INTERPRETATION OF STATUTORY RULES AS APPLICATION: A LEGAL HERMENEUTICS

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Abstract

The thesis critically examines the judicial interpretation of statutory rules, now the source of most of our law. Courts in adopting a traditional two-step approach denoted as prospective interpretation (first ‘understand’ the meaning and then apply that meaning) have promulgated conditions that effectively rewrite statutory rules and limit their accessibility, so presenting a challenge to the separation of powers and to rule of law values. My research critically examines the tenability, completeness and utility of prospective interpretation, in particular by analysis of the work of Neil MacCormick. An alternative approach, denoted as concurrent interpretation: judicial interpretation by correspondence of the words of the rule with the facts of the particular case, is explored. The conceptual legitimacy of, and methods for, concurrent interpretation are found in philosophical hermeneutics and its account of language. The perceived problem that philosophical hermeneutics has nothing to say about method is confronted. By drawing on the work of Arthur Kaufmann, Paul Ricoeur and Jarkko Tontti in particular I introduce a legal hermeneutics as a practice of legal argument in the context of the judicial interpretation of statutory rules.
Preface

The thesis research would not have begun without the encouragement of John Burrows, John Fogarty and Lindsay Trotman. I am grateful to them for this and for sticking with the project right through to completion. John Burrows had taught me as an undergraduate and his knowledge of interpretation is without par in New Zealand. In his usual quiet way he was able to steer me past a few blind alleys and in a sense I hope I have promoted theoretical ideas in support of application that would please him. All of them have made valuable time for my project and me.

The esoteric nature of my research presented a challenge to my supervisors and it is pleasing that Mark Henaghan and Michael Robertson rose to the challenge especially in the last year. Mark’s eye for the finished product is legendary. He made a special effort to keep my research grounded in legal practice and as accessible to lawyers as possible. Also as Dean he has been brilliant in facilitating my attendance at conferences, in promoting my University Scholarship and in many other material ways.

Michael took up with enthusiasm my presentations of research in respect of a succession of drafts, challenged many of my ideas and provided invaluable and repeated editing of the whole thesis. This is an opportunity to thank Michael for his considerable investment in time and knowledge to my project. Also thanks to Simon Currie for proofreading.

An enjoyable aspect of my research has been making extensive contacts mostly overseas, many of whom have become good friends. I am sorry I can only mention a few of you: Arthur Glass and Nicholas Aroney who kept a close interest in my work, Alexandra Kolb for her enthusiasm and advice, Jay Mootz who has given me the confidence to believe I might be on the right track and has sent me his books, and especially Torben Spaak who made me so welcome at Uppsala and has become a good friend with a reciprocal and genuine interest in our academic endeavours.
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## Abbreviations

<table>
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<th>Description</th>
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<tbody>
<tr>
<td>FTA</td>
<td>Fair Trading Act 1968.</td>
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<tr>
<td>Heaven</td>
<td>AMP Finance Ltd v Heaven (1997) 8 TCLR 144 (CA).</td>
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<tr>
<td>Jackson Narrative</td>
<td>BS Jackson Law, Fact and Narrative Coherence (1988).</td>
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<tr>
<td>Standpoint</td>
<td>Arthur Glass “A Hermeneutical Standpoint” in Jeffrey Goldsworthy and Tom Campbell (eds), Legal Interpretation in Democratic States (2002).</td>
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<td>Reference</td>
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<td>UPLR</td>
<td>Zenon Bankowski and James MacLean (eds) <em>The Universal and the Particular in Legal Reasoning</em> (2006).</td>
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Chapter 1

Introduction

Janet Frame in the first volume of her famous autobiography records her earliest memories including the moment at the age of two when she first became aware of a world outside herself:¹

I remember a grey day when I stood by the gate and listened to the wind in the telegraph wires. I had my first conscious feeling of an outside sadness, or it seemed to come from outside. … I felt a burden of sadness and loneliness as if something had happened or begun and I knew about it. I don’t think I had yet thought of myself as a person looking out at the world; until then, I felt I was the world. In listening to the wind and its sad song, I knew I was listening to a sadness that had no relation to me, which belonged to the world.

Frame is describing her moment of “being-in-the-world”.² For the first time she perceives herself as an individual person, a person aware of a world outside herself capable of interpreting that world. She felt something that had a description, a meaning that was meaningful outside of herself that she could interpret. At that moment she may or may not have had the precise words to describe her feelings but either then or shortly after she had the capacity to attribute her feelings in terms of language: a sadness that had no relation to her. In earlier and subsequent pages Frame describes her acquisition as a little girl of language in the speech community of her family.³


² Martin Heidegger Being and Time, Joan Stambaugh translation of Sein und Zeit (1996) at 49-55.

³ Following these thoughts I investigated whether or not Frame was aware of Heidegger or his work. It seems unlikely. Lydia Wevers in “Self Possession: ‘Things’ and Janet Frame’s Autobiography”
This account is a long way from law and a reader might think a long way from legal interpretation. However it serves to signal an alternative approach to legal interpretation. As the thesis develops I hope it can be seen that the way we use language and interpret language is complex and is bound up with who we are and how we deal with conflicts and make choices as human beings. Understanding and meaning do not come simply by holding up a word or sentence and saying, yes it means this. No one person or institution can claim the oracle of interpretation. And interpretation such as described by Frame is something we do all the time, a skill we acquire in our use of language as human beings. Interpretation is an ordinary competence we all have. All these thoughts inform the task of interpretation at any level and in respect of any discourse or text including the judicial interpretation of statutory rules.

The topic of the thesis and the research object is the judicial interpretation of statutory rules. Therefore the investigation of interpretation is confined to a specific sphere of the human practice of interpretation and a number of delimitations are immediately apparent. The thesis is about what judges do or should do in deciding a court case in which a rule promulgated by Parliament in the form of a text is invoked. As it happens cases about statutory rules now form the great bulk of judicial work.

The context of judicial process in deciding a particular case has a significant bearing on the interpretative task because judicial interpretations in that context are made in the arena of discursive conflict and for the purpose of resolving a conflict in each particular case. I hope that as the thesis proceeds it will be apparent how the context of resolving conflict in the particular case informs or should inform the judicial process of statutory interpretation.

Already there is mention of what judges do and what judges ought to do. I am aware that there is a difference between on the one hand describing what happens in judicial interpretation and on the other hand advancing an argument about what should happen when judges engage in interpretation. It has to be said that this distinction is not

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always maintained in the literature and for this reason as the literature is analysed is sometimes blurred in the earlier chapters of the thesis.\(^4\) However in Chapter 5, notably in section 5.4, the distinction is directly confronted and is then resolved in the manner argued in Chapter 6.

The thesis is a cumulative progression of ideas and relevant material beginning with necessary foundations in Chapter 2, moving to the identification and description of two accounts of the judicial interpretation of statutory rules. I denote these accounts as concurrent interpretation and prospective interpretation and the arguments for and against these interpretative accounts are examined in Chapters 3, 4, 5 and 6. Throughout the thesis they are considered in a number of levels (i) their tenability, (ii) their completeness and (iii) their utility. It will be seen that the thesis is a sustained argument in favour of concurrent interpretation on theoretical and practical grounds confirmed in an exploration of cases in Chapter 7. There is a brief conclusion.

Throughout care is taken to keep the thesis to the task of the judicial interpretation of statutory rules and within bounds. There are many by-roads on offer and it has been necessary to resist opportunities to explore related philosophical, jurisprudential and legal topics. Care is taken as the thesis progresses to set out delimitations.

Two general delimitations should be mentioned now. First it may appear that ideas found in American Realism are relevant to the argument for concurrent interpretation. Although that may and may not be so in the respects touched on as the thesis proceeds, a deliberate decision has been taken to avoid a complex and exhausting excursion into American Realism and instead bring to the table relatively new philosophical and jurisprudential ideas that are, I contend, directly apposite to the judicial interpretation of statutory rules.

Second the thesis resists direct engagement with the interpretative debates notably found in North American jurisprudence, the different theoretical positions that have developed over the last thirty years under headings such as originalism,

intentionalism, and textualism. In a sense the thesis transcends these debates and provides material relevant to them but it is not necessary and it is not realistic in terms of the scope of the thesis to engage with these matters now. However the common law response including the response in North American jurisprudence to the philosophical ideas discussed in the thesis is not neglected and is the topic of Chapter 5.3.

Related to these debates are the interpretative arguments, mainly textual, systemic, intentionalist and teleological. I think the interpretative arguments are best seen as methods and techniques of legal reasoning⁵ that is, as interpretive tools. As such they are relevant to an evaluation of the best interpretative practice and are discussed in Chapter 7, notably in section 7.8.

The thesis can be read as a synthesis of philosophical ideas and legal practice. The challenge is to introduce vast and complex topics in a way that is directly relevant, accessible and proportionate to the thesis. There is bound to be disagreement as to whether the selected content is too much or too little. The aim is to introduce ideas that are not generally well known to common lawyers, to demonstrate the way these ideas interconnect with statutory interpretation and to demonstrate the relevance of these ideas to the judicial interpretation of statutory rules.

⁵ This is the approach of Torben Spaak: Guidance and Constraint: The Action-Guiding Capacity of Theories of Legal Reasoning (2007).
Chapter 2

Foundations

2.1 Introduction

This chapter sets out parameters and themes that underlie the ideas presented in the thesis. As developed later, two accounts of the judicial interpretation of statutory rules are identified and denoted as prospective interpretation and concurrent interpretation. Before engaging with the two accounts it is necessary to set some foundations.

The thesis is limited to the judicial interpretation of statutory rules. It is not concerned in any direct way with the judicial interpretation of contracts or of legislation that does not have the character of statutory rules such as legislation of a constitutional nature. Therefore it is necessary to be clear about the nature of statutory rules and this is the subject of section 2.2.

Rule of law principles and values underlie any assessment of the two interpretative accounts. Therefore there is a short treatment of the rule of law for the purpose only of identifying the principles and values directly relevant to the judicial interpretation of statutory rules. This is the subject of section 2.3. In the course of the thesis the rule of law principles and values will be yardsticks against which to measure the tenability, completeness and utility of the two interpretative accounts.

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6 In any case there are good arguments for distinguishing statutory interpretation from constitutional interpretation that do not need to be discussed in the thesis and are explored by James Allan in “Constitutional Interpretation v Statutory Interpretation: Understanding the Attractions of Original Intent” (2000) 6 Legal Theory 109 and “The Curious Concept of the ‘Living Tree’” in Grant Huscott and Bradley W Miller (eds) The Challenge of Originalism: Theories of Constitutional Interpretation (2011) at 196-197.
Relevant to statutory rules and the role of courts in interpreting them is the separation of powers between Parliament that makes the rules and courts that apply them. The thesis supports the separation of these powers: that it is the function of Parliament not courts to make law including rules. This constitutional cornerstone is the subject of section 2.4. The treatment is not concerned with any perceived separation of executive powers.

The chapter proceeds to a discussion of the practice of the courts in their interpretation of statutory rules. The focus is on what courts, lawyers and commentators say is happening; how they describe interpretative practices both when deciding cases and in commentaries about those practices.

It is necessary first to consider the need to interpret. Then the two interpretative accounts are identified and denoted as prospective interpretation and concurrent interpretation. Throughout the thesis they are considered in a number of levels including (i) their tenability, (ii) their completeness and (iii) their utility. These three levels are a recurring theme in the thesis. The provenance of the two interpretative accounts is explored and ideas relevant to them are introduced for further exploration is subsequent chapters. The way the accounts work in practice is illustrated by reference to cases.

The aim is to undertake a fresh examination of and introduce new ideas directly relevant to the important topic of statutory interpretation that go beyond its usual treatment. Most treatments of statutory interpretation are concerned with (the best) approaches to interpretation, called tools in this thesis. An aim of the thesis is to put concurrent interpretation on a proper footing and to critically examine prospective interpretation and its current dominance of statutory interpretation both intellectually and in practice.

Judicial interpretation is a vast and much debated topic and it is no accident or modesty that academics working in this field generally make no greater claim than to

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7 Tools of interpretation are discussed in a practical context in Chapter 7. The tools of interpretation include the interpretative arguments.
have contributed to “a programme for further study and research”\(^8\), to cite from the text most closely examined in subsequent chapters of the thesis. The thesis cannot give the final and definitive account of the judicial process in the application of statutory rules but it can strive to make a worthwhile contribution to this topic.

### 2.2 Statutory rules

Statute law consists of Acts of Parliament and subordinate or delegated legislation mainly statutory regulations made under the authority of Acts of Parliament.\(^9\) “The Parliament of New Zealand continues to have full power to make laws.”\(^10\) In one sense statutes are simply a form of legal text that lawyers have to interpret. However statutes are special most of all because of the authority that attaches to them\(^11\) and for this thesis because of the way statutes set out more or less concise formulations of legal rules. There can be no doubt that the interpretation of statutory rules by courts is a highly significant aspect of legal practice. Significant areas of law are now governed by statutory rules. However not all statutory texts take this form and there is a variety of statutory provisions including those that establish entities, set out purposes and powers, are of declaratory effect and are of a constitutional nature. Statutes may also serve symbolic purposes, the New Zealand Bill of Rights Act 1990 being an example.\(^12\) The thesis is not directly concerned with statutory provisions other than rules and the implications for the interpretation of such other provisions arising herein are incidental.

Another form of legislation often found in the same context as statutory rules is the statutory conferment of wide discretions on courts particularly with regard to

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10 Constitution Act 1986, s 15(1).


12 This Act is given separate treatment in *Burrows Statute Law* at ch 11.
remedies, both as to whether or not to grant a remedy and as to the content of that remedy. These statutory discretions may be unfettered,\textsuperscript{13} others may be circumscribed by general principles\textsuperscript{14} and others may list considerations to be taken into account.\textsuperscript{15} A dramatic and commonplace example is the statutory provision for the disposal by courts of claims against the estate of a deceased person:\textsuperscript{16}

If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the Court thinks fit be made out of the deceased’s estate for all or any of those persons.

With regard to statutory provisions that confer judicial discretions, this thesis adopts the approach in \textit{Burrows Statute Law}: “The judges exercising this function are not properly “interpreting” at all; they are exercising a power given to them to find a just solution to the problem before them.”\textsuperscript{17}

The distinction between rules and the conferment of discretions is well accepted. Frederick Schauer an exponent of rule-based decision-making says:\textsuperscript{18}

I refer to the distinction between (comparatively) specific rules and (comparatively) vague ones as a distinction between rules (specific) and standards (vague). The

\begin{itemize}
\item\textsuperscript{13} For example Family Protection Act 1955 and as to remedies in the Fair Trading Act 1968 [“FTA”].
\item\textsuperscript{14} For example Illegal Contracts Act 1970: court must not give relief if it considers that to do so would not be in the public interest.
\item\textsuperscript{15} For example Contractual Remedies Act 1979 [“CRA”]. Section 9 (4) provides matters the court shall “have regard to” when making an order for relief.
\item\textsuperscript{16} Family Protection Act 1955, s 4(1). Emphasis added.
\item\textsuperscript{17} \textit{Burrows Statute Law} at 515. The same proposition is found in all the earlier editions dating from 1992.
\item\textsuperscript{18} Frederick Schauer “The Convergence of Rules and Standards” in Rick Bigwood (ed) \textit{The Statute: Making and Meaning} (2004) 21 at 23. He sets out in a footnote a large number of citations that support the distinction.
\end{itemize}
distinction (and its accompanying terminology) has a wide currency in legal theory, and is no less problematic than similar distinctions.

In the New Zealand context, Janet McLean supports the distinction describing how Parliament makes a choice of legislative design and on that basis discusses some of the consequences.\(^\text{19}\) As she says: “We need a theory about discretions alongside our theory about rules.”\(^\text{20}\) I attempt to add to theories about rules but the equally vast topic of discretions is beyond the reach of this thesis.

It is interesting to note that HLA Hart appears to have drawn a similar distinction. In the context of “Formalism and Rule-Scepticism” he discusses the legislative techniques of statutory delegation that may or may not require conformity with “a variable standard” in particular with a standard of reasonableness.\(^\text{21}\) Neil MacCormick adopts the distinction and in his book *Legal Reasoning* treats “reasonableness” separately.\(^\text{22}\)

Of course in particular instances it may be difficult to draw a precise boundary between rules and standards. “Just as rules are not infinitely precise, nor are standards infinitely vague.”\(^\text{23}\) As Schauer demonstrates, this distinction is fluid over time. However the statutory provisions examined throughout the thesis, in detail in Chapter 7, are readily recognisable as rules and fit with MacCormick’s account of what rules are as distinct from discretions.

So, what are legal rules? It is difficult to improve on what is said by MacCormick.\(^\text{24}\)

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\(^\text{20}\) Ibid, at 47.

\(^\text{21}\) HLA Hart *The Concept of Law* (1961) at 132.

\(^\text{22}\) *Legal Reasoning* at ch 9.


\(^\text{24}\) *Legal Reasoning* at 24.
A legal rule is a normative provision stated in or constructed from a recognized legal source that has the form of linking a determinate normative consequence to determinate operative facts. It is in the nature of a rule to provide that whenever a certain state of facts obtains, a given normative consequence is to follow there-from.

And later in the same book he adds: “It is quite often the case that the law sets up a provision that is to be conditional on the satisfaction of a certain criterion or standard of value.” 25 There are different sources of legal rules including statutes and MacCormick includes statutory rules, the subject of the thesis.

In the thesis the words criterion and criteria are used to encompass all the things and elements on which the application of a rule depends. Reference to criteria, sometimes called elements, accords with the actual practice of pleading and argument of both the parties to litigation and the courts.

Section 9 FTA, a subject of Chapter 7, is a useful and commonplace example: it is a rule that provides that “no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.” The criteria are (i) a person, (ii) in trade, (iii) engages in conduct, (iv) that is misleading or deceptive or is likely to mislead or deceive. All of the criteria in a rule must be established if a rule is to apply. 26

Rules by their nature and consistent with formal justice are expressed in more or less general terms and in written language. It is a necessary feature of rules including their criteria that they be expressed in general terms because Parliament cannot anticipate every factual situation. In effect and consistent with the separation of powers Parliament delegates to courts the function of giving force to rules. Whilst the statute is available for the information of the public and government agencies as a silent guide to conduct with the accompanying threat of court sanction courts do not have any explicit function until their function is invoked.

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25 Legal Reasoning at 73.

26 And in the case of FTA, s 9 a further criterion of a successful claim for a remedy: that the loss or damage was “by” the contravening conduct.
Rules are not self-interpreting and self-applying. The court process is initiated so bringing the statutory rule into play. A party pleads the relevant statutory rule including the criteria in the rule and seeks a remedy either provided for in the relevant statute or arising from an alleged breach of the relevant rule. The party also pleads facts that are claimed to justify the claim including those facts that would establish each of the criteria of the relevant rule. These claims are made against another party to the same proceeding. There is a conflict moderated by courts by reference to the statutory rule. This system is governed by established rules of procedure and practice including those of onus and standard of proof. The judicial process is practical case-by-case adjudication by courts of conflicts between parties by discursive means rather than by actual violence and is not an abstract exercise in semantics.

The judicial process requires an identification of the relevant rule or rules, a finding and evaluation of the facts and of their fit or otherwise with the relevant rule or rules in the context of resolving the conflict in the case before it. Consistent with ideas discussed later in this thesis the word “conflict” has been used deliberately as appropriate to denote one of the conditions for every interpretative situation. The nature and degree of conflict will vary from case to case but is present in every case.

As the thesis proceeds the character of statutory rules is further developed. At this stage it is sufficient to make the following points. (1) The “legal authority of statutory rules stems from formal sources not historical origins.”27 (2) The statutory rule is itself the reason for judicial action without the court “having to go back to examine the background justification for it.”28 (3) Statutory rules are quite unlike precedents.29 (4) Statutory rules are expressed in language the use of which is “irreducibly open-textured” and subject to vagueness. Further, rules are laid down now for application to future and unknown states of affairs. Clarity may be aimed for between over-specificity


29 Grant Lamond in “Do Precedents Create Rules?” (2005) 11 Legal Theory 1 makes a convincing case for this proposition and see the “simplifying assumption” of Richard Wasserstrom discussed in Chapter 4.4.3.
and over-breadth but absolute clarity is unobtainable. 50 (5) “Vagueness” in statutory rules is not necessarily a deficit, indeed there are many good reasons why there is ‘vagueness’ and why ‘vagueness’ is desirable. 31 (6) A convincing case can be made for the proposition that statutory rules best achieve clarity in law. 32 (7) There are rule of law implications discussed in the next section.

2.3 Rule of law

The rule of law is notoriously vague and contested and, depending on how the phrase is used, can be meaningless or self-serving. Therefore it is essential to be clear about the context and purpose for a discussion in the thesis of the rule of law. The thesis is not directly concerned with constitutional issues; it is about the judicial interpretation of statutory rules and the extent to which rule of law principles and values might impinge on that activity. In particular, proponents of prospective interpretation may argue that their preferred approach to statutory interpretation guarantees or at least enhances the rule of law and that concurrent interpretation has consequences that derogate from the rule of law. Those arguments are contested in the thesis. Indeed it is suggested that concurrent interpretation particularly in respect of statutory rules enhances the rule of law. So the starting point is an assumption (justified by consensus) that (i) there is a rule of law and Parliament, the administration of the state and the courts are (more or less) bound by it and (ii) the principles and values of the rule of law are desirable.

I agree with Kaarlo Tuori33 that the rule of law is both a descriptive notion and a normative notion. There probably is a consensus about the content of a number of

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31 Yowell “Legislation, Common Law and the Virtue of Clarity” in Richard Ekins (ed) Modern Challenges to the Rule of Law (2011) at 117-121 and Timothy Endicott Vagueness in Law (2000) at 202-203. This idea is further developed with reference to Cass Sunstein in Chapter 5.7.

32 Yowell in “Legislation, Common Law and the Virtue of Clarity” in Richard Ekins (ed) Modern Challenges to the Rule of Law (2011) makes this case at 121-128.

basic principles that can be described. Underlying these principles are a number of rule of law values or ideals. The relevance and weight of these values or ideals, as they apply to the interpretation of statutory rules, is a theme of the thesis.

It is now necessary to identify the principles and values of the rule of law germane to the arguments for and against the interpretative accounts. There are three core principles. The first is the prevention of arbitrary power: government power must be exercised in accordance with the law. The second is equality: no person or institution is above the law and all persons are to be treated equally before the law. The third is a system of law: the ordinary law of the land reinforced and applied by an independent judiciary to whom all persons and institutions are subject.

Underlying these principles are values or ideals the number and content of which varies usually depending on the background and interests of the particular author. Lord Bingham of Cornhill sets out eight sub-rules.34 JD Heydon finds six “key characteristics of legal systems governed by the “rule of law”.35 Goldsworthy begins with the proposition “The basic goal of the rule of law is to ensure that the law is capable of guiding the behaviour of its subjects” and then lists four requirements to meet that goal.36 So what are the values or ideals underlying the rule of law that are of interest to the judicial interpretation of statutory rules?

MacCormick, whose work is the subject of Chapter 4, is a proponent of prospective interpretation and it is important to know what aspects of the rule of law he sees as germane to his institutional theory of law and his concept of legal reasoning. In his book *Legal Reasoning* MacCormick echoes the three core principles:37

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34 Lord Bingham of Cornhill *The Rule of Law* (2010) as separate chapters in Part II.

35 JD Heydon (The Hon Justice Dyson Heydon, High Court of Australia) “What Do We Mean By the Rule of Law” in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (2011) at ch 2. Commentators sometimes refer to thick and thin versions of the rule of law and as having formal and aspirational aspects.


37 *Legal Reasoning* at 2.
To have properly published and prospective laws, equality of citizens before them, and limitation of official power with respect to them, are foundations for democratic liberty and essentials for a stable economy.

This formulation draws attention to a fundamental aspect of the first core principle: the prevention of arbitrary power. This aspect is the requirement that “the law must be accessible and so far as possible intelligible, clear and predictable.” Lord Bingham in his discussion of this sub-rule points to current problems with “legislative hyperactivity” and with judgments that are unduly long and complex. The fundamental aspect of the first core principle lies at the heart of MacCormick’s institutional system for legal argumentation in particular in statutory interpretation. The third core principle that there be a system of law is in the background.

Therefore the discussion in the thesis of the rule of law concentrates on the principle of prevention of arbitrary power and the values that people know in advance the content of laws and of accessibility, intelligibility, clarity and predictability but will not overlook the promotion of a system of law. Indeed these matters are important for an assessment of concurrent interpretation as well as of prospective interpretation. The task now is to identify for further discussion those rule of law values against which prospective interpretation and concurrent interpretation are to be assessed.

MacCormick reiterates a commonly held view (which I endorse) that citizens are entitled to regulate their conduct according to accessible statutory rules consistent with a rule of law value that the scope for disputes should be diminished. He points to linguistic and systemic interpretative arguments as “genuine and generally operative legal values connected with the ideal of the Rule of Law.” He tells us more about these arguments:

Behind linguistic interpretation lies an aim of preserving clarity and accuracy in legislative language and a principle of justice that forbids retrospective judicial

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38 Lord Bingham’s first sub-rule in The Rule of Law (2010) at 37–47.

39 Legal Reasoning at 139.

40 Ibid.
rewriting of the legislature’s chosen words. Behind systemic interpretation lies a principle of rationality grounded in the value of coherence and integrity in a legal system.

MacCormick would have this treatment lead to the contention that statutes are universal in their formulation and that “any ruling between rival interpretative possibilities is likewise universal or universalizable … The conclusion reached has to be a conclusion about what is right for any such case, not just right *ad hoc.*”

The claim for universalizability is challenged in the context of statutory rules and with regard to rule of law values in Chapter 4 but the existence and importance of the values, which are certainty, coherence and rationality (in addition to impartiality and accountability, also discussed) is not challenged. The value of legal certainty is incontestable and well-described by MacCormick in terms that do not require repetition. The point is to evaluate prospective interpretation and concurrent interpretation in the light of all these values. As MacCormick says the idea of a legal system “involves the idea that law is not arbitrary or pointless, but an expression of reasonably tenable values or principles concerning human interaction.”

The thesis accepts the rule of law core principles and rule of law values. The contention is that concurrent interpretation meets those principles and values and does a better job of meeting them than does prospective interpretation. This important matter is revisited towards the conclusion of the thesis, in Chapter 7.

### 2.4 Separation of powers

There is a current debate about parliamentary sovereignty: does Parliament have supreme power or is it subject to legitimate challenges from the courts? Rather than

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41 *Legal Reasoning* at 140.

42 *Legal Reasoning* at 238.

43 *Legal Reasoning* at 231.

44 A vigorous discussion in the New Zealand context is found in the contents of the Special Conference Issue of NZJ PIL June 2005. See Jeffrey Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” at 7-37. Also Philip Joseph “The Rule of
engage in that debate I am concerned with the respective powers of Parliament and the courts in the task of judicial interpretation: a concern about their respective functions. And the concern is limited to statutory rules so putting to one side more vexed concerns arising from the interpretation of constitutional legislation and the function of judicial review.

As a starting point I adopt as pertinent to statutory rules the description of legislative authority provided by Richard Ekins and endorsed by Jeffrey Goldsworthy.\(^45\) Parliament has the authority to make laws by enacting statutes. By this means it choses rules which citizens and officials including courts are legally obliged to obey. Parliament has the authority to settle in advance what is to be done. Of course not everything can be settled in advance and the design of a rule is a matter of parliamentary choice for example, as to the enactment of criteria or the enactment of discretionary powers. It usefully can be added that statutes and statutory regulations must be printed and made available to the public. Access to legislation is fundamental to the rule of law and in particular to the basic goal that law be capable of guiding the behaviour of citizens and officials. The corollary is that everyone is presumed to know the law, in our case the content of statutory rules.

The legal obligation of courts is to interpret and apply every validly made statute in a way that is consistent with Parliament’s legal authority to enact it and the court’s corresponding obligation to obey it. Most rules of legislative competence do not provide explicit direction as to how statutes are to be interpreted but, consistent with the separation of powers, courts must respect Parliament’s authority to make rules and not frustrate or usurp that authority. In the context of statutory rules the distinction is between law-creation and law-application and statutory interpretation is secondary to statute law-making.

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The next point concerns the court’s authority to interpret. In this regard I adopt the analysis of Goldsworthy.\footnote{Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” (2005) 3 NZPIL 7 at 23-25. I have omitted: “to clarify it when it is obscure and to supplement it when it is indeterminate” on the grounds that this phrase may be controversial and is not determinative of the central analysis.}

Statutes are not empty shells with no meaningful content until courts breathe life into them. They are assumed to have meaningful content that is binding on the courts as well as other legal officials and citizens. The courts’ authority “to determine what the law is”, amounts to authority to ascertain that content … They have no authority to change that content except perhaps in very limited circumstances to correct some deficiency in Parliament’s expression of its obvious purpose.

