns about unconscientious conduct. Value-based judgments involve mixtures of fact and value and are therefore sometimes described as ‘fact-value complexes’. Proponents of the fact-value distinction, such as A J Ayer and R M Hare, saw fact as the only appropriate basis for decision-making and therefore treated value-based judgments as ‘incapable of object truth and objective warrant’. Thus, the ‘value judgment’ is sometimes used pejoratively to refer to ‘dubious, unreliable, or biased judgment’. The positivist distinction between fact and value view fit well with the ‘strict and complete’ legalism advocated by former Chief Justice Owen Dixon and its formalist emphasis on the logical deduction of legal principles from authoritative legal materials. In contrast, Julius Stone and others have argued that judges make value-based choices even in finding and interpreting the ‘facts’ of a matter and philosophers such as Hilary Putnam have demonstrated the interconnectivity (or ‘entanglement’) of fact and value and the prevalence of problems of mixed law and fact. This notion of value judgment corresponds with the sense of value as indicating something valuable, relevant, or significant to decision-making (ie values and valuing, in the senses described in Part I and Part II, respectively).

Example: This decision is not based on logic alone – it is a value judgment premised in the principles of modern liberalism such as our allegiance to the rule of law and our respect for individual liberty.

4. Decisions assessing the value (ie merit, worth, quality, amount, or significance) of something (evaluative judgments). Evaluative judgments assess the value of conduct, circumstances, or other subject matter, typically with reference to criteria and standards. In law, the term ‘evaluative judgment’ is generally reserved for situations in which the court is asked to apply a legal standard to a set of facts. Evaluative judgments

---

119 See, eg, Gleeson, ‘Law, Values and the Advocate’, above n 35.
120 Stone, Legal System and Lawyers’ Reasonings, above n 11, 264.
122 A J Ayer, Philosophy in the Twentieth Century, above n 117.
123 R M Hare, The Language of Morals. (Oxford University Press, 1952).
may assess value in numerical terms (eg a valuation of assets, an assessment of damages, an apportionment of negligence) or in terms of notional quantity (generally leading to a ‘binary’ or yes/no answer). Evaluative judgments are typically also value-based judgments because judges have regard to values when considering, for example, the standard of conduct that a legal standard requires. Evaluative judgments are best described as a question of mixed law and fact as the judge must determine whether the facts satisfy the applicable standard; they differ from a question of law which is about the correct legal test to apply and a question of fact which is about happened.\textsuperscript{130} This notion of value judgment corresponds with the sense of value relating to the attribution of merit, worth, quality, amount, or significance to subject matter (ie value and evaluating, in the senses described in Part I and Part II, respectively).

Example: In deciding whether to approve an application for an extension of time, the judge had to make a value judgment about the reasonableness of the plaintiff’s conduct in the circumstances.

Of these four forms of value judgment, most judicial references are to value-based judgments or evaluative judgments. Thus, I use the term ‘value judgments’ to refer to value-based judgments and evaluative judgments only. I also distinguish between value-based judgments and evaluative judgments in the sense described above. The use of term ‘evaluative judgment’ varies somewhat through the case law (see Part IV). In addition, I note the caveats that should accompany any effort to reduce the complexity of law through the infliction of categories and classification upon it. As the High Court observed about a scheme of classification developed by Basten JA of the New South Wales Court of Appeal:

\begin{quote}
\textit{\ldots it is not useful, with respect, to attempt a taxonomy of the kind proposed by Basten JA. First, as his Honour pointed out, ‘there are more variations than the categorisation [which he proposed] would suggest’. Secondly, the adoption of such a taxonomy would lead to error if the classes identified were treated as useful starting points for consideration of the effect of particular statutory provisions for appeal. The language of the statute must be the relevant starting point, not a taxonomy which seeks to reduce a wide variety of statutory provisions to a few discrete categories.}\textsuperscript{131}
\end{quote}

\textbf{C Role of Value Judgments in Adjudication}

Value judgments are not uniquely, or even distinctly, judicial. The High Court has stated on several occasions that the making of value judgments is not, by itself, an indicator that


\textsuperscript{131} \textit{Kostas v HIA Insurance Services Pty Ltd} (2010) 241 CLR 390, 418 [89].
judicial power is being exercised. In Precision Data Holdings Ltd v Wills, for example, the High Court stated that:

> The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.

Administrative decision-making often requires ministers and other administrators to evaluate the merit of applications or claims, often according to broad legal standards. Thus, although judges and administrators may encounter different types of value judgments and apply different approaches to resolve them, both regularly engage in evaluative reasoning (Part V).

Value judgments play a number of roles in judicial decision-making. Firstly, legal tests may use value-based judgments to supplement inferences or conclusions drawn from primary facts. In March v Stramare, for example, Mason CJ noted that the ‘but-for’ test yielded unsatisfactory results as an exclusive criterion of causation in torts and therefore the results ‘must be tempered by the making of value judgments and the infusion of policy considerations’. However, the High Court has subsequently expressed doubts about the role of value judgments in determining causation in tort cases.

Secondly, a finding of fact may have a value judgment contained within it. For example, Barwick CJ, in considering an issue of testator’s family maintenance in White v Barron, observed that ‘[o]f necessity, embedded in that question of fact is a value judgment as to what in all the circumstances is adequate maintenance’. A finding of fact involving a value judgment may function as a precondition (or ‘jurisdictional question’) for the exercise of a discretionary power (eg Singer v Berghouse). A judge may also be ‘required to make a particular decision if he or she forms a particular opinion or value judgment’. As a finding of fact involving value judgments is, by its nature, evaluative, such determinations can be

---


137 (1994) 181 CLR 201.

characterised as an ‘evaluative factual judgment’. The relation between the finding and the evaluation of facts is an uneasy one and is examined further in Part V.

Thirdly, while value judgments may be involved in findings of fact for questions of fact and for questions of mixed law and fact, they may also be involved in determining questions of law. For example, in considering the rules for the exclusion of evidence under the Evidence Act 2006 (NZ) in The Queen v George Evans Gwaze, the Supreme Court of New Zealand commented on the evaluative judgments involved in questions of admissibility:

There was no preliminary question of fact required to be found and left unresolved... The only issue was whether, taking the statements at face value, they fulfilled the statutory conditions for admissibility. Were they relevant? Were they hearsay which was reliable? Were they opinion which was substantially helpful? Did their probative face value outweigh the risk that they might have an unfairly prejudicial effect on the proceedings? These were all judgments required by the statute as the condition of admissibility. If the Judge, as we think, erred in fulfilling the statutory conditions, he erred in law.

Fourthly, evaluative judgments are increasingly recognised as a distinct adjudicative task. In Gett v Tabet, for example, Allsop P and Beazley and Basten JJA described the adjudicative tasks undertaken by a trial judge and noted that ‘in order to satisfy the relevant legal principles, it is usually necessary to draw inferences from the primary facts, or make evaluative judgments or characterisations’.

Finally, a single overall decision may involve multiple evaluative judgments. For example, statutory provisions may require judges to: (1) compare the relative value of two aspects of a single matter (eg the probative value of evidence against its possible prejudicial value) or (2) consider the individual value of several matters in reaching an overall decision (eg the value of multiple prescribed criteria a judge must have regard to). The overall ‘balancing’ or ‘weighing’ exercises are themselves complex evaluative judgments.

