ESTABLISHING TRUTH

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The Hon G.T. Pagone Q.C*

The title of this talk has implicit assumptions that need to be identified and rejected from the outset. I speak as a lawyer who has been variously an advocate, a judge, an academic and recently the Chair of a Royal Commission. In each of these roles the search for answers, or of the right outcome, has not required that what be established is truth: that would be too hard a task and is best left to those in other disciplines.

Australia's distinguished jurist, Sir Owen Dixon, delivered an oration in 1957 to the Royal Australian College of Surgeons with the title "Jesting Pilate". The title was taken from the philosophical essay by Lord Bacon[1] which, in turn, referred to the passage from the gospel of St John[2] in which Pontius Pilate is recorded to have said "what is truth" before leaving the Judgment Hall without waiting for an answer. It is a useful exchange to reflect upon in a talk about establishing truth. Pilate's question, and his not staying for an answer, may be seen in different ways. One is that he did not think that truth could be established; at least not in a hall of judgment over human activity. Let me embrace that view at once and say that what we seek to establish by the forensic processes in law courts, tribunals and, in large part, Royal Commissions, is not aptly described as "truth" in an absolute sense, but something more modest, namely, a reliable best outcome on the available material after hearing, testing, and contesting.

The legal system in Australia is built upon the doctrine of the separation of powers. Judges quell controversies[3] but do not legislate or have the executive powers of government. It is the role of the courts to resolve disputes by the application of pre-existing, and known, rules of law to established facts. That process in not the same as the search for truth; it involves, rather, a resolution of disputes where the parties have control of the issues to be resolved and of the evidence to be relied upon to resolve the issues by reference to objective standards and by an

* B.A. Dip. Ed., LL.B., (Monash), LL.M. (Cambridge), LL.D. (Melb). Retired Judge of the Federal Court of Australia; former Justice of the Supreme Court of Victoria; Professorial Fellow, Law School, University of Melbourne; President, International Association of Judges

[1] "Of Truth" The Works of Lord Bacon

[2] St John 1, Ch 18, v 38 - 40

[3] *D'Orta – Ekenaike v Victorian Legal Aid* (2005) 79 ALJR 214 [45]

impartial and independent decision maker. Our judges are best seen as impartial arbiters of disputes between people rather than as the inquisitor searching for the truth. The judicial process was described by Sir Owen Dixon in a lecture in 1955 to an American audience in these terms:

> The Court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness. With us in Australia appeals are argued at length in open court and written briefs are not filed. The argument is dialectical and the judges engage in the discussion. At every point in the argument the existence is assumed of a body of ascertained principles or doctrines which both counsel and judges know or ought to know and there is a constant appeal to this body of knowledge. In the course of argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the Court will ascribe an imperative authority, if the Court has established by its practice a distinction between persuasive and imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion.[4]

This passage draws attention to a number of essential aspects of the judicial process in Australia. The fundamental aspect, of course, is that it is the role of the judge to apply pre-existing law to proven facts. In that process the advocates rely upon pre-existing rules and principles which they contend apply to the particular facts in question. The facts, at least within our legal system, are not for the judge to investigate but are for the parties themselves to bring before the decision maker in accordance with rules designed to produce fair and reliable outcomes. The system, in other words, is based upon a balance of competing values designed to produce fair outcomes and leaving it to the parties, who have an interest in the outcome, to produce the evidence upon which they wish to rely, consistently with those rules, for the outcome they seek to obtain.

In that process it is useful to note that cases frequently do not have a single correct answer either in fact or in law and the judge will need to explain why one view is preferred. In many cases a judge must decide between competing evidence and competing principles of law. It is accepted, as Sir Own Dixon went on to explain, that a decision of the court will be "correct" or "incorrect" or "right" or "wrong" to the extent that it conforms with legal principles which

[4] Sir Owen Dixon, *Jesting Pilate* (Law Book Co, 1965), 155-6.

are applied according to standards of reasoning that are objective and, of course, which are not adopted arbitrarily or personal to the judges.[5]

Our legal system has developed from the common law of England in which the best resolution of disputes is thought to be obtained through an adversarial system of justice. There is much that may be said against the adversarial system but there is also much to be said in its favour and it is designed to produce just results which the parties can confidently feel to have been reached fairly, with their participation and to a very large extent in proceedings which they controlled. Civil disputes in the adversarial system, for example, are commenced by the parties to the dispute. The parties have most at stake in the dispute and it is they who know the facts on which the outcome will depend. It is the parties who identify the claim and the issues they want to raise to have the claim resolved. It is the parties who have the responsibility of gathering the evidence and of bringing that evidence to the decision maker.