Statutes do not mean whatever courts say they mean.

In adopting as I do the views of Ekins and Goldsworthy in respect of separation of powers I acknowledge that they may be inclined to prefer prospective interpretation and it is likely that we differ on matters relevant to the tools of interpretation, in particular the matter of parliamentary intention. However it is pertinent that we start from much the same position even though it is a theme of the thesis that concurrent interpretation best reflects the separation of powers and rule of law concerns at least in respect of statutory rules.

All the above has implications for prospective interpretation when in the course of interpretation in advance courts promulgate tests and glosses that effectively rewrite the statutory words and in subsequent cases reiterate and insist on those tests and glosses. This interpretative practice is illustrated in the analyses of cases undertaken in Chapter 7. On the other hand concurrent interpretation is the faithful application by courts of the statutory words to the particular case at hand.
2.5 The need for interpretation and current statutory interpretation

Notwithstanding the best efforts of Parliament and the team of experts employed by it specifically for the function of drafting legislation including statutory rules there is a need for interpretation by courts. Rules are expressed in written language and may contain faults of expression including obscurity, ambiguity, ellipsis, vagueness, contradictions, incomplete expression and presuppositions. Of more significance for this thesis are two fundamental and crucially important reasons for the need to interpret that require introduction now.

The first reason arises from the nature of language. In the context of legislation under the headings of legislative uncertainty and more dramatically “the diseases of language” problems inherent to language are said to include ambiguity, vagueness and generality (too little or too much). A strong impression conveyed in standard treatments of statutory interpretation is that uncertainty is a bad thing and as far as possible is to be eradicated or at least is to be strictly controlled. There seems to be a lack of willingness to ask if eradication and even strict control are either possible or necessarily desirable and debate the consequences of that thought.

The second reason arises from the nature of statutory rules. Such rules are necessarily expressed in general terms; they are invoked in a context of conflict between parties in a real life situation that was not anticipated by Parliament or its drafters and they come before courts for interpretation in the task of resolving particular conflicts.

These two fundamental reasons are themes that underlie the thesis. They colour the discussion of the two interpretative accounts in practice and in theory and are developed further in the treatments of language and the particularity of applying rules.

Currently the judicial process of statutory interpretation is discussed as one of interpretation, interpreting the meaning of the words of a statutory rule; determining

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48 Reed Dickerson The Interpretation and Application of Statutes (1975) at ch 5.
what the statutory words mean. Goldsworthy tells us the word ‘interpretation’ is used in law to denote two different processes called ‘clarifying’ and ‘creative’ interpretation:

One involves revealing or clarifying the meaning of a legal text, a meaning that despite being previously obscured was possessed by the text all long. The other process involves constructing the meaning of a text, by modifying it or adding to it meaning that it did not previously possess.

These two different processes are a live issue when considering prospective interpretation. Concurrent interpretation is also about getting the meaning but by a process that makes Goldsworthy’s distinction redundant. Much the same can be said for the debates about matters such as the nature and relevance of Parliamentary intention, the precedential effect of judicial pronouncements on meanings, literal versus ordinary versus purposive interpretations, the effect of presumptions, the limits of context and the content and rank of the interpretative arguments to name some of the more lively debates. All these matters take their appropriate place as tools (not rules) that assist the court with concurrent interpretation.

Surveys of current approaches to and practices of statutory interpretation are readily available in standard texts and it is not productive to repeat them. Instead this chapter focuses on commonplace accounts of judicial interpretation found in these texts either directly or by citation. I contend that two distinct accounts of interpretation can be found in this discussion. Throughout the thesis these two accounts are denoted as prospective interpretation and concurrent interpretation. I set out concise descriptions of these two accounts before setting out examples of statements that articulate and endorse either one of the accounts. The concise descriptions are starting points for further development throughout the thesis.

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Prospective interpretation
In interpreting a statutory rule one first ascertains the meaning of the rule by considering the words used and sometimes the context of the rule’s production. Then one applies the rule so interpreted to the fact situation of the case in a deductive fashion. In effect interpretation is in advance of application hence prospective.

Concurrent interpretation
In interpreting a statutory rule one first identifies the rule relevant to the conflict before the court. Then the rule and the real life fact situation are concurrently brought into correspondence, the facts are identified and characterised in terms of the rule and the words of the rule in terms of the situation. In this process the meaning of the rule is realised in application and in effect retrospectively.

The following are statements that articulate and endorse sequentially these accounts:

Prospective interpretation
Applying the law always involves interpreting it. Any norm posed in an authoritative legal text has to be understood before it can be applied.\textsuperscript{51}

In the light of what has been said, one may say that interpretation is the process by which the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them.\textsuperscript{52}

Whether a statute is drafted in great detail or only in broad principle will obviously affect the scope for judicial interpretation. It will not, however, change the essential nature of the Court’s role. That role is to ascertain the meaning of the statute, and then to apply it to the case before the Court.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{51} Legal Reasoning at 121.
\item \textsuperscript{52} Cross Statutory Interpretation (1995) at 34.
\item \textsuperscript{53} Ian McKay “Interpreting Statutes – A Judge’s View” (2000) 9 Otago LR 743 at 744.
\end{itemize}
It is important at the outset to distinguish between questions about what a legislative provision means and questions about what its effect is.\textsuperscript{54}

**Prospective interpretation – textual context**

The purpose of interpretation is sometimes mistakenly thought to be a search for the meaning of words. This in turn leads to an assumption that one must identify an ambiguity as a pre-condition to taking into account evidence of the setting of a legal text. Enormous energy and ingenuity is expended in finding ambiguities. This is the wrong starting point. Language can never be understood divorced from its context.\textsuperscript{55}

While all statutory interpretation is text based, it has long been accepted that the words of the text must be understood in their context. The words do not exist in limbo.\textsuperscript{56}

… there is no doubt that the text of a provision must be interpreted having regard to the Act as a whole and the legal system generally.\textsuperscript{57}

**Concurrent interpretation**

Cases that come to court always involve the application of the statutory provision in question to the facts of the case: in that sense interpretation is always related to application.\textsuperscript{58}

The interpretation of statute law is not just about attaching meaning in the abstract. We read statutes differently from the way we read novels or newspaper articles. We read statutes to find the answer they give to a particular problem that has presented

\textsuperscript{54} Craies on Legislation (2008) at [16.1.6].


\textsuperscript{57} Agnew v Pardington [2006] 2 NZLR 520 (CA) at [32]. Glazebrook J referring to the omission of the words “and its context” from the enacted text of s 5 (1) Interpretation Act 1999, and echoing Richardson P’s twin pillars of interpretation: the scheme and relevant objectives of the legislation: Challenge Corporation v CIR [1986] 2 NZLR 513 at 549.

\textsuperscript{58} Burrows Statute Law at 179. See also the treatment of s 9 FTA in ch 8: Heaven NZ, three-step test compare Butcher Australia, the task is “[t]he application of a statutory text, expressed in general terms, to particular facts.”
itself. In other words, in addition to discovering *meaning*, one is finding out how the provision *applies to the fact situation* that has arisen.\(^{59}\)

Prospective interpretation includes statements advocating a contextual approach in that, context relates to matters internal and external to the words themselves and not to the particular facts of the case.\(^{60}\) Internal matters include the scheme of the relevant Act. External matters include other laws and the Parliamentary history of the relevant Act. By these means context assists with prospective interpretation.

With respect to prospective interpretation, although this may be unconscious, lawyers including judges by their nature like to know what the statutory words ‘mean’, equated with knowing what the law is, before getting immersed in the facts of a particular case. As is said in *Burrows Statute Law*: “Judicial dicta on the meaning of a statute have occasionally assumed more importance than the words of the statute itself. Judicial paraphrases of sections have sometimes virtually supplanted the sections themselves.”\(^{61}\) And: “Our immersion in the common law makes us somehow feel more comfortable with cases than with statutory text.”\(^{62}\)

Rather than use the statutory text to confront and resolve the conflict before the courts in the particularity of the facts, courts have preferred to engage in prospective interpretation. Zenon Bankowski pejoratively describes such judicial interpretations: “They are a cowardly way out of decision making. They mean that I no longer have to make up my mind in the encounter with the awesome mystery of the particular before me.”\(^{63}\) Prospective interpretation is consistent with the legal positivist tradition of law

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60 Treatments are found in *Burrows Statute Law* at ch 9 and Pearce and Geddes *Statutory Interpretation in Australia* (2006) at ch 3 and ch 4.

61 *Burrows Statute Law* at 191.

62 Ibid, at 192.

63 Zenon Bankowski “Parable and analogy: the universal and particular in common law” [1998] *Acta Juridica* 138 at 140. And see his chapter “In the Judgement Space: The Judge and the Anxiety of the
as a social fact: that laws are identifiable and knowable at any given time, are universal and not particular. Concurrent interpretation appears to challenge this tradition. Much more is said about the points made in this and the previous paragraph in Chapter 4.

Concurrent interpretation is the subject of the next section of this Chapter. Prospective interpretation is the subject of the section after that. Levels of enquiry relevant to the two accounts are (i) their tenability, (ii) their completeness and (iii) their utility. Does concurrent interpretation meet all or any of these levels and if so, does it present a challenge to prospective interpretation at least as an all-embracing account of statutory interpretation? I suggest that there are inadequacies in the completeness and utility of prospective interpretation and that these are rectified by concurrent interpretation. However only by going on to examine prospective interpretation in Chapters 3 and 4 can there be an assessment of the tenability of that account. Tied in with these issues is the tenability of concurrent interpretation explained further in Chapters 5 and 6.

### 2.6 Interpretation as concurrent interpretation

The first of the statements that support concurrent interpretation is found in *Burrows Statute Law* and it is appropriate to consider the supporting references in that book. They are necessarily truncated in *Burrows Statute Law* and may usefully be expanded here. The first reference is to a lecture delivered by Beverley McLachlin Chief Justice of Canada on the topic of unwritten constitutional principles including a discussion of the desirability and effect of putting laws in writing, in respect of which she says:

… even when the legislature takes the trouble to write down laws, the result is almost always incomplete. Laws are necessarily stated in general terms. They are intended to

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64 *Burrows Statute Law* at 179.

apply to a wide variety of situations. Law-makers cannot conceivably foresee all the situations to which a legal provision may apply, nor how it should do so. Judges must reduce the legislative general to the situational particular. The result is that even where laws are written down, it is often impossible to predict how the law will apply in a particular situation in advance of a judicial ruling on the matter. … In this sense, much of the law is never “on the books”.

Reference next is made to Richard Posner a Judge of the US Court of Appeals and a prolific American commentator. In a wide-ranging and much cited article\(^\text{66}\) about statutory interpretation he comes to the topic of the “specific canons” of interpretation. These include the interpretative arguments. He hones in on “plain meaning”, “start with the words” and purposive canons. He tells us “most canons of statutory construction go wrong … because they impute omniscience to Congress … always an unrealistic assumption.”\(^\text{67}\) Ambiguity is not the result of poor drafting but of the fact that “a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.”\(^\text{68}\) Statutes are inherently incomplete. Matters are not decided until they have to be. This is necessarily by courts. The legislature is not a fact-finding body.

Another reference is to John Bell.\(^\text{69}\) In a discussion about the importance statutes play in the formulation of legal rules he refers to their distinctive character as legal texts and says:\(^\text{70}\)

> The legal text is to be understood not as revealing something about the author or the times in which she was writing, but as creating a norm within the context of a legal order which must be applied to concrete fact situations. It is this special character of

\(^{66}\) Richard A Posner “Statutory Interpretation – in the Classroom and in the Courtroom” (1983) 50 U Chi LR 800.

\(^{67}\) Ibid, at 811.

\(^{68}\) Ibid.

\(^{69}\) John Bell “Studying Statute Law” (1993) 13 Oxford Journal of Legal Studies 130. He is a co-editor of Cross on Statutory Interpretation the source of the second reference in support of prospective interpretation.

\(^{70}\) Ibid, at 133. Emphasis in original. Reference is made to Gadamer Truth and Method (1975) at 294-5. [now (1986) [“TM”] at 325-6 “concretising the law in each specific case.”]
application which makes legal interpretation, along with theological interpretation, a distinctive activity.

And he adds: “Kelsen was right to suggest that statutory texts do not contain the norm to be applied, but rather provide essential materials out of which the legal norm is to be constructed.”71 This ‘construction’ is necessarily in application case by case. As Hans Kelsen says: “… the judge who applies the law ought to know the law. [That is, be able to identify the relevant statutory rule] But this knowledge is not the essential element of their functions; it is only the preparation for their functions.”72 Kelsen describes the “constitutive character of the judicial decision”73 as a process from the general (abstract) to the individual (concrete). Only in the judicial process “does the norm become applicable in the concrete case, and thereby a legal situation is created for this case which did not exist before the decision.”74 It is an error to see the judicial process as a merely declaratory function. As Kelsen explains, the decision has retroactive force for that case.

Kelsen also mounts a convincing argument that as far as statutory rules are concerned there are no gaps in the law: a rule applies or it does not. He and the thesis are not talking about a situation where there is no law at all but of a situation where a party invokes a rule in litigation and fails to prove any one of the criteria to the rule. The consequence then is that the other party is not in breach of the rule. “This theory [of gaps in the law] is erroneous because it ignores the fact that the legal order permits the behaviour of an individual when the legal order does not obligate the individual to behave otherwise.”75 This approach to so-called gaps in the law promotes concurrent interpretation in that courts may be content with an outcome where one of the criteria is not met and not be tempted to rewrite the rule in order to extend its reach.

71 Ibid. The reference is to Hans Kelsen Pure Theory of Law (1967) at 72.


73 Ibid, at ch V, Section 35 (g) at 236-256.

74 Ibid, at 238.

In *Burrows Statute Law* the point is made that “sometimes the application of apparently clear words to the facts in hand creates particular difficulty. Provisions that seem perfectly clear in the abstract sometimes dissolve into uncertainty in the face of an unforeseen fact situation.” Reference is made to a large number of cases that illustrate this problem often involving the question of whether the meaning of a word should be extended beyond its core meaning. “The application of words to a particular fact situation can also raise questions of whether those words should be used in their general sense, or should be “read down” as having a more restricted meaning.” Obviously the authors are not advocating interpretation in advance of application and have in mind the necessity of considering the words in the light of each fact situation.

One case of this type to which reference is made is *Lancashire County Council v B* where the issue was whether the words “care given to a child” extended beyond the care given by parents to include the care given by other persons who shared in that care. It was obvious that the child was at risk but impossible to identify the carer responsible, a circumstance clearly not foreseen by Parliament. It is easy to understand why a broad interpretation is preferred. In this case there was the decision of the primary Judge and much literature and extraneous material that would support a restrictive interpretation but as Lord Nicholls of Birkenhead said:

> in the present context all these observations and passages suffer from the drawback that they do not address the particular problem raised in the present type of case. … Generalised statements, not dealing with this special type of case, provide little or no assistance.

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76 *Burrows Statute Law* at 179.

77 *Burrows Statute Law* at 181.

78 *Lancashire County Council v B* [2000] 2 AC 147.

79 Ibid, at [22]. Lords Slynn of Hadley, Nolan, and Hoffmann concurred and Lord Clyde in a separate opinion agreed with the result.
Two recent cases well illustrate both the nature of and difference in practice between concurrent interpretation and prospective interpretation. In each of the cases concurrent interpretation was preferred.

The first of these is the recent decision of the New Zealand Supreme Court in *Air Nelson Ltd v The New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated*.80 The Court recognised “the difficulty of trying to find a definition for what is really a contextual judgment” – that the interpretation of words in a statute is not about finding meaning in an abstract sense, “but with recognising the nature and scope of [the particular words] in particular cases. That is, the issue is not one of construction but of application.”81

Employees of Air Nelson Ltd carried out the work of “line maintenance” consisting of relatively minor repairs and servicing of aircraft on the apron or overnight in the hangar. The airline also engaged independent contractors to carry out “heavy maintenance” and they also carried out line maintenance work depending on the amount of work required. When line maintenance employees were lawfully on strike the airline engaged contractors to carry out line maintenance work. The Employment Court found that this work was “within the range of work which [the contractors] routinely performed. … was standard practice and unexceptional … and can be regarded as the contract engineers’ own work rather than that of the striking employees.”82

This finding of fact was necessary because the Union asserted that Air Nelson had contravened a rule contained in s 97 (2) of the Employment Relations Act 2000 [“ERA”]. This provides that if there is a lockout or lawful strike –

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81 Ibid, at [19].

82 *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated v Air Nelson Ltd (No2)* [2007] ERNZ 725 (EC) at [28].
An employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with subsection (3) or subsection (4).

The Court of Appeal granted leave to appeal on a question of law: the correct meaning of the words “the work of a striking or locked out employee” as used in s 97. In a joint judgment allowing the appeal the Court interpreted the words as meaning “the work a striking or locked out employee would probably have been performing had he or she not been striking or locked out.” The Court of Appeal was of the view that the Employment Court was wrong because it had asked the wrong question. “The focus should not have been on what contractors engaged by Air Nelson normally did but rather on whether [the contractor was on the relevant dates] performing work which, but for the strike, a striking employee would have been performing.” Effectively this is the formulation of a test, a precondition, for application of s 97: “but for” and counterfactual, and the approach of the Court of Appeal is a model of prospective interpretation.

The Supreme Court made short work of the arguments deployed by the Court of Appeal and were brought to the following conclusion:

The judgments in the Courts below illustrate the difficulty of trying to find a definition for what is really a contextual judgment. The essential question is concerned not with the meaning of “work” but with recognising the nature and scope of particular work in particular cases. That is, the issue is not one of construction but of application. The assumption by the Court of Appeal that the case is concerned with construction led it to mischaracterise the approach of the Employment Court as one of having asked itself the wrong question. But in our view the Employment Court did not ask itself the wrong question. Rather, it took a different view of the facts.

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83 New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated v Air Nelson Ltd (No2) [2009] ERNZ 178 (CA) at [52].
86 Air Nelson Ltd v The New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated [2010] 3 NZLR 433 (SC) at [19].
The second case is one recently heard by the United Kingdom Supreme Court: *Yemshaw v London Borough of Hounslow*. This case concerned “what is meant by the word “violence” in section 177(1) of the Housing Act 1996. Is it limited to physical contact or does it include other forms of violent conduct?” ‘Violence’ was a relevant statutory criterion of homelessness in that even a person in accommodation would still be homeless if it was probable that occupation of accommodation would lead to violence from some other person residing in that accommodation. This in turn affected the statutory rule imposing obligations on the respondent Council to place homeless people in accommodation.

The appellant was a married woman with two young children living in the matrimonial home with her husband. She claimed that she had to leave that home because of her husband’s domestic violence. She was living with her children in a women’s refuge and sought accommodation from the respondent. She did not claim that she had been physically assaulted by her husband or that he had threatened to do so but said she was frightened of him and his controlling behaviour amounted to emotional, psychological and financial abuse. She referred to his shouting in front of the children, not treating her like a human, not giving her money for housekeeping and saying she could not cope with the children. In these circumstances the Council declined to assist her with accommodation, essentially because there had been no actual or threatened physical violence.

In coming to this decision the Council was precluded from considering violence in a broader sense by the decision of the Court of Appeal in *Danesh v Kensington and Chelsea Royal London Borough Council*. This case concerned the meaning of “violence” in respect of a Council’s obligation to accommodate a person rather than refer him to another Council where the applicant had a local connection. The applicant claimed that he was at risk of violence in the area of the other Council...

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88 Ibid, at [1], Baroness Hale of Richmond with whom Lord Hope of Craighead and Lord Walker of Gestingthorpe agreed.

89 Ibid, at [16]-[17].

90 *Danesh v Kensington and Chelsea Royal London Borough Council* [2007] 1 WLR 69 (EWCA).
arising from incidents of racial abuse. The case turned on the meaning of violence in the same Act and in circumstances indistinguishable from *Yemshaw*. The Council refused the application and an appeal to the County Court was allowed. The Council successfully appealed. Neuberger LJ as he then was gave the judgment of the Court of Appeal firmly expressing the opinion that “violence” means physical violence and does not include threats of violence or acts or gestures that lead someone to fear physical violence. This was stated in general terms and with the intention that it affect all future applications for housing. This view was supported by reference to the natural meaning of the word and systemic, contextual and consequential interpretative arguments.

Understandably *Danesh* was followed by the Council in *Yemshaw* and when Mrs Yemshaw appealed was followed by the County Court and the Court of Appeal.91 The Supreme Court was able to consider the interpretation of “violence” afresh. In a masterly opinion Baroness Hale of Richmond demolishes the arguments of Neuberger LJ. At the forefront were the particular facts in *Yemshaw* which militated against the narrow interpretation. For example: “… the general understanding of the harm which intimate partners or other family members may do to one another has moved on.”92 “Silent phone calls, heavy breathing, the sorts of stalking behaviours … can all put the victim in very real (and justified) fear of violence in the narrow sense. They should be covered by the concept of violence.”93

Nevertheless Lady Hale was careful not to make the final decision. The case was remitted to the local housing authority for decision. Referring again to the circumstances of Mrs Yemshaw she accepted that such decisions are not easy and “will involve officers in some difficult judgments. But these are no more intrinsically difficult than many other judgments that they have to make.”94 Her Ladyship posed some of the questions the authority would have to consider not by way of a subjective

91 *Yemshaw v London Borough of Hounslow* [2009] EWCA Civ 1543.

92 *Yemshaw v London Borough of Hounslow* [2011] 1 WLR 433 at [28].

93 Ibid, at [31].

94 Ibid, at [36].
test but “The test is always the view of the objective outsider but applied to the particular facts, circumstances and personalities of the people involved.”\textsuperscript{95} It was still an open question whether or not in any particular case there was “violence”. The broad generalisation and prospective interpretation of \textit{Danesh} was overruled.\textsuperscript{96}

It is contended that cases like \textit{Yemshaw} illustrate a fundamental point well summarised by Allan Hutchinson.\textsuperscript{97}

A marked feature of common law adjudication is not so much that a rule is fixed beforehand and then applied to the facts of the case; a rule is fixed in light of the outcome that it will bring about in the particular case. There is a constant mediation between rule-fixing and rule-application in the judicial decision-making process such that it becomes illusory to talk about there being two distinct stages as a practical matter.

Hart says as much: “Rules cannot claim their own instances, and fact situations do not await the judge neatly labelled with the rule applicable to them. Rules cannot provide for their own application, and even in the clearest case a human being must apply them.”\textsuperscript{98} Indeed it is ironic that the interpretative task is at its most demanding when there appears to be a settled ‘core meaning’ (as with ‘violence’) and particular cases throw up decent competing arguments in favour of any number, but usually two, ‘meanings’ for the case in hand. This is not to say that the task is then a hopeless and indeterminate one. The answer will depend on who asks, why they ask, where and when and most significantly on the context of resolving conflict by judicial process. There is much more about that process in later chapters.

\textsuperscript{95} Ibid.

\textsuperscript{96} This caused some anguish in the Supreme Court because the opinion of six Lord Justices was overruled including that of (now) Lord Neuberger MR. Lord Roger of Earlsferry gave a separate concurring judgment in deference to the Court of Appeal and Lord Brown of Eaton-under-Heywood set out “very real doubts” about the approach of Lady Hale, but declined to dissent, ibid, at [60].

\textsuperscript{97} Allan C Hutchinson “Razzle-Dazzle” (2010) 1 Jurisprudence 39 at 58.

\textsuperscript{98} HLA Hart \textit{Essays in Jurisprudence and Philosophy} (1983) at 106.
To summarise at this point of the discussion, it is evident that concurrent interpretation is tenable and has particular utility when cases are difficult not necessarily because of the language content of the rule but because the particular facts of a case throw up circumstances that could not have been predicted. This point supports the view that interpretations made in advance of application and in terms of generalisations, particularly if claimed to have overarching effect, are conceptually suspect and in any event are incomplete and of doubtful utility.

### 2.7 Interpretation as prospective interpretation

Prospective interpretation is summarised as follows: In interpreting a statutory rule one first ascertains the meaning of the rule by considering the words used and sometimes the context of the rule’s production. Then one applies the rule so interpreted to the fact situation of the case in a deductive fashion. In effect interpretation is in advance of application, hence prospective.

It will not have escaped the attention of the reader that the descriptions of prospective interpretation set out in section 2.5 are sourced from texts and authors that are the canons, the authorities of statutory interpretation. This being the case how can one sensibly raise questions about the tenability, completeness and utility of prospective interpretation? One answer is that sensible issues are raised in the discussion of concurrent interpretation. Another answer is that courts do variously describe themselves as interpreting statutory rules in accord with either prospective interpretation or concurrent interpretation (without using those denotations) as illustrated by the cases discussed above and in subsequent chapters. The argument for prospective interpretation is now introduced.

Lawyers, commentators and judges like to know what a statutory rule means in general terms and at the earliest possible moment. For example lawyers give advice to clients contemplating litigation. Judges are more comfortable if they have an opinion about meaning before the case unfolds. Lawyers, commentators and judges are avid consumers of tests and formulae propounded by courts in earlier cases where the same
rule has been interpreted. (These tests and formulae require interpretation as well and they may make the law less accessible.) Indeed it is inevitable and appropriate that people, whether judges, lawyers or citizens, may at any time form interpretations, may articulate in different words usually mentally what seems to them to be a meaning of a rule and do this in advance of application.

The interpretative task is a process at its most simplest seen as moving from a first grasp of the relevant text to a deeper understanding and finally to a decision. In the situations that are interesting for the thesis different people and at different times will form an idea of the sense of the text. This is inevitable and appropriate. Significantly in law it is also inevitable and appropriate that an interpreter will want to know the facts relevant to the idea of the sense of the text. It will be asked if these facts may be regarded as typical.

During the course of the thesis there is reference to s 9 FTA as a paradigmatic example of a statutory rule. Section 9 provides: “No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.” What does the criterion “in trade” mean? A lawyer will not think about “in trade” abstractly but will think of a situation or situations relevant to that phrase and thereby will form an idea of the sense, a prefiguration, of the meaning. This process is normal and inevitable and this thesis cannot and does not object to it. There is objection only if the process stops there or is inhibited by previous prospective interpretations or is brought to an end before concurrent interpretation. That is, there is objection if interpretation is not the complete process of reference; of prefiguration, configuration and refiguration discussed in Chapter 6.

The thesis acknowledges that sometimes there are good pragmatic reasons for the preliminary determination of questions of law, the making of preliminary rulings and procedures for expedited and therefore incomplete interpretations. These are discussed in the next chapter. In short these matters do not in themselves bear on the choice between prospective interpretation and concurrent interpretation.

Likewise it is acknowledged that the canons of interpretation propound and describe principles most of which are common sense albeit sometimes lacking consistency and
coherence. For example the interpretative arguments (purposive, systemic, intentionalist and textualist) are useful in many cases. The many tools of interpretation found in the Canons reflect good practice. However it must be born in mind that it is generally accepted that *stare decisis* does not attach to the interpretative tools and for the good reason that they are just that. The same is true of the application of statutory provisions in respect of interpretation. These tools of interpretation and statutory provisions are just as applicable and useful to concurrent interpretation as they are to prospective interpretation. The key is to recognise them for what they are: tools whose utility and pragmatic function will depend on the case in hand. The points made in this paragraph are reiterated in the course of the thesis.

### 2.8 Summary

This chapter lays a foundation for a discussion of the judicial interpretation of statutory rules. It begins with a discussion of statutory rules. A distinction is made between rules and the conferment of discretions and an important delimitation is drawn for the thesis. It is only concerned with statutory rules and their criterion or criteria and not with statutory discretions or with other sources of law.

Principles and values of the rule of law relevant to the judicial interpretation of statutory rules are identified, in particular that people know in advance the content of laws and the values of accessibility and certainty. These principles and values are a theme of the thesis.

The respective functions and powers of Parliament and the courts are discussed and a stand is taken in support of the separation of powers. This is consistent with a contention that concurrent interpretation promotes the idea that it is Parliament that makes laws and not the courts.

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Clearly there is a need for interpretation of statutory rules and that is the function of the courts. The need arises not so much from faults of expression but from the nature of language and the nature of statutory rules.

Two accounts for the interpretation of statutory rules, denoted as prospective interpretation and concurrent interpretation are identified with a view to analysis on a number of levels, including (i) their tenability, (ii) their completeness and (iii) their utility. Beginning with concurrent interpretation it becomes clear that although its ‘pedigree’ is not as compelling as that of prospective interpretation it has demonstrative utility and even at this introductory stage is conceptually tenable. Issues that cast doubt on the tenability, completeness and utility of prospective interpretation are raised.