Given such a diverse range of functions, it can be difficult to describe a particular decision or aspect of a decision as involving a distinct ‘value judgment’. Legal questions that require decision-makers to determine whether a particular set of facts falls within a statutory

---

140 [2010] 3 NZLR 734.
141 Ibid [52] – [53].
143 Ibid [13].
144 Eg Evidence Act 1995 (Cth) s 101(2).
145 Eg Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 40.
definition or rule (cf a standard) tend to call for deductive or analogical reasoning more than evaluative reasoning, although the latter may also be involved. Where the boundaries of definitions or classifications are not clear, value judgments may play a role, eg McHugh J observed that: ‘The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another’.  

146 Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs (1992) 176 CLR 1 [30].
PART IV
EVALUATIVE JUDGMENTS IN LAW

A. The Rise of the Evaluative Judgment

In 1987, the newly appointed Chief Justice of the High Court published a journal article discussing the ‘distinct’ Australian law that might arise following the formal removal of the Privy Council as the ultimate court of appeal for Australian jurisdictions. Curiously, however, Sir Anthony Mason emphasised that it was the legislatures – not the courts – that were the real impetus for legal change in Australia. Indeed, according to Sir Anthony, Australian legislatures had been developing their own ‘indigenous solutions’ for some time.

Sir Anthony argued, in particular, that legislatures had shifted away from statutes framed around precise legal rules and towards statutes reliant upon broad legal standards. Such standards, which often called upon judges to balance complex and often competing considerations, fundamentally altered the nature of judicial decision-making. Certain judicial tasks became analogous to functions previously undertaken by legislators and administrators, suggesting that it was no longer appropriate to think of law and politics as existing in their own ‘watertight compartments’. The shift towards legal standards meant, Sir Anthony argued, that:

[t]he notion of a ‘political question’…made rather more sense at a time when we thought that legal questions were invariably determined by the application to the facts as found of a pre-existing and predetermined standard. However, we live in a different era when courts such as the Family Court make discretionary judgments, applying broad criteria.

As an example of this novel type of judicial decision-making, Sir Anthony chose an issue of family law that the High Court had dealt with in *Cominos v Cominos*, in the year Sir Anthony ascended to the High Court, and again in 1986, in *Norbis*:

Take, for example, the making of financial orders intended to constitute a reasonable allocation of the parties’ property in the light of relevant factors. Although this function of balancing interests is very different from the traditional concept of the judicial function, we have managed to force it through the accepted tests and to conclude that it amounts to an exercise of judicial power.

In *Cominos*, the High Court had found that the conferral of certain powers under the *Matrimonial Causes Act 1959-1966* (Cth) to State courts was a valid exercise of the
constitutional powers of the Federal Parliament. The validity of the conferral was challenged on the basis that the functions conferred by several provisions of the Act were beyond the scope of Federal judicial power. The challenge relied, in part, on comments in *Reg v Spicer; Ex parte Waterside Workers’ Federation of Australia*\(^{152}\) suggesting that the legal tests underlying the exercise of a judicial discretion could not be indeterminate in character, as ‘the discretion must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards.’\(^{153}\)

In *Cominos*, however, the Court found that the legal standards expressed in the provisions provided sufficiently clear direction. Walsh J found, for example, that it was incorrect to say that a court, in exercising its powers under the Act, is:

> at liberty to act in an arbitrary way or is at liberty to give effect…to ‘its own idiosyncratic conceptions and modes of thought’. The court is not at liberty…to act upon broad policy considerations, unrelated to the facts of the particular case or to what is adjudged appropriate to the means, interests and needs of the parties to the marriage or the children of the marriage.\(^{154}\)

Sir Anthony argued further that legislatures would continue to grant courts the complex and evaluative task of applying vague legal standards to particular factual circumstances, even if doing so detracted from the atmosphere of legal certainty and judicial objectivity that had prevailed during the Dixon-era emphasis on legalist reasoning:

> The legislative tendency to confer jurisdiction on courts to resolve the rights of parties by balancing their interests and expectations, in preference to applying pre-determined formulae, is likely to gather strength…Despite criticism of the ‘palm tree’ quality of this approach, it will create its own pressure for relaxation in the concepts of judicial power and justiciability.\(^{155}\)

Legislative trends since 1987 have supported Sir Anthony’s view. Chief Justice French, among others, has commented on the use of broad legal standards in statutes. For example, the Chief Justice has observed extracurially that:

> The entrusting by the legislature to judges of responsibility for developing the law within broadly stated guidelines is commonplace and has become more so over recent decades. It reflects the complexity of our society and the individual variety of particular circumstances.

Chief Justice French also described the prevalence of evaluative expressions in Commonwealth statutes, noting that ‘good faith’ appears in more than 160 Commonwealth

---

152 (1957) 100 CLR 312.
153 *Reg v Spicer; Ex parte Waterside Workers’ Federation of Australia* (1957) 100 CLR 312.
154 *Cominos* (1972) 127 CLR 588, 593
155 Mason, ‘Future Directions in Australian Law’, above n 11, 162.
statutes, ‘reasonable’ in over 140, the ‘interests of justice’ in at least 50, and ‘unconscionable’ in at least 12. The challenge provided by such imprecise standards is that they:

require judges to consider their general range and make evaluative judgments about their application in particular cases. Interpretation and application of these standards case by case involves not only the development of a principled approach based on logic, but one necessarily informed by value judgments.

B Evaluative Judgments in Law

Evaluative judgments arise when judges are required to assess the value of conduct, circumstances, evidence, or other subject matter by applying a legal standard to a set of facts. They occur in statute law, common law, and equity. The application of statutory standards is a matter of statutory interpretation. The background legal principles of equity and the common law play similar roles in informing the application of standards derived from those jurisdictions.

Evaluative judgments are called for when legislatures frame statutory provisions as broad legal standards rather than as closely prescribed rules. Standards can be defined as the ‘legal or social criterion that adjudicators use to judge actions under particular circumstances’. Provisions are ‘rule-like’ if they require a determinate response when certain ‘triggering facts’ exist and ‘standard-like’ if they require the application of a ‘background principle or policy’ to the circumstances. The application of a rule requires judges to determine whether all the elements of the rule are present in the fact situation (eg do facts a, b, c support elements x, y, z?), whereas the application of a standard requires judges to assess where the circumstances of the case sit in relation to an abstract standard (eg do facts a, b, c constitute reasonable conduct?).

Though the case dealt with the exercise of a statutory power by a Minister, in *Haoucher v Minister for Immigration & Ethnic Affairs* Gaudron J distinguished the evaluation of facts from both: (a) the finding of the facts and (b) the classifying of facts according to a legal rule or definition:

The process of evaluation, often referred to as the process of making a value judgment, is not one that is susceptible of analysis in precisely the same way as is the process of fact finding or the process of determining whether the facts as found satisfy some identified or identifiable

---

157 Ibid.
criterion…the process of evaluating given or undisputed facts is one in which the putting of a
case assumes less significance than in the process of fact finding or the process of classifying
facts according to some particular criterion. 161

While the content of a rule is expressed in the statutory text (although case law may need to
be considered to apply the law correctly), judges must determine the content of a standard at
the time that the law is applied. Thus, when legislatures express statutory standards in
imprecise terms, they give judges the task of determining ‘on a case-by-case basis in the
tradition of the common law how the law applies to particular circumstances’. 162 While the
circumstantial, flexible nature of legal standards allows judges to make a ‘fact-specific
determination’, rules enact ‘bright line tests’ that often result in a ‘less than a perfect fit
between the specific wording of a rule and the varying fact patterns of the regulated
conduct’. 163

Administrative decision-makers also make evaluative judgments when called upon to apply
statutory standards. For example, in *Australian Broadcasting Tribunal v Bond*, 164 Toohey and
Gaudron JJ observed that in assessing whether the conduct and character of a person meets
the statutory criteria for the granting of a commercial broadcasting licence:

The question whether a person is fit and proper is one of value judgment. In that process the
seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker.
So too is the weight, if any, to be given to matters favouring the person whose fitness and
propriety are under consideration.165

Use of the term ‘evaluative judgment’ is not a recent phenomenon. Julius Stone and other
legal scholars referred to ‘evaluative judgments’ from the 1940s onwards.166 For example, in
critiquing Stone’s *Province and Function of Law*, F C Hutley observed that:

Stone again and again says that evaluative judgments are non-syllogistic…The writer is
unaware of any serious attempt to justify the assumption that evaluative judgments are, in
Stone's somewhat question-begging term, non-syllogistic. 167

The earliest references to the term in Commonwealth jurisdictions are in a 1982 High Court
case168 (Brennan J) and two Federal Court cases in 1987 (both French J). 169 The Federal Court

---

161 Ibid 673-674 (Gaudron J).
164 (1990) 170 CLR 321.
165 Ibid [63].
168 *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25,
144 (Brennan J).
used the term consistently from the 1990s onwards, while the High Court has used it in fifteen cases (including several references by French CJ). Chief Justice French has also used the term ‘evaluative judgment’ in extracurial comments. For example, in a 2012 speech, his Honour observed that:

Some of the judgments involved in applying the law to the facts are evaluative and in a sense normative. Obvious examples are the application of criteria such as ‘reasonable’, ‘good faith’, ‘dangerous’ and ‘reckless’ to a person’s acts or omissions…In the field of intellectual property the question whether a claimed invention involved an inventive step having regard to prior art is another example of an evaluative factual judgment. It is an evaluative judgment made in a purposive setting in which the law seeks to strike a balance between appropriate limits on the boundaries of monopoly rights and appropriate rewards for innovation.

The sort of ‘balancing’ assessment that the Chief Justice described indicates one of the key benefits in allocating to the courts the task of applying legal standards on a case-by-case basis rather than prescribing precise rules to govern all circumstances.

There are three main uses of the term ‘evaluative judgment’ in Australian case law. Firstly, and most commonly, judges use the term to describe any decision in which they are called upon to evaluate conduct, circumstances, or other matters. Secondly, the term is sometimes used synonymously with ‘discretionary judgments’. For example, in Green v R, Brennan CJ stated that:

…the question whether this Court should interfere with the view of a Court of Criminal Appeal was submitted…to be subject to the principle of review of discretionary or evaluative judgments contained in House v The King…[The Crown] urged that this Court should approach disturbance of such a discretionary determination applying the well-established principles which restrain appellate interference in evaluative decisions. [footnotes omitted]

Thirdly, Basten JA of the New South Wales Court of Appeal sometimes uses evaluative judgment in a specific sense. For example, in Costa v The Public Trustee of NSW, Basten JA used the term evaluative judgment to refer just to evaluative decisions with quantitative outcomes such as assessments of damages and apportionment of negligence and, further,

173 Ibid 705.
distinguished between the making of inferences and the making of evaluative judgments.\textsuperscript{175} However, in a joint judgment in \textit{Gett v Tabet},\textsuperscript{176} Allsop P, Beazley JA, and Basten JA, while retaining the distinction between inferences and evaluative judgments, used ‘evaluative judgment’ in a sense that was synonymous with value judgments generally.\textsuperscript{177}

\textbf{D Norbis: Discretion & Evaluative Judgment}

In \textit{Norbis}\textsuperscript{178} the High Court considered the approach a court can take in assessing the entitlement to property of the parties to a marriage under s 79 of the \textit{Family Law Act 1975 (Cth)}. Section 79(1) provided that the court ‘may make such order as it thinks fit’ to alter the interests of the parties in the property. However, s 79(2) provided that the court ‘shall not make an order…unless it is satisfied that, in all the circumstances, it is just and equitable’ to do so. Section 79(4) then prescribed a range of considerations that a court ‘shall take into account’ in considering what order (if any) to make, including financial or non-financial contributions relating to property, the welfare of the family constituted by the parties, and the effect of any proposed order on the parties’ earning capacity. In \textit{Norbis}, both parties accepted that, in making orders under s 79, the trial judge in the Family Court was exercising a ‘very wide’ discretion and that the Full Court of the Family Court, in considering the appeal, had been bound to apply the appellate principles governing the review of an exercise of a discretionary judgment.

The requirement to consider the contributions indicated in ss 79(4)(a)-(c) meant that a trial judge had to assess the assets owned by the parties in light of the statutory criteria. Seeking to deter the ‘practice of giving over-zealous attention to the ascertainment’\textsuperscript{179} of the parties’ contributions, the Full Court of the Family Court had, on appeal, prescribed the use of a ‘global approach’ for assessing contributions rather than an asset-by-asset approach, as had been applied by the judge at first instance in (Nygh J). The principal issue for the High Court was whether a trial judge was bound to adopt a ‘global’ approach in assessing the assets of the parties, as the Full Court of the Family Court had held, or whether the trial judge was not obliged to apply particular approach to the exclusion of another.

In their joint judgment, Mason and Deane JJ (Brennan agreeing) observed that as the Full

\textsuperscript{175} Ibid [103] (Basten JA).
\textsuperscript{176} [2009] NSWCA 76 (9 April 2009).
\textsuperscript{177} Ibid [13].
\textsuperscript{178} (1986) 161 CLR 513.
\textsuperscript{179} Ibid 524.
Court of the Family Court was ‘a specialist appellate court with unique experience in the field of family law’, it was well positioned to provide trial judges with guidance in the exercise of their discretionary powers. Nonetheless, such guidance could not come in the ‘form of binding rules of law’ as this would encroach impermissibly on the discretion conferred upon the trial judge. After noting that the principles governing appellate review of a discretionary decision at first instance were ‘well settled’, Mason and Deane JJ observed that those principles had been ‘constantly reiterated and applied’ through their expression in the majority judgment in *House v The King* and observed:

4. The sense in which the terms ‘discretion’ and ‘principle’ are used in these remarks [in *House v The King*] needs some explanation. ‘Discretion’ signifies a number of different legal concepts…. Here the order is discretionary because it depends on the application of a very general standard - what is ‘just and equitable’ - which calls for an overall assessment in the light of the factors mentioned in s.79(4), each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.

5. The principles enunciated in *House v. The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties’ rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.

These comments by Mason and Deane JJ (made obiter dicta) are best seen as part of a series of cases between 1979 and 1986 in which the High Court addressed the appropriate appellate principles for the review of evaluative decisions involving quantitative value judgments, particularly for issues of adequate provision in family law (often involving a standard requiring a ‘personal assessment of the circumstances’), but also in the calculation of damages, the valuation of shares, and the apportionment of negligence. In *Federal
Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd,\textsuperscript{190} for example, Mason J observed:

This Court has consistently applied the rule that on a question of valuation an appellate tribunal is not justified in substituting its own opinion for that of the court below unless it is satisfied that the court below acted on a wrong principle of law or that its valuation was entirely erroneous…As with the assessment of damages, especially in personal injury cases, the valuation of property by a court has many of the characteristics of a discretionary judgment. Valuation is a matter of estimation, not of precise mathematical calculation. It certainly involves the making of a value judgment in the metaphorical as well as the literal sense.\textsuperscript{191}

In that case Aickin J also observed:

The task of a trial judge is to approach a question of valuation in accordance with established principles and to endeavour to arrive at a fair and just figure, bearing in mind that valuation by expert witnesses is not an exact science and that the task involves in most cases a consideration of differing expert opinions. In the end his conclusion is not merely a judgment as to the value of the relevant property but is in the nature of a ‘value judgment’. It is not a judicial discretion in the technical sense of that term but the boundary line between the formation of a value judgment and the exercise of a discretion is neither clear nor precise. It is no doubt for this reason that Dixon J. (as he then was) said in the well-known passage in his judgment in The Commonwealth v. Reeve…that:

‘For the estimation of a money sum is usually so much a result of judgment and sound discretion and so little the product of analytical reasoning, that, were it otherwise, every appeal would mean an assessment of compensation de novo, without any assignment of error in the reasoning or conclusions of the court appealed from.’\textsuperscript{192}

A general concern with the appellate principles and the distinction between discretionary and non-discretionary decisions is evident in a range of High Court and New South Wales Court of Appeal cases decided between \textit{Norbis} and \textit{Singer v Berghouse}\textsuperscript{193} in 1994.\textsuperscript{194} Two addressed quantitative value judgments in family law.\textsuperscript{195} In \textit{Beneficial Financial Corporation Ltd v Karavas},\textsuperscript{196} Kirby P referred to the evolution of this concern in observing that:

the dichotomy between ‘discretionary’ and ‘nondiscretionary’ decisions may be just as false and arbitrary as that between interlocutory and final decisions…Something of a disenchantment with the utility of the distinction between ‘discretionary’ and ‘non-discretionary’ decisions (for the purpose of governing appellate review) may be seen in the reasons of Mason J in \textit{White v Barron}…That opinion has now been elaborated in the joint reasons of Mason J and Deane J in \textit{Norbis v Norbis}…where the differing legal concepts imported by the word ‘discretion’ are acknowledged.\textsuperscript{197}

\textsuperscript{189} Podrebersek v Australian Iron & Steel (1985) 59 ALR 529.
\textsuperscript{190} (1981) 146 CLR 336.
\textsuperscript{191} Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336, 381.
\textsuperscript{192} Ibid 398 (Aickin J).
\textsuperscript{193} (1994) 181 CLR 201.
\textsuperscript{195} \textit{Hunter v Hunter} (1987) 8 NSWLR 573; Golosky v Golosky (Unreported, New South Wales Court of Appeal, Kirby P, 5 October 1993).
\textsuperscript{196} (1991) 23 NSWLR 256.
\textsuperscript{197} Ibid 262.
If the statements of Mason and Dean JJ about discretion are read in the context of their judgment and with an understanding their historical context, it is clear that their Honours were not identifying the essential features of a discretionary decision in order to, for example, indicate the defining characteristics of discretionary decisions generally or to draw an analogy between the discretionary power conferred by s 79 and a similar power conferred by another provision in order to argue that the latter also involved the exercise of a discretion. Rather, the aim was to describe the manner in which, to use an oft-cited expression, the ‘generous ambit within which reasonable disagreement is possible’ arises during the exercise of the discretion conferred by s 79. The concern of Mason and Deane JJ was to show how – within the context of a power accepted to be discretionary – there can arise ‘differences of opinion which, within a given range, are legitimate and reasonable answers to the questions’. The reference to ‘within a given range’ is significant because it emphasises the quantitative nature of the trial judge’s determinations – as the judge’s assessments of the parties’ respective contributions involve monetary amounts, it is easy to see how judges might come to varying conclusions within an overall range of acceptable answers. The nature of the discretion, in this instance, was to allow for a range of determinations. Having demonstrated the ‘latitude of choice’ inherent to this exercise of a discretion power, it then becomes clear: (1) why it was impermissible for an appeal court to infringe upon the exercise of that statutory discretion with a judge-made binding rule of law and – thus – (2) why the Full Court of the Family Court erred in finding that the trial judge had committed an error of law in failing to apply the ‘global’ approach as the Full Court had prescribed.

A ‘generous ambit’ for reasonable agreement exists because the statutory language in s 79 confers a discretionary power to make an order adjusting the property of the parties – this differs from a situation in which a statute confers a power but does so in language that does indicate clearly that the judge has discretion in exercising that power (eg the term ‘may’ is not used). It may well be that a determination in the latter sense often leads judges to arrive at different conclusions, but to claim – on that basis – that the decision is discretionary is a different task of reasoning than one which sets out to describe the manner in which the exercise of a discretion can lead to judges arriving at a range of legitimate responses and, in this way, to characterise the width of discretion that exists for that discretionary power.

PART V
EVALUATIVE JUDGMENTS & EVALUATIVE REASONING

A. Modes of Legal Reasoning

Value, values, and value judgments play an integral role in judicial decision-making (Parts I-III). The increasing use of broad legal standards in statutory law means that evaluative judgments are a key component of modern adjudication (Part IV). This Part considers the key features of evaluative reasoning and evaluative judgments in law. To avoid conflating process (ie reasoning) and outcome (ie judgment), I distinguish between evaluative reasoning as the process of attributing value to a subject matter and evaluative judgment as referring to the overall decision.201

The first step in characterising the key features of evaluative reasoning and evaluative judgments is to situate evaluative reasoning within the broader field of judicial decision-making. Van Hoecke suggested that ‘value thinking’ constitutes a distinct aspect of legal reasoning:

Generally speaking, we can state that each legal argument contains three components: deductive reasoning, inductive reasoning, and value thinking. With the deductive part of reasoning one reaches a legal solution by a logical deduction, starting from legal premises. With the inductive part of reasoning one starts from concrete facts and from desired results to reach general rulers, a hierarchy of principles, etc. Finally, value thinking is also inevitable in legal reasoning. Even the choice of premises (in deductive reasoning) and the choice of the facts and values considered to be relevant (in inductive reasoning) are themselves value-laden.202

The concept of valuing (Part II) overlaps with Van Hoecke’s conception of ‘value-thinking’, in the sense of a judge using values to guide decision-making and to justify choices. There are, arguably, two additional forms of legal reasoning – analogical reasoning (which is really a form of inductive reasoning)203 and evaluative reasoning. Evaluative reasoning overlaps with the concept of evaluating (Part II), in the sense of a judge attributing value (ie merit, worth, quality, etc) to subject matter. Thus, in assessing the adjudicative character of a decision, we may consider whether the decision requires a judge to engage in one or more forms of reasoning:

(a) deductive reasoning;
(b) inductive reasoning;
(c) analogical reasoning;

---

(d) value-based reasoning (or valuing); and
(e) evaluative reasoning (evaluating).

B Evaluation

The next step in characterising evaluative reasoning is to consider the nature of evaluation. To ‘evaluate’ means to ‘form an idea of the amount, number, or value of’. Similar verbs include assess, appraise, and ascertain. The emergence of evaluation as an academic and professional specialty has generated a significant literature on the nature of evaluation, including its epistemological basis. Taylor described evaluation as a reasoning process that proceeds through a series of logical steps devoted to the question ‘What is the value of this?’ and culminates in an evaluative judgment that concludes the process ‘in a logical and a temporal sense’ and provides a ‘settled opinion that something has a certain value’.

Scriven and others have suggested that evaluative processes across all disciplines have a similar logical structure. Fournier expressed the basic logic of evaluation as having four stages:

1. Establishing criteria of merit. On what dimensions must the evaluand do well?
2. Constructing standards. How well should the evaluand perform?
3. Measuring performance and comparing with standards. How well did the evaluand perform?
4. Synthesizing and integrating data into a judgment of worth or merit. What is the merit or worth of the evaluand?

C Judicial Tasks in Evaluative Judgments

In law, the concept of evaluation generally relates to the assessment of a subject matter according to a legal standard (Part IV). While evaluative judgments vary in complexity and outcome, they typically require judges to undertake one of three tasks:

(1) establish whether subject matter satisfies a standard or crosses a threshold level (eg was the defendant’s conduct reasonable?);

---

(2) determine an allocation of assets, responsibility, or other divisible thing or concept among the parties that satisfies a standard (eg what is a ‘just and equitable’ allocation of assets among the parties to a marriage?); or

(3) weigh or balance multiple (and often competing) factors (eg does the probative of a piece of evidence exceed its prejudicial value?).