That process occurs in the context of known rules of procedure and of evidence which are designed to be fair to the parties. It is common to hear complaints about those rules being technical, costly and veils behind which truth can be concealed and injustice allowed to reign. But the rules are designed to achieve the very opposite of injustice. It is important to a free society governed by the rule of law that liberty, rights and property not be deprived merely by accusation. Something more is needed to convict a person, or to take from a person rights or property, than the mere accusations or claims of another. The rules of procedure and of evidence may be traced to arcane antiquity but they are there to ensure that the rule of law is not usurped by mere accusation, claim or public clamour. Established procedure must be followed to deny a person's liberty, rights, or property; and there must be reliable evidence which is admissible to the dispute. The evidence must be the best evidence available and it must have a tendency to prove the claims and contentions which are made. For the evidence to be reliable it must also be able to be tested by cross examination and by contrary evidence. That can often be very distressing to the person making an accusation or bringing a claim but a society in which accusation cannot be tested is one in which false claims can be made and other injuries caused.

The decision maker must be independent of the parties to ensure fair outcomes and to give confidence in the outcome. The parties to a dispute, whether civil or criminal, need to feel that

[5] Sir Owen Dixon, "Concerning Judicial Method," *Jesting Pilate* (2nd edition), (1977), 155

the person deciding the dispute has done so without an interest in the outcome. A losing party is entitled to be confident that the loss is not due in any part to the personal or private advantage of the judge. The public needs also to be confident in that and is the means by which there can be confidence in the law and compliance with it.

These features may do much to achieve the "correct" answer, and perhaps to ascertain the "truth," but the fact is that they cannot guarantee much more than the "best" that can be done in an otherwise imperfect world. The rules of procedure sometimes prevents bringing truth to light, and the many rules of evidence may at times prevent acting upon what may otherwise be truthful but not available in admissible evidence. There is also what seems to be an ever-increasing body of knowledge revealing the many defects in our process of decision making which should also cause us to doubt our convictions in "truth". We are probably all aware of the "irrational" decisions that we make in our daily lives and we may have told ourselves, or have been told by someone close to us, that an item bought on sale might not have been worth the discounted price. Being told that the item had once cost much more than the available amount on sale has an effect of anchoring our unconscious thought processes which may cause us to persuade ourselves that there is a bargain not to be let past. Similar defective reasoning is at play in the more serious task of public decision making and judging.

There are increasing studies which have revealed significant incorrect impact of unconscious processes on judicial decisions. The book by Daniel Kahneman, *Thinking, Fast and Slow*, identifies many of the unconscious influences in our decision making which frequently produce incorrect outcomes. One simple experiment referred to by Professor Kahneman revealed that an incorrect statement printed in bold type was more likely to be believed than an equally incorrect statement printed in ordinary type. Work in cognitive psychology shows that the way in which something is framed will also have an impact upon an outcome. An example of that can be seen in the constitutional decision in the United States of America in the case of *Bowers v Hardwick*.[6] That case concerned the extent of the constitutional protection for privacy in face of a state law making the act of sodomy a crime. The plaintiff, Mr Hardwick, had been arrested, and subsequently charged and convicted with the crime of sodomy under Georgia state law when a police officer entered the plaintiff's bedroom and found him having sex with another man. He challenged that law maintaining that it violated his right to privacy protected by the American Constitution. Whether it did depended upon whether the right claimed by Mr

[6] 478 US 186 (1986)

Hardwick could be said to be so deeply rooted in national traditions that it would be protected under due process. How the right Mr Hardwick claimed was to be "framed" was critical to the outcome. Mr Hardwick claimed a right to intimate associations, or intimate associations within his home, but the majority of the judges in the United States Supreme Court characterised Mr Hardwick's claim as a right of "homosexuals to engage in sodomy". Expressed in that way the question answered itself against the plaintiff. In contrast, Justice Blackmun, in dissent, said that the right should be characterized as the right to conduct consensual intimate associations in the privacy of one's home and, so framed, would have produced a different outcome.