Now it is necessary to consider arguments that would militate against concurrent interpretation and support prospective interpretation. This is the topic of the next two chapters.
Chapter 3

Arguments in support of prospective interpretation – Part I

3.1 Introduction

In Chapter 2 accounts of the judicial interpretation of statutory rules denoted as prospective interpretation and concurrent interpretation are identified and introduced. Arguments for and against the accounts are advanced and it is indicated that in addition there are further arguments that may militate against concurrent interpretation and support prospective interpretation.

An aspect of prospective interpretation is interpretation in advance of application and there is no doubt that legal practice and procedure in specific instances encourages and is sometimes based on the premise that prospective interpretation is necessary, so having the effect of promoting the conceptual tenability, completeness and utility of prospective interpretation at the expense of concurrent interpretation.

In this chapter I discuss the main instances in which legal practice and procedure seem to require interpretation in advance of application beginning with the distinction made between questions of law and questions of fact. This is followed by discussions of preliminary rulings particularly in the context of the European Court of Justice and then of procedures for summary judgment, declarations and for strike out of claims.

Briefly, it is demonstrated that a feature of all these instances is their pragmatic value. The discussion also has the virtue of bringing to the fore practical aspects of the interpretative accounts. For example with regard to the law/fact distinction it is argued that the courts’ approach to statutory rules is strategic and looks like concurrent interpretation, even if courts purport to do otherwise and in so doing adopt analytical terminology consistent with prospective interpretation.
3.2 Interpretation and questions of law

An aspect of prospective interpretation is interpretation in advance of application. An instance of this is the distinction made in legal practice between questions of law and questions of fact. Does this practice enhance the tenability, completeness and utility of prospective interpretation?

It has been a convenient aspect of legal practice to make a distinction between questions of law and questions of fact. There have been three main reasons (i) to distinguish the respective roles of judge and jury, (ii) to limit the review of decisions by procedural means and (iii) in public law as a way of separating the institutional responsibilities of the courts and executive decision makers. I think there are irresistible arguments that the distinction relates to the way the practice of law is organised, is essentially strategic and does not have any discernible theoretical foundation. The distinction between law and fact does arise in the interpretation of statutes and therefore it is necessary to address the distinction in respect of statutory interpretation now and anticipate an argument that the conceptual tenability of prospective interpretation is promoted by this distinction. The distinction between law and policy is not relevant and is not discussed.

There are two interrelated starting points. One is the conventional statement: “Generally speaking, ‘the meaning to be attributed to statutory words is a question of law, being a matter of statutory interpretation.’ … while the true meaning of the words is a question of law the application of that meaning to the facts of the case is a

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question of fact.”101 The point immediately is made that the cases show that it is
difficult, indeed except in the most simple of cases impossible, to make this
distinction in a meaningful way, so much so that resort is had to ‘mixed law and fact.’
There are countless judicial opinions to be found in the cases many of which are
irreconcilable and display convoluted and ingenious reasoning.102

The other starting point is that courts see themselves both in terms of separation of
powers and expertise as the ultimate arbiters of questions of law. For example judicial
review of the exercise of public functions is justified by the rule of law (ensuring that
public functionaries comply with the law)103 and is limited to matters of law, the
courts being reluctant to exercise control over matters of fact or policy. The scope of
judicial review is a large topic in administrative law and the temptation to engage in
detail with it in the thesis must be resisted. Instead a brief excursion is made into
those questions of law that are claimed to arise from a perceived error in the
interpretation of a statutory rule and so afford the opportunity for judicial review.

As Peter Cane points out:104

> In practical terms the distinction between law and fact is reasonably straightforward:
a question of fact is a question about the existence of some phenomenon in the world
around us; a legal question is a question about rules and norms found in primary and
secondary legislation … But this practical approach is not of much help when the
issue is how to categorize the process of applying law to facts …

Cane poses the question: is a decision of a public functionary about whether and how
a rule applies to particular facts a decision on an issue of law or a decision on an
issue of fact?

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101 Burrows Statute Law at 185 citing Shah v Barnet London Borough Council and other appeals
[1983] 2 AC 309 at 341 per Lord Scarman. See also Bennion on Statutory Interpretation: a code
(2008) at 1221-1223.

102 An entertaining and appropriately cynical account in the administrative law context appears in
Woolf and ors De Smith’s Judicial Review (5th ed, 1995) at [5-078]-[5-090]. The latest edition
(2007) and supplement (2009) contain a truncated account at [11-042]-[11-046].

103 Rule of law is the topic of Chapter 2.3.

104 Cane Administrative Law (5th ed, 2011) at 59.
An approach to the distinction between law and fact in the context of statutory interpretation and relevant to this thesis is found in two approaches to the distinction in this type of case which Cane identifies and calls analytical and strategic: 105

According to the analytical approach, the first question to ask is whether an issue is one of law or of fact. The answer to this question will determine issues such as how much discretion the administrator had in resolving the issue or which modes of accountability are available to challenge the decision. However, people may disagree about whether particular issues should be classified as matters of law or matters of fact. …

[The strategic approach] treats the law/fact distinction not so much as a description of what is involved in applying law to fact but rather as a formula for expressing value-judgments about the appropriate scope for bureaucratic discretion and accountability. … courts first decide whether or not they want to give a remedy and then classify the issue at stake in order to achieve the desired result.

The analytical approach purports to separate the questions ‘what is the difference between law and fact?’ and ‘on what basis will we overturn a decision?’ The strategic approach accepts that a categorical distinction between law and fact cannot be made and asks ‘who is best placed to decide the issue before us?’ The strategic approach has a number of strengths: (i) it recognises that the distinction is not capable of analytical resolution, (ii) there is still a control (best placed to decide/separation of powers) and not a blind discretion 106 and (iii) it requires the courts to look closely at the particular circumstances of the case.

With regard to the last strength Cane has said: 107

105 Ibid, at 60-61.


... it alerts us to the fact that often, in order to understand a case properly, we must pay close attention to its subject matter: planning, immigration, housing, etc. The study of general principles is not enough in itself, and this should be borne constantly in mind.

This passage appears in the fourth edition. I suggest that in his fifth edition Cane is prepared to be more forthright in his support for the strategic approach as an accurate description of what courts actually do even if judges are loath to admit as much and even if they express themselves in analytical terms. Cane makes the important point that “… the law/fact distinction is a tool for allocating decision-making power between administrators on the one hand and accountability institutions such as courts and tribunals on the other.”108 The allocation will depend on factors that weigh in favour of less or more bureaucratic discretion. In this regard the context in which the matter arises and the issues at stake may explain the answer given by a court to the question of allocation of decision-making power. Other matters are the value of achieving consistency and uniformity of decision-making and the degree to which specialised knowledge is required.

Ronald Allen and Michael Pardo (Paul Kirgis agreeing) demonstrate109 that from ontological, empirical and analytical perspectives the distinction is an allocative and functional one founded on pragmatic reasons: a legal fiction that is to be judged by its usefulness and the pragmatic functions it serves.

Timothy Endicott acknowledges that academic consensus favours the pragmatic analysis before expounding what he calls an analytical account: presumably an account that would have universal application.110 A theme through his article is the case Brutus v Cozens.111 This case and its relevance to statutory interpretation generally is a topic of Chapter 7.5. In the course of an anti-apartheid protest Brutus

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had invaded a tennis court during Wimbledon. He blew a whistle, threw leaflets and sat down on the court. Spectators were upset and hostile. He was removed by police and charged that he used insulting behaviour whereby a breach of the peace was likely to be occasioned. Magistrates found that the behaviour was not ‘insulting’. The Divisional Court allowed an appeal on a question of law (whether conduct which evidences disrespect for the rights of others … is insulting behaviour). On further appeal the House of Lords restored the magistrates’ decision.

Endicott analyses the case as containing three questions the magistrates had to answer: (1) question of fact: what did Brutus do? (2) Question of law: what is the offence? (3) Question of application: was Brutus’s behaviour insulting?\(^{112}\) Obviously this is a style of prospective interpretation that Endicott would support. The House of Lords would have none of that: there was no point of law and it was not incumbent on the courts to provide an explanation of the word insulting. As Lord Reid says the court could act as a dictionary or could frame a definition but that would not resolve the outcome. Substituted words like ‘affront’ do not help. “There can be no definition. But an ordinary sensible man knows an insult when he sees or hears it.”\(^{113}\) “Insulting means insulting and nothing else.”\(^{114}\)

Returning to Endicott’s three questions, the first two questions are “obvious cases of questions of law and questions of fact”\(^{115}\) but the third question (application) is less certain. Essentially his argument is that when considering whether or not the question of application is one of law or of fact one does not ask the pragmatic question “what would it be useful to treat as questions of law?” but one asks the analytical question “what is the point of treating questions as questions of law?”\(^{116}\) He prefers the second question and his answer is “When doing so will give effect to the court’s view of what the law requires. That is, when the court decides that the law requires one answer to

\(^{112}\) Endicott “Questions of Law” (1998) 114 LQR 292 at 293.

\(^{113}\) Brutus v Cozens [1973] AC 854 (HL) at 862.

\(^{114}\) Ibid, at 863.

\(^{115}\) Endicott “Questions of Law” (1998) 114 LQR 292 at 310.

\(^{116}\) Ibid, at 319.
the question of application.”\textsuperscript{117} “...it is a question of fact when it is capable of decision either way, … it is a question of law when the law requires a decision one way.”\textsuperscript{118} 

It seems that Endicott claims that there can be any number of findings of facts but in application and certainly in concurrent interpretation there is only one answer and that is by bringing the law (the rule) and the facts together as happened in \textit{Bratus}. If there is one answer then it answers a question of law. Michael Phillis demonstrates that this approach is actually pragmatic though claimed to be analytical.\textsuperscript{119} 

I think Cane would agree. He points out the effect of Endicott’s analysis is that a question of law is a question that the court thinks it should answer for itself.\textsuperscript{120} And the court makes that decision on functional and strategic grounds. Perhaps Endicott effectively concedes as much and his difference with Cane is merely terminological; he appears to use a narrower notion of pragmatic but the difference is unimportant in functional terms.

It is contended that the problem of providing an accurate analysis and description of the courts’ approach to the distinction between questions of law and questions of fact is illustrative of the problem of providing an accurate analysis and description of prospective interpretation. The strategic approach looks like concurrent interpretation with its one step process of assimilation of statutory rule and facts in a task of deciding whether or not to intervene. It asks and answers Cane’s essential question: is the challenged decision about \textit{whether and how a rule applies to a particular fact}. The answer to the question requires concurrent treatment of rule and facts. And in the application of tools for allocating decision-making power the tools (like consistency/analogy and attention to the particular) are similar to those applied (amongst others) to the task of concurrent interpretation.

\textsuperscript{117} Ibid, at 316-7. Emphasis in original. 

\textsuperscript{118} Ibid, at 321.  


\textsuperscript{120} Cane \textit{Administrative Law} (5\textsuperscript{th} ed, 2011) at 62, n 34. See also Allen and Pardo “Facts in law and facts of law” (2003) 7 E&P 153 at 167-168.
A New Zealand case that illustrates the points made above is *SK v KP*.\(^{121}\) The issue was whether or not a child was “habitually resident” in a Contracting State (Illinois) so that the child was wrongfully retained in New Zealand. At the relevant time appeals to the Court of Appeal were confined to questions of law. As McGrath J explained although “the meaning to be attributed to the words “habitually resident” … being a matter of interpretation, is a question of law”\(^{122}\) the use of the term in the relevant Convention (“a question of pure fact”) is a factual concept.\(^{123}\) His Honour considered that “it does not however follow that a question of habitual residence is so exclusively a question of fact as to preclude appellate review …”\(^{124}\) Appellate review was maintained because:\(^{125}\)

The underlying legal nature of the question of meaning allows for appellate supervision … where issues of principle concerning the concept of habitual residence are raised. … [W]hile, in a sense, the ordinary meaning of “habitual residence” is a question of fact … that does not remove the legal nature of the Court’s task of correctly identifying the principles according to which the inquiry is to be conducted to determine the concept of habitual residence.

I suggest that rather than promoting prospective interpretation the law/fact distinction on analysis presents a challenge to the tenability, completeness and utility of prospective interpretation and promotes concurrent interpretation as at least consistent with an accurate analysis and description of the judicial interpretation of statutory rules. This may become more obvious as the thesis proceeds.

\(^{121}\) *SK v KP* [2005] 3 NZLR 590 (CA).

\(^{122}\) Ibid, at [4].

\(^{123}\) Ibid, at [5] citing precedent well establishing this point.

\(^{124}\) Ibid, at [7].

\(^{125}\) Ibid.
3.3 Interpretation and preliminary rulings

3.3.1 Preface

Concurrent interpretation of a statutory rule takes place when one first identifies the rule relevant to the conflict before the court. Then the rule and the real life situation are concurrently brought into correspondence, the facts are identified and characterised in terms of the rule and the words of the rule in terms of the situation. In this process the meaning of the rule is realised in application and in effect retrospectively. The questions then are first, what is the place of concurrent interpretation when there are procedures that allow, indeed sometimes direct, courts to make decisions “on the papers” about the meaning of statutory rules and often in advance of application? Second, does this enhance the tenability, completeness and utility of prospective interpretation?

These two important questions are now considered in respect of the procedures in two categories (i) preliminary rulings of the European Court of Justice (“ECJ”) and (ii) summary judgment, declarations and strike out applications. The reader may well wonder what the ECJ could have to do with this topic. Potentially a lot because Joxerramon Bengoetxea in his book *European Jurisprudence* adopts the ideas of MacCormick and in his discussion of the preliminary rulings of the ECJ finds support for prospective interpretation contra concurrent interpretation.

The discussion in this chapter particularly with reference to theoretical ideas in section 3.3.3 anticipates the content of the next chapter. In Chapter 4 the arguments in support of prospective interpretation found in the work of MacCormick are discussed in some detail. His ideas are aligned with prospective interpretation.

As traversed in the next chapter, he promotes an institutional order of rhetorical justification as “a shared framework of understanding and interpretation among persons in some social setting.” In short, MacCormick maintains that interpretations are rhetorically effective justifications of the meaning of statutory

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126 Joxerramon Bengoetxea *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (1993) [“European Jurisprudence”].

127 *Legal Reasoning* at 6.
words that are to be applied and applied successively as legislation comes before the courts and where appropriate previously justified interpretations are taken into account. MacCormick casts the judicial process in deductive terms interdependent with the idea that interpretation is separate from and in advance of application. His account of statutory interpretation as one that articulates and endorses prospective interpretation appears in the next chapter.

Also, in section 3.3.3 below there is reference to philosophical ideas about language that anticipates the discussion of philosophical hermeneutics in Chapter 5. This is because Bengoetxea is familiar with these ideas and is careful to address their potential force as a counter to his own ideas.

3.3.2 European Court of Justice

Pursuant to Article 267 of the Treaty on the Functioning of the European Union 2007 the ECJ “shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of treaties; and (b) the validity and interpretation of [Community] acts …” Since the first reference in 1961 a considerable body of case law and literature has accumulated but the following conventional summary suffices for present purposes.

Article 267 enables any question of EC law to be referred to the ECJ for a preliminary ruling by any national court that considers a decision on the question “necessary to enable it to give judgment.” The ruling is an interlocutory one constituting a step in the proceeding before the national court which although bound by it must proceed to apply the ruling to the facts of the case. The ECJ has no jurisdiction to apply its ruling. The relationship between national courts and the ECJ has been described as a cooperative one whereby uniformity amongst member states is achieved consistent with the objectives of the treaties. The right of national courts to decide cases within their jurisdiction is preserved. A recent development in response to the large number of references is that the ECJ now insists there be an actual dispute and on the

cooperation of national courts in adequately identifying the background facts and the issues.

Depending on context the preliminary ruling will be more or less conclusive of the final result and it must be acknowledged that in some cases the ruling will settle the outcome. Such a case is *Fiorini (Christini)*\(^{129}\) also a simple example of the procedure. An Italian widow living in France claimed the special fare reduction card issued by the French Railways to the parents of large families. The Railways refused because its rules said the applicant must be a citizen of France. In bringing her claim the plaintiff relied on an EU regulation that provided that workers from another member state should be entitled to the same “social advantages” as workers in the relevant state in this case France. The question of interpretation was whether or not the entitlement to reduced fares was a social advantage. The ECJ held that it was because the family was entitled to remain in France after the husband’s death and when the card was available to the families of deceased French workers it should not be denied to the families of deceased workers from other member states.

The often vexed question of the respective jurisdictions of the ECJ and national courts, interpretation on the one hand and application on the other hand, was directly in issue in a recent English case: *Arsenal Football Club v Reed.*\(^{130}\) Arsenal FC was the proprietor of trademarks including two word marks “Arsenal” and “Arsenal Gunners”. Mr Reed for a number of years had been selling from a stall outside the Arsenal ground clothing especially scarves marked “Arsenal”. He displayed prominent notices stating: “The word or logo(s) on the goods offered for sale, are used solely to adorn the product and does not imply or indicate any affiliation or relationship with the manufactures or distributors of any other product”. Arsenal FC brought a claim for infringement of their trademarks relying on a European Trade Mark Directive adopted into UK legislation pursuant to which there is an infringement if Mr Reed “uses in the course of trade” the protected sign. Mr Reed said the Directive was aimed at trademark use. “By that he meant that the use had to be in

\(^{129}\) *Fiorini (Christini)* v SCNF C-32/75, [1975] ECR 1085.

a manner that indicated the origin of the goods. It was his case that he used the word “Arsenal” and other marks as badges of allegiance, not in a manner that indicated a connection in the course of trade between the goods and Arsenal.”\(^{131}\) That was the purpose of the notices. Laddie J upheld this ingenious defence: the use “would be perceived as a badge of support, loyalty or affiliation … not … as indicating trade origin.”\(^{132}\)

However Laddie J necessarily referred the matter to the ECJ and composed two related questions: whether or not there is a defence when the use does not indicate trade origin (i.e. a connection in the course of trade between the goods and the trade mark proprietor) and if so is the fact that the use in question would be perceived as a badge of support, loyalty or affiliation to the trade mark proprietor a sufficient connection?\(^{133}\)

The role of the ECJ with regard to facts was described by Aldous LJ in the same case:\(^{134}\)

… the ECJ has jurisdiction to review the legal characterisation of facts found by a national court. Also the ECJ has in the past provided guidance in order to enable the national court to give judgment. On occasions it has “steered” the national court for the purpose of unified application of the law. However, as the House of Lords has made clear … the English Court is not bound by that steer and therefore, with hesitation, could conclude a case in a different way. It is the national court alone that must find the facts.

As the Court of Appeal said,\(^{135}\) in this case the ECJ did not set out to answer the questions referred. Instead it took a different view of the relevant law: “uses in the course of trade” was not use in the sense that it indicated the origin of the goods but

\(^{131}\) CA at [17].

\(^{132}\) Ch 1 at [58].

\(^{133}\) Ch 2.

\(^{134}\) CA at [25]. References omitted. Clarke and Jonathan Parker LJJ concurred.

\(^{135}\) CA at [32].
was about protecting the proprietary rights of the holder of the trade mark. The relevant consideration was whether the use complained of was likely to damage that proprietary right or jeopardise the guarantee of origin, which constituted an essential function of the trademark. On this basis the ECJ re-examined the facts and concluded that not only were the defences immaterial but as a matter of fact the use by Mr Reed was liable to jeopardise the guarantee of origin that constituted the essential function of the trademark.

The case came before Laddie J for continuation of the trial in light of the answers given by the ECJ. Counsel for Arsenal invited the Judge to order the injunction sought in light of the clear ruling of the ECJ. Counsel for Mr Reed argued that the ECJ had exceeded its jurisdiction, including finding facts inconsistent with the findings of the national court and in those circumstances the national court should not, indeed could not follow, the direction of the ECJ. His Honour accepted the analysis of Mr Reed’s counsel, found that it was impossible to formulate another question and entered judgment for Mr Reed on the basis of his own view of the facts and their relevance but noted that the correct route of appeal was to the Court of Appeal. Indeed that is where the case was finally resolved and in favour of Arsenal.

Essentially, Aldous LJ for the Court of Appeal following a detailed review of the history of the litigation took a pragmatic approach:

… I do not believe that the ECJ disregarded the conclusions of fact made by the judge in his first judgment. However I accept that they did conclude as a fact that, in the circumstances found by the judge, use by Mr Reed was liable to jeopardise the guarantee of origin which constituted the essential function of the trade mark rights owned by Arsenal. That was, I believe, a finding of fact that was inevitable in the circumstances. … the judge should have followed the ruling and decided the case in Arsenal’s favour.

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136 ECJ at [48].
137 ECJ at [61] and see the Order itself.
138 Ch3 at [29].
139 CA at [48].
Fiorini and Arsenal are discussed again at the end of the next section.

3.3.3 Preliminary rulings and prospective interpretation

It is obvious that the European procedure of “preliminary rulings” meets social and political goals in respect of which there is a broad consensus and does so with considerable success. It is demonstrably a pragmatic, flexible and useful imposition in the legal culture of much of Europe. The procedural distinction between interpretation and application resonates with prospective interpretation and with the ideas of MacCormick discussed in Chapter 4. It is appropriate to ask if the distinction lends weight to those ideas and further if it is possible to contend otherwise. It is necessary to engage with the views of Bengoetxea found in his book European Jurisprudence.

It is clear from the introduction and early chapters of European Jurisprudence that Bengoetxea is a convinced member of the school of “Institutional Legal Positivism”, the title of chapter 2. However unlike other members of this school of thought he is prepared to engage explicitly with the ideas of Hans-Georg Gadamer, Charles Taylor and others of the school of philosophical hermeneutics and in particular, with their contention as he puts it “in truth there is no distinction between interpretation and application.”

Bengoetxea sets out clearly his standpoint and the delimitations that guide him to his approach to statutory interpretation. In essence he prefers justification to discovery. He tells us:

The type of social action I have chosen to study is the justification of judicial decisions. The method chosen for this study is the rational reconstruction of authoritative doctrines of interpretation and justification as found in the judgments of the ECJ and in other legal material, using methods of analytical jurisprudence.

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140 European Jurisprudence at 95. Discussed further in Chapter 5. MacCormick in Legal Reasoning at 19 refers to the idea of 'pre-understandings' and the 'teachings' of Josef Esser.

141 European Jurisprudence at 81-84. Justification and discovery are discussed in Chapter 4.

142 European Jurisprudence at 84.
He acknowledges that he must deal with what would seem to be contrary ideas about the importance of application¹⁴³ and sets out to give reasons that would justify his choice. The following is a summary.

MacCormick draws a difference between interpretation in the wide sense and interpretation in the strict sense.¹⁴⁴ Bengoetxea adopts and recites this difference and appears to claim that the contention there is no distinction between interpretation and application “operate[s] on a notion of interpretation sensu largo, as equivalent to understanding: the ascription of meaning to a text in any situation.”¹⁴⁵ Interpretation stricto sensu is “more readily amenable to the concept of interpretation used in the Treaties establishing the European Communities (especially article 177 of the EEC Treaty) and to the use of this concept by the ECJ.”¹⁴⁶ Therefore interpretation stricto sensu is claimed to be more readily amenable to prospective interpretation and the concept of rhetorical justification promoted by MacCormick. Bengoetxea does not explain why the non-distinction between interpretation and application does not apply equally to both senses of interpretation.

Following a further discussion of the ideas of Gadamer in particular, Bengoetxea says:¹⁴⁷

I find such views interesting. It may be that as a matter of fact (heuristic) interpretation involves some form of imaginary or tentative application of a given provision to a given factual situation. It may well be that if a proposed interpretation leads to consequences that are negatively evaluated by the interpreter, a different, more ‘suitable’ interpretation will be adopted, and that therefore interpretation of a provision is not possible without a view of facts of specific cases.

¹⁴³ The relevant part is headed Interpretation and Application, European Jurisprudence at 95.
¹⁴⁴ Discussed in Chapter 4.
¹⁴⁵ European Jurisprudence at 95.
¹⁴⁶ Ibid.
¹⁴⁷ European Jurisprudence at 96.
Importantly he goes on to say:\textsuperscript{148}

But when one tries to apply these views to cases such as preliminary references for interpretation from the domestic law-applying courts … one runs into interesting problems. Those views can contribute to the explanation of the heuristics of decision-making (context of discovery) but not of the justification of decisions of interpretation in cases where interpretation and application are tasks assigned to different courts.

He goes on to describe the procedure already outlined in section 3.3.2 and to consider the judicial process of the ECJ.

In chapter 4 \textsuperscript{149} of his book Bengoetxea considers the discovery (he prefers ‘explanation’) and justification “levels of analysis of judicial decision-making.”\textsuperscript{150} For the purpose of this Chapter it is sufficient to address the section headed “2. DECISION-MAKING IN THE APPLICATION OF THE LAW”\textsuperscript{151} He tells us that in making decisions judges “usually perform an adjudicative function but there is also decision-making activity in the mere interpretation of the law as is the case with preliminary rulings by the ECJ.”\textsuperscript{152} He refers to the work of Jerzy Wroblewski\textsuperscript{153} and adopts the following “theoretical model of application of Community law [in] four stages”:\textsuperscript{154}

(a) the individuation of the applicable norm (this stage covers two steps: individuating the applicable norms and deciding on its validity), (b) ascertaining a fact as having been proven for legal purposes and with a view to the applicable norm,

\textsuperscript{148} Ibid.

\textsuperscript{149} Titled “Approaches to Judicial Decision-Making” in European Jurisprudence at 112-135, followed by Part II (ch 5-7), which is about legal justification.

\textsuperscript{150} European Jurisprudence at 112.

\textsuperscript{151} European Jurisprudence at 126.

\textsuperscript{152} European Jurisprudence at 126-7.

\textsuperscript{153} Wroblewski was a colleague of MacCormick. The primary source referred to by Bengoetxea is in Italian. However a similar account is found in Wroblewski (Bankowski and MacCormick eds) The Judicial Application of Law (1992) ch IV.

\textsuperscript{154} European Jurisprudence at 127.
(c) formulating this fact in the language of the applicable norm, in the language of
universals which makes subsumption of the particular fact of the given case under the
universalised formulation of the applicable norm possible, and (d) the binding
determination of the legal consequences of the proven facts on the basis of the
applicable norm.

Put simply in respect of statutory rules the process is described by Bengoetxea as first
identify the rule relevant to the case and decide on its validity; then ascertain the
relevant facts; then relate those facts to the rule; and finally make a binding
determination. This resonates with concurrent interpretation. Bengoetxea is obliged to
accept that preliminary rulings centre on stage (a) but contends that “this does not
imply that the other stages are not taken into account. They are, and are therefore
relevant to an explanation of the heuristic [discovery] process of decision-making, but
they are not usually mentioned in the justification of the judgment.”155 He endeavours
to explain that the ECJ makes its ruling “only after the facts of the case have been
established.”156 This is dubious and perhaps explains why he goes on to say: “It must
be remarked that the model here presented does not intend to provide a correct
description or explanation of judicial decision-making but it allows for better
understanding of the justifications of judicial decisions. … It is thus a model suitable
for an analysis of justification.”157

It follows that Bengoetxea accepts (correctly) that preliminary rulings are not a
complete account of the relevant judicial process: the judicial interpretation of
statutory rules. As he acknowledges he has “opted for the process of justification, i.e.
the arguments offered by the Court for its decision. But I have tried not to neglect the
process of discovery.”158 This is only to the extent that “discovery can provide a better
understanding of justification.”159

155 Ibid.
156 Ibid.
157 European Jurisprudence at 128.
158 European Jurisprudence at 134-5.
159 European Jurisprudence at 135.
Consequently preliminary rulings are best seen as a pragmatic (strategic) and useful device that meets social and political goals and is a part only of the relevant judicial process. In many situations it is easy to identify the rule and the facts and to characterise the facts in terms of the rule and say with confidence for example, yes that conduct was misleading or deceptive or likely to mislead or deceive. Those situations do not get to court. There are other situations where the facts are plain but there is doubt as to whether the statutory rule extends to those facts. Fiorini (Christini) is an example. In these cases a process of concurrent interpretation is still required for the case in hand but the process has been simplified. In Fiorini (Christini) the determination was inevitable but it still had to be made by the national court (if not settled). One can imagine that following the ECJ decision it might be found that the plaintiff had not in fact married the worker. The national court would proceed to determine the case in the light of the preliminary ruling and these new facts.

In Arsenal the judicial process was more complex. The rule was easily identified and the facts were not in contention but the meaning of the rule in relation to the facts was contentious. For this case there was a preliminary issue about the reach of the rule (discussed as the problem of classification in Chapter 4): might it cover this type of case, do trademarks protect the proprietor where the person alleged to be in breach made the origin of goods clear? As it happened the answer to that question given by the ECJ in the negative, effectively decided that particular case in the national courts.

It is contended that neither of these examples undermine concurrent interpretation. Preliminary rulings are one stage of the judicial process and are not typical of the judicial process as a whole and of course have no application to New Zealand. Nor does this procedure imply that prospective interpretation is conceptually inevitable: that this is the way to interpret and the only way to interpret.