Lord Neuberger, in describing the evaluative judgment required of a trial judge needing to decide whether a statutory threshold was exceeded prior to making a care order under s 31(2) of the Children Act 1989 (UK), characterised the task of the trial judge in this way:

In order to determine whether [the threshold] was crossed in this case, the task the Judge faced can be analysed as involving three steps. He was required (i) to determine the factual issues, which involved resolving a substantial amount of disputed evidence, (ii) to identify the nature of the threshold, which involved construing section 31(2), and (iii) to decide whether on the primary facts he had found and the assessments he had made, that threshold was crossed.209

From an appellate perspective, the first step (fact-finding) is a question of fact for which appeal courts show considerable deference, both because of the advantages trial judges possess in seeing and hearing the witnesses and for reasons of judicial policy (eg an appeal should not involve a complete re-finding of the facts).210 The second step (determining the meaning of the provision) is, in contrast, a question of law and therefore one in which appellate courts are in an equivalent, if not better, position than the trial judge to determine.211 The third step (determining if the threshold was crossed) is a question of mixed law and fact as the trial judge must evaluate the facts according to particular criteria and determine whether the threshold was reached.212

D Evaluative Judgments as Normative Assertions

The next step is to recognise that evaluative judgments are not simple factual conclusions. Rather, they require judges to characterise and evaluate the facts. Thus, evaluative judgments represent a normative assertion – they are claims about what degree or amount of value ought to be attributed to a subject matter. Their normative character is suggested by the language used to describe the legal standards applied in evaluative judgments: eg ‘thick evaluative terms’,213 ‘broad evaluative term’,214 imprecise criteria,215 ‘open textured criteria’,216 ‘value-

---

209 In re B (A Child) [2013] UKSC 33 (12 June 2013) [44].
qualified precepts’, and ‘broad legal standard’. An evaluative claim differs from findings of primary fact and from inferences, both of which are factual assertions and therefore essentially descriptive in nature. The philosopher Paul Taylor observed that:

The truth of normative assertions depends on human decisions; the truth of factual assertions does not…A normative assertion is true…only because we have decided to adopt a standard or rule as applicable to what we are making the assertion about…the way the world is does not logically determine what decision we must make. Our adoption of a standard or rule on which the truth or falsity of our assertion depends does not itself depend on the way things are. We must decide what ought to be the case. We cannot discover what ought to be the case by investigating what is the case.

In law, terms such as ‘correct’, ‘legitimate’, or ‘valid’ are more appropriate than the terms ‘true’ or ‘false’ in describing the nature of a legal conclusion. The task of appellate review for evaluative judgments may, depending on the nature of the appeal, include assessing the correctness of the trial judge’s normative assertion – that is, whether it represents a legitimate conclusion about what ought to be (or ought to have been) the case between the parties.

E The Logic of Evaluative Judgments

Having examined the normative character of evaluative judgments, we can look at their logical character. The logic that underlies evaluative judgments (and which constitutes the process of evaluative reasoning when legal standards are applied to a set of facts) differs somewhat from the general logic of evaluation described by Fournier, but retains the same principal components. ‘Logic’, in this context, means a systematic process of reasoning that is applied routinely to legal decisions of a certain kind. This sort of logic, while imperfect and limited in scope, can nonetheless act ‘as a kind of geography’ for the reasoning process. The logic of evaluative judgments – as it applies to a decision calling for a yes/no answer – can be parsed into four logical steps:

1. interpreting the legal standard;
2. finding the facts;
3. applying the standard to the facts; and

214 Justice Robert French, ‘Mental States in Civil Litigation’ (Speech delivered at the Australian Institute of Judicial Administration Incorporated: New Challenges, Fresh Solutions, 19-21 September 2003).
216 Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315 (Kirby J) [83].
220 Taylor, Normative Discourse, above n 201, 248.
4. **judgment.**

This logic of evaluation is outlined below and is summarised in Table 1. Two important caveats are noted. Firstly, any attempt to describe the process by which judicial decisions are made runs the risk of over-analysis. Nonetheless, it is clear that evaluative judgments do require judges to take certain logical steps, even if judges fail to articulate them or perform them intuitively. Secondly, evaluative judgments are integrated, holistic decisions. Thus, the same reasoning that calls for caution in separating the elements of negligence (duty, breach, causation) into analytically distinct components also applies to evaluative judgments.\(^{222}\)

Evaluative judgments exhibit considerable continuity and connectivity among the different logical steps, such that the steps tend to shade into and shape each other.

1 **Interpreting the Legal Standard**

Judges must first determine the meaning of a standard: what do words and phrases like ‘unacceptable risk’ and ‘just and proper’ mean? The meaning of a legal criterion is a question of law and, for statutory provisions, an issue of statutory interpretation. For common law and equitable standards, the meaning of a term is determined by reference to the relevant body of legal and equitable principles indicated in legal authorities. Some standards, such as relevance, have meanings that are relatively fixed and clear. Other standards are expressed in vague terms or in reference to community standards, making their meaning more difficult to determine. In *Thomas v Mowbray*,\(^{223}\) Gummow and Crennan JJ quoted a statement by Leslie Zines that emphasises the need for a purposive approach in interpreting statutory standards and the appropriate application of common law techniques:

> Any standard or criterion will have a penumbra of uncertainty under which the deciding authority will have room to manoeuvre - an area of choice and of discretion; an area where some aspect of policy will inevitably intrude. The degree of vagueness or discretion will be affected by what is conceived to be the object of the law and by judicial techniques and precedents. Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard.\(^{224}\)

Along with determining the meaning of the legal standard, judges must also identify the criteria guiding the application of the standard to the facts. These criteria include any considerations, factors, or principles that are prescribed by statute or are indicated by legal authority. Examples of criteria include:

\(^{222}\) *Tame v New South Wales* (2002) 211 CLR 317 [99] (McHugh J); *Drinkwater v Howarth* [2006] NSWCA 222 (3 August 2006) [21]-[22].


(a) **decision-making principles** (eg ‘the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’);

(b) **characteristics of the parties** (eg a ‘special disadvantage’);

(c) **characteristics of the subject matter** (eg the reliability of physical evidence);

(d) **the circumstances of the case** (eg commercial transactions); and

(e) **the context or consequences for the decision** (eg risks to the community).

Broad, indeterminate standards, as well as novel standards that have yet to receive judicial consideration, may suggest or impose few criteria. In contrast, some statutory standards prescribe a series of complex, often competing, factors that judges must have regard to. If multiple criteria are involved, judges must consider how to weight those criteria.

2 **Finding the Facts**

Appellate courts give trial judges considerable deference in the process of fact-finding and will only disturb a finding of primary fact if it is clearly erroneous. Less deference is shown to inferences of secondary fact, although regard is given to the advantages of the trial judge, particularly where a finding or inference relies upon an assessment of witness credibility.

While fact-finding is a relatively generic adjudicative process, the finding of primary facts and the resolution of factual disputes will inevitably influence a judge’s appraisal of those facts when called upon to apply the relevant standard, as well as the drawing of any inferences of secondary fact. As Campbell JA observed, the ‘finding of primary facts shades to some extent into their evaluation’. Further, some standards are particularly fact-dependent, such that their application turns critically upon what facts are found. Factual findings are particularly integral in assessments of risk, for example. In those cases, a decision to reverse a trial judge’s evaluation may ‘involve an appellate court effectively disagreeing with (i) primary findings of fact made by the judge, or (ii) the impressions he obtained from seeing the witnesses’.