Unconscious biases affecting decisions are also at play in reference points when judges and decision-makers make such diverse decisions as imposing custodial or monetary penalties, and award damages. A study in 2015 concluded that judges were likely to be affected by numeric reference points when deciding sentences and assessing damages. The researchers concluded that judges imposed shorter sentences when assigning sentences in months rather than in years, and awarded higher amounts of compensatory damages when informed of a cap on the amount that could be awarded[7] even though these influencing considerations were logically irrelevant to the decision.

We can know, and reason, logically that things which can be measured by different scales remain objectively the same irrespective of the units in which they are measured, and yet it seems that the scale we adopt to measure things have an impact upon our decisions. 50 shares in a company that has only 150 shares on issue have the same worth as 50,000 shares in the same company of 150,000 shares, and yet we may value having 50,000 shares more than having 50 shares even though their objective economic value is exactly the same. Being influenced by the scale of measurement it seems can have a distorting effect in judgments and human choices in a wide variety of circumstances. As was stated by the researchers in the 2015 study:

> Scale distorts judgments and preferences. A wide range of studies have documented such effects. Consumers prefer rewards programs that are denominated in thousands of points rather than hundreds, even though the units are set arbitrarily. Stock splits increase share value, even though they have no effect on a firm's true worth. Travelers who have to translate their currency of higher value into one of lower value (such as when Americans use pesos) tend to overspend. Similarly, American consumers express less willingness to pay for a silk tie as the nominal denomination of the currency in which the item is priced increases. Workers are happier with a 5% raise in a time of 12% inflation than with a 7% salary cut in the face of 0% inflation, even though the two

[7] JJ Rachlinkski, AJ Wistrich and C Guthrie "*Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*" (2015) 90 *Indiana Law Journal* 695.

> are economically identical. Gamblers treat a 5-9 in 100 chance of winning as higher than a l in 10 chance. People planning for a wilderness trek state that a battery for a GPS device needed to guide them will be more reliable when the battery life is described as 120 minutes rather than 2 hours. People say they are willing to pay 126 euros for a cellphone with an advertised battery life of 6 days, but only 102 euros for one with a battery life of 144 hours. Movie watchers state that they would prefer a movie rental plan that offered 7 movies per week for $10 per week over one that offered 9 movies per week for $12 per week; but their preferences reverse when the plans were multiplied out into a whole year; that is, they preferred a plan that offered 468 (9 x 52) movies per year for $12 per week over one that offered 364 (7 x 52) movies per year for $10 per week.

(Footnotes omitted).

The researchers found that judges were also vulnerable to scaling effects when asked to impose sentences by reference to different units of measurement. Judges who were asked to impose sentences by reference to years imposed on average longer sentences than those who imposed sentences by reference to months.[8]

Such reference points, or anchors, can also be seen in differences in political views or social attitudes we have that are taken for granted without our being aware of them. Some predispositions are so embedded in our intuitions, times, culture and context that their distorting effect may be hidden from our ability to consider, discuss or alter them. We should doubt the confidence we have today in what we take for granted when we look back on past expressions of what others had taken for granted in the past that we may now consider to be quite wrong. A few examples from a 1960 publication on advocacy intending to give reliable insight into the evidence of female witnesses may illustrate the point:

> As the chief motive for exaggeration springs from an innate love of the marvellous, and as this love, like all others, is most remarkable in the softer sex, a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This is the more necessary, in consequence of the extensive and dangerous field of falsehood which is opened up by mere exaggeration.[9]

> In India *female witnesses* generally present peculiar difficulties, on account of their habit of seclusion and observance of strict *purdah*. Considerable allowance should be made in their case, and the judge and the lawyer must first make sure that they have understood the questions thoroughly. As they do not appear before the public, their sense of shame and embarrassment stand in the way of giving clear answers.[10]

[8] Ibid, 716.
[9] RK Soonavala, *Advocacy: its principles and practice dealing with the art of advocacy*, (Tripathi, 1960), 731, quoting Taylor, *Evidence*, s 54.
[10] Ibid, 731, quoting from *Sarkar Law of Evidence* (Lexis Nexis, 8th ed) 1147.