What other grounds (positivist, institutional, justificatory) support the two-step interpretative practice of prospective interpretation? This is the subject of the next chapter.
3.4 Summary judgment, declarations and strike out applications

Summary judgment, declarations and strike out applications are procedures that enable courts to make rulings in cases brought by parties for resolution by the courts on the papers without going fully into the facts of the case. There is, and even in respect of declaratory proceedings must be, a genuine issue. Often the issue concerns the interpretation of statutes.

Savill discussed at length in Chapter 7 is an example of the summary judgment procedure. It is contended that this case is an example of prospective interpretation and well illustrates the problems that may arise. This is not repeated now.

Body Corporate 202254 v Taylor is a good example of the perils of statutory interpretation in advance of application in strike out proceedings. This case arose from the sale of apartments in a leaky building to the plaintiff Body Corporate. The claim, commenced in 2003, soon became bogged down in interlocutory proceedings culminating many years later in an appeal heard by a full bench of the Court of Appeal on 20 November 2007. Judgment was delivered on 22 August 2008. In the meantime the potentially most vulnerable defendants were struck off the register of companies or became insolvent leaving Mr Taylor, the principal behind the companies responsible for the development, as the only party with any substance.

The defendants applied to strike out claims in negligence and for breach of the FTA as disclosing no cause of action. In the High Court there was a succession of judgments, at least three between 2004 and 2006, the last ones permitting the plaintiff to proceed with its claim based on the FTA but not in negligence. Both parties appealed. The Court of Appeal unanimously as to result permitted the claim to proceed on both causes of action. Much of the report is taken up with difficult issues relating to the personal liability of directors for negligence and this does not concern us here.

The claim for breach of s 9 FTA was founded on the words contained in a promotional brochure produced by the real estate agent asserting “the strength and experience” of

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the developer and asserting that “We are certain that you will be delighted with the standard of workmanship of your apartment and the professionalism of the developer.” There was also reference to quality of design and design features. For the purpose of the appeal it was assumed that these assertions “either originated with or were at least approved by Mr Taylor” and were misleading or deceptive.\textsuperscript{161} A criterion of s 9 is that the conduct be ‘in trade’ and the Court of Appeal heard argument that as a matter of interpretation the ‘in trade’ criterion qualifies not just the conduct but also the status or description of the defendant. That is, because he was acting only as an agent or director of his companies and not on his own account he cannot have been engaged in trade (“the narrow approach”) and the Court was divided on this point. William Young P and Arnold J (Chambers J apparently agreeing) decided against this contention preferring “the broad approach”. Glazebrook and Ellen France JJ preferred “the narrow approach” but decided that there was an issue of fact as to the true role of Mr Taylor that should go to trial in any event.\textsuperscript{162}

As William Young P points out the phrase ‘in trade’ operates grammatically as an adverb directly applying to the verb ‘engage’.\textsuperscript{163} So why did the Court go down the route of learned, lengthy, divided and with respect misguided discussions of the relevant state of affairs on the papers in the context of interlocutory appeals? They did this because the court wanted to and thought it could find the meaning of the relevant phrase in advance of trial. To find that meaning they used prospective interpretation and called in aid the usual interpretative arguments.

William Young P posed\textsuperscript{164}

\begin{itemize}
\item[(a)] Is it arguable that the “in trade” requirement is met given that he was acting only as an agent and director of his companies?
\end{itemize}

\textsuperscript{161} Ibid, at [20] and [65].

\textsuperscript{162} Ibid, at [121].

\textsuperscript{163} Ibid, at [68].

\textsuperscript{164} Ibid, at [67].
(b) Is it arguable that Mr Taylor’s conduct associated with the publication of the brochure was misleading or deceptive?

With respect there can be only one question: is it arguable that Mr Taylor did in trade engage in conduct that was misleading or deceptive or was likely to mislead or deceive assuming that he was responsible for the material in the brochure? Put that way the answer suggests itself subject to the contention for Mr Taylor that the ‘in trade’ state of affairs is also descriptive of the person alleged to be in contravention and not (merely) of the conduct (“the narrow approach”). It must be said that William Young P in his discussion of the second of his questions does come to this core analysis of the case (suggested by the single question) when he considers Mr Taylor’s likely role as the supplier of information to the real estate agent.165

So what of the narrow approach requiring proof not only that the conduct was in trade but also that the person was “in trade on his or her own account”?166 These last words are those used in the Court of Appeal but Peter Watts a long time supporter of the narrow approach would be content with the precondition that the person is a trader or is himself or herself in trade that is coming personally within the definition of ‘trade’ in s 2 FTA and not a director or employee.167

However one expresses the narrow approach it can only be described as a gloss, whether by way of reading additional words into section 9168 or “as a matter of interpretation.”169 The narrow approach favoured by the minority judges presents a classic case of prospective interpretation and of the risks associated with that approach. It is ironic that their analysis is followed by a recognition that the appellant argues that on the facts Mr Taylor should be considered to be ‘in trade’ regardless of

165 Ibid, at [86].

166 Ibid, at [101] Glazebrook and Ellen France JJ.


168 Ibid, Watts (2007) at155; and Body Corporate 202254 v Taylor at [72].

169 Body Corporate 202254 v Taylor at [101], [105].
whether the narrow or the broad approach to ‘in trade’ is applied. Intended evidence was pointed to that Mr Taylor conducted his business through his companies and not the other way round.\(^\text{170}\) As mentioned above the Court of Appeal was unanimous in ruling that this issue should be determined at trial.

It is interesting to note as a precursor to the next chapter and the analysis of cases in Chapter 7 that at the heart of the narrow approach (engendered by prospective interpretation) are policy considerations. The concern is that s 9 imposes strict liability with no excuse for unintentional or reasonable error and that even low-level (honest) employees might be liable to become “the virtual surety of the boss’s contracts …”\(^\text{171}\) Associated with this concern is the challenge s 9 presents to well-established legal principles that “preserve a meaningful distinction between companies and those behind them.”\(^\text{172}\) The idea of the ‘corporate veil’ is a hallowed concept dear to the hearts of all those with an interest in company law and the prospect that Parliament by means of s 9 might render the considerable learning on the topic of director’s liability in negligence redundant is unappetising. The advocates of the narrow approach eschew a direct approach and would seek a meaning that would meet their concerns. This is an example of tradition affecting the process of fully understanding the text.

In Chapter 7.7 there is an account of how the High Court of Australia approached the same issue by utilising analogous reasoning in the course of concurrent interpretation.

Now what of the procedure for judicial declarations? In *Skycity Auckland Ltd v The Gambling Commission*\(^\text{173}\) declarations were sought as to the meaning and scope of the phrase “opportunities for casino gambling” in various sections of the Gambling Act 2003. This was important to Skycity because the prohibition of any increase in gambling opportunities significantly affected its business. Naturally it argued for a narrow interpretation confining the words to the number of games and/or the number

\(^{170}\) *Body Corporate 202254 v Taylor* at [121].


\(^{173}\) *Skycity Auckland Ltd v The Gambling Commission* [2008] 2 NZLR 182 (CA).
of player positions in a particular casino. The Commission contended for a broader meaning; the prohibition also covers aspects such as rates of play and the number of wagering options. Skycity sought a declaration supporting its interpretation in particular, that a number of specified matters are not to be taken into account by the Commission. When the High Court declined the application Skycity appealed to the Court of Appeal. O’Regan J for the Court began by pointing out that there were issues concerning aspects of gambling and said: “All this highlights the difficulty of dealing with the issues raised in this appeal in the context of declaration proceedings, without the backdrop of specific factual circumstances.”

His Honour then canvassed the submissions advanced on behalf of Skycity by reference to interpretative arguments under headings: ordinary meaning, context, legislative history and consequences. There was no one abstract meaning for the phrase in question. At heart, “the job of the Commission is to determine whether any particular factual situation placed before it” comes within the prohibition, subject to a right of appeal. “As we noted at [7] above, there are real difficulties in dealing with issues of statutory interpretation in a factual vacuum.” On that ground the appeal against a refusal to grant a declaration was dismissed.

There are cases where a robust approach has been taken to the interpretation of statutes in proceedings of the type in question. An example is Select 2000 Ltd v ENZA Ltd. ENZA claimed that Select had exported fruit contrary to statutory export permits and claimed damages or an account of profits. Select in its defence said that there was no duty founding such a cause of action and sought summary judgment to that effect. The key issue was whether on an interpretation of the relevant statutory rules a civil claim was available. The Master declined summary judgment and Select appealed. The Court of Appeal saw the issue as “a pure question of statutory construction” that

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174 Ibid, at [7].
175 Ibid, at [74].
176 Ibid, at [78].
177 Select 2000 Ltd v ENZA Ltd [2002] 2 NZLR 367 (CA).
178 Ibid, at [26].
could be resolved without trial. A submission that “the factual background created by
the evidence would be useful “back-lighting” was rejected as being “more likely to
distort what must be an objective and rigorous construction exercise.”179 “Although
the point is novel and not without difficulty it can properly be grappled with and
determined by way of summary judgment.”180

The Court of Appeal employed usual interpretative arguments in particular systemic
arguments and came to the clear conclusion that if Parliament intended a civil remedy
in favour of ENZA it would have said so but it did not, though imposing substantial
penalties for breach.

The thesis is not the place for an excursion into the law of procedure including the
very many cases sometimes finely balanced as to whether or not the procedures in
question have been appropriately invoked. Here the issue is the effect, if any, these
procedures have on the tenability, completeness and utility of the interpretative
accounts. These procedures are consistent with and are enabled by prospective
interpretation but are not available as a matter of either jurisdiction or discretion unless
it is thought indisputable that the case is clear and all necessary material and parties
are before the court. The procedures are only available when the facts are not, or are
deemed not to be, in dispute. The situation is similar to ‘questions of law’ discussed in
Chapter 3.2. A strategic choice is made to resolve an issue of interpretation on the
papers.

These procedures are consistent with and may encourage prospective interpretation but
they also illustrate the limits of prospective interpretation. Further, in making an
assessment as to whether or not any of the procedures are appropriate in a particular
case, courts might be assisted by having regard to the arguments that support
concurrent interpretation that is, in the way these arguments demonstrate that meaning
in advance might prove spurious in a particular real life fact situation.

179 Ibid, at [27].
180 Ibid, at [28].
3.5 Summary

An aspect of prospective interpretation is interpretation in advance of application and there is no doubt that legal practices and procedures in specific instances discussed in this chapter encourage and are sometimes based on the premise that prospective interpretation is necessary. It might be contended that the effect is to promote the tenability, completeness and utility of prospective interpretation at the expense of concurrent interpretation.

Relevant aspects of practice and procedure are discussed, beginning with the distinction made between questions of law and questions of fact. As it happens the way the courts make the distinction in actual practice is strategic and resonates with concurrent interpretation. Commentators have demonstrated that from ontological, empirical and analytical perspectives the distinction is an allocable and functional one founded on pragmatic reasons: a legal fiction that is to be judged by its usefulness and the pragmatic functions it serves. Rather than promoting prospective interpretation the law/fact distinction on analysis presents a challenge to the tenability, completeness and utility of prospective interpretation and promotes concurrent interpretation as at least consistent with an accurate analysis and description of the judicial interpretation of statutory rules.

A discussion of preliminary rulings follows particularly in the context of the ECJ. We see how the procedure for preliminary rulings is aligned with prospective interpretation and challenges concurrent interpretation as exemplified in the work of Bengoetxea. However I contend that he accepts that preliminary rulings are only the first step of a process that includes four steps and by reference to Fiorini and Arsenal demonstrate that though the ECJ step is sometimes crucial, it is one step in a complete process of interpretation that also includes the national court. Much more has to be said about the theory underpinning the ideas put forward by Bengoetxea and for that matter MacCormick and this is the subject of the next chapter.

The procedures for summary judgment, strike out of claims and declarations are then discussed. Such procedures can have pragmatic value in appropriate cases such as,
when it is clear that a complete process of concurrent interpretation adds nothing to
the interpretative task or there is sufficient material (and no material left out) to enable
the court to engage in concurrent interpretation on the papers. In other circumstances
these procedures are untenable, incomplete and of no utility.
Chapter 4

Arguments in support of prospective interpretation – Part II

4.1 Introduction

Two accounts for the judicial interpretation of statutory rules denoted as prospective interpretation and concurrent interpretation are identified and discussed in Chapter 2. They are examined in the light of their tenability, completeness and utility. The discussion in Chapter 2 brings to the fore a number of conceptual questions.

It is acknowledged that there are arguments for prospective interpretation and some of these arguments of a procedural nature are discussed in Chapter 3. But the conceptual arguments for prospective interpretation remain and these are the subject of this chapter. This requires an account and critical analysis of the ideas of Neil MacCormick. In a sense he is a representative of views held by others. In particular he has engaged directly with statutory interpretation and has put himself in the forefront of the interpretative debate central to the thesis.

Following an introduction to the work of MacCormick the conceptual questions are discussed in discrete topics. This is convenient and assists with accessibility but it is acknowledged that there is inevitable overlap. The topics are (i) analogy/deduction, (ii) discovery/justification and (iii) particular/universal. Features of analogy, discovery and the particular align with concurrent interpretation and features of deduction, justification and the universal align with prospective interpretation. However the discussion cannot be complete because the emphasis of this chapter is on prospective interpretation. The conceptual aspects of concurrent interpretation (including further critique of prospective interpretation) are the subject of Chapters 5 and 6.
Rule of law principles and values are understandably important to MacCormick as indeed they are for the thesis. In particular the principle that citizens have due notice of laws and the values of accessibility, impartiality, legal certainty, rationality and accountability are discussed. Does prospective interpretation promote the rule of law? Does concurrent interpretation do a better job of promoting the rule of law? These questions are themes of this chapter and receive further discussion when the three topics are brought together in section 4.6.

The chapter ends with an introduction to (i) ideas in North American jurisprudence about analogous reasoning in law and (ii) mention of a very recent account of legal reasoning in the context of a discussion about ‘originalism’.

4.2 MacCormick and legal reasoning

4.2.1 Institutional normative order

MacCormick is a pre-eminent jurisprudential scholar and avowed legal positivist (“post-positivist”) whose many publications are both recent and influential. He is one of the few positivists to engage directly and in detail with legal interpretation. His book *Legal Reasoning* is directly relevant to the topic of judicial reasoning in respect of interpretation and collects much of his earlier work. His ideas are aligned with prospective interpretation.

His institutional order is “a shared framework of understanding and interpretation among persons in some social setting.” He is particularly interested in “what are...”

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182 Also called an “institutional fact”. John Bell describes this as a system of rules or legal standards operating in a context of institutions, professions and values that form together a ‘legal culture’ in
good arguments, and how we can distinguish good from bad arguments in these issues of interpretation and practical decision-making."\textsuperscript{184}

Parliamentary legislation is an integral part of the institutional order, which he introduces in terms that resonate with statements made in Chapter 2.2:\textsuperscript{185}

Moreover everybody knows that the job of legislation is never completed when the text of a statute leaves the legislature. In due course problems, foreseen or unforeseen by the legislature, will arise concerning the exact scope of a legislative text, or its exact application to some situation that arises and that has significance enough for a party affected to litigate the question. The final process of concretization or determination … will still have to take place through judicial decision. In future, reliable commentaries on the legislation will give an account of the judicial glosses and explanations or interpretations that now contribute to the body of law that the legislation has called into being.

In short interpretations are rhetorically effective justifications of the meaning of statutory words that are to be applied and applied successively as legislation comes before the courts and where appropriate previously justified interpretations are taken into account.

That “law is an interpretative concept and all legal reasoning is interpretative and value-laden through-and-through,” \textsuperscript{186} and that “[t]he proper interpretation and application of legal rules, and the proof and interpretation of facts relevant to law-application can be hugely problematic”\textsuperscript{187} are seen as challenges to be met by working

\textsuperscript{183} John Bell \textit{Judiciaries within Europe} (2006) at 6-7. The thesis has no quarrel with this. The thesis has more to do with legal practice than about what law is as a concept.

\textsuperscript{184} \textit{Legal Reasoning} at 6.

\textsuperscript{185} \textit{Legal Reasoning} at 7.

\textsuperscript{186} \textit{Legal Reasoning} at 10. “Concretization” is discussed in Chapter 6.

\textsuperscript{187} \textit{Legal Reasoning} at 38.
towards the best possible solution using the rhetorical theories advanced by MacCormick.

There are two ‘commonplaces’ of law: (1) The Arguable Character of Law (“so far as law is that which underlies legal claims or accusations and legal defences, law is something arguable, sometimes, but not always, conclusively, always at least persuasively,”)\(^{188}\) and (2) The Rule of Law. MacCormick attempts a reconciliation of these two commonplaces by means of judicial process the constituents of which are (a) Rhetorical theories\(^{189}\) (relevant to the final chapters of this thesis, including as he does Continental ideas); (b) Proceduralist theories\(^{190}\) (as a means to limit the scope of arguments); and (c) Laws\(^{191}\) (these include statutory rules\(^{192}\) and contests arising from them are “an integral element in a legal order that is working according to the ideal of the Rule of Law.”\(^{193}\)

MacCormick casts the judicial process in deductive terms as appears in the following excerpts (my interpolations):\(^{194}\)

No claim or accusation may be made without proper citation of the legal warrant that backs it [in our case the statutory rule] and without giving notice of the allegations of fact in virtue of which it is asserted that the law warrants the conclusion proposed … This has the full logical certainty that inheres in syllogistic form. There is a rule ‘Whenever \(OF\) [operative facts] then \(NC\) [normative consequences]’ … [It is alleged that the operative facts] occurred in a concrete case at a specified time in a way that materially involves the accused person or defendant. So the relevant normative consequence \(NC\) ought to be implemented as demanded. This is the standard legal syllogism variously embodied in criminal or civil pleading and procedure.

\(^{188}\) \textit{Legal Reasoning} at 15.

\(^{189}\) \textit{Legal Reasoning} at 17-20.

\(^{190}\) \textit{Legal Reasoning} at 21-23.

\(^{191}\) \textit{Legal Reasoning} at 23-31.

\(^{192}\) \textit{Legal Reasoning} at 24.

\(^{193}\) \textit{Legal Reasoning} at 27.

\(^{194}\) Ibid.
I contend that his emphasis on syllogistic (deductive reasoning)\textsuperscript{195} is interdependent with the idea that interpretation is separate from and in advance of application. Indeed deduction, justification and universalizability are interdependent and essential ingredients of MacCormick’s concept of legal reasoning and Torben Spaak in his review of \textit{Legal Reasoning} appears to agree that this is so.\textsuperscript{196} It follows from the points made in this summary and MacCormick’s description of interpretation discussed in the next section: (i) that the thesis correctly identifies a conceptual source of prospective interpretation and (ii) if the thesis is to successfully challenge prospective interpretation and promote concurrent interpretation then it must also challenge the paramount place of syllogistic reasoning in the judicial application of statutory rules. Indeed this is a central aspect of this chapter. MacCormick clearly sees the significance of this as shown by his vigorous efforts to uphold syllogistic reasoning in the face of contrary arguments.\textsuperscript{197} As he acknowledges, his reconciliation of the arguable character of law and the rule of law unravels “if the [his] ‘orthodox’ view about legal reasoning is not itself sustainable.”\textsuperscript{198}

4.2.2 Arguing about interpretation

MacCormick turns specifically to the topic of interpretation in chapter 7 of his book titled “Arguing about Interpretation”. He begins this chapter with the passage set out as one of statements of prospective interpretation.\textsuperscript{199} That passage and the immediately following text is:\textsuperscript{200}

\begin{itemize}
\item \textsuperscript{195} This is a recurring theme throughout \textit{Legal Reasoning}. MacCormick provides a summary: “… the major premiss is the statute [as he explains better broken down into its components/criteria and expressed in universal terms] … The allegations of fact in pleadings amount to a set of minor premisses that are necessarily particular …” \textit{Legal Reasoning} at 36. The particular is said to be subsumed by the universal in the deductive process.
\item \textsuperscript{197} For example \textit{Legal Reasoning} at ch 4: “Defending Deductivism.”
\item \textsuperscript{198} \textit{Legal Reasoning} at 31.
\item \textsuperscript{199} In Chapter 2.5.
\item \textsuperscript{200} \textit{Legal Reasoning} at 121. The wide sense of interpretation has been called \textit{interpretatio sensu largo}.\end{itemize}
Applying the law always involves interpreting it. Any norm posed in an authoritative legal text has to be understood before it can be applied. Accordingly, in a wide sense of the term ‘interpretation’, every application of law requires some act of interpretation, since one has to form an understanding of what the text says in order to apply it, and any act of apprehension of meaning can be said to involve interpretation.

Note the reference to the wide sense of the term interpretation. MacCormick goes on to tell us:

A narrower or stricter conception of interpretation is more useful and relevant to the study of legal reasoning. This is the sense according to which we ‘interpret’ only when facing some occasion of doubt about meaning, followed by a resolution of that doubt by reference to some reason(s) supporting the preferred way of resolving it. This reflective elimination of doubt is to be distinguished from a simple unmeditated understanding of a text.

The wide sense of interpretation might arise when one sees a non-smoking sign. Reflexively and without any conscious act of interpretation we know smoking is forbidden. This is not what this thesis is about in any direct sense and nor is it of interest to MacCormick. The thesis is concerned with his analysis of statutory interpretation in the strict sense. However the distinction assumes (perhaps misguidedly) some importance when discussing preliminary rulings in the previous chapter.

In respect of the strict sense of interpretation MacCormick proceeds to tell us that the task is one of “forming a judgment to resolve the doubt by deciding upon some meaning which seems most reasonable in the context. Here, I shall be dealing only with interpretation so understood.” Issues arising from rival interpretations are said

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201 Ibid. The narrower sense of interpretation has been called *interpretation stricto sensu*. This distinction and much of what follows may be found in MacCormick and Summers (eds) *Interpreting Statutes: a Comparative Study* (1991) Chap 2 and MacCormick “Argumentation and Interpretation in Law” (1993) 6 Ratio Juris 16.

202 *Legal Reasoning* at 122. Context is linguistic context (prospective interpretation - context) not application.
to “turn on differences of the understanding of a statutory or other binding text.”

There are disputes “concerning the proper meaning to be ascribed to the text, both in general terms and with particular regard to a particular situation. It is a well-recognised truism that even the most carefully drafted and detailed text can never convey a fully determinate meaning for all possible purposes.” This is where legal reasoning comes in to find the most justifiable reasons so that “The court’s conclusion on the issue which reasons are the stronger for one interpretation or the other leads to the decision on the concrete matter in dispute ...”

MacCormick tells us, “The task of the whole chapter is to establish, with close reference to actual instances of judicial interpretation, what should be acknowledged as good arguments for interpretative conclusions.” On this basis he proceeds to a conventional discussion of the interpretative arguments including their content and ranking and of matters underlying those arguments. In short MacCormick in propounding his institutional theory of law puts his faith in legal rhetoric to reconcile the arguable character of law and rule of law ideals. This is consistent with prospective interpretation and has been influential in its promotion as a practice of statutory interpretation.

This influence is seen in Spaak’s analysis in his review already referred to and in an article predating Legal Reasoning and drawing on MacCormick’s earlier publications. Spaak provides a neat description of the interpretative process contended for by MacCormick:

The judge finds the legal raw material in the sources of law, such as legislation ...

Faced with a problem of statutory interpretation, he must find a pertinent statutory

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203 Ibid.

204 Ibid, citing Hart et al.

205 Legal Reasoning at 123.

206 Conventional but for some debatable, a matter beside the point of this thesis.


provision, and determine whether the provision applies to the facts of the case. He begins by clarifying the meaning of the provision, which often involves dealing with problems of vagueness or ambiguity. He then decides whether to apply the provision in accordance with its meaning.

Spaak explains that this requires legal method in an effort to establish the major premise of the legal syllogism which effort is guided and constrained by the interpretative arguments.\textsuperscript{209}

4.2.3 Engaging with MacCormick’s ideas

The thesis engages with MacCormick’s account of legal interpretation particularly in the context of statutory rules. There is no one correct approach to this task and in any event it is unlikely that all arguments for and against MacCormick’s account can be exhausted in the thesis. I think key aspects are a close examination of MacCormick’s insistence on deductive reasoning and, subsidiary to that, of what his and opposing arguments mean for the rule of law.

MacCormick’s account of legal reasoning is a powerful and highly influential one and it is with some trepidation that a challenge to his account is mounted in the thesis. However this is essential if concurrent interpretation is to be seen as a preferable and tenable alternative to prospective interpretation. And it would be inadequate simply to insist on the conceptual tenability, completeness and utility of concurrent interpretation, with its one step process of concurrent correspondence of rule and particular facts by analogous reasoning in resolving the particular conflict, without examining in detail the contrary position of MacCormick. That is, MacCormick maintains there are two steps in the form of a deductive syllogism culminating in a justification that is universal in its effect. Therefore the following lengthy exegesis is more than a diversion and is intended to give proper respect to MacCormick and his position.

I have set out above Spaak’s description of the two-step process of judicial interpretation. He also tells us that MacCormick “explains that the legal syllogism

\textsuperscript{209} Ibid, at 477.
plays an important *structuring role* in legal thought because it is within the syllogistic framework that arguments make sense as *legal arguments.* As does the thesis, Spaak relates the contention for the legal syllogism to MacCormick’s concern with the process of justification, pointing to the claimed distinction drawn between justification and discovery.

Spaak raises a number of objections to MacCormick’s account of legal reasoning in the publications referred to and these objections are canvassed below. However it would be remiss not to make clear that Spaak is in general agreement with the account of MacCormick and says: “I believe MacCormick’s claim that deductive justification plays an important role in legal reasoning is sound and that his account of deductive justification is essentially correct.” I believe from my understanding of Spaak’s work that he would in principle support prospective interpretation consistent with his ‘positivist’ approach to jurisprudence. However it is worth noting that Spaak gives weight to the way MacCormick’s account brings to the fore “the question of the dependence of the ideal of the Rule of Law on the methods and techniques of legal reasoning.” Of course this dependence works in the opposite direction too. Whilst I agree with the interdependence of the rule of law and legal interpretation, a theme of the thesis is that concurrent interpretation demonstratively does a better job of achieving rule of law goals than does prospective interpretation.

I hope that an accessible approach to the task is found in a discussion of three topics albeit interdependent and overlapping. The topics are (i) analogy/deduction, (ii) discovery/justification and (iii) particular/universal. Features of analogy, discovery and the particular align with concurrent interpretation and features of deduction, justification and the universal align with prospective interpretation. In effect this is a first approach and does not, indeed cannot complete the discussion. Another approach

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211 Ibid. Reference is made to Wasserstrom without elaboration or mention of Wasserstrom’s delimitations, discussed in section 4.4.3. I return to Spaak’s review when discussing particular/universal and when bringing the three topics together in sections 4.5 and 4.6 below.

212 Ibid, at 127.

213 Ibid, at 137.
is found in the ideas of Cass Sunstein. His promotion of analogous reasoning is at the heart of his legal theory based on ‘incompletely theorized agreements’ (particularly relevant to statutory rules) and this is introduced as a second approach in section 4.7. A third approach is found in the discussion of the conceptual aspects of concurrent interpretation in Chapters 5 and 6. Proponents of concurrent interpretation insist that the legal reasoning for judicial interpretation of statutory rules is analogous reasoning for the particular case.

The thesis does not engage in an analysis of logic and nor does MacCormick. In a sense there is a level playing field. We can agree on what we are talking about when we refer to analogy and deduction. MacCormick provides a neat summary of argument by analogy: “argument from like case to like case. If you can grow turnips successfully on a given piece of ground, it is reasonable to suppose that you can also grow carrots there.” This is the practical analogical reasoning we engage in all the time. The topic of analogy is developed further when discussing Sunstein’s ideas later in this chapter. Also in Chapter 6 in the context of the central part analogous reasoning plays in concurrent interpretation, particularly with reference to the ideas of Arthur Kaufmann and Jarkko Tontti. I hope that as this chapter develops, if not already, it is clear that prospective interpretation depends on deductive reasoning. Later chapters will show that concurrent interpretation depends on analogous reasoning.

The nature of deductive reasoning is discussed with reference to MacCormick’s account in the next section of this chapter.

The discussion of MacCormick’s ideas cannot end with the topic of analogy/deduction. This is because whilst MacCormick acknowledges the force of analogous reasoning he puts such reasoning in the background; in the camp of

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214 The breadth and complexity of this topic for law is well seen in Giovanni Sartor Legal Reasoning: A Cognitive Approach to Law (2005).