---

225 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 39.
227 Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic).
228 Da Costa (1970) 124 CLR 192.
231 In re B (A Child) [2013] UKSC 33 (12 June 2013) [58].
The relationship between the finding and evaluation of facts is an uneasy one and invokes issues about the appropriate level of appellate scrutiny for decisions. In *Da Costa*, for example, Windeyer J argued that:

…inferences of fact from proved specific facts seem to me to be logically in a different position from the evaluation or appraisal of the quality of a man's conduct…A true inference of fact is an inference of an actual matter or event. It is reached by a consideration of actual facts proved and the probabilities to which they give rise. But the evaluation of conduct in terms of reasonableness is a value judgment upon facts rather than an inference of a fact.

While the majority judgment in *Warren v Coombes* did not reject the proposition that an inference of primary fact might differ logically from an inference of negligence, it did reject what Windeyer J saw as the legal consequence of that distinction – that appellate courts should treat a judge’s decision on negligence as equivalent to a jury’s verdict on that question. Instead, the majority found that, in cases where the facts were undisputed and there was no question of witness credibility, there was:

no reason in logic or policy to regard the question whether the facts found do or do not give rise to the inference that a party was negligent as one which should be treated as peculiarly within the province of the trial judge. On the contrary we should have thought that the trial judge can enjoy no significant advantage in deciding such a question.

3 Applying the standard to the facts

To apply the standard to the facts, a trial judge must characterise the facts according to the criteria. In choosing the facts to evaluate and in attributing value to them, a trial judge is also asserting what the content of the legal standard ought to be in the circumstances of the case. As French J observed regarding the unconscionability provisions in the *Trade Practices Act 1974* (Cth): ‘The description embodied in the word “unconscionable” ultimately refers to the normative characterisation of conduct by a judge having jurisdiction in the relevant class of case’.

A judge will generally need to make at least two value attributions: (1) to attribute value to the subject matter in question (eg the defendant’s conduct) and (2) to establish a reference value for the legal standard (eg the minimum standard of conduct required to satisfy the standard in the circumstances). In complex factual scenarios involving multiple, often

233 Ibid 213.
234 (1979) 142 CLR 531.
235 And had earlier quoted with approval from the judgment of Viscount Simonds in *Bennax v Austin Motor Co Ltd* [1955] AC 370, 373 where it was stated that ‘some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts’.
236 *Warren v Coombes* (1979) 142 CLR 531, 553.
conflicting criteria, the task of characterising and evaluating facts may require detailed and lengthy analysis, although the process may involve holistic and integrative elements. Ultimately the judge must, through a process of synthesis, reach an overall attribution of value for the subject matter and, by comparing this with the reference or threshold value set for the standard, reach an overall judgment about the merit, quality, amount, or significance of the subject matter. For questions involving attributions of notional value, appeal judges may differ from trial judges in either the notional value attributed to a subject matter or to the conclusion, finding, or judgment arising from those value attributions.

In determining whether a trial judge has erred, an appeal judge must consider the advantages held by the trial judge and the implications of those advantages for evaluating facts and establishing appropriate thresholds or reference levels. Such advantages may arise because of specialist expertise, judicial experience, or familiarity with similar cases or because trial judges are able to see all the evidence, hear all witnesses, and examine all the material following the trial. These advantages, where present, may mean a trial judge is better positioned to attribute value to facts, set appropriate thresholds, and conduct complex assessments (eg the balancing or weighing of competing considerations), particularly where the facts of the case are complex. Appeal judges also recognise that a set of reasons always constitutes an incomplete statement of the actual process of reasoning the judge applied.

Hoffman LJ captured two key aspects of the complexity of appellate review for evaluative judgments in Re Grayan Building Services Ltd:

The judge is deciding a question of mixed fact and law in that he is applying the standard laid down by the courts [(in that case) conduct appropriate to a person fit to be a director] to the facts of the case. It is in principle no different from the decision as to whether someone has been negligent or whether a patented invention was obvious: see Benmax v Austin Motor Co Ltd [1955] AC 370. On the other hand, the standards applied by the law in different contexts vary a great deal in precision and generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge’s decision.

The first aspect arises because evaluative judgments involve the application of a legal standard to a set of facts. In this way, they constitute a question of mixed law and fact that is

---

242 Ibid 254.
logically analogous to a determination of negligence and to a finding that an invention falls within the statutory definition of ‘obvious’. This aspect suggests that an appeal court is generally as well (if not better) positioned as the trial judge to decide the question. However, the second aspect arises when the standard is imprecise or the criteria guiding the determination are complex. In these circumstances, the appeal court must carefully consider the advantages of the trial judge and whether, given those advantages, the appeal court is able to make an objectively better decision. This aspect is particularly applicable when the answer is a numerical value (see further below).

4 Judgment

There are two basic outcomes for legal decisions involving evaluative judgments: (1) a numerical answer (eg quantum or percentage) or (2) a binary/binomial (yes/no) answer (see Part I and Part IV). In evaluative judgments calling for a numerical answer, allowance is generally given for a range of legitimate answers so that minor differences in (eg) monetary awards or percentages do not amount to appellable error. In evaluative judgments calling for a yes/no answer, the range of acceptable difference only extends to whether the appeal judge can accept that both the ‘yes’ and the ‘no’ answers represent legitimate responses. For questions of law, and for some questions of mixed law and fact, there can be only one ‘correct’ answer.

Francis Bennion suggested that although decisions calling for the exercise of judgment (rather than discretion) should notionally have one correct answer, the terms used to define standards may be so indeterminate that an ‘area of judgment’ could be said to exist. Bennion quoted Lord Mustill LJ in *South Yorkshire Transport Ltd v. Monopolies and Mergers Commission* as observing that ‘the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case’. In Australia, if the words took their ordinary meaning, it would be a question of law as to whether more than conclusion was reasonably open and, if more then one was reasonably open, it would be a question of fact as to which was correct.

---

244 Cf Aktiebolaget Hässle v Alphapharm Pty Ltd (2002) 212 CLR 411.
246 Hunter v Hunter (1987) 8 NSWLR 573, 576 (Kirby J); Singer v Berghouse (1994) 181 CLR 201, 212.
249 [1993] 1 WLR 23.
250 South Yorkshire Transport Ltd v Monopolies and Mergers Commission [1993] 1 WLR 23, 32 [Lord Mustill].
conclusion. If the words in their standard had a legal meaning, it would be a question of law as to which was the correct conclusion.

Table 1: The basic logic of evaluation for evaluative judgments with a yes/no answer

I. Interpreting the legal standard

1. Determining the meaning of the legal standard
   - What do the terms comprising the standard mean?

2. Selecting the criteria to guide the application of the standard
   - What considerations, factors, or principles should guide the judge in applying the standard?
   - What criteria are prescribed by statute or indicated by case law?

3. Weighting the criteria
   - What weight should each criterion receive?

II. Finding the facts

4. Finding of facts
   - What are the primary facts and inferences of secondary fact?
   - Are any facts in dispute?
   - Do any facts depend on conclusions about the credibility of witnesses?

III. Applying the standard to the facts (selecting & evaluating the facts)

5. Selecting the facts for evaluation (content of the standard I)
   - Given the criteria guiding the application of the standard and the nature of the case, what subject matter requires evaluation (eg conduct, state of affairs)?
   - What facts are relevant to this subject matter?

6. Setting the threshold for the standard (content of the standard II)
   - What threshold value must the subject matter achieve to satisfy the standard?