> A woman will lie more roundly, readily, and more skilfully for her accomplice or lover than he for her; equally if she has come to hate him she will as a rule be more viciously vindictive than any man can be, and her thirst for revenge will carry her very far, until it is assuaged, and then it is quite likely that she will as bitterly repent. Women are apt to be more thoroughly good than good men, and bad women more iniquitously bad than bad men …The average woman will find out the aim of her questioner more rapidly and surely than will the average man. It is impossible to define any method of examining women as distinct from that used when exploring the minds of men.[11]

> A woman has always an advantage over counsel. In the first place she is so everlastingly on the fidget that it is difficult to put any question whatever to her; in the second, she never sticks to the point and will not be kept to it; in the third place she is a woman, and has the sympathy of the Court. If, further, she is clever and pretty, as long as jurors are men, she must be invincible.[12]

Examples of this kind are bountiful and are not confined to expressions of different political, philosophical or policy views about which reasonable people may differ. They are often expressions of unfounded views widely held by people, including decision-makers, at a particular time or place. In 1947, for example, the New South Wales Conservation and Irrigation Commission refused to consent to the transfer of an irrigation-farm licence to a naturalised Australian of Italian origin in part for the stated reason that experience was said to have shown that "as a general rule Italians [were] not good farmers under irrigation methods".[13] It is hard for us to see today how such beliefs could have been held by a responsible decision maker.

The risk of being inappropriately influenced by unconscious reference points which we carry with us are at play at the very heart of the common law system of proof by oral testimony. There was a time when the law excluded evidence being given by the parties to a dispute because of the fear that it was unreliable and likely to be false.[14] We also inevitably make judgments about people, about the reliability of what they say, and we form impressions about them based upon their appearance and demeanour. The demeanour of a witness is part of the evidence upon which decisions are made, and a standard text book on the law of evidence expressed the view that a court may be more disposed to believe a witness who "gives evidence in a forthright way, unperturbed under cross-examination",[15] although a moment's reflection might lead us to reason that not to be a reliable position to adopt bearing in mind that the

[11] Ibid, 731-732, quoting from WT Shore, *Crime and its Detection* (The Gresham Publishing Company Ltd, 1932) 132-133.
[12] Ibid, 732, quoting from *20 Monthly Law Journal* 224 (India).
[13] *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492, 495.
[14] See W.S. Holdsworth *Charles Dickens as a Legal Historian* (1929, Yale University Press) 132 -135).
[15] J.D. Heydon, *Cross on Evidence*, (Lexis Nexis Butterworths, 7th ed, 2004), 56 [1285].

hallmark of a confidence trickster is of having an impressive demeanour.[16] Other distorting effects include the bias which comes from hindsight, framing, egocentricity and the tendency to treat the probability of a hypothesis given the evidence as the same as, or close to, the probability of the evidence given the hypothesis.[17]

The potentially distorting effect of unconscious bias may not mean that it is to be given no role in the decision. The unreliability of demeanour evidence, for example, does not mean that demeanour may not sometimes be relevant or helpful in reaching a decision. In *Fox v Percy*[18] Gleeson CJ, Gummow and Kirby JJ said:

> [I]n recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.[19]

The potentially distorting impact of unconscious biases is a reason to deal with the potential distortion rather than to reject entirely a factor which may properly bear upon a decision.[20] What is important for the application of the law is the "construction of a satisfactory road towards to the truth"[21] (to adopt the view expressed by a psychotherapist in a different context), rather than to see the road as unacceptable because of the defects. Thus, for example, evidence of a price paid or obtained after a date may not be proof of the price or value at the relevant date (and may be an example of hindsight bias), but it may be a useful reference point against

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[16] AM Gleeson QC, Discussion Paper presented to the Gunn Club, Sydney, c.1980, 5 (the author is indebted to Mr Stephen McMillan of Counsel for providing a copy of this paper); see also AM Gleeson QC "Judging the Judges" (1979) 53 *Australian Law Journal* 338, 344.