215 Legal Reasoning at 18.

discovery as it were and claims primacy for deductive justification. This move is premised on an argument that there is a distinction between discovery and justification, as MacCormick appears to acknowledge. Hence it is necessary to enter into a discussion of the topic discovery/justification and of a contrary argument that there is one process of decision-making. The argument in the thesis is that in effect both the distinction between discovery and justification and the terminology are redundant in respect of the judicial interpretation of statutory rules.

Further, MacCormick claims that deductive justifications have universal import. His promotion of the universal over the particular is challenged in respect of statutory rules in the topic particular/universal. The principles and values of the rule of law already discussed are germane to this topic. Rule of law values most relevant to the judicial interpretation of statutory rules are made explicit: impartiality, legal certainty, rationality and accountability and the general principle that citizens have due notice of laws. In the discussion of particular/universal and when bringing the three topics together it is contended that concurrent interpretation does a better job of meeting the rule of law than does prospective interpretation.

Finally, as the thesis proceeds to the three topics I must again emphasise that the discussion is directed to the judicial interpretation of statutory rules. The importance of this delimitation is particularly apparent when discussing the three topics and the rule of law.

4.3 Analogy/deduction

4.3.1 Preface
Chapter 3 of Legal Reasoning is titled “On the Legal Syllogism” and chapter 4 is titled “Defending Deductivism.” They stem from chapter 2 of his 1978 book titled “Deductive Justification” considerably bolstered by his debate with Bernard Jackson
including a contribution by MacCormick to that debate found in his *Notes on Narrativity*.  

Jackson challenged MacCormick’s deductive account in his book *Narrative Coherence* and subsequently the debate was played out in the pages of the International Journal for the Semiotics of Law in 1991 and 1992. MacCormick acknowledges that chapter 4 of *Legal Reasoning* “contains elements drawn from” his contributions to that debate. There is also a little known paper presented by MacCormick to a symposium in Graz, Austria that contains an account of his position on this topic, discussed in section 4.3.5. Jarkko Tontti has also engaged with this debate with particular reference to *Jackson Narrative* and *MacCormick Narrativity*. MacCormick seems to have been unaware of Tontti and his work.

The following approach is adopted. I begin with a summary of MacCormick’s position, which is then discussed mainly with reference to Jackson and Tontti. MacCormick then exercises his right of reply as it were, in particular in *Legal Reasoning* and the Graz paper.

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218 BS Jackson *Law, Fact and Narrative Coherence* (1988) [“Jackson Narrative”].


220 *Legal Reasoning* at ix.

221 In *Legal Reasoning* at 55-61 MacCormick discusses the arguments of Kelsen and Jackson together. Jackson adopts many of the ideas of Kelsen, for example see Jackson *Making Sense of Jurisprudence* (1996) 252. Therefore Kelsen’s ideas are not treated separately.
4.3.2 The legal syllogism

Syllogism is a form of reasoning in which a conclusion is deduced from two given or assumed propositions called premises that contain a common or middle term that is absent from the conclusion. There are many famous examples such as:

**Major Premise**  
All persons who blaspheme the gods are liable to be executed.

**Minor Premise**  
Socrates (is a person and) has blasphemed the gods.

**Conclusion**  
Therefore Socrates is liable to be executed.

The general rule (major premise) is applied to the facts of the case (minor premise), it being claimed that these facts having been established independently as an instance of the facts mentioned in the major premise are ‘subsumed’ within it.

MacCormick depicts legal rules as taking the form:

\[ \text{If } OF \text{ then } NC \]
\[ OF \]
\[ \text{therefore } NC. \]

*OF* are ‘operative facts’ and *NC* are ‘normative consequences’. MacCormick considers statutes that set norms of conduct and liability are intrinsic to an ongoing legal order. A claimant must specify the sentences or sentences (statutory criteria) on which it relies. “There have also to be some relevant issues of fact … capable of being tried and determined. Moreover those allegations of fact obviously have to be relevant to the statutory sentences cited …” The pleadings “amount to an attempt to construct a legal syllogism.”

Although statutes typically deal in terms of universals

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222 Legal Reasoning at 32.

223 Legal Reasoning at 34.

224 Legal Reasoning at 36.
the claimant must prove “facts that substantiate the alleged [statutory] particulars as instances of the universals.”

MacCormick gives an example. A statute provides that if a consumer of products is injured by a defect in the products the producer is liable. Connie is a consumer, she has been injured, the injury was caused by a defect in the product and Paul is the producer. “The claim founded on these allegations is the conclusion of the syllogism: Paul is liable to compensate Connie …”

The practice of law is not so simple, as MacCormick acknowledges:

Of course law is not an exact science, and of course legal decision-making and legal justificatory reasoning lack the demonstrative character that their construction in syllogistic form would seem to attribute to them. … one must attend not only to the making of a claim, but also to the making of a decision about the claim. What kind of justification is possible for a decision to accept and enforce such a claim, or indeed for a decision to reject it?

The response is a number of generalisations: “interpretation in the light of an understanding of the point of law, its fit with the surrounding law and a sense of justice …” Or to ask if the narratives of witnesses fit with the concept in question. All this is interpretative reasoning and includes the interpretative arguments. “So in the end it is not the legal syllogism that alone determines the outcome of the case.” “Why then insist on the syllogism at all?” MacCormick asks rhetorically and responds:

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225 Ibid.
226 Ibid.
227 Legal Reasoning at 37.
228 Legal Reasoning at 39.
229 Legal Reasoning at 40.
230 Legal Reasoning at 42.
231 Legal Reasoning at 42-43.
The answer should be obvious: it is what provides the framework in which the other arguments make sense as legal arguments. We go back to the point about what could possibly count as applying a statute at all. We go back to the issue of a conceivable procedure for raising a case with a view to implementing a statute. That has an intrinsic logic of its own within which it is clear why the interpretative points and arguments have a real bearing as legal arguments. Moreover, this helps to remind us why it is so important for a lawyer to be meticulous in sifting through every one of the universals or concepts deployed in a statute, and figuring out their relevant ordering and mutual interaction or super- and subordination. … Of course, that does not mean that it is necessary or even best to set out real legal arguments in rigorously syllogistic form. How to present the case belongs more to rhetoric than to logic, but the most effective rhetoric is likely to be that which rests on a clear understanding of the implicit logic of the process.

MacCormick rehearses his formula: Whenever \( OF \) then \( NC \). By this formula the problems raised by cases are categorised: problem of proof, problem of classification, problem of evaluation, problem of competing interpretations and problem of relevancy. These problems, characterised as the problem of second-order justification, are then to be resolved in a way that is coherent, assesses consequences and is the best possible interpretation in the context of the legal system within MacCormick’s concept of an institutional normative order.\(^{232}\)

There may well be a consensus as to the categorisation of these ‘problems’ raised by cases but the question remains as to how these problems are and should be resolved. MacCormick is not explicit as how deductive reasoning achieves this task. I confess that I have not found it easy to distil from a reading of *Legal Reasoning* including the quotations above where deductive justification in legal interpretation sits and in particular where classification and evaluative reasoning (discovery) stop and deduction begins. (This point is amplified in the next section when discussing discovery/justification.) It would seem that there is a transition because MacCormick claims syllogistic reasoning for the process of justification the final step but would

\(^{232}\) *Legal Reasoning* at 47-8. The so-called problem of second-order justification is discussed in the context of universalization below.
permit as he must, analogous reasoning and other types of ‘evaluations’ in the earlier steps of the resolving the ‘problems’ he has listed.

MacCormick’s article on Legal Deduction (1992)\textsuperscript{233} in particular Section VI headed “A New Problem: Evaluations in Legal Reasoning” is hardly more illuminating. He considers and dismisses as unsound, objections “to ascribing deductive character to any reasoning process in which such values and evaluations play a part.”\textsuperscript{234} MacCormick claims: “Such evaluations, however, are not here represented as conclusions of argument, but as premises.”\textsuperscript{235} And later: “Certainly, my thesis is only that, once certain information is supplied, the process of reasoning with that information is a deductive one.”\textsuperscript{236} By such means he supports his claim to a two-step judicial process of prospective interpretation.

4.3.3 Analogous reasoning

As mentioned, MacCormick discusses rhetorical theories early in \textit{Legal Reasoning} and reminds us that argument by analogy is argument from like case to like case. The following is a brief introduction to ideas explored in Chapter 6. Tontti in Part Three of his book \textit{Right and Prejudice}\textsuperscript{237} (“R&P”) takes on the task of explaining what he calls “Knowing and Doing Law” and specifically addresses MacCormick’s insistence on deductive justification. In his preface to Part Three he says:\textsuperscript{238}

> The meanings of words in legal and ordinary languages change with time and the normative context of application is the most important factor in determining the ‘correct’ legal meaning of a word. The correct legal meaning of a word can never be definitively determined \textit{in advance}; it is only through the act of interpretation and


\textsuperscript{234} Ibid, at192.

\textsuperscript{235} Ibid.

\textsuperscript{236} Ibid, at193.

\textsuperscript{237} Jarkko Tontti \textit{Right and Prejudice: Prolegomena to a Hermeneutical Philosophy of Law} (2004) [“R&P”].

\textsuperscript{238} R&P at 148. Emphasis in original.
application here and now that the meaning of a legal term is ‘finally’, that is in the specific case to be solved, defined.

In effect there is a fundamental tension between on the one hand the rule of law ideal that citizens should be able to know in advance the legal consequences of their actions or omissions and on the other hand the fact that laws cannot refer to the reality of the actual circumstances of a particular situation. As mentioned this (and other) rule of law values are a significant underlying theme. As Tontti puts it “there is an unbridgeable temporal gulf between general laws, [necessarily] expressed [in advance] in universalistic and abstract terms and statements of fact in lawsuits, [which occur later and] refer to particular and concrete circumstances.”

The temporal gulf is perhaps best illustrated by reference to the syllogism set out at the beginning of this section: Socrates and blasphemy. Logic is atemporal and strictly the syllogism reads:

- **Major Premise**: If (it is true that) all persons who blaspheme the gods are liable to be executed.
- **Minor Premise**: And if (it is true that) Socrates (is a person and) has blasphemed the gods.
- **Conclusion**: Then (it must be true that) Socrates is liable to be executed.

Compare MacCormick: *If OF then NC, OF therefore NC*, which would attempt to conflate temporality.

The stability of each of the premises is a further problem. That they need to be stable and have the required match is acknowledged by MacCormick: “All in all, I conclude that the problem of matching major and minor premises in a normative syllogism is

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239 R&P at 180. Emphasis in original.

240 Jackson Narrative at 38.
the problem of securing the sameness of sense of the predicates deployed in both.”

He acknowledges, “interpretative and qualificative decisions have to be made in so constructing a syllogism.” Referring again to the Socrates example: the major premise ‘blasphemy’ requires interpretation, and for the minor premise a finding of fact is required. Does a narrative constructed in the present show that Socrates blasphemed the gods, in breach of a law made some time before the alleged blasphemy? This problem is discussed at length by Jackson in a survey of cases that illustrate the manifold factors that go into the judicial process.

The irresistible conclusions are first that the temporal element of the normative syllogism cannot be maintained (“... in every instance of legal decision-making the sense of the law is each time newly determined by the case to be solved.”). Second it is necessary to construct the sameness of the premises by analogical reasoning. On Tontti’s analysis, “... when defending the deductive justification MacCormick is, in the end, forced to modify his argument in such a way that the so-called deduction of the normative syllogism is actually turned into an analogy.”

4.3.4 Defending Deductivism

“Defending Deductivism” is the title of chapter 4 Legal Reasoning. MacCormick tells us his “main point is clear. Always, there has to be an at least implicit decision to treat the facts actually averred or proven as properly characterized by the predicate ‘B’ in the sense in which this term is used in the relevant legal proposition”: that is, the major premise, the rule that all persons who ‘blaspheme’ the gods are liable to be executed. Predicate ‘B’ is the minor premise: Socrates has blasphemed the gods. “The

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241 MacCormick Narrativity at 174.
242 Ibid.
243 MacCormick discusses the problem in relation to this example in MacCormick Narrativity at 169-173.
244 Jackson Making Sense in Jurisprudence (1996) at 253-263.
245 Legal Reasoning at 181. Emphasis in original.
246 Legal Reasoning at 181.
247 Legal Reasoning at 59. Emphasis in original.
specific case referred to by the decision maker then counts as an instantiation of the relevant legal universal, and this justifies the decision of the case …”\textsuperscript{248} MacCormick acknowledges that “[o]ften the process also explicitly involves (and some would say that it always implicitly involves) a deliberative interpretation of the terms of the relevant legal text. … and affirming that the particular facts averred or proven do qualify as instances of the given predicates in the sense fixed by the interpretative decision.”\textsuperscript{249}

To criticism that this means that the key elements of reasoning fall out of sight if the judicial process is restricted to using deductive logic in order to give a formal representation or reconstruction of the decision-making, MacCormick again points to his acceptance of the necessity of realising in advance the operative facts relevant to the normative consequences\textsuperscript{250} but maintains the priority of the step of justification. This includes problems of classification. Events are not self-labelling. MacCormick tells us this “depends on some kind of decision that has to be justified ‘externally’ to the deductive argument that applies once the classification is determined.”\textsuperscript{251}

In this regard MacCormick acknowledges Bankowski’s idea of ‘truth certifying procedures’ and says “[f]or legal purposes, the value ‘true’ is ascribed to that which is authoritatively so certified.”\textsuperscript{252} A similar approach is made to evaluations in legal reasoning such as in determining facts, their relevance and the weighing up of those facts against the terms of the rule (the normative consequences). Such determinations “amount to certifications of what is true for legal purposes …”\textsuperscript{253} but these are not conclusions of argument but only determine premises. “Justifying one’s evaluations is not the same as deducing them, or giving a deductive proof of them.”\textsuperscript{254}

\textsuperscript{248} Ibid.

\textsuperscript{249} Ibid.

\textsuperscript{250} See \textit{Legal Reasoning} at 69.

\textsuperscript{251} \textit{Legal Reasoning} at 71.

\textsuperscript{252} \textit{Legal Reasoning} at 72, following Bankowski “The value of truth: fact scepticism revisited” (1981) 1 LS 257.

\textsuperscript{253} \textit{Legal Reasoning} at 74.

\textsuperscript{254} Ibid.
Moving to the conclusion of his defence MacCormick asserts: \(^{255}\)

In any event, no one does suppose that deductive legal reasoning can supply all the information required for justifying legal claims or decisions. The present thesis holds no more than this: Once certain information is supplied, the process of reasoning with that information is a deductive one. That it is supplied by a process involving judgement does not entail that it lacks truth-value as supplied, or therefore that it cannot form a premiss or premisses of deductive reasoning.

Although there are processes of determination or judgment to find and classify facts “that is perfectly compatible with my thesis that legal reasoning can be and always is in part deductive.” \(^{256}\)

4.3.5 Graz

According to MacCormick’s account analogous reasoning necessarily precedes deductive justification and the next topic addresses MacCormick’s attempt to confine analogous reasoning to discovery and his promotion of justification. Before doing so reference should be made to his Graz paper. \(^{257}\) MacCormick mounts a forthright counter to his critics on a number of fronts but the references below are confined to statutory rules and problems of classification.

MacCormick acknowledges that legal deductive arguments depend on the premises. “Hence whoever makes such an argument has to stand ready to defend and justify the premises, using for this purpose interpretative, analogical, evaluative and consequentialist arguments which – even if they include deductive elements or steps – are fundamentally non-deductive in character.” \(^{258}\) There are particular problems when “the law makes some provision which is conditional upon satisfaction of a certain

\(^{255}\) *Legal Reasoning* at 75.

\(^{256}\) Ibid.


\(^{258}\) Ibid, at 138.
criterion or standard of value."\textsuperscript{259} "Justifying one’s evaluations is not the same as deducing them, or giving deductive proof of them. Such evaluations, however, are not here represented as conclusions of argument, but as premises."\textsuperscript{260} "Certainly, my thesis is only that, once certain information is supplied, the process of reasoning with that information is a deductive one."\textsuperscript{261} And in conclusion:\textsuperscript{262}

For it is indeed true that all the crucial choices of interpretation and ascription, as well as fact-determination, that we make in legal reasoning processes take place outside of the deductive process, and are presupposed before any deductive argument can get going.

The questions remain, why insist on the syllogism? why deductive justification? Justification in the sense of a process of ticking off the boxes by deduction in respect of decisions already made (identifying the rule, finding the particular facts, applying the rule to the particular facts) is I suggest redundant. This does not mean to say that previous decisions have no further use in law. As discussed further below and in Chapter 7 previous decisions including the facts giving rise to those decisions do continue to have analogical value. But this is not achieved by promulgating overarching meta theories or tests.

### 4.4 Discovery/Justification

#### 4.4.1 Introduction, references and a delimitation

As discussed above MacCormick’s account of law is essentially justificatory and whilst he does not ignore discovery he sees discovery as distinct from the task of justification. He begins his discussion as follows:\textsuperscript{263}

\textsuperscript{259} Ibid, at 131.

\textsuperscript{260} Ibid, at 132.

\textsuperscript{261} Ibid, at 133.

\textsuperscript{262} Ibid, at 138.

\textsuperscript{263} \textit{Legal Reasoning} at 208.
The process of discovery concerns the steps in thought that lead from first confronting a problem – here, of course, a problem in law, but it could be any other kind of problem, whether theoretical or practical – to figuring out an answer to that problem. After thinking out an answer has been done the next task is to justify it; to check that it is and show why it is the right answer.

It is contended that there are at least three important aspects to MacCormick’s treatment of discovery: first his support for the idea that discovery and justification are distinct, second his promotion of justification over discovery and third his orientation of the discussion of discovery and justification into the debate about analogous reasoning. In short he purports to reinforce his justificatory and deductive stance by his contentions (i) that there are two concepts called discovery and justification (ii) that discovery and justification are distinct and separate and (iii) that analogous reasoning in law is confined to the discovery camp as it were. He then claims:

But once it [the example given of an analogy] is placed in a justificatory perspective, there is need for formulation of some principle that captures what the relevant similarity is. … A principle that can be shown to be itself anchored in established law it is then relevant to legally justifying the decision in the instant case.

That is, deductive reasoning and justification together play their part central to MacCormick’s concept of legal reasoning.

These themes addressed on a smaller scale are found in MacCormick’s first and very influential book Legal Reasoning and Legal Theory. By the time MacCormick came to write Legal Reasoning he was obliged to meet criticisms of his earlier

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264 Legal Reasoning. The relevant chapter is 10 titled “Coherence, Principles, and Analogies”.

265 Legal Reasoning at 210-211.

treatment of discovery. A well-recognised source of the debate is Bruce Anderson’s book “Discovery” in Legal Decision-Making.\textsuperscript{267}

Anderson sets the scene at the commencement of his first chapter:\textsuperscript{268}

Contemporary studies of legal reasoning are primarily concerned with analysing how judicial decisions are justified. They stress the logical, rational and “objective” nature of the process of legal justification. Legal theorists who study legal reasoning in this context accept that there is, and should be, a rigid distinction between the process of discovery (“how a judge “actually” reaches a tentative decision”) and the process of justification (“how a judge publicly justifies a decision”). The “actual” process followed by a judge to invent or discover a solution to the case is a distinct and independent process that is considered relatively unimportant compared to the process of publicly justifying a judicial decision by supporting reasons and arguments.” … Some theorists … classify the discovery process as a psychological, not a legal, matter that should be left to psychologists.

The point can be made already that in discussions of this topic there is a tendency to fudge the definite point of actual decision.

The work of psychologists has so far proved disappointing and this is an opportunity to stress an important delimitation to this thesis. This thesis is not about an aspect of judging perhaps best illustrated by reference to papers delivered to the conference “Judicial Reasoning: Art or Science?” held at Canberra, Australia on 7-8 February 2009. A sample of paper titles gives a perspective: “Blinking on the Bench: How judges decide cases”, “Jurisprudence as Epistemology: Reasoning beyond reason in the law”, “The Art and Performance of Judging”, “Judicial Decision-making & Neurobiology: The role of emotion and the ventro-medial cortex in deliberation and reasoning”, “A Judge’s perspective on Computer Assisted Judging”, and “Judicial Reasoning and the ‘Just World Delusion’: Using the psychology of justice to evaluate legal judgments”\textsuperscript{269}

\textsuperscript{267} Bruce Anderson “Discovery” in Legal Decision-Making (1988) [“Anderson Discovery”].

\textsuperscript{268} Anderson Discovery at 1.

\textsuperscript{269} Appreciation is due to the Hon Justice Susan Glazebrook for this information.
4.4.2 American realists

Anderson begins his discussion with a description of the work of the American realists in particular of Jerome Frank. For this school of thought the judicial decision-making process is one process of dynamic (and particular) problem-solving involving various conscious and deliberate activities denoted as (i) puzzling (ii) hunching and intuiting (iii) checking and testing (iv) judging or deciding and (v) presenting the judgment. “Judgments are neither dictated by legal rules and principles nor reached according to syllogistic reasoning.” Anderson refers to observations of Frank that are particularly relevant to this thesis and are worth setting out in full:

Frank argues there is more to fact-finding than “solving the double-jointed problem of selecting the relevant facts and the relevant rule.” He claims that Dewey writes as if the facts can be directly observed and are waiting ready-made before a trial begins and that the task of judges is merely to pick and choose the relevant facts. The “facts”, Frank asserts, do not exist before the trial begins. Indeed, the facts are unknown and unknowable until a judge announces the decision; the facts are the judicially determined facts.

The American realists were agreed that a step (penultimate) in the process of discovery is reaching a decision. This is followed by public exposition (accountability/justification) but as Anderson notes it is difficult to separate these two activities and I surmise that judges sometimes do change their opinions as they engage in the activity of preparing the reasons for public exposition. The main point is that justification is seen as one part of the judicial process and “not the major constituent or the primary function of the process.” The American realists acknowledge that in the activity of presenting decisions syllogisms can play a role.

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270 Jerome Frank Law and the Modern Mind (1949). The thesis is not the place for a treatment of the debate between formalists and realists. As explained in Chapter 6 the thesis contends for concurrent interpretation on the grounds of philosophical hermeneutics and not on utilitarian or consequential grounds.

271 Anderson Discovery at 4.

272 Anderson Discovery at 7-8, referring to Frank (1949).

273 Anderson Discovery at 9.
The judge’s opinion often paints a picture of taking a rule as the major premise and employing the facts as a minor premise then coming to judgment by a process of pure reasoning. However this serves to obscure what actually happens not that even the most capable judge is in a position to describe all that goes into the judicial process.274

4.4.3 Positivist response

Anderson traces the source of the argument for a distinction between discovery and justification to the work of the American positivist Richard Wasserstrom.275 It might be that Wasserstrom misrepresents the position of the American realists as Anderson asserts276 but putting that to one side it is important to understand what Wasserstrom has to say about discovery and justification and in particular the delimitations he draws relevant to the thesis. His analysis of discovery and justification is in the context of defending deductive reasoning.277 His interest is in the nature of the judicial process, which he contends is ambiguous in that it is278 capable in itself of denoting two quite different procedures … indicated by reference to two types of questions that may be asked about any decision. One kind of question asks about the manner in which a decision or conclusion was reached; the other inquires whether a given decision or conclusion is justifiable.

A person “may want to know about the factors that led to or produced the conclusion; [or] … in the manner in which the conclusion was to be justified.”279 Wasserstrom goes on to demonstrate by examples that the factors in respect of each of discovery and justification are different.280

274 See generally Anderson Discovery at 9-10.


276 Anderson Discovery at 11-15.

277 The relevant chapter is titled “The Possibility of a Deductive Procedure”.


279 Ibid.

The work of Wasserstrom in promoting a two-level deductive procedure of legal justification has been very influential and lays the foundation for MacCormick’s own work. Wasserstrom tells us that he “will refer to the procedure by which a conclusion is reached as the process of discovery, and the procedure by which a conclusion is justified as the process of justification,” and claims to “having succeeded in establishing a rigid dichotomy between these two procedures.” In the discovery process a “conclusion” is reached that is then justified. Wasserstrom says “one should not put forward a conclusion or act upon a decision [already made] until one has subjected it to, and substantiated it by, one’s logic of justification. This is perhaps what is meant by rational behaviour.”

Wasserstrom makes it clear that his procedure of legal justification cannot apply to all aspects of judicial decision-making. He is primarily concerned with the development of the common law by precedents. He is careful to set out and explain his delimitations, his ‘simplifying assumptions’. First he makes it absolutely clear that he does not include statutory law in his analysis. “The whole of this investigation assumes that no legislative rules of law are present in the legal system.” This is because of issues relating to the separate functions of legislatures and courts and “[s]tatutes are often vague and ambiguous; unforeseen cases arise …” Second he acknowledges that deductive reasoning has a limited role when it comes to selecting premises. “Thus, the claims relating to the uniqueness of fact situations, the arbitrariness of classification, … must be examined in order to see whether it is even useful to consider procedures of justification which are in any way “deductive” or “logical.”

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282 Ibid.

283 Ibid. Emphasis in original.

284 Ibid, at 8.

285 Ibid.


Wasserstrom goes on to make the following observations, citing Hart, which are central to the thesis and are therefore set out in full.\textsuperscript{288}

It should once again be conceded that there is clearly a sense in which the activity of characterization cannot be governed by the rules of formal or deductive logic. This is so for at least two reasons. First, it is surely correct to observe that “fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge.” And second, even if this were the case, it would still be true that “logic does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of any expression.” One cannot appeal to the canons of logic to decide whether a given classification is necessarily the correct one.

Anderson discusses the contradictions between the realists’ and positivists’ accounts of decision-making\textsuperscript{289} and attempts to identify the point of distinction drawn by the positivists that is, where the process of discovery ends and legal justification begins. This is not easy perhaps impossible to do as is clear from his attempt at a further explanation in a lengthy footnote:\textsuperscript{290}

Although legal positivists do not treat the process of justification as part of the “actual” process whereby a judge reaches a decision, they do not deny that there may be some overlap of testing in the decision-making process and the public legal justification of a decision. But in their opinion, how a judge actually tests and justifies a legal decision to oneself in private is independent from the process of public legal justification that ultimately determines which rival legal ruling is accepted which, in turn, determines the outcome of a case. Hence questions about the mental processes that comprise the decision-making process such as how a judge actually tests and justifies an outcome to oneself are irrelevant to their project. Instead legal positivists direct their efforts to understanding and explaining why and how a legal decision is publicly justified irrespective of what a judge actually thought about when testing it.

\begin{itemize}
\item \textsuperscript{288} Ibid, at 32-3, citing Hart “Positivism and the Separation of Laws and Morals” (1958) 71 Harvard LR 593 at 607 and 610.
\item \textsuperscript{289} Anderson Discovery at 17-20.
\item \textsuperscript{290} Anderson Discovery at 20 and n 81. Emphasis added.
\end{itemize}
In my view use of the word “determines” is unfortunate and “irrespective” has an air of unreality but perhaps these objections serve to indicate the real problem of making a distinction at all. Both MacCormick and Anderson fail to consider Wasserstrom’s delimitations and what he has to say about the exclusion of statutory rules and the problem of classification. Whilst MacCormick does develop the topic further in subsequent publications including in *Legal Reasoning* and clearly continues to be influenced by Wasserstrom’s ideas, he does not discuss the problems identified by Wasserstrom. Instead he endeavours to include statutory rules in his system of justificatory reasoning and to emphasise justification as the crucial part of that reasoning. I return to these matters following discussion of two other perspectives one relating to science and the other to the writing of Bankowski.

### 4.4.4 Discovery and science

Wassertrom, and MacCormick in both his 1978 book on Legal Reasoning and in *Legal Reasoning* (2005), seek to draw support from the philosophy of science and its treatment of ‘discovery’. Wasserstrom gives three examples of decision-making including the discovery of a vaccine by the random choice of a formula. In each case we are told how the decision was reached but in none of them whether the decision was valid or justified.  

In his 1978 book MacCormick refers to the story of Archimedes’ ‘Eureka’ discovery (the bath overflowed when he got into it): the flash of insight that had to be tested and proved experimentally. Dan Hunter points out: “By characterising discovery as a “flash of insight,” MacCormick made the process essentially unfathomable.”\(^{292}\) And Anderson adds by “identifying science with law, the prestige of science in the academic community helps to bolster and enhance the attractiveness of MacCormick’s account of discovery and justification and helps fix justification as the crucial process in legal reasoning.”\(^{293}\)

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293 Anderson Discovery at 17.
The claims of Wasserstrom and MacCormick are that (i) the distinction between discovery and justification can be found in science and law and (ii) testing in science is a model for legal justification. As a result of recent developments in the philosophy of science these claims have become a contentious and complex topic beyond the usual reach of jurisprudence. The following is best seen as an attempt to bring these developments to the attention of readers and at least show that the claims of Wasserstrom and MacCormick appear misguided.