7. Evaluating the facts (attributing value)
   - What value should be attributed to particular facts (as found), given the criteria guiding the application of the standard?
   - Is the value attributed in numerical terms (eg a quantum or percentage) or as notional quantity?

8. Synthesising multiple value attributions
   - Do different criteria suggest different value attributions for particular facts? How should those competing value attributions be reconciled?
   - If a subject matter (eg an act or omission) consists of multiple facts, what overall value should be attributed to the subject matter?

9. Weighing or balancing multiple value attributions
   - Where the weighing or balancing of value attributions relating to different criteria are called for, how should the competing value attributions be resolved?

10. Comparing to the standard of evaluation
    - Does the value for a subject matter fall above or below the standard of evaluation?

IV. Judgment

11. What is the overall assessment?
    - Does the subject matter satisfy the standard?
    - Does the value of one legal criterion outweigh the value of another?

12. How does the assessment translation into a decision outcome?
    - numerical answer (eg quantum, percentage)
    - binary/binomial (yes/no) answer
F Evaluative Judgments Are Neither Legally Nor Factually Determined

While evaluative judgments have underlying logic, they are neither logically nor factually determined. *Not logically determined* means that although evaluative judgments involve a series of distinct logical operations, this process does not constitute a precise logical algorithm that – when applied to any factual scenario – leads directly to a single definitive answer. *Not factually determined* means that there are no specific facts or circumstances that automatically trigger a certain outcome. A legal standard does not prescribe the particular conditions in which it will be satisfied. Broad legal standards are also sometimes discussed using Stone’s concept of a legal category of indeterminate reference.\(^{252}\) Stone argued that broad standards like reasonableness were ‘predicated on fact-value complexes not on mere facts’\(^{253}\) and that the application of such standards cannot be resolved through logical deduction from legal authorities alone.

This logical and factual indeterminacy contrasts with the precision and clarity of legal rules. In contrast to legal standards, rules (typically) prescribe the factual circumstances in which they apply and are therefore amenable to deductive (reasoning by syllogism) or inductive (reasoning by weight of evidence) reasoning.\(^{254}\) While these forms of reasoning can be applied in evaluative reasoning, the evaluator must make value-based choices to link premises and lines of evidence to each other and to the overall conclusion. Thus, logical entailment (ie premises entailing the conclusion) and general inference (eg facts a, b, and c together support conclusion d) can only be established if the validity of the value choices is accepted – this is really a normative question (eg facts a, b, and c together ought to indicate that the standard is satisfied).

This indeterminacy reflects the choice-rich character of evaluative judgments. Choices must be made, for example, about what criteria will guide the application of the standard and about what value to attribute to particular facts. This choice-richness means that judges typically follow different reasoning pathways, even if they reach the same ultimate conclusion. The implications of this choice-richness are most marked for decisions calling for numerical answers (eg a quantum), as it means that judges will almost invariably reach different outcomes. While these differences may be slight, the near-certainty of such differences suggests that there cannot be a single ‘correct’ answer to the problem and, thus, that appellate courts must allow for a range of legitimate answers. For questions calling for a yes/no answer,


\(^{253}\) Ibid 264.

\(^{254}\) Guest, ‘Logic in the Law’, above n 221, 176.
the translation of all reasoning processes to a simple binary outcome means that, while differences in reasoning pathways will still occur, those differences are only significant to the extent that they lead judges to decide yes or no. Judges may, for example, choose different criteria and make different value attributions and yet still reach the same yes/no answer.

255 Or if they involve a decision-making error, such as the consideration of an irrelevant factor.
CONCLUSION

This thesis examined the nature of value in law on the basis that judicial decision-making would benefit from a more sophisticated understanding of the role of value, values, and evaluation in adjudication. The thesis examined the building blocks of value and values, then assessed the decision types of value judgments and evaluative judgments, and concluded by characterising the key features of evaluative reasoning and evaluative judgments.

The thesis evaluated three broad claims:

1. Value has two broad senses in law: (i) value as a notion of the merit, worth, quality, amount, or significance of legal subject matter (eg conduct, circumstances, evidence) and (ii) values as a belief about what is valuable, significant, or relevant in a particular context and, often, as a guide or reason for a particular choice or course of action. The differing senses of value and values are evident in the distinction between the activities of valuing and evaluating and between the two principal forms of value judgments in law, value-based judgments and evaluative judgments.

2. Value encompasses two distinct concepts of value: (i) numerical value and (2) notional value. Numerical value typically involves a monetary amount or percentage. Notional value indicates the conceptual quantity of value being attributed to a subject matter.

3. Evaluative judgments involve the attribution of value to subject matter (eg conduct, circumstances, evidence) according to a legal standard. Evaluative judgments and evaluative reasoning have several characteristic features, principally that they involve the making of normative assertions, follow an underlying evaluative logic, and are factually and logically indeterminate.

Assuming these claims are accepted, how do these points advance our understanding of value in law and how judges ought to approach questions involving issues of value, value, and evaluation? I will discuss two implications.

First, judges should play closer attention to the justification of evaluative assessments, particularly where the legal standard is imprecise. For example, in ACCC v C G Berbatis Holdings Pty Ltd,256 both the Full Court of the Federal Court and the High Court disagreed with the value that French J attributed to the conduct of the lessors. Gleeson CJ, for example, observed:

---

The reasoning of French J appears to involve a judgment that it was wrong for the lessors to relate the matter of the lessees’ claims to the matter of their request for a renewal of the lease. Why this is so was not explained. It formed a crucial part of the reasoning of French J and, in my view, cannot be sustained.257

However, such disagreements may also relate to differing views on, for example, the appropriateness of legal and equitable intervention in commercial tenancy arrangements.258 To what extent does the difference of opinion between French J and most of the appellate judges reflect: (a) a failure of articulation or (b) differing judicial ideologies? Here it is helpful to recognise that evaluative judgments are not logically or factually determined – rather, they represent normative assertions, as French J recognised.259 Normative arguments are driven by values and thus, to the extent that French J failed to explain his evaluation of the lessor’s conduct, this arguably reflects a failure to articulate the values that guided the making of that value attribution.

Second, for non-discretionary evaluative judgments in appeals by way of rehearing, the appeal court must consider what advantages the trial judge may have had in the making of value attributions. To recognise that trial judges have advantages in deciding evaluative questions is different from holding that trial judges have ‘discretion’ in deciding those questions. Evaluative reasoning is, as we have seen, ‘choice-rich’ and judges (both trial and appellate) will almost invariably follow different pathways of reasoning in deciding an evaluative question even if they reach the same (or similar, in the case of a numerical answer) ultimate conclusion. If an appeal judge reaches a different conclusion than the trial judge and the question does not require a single ‘correct’ answer, the appeal judge must then consider the nature of the advantages held by the trial judge and whether, given those advantages, the appeal judge ought to conclude that the trial judge’s conclusion constitutes a legitimate answer. The emphasis is therefore on the appropriate degree of deference to give to the decision of the trial judge. Close attention to the logic and nature of evaluative reasoning will assist judges in making that assessment.