[17] C Guthrie, JJ Rachlinski, AJ Wistrich "Judging by Heuristics; Cognitive Illusions in Judicial Decision-Making" (2002) 86 *Judicature*, 44.

[18] (2003) 214 CLR 118.

[19] See also *Fox v Percy* (2003) 214 CLR 118 at 138, 158, 166; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458; 224 ALR 1 at 8, 14, 21; *Goodrich Aerospace Pty Ltd v ARSIC* (2006) 66 NSWLR 186; McClennan P, Who is Telling the Truth? Psychology, common sense and the law (Paper presented at 2006 Annual Conference of the Law Courts of NSW, 2-4 August 2006); Justice David Ipp, "Problems with Fact-Finding" (2006) 80 *Australian Law Journal* 667.

[20] JJ Rachlinkski, AJ Wistrich and C Guthrie "Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences" (2015) 90 *Indiana Law Journal* 695 at 736.

[21] DW Winnicott, *Thinking About Children* (Addison-Wesley Publishing, 1996) 7 (said by the author about science rather than the law); see also Judge William Young, "Quality of Justice – Myth or Reality" (2017) 23 *Commonwealth Judicial Journal* 9, 12-13.

which to evaluate other evidence.[22] Some decisions may also require a degree of subjective judgment in which unconscious factors will inevitably play some part. Sentencing requires an "instinctive synthesis"[23] which involves taking into account all of the relevant factors to arrive at a single result giving due account to all.[24] Civil penalties will also be affected by reference points in which anchors such as, for example, maximum penalties may have an impermissible distorting effect[25] without careful explanation and reasoning.

The legal profession is often seen as another barrier to ascertaining truth by rules which may seem to supress what may bear upon the truth. Shakespeare famously had one of his characters proclaim: "[t]he first thing we do, let's kill all the lawyers," [26] but the basis of those rules, and of the regulatory supervision of the profession, is intended to assist in the ascertainment of the best and fairest outcome rather than the suppression of "truth". The rule known as lawyer and client, or legal professional, privilege, for example, prevents disclosure of confidential communications between lawyer and client made for the purpose of giving or receiving legal advice but its role is to further the interests of justice not to impede it. We have heard much about that rule, and of the consequence of its breach, in the public discussions concerning Lawyer X. She was acting as lawyer to a number of people suspected, and charged with, serious criminal offences whilst at the same time engaged as a police informer: what she was told in confidence for the purpose of legal advice and defence to criminal charges was being conveyed to the police and prosecuting authorities.

The purpose of the rule is not to conceal truth and, indeed, the rule cannot be relied upon if the confidential communication is made for the purposes of furthering illegality. The lawyer must be engaged in a professional capacity and not participate in illegal transactions.[27] The rule, rather, is intended to assist in achieving the best outcome in litigation, and in the general administration of the law, by maximising the candour in discussions between lawyer and client so that the lawyer can give the best and correct advice in the full knowledge of the facts and circumstances of the client. The alternative would be for the client to withhold facts when seeking legal advice and assistance for fear that what was said could be disclosed to others.

[22] *McCathie v Federal Commissioner of Taxation* (1944) 69 CLR 1, 16; *Federal Commissioner of Taxation v Harris* (1980) 30 ALR 10, 18, 19 and 25.
[23] *R v Williscroft* [1976] VR 292, 300.
[24] *Wong v The Queen* (2001) 207 CLR 584, 611.
[25] See *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118, [43].
[26] Henry VI Part 2, Act IV, Scene 2, l59, Dick the Butcher to Jack Cade
[27] *Leary v Federal Commissioner of Taxation* (1980) 47 FLR 414, 434–5 (Brennan J).

That would necessarily distort the administration of the law by distorting the basis upon which legal advice and assistance was given.