Briefly, the primary source of the distinction is the work of Karl Popper who in *The Logic of Scientific Discovery* (1959) makes a sharp distinction between “the process of conceiving a new idea” and “the methods and results of examining it logically.” This is based on the claim that different methods apply essentially between empirical psychology and the logic of knowledge. The flash of insight and other subjective factors produce discoveries that must be objectively tested, proved and justified.

There are at least three responses. One is to argue that ‘testing’ in science is quite a different business to that of ‘testing’ in law. How can it be plausible to compare (i) the scientific method Popper explains of deducing predictions from theories and hypotheses and then testing them by experimentation in a process of falsifiability to (ii) the necessarily evaluative and practical field of law? Anderson mounts a convincing argument that this is not possible and this is not repeated.

A second response is to argue that Popper was wrong in his emphasis of the distinction. The thesis is not the place to rehearse the debate between Popper and Thomas Kuhn and the subsequent extensive discussions in the philosophy of science.

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295 Anderson *Discovery* at 38-52.

296 Thomas Kuhn *The Structure of Scientific Revolutions* (1962) and see for a summary of different perspectives of the debate: Neil McLaughlin Canadian Journal of Sociology Online November 2006, [http://www.cjsonline.ca/reviews/kuhnpopper.html](http://www.cjsonline.ca/reviews/kuhnpopper.html)
A third response is found in an accessible article written by Larry Wright that has the virtue of resonating with many of the ideas explored in the thesis. Wright turns the distinction between discovery and justification on its head by beginning with the point “we should not confuse what caused us to believe something with the reason we should believe it.” That is: *why I think* C is not to be confused with *why I should think* C. The distinction between discovery and justification “has typically been marshalled to draw attention to the possibility of confusing causal (explanatory) matters with normative ones” but this in turn has lead to confusion. As Wright tells us: “‘Discovery’ is a success-word and hence has a normative component: we typically can’t say we’ve discovered something until we know what it is. Simply walking across the South Pole isn’t discovering it: you must know you’re there.”

At heart are *reasons*: why I think C and why I should think C. “Giving reasons for thinking something-or-other has a significant function in our lives.” Generally this is an effortless competence for example the odometer reading is reason to think the car needs servicing. And returning to why I think and why I should think the answer to both questions is the same: “why do I and why should I think the car needs servicing? The number of miles accumulated since the last oil change.” So having explained how I came to think C is there another function for giving a reason? There is and that is when I am trying to get someone else to think C. This function motivates *reasons-giving*. Wright provides the following description:

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298 Ibid, at 97. First person pronouns are adopted following Wright.

299 Ibid.

300 Ibid.

301 Ibid, at 97-98.

302 Ibid, at 99.

303 Ibid, at 100. Emphasis in original.
Just knocking about the world we develop a skill in judging inferential connections between things. … We simply learn to distinguish good from bad indicators and to recognize tough cases. … this renders more transparent the cryptic remark, above, that ‘what makes me think C is a good reason to think C’.

This does not mean we cannot say things further about what makes the reason a good reason, “but it is a misunderstanding to think that we must … For justification, if it is to be of any value to us, comes to an end. And the best place for it to end is in a competent judgment.”304 Accountability in the sense of explaining why we think something is discussed as a rule of law matter in some detail in the next section.

4.4.5 Bankowski
Anderson follows his discussion of Wasserstrom and MacCormick with a consideration of the views of Bankowski, in particular those set out in a chapter of a book about the work of juries.305 In a section titled “The discovery of truth” Bankowski discusses the ideas of Frank and Wasserstrom in particular and concludes that there can be no clear distinction between discovery and justification.

His arguments are first terminological: discovery is not complete until something has passed all relevant tests (discovery is “justified truth”) and second the processes of discovery and justification are not independent. He tells us “discovery is purposive activity in the sense that it comprises actions which have to be interpreted under some theory of justification, and thus “discovery” cannot be independent of justification. … Discovery includes justificatory activity.”306 Bankowski’s example is similar to Wright’s (south pole); the discovery of the source of a river, you have to know first what counts as the ‘source’.

304 Ibid.
In law we talk about getting at the truth and it seems undeniable (MacCormick agrees)\textsuperscript{307} “that the judicial process is simply a particular method of attempting to get at the truth, a particular truth certifying procedure.”\textsuperscript{308} Law has its particular procedures not to be confused with science. In particular legal procedures sometimes require the exclusion of information that would otherwise be relevant and as will be discussed in Chapter 7 the law has its own ways of reconstructing narratives in the adversarial system and in the context of resolving conflict. As Bankowski says “the way we set about finding the truth will also determine in part the truth that we get”\textsuperscript{309} and the nature of the task is also relevant. A police investigation will ‘discover’ guilt at the point of a charge, the court’s verdict of guilty at a later stage. In respect of statutory rules decisions are made in the one-step process concurrent interpretation.

4.4.6 MacCormick and discovery

MacCormick in his 1978 book on \textit{Legal Reasoning}\textsuperscript{310} affirms and develops Wassertrom’s response to the realists in particular the distinction between discovery and justification and the promotion of a deductive procedure of justification. Notwithstanding the clear and reasoned delimitations of Wassertrom himself, MacCormick makes no such delimitations and does not discuss them. MacCormick says: “what prompts a judge to think of one side rather than the other as a winner is quite a different matter from the question whether there are on consideration good justifying reasons in favour of one side than another.”\textsuperscript{311}

We turn to the treatment of discovery by MacCormick in \textit{Legal Reasoning} (2005). He acknowledges that he was in error to consign discovery to “being purely a matter of psychological contingency, not of reasonable procedures.”\textsuperscript{312} He agrees “there are rational heuristic steps one can take in trying to work out the answer to a problem, and

\textsuperscript{307} For example \textit{Legal Reasoning} at 72.


\textsuperscript{309} Ibid, at 21.

\textsuperscript{310} MacCormick \textit{Legal Reasoning and Legal Theory} (1978).

\textsuperscript{311} Ibid, at 16.

\textsuperscript{312} \textit{Legal Reasoning} at 208.
these are then reflected in the reasons one can give in justifying the conclusion finally reached or decision finally handed down.”\textsuperscript{313} However MacCormick adheres to justification as distinct from discovery: “… the claim to have made a ‘discovery’ must remain a contestable claim until a satisfactory justification can be stated. … the claim to have discovered the right answer to a given problem requires to be supported by reasons offered \textit{ex post} to show why the answer is indeed right.”\textsuperscript{314}

Having reasserted his position MacCormick draws comfort from another scientific discovery, that of the ‘double helix’ by Francis Crick and James Watson. Their hypothesis bore fruit including revelation of the structure of DNA from a huge array of further studies and experiments. “The truth seems to be that there is an ongoing interaction between attempts to think through a problem and attempts to show that one has thought through to a convincing argument.”\textsuperscript{315} Surely this is an argument for one process but apparently not so because MacCormick goes on to say: \textsuperscript{316}

In practical thought, such as in legal reasoning, there is not a physical reality that in some way matches or confirms the descriptions and predictions of the ‘discoverer’. Nevertheless, the development of acceptable general principles linking the ‘discovered’ analogy with the general body of the law is in turn somewhat analogous to the confirmation over time of a hypothesis or theory in natural science.

It is apparent that at this stage of the discussion MacCormick has in mind the contrary argument that legal reasoning is analogous reasoning. MacCormick is compelled to acknowledge the force of analogous reasoning but puts this in the discovery camp. There are a number of indicators that this is so including: “Thus stated [by Hunter], the analogy is self-sustaining. But once it is placed in a justificatory perspective, there is need for formulation of some principle that captures what the relevant similarity is.”\textsuperscript{317} What he means is that the analogy has to be shown as anchored in established

\textsuperscript{313} Ibid.

\textsuperscript{314} \textit{Legal Reasoning} at 209.

\textsuperscript{315} Ibid.

\textsuperscript{316} Ibid.

\textsuperscript{317} \textit{Legal Reasoning} at 210-211.
law to then be legally justified. I can see that this might be the case in the incremental development of the common law such as, in respect of non-statutory torts but I think it difficult to see how it can be of interest to the interpretation of statutory rules.

Indeed MacCormick seems to acknowledge as much when he discusses cases “dealing with problems of classification.”

318 It can be suggested that he is driven by the preceding argument that there is no division between discovery and justification and an interrelated argument concerning the force of analogous reasoning to promulgate an exception to the interpretative practices in respect of statutory rules and to plump for concurrent interpretation. As he explains, problems of classification arise when “a predicate ‘P’ [is] a condition of some normative consequence in a relatively complex setting of rules or sets of rules of statute law or case law or both together.”

319 Previous decisions about what counts as P are relevant but “every event and person and relationship in the real world is unique.”

320 Having reached this point MacCormick appears to have little more to offer by way of analysis of the relevant and actual judicial process except for reference to his treatment of ‘reasonableness’.

321 This is germane to statutory discretions and not to statutory rules.

**4.5 Particular/universal**

I begin the discussion of this topic with brief reference to relevant sources. “Universals and Particulars” is the heading of chapter 5 Legal Reasoning. Prior to publication of this book an earlier version of the chapter was the subject of a conference at the University of Edinburgh, contributions to which appear in The Universal and the Particular in Legal Reasoning (2006). The contribution of Bell is
particularly pertinent. This book and *Legal Reasoning* are the primary sources of the discussion below. In addition reference is made again to Spaak’s review because his discussion presents an interesting challenge to MacCormick’s claim to universalization. Again there is overlap with the topics already discussed in this chapter. Essentially the discussion is “about the extent to which we can provide universal justifications for our decisions in individual cases.”

MacCormick distinguishes universalization from generalization making the point that [“‘U’]niversal’ contrasts with ‘particular’ as ‘general’ contrasts with ‘specific’. … ‘Universal’ and ‘particular’ are logical properties, whereas generality and specificity are quantitative ones.” He presents universalization as essential to justification in line with the universal values that inform the rule of law. He seems to have in mind normative justifications of legal decision-making that is, that legal decisions make sense in the world and in the context of the legal system. Such decisions will exhibit the characteristics of consistency and coherence and will be preferable decisions in terms of consequences.

Arguments for consistency and coherence and also consequentialist arguments are treated as second-order justifications. As explained by Spaak in the context of a discussion of MacCormick’s claim of universalization these arguments require judicial choice that is, there is a so-called problem of second-order justification and the problem of second-order justification is met by, I would say is subsumed by, application of the interpretative arguments. It is in this context that Spaak discusses and ranks the principal interpretative arguments: textual, systemic, purposive and intentionalist. This important point is discussed again at the end of this section.

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323 Ibid, at 41.

324 *Legal Reasoning* at 94, following RM Hare.

MacCormick accepts that particularism has its place because the law is concerned with resolving particular cases. “Therefore the reasons that can be stated to justify a decision will be reasons rooted in the particular case. The requirement that a decision be justified is met only if there are good reasons for deciding in the particular chosen way …”\textsuperscript{326} Having good reasons for deciding the particular case is not sufficient. MacCormick contends that we must also “find reasons for our reasons.”\textsuperscript{327} This happens in the process of justification when we say this is our judgment ‘because.’ “The ‘because nexus’ is all-important.”\textsuperscript{328} And “[t]he ‘because’ of justification is a universal nexus, in this sense: for a given act to be right because of a given feature’ or set of features, of a situation, materially the same act must be right in all situations in which materially the same feature or features are present.”\textsuperscript{329}

Why do we need justification? Rule of law values require that legal decisions “always be, and be shown to be, grounded in the pre-established law in some appropriate way”\textsuperscript{330} exhibiting the characteristics of consistency and coherence and being preferable decisions in terms of consequences. In order to see what concerns MacCormick it is necessary to look at the universal rule of law values MacCormick has in mind. Bell helpfully collects values relevant to interpretation under the heading “What do we value as ‘universalism’?”\textsuperscript{331} These values are impartiality, legal certainty, rationality and accountability.

Impartiality is the strongest and is required in all cases. This includes the idea of equality before the law; that rules apply equally to everybody.

\textsuperscript{326} Legal Reasoning at 83.

\textsuperscript{327} Legal Reasoning at 89.

\textsuperscript{328} Legal Reasoning at 88.

\textsuperscript{329} Legal Reasoning at 91.

\textsuperscript{330} Legal Reasoning at 99-100.

\textsuperscript{331} UPLR at 42-43.
“But the values of certainty and rationality are perhaps less strongly held”\(^{332}\), and this is particularly so when the particular is most at stake such as when policy considerations prefer a rule expressed in general terms requiring specific application to a particular case. As Bell says in respect of such cases “this means that we abandon the idea of making a rule to decide the outcome in advance.”\(^{333}\) We then hedge decision-making in this type of case with procedural rather than substantive safeguards and “create a context in which we are happy to allow the decision to be made in relation to facts which are substantially unrepeatable. … Our lawyer can give us predictions of what this judge is likely to do, but they are more in the realm of jurimetrics than jurisprudence.”\(^{334}\)

But that is where the rule of law value of *accountability* comes into play. The value of accountability requires discussion now especially because ‘accountability’ has become something of a buzzword. Obviously the thesis is not concerned with the accountability of courts in a general sense though I agree with Cane’s characterisation of legal decision-makers including courts as public accountability institutions,\(^{335}\) which has the virtue of aligning the function of courts with accountability as now explained and also sees the judicial role in a realistic light with regard to statutory rules. I also have in mind the bottom up approach to statutory interpretation advocated by Cass Sunstein discussed shortly and the trend to reconceive the judicial system as a public service (competing with others for public expenditure as evidenced by extra-judicial speeches) well described by Bell.\(^{336}\)

Bell and the thesis are concerned with the obligation of courts to give an account of their reasons for decision. As Bell explains “we expect a public decision-maker to decide for good reasons rather than personal favouritism and we expect them to be

\(^{332}\) UPLR at 42.

\(^{333}\) Ibid.

\(^{334}\) UPLR at 43.

\(^{335}\) Cane *Administrative Law* (5th ed, 2011).

willing to defend their decisions.” As Cane tells us reasons for the decision are part of the fair procedure we expect in decision-making by accountability institutions and reasons for decisions are inherent to the procedural safeguards required in cases where statutory rules are invoked as mentioned by Bell.

Accountability is not justification; it is not the deductive process of justification that MacCormick prescribes. Accountability is an explication of the court’s correspondence of rule and facts for that case. It includes identification of the rule and its criteria, identification of the relevant and admissible facts and a summary of the new narrative constructed by the court as discussed in Chapter 6. Lord Brown of Eaton-Under-Heywood for the House of Lords puts the approach to reasons this way:

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”, disclosing how any issue of law or fact was resolved.

Or as Cane says: “… the reasons must satisfy a minimum standard of clarity and explanatory force, and must deal with all the substantial points that have been raised.”

Accountability in this way meets the rule of law demand for an open account of the judicial process. A balance is struck between (i) the normal demand for universalism and (ii) attention to the particular. Significantly Bell goes on to discuss justification in the context of particular cases and concludes: “justification has a limited role in the decision making about facts, especially the classification of facts into relevant legal categories. As long as the decision maker is operating within the correct framework, the actual interpretation of the facts is a matter of experienced judgment.”

337 UPLR at 43.
338 South Bucks District Council v Porter [2004] 1 WLR 1953 (HL) at [36].
339 Cane Administrative Law (5th ed, 2011) at 89.
340 UPLR at 50.
Bell has statutory rules in mind pointing out that we accept as we must that they cannot be perfectly expressed. Though universal in character and intended to be such, inevitably new and particular situations occur. “In sum, universalism is an ambition that is mediated through the particular. The particular manifests itself in the specificity of individual facts that have to be analysed and the incremental way in which legal rules are often built up.”

Bankowski echoes Bell’s thoughts:

Since the rule is not self-applying we have to decide each time whether the conditions of its application are met. This is not necessarily because the rule is vague or general and vague. It is precisely because … each situation is unique that we cannot just let the rule apply itself and have to decide each time whether it applies.

Returning to the so-called problem of second order justification, the point is made that if the arguments for consistency, rationality and consequences are met by the interpretative tools including the interpretative arguments as Spaak rightly claims, then ‘universalization’ or ‘justification’ do not add to the decision-making process. Instead the arguments are part and parcel of ordinary reasoning in the particular. In other words the matters of consistency, coherence and consequences sit with certainty, rationality and accountability. The contention for concurrent interpretation accepts the utility of the interpretative tools (not rules) including the interpretative arguments. Analogous reasoning encourages the finding of similarities including the matters of consistency, coherence and consequences.

341 UPLR at 51.

4.6 Bringing the three topics together

MacCormick’s emphasis on syllogistic (deductive) reasoning requires interpretation separate from and in advance of application with two consequences: (i) that the thesis correctly identifies a conceptual source of prospective interpretation and (ii) if the thesis is to successfully challenge prospective interpretation and support concurrent interpretation then it must also challenge the paramount place of syllogistic reasoning in the judicial application of statutory rules. It is argued that legal reasoning in respect of statutory rules is inevitably analogous. MacCormick clearly sees the significance of such an argument as shown by his vigorous efforts to uphold syllogistic reasoning in the face of contrary arguments. The question remains on the table: is MacCormick’s claim redundant in respect of statutory rules?

Before embarking on a consideration of this question it is necessary to say something about the role of the judge. The judge is the decision maker but also has other roles including overall control of the conduct of the proceeding, ruling on matters of procedure and evidence and mediating the conflict between the parties so it conforms with rule of law expectations of equality, impartiality (including maintaining an open mind) and the right of each party to be heard. In this process the judge is continuously engaged in a process of evaluation of a range of matters including specific points of argument and demeanour.

At some point the judge makes a decision and when the parties to the conflict have exhausted their procedural rights to a fair hearing either immediately or reserved the judge pronounces that decision. Then or later the judge will give reasons. If the judge has reserved the decision she may come to a conclusion, if not already, in the process of writing the reasons for judgment. In either case the reasons for judgment will conform to the rule of law expectation of accountability.

The thesis is concerned with the judicial interpretation of statutory rules and as traversed earlier, and as MacCormick acknowledges indeed describes, this gives rise to problems of classification: what is the meaning of the statutory rule and do the facts of the particular case come within the scope of the statutory rule invoked by a party to
the conflict before the court? I now discuss what the three topics (analogy/deduction, discovery/justification and particular/universal) bring to the task of finding an answer to that question.

First it is plain that the decision-making task is a process and it is played out in respect of a particular case. The American realists and Bankowski give accounts of a process of discovery. I suggest that the terms ‘discovery’ and ‘justification’ be put to one side. The term ‘decision-making process’ is adequate and does not carry the same baggage. MacCormick himself provides a brief sketch (as he calls it) of how we succeed in coming to an objective judgment where there are conflicting reasons. As he describes, we move from an immediate reaction to a situation seen at first glance. We seek to be fully informed and in a process of correction or adjustment we find a rationalized response to the whole of a situation in all its particularity.

The process ends with a decision as explained by Wright and Bankowski and as acknowledged by Wasserstrom. We do not need to but we may, and the rule of law value of accountability expects, an account of that decision (already made). On this analysis all the important steps take place in ‘decision-making’ (I suggest that MacCormick conceded as much in Graz) and the judgment is rhetorical window dressing that satisfies the rule of law value of accountability. It follows that interpretation is best seen and applied as concurrent interpretation and not as a two-step process in respect of statutory rules. As Rauno Halttunen says “On a general level, legal justification appears as an activity, one pivotal aspect of which is to demonstrate that the decision has been arrived at and/or can be accounted for properly after the fact as regards all of its components.”

Second MacCormick is forced to concede that analogous reasoning resolves problems of classification. Although he would still advocate syllogism once classification is determined and the premises are found he is not clear what justification adds (reasons for reasons?) to the decision-making process. The so-called second order justifications consistent with ideas of coherence, consistency and consequentiality have already

343 Legal Reasoning at 87, discussing ‘Particularism’ and citing Adam Smith.

been subsumed in the decision-making process. The danger is that in a process of prospective interpretation courts are encouraged to forget that it in fact reached its decision in the particularity of the case and attempt to promulgate tests, gloss and explanations in the false expectation of meeting ideals of certainty and rationality. This is particularly so under the imprint of justification. This does not mean that previous decisions and the rule and facts on which they are based cannot have value as analogies.

Third Spaak demonstrates that MacCormick’s theory of legal reasoning, as a reconciliation of rhetoric (the arguable character of law) and the rule of law, fails to deliver the legal certainty that MacCormick claims: “The notion of what is rationally arguable is rather more indeterminate than MacCormick thinks.” Spaak explains that legal certainty inherently cannot be very certain and this is because of the intrusion of morally relevant values. As a result:

There can be no such thing as an interpretation of a statute that is true or valid simpliciter; instead, an interpretation of a statute can only be true or valid relative to a given moral framework. In my view, this is one important reason – perhaps the reason – why there usually is more than one correct solution to a legal problem.

A similar argument is found in a response made to MacCormick’s claim to universalization by Steve Burton. He suggests that determinacy (that cases be decided on more than a felt reaction to the particular case) is met by incomplete generalisations found in analogous reasoning.

Absolute certainty and absolute determinacy are inherently elusive as we have seen when discussing the need for interpretation and will see when discussing the nature of language in the next chapter. The best we can expect is that “interpretation is the reconstruction of a hidden rational meaning; interpretation of legal texts lives on the


presupposition of their inherent rationality.”348 It is interesting to think that in respect of statutory rules indeterminacy may be both the result of, on the one hand Parliament in promulgating general norms deliberately leaving open their application to particular cases and on the other hand owing to the open texture of language.349 At heart statutory rules require a balancing of certainty and acceptability; of stability and flexibility.350

Fourth Bankowski, Bell, Jackson and Tontti demonstrate the particularity of rules. It follows as Bell argues that rule of law values of certainty and rationality are necessarily limited by competing policy considerations that require rules to be expressed in general terms for specific application to particular cases. The ideal of capturing a principle of law of universal effect351 is not obtainable in respect of statutory rules. The decision may serve the limited (though valuable) purposes of meeting the rule of law value of accountability and of providing material for analogous reasoning in future cases. The fundamental and irremediable tension between the rule of law principle of accessibility to laws: that citizens should be able to know in advance the legal consequences of their actions or omissions and the fact that laws cannot refer to the reality of the actual circumstances of a particular situation is a particular feature of statutory rules that cannot be remedied by justification or interpretation in advance.

Fifth the scenario and the cases analysed in Chapter 7 demonstrate that the rule of law value of certainty is not advanced by prospective interpretation. Judicial attempts at interpretation in advance give rise to the promulgation of tests which themselves require interpretation. Further they derogate from the rule of law principle of due notice of laws and the associated values and from the doctrine of separation of powers.

348 Bernhard Schlink “The Inherent Rationality of the State in Hegel’s Philosophy of Right” (1989) 10 Cardozo L Rev 1427 at 1428-1429, referring to Gadamer.


351 Legal Reasoning at 210-211.
4.7 Analogy and North American jurisprudence

In order to present a complete introduction to the analogy/deduction debate in law it is necessary to touch on the recent work of major players in North American jurisprudence first in respect of analogous reasoning and second in respect of ‘originalism’. From at least the 1990s Cass Sunstein has been promoting analogous reasoning in a series of articles and lectures culminating in his book Legal Reasoning and Political Conflict. Not everyone in North American jurisprudence agrees with Sunstein and, as we see also in the discussion of the response of North American jurisprudence to philosophical hermeneutics in the next chapter, a feature of this particular debate is that it does not engage with Anglo-Commonwealth thinking. Most pointedly for the thesis there is no mention of MacCormick that I have been able to locate. Nevertheless there is value in putting forward a summary of the arguments for analogous reasoning in law made in North American jurisprudence and in doing so I am assisted by Emily Sherwin, who brings the competing positions together in a concise article. The debate concerns law generally including the development of the common law by courts over time. I will endeavour to highlight in a brief summary those features of the debate that are relevant to the judicial interpretation of statutory rules and in so doing make it clear that in this context I am inclined to agree with the ideas of Sunstein and see them as particularly apposite to the judicial interpretation of statutory rules.

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352 We hear more from North American jurisprudence in Chapter 5.3.1.


354 Emily Sherwin “A Defense of Analogical Reasoning in Law” (1999) 66 The University of Chicago LR 1179. Alexander and Sunstein are thanked by Sherwin for helpful comments.
It seems to me that a starting point is the virtue of statutory rules as a source of law. The promulgation by Parliament of rules makes it possible to obtain general agreement where agreement is necessary and to make it unnecessary to obtain agreement where agreement is impossible. The result is an “incompletely theorized agreement on a general principle” like prohibiting misleading or deceptive conduct without a need to agree on what that principle entails in particular cases. The agreement is incompletely theorized in the sense that it is incompletely specified. The degree of specification may reflect the extent to which agreement was possible. Incompletely theorized agreement meets the problem of social pluralism: people in our society disagree about what counts as good or right and how to accommodate what is good or bad. At the same time we do need social stability, mutual respect and reciprocity.

That is where analogous reasoning comes in. Sunstein gives a detailed account of analogical reasoning both outside and in law that resonates with the discussion in Chapters 6 and 7. This is our everyday competence to draw similarities. For law, Sunstein identifies four different but overlapping features: (i) “principled consistency; (ii) a focus on particulars; (iii) incompletely theorized judgments; and (iv) principles operating at a low or intermediate level of abstraction.” He explains each of the features and perhaps it is the fourth one that requires further explanation here. Sunstein cautions against courts taking on board or enunciating high-level theories in respect of which there is unlikely to be a consensus. A bottom up approach to the task is advocated. “People can converge on the low level principle [there is a rule that prohibits conduct that is misleading or deceptive] from various foundations or without well understood foundations at all.” There may not be consensus however about overarching high-level theories. To take the example of the statutory rule prohibiting

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356 For example ibid, at 5.

357 Ibid, in ch 3.

358 Ibid, at 67.


360 Ibid, at 69.
misleading or deceptive conduct, as to whether that rule applies to business people in the same way as ordinary citizens and whether the conduct of the claimant should be taken into account. Judicial exegesis in respect of this rule is discussed in Chapter 7.4.

Sunstein distinguishes between, and discusses separately, how analogy does its work within the common law in the interpretation of constitutions, statutes and rules. The emphasis is on like cases, a comparison of cases in respect of both facts and reasons.\(^\text{361}\) The ambitions (unattainable ideals) cannot be to achieve the reflective equilibrium advocated by Brewer or the top down search for integrity advocated by Dworkin.\(^\text{362}\) Although the idea of the chain novel promotes analogical reasoning, much more (too much) is expected of Hercules. The following is a neat summary of Dworkin’s claim:\(^\text{363}\)

… interpretation in law consists of different efforts to make a governing text “the best it can be.” This is Dworkin’s conception of law as integrity. Under that conception, judges try to fit their rulings to pre-existing legal materials, but they also invoke principle, in the sense that they try to cast those materials in their best light. The goal of the judge is to analyze the case at hand under the two dimensions of “fit” and “justification.”

Sunstein explains why Dworkin’s ambition is unattainable and why it is not desirable in respect of statutory rules. This partly is to do with the time constraints and practical task of judging conflicts but also has to do with the role of a judge in a pluralistic society. A judge may strive to meet the values of consistency, coherence and consequentiality but is not well placed to upset institutional arrangements and the already existing incompletely theorized agreements that produce the rules for adjudication.\(^\text{364}\)

\(^{361}\) Sherwin supports the idea that everything to be found in a previous case is taken into account: Sherwin “A Defense of Analogical Reasoning in Law” (1999) 66 The University of Chicago LR 1179 at 1196.


\(^{363}\) Ibid, at 49.

\(^{364}\) Ibid, at 32-33 and 52-53.
In fact a significant advantage of statutory rules is that “when rules are in place high level theories need not be invoked for us to know what rules mean, and whether they are binding.” Particular application is cost effective and efficient and rules promote equal treatment, accountability and more or less predictability. Another virtue arising from the character of rules as incompletely theorized agreements is the constructive use of silence. Not saying too much or theorising at a too high a level reduces the potential for conflict.

These ideas are echoed in *Burrows Statute Law*. Referring to vagueness in statutory expressions the authors point out: “Sometimes expressions like this are deliberately chosen by the lawmakers to give the courts a wide discretion in deciding particular cases … Sometimes they are also evidence of a degree of political compromise in the passing of the legislation.” Why should judges step in and attempt what Parliament itself has decided not to attempt?

I now mention a very recent account by Steven Smith of legal reasoning in the context of a discussion about ‘originalism’. Smith asks, is it true that ‘meaning’ is independent of ‘expected applications”? His initial response is to acknowledge that the distinction seems plausible. For instance, legislators may agree on the words to be used in a statute but differ about the precise application of those words; and we might say: we agree on the meaning but disagree on the application. Smith proceeds to challenge the distinction and suggests that meaning and application are “so inherently connected that you simply cannot understand what goes on in an enactor’s mind … if you pull the two apart and treat one simply as “evidence” of the other.” Meaning and application are inextricably co-mingled. To develop Smith’s argument a little

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365 Ibid, at 111.
368 *Burrows Statute Law* at 176. There are no references.
370 Ibid, at 240.
further, when we talk about application we are talking about expected applications and as he says “a distinction between “semantic meaning” and “expected applications” may serve not so much to clarify as to distort our understanding of the real-world situation.” I suggest that an ‘expected application’ is a ‘prefiguration’, a first but incomplete step in interpretation as discussed in Chapter 6.