257 Ibid 65 [16].
ACKNOWLEDGMENTS

Thank you to Robyn Honey for her intellect, enthusiasm, and guidance this last year. Robyn is a most wonderful teacher and mentor.
BIBLIOGRAPHY

A Articles/Books/Reports


Bennion, Francis, ‘Distinguishing Judgment and Discretion’ [2000] *Public Law* 368


French, Justice Robert, ‘Mental States in Civil Litigation’ (Speech delivered at the Australian Institute of Judicial Administration Incorporated: New Challenges, Fresh Solutions, 19-21 September 2003)


Gleeson, Justin, ‘Law, Values and the Advocate’ in Justin Gleeson and Ruth Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 4


Hare, R M, The Language of Morals. (Oxford University Press, 1952)


Hutchinson, Allan, Dwelling on the Threshold (Carswell, 1988)


Hutley, F C, ‘Logic and the Legal Process’ (1949) 1 UWA Law Review 172


Pattenden, Rosemary, The Judge, Discretion, and the Criminal Trial (Clarendon Press, 1982)


Rescher, Nicholas, Introduction to Value Theory (Prentice-Hall, 1969)
Scriven, Michael, ‘The Exact Role of Value Judgments in Science’ in R S Cohen and K Schaffner (eds), Proceedings of the 1972 Biennial Meeting of the Philosophy of Science Association (Reidel, 1974) 219
Stone, Julius, Human Law and Human Justice (Maitland, 1968)
Stone, Julius, Legal System and Lawyers’ Reasonings (Maitland Publications, 1964)
Tamanaha, Brian, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (Princeton University Press, 2010)
Taylor, Paul W, Normative Discourse (Greenwood Press, 1976)
Van Hoeke, Mark, Law as Communication (Hart Publishing, 2002)
Zines, Leslie, The High Court and the Constitution (Federation Press, 4th ed, 1997)

B Cases
ACCC v C G Berbatis Holdings Pty Ltd (2003) 214 CLR 51
ACCC v C G Berbatis Holdings Pty Ltd [2000] FCA 1376
ACCC v C G Berbatis Holdings Pty Ltd (2000) 96 FCR 491
ACCC v Liquorland (Australia) Pty Ltd [2006] FCA 826 (30 June 2006)
Aktiebolaget Hässlle v Alphapharm Pty Ltd (2002) 211 CLR 411
Antononic v Volker (1986) 7 NSWLR 151
Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582
Australian Education Union v General Manager of Fair Work Australia (2012) 246 CLR 117
Australian Gas Light Co v ACCC (No 3) (2003) 137 FCR 317
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Barwon Spinners Pty Ltd v Podolak (2005) 14 VR 622
Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343
Beneficial Financial Corporation Ltd v Karavas (1991) 23 NSWLR 256
Benmax v Austin Motor Co Ltd [1955] AC 370
Biogen Inc v Medeva plc [1997] RPC 1
Boyne Smelters Ltd v Ex Parte Federation of Industrial Manufacturing & Engineering Employees of Australia (1993) 177 CLR 446
Buck v Bavone (1976) 135 CLR 110
Cattanach v Melchior (2003) 215 CLR 1
Certain Lloyds Underwriters v Kathy Giannopoulos [2009] NSWCA 56 (20 March 2009)
Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs (1992) 176 CLR 1
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194
Collector of Customs v Agfa Gevaert Ltd (1996) 186 CLR 389
Cominos v Cominos (1972) 127 CLR 588
Commonwealth v Verwayen (1990) 170 CLR 394
Costa v The Public Trustee of NSW [2008] NSWCA 223 (17 September 2008)
Cullen v Trappell (1980) 146 CLR 1
Da Costa v Cockburn Salvage & Trading Pty Ltd (1970) 124 CLR 192
DAO v R (2011) 81 NSWLR 568
Drinkwater v Howarth [2006] NSWCA 222 (3 August 2006)
Dwyer v Calco Timbers Pty Ltd [2006] VSCA 187 (8 September 2006)
Dwyer v Calco Timbers Pty Ltd (2008) 234 CLR 124
Edwards v Noble (1971) 125 CLR 296
Egan v Willis (1998) 195 CLR 424
Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd (1981) 146 CLR 336
Fox v Percy (2003) 214 CLR 118
G v H (1994) 181 CLR 387
Gett v Tabet [2009] NSWCA 76 (9 April 2009)
Goodman v Windeyer (1980) 144 CLR 490
Green v McKay (Unreported, New South Wales Court of Appeal, Kirby P, 24 April 1991)
Green v R (1997) 148 ALR 659
Gronow v Gronow (1979) 144 CLR 513
Haoucher v Minister for Immigration & Ethnic Affairs (1990) 169 CLR 648
Harriton v Stephens (2006) 226 CLR 52
Hogan v Hinch (2011) 243 CLR 506
House v The King (1936) 55 CLR 499
Hunter v Hunter (1987) 8 NSWLR 573
Golosky v Golosky (Unreported, New South Wales Court of Appeal, Kirby P, 5 October 1993)
In re B (A Child) [2013] UKSC 33 (12 June 2013)
Jago v District Court of NSW (1989) 168 CLR 23
Kelso v Tatiara Meat Co Pty Ltd (2007) 17 VR 592
King v The Queen (2012) 245 CLR 588
Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390
Langer v Commonwealth (1996) 186 CLR 302
Lee Transport Co Ltd v Watson (1940) 64 CLR 1
Maloney v The Queen (2013) 298 ALR 308
March v E & M H Stramare Pty Ltd (1991) 171 CLR 506
Minister for Immigration and Citizenship v Li (2013) 297 ALR 225
Mobilio v Balliotis [1998] 3 VR 833
Monis v The Queen (2013) 295 ALR 259
Moore v Regents of the University of California (1990) 793 P 2d 479
Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383
Muschinski v Dodds (1985) 160 CLR 583
Nigro v Secretary to the Dept of Justice [2013] VSCA 213 (16 August 2013)
NOM v DPP [2012] VSCA 198 (24 August 2012)
Norbis v Norbis (1986) 161 CLR 513
Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529
Precision Data Holdings Ltd v Wills (1992) 173 CLR 167
R v Ford (2009) 201 A Crim R 457
R v Lockyer (1996) 89 A Crim R 457
Reg v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361
Re Grayan Building Services Ltd [1995] Ch 241
Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia (1987) 163 CLR 656
Ruhani v Director of Police (2005) 222 CLR 489
Russo v Russo [1953] VLR 57
Shrimpton v The Commonwealth (1945) 69 CLR 613
Singer v Berghouse (1994) 181 CLR 201
South Yorkshire Transport Ltd v Monopolies and Mergers Commission [1993] 1 WLR 23
State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq) (1999) 73 ALJR 306
Tame v New South Wales (2002) 211 CLR 317
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315
The Queen v George Evans Gwaze [2010] 3 NZLR 734
Thomas v Mowbray (2007) 233 CLR 307
Travel Compensation Fund v Robert Tambree t/as R Tambree and Associates (2005) 224 CLR 627
Vetter v Lake Macquarie City Council (2001) 202 CLR 439
Victoria v Australian Building Construction Employees' & Builders Labourers' Federation (1982) 152 CLR 25
Wainohu v New South Wales (2011) 243 CLR 181
Wallace v Kam (2013) 297 ALR 383
Warren v Coombes (1979) 142 CLR 531
Western Mail Securities Pty Ltd v Forrest Plaza Developments Pty Ltd [1987] FCA 11 (23 January 1987)

White v Barron (1980) 144 CLR 431

Wong v Silkfield Pty Ltd (1999) 199 CLR 255

C Legislation

Australian Constitution

Children Act 1989 (UK)

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)

Criminal Code 1995 (Cth)

Evidence Act 1995 (Cth)

Evidence Act 1995 (NSW)

Evidence Act 2006 (NZ)

Family Law Act 1975 (Cth)

Matrimonial Causes Act 1959-1966 (Cth)

Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)

Trade Practices Act 1974 (Cth)

D Treaties

European Convention on Human Rights 1950 (EU)

E Other

Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi

Transcript of Proceedings, Dwyer v Calco Timbers Pty Ltd [2007] HCATrans 395 (3 August 2007) (Hayne J)