The public as a whole has an interest to ensure that lawyers are looking after the interests of their clients. The public as a whole benefits from the law being applied properly through professional, trained and trustworthy lawyers. The members of the public cannot possibly know all of the details of the law and generally should not be expected to do so. The public relies upon lawyers to act for individual members of the public and in that way to provide to the individuals the legal skills and knowledge which they need but otherwise lack. It is the public interest in having its justice administered properly that explains many of the rights which clients have against their lawyers and which might otherwise seem anomalous. The right of a client to maintain confidential the communications with a lawyer is fundamentally a right which benefits the community as a whole by encouraging the clients to be open and frank when seeking legal assistance.[28] It is a rule which promotes justice being administered properly.[29]

The public interest in seeing justice being administered properly also explains the duties which lawyers sometimes have to put aside personal values or personal preferences when deciding to act for, or when acting for, a client. The duty of a barrister is to "promote and protect fearlessly and by all proper and lawful means the best interests" of the client[30] without regards to the barrister's self interest or to any personal consequence.[31] There are many times when I found myself as a barrister acting for someone whose values, conduct or character I found distasteful or unpleasant. The system as a whole, however, benefits from everyone having access to proper legal services and for some lawyers being obliged to accept briefs for clients in court proceedings.[32] Access to lawyers, legal advice and legal services provides a substantial and secure foundation upon which we can all have confidence that justice is administered properly. We can all feel more confident when accused paedophiles, rapists or murderers are convicted if they have had access to competent and robust independent legal services for their defence.

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[28] *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ); *Baker v Campbell* (1983)153 CLR 52, 63 (Gibbs CJ).
[29] *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ), 690 (Jacobs J); *Baker v Campbell* (1983)153 CLR 52, 66 (Gibbs CJ), 94-95 (Wilson J).
[30] Butterworths, *Halsbury's Laws of England,* vol 3(1) (2005 reissue) 3 Professional Practice and Conduct, 'Duty to the lay client' [510].
[31] See *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid); *Tombling v Universal Bulb Company, Limtied* [1951] 2 TLR 289, 297 (Lord Justice Denning); *Abse v Smith* [1986] QB 536, 546 (Sir Donaldson MR); *Tuckiar v R* (1934) 52 CLR 335.
[32] The Victorian Bar, *Rules of Conduct and Continuing Legal Education Rules 2005,* r 86.

The system as a whole also benefits from an obligation upon barristers to accept a brief for a client without personal conviction in the moral position or correctness of the client's case.[33] Often the client is in the vulnerable position of reliance and dependence upon the lawyer's knowledge, skill, expertise, experience, honesty and judgment.[34] We can all feel more confident in the correctness of outcomes if we know that lawyers agree to act for clients without prejudgment of the merits and morals of their clients or of their case: it justifies our confidence in knowing that lawyers are putting their client's position independently, dispassionately and fairly in the client's interest. The lawyer must look after the client and the client's interests and it is in the public interest for that to be so.

The lawyer's duty to the law also imposes a duty upon the lawyer to the administration of justice which the client may, in some circumstances, prefer the lawyer did not have. The lawyer must both act for the client as well as uphold, and not subvert, the law.[35] The simultaneous duty which a lawyer has to the client and to the law can be seen in the facts and the decision in *Tuckiar v R*.[36] In that case a barrister had been defending an indigenous client charged with the murder of a police constable in the Northern Territory. During the trial the barrister for the accused interviewed his client at the suggestion of the judge to determine whether the accused agreed with the evidence given by a witness of a confession which the accused was alleged to have made. The barrister said in open court after the interview that he found himself in the worst predicament he had ever faced in all of his legal career. The jury had found the accused guilty of murder and, his counsel, between the guilty verdict and the judge's pronouncement of a sentence, informed the judge about what his client had told him when interviewed. The accused had told two different and inconsistent versions of the events, only one of which could be true. The accused had informed his counsel during the interview that the first account he had told was the true one and that the second account was a lie. Revealing this confession enabled the trial judge to accept as truthful the evidence of a Constable McColl and also that of a young boy named Harry whose evidence the judge had doubted as truthful. The joint judgment of Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ was critical of this conduct. Their honours said:

> It would be difficult for anyone in the position of the learned judge to receive the communication made to him by counsel for the prisoner and yet retain the same view

[33] The Victorian Bar, *Rules of Conduct and Continuing Legal Education Rules 2005*, r 11.
[34] *Tip Top Dry Cleaners Pty Ltd v Mackintosh* [1998] 98 ATC 4346; *Hurlingham Estates Ltd v Wilde & Partners* (1996) 37 ATR 261; *Hawkins v Clayton* (1988) 164 CLR 539.
[35] *Re B* [1981] 2 NSWLR 372, 381-2 (Moffitt P).
[36] (1934) 52 CLR 335.