4.8 Summary

Prospective interpretation is fundamental to MacCormick’s institutional legal order. Topics central to prospective interpretation are identified and examined namely deductive reasoning, justification and universalism.

I contend that these practices and concepts are demonstratively redundant in respect of statutory rules. Decision-making in respect of statutory rules necessarily is a process of concurrent interpretation involving both the terms of the rule and the particular facts. This is a process of analogous reasoning and is grounded in the particular. A separate process of justification adds nothing to that process. Nor does accountability per se but it is recognised that there is rule of law value in the decision maker offering an account of the decision already made in and in respect of the particular case.

This outcome challenges the conceptual tenability of prospective interpretation in respect of statutory rules. Certainly it can make no claim to be a complete interpretative account. The importance of the rule of law to legal interpretation has been acknowledged. I agree with MacCormick and Spaak that this is so. But the question remains: in the particular case of statutory rules does prospective interpretation enhance the rule of law or does it have a tendency to derogate from the rule of law? This continues to be a theme when discussing concurrent interpretation.

A reader may then ask, well if prospective interpretation is defective in the ways explained what are we left with, how can we know where we stand, how do courts

371 Ibid.
decide cases in which statutory rules are invoked? The answer is found in concurrent interpretation. A lot more has to be said about concurrent interpretation and that is the task of the next chapters.
Chapter 5

Concurrent interpretation and philosophical hermeneutics

5.1 Introduction

Two accounts for the judicial interpretation of statutory rules denoted as prospective interpretation and concurrent interpretation are identified and discussed in Chapter 2 and competing arguments for and against each of the interpretative accounts are indicated. Arguments in support of prospective interpretation are the subject of Chapters 3 and 4 and a critical analysis of those arguments raises questions that challenge the tenability, completeness and sufficiency of prospective interpretation.

So far in the thesis not much is said about the conceptual aspects of concurrent interpretation. In this chapter and Chapter 6 I address theory relevant to concurrent interpretation and develop ideas for concurrent interpretation in practice.

The thesis for concurrent interpretation is a synthesis of philosophical ideas and legal practice. The philosophical ideas and theory now explored provide the best theoretical explanation of concurrent interpretation. The challenge is to introduce vast and complex topics in a way that is directly relevant, accessible and proportionate to this thesis. There is bound to be disagreement as to whether the selected content is too much or too little. The aim is to introduce ideas that are not generally well known to common lawyers, to demonstrate the way these ideas interconnect with statutory interpretation and to demonstrate how these ideas support concurrent interpretation.

The starting point is hermeneutics (the study of interpretation that has a long history) and in particular philosophical hermeneutics (a 20th century development) that sets out a new basis for our understanding of language and the way we interpret. The discussion aims to demonstrate that concurrent interpretation aligns with the new
development of philosophical hermeneutics. Philosophical hermeneutics is now largely taken for granted as a starting point for the discussion of interpretation in the humanities and social sciences but not yet in law (with exceptions discussed below).

Consistent with the modest aim set out above the chapter proceeds in cumulative steps: (i) an introduction to philosophical hermeneutics (ii) a summary of the response of the common law to philosophical hermeneutics and (iii) identification of a perceived problem with philosophical hermeneutics. The introduction to philosophical hermeneutics is in two steps, first a discussion of ideas about language developed in German philosophy (Heidegger and Gadamer) and second a discussion of two accounts of language that define very different ways of understanding the question what is meaning: expressive and designative (Taylor).

By this approach to an introduction to philosophical hermeneutics it is hoped to dispel an impression that there is something mystical about philosophical hermeneutics, a view apparently influenced by the Germanic origin of the central ideas. Charles Taylor is a prominent Canadian philosopher who amongst many of his colleagues has taken on board the work of Heidegger, Gadamer and other German philosophers and explains in a practical way the impact this work has on language and our interpretation of language. The intention is that the two approaches complement each other.

In the previous chapter there is considerable discussion of analogous reasoning. I hope it becomes apparent that analogous reasoning is consistent with, indeed is an inevitable consequence of, our ordinary competence in using language, in particular in the way we make choices. This is a feature of Taylor’s account of philosophical hermeneutics and can be seen as a welcome development of philosophical hermeneutics.

The summary of the common law response is also in two parts, the response found in North American jurisprudence and the response of English and Commonwealth jurisprudence. Remarkably (perhaps typically) there is little in the way of cross-reference between these two parts. This summary leads into a discussion of Gadamer’s approach to legal hermeneutics and an important discussion of a perceived
problem with philosophical hermeneutics and its application to legal interpretation. In particular there are three possible responses to the problem, one that would limit the scope of the thesis and two others that set the foundation for Chapter 6 in which philosophical hermeneutics is brought into the arena of legal interpretation on theoretical and practical levels: a legal hermeneutics.

5.2 Philosophical hermeneutics: an introduction

5.2.1 Preface

Philosophical hermeneutics stems from the philosophy of Martin Heidegger (1889-1976) as developed by Hans-Georg Gadamer (1900-2002) in his famous book Truth and Method.372 This philosophy is ontological and is about our being, what we are as humans. Rather than treat language as an object, language takes on a new character as something that we acquire as part of our make-up and as an essential part of who we are as humans. As a result we are forced to re-evaluate how we use and interpret language.

There are many different ways of explaining philosophical hermeneutics.373 This thesis attempts three approaches: (i) a discussion of the concept of language, (ii) language as expressive versus language as designative, and (iii) the response of legal theorists. The first two of the three approaches appear in this section and the third in the next section. The focus continues to be on the interpretative accounts in particular in raising questions about the tenability, completeness and utility of prospective interpretation. The three approaches overlap and it is hoped are building blocks to an appreciation of philosophical hermeneutics and what it means for legal interpretation. The initial approaches may seem trivial, selective and incomplete to some readers but they lay the foundation for the next sections of this chapter in an accessible manner.


5.2.2 Language

The concept of language is one entry point to philosophical hermeneutics. Language may be uttered in speech, be written in texts or be expressed as we think. Language is our means of communication and law is expressed by and through language. But language is more than this. It is our means of understanding our place in the world and without language we do not exist as humans in the world. We have language in addition to our environment and the physical and mental sensations driven by our make up common to all mammals. When we think we converse with ourselves in language. When we understand ourselves and our environment we do this by thinking in language. We acquire language in our speech community.

Conventional theories assume that we first know something before assigning a word to it; that we by thought processes give meanings as subject to an object and in the same way interpret the meanings of words. Twentieth century philosophy has demonstrated that we are in fact so involved with language that we cannot make it a complete object of investigation. Experience does not happen outside and before language but within language. Everything we do and are conscious of is via language and by language we form our view of the world. We are always interpreting that is, understanding something as something and this is grounded in something we have or see or conceptualise. Interpretation cannot happen in vacuo; we do not come into our world as a clean slate and over time develop a coherent and rational world. We start from practical involvements in the world in activities and in forms of socialization. Through cultural training we unreflectively acquire language and a world-view. These are the sources of our individual interpretations.

Philosophical hermeneutics gives rise to a number of implications, which we will see are significant to the judicial interpretation of statutory rules. They include the following.

- Both the object of interpretation and the interpreter stand within a pre-given historical and linguistic tradition. Interpretation demands and is filtered by pre-understandings.
- No impartial or neutral standpoint is available. Pre-understandings and prejudices are necessary conditions of understanding. Prejudices are not necessarily unreasonable. Fore-structures of understanding enable us to form initial judgments with which we test the things that make up our world by interpreting them. In respect of a text our historical and linguistic tradition gives us an expectation or anticipation of meaning.

- There is an inevitable temporal distance between the object of interpretation and the interpreter. The text is created some time before it is interpreted. Nevertheless our tradition enables us to recognise the text as a text and to form an initial view of its meaning. This is tested against our current understanding, which cannot be in advance but occurs in a process of understanding here and now of what the text has to say to us.

- The temporal distance cannot be overcome. We cannot transport ourselves into the shoes of the author. New sources of understanding are continually emerging. Understanding is a historically effected event.

- The meaning of a text does not depend on the situation and intention of the author or of the first reader but goes beyond its author and her situation. The meaning of the text is the meaning here and now.

- Language sets the ultimate boundaries of our understanding.

- Language is inherently polysemous. This is not necessarily a bad thing. For example there are demands for plurality and flexibility.

- Interpretation is application: it is a productive and creative event and is not reproductive. It is necessarily unique and singular to each situation and case in hand.

- Meaning cannot be determined in advance of application. The crucial factor in determining the ‘correct’ meaning is application in context. Only through the act of understanding, interpretation and application here and now is the meaning of
a legal text ‘finally’ and in the specific case adjudicated upon defined. Only to that extent is method relevant.

- The hermeneutic circle is an old idea that when we interpret there are circular relationships between the parts and the whole. For example, in respect of a text there is interplay between our interpretation of a word in the context of the sentence, and the sentence in the context of the text, advancing towards a better and deeper understanding. Another example is the way we form provisional understandings with which we enter the circle and then test them. This is something we do all the time.

- Another metaphor used to illustrate the event of interpretation is fusion of horizons. The tradition of the text first raises a question for the interpreter about something from her particular standpoint as interpreter and thus establishes the horizon in question. The interpreter from her standpoint asks questions of the text and reconstructs an answer. This reconstruction brings the text metaphorically to speak to the interpreter resulting in a fusion of the horizons of text and interpreter for that situation.

Statutory rules are texts in written language and thereby convey a meaning. Getting that meaning is a task that is inevitably influenced by these implications. Concurrent interpretation is compatible with these implications. As this chapter and the next chapter develop we can see if prospective interpretation resists these implications.

5.2.3 Expressive versus designative

Another approach to an understanding of philosophical hermeneutics is found in the debate between two accounts of language that define very different ways of understanding the question: what is meaning? This is particularly the work of Charles Taylor (1931- ) a Canadian philosopher and formerly professor of philosophy at Oxford University. Charles Taylor uses the terms ‘designative’ (language as

designation) and ‘expressive’ (language as expression) to distinguish the two accounts and these are adopted as a much referred to and valuable taxonomic tool.

Put briefly the **designative account** takes utterances and texts to make sense and have meaning because they represent, stand for and correspond with something in the world or something in the mind. Words have an objective fixed meaning and are meaningful because of their association with the things they stand for.

Again briefly the **expressive account** shows that the resonance of meaning goes beyond attempts to fix meaning by designation. Language has a much more fundamental function. It is a social product and the whole wealth of contextual circumstances contribute to meaning and cannot be omitted from an evaluation of meaning here and now that is, in any particular situation and moment.

For both accounts there is a qualitative difference between getting something right in language on the one hand and merely participating in some causal chain on the other hand. The getting it right in the designative account has just one source: truth as correspondence between a representation and its object. The norm of designation is the ability of a word or sentence to designate or represent an object or state of affairs that enables words or sentences to mean something. For the designative account getting things right in language is a matter of having the designative function in order.

Taylor with other contemporary philosophers does not discount designation but demonstrates that this is a much too narrow conception of the ability to use language to get things right. We are able to get things right in language in a host of ways. Examples are by articulating a feeling properly, by evoking the right mood or by establishing an appropriate inter-personal relation. Unlike designation these forms of language use are not about something that stands independently of the articulation itself. Articulation can help constitute the emotion, mood or social relation that

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contribute to a full picture of meaning. They can also be right or true. The same applies to context and the particular circumstances in which language is used.

Taylor’s central thesis is that human beings are “self-interpreting animals.”375 By that he means that we are more than mere animals because we interpret to get things right and other animals do not. Of course he is aware that other animals can respond to stimuli and he gives the example of the rat trained to go through the door with the triangle not the square because that gets the cheese. But getting it right for the rat is learning “in the furtherance of some non-linguistically-defined purpose or task.”376

Humans can do the same but we have an added dimension which Taylor calls the “linguistic dimension.” “A creature is operating in the linguistic dimension when it can use and respond to signs in terms of their truth, or descriptive rightness, or power to evoke some mood, or recreate a scene, or express some emotion, or carry some nuance of feeling … To be a linguistic creature is to be sensitive to irreducible issues of rightness.”377 Other animals may exhibit fear but not anguish, anger but not indignation, and love but not admiration.378 They exhibit fear but do not interpret by using language the emotion of fear. Nor do they have the expressive dimension of human speech, the varieties of body language linked to the things we say or the varieties of genre, style and mood linked to the things we write.

Language comes about as a reflective stance towards things. The action that expresses and actualizes this stance is speech-using language. Language is the expression of thought. Obviously at times we are unreflective and respond to situations such as a bee sting or in sport or craft activity without using language at all or without reflection. We are not concerned with that type of situation.

375 HAL at 45.
376 PA at 84.
377 Ibid.
378 PA at 98.
To possess a word in human language is to have some sense that it is the right word, to be sensitive to the issue of its “irreducible rightness.”\(^{379}\) The phrase ‘irreducible rightness’ requires explanation. An explanation also serves to reinforce an important aspect of concurrent interpretation. I have been talking about how we go about getting something right in language. This task cannot be reduced to the passive labelling of things, merely identifying an object. We can do more with language often unconsciously and this is particularly true when we use and interpret words that say more than what an object is such as words that carry various connotations. We can also construct narratives and deal with the temporal aspects of language use, both of which are explored in Chapter 6.

Taylor uses the word ‘envy’ as an example. It may mean indignation, resentment, self-pity and so on. In the course of an experience of being envious the meaning may change. The right word may do more than just describe, it shapes. “In other words, we can’t explain the rightness of the word “envy” simply in terms of the condition that using it produces; rather, we have to account for its producing this condition.”\(^{380}\)

The word ‘misleading’ is similar. The experience of being misled will depend on the particular circumstances. The experience of being misled might even change during the course of the relevant conduct in trade from outright misleading conduct to a timely correction. Getting the right meaning of ‘misleading’ can only be contextual and cannot be predicted in advance. As explained in the next chapter only in the process of constructing narratives in a process of concurrent interpretation can the necessary condition for the irreducible rightness of the meaning of “misleading” be found.

In our thinking about meaning we automatically adopt techniques of analogous reasoning. “Living with things involves a certain kind of understanding (which we might also call “pre-understanding”). That is, things figure for us in their meaning or


\(^{380}\) PA at 104.
relevance for our purposes, desires, activities.”

Taylor gives the example of navigating his way along the path up the hill his mind totally absorbed anticipating the difficult conversation he is going to have at his destination. He treats the different features of the terrain as obstacles, supports, openings, invitations to tread more warily or run freely etc. Even when he’s not thinking of these things they are relevant to him. He knows his way about among them.

Conceptual thinking is embedded in everyday coping and “more fundamentally, the background understanding we need to make the sense we do of the pieces of thinking we engage in resides in our ordinary coping.”

Taylor tells us he might draw a map laying out the environment he normally walks in. “But this wouldn’t end the embedding of reflective knowledge in ordinary coping. The map becomes useless, indeed ceases to be a map in any meaningful sense for me, unless I can use it to help me get around. Theoretical knowledge has to be situated in relation to everyday coping to be the knowledge that it is.”

Taylor as he navigates his way along the path is interpreting his environment. Perhaps he could have attempted to do this in advance by reference to a map, but the map does not provide a complete interpretation. In the same way prospective interpretation does not, indeed cannot, provide a complete interpretation.

Taylor is rightly puzzled at the hold designation has over us.

Designative theories, those which make designation fundamental, make meaning something relatively unpuzzling, unmysterious. That is a great part of their appeal. The meaning of words or sentences is explained by their relation to things or states of affairs in the world.

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382 Ibid, at 112.
383 Ibid, at 113.
384 HAL at 220-1.
By contrast, expressive theories maintain some of the mystery surrounding language. Expressive theories cannot be fully separated from the medium, because it is only manifest in it. … the method of isolating terms and tracing correlations cannot work for expressive meaning.

Taylor suggests that we have been shaped by a kind of ontologising of rational procedure. “That is, what were seen as the proper procedures of rational thought were read into the very constitution of the mind, made part of its very structure.”\textsuperscript{385} This is seen in our natural tendency to favour rational procedures and to promote ourselves as controlling individuals. The tendency is particularly evident in legal practice. Law is presented as akin to science and lawyers present themselves as knowing the law, even how it applies to any particular situation. Courts habitually re-present statutory rules in the form of ‘tests’ of which lawyers and academics are avid consumers. Examples are discussed in detail in Chapter 7. It seems that “the method of analysing a complex phenomenon into simple components, treating them as neutral bits of information, and rationally reprocessing them, is written into “the mind” itself. … A picture of what it is to know obscures our understanding of what it is like to be a perceiver.”\textsuperscript{386} This is reinforced by the very considerable advances in science since the seventeenth century.

The distinction between the designative and expressive accounts of our use of language drawn by Taylor mirrors the distinction between prospective interpretation and concurrent interpretation. Rather than designate meaning in advance and look for correspondence with that meaning Taylor demonstrates that meaning is best got in concurrent application of language with the particular.

\textsuperscript{385} PA at 61.

\textsuperscript{386} Nicholas Smith “Taylor and the Hermeneutic Tradition” in Ruth Abbey (ed) \textit{Charles Taylor} (2004) at 34.
5.3 The common law response to philosophical hermeneutics

5.3.1 North American jurisprudence

Since the 1970s under the rubric of interpretation a vast literature has developed and there has been fierce debate in North American jurisprudence sometimes called “the interpretive turn”. 387 In the attack made by many academics in North American jurisprudence against tradition and legal positivism the ideas of Gadamer and philosophical hermeneutics found in literary studies and in the social sciences provided useful material. Two bookends are Interpretation Symposium (1984) 388 and Symposium on Philosophical Hermeneutics and Critical Legal Theory (2000). 389 Both publications and symposia have dwindled over recent years perhaps for the reasons indicated shortly.

The following is an outline of conclusions from my analysis of the work of the most published and most cited North American flag bearers of philosophical hermeneutics in law: William N. Eskridge Jr., Allan C. Hutchinson, and Francis J. Mootz III. 390 The picture they paint of philosophical hermeneutics is taken for granted in North America. As clarified below the focus of their work has been on understanding and interpretation rather than on application and the realisation of law in the judicial process of resolving conflict. I suggest that a misconceived attempt has been made to bring philosophical hermeneutics into the main stream of legal interpretation rather than explore the possibilities philosophical hermeneutics has for clarification of the methods through which practical interpretative work is carried out, the topic of Chapter 6.

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387 See Stephen M Feldman, American Legal Thought from Premodernism to Postmodernism (2000) for a comprehensive overview. A full account of philosophical hermeneutics and what it may mean for the two step process of legal interpretation (interpretation and then application) is found in Teresa Godwin Phelps and Jenny Ann Pitts “Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation” (1985) 29 St Louis U LJ 353. For a succinct account see Dennis M Patterson “Authorial Intent and Hermeneutics” (1989) 2 Can J L & Jurisprudence 79.


390 My analysis of this work must be read in the light of my express delimitation in respect of American Realism. The work of Eskridge, Hutchinson and Mootz is focussed on a different level of discussion and in a different context to that of the thesis.
The work of Eskridge a major United States figure in legal interpretation illustrates the misconceptions I have in mind. His most detailed and influential exposition of philosophical hermeneutics and what it means for his theory of dynamic interpretation is found in “Gadamer/Statutory Interpretation”391 to which I now refer.

Eskridge declares his purpose is to apply the ideas of Gadamer to statutory interpretation and more specifically to support his own concept of dynamic statutory interpretation. He begins with the thesis that Gadamer’s hermeneutics, despite critique, “remains an important theory of interpretation.”392 From that premise (dubious because Gadamer did not propound any such thing) the enquiry is whether Gadamer’s hermeneutics has application in the sense of being relevant to statutory interpretation and if so what the implications might be. Eskridge finds “at least three implications follow for theories of statutory interpretation.”393 These are (i) to liberate statutory interpretation from foundationalism, (ii) to suggest “the contours of a positive theory of statutory interpretation”394 (Eskridge clearly has his dynamic theory in mind) and (iii) to suggest “several powerful metaphors for refining and defending normative theories of dynamic statutory interpretation.”395

The second of those implications requires further discussion. In this context Eskridge extrapolates from Gadamer the ideas of horizons of text and interpreter and the hermeneutic circle coalescing these into the idea that interpretation is an open and dynamic conversation about a specific situation taking into account traditions particularly precedents in a to-and-fro process crystallizing into a widely acceptable consensus. He does not overlook the aspect of application but oddly contends: “The hard cases are those in which there is a tension that must be resolved, not by the imposition of one perspective over the other, but by the to-and-fro dialectical play.”396

392 Ibid, at 632.
393 Ibid, at 637-638.
394 Ibid, at 646.
395 Ibid, at 638.
396 Ibid, at 651.
He seeks to illustrate dynamic interpretation by reference to a case, purportedly demonstrating a fusion of horizons by which the text reveals a correct interpretation of the relevant statute. I put it that way because though Eskridge is concerned with the application of the statute to the case at hand he sets up and describes a method of statutory interpretation that is about finding the correct meaning: “Is this a correct interpretation of section 212 (a) (4) today?” What follows is an abstract analysis of the legislation and cases rather than an analysis consistent with concurrent interpretation.

Essentially he is looking for a method of statutory interpretation that is about finding the correct meaning that he calls dynamic interpretation. His dynamics are not about the judicial process but are about interpreting in the sense of finding the “correct” meaning of a statute. Eskridge acknowledges “Hermeneutics is not methodological and directive (as Gadamer sees it, anyway). It is, instead, illuminating and therapeutic.” Gadamer’s view is not seen as an obstacle to a theory of dynamic interpretation but rather as providing therapeutic support and illumination first in demolishing foundationalism and second in bringing “to statutory interpretation the lesson that it is an inherently dynamic enterprise and that a spirit of play and inquiry ought to animate the interpreter’s approach to the statute.” Requisite are “opportunities for real and meaningful dialogue about what a statute should mean.”

A similar approach to philosophical hermeneutics is found in a companion article co-authored with Philip Frickey a precursor to their influential book Dynamic Statutory Interpretation. They are also co-authors of the current standard United States textbook Legislation and Statutory Interpretation, which significantly makes

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397 Ibid.
398 Ibid, at 679.
399 Ibid.
400 Ibid.
402 Eskridge Dynamic Statutory Interpretation (1994).
no mention of philosophical hermeneutics and places dynamic theories under the umbrella of “Pragmatic Theory”. 404

Mootz takes up the challenge to bring philosophical hermeneutics to the forefront of statutory interpretation in “The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur.” 405 He at least takes on board post-Gadamer critique of philosophical hermeneutics (more about this below) seeing these critiques as supplying ideas useful to his proposed new model, which he is careful to distinguish from method. 406

However I suggest his approach also suffers from an emphasis on interpretation of the text. Rather than discuss application Mootz talks about “institutional practice” in which judges seek to articulate what the document means. What interests Mootz are the attitudes of judges and the way they articulate those attitudes. Gadamer’s hermeneutical approach is seen as something to be applied and “as an attitude that [scholars] should bring to bear on their evaluations of law and judicial decisionmaking.” 407 It seems that Mootz is deflected from application by his anxiety to address the charge of relativism: “The hermeneutics model of legal interpretation must confront the challenge of delineating critical standards of legal interpretation that can ensure judicial compliance with the meaning of legal texts.” 408

Following his organization of the 2000 (“bookend”) Symposium Mootz has been directing his attention to rhetorical knowledge and to a philosophical analysis of

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404 Ibid at 249-252. After completing my analysis of the work of Eskridge a new analysis by Mootz was published: “Gadamer’s Rhetorical conception of Hermeneutics as the Key to Developing a Critical Hermeneutics” in Mootz and Taylor (eds) Gadamer and Ricoeur: Critical Horizons for Contemporary Hermeneutics (2011) at 95-97. This analysis is from a different perspective and reflects Mootz’ own rhetorical approach to philosophical hermeneutics mentioned below.

405 Mootz “The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur” (1988) 68 BU L Rev 523. This work of 94 pages of closely analytical text is much cited but with little in the way of commentary.

406 Ibid, at 527.


408 Ibid, at 567. There is a lengthy discussion of “the critical standards of legal interpretation” at 567-616.
Gadamer and Ricoeur that would accentuate the rhetorical dimension of hermeneutics.\(^{409}\) He finds in his analysis of Gadamer’s work a rhetorical dimension in Gadamer’s treatment of tradition that provides a basis for critical hermeneutics so overcoming the problem discussed in the next section. This is contentious and the point may be made that Mootz is bound as it were to confine Ricoeur’s intervention to his (Mootz’) perspective of rhetorical knowledge and he does not appear to expand on how a rhetorical approach might work in practice except to refer to Eskridge’s dynamics. On the contrary I think there is a good argument that Ricoeur provides ideas and material that can be the basis of a practical approach to concurrent interpretation as discussed in the next chapter. Tontti in particular develops Ricoeur’s response to philosophical hermeneutics into a practical approach of concurrent interpretation.

My critique of the earlier Mootz is reinforced by Hutchinson.\(^{410}\) This appears first in his contribution to the 2000 “bookend” Symposium\(^{411}\) and more recently in his book *Evolution and the Common Law*.\(^{412}\) Reference is made first to his article. He criticises the tendency to utilize Gadamer’s ideas in a traditional and uncritical fashion as some form of methodical corrective. Whilst Hutchinson acknowledges the importance of Mootz’s scholarship in familiarising North American jurisprudence with Gadamer’s work he considers that Mootz “has not abandoned the hope of developing a rigorous logic or art of rational interpretation that will be able to sanction some interpretations as clearly better than others by stint of its own rhetorical standards.”\(^{413}\) “But Mootz cannot or will not resist the almost overwhelming urge to shackle Gadamerian

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\(^{410}\) Already cited in respect of interpretation as concurrent interpretation in Chapter 2.6.


\(^{413}\) Hutchinson “Work-In-Progress” at 1045.
hermeneutics to the conservative wagon of mainstream jurisprudence.” In the conclusion to his article Hutchinson makes the valuable point discussed further below that Gadamer is partially to blame for this state of affairs. “There is a fatalistic as well as a quietistic aspect to Gadamer: he comes close to insisting that things are simply the way they are and that there is little that can be done other than to accept that.”

These appraisals are echoed in his book Evolution and the Common Law. Following an account of Gadamer’s ideas Hutchinson provides a detailed analysis of the approach of Ronald Dworkin (discussed below) and of Mootz in respect of philosophical hermeneutics. With regard to Mootz he largely repeats what he has said in his article just referred to but also takes up a detailed discussion of a later article by Mootz. He adds to his earlier appraisals: Mootz “still presents legal hermeneutics as a conversational activity in which deferential interpreters await hermeneutical revelation from textual authorities.”

Hutchinson identifies the problem with philosophical hermeneutics discussed in the next section but rather than work through this problem by restructuring and developing philosophical hermeneutics in the way continental academics have, Hutchinson seems content to borrow those aspects that would support his own agenda, which (briefly) is that legal interpretation is essentially a political process. The following is his startling representation of Gadamer’s ideas: “Whatever else he may be saying, Gadamer is telling lawyers that interpretation is an inevitably active and therefore political process. Lawyers cannot avoid working with and among social forces that make interpretation both possible and problematic … The foundations of language and therefore law will always be as contingent and shifting as the foundations of society and history.”

414 Ibid, at 1048.
415 Ibid, at 1080.
417 Hutchinson Evolution and the Common Law (2005) at 177.
418 Ibid, at 173.
Very recently legal scholars have taken on board the ideas of Ricoeur. This is seen in the work of Mootz already noted and George Taylor has further developed these ideas. The treatment of Ricoeur in the thesis is independent to that of Mootz and Taylor but we share the hermeneutical argument “that application does not follow behind understanding but rather provides understanding.” I appreciate also that Taylor brings to the table the idea of a legal hermeneutics, as is seen in the next chapter of the thesis. However it appears that he is more tentative in his embrace of Ricoeur’s ideas perhaps because, though he gives a full account of ‘the text’, he appears not to give the same importance to the functions of ‘narrative’ and ‘conflict’ found in the work of Tontti and explored in the next chapter of the thesis.

The combination of philosophical hermeneutics and the interpretative debate in North American jurisprudence is I think unfortunate. Although sparking new ideas and thinking it has cast philosophical hermeneutics into the interpretative debate primarily as a weapon against foundationalists and legal positivists. There has been a misguided stance that philosophical hermeneutics can be brought into line with conventional views about interpretation consistent with prospective interpretation. Even those in North American jurisprudence most faithful to philosophical hermeneutics in my opinion in varying degrees unwittingly have betrayed its central concepts.