> of the dangers involved in the weakness of the Crown evidence. This may, perhaps, explain His Honor's evident anxiety that the jury should not under-estimate the force of the evidence the Crown did adduce. Indeed counsel seems to have taken a course calculated to transfer to the judge the embarrassment which he appears so much to have felt. Why he should have conceived himself to have been in so great a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and to the Court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only. … Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted. The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure.[37]

The lawyer's task in that case had been to assist the client to maintain such defence as was lawfully available. The lawyer's role is generally to supply the legal knowledge and expertise needed by the client to enable the system to work properly. A conviction could not be secured if the prosecution could not prove its case. The public interest requires convictions to be secured by due process. People should not be charged or convicted on the basis of suspicion, hunch or guesswork by the courts, juries, police or prosecuting officials. The public also has an interest to encourage an accused person to be fully frank and candid with his or her lawyer so that the client's interests can be pursued and maintained fully and properly in accordance with the law. The defence lawyer was obliged to put such defences as were available for the accused client and to test the defects and weaknesses in the prosecution's case. The lawyer was not permitted to mislead the court by putting affirmative facts contrary to the instructions given but needed to know his client's version of events so that his case could be put fairly. The public interest is not advanced by encouraging an accused person to mislead a court through conscious deceit of a lawyer but is advanced by encouraging an accused person to rely upon such defences as are legally available on the facts.

[37] Ibid 346.

This aspect of the lawyer's duty to the law is found both in the common law[38] and in statute.[39] The content of the duty may vary as between the work and functions of barristers and solicitors,[40] but it is fundamental, and necessary, to the administration of our legal system. The law is, in very large part, administered by the legal profession. Mostly the law is applied by each of us going about our daily business lawfully, but the legal profession has the practical day to day management and application of a significant part of the law. Members of the public routinely seek the advice of lawyers and act upon that advice to regulate their behaviour, to pursue rights or to abandon claims. Contracts are made through lawyers regulating the rights of parties in commerce, and domestic settlements are secured through lawyers dealing with family rights. The cases which go to court for compulsory determination by a judge are a very small percentage of the instances which together make up the total management and administration of the law and justice in any society. For such a system to work, and for the public to have confidence that it is working properly, the lawyers must uphold the law and its proper administration.

Articulating reasons for decision, and thereby becoming aware of potentially distorting unconscious biases, is fundamental to making fair, impartial and objectively defensible decisions. Awareness of the factors that influence decisions enables those factors to be dealt with appropriately. The role they play, if any, in a decision needs to be articulated in reasons for the decision. The discipline of providing reasons for decisions is the law's means to bring to light those factors which explain how or why a decision is made. It is also the means by which the decision maker explains both why and how a decision is the best on the law and evidence rather than, perhaps, the identification of the much more elusive truth.

The lawyer's aim is best seen not as that of seeking the establishment of truth but as the process of arriving at reasoned outcomes. The reasoning must rely upon objective principles and not upon personal whim or arbitrary power. Plato in *The Republic* had thought of the ideal government as one by wise and superior "philosopher kings" who knew what was good for the people and, therefore, were not themselves subject to any control over their commands or decisions. Aristotle, on the other hand, postulated as superior a government based upon law and reason. In the Aristotelian view there is removed arbitrary passion in favour of common

[38] *Rondel v Worsley* [1969] 1 AC 191; *Ziems v Prothonotary* (1957) 97 CLR 279; *Myers v Elman* [1940] AC 282; *Giannarelli v Wraith* (1988) 165 CLR 543.
[39] *Legal Profession Act 2004* (Vic), s 2.7.2.
[40] *Myers v Elman* [1940] AC 282; *Rondel v Worsley* [1969] 1 AC 191.

rules and principles. It is by the recourse to reason and to justification that we seek to ascertain, if not truth, at least a defensible basis on which to base decisions. We cannot remove all of the obstacles in the way of ascertaining truth, but we can reduce their impact and, perhaps, best approach an approximation of the truth we would like by having to justify what we do by reference to principles beyond the mere existence of power, and by reference to material which is reliable and is tested transparently and fairly to those affected.