It remains an odd fact that North American jurisprudence in its treatment of philosophical hermeneutics has apparently overlooked the Continental jurisprudence of Arthur Kaufmann and Jarkko Tontti both of whom can be found in English, to say nothing of the many others who have written on this topic in other European languages references to which can be found in the writing of Gadamer, Kaufmann and Tontti. The same comment may be made in respect of the apparent lack of attention given to Anglo-Commonwealth jurisprudence especially the work of Arthur Glass.


5.3.2 English and Commonwealth common law

Generally speaking in England and Commonwealth countries interest in philosophical hermeneutics has been muted and cautious often expressed in the course of reviews or surveys. There are two exceptions, Ronald Dworkin and Arthur Glass whose work is now discussed.

Dworkin is familiar with Gadamer’s work as he expressly acknowledges in his famous book *Law’s Empire*. Indeed his approach to law as a concept is often described as hermeneutical and Dworkin himself refers to his interpretative account of law and adjudication. His description of law as integrity invokes the interpretative: the best constructive interpretation of the community’s legal practice. Dworkin provides Hercules with a twin called Hermes (the derivation of the word ‘hermeneutic’, and an unlikely candidate for judicial office) who is said to be almost as clever as Hercules and just as patient. Dworkin discusses the respective talents and methods of Hermes and Hercules in the context of a move from a speaker’s meaning theory of interpretation to the idea that the interpretation must be the best justification of a past legislative event consistent with the integrity of law. The discussion does not consider philosophical hermeneutics or the place of language, and nor does Dworkin engage with the particulars of legal interpretation in the way MacCormick, Kaufmann, Ricoeur and Tontti do and this thesis attempts. I return to Dworkin in Chapter 7.

Glass is a prolific Australian academic in law with a particular interest in statutory interpretation. His contribution “A Hermeneutical Standpoint” to a workshop on

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424 Dworkin’s stages of interpretation leave open what accounts for “actual interpretation”. Ibid, at 65-68.

legal interpretation in Melbourne in June 2000, which included leading theorists from Australia, New Zealand and the United States of America is “a favourable but not uncritical account of Gadamer’s hermeneutics.”

The same can be said of his article “Interpretation / Application / Decisionmaking” and a book chapter “Phronesis and Legal Deliberation.” It is obvious that Glass has a detailed appreciation and knowledge of philosophical hermeneutics and a discussion of his work has the added virtues of reiterating and recontextualising points already made in this thesis and providing an entry to the next section of this chapter. References are made to all three works called respectively Standpoint, IAD and Phronesis.

As a preliminary point it is pertinent to note that in IAD and Phronesis Glass specifically addresses the distinction drawn between law and fact and makes two interesting observations. First he relates the making of this distinction to interpretation in advance of application that is, the distinction is made when there is a conventional approach to interpretation. He sees the distinction of law and fact as essentially pragmatic and as not standing in the way of legal interpretation by one process of application. In effect application (concurrent interpretation) would conflate the distinction. Second he makes the obvious point that interpretation is necessary before it can be said that there is a question of law or of fact.

Glass is particularly interested in Gadamer’s development of philosophical hermeneutics. In Phronesis Glass puts to one side the problem discussed in the next section and specifically raises the topic of phronesis (practical wisdom) for its own sake to see whether Gadamer’s discussion of phronesis says something of interest to contemporary legal decision-makers. Glass had emphasised that Gadamer’s

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429 The topic of Chapter 3.2.
430 IAD at 98, n 2.
431 Phronesis at 298.
432 Phronesis at 294.
philosophical hermeneutics is “the theory of application (that is, the theory of bringing the universal and the individual together)” and that the primary question for legal interpreters is how to “approach the inevitable tension between the universality of the valid legal rules and the concrete individuality of the case”?

Glass adopts in *Phronesis* an engaging means of explaining the impact of philosophical hermeneutics on legal interpretation by looking at the concept of knowledge. Knowledge may be considered in three distinct types. Scientific knowledge such as in mathematics is always the same. No one deliberates about what always happens the same way. Such knowledge lends itself to being set out in advance. Then there is technical knowledge. Such knowledge may also be in advance of application such as when knowledge is required to carry out work by reference to a specific design. Finally there are normative situations where phronesis is required. A decision is required and whilst we have fore-grounded knowledge of matters relevant to making that decision, that decision cannot be made independently of the particular situation that requires the decision.

There follows a discussion of the qualities of phronesis relevant to legal decision makers. These include most relevantly for this thesis: “Focusing on the subject matter of the case is an intriguing way of disclosing matters significant for legal decision-making. And while it may be an unfamiliar way for law it does not take the decision-maker outside of the basic expectations presently associated with the office of decision-maker.”

Glass explains Gadamer’s philosophical hermeneutics in some detail in *Standpoint* and *IAD* from which sources much of the following is drawn but with minimal specific references. Perhaps I should remind readers that what follows is not my account but continues to be the account of Glass. He takes from his reading of

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433 *Phronesis* at 289.
434 *Phronesis* at 290.
435 *Phronesis* at 294-295.
436 *Phronesis* at 300.
Gadamer that interpretation is always one and the same process of application contrary to the way lawyers normally consider interpretation to be two processes – discovering the meaning of the text and discovering how to apply the meaning in a particular situation. He thinks that Gadamer is right to emphasise the importance of application for legal interpretation associated with adjudication but also makes the point that Gadamer’s project is not about a method for such legal interpretation. On this basis he examines Gadamer’s work to see what are the available understandings and techniques through which legal interpretation is achieved. There are a number of such understandings and techniques.\footnote{Standpoint at 131-132.}

The first of these is an appreciation that both the object of interpretation and the interpreter stand within a pre-given historical and linguistic tradition: a tradition that is itself an ongoing living process in which the past is transmitted to the present. Understanding in interpretation is always the transmission of the past to the present: a present application of an ongoing tradition. This is not about method, but is about the way we understand.\footnote{Standpoint at 133.}

Associated with this is the idea that understanding has a forestructure or pre-understandings including contemporary assumptions and conventions. The pre-understandings provide a normative framework which determines in advance what is worth inquiring about, our questions for the subject matter and the methods and standards of inquiry. Understanding is always from a certain perspective, a historically conditioned starting point.\footnote{Standpoint at 134.} Understanding must be productive and not merely reproductive with the consequence that we understand in a different way from the author and the original reader.\footnote{Standpoint at 135.} Of course this does not mean that everyone thinks the same or makes the same interpretation. This is an important description of those matters that precede and contribute to interpretation and can be seen for example, in the interpretative tools discussed in Chapter 7.
Glass draws three implications. These lead into the perceived problem with philosophical hermeneutics for legal interpretation and are recorded now as a step towards a discussion of that problem. The thesis is not necessarily committed to these implications and it may well be that Glass is not committed to them either as appears from his discussion of the perceived problem which follows.

First, philosophical hermeneutics:  

alters the goal of interpretation. For rather than looking through the text for its original meaning (or for the spirit of its author) the interpreter is directed to consider the meanings that lives on into the present, viz., the subject matter of the text and its language. In other words, and this is the way Gadamer frequently puts it, texts are always about something and should be understood in regard to what they say and not as expressions of life.

Second, “questions of method are now pushed to the side because philosophical hermeneutics sees itself as analysing understanding at a more fundamental level. Moreover, it considers that its analysis shows that the concentration upon special methods was misplaced.”

Third, “if what is to be understood [from a text] transcends any context that may be imposed upon it then no text can have a single meaning and no interpretation can be the one right interpretation … For understanding is not a repetition of an original meaning but a participation in a present meaning.”

Glass proceeds to an analysis of Gadamer’s assertion: “Application does not mean first understanding a given universal in itself and then afterwards applying it to a concrete case. It is the very understanding of the universal, the text itself.”

\[441\] Ibid.
\[442\] Ibid.
\[443\] Ibid. Reference omitted.
\[444\] Standpoint at 136, citing TM.
course this echoes prospective interpretation and the claim easily may be made that philosophical hermeneutics and the way we now understand language condemns prospective interpretation to the scrapheap. Therein lies a problem because the fact is that courts do purport to engage in prospective interpretation or at least in interpretation that is described by courts in terms indistinguishable from prospective interpretation, and whether misguidedly or as pretence. The thesis is approaching the perceived problem but it is necessary and worthwhile to consider what Glass has to say first. This is particularly so because Gadamer himself addresses legal interpretation in a section of TM titled “The Exemplary Significance of Legal Hermeneutics” and Glass provides an interesting analysis of this part of TM by first asking “What is the significance of this claim [application does not mean first understanding …] for legal interpretation?”

Glass points out that Gadamer’s account of the exemplary significance of legal hermeneutics begins with a discussion of whether there is a difference between the way a jurist and a legal historian understands the meaning of law. This was in response to the ideas of Emilio Betti who saw the tasks of both jurist and legal historian as one of reconstructing the original meaning of law and Gadamer mounts a direct challenge to that idea as it might apply to both jurist and legal historian. Though their tasks may be different “there is no difference in the nature and the structure of their understanding. Application is involved in both.”

In developing a hermeneutical standpoint to legal interpretation Glass proceeds to the following contention:

Two points can be made about Gadamer’s response [to Betti]. First, there is a serious ambiguity in the way he uses here the notion of application. And noticing this will tell us something of importance about how application works in law. Second, while Gadamer is interested in what is common to the tasks of the jurist and the legal

445 Ibid.

446 Ibid.

447 Ibid. Emphasis in original and citation of TM omitted.
historian it is the differences between the two orientations that are of greater significance for our purposes.

Glass finds that Gadamer is at first sight convincing in his argument that application is the same for jurist and legal historian and points to features of commonality. “This initial plausibility passes however once it is seen that the argument for the necessity of application in all understanding relies upon an ambiguity.” 448 This arises from Gadamer’s treatment of understanding. Glass’ analysis is that Gadamer is endeavouring to make two quite different claims and therein lies a crucial ambiguity.

The first claim is that all understanding requires applying the text to be understood to the interpreter’s present situation: the situatedness of all understanding – we only understand the meaning of something if we relate it to ourselves and to our present concerns and this includes appropriation and integration of the past to the present. Each act of understanding is a fresh event.

The second claim is put in this way by Glass: 449

… that any act of understanding must apply the text to the present by making it relevant normatively for its contemporary readers. For we are told that we must see the truth or the validity of the answers the text gives not only for the time and place of its origin but for the interpreter’s own situation. Now with this second claim Gadamer asserts that all forms of understanding have a characteristic that is usually associated only with legal or biblical hermeneutics – namely, that a correct interpretation must presuppose the bindingness or the normative authority of the interpretative material.

The first claim may be unobjectionable as far as it goes. “But to say that all understanding is contextual and situational, just because it fits all interpretive practices is too empty a claim to help with the analysis of any specific interpretive practice.” 450 Surely the how of ‘relating to the present’ must differ depending on that

448 Standpoint at 137.

449 Ibid. Emphasis in original.

450 Ibid.
task, and oddly this section of TM would attempt to combine the interpretative work of jurists and legal historians, notwithstanding obvious differences. Jurists must interpret past laws to decide the case in hand, whereas legal historians are concerned with the significance of past events. No legal historian would accept the narrowness of context in the judicial process or the constraints of admissibility of evidence or the interpretative tools, all of which are essential aspects of legal interpretation.

As for the second claim, the second sense of application – that the interpreter must presuppose the validity or binding force of the text, Glass contends: “Application in this sense would appear to be for us a precondition of understanding only in legal or theological hermeneutics. For outside of these practices the normativity of the tradition that is being transmitted cannot be assumed.”

Legal historians have no commitment to their objects of interpretation. And their understanding may be without presupposing their valuableness or normative significance. Put simply legal interpreters are in the business of getting an understanding legally correct.

Glass concludes this discussion by expressing a view that resonates with this thesis: we need a more specific hermeneutics that deals with legal practice and its procedures, concerns, criteria and standards. It seems that Glass would find such specific hermeneutics in a practical reorientation of Gadamer’s hermeneutics rather than return to Heidegger (as Tontti has) or use philosophical hermeneutics as a starting point for the development of new ideas (as Ricoeur has). The work of both Tontti and Ricoeur are discussed in the next chapter. He may be correct (compare Kaufmann) and it is worthwhile to continue the discussion of Glass’ contribution because he does makes three points important to this thesis.

The first of these points is to explicate a question crucial for any theory of understanding often overlooked or taken for granted: how can we distinguish between understandings and misunderstandings? As explained by Glass, Gadamer’s insistence on an approach that has no methodological consequences invites confusion exacerbated by Gadamer’s advice during the course of his work as to how interpretation should be done. Examples are that understanding should be treated as a

451 *Standpoint* at 138.
task, of how we should position ourselves for that task and his account of *phronesis*: doing what there is most reason to do (practical reasoning) in light of the nature of the subject matter under discussion.\textsuperscript{452}

It seems that Glass recognises Gadamer’s work in terms of its ontological priority and as a perspective limited to describing what always occurs in understanding and goes on to say:\textsuperscript{453}

The difficulty with this approach is that very often traditions have been effectively transmitted through interpretive methods and practices that, at least from our present viewpoint, would appear to be distortive and misinterpretive. … it would seem forced to claim that the interpretation which just happens to be historically effective or successful will always be the ‘best’ available interpretation.

His central point is that the concept of interpretation only has meaning when thought of in opposition to its negative counterpart viz, misinterpretation and that this has methodological consequences.

The second point is to bring the general norms that stand behind our techniques of legal interpretation into the realm of Gadamer’s pre-understandings. These norms can do two things: (i) constitute and give meaning to legal interpretation and (ii) provide standards for evaluating the adequacy of any particular interpretation. The general norms that Glass has in mind and discusses in some detail are directed to the expectations attached to the office of the legal decision maker. He specifically refers to coherence, rationality and concordance, aspects of the rule of law values already identified.

Glass makes clear that the starting point is the authority of the text (clear in respect of statutory rules). The text is to be directly applied to the specific question at hand. It is contrary to the authority of the text to interpret it as though it contains something else and irrelevant to interpret something else altogether. New interpretations are both

\textsuperscript{452} *Standpoint* at 139-141.

\textsuperscript{453} *Standpoint* at 139.
necessary and unavoidable because the need for interpretation only arises explicitly when a case to be decided gives rise to a conflict of interpretations. There are interpretative conventions and tools perhaps cast by Glass too strongly as ‘demands’ and assumptions but understandably Glass is unable to go into what would have been a disproportionately long exegesis of interpretative methods. 454

The third point is found under the heading ‘Temporal Context: Then and Now’ where Glass addresses the relevance of previous legal interpretations in the light of Gadamer’s view that interpretation is always production of a new meaning and not reproduction. He offers an approach that focuses on both past meaning and present meaning. Sometimes the attention of an interpreter will be directed to ‘original meaning’ and purported author’s intention. 455 As I understand Glass he can see these have analogous value but primarily the text by its words has a public meaning that concerns the present interpreter in resolving the particular case.

In sum a virtue of philosophical hermeneutics is that it gives theoretical substance to concurrent interpretation. The meaning of a text does change with each application. I am sure Glass is not suggesting that every time we read a text we form a different interpretation. Usually but not necessarily we make the same interpretation in subsequent readings. The interest for the thesis is successive applications of statutory rules to new situations. More significantly philosophical hermeneutics shifts the basic goal of legal interpretation: we think of interpretation as existing not behind the law (for example in the author’s intentions) or in the law (in the meaning of words in advance of application) but in front of law – where law is put into play. 456 The meaning of law does not reside only in the legal texts but in the particular fact situation. That is Kaufmann as we will see in the next chapter but Glass, apparently independently, says as much when he tells us the law for “decision-makers is also a

454 Standpoint at 143-145.

455 Glass notes that the “canon of author’s meaning” is in place and is undoubtedly available to legal interpreters as a tool. That is, legal interpreters often describe their interpretations with reference to “author’s meaning” even though this meaning is not available to them.

456 Standpoint at 147. On this point Glass adapts Ricoeur’s account of distanciation with express reference to Ricoeur’s essay “The Hermeneutical Function of Distanciation” discussed in the next chapter.
matter of learning to see what the situation expects of them. Focusing on the subject matter of the case is an intriguing way of disclosing matters significant for legal decision-making. 457

Other perceived positive contributions of philosophical hermeneutics are first, its commitment to the text so promoting the authority of, and discouraging the undermining of, legal texts. Second, the “way it demands of legal decision-makers, take responsibility for your decisions” 458, echoing the demand of Bankowski that judges be immersed in the particular in the task of legal interpretation.

5.3.3 Gadamer and legal hermeneutics

The ideas of Kaufmann discussed in the next chapter are founded on philosophical hermeneutics and the ideas of Ricoeur and Tontti are a critique of philosophical hermeneutics. Preliminary to a discussion of those ideas and also of the perceived problem it is necessary to explore further what Gadamer himself has to say specifically about legal interpretation in later writing and further to his account of the exemplary significance of legal hermeneutics contained in TM proper and already discussed above. TM has a number of appendices and supplements. The first supplement is titled “Hermeneutics and Historicism (1965)” and first appeared in the third German edition of TM in 1975. This Supplement is important because spurred by the criticism of Emilio Betti an Italian legal historian and teacher of law writing in German, Gadamer steps into the legal arena and it would seem a consideration of the methodology of legal interpretation.

Gadamer begins his discussion with something of a fanfare celebrating the attack on legal positivism by German jurisprudential scholars notably Kurt Engisch (1953, 1956) Karl Larenz (1961) and Josef Esser (1970, 1979) likening their attack to his own critique of historical objectivism. 459 Following a digression he returns to legal hermeneutics and apparently contrary to his earlier claim of a universal hermeneutics

457 Ibid.

458 Standpoint at 148.

459 TM at 511.
says “It is by no means self-evident that legal hermeneutics belongs within the context of the problem of general hermeneutics.”

Gadamer seems to accept that legal interpretation is a special case with methodological tasks to fulfil:

It is not its [legal hermeneutics] task to understand valid legal propositions but to discover law – i.e., to interpret the law that the legal order fully penetrates reality. Because *interpretation has a normative function here* [in the sense of aiming to get the interpretation right], it is sometimes – for example by Betti - entirely separated from literary interpretation, and even from that historical understanding whose object is legal (constitutions, laws, and so on.). That the interpretation of the law is, in a juridical sense, an act that creates law cannot be contested. The different principles that are to be applied in this act – e.g., the principle of analogy or the principle of filling gaps in the law, or finally the productive principle that lies in the legal decision itself – i.e., that depends on the particular legal case – do not merely present methodological problems but reach deeply into the matter of law itself.

In a footnote to the passage quoted above, Gadamer refers to the development of philosophical hermeneutics in German jurisprudence notably by Larenz. The work of Larenz, described as an excellent survey, is seen by Gadamer to show “that this methodology has something to say in every case about undecided legal questions and is consequently a kind of ancillary discipline of legal dogmatics.”

Gadamer proceeds to give his views on legal interpretation, perhaps too strongly and indicating that he has German rather than Anglo-American jurisprudence in mind, but consistent with concurrent interpretation and with much that has been said above:

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460 TM at 517.
461 Ibid. Emphasis and interpolations added.
462 TM at n 24.
463 Ibid.
464 TM at 518.
Obviously a legal hermeneutics cannot seriously be satisfied with using the subjective principle of the meaning and original intention of the lawgiver as a canon of interpretation. Often it cannot avoid applying objective concepts—e.g., that of the notion of law expressed in a particular law. It is obviously an entirely lay idea to regard applying the law to a concrete case as the logical process of subsuming the individual under the universal.

Legal positivism, which would like to limit legal reality entirely to the established law and its correct application, probably has no supporters today. The distance between the universality of the law and the concrete legal situation in a particular case is obviously essentially indissoluble.

Gadamer objects to the deductive pre-determination of individual cases: “nor does it seem satisfactory to consider the power of the individual case to create law as something deductively predetermined” and says the collection of all possible legal truths in one coherent system is impossible. “Even the ‘idea’ of this kind of perfect dogmatics seems senseless, quite apart form the consideration that the power of the individual case to create law is, in fact, responsible for constantly new codifications.”

Notably Gadamer with reference to codifications of law continues: “What is remarkable about the situation is this: that the hermeneutical task of bridging the distance between the law and the particular case still pertains …”

These observations of Gadamer are striking in two respects first, in their explicit support for concurrent interpretation and second, in their formulation in terms of method for the special case of law as a task of legal hermeneutics. It might then be suggested that Gadamer is contradicting his response to Betti that fundamentally he is not proposing a method but describing what is the case.

465 Ibid.
466 Ibid.
467 Ibid.
468 TM at 512.
Gadamer seems to address specifically the problem of quaeestio juris raised by Betti (and subsequently by Lawrence Hinman). He does this in a conversational and convoluted manner as though addressing Betti in person.\(^{469}\) It might then be suggested that TM is open to a reading that whilst fundamentally and generally speaking Gadamer’s ambition is to critique the concept of method held by modern science and to propound a philosophical theory of hermeneutics, on another level (especially in specific areas of hermeneutical practice the existence of which Gadamer acknowledges) to explore the nature of the specific tasks required and the best methods of achieving those tasks.\(^{470}\)

I think the less contentious conclusion is that Gadamer maintains the view that the principles of philosophical hermeneutics condition the carrying out of those tasks. That continues to be a claim that interpretation is what happens to us over and above our wanting and doing but legal positivists misapprehend the true position whether consciously or not. Therefore they fall into error with consequences already discussed in respect of prospective interpretation.

This is an argument that Gadamer accepts the obvious, that interpretation is carried out in law without an understanding of philosophical hermeneutics (he specifically mentions legal positivists) and that legal academics such as Larenz have endeavoured to correct such practices. It is obvious from the examples and discussion in this thesis that courts do purport to engage in prospective interpretation and that prospective interpretation is contrary to philosophical hermeneutics.

In Chapter 6 the work of Kaufmann is discussed in some detail. It will be seen that he proceeds on a similar basis: if legal interpretation is to be interpretation at all it must embrace philosophical hermeneutics and concurrent interpretation.

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\(^{469}\) TM at 512-513.

5.4 A perceived problem with philosophical hermeneutics

By now it may be obvious that in respect of legal interpretation it is necessary to confront a fundamental problem that follows from philosophical hermeneutics as propounded by Gadamer. He repeatedly tells us that he does not propose a method and that his “real concern was and is philosophic: not what we do or ought to do, but what happens to us over and above our wanting and doing.” He has firmly disavowed critique.

This problem is compounded by Gadamer’s insistence on the universality of philosophical hermeneutics and his holding up of law as a paradigm example of his view of philosophical hermeneutics. We usefully may learn more about the conditions of understanding including phronesis but recognition of what happens above our wanting and doing would appear to make no difference to current legal practice.

Hinman provides a detailed discussion of the problem. He draws attention to the passivity of Gadamer’s understanding of hermeneutics: although Gadamer describes our participation in an event of interpretative understanding the event seems to play itself out independently of our will. This is significant not only in respect of what Gadamer has to say about method but also in respect of what he has to say about truth. If Gadamer’s claim is that he has found an understanding of hermeneutics that guarantees truth in some unique way then such an “understanding is presumably to be recommended as an essential dimension of what ought to take place in the process of coming to understand and know the truth. This, however, is to say what understanding ought to be.”

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471 TM at xxv-xxvi, and see his debate with Betti in TM at 512-513.

472 TM at 469-471.

473 TM at 321-326.


475 Ibid, at 530.

476 Ibid, at 531.
One response is to take Gadamer whole and at face value, to accept his ontological analysis and accept that it cannot have and does not have anything to say about methods of interpretation or about how we should go about interpretation. That means that his analysis is a description of interpretation as always happens over and above our wanting and doing. The corollary is that all legal interpretation is the same interpretation whether I describe it as prospective interpretation or concurrent interpretation or whether any one of the interpretative debates such as, about originalism, textualism, intentionalism, to name a few of them, prevails. The contribution of the thesis is then limited to (i) drawing attention to what appear to be two different descriptions of the judicial interpretation of statutory rules and to encourage concurrent interpretation as being a more accurate account of statutory interpretation in that, its description is more aligned with philosophical hermeneutics (that is, with what we do) and (ii) bringing to the common law philosophical material and analyses that may provide a more complete understanding of the issues and what is at stake rather in the manner of North American jurisprudence and Glass. At least then I would be in good company.

A second response is found in the work of Kaufmann discussed in Chapter 6. This is the important task of making plain the implications that philosophical hermeneutics have for legal interpretation particularly of statutory rules. It will be seen that he proceeds on the basis that if legal interpretation is to be interpretation at all it must embrace philosophical hermeneutics and concurrent interpretation. Of course there is a good argument that this response falls within the first response but even if this is the case it is helpful to distinguish it as a second response on three grounds: (i) Kaufmann does not appear to be deterred by the problem, (ii) his ideas are directly relevant to the third response and are developed by Tontti in particular and (iii) the accessibility of the challenging material introduced in the next chapter is thereby enhanced. Consistent with the German tradition there is a continuity and progressive development in the ideas of Heidegger, Gadamer, Kaufmann and Tontti. Tontti’s ideas are best examined following a discrete discussion of Kaufmann’s (and Ricoeur’s) ideas.
A third response is to contend that Gadamer was wrong to disavow critique. That is, that whilst Gadamer provides a sound treatment of philosophical hermeneutics building on the work of Heidegger he diminishes a crucial aspect of philosophical hermeneutics. This crucial aspect is that critique is inevitable. Inherent in language is choice and the conflict of making choices. As it happens there are sound arguments to this effect from academics far more qualified than I. Speaking for myself I am convinced that for understandable psychological reasons Gadamer ‘buried’ this core aspect of Heidegger’s work. A theme of his long and at times distressing life story and of his work is the avoidance of conflict.

A reading of TM discloses a recurrent theme of Gadamer’s theory of hermeneutic experience and that is dialogue or as he prefers to call it the art of conversation. Requirements of the art of conversation include that the partners do not talk at cross purposes, ensuring the other person is with us, to allow oneself to be conducted by the subject matter, that one does not try to argue the other person down. There is an art to questioning and testing. In this way an interpreter in the task of hermeneutics is said to engage with a text leading to a fusion of horizons. The theme is also seen in his responses to critics, a famous and much repeated example being his conclusion to his Afterword: “But I will stop here. The ongoing dialogue permits no final conclusion. It would be a poor hermeneuticist who thought he could have, or had to have, the last word.” Of course litigation and the interpretations required in the conflicts of interpretation are not conversations and above all a final interpretation and last word is demanded.

We are fortunate that Tontti has applied his knowledge of the work of Heidegger and Gadamer (and Ricoeur) to the dilemma posed by Gadamer’s treatment of philosophical hermeneutics and I adopt the following passage found in Tontti’s book:

… conflict is necessarily incorporated into every interpretative situation. All interpretative situations contain an authentic choice between possible interpretations.

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477 TM at 581.

478 R&P at 36-37. Emphasis in original, references omitted.
and all actualised interpretative moments in the history of Being hide some other possible ways of presenting and interpreting that particular situation, that is they are performative, violent instances of language. It is force that, in the end, stabilises meaning. Or, as Heidegger points out, at the level of fundamental ontology; Being itself ‘quarrels’ or disputes’ …

Because of their performative nature, legal interpretation and legal decision-making are paradigmatic examples of a hermeneutic praxis where the element of conflict conditions the interpretative situation. Even if the process of interpretation in litigation can be conceived of as a dialogue, as Gadamer developed the subject matter, this dialogue is necessarily composed of views which are different. If they were not, a dialogue would not be needed at all.

Tontti is not the only academic to question Gadamer’s commitment to truth without method. We have seen Glass wrestle with this question. Jürgen Habermas in social sciences has provided his own avenue to critique.

Hinman himself suggests a way that resonates with Tontti of resolving the problem without assuming that Gadamer himself would approve. Gadamer’s claim can be understood as a description of what takes place generally in understanding if it is to be considered understanding at all. Attention would then shift to the particular event of understanding. In the particular, questions arise and decisions must be made about the productivity of steps to be taken to obtain understanding. Gadamer speaks of “justified prejudices productive of knowledge” and “of hermeneutical productivity” so suggesting that the claim to truth is established in the process of a productive activity.479 This is similar to the approach of the later Mootz, Glass and Kaufmann, and leads to the approach of Ricoeur. Relevant to but not citing the work of Ricoeur, Hinman makes a more fundamental point:480

If Gadamer’s understanding of hermeneutics … is to avoid undermining its own distinctive claim to truth, it must begin with a recognition of the necessity of asking


480 Ibid, at 535.
the *quaestio juris* as the question of what understanding, interpretation, and application ought to be. To fail to do this is, in Heideggerean terms, to reduce Dasein to is (sic) facticity and to ignore the fact that Dasein is in each case the kind of being for whom its own being is an issue. The question of how we understand is for us always simultaneously the question of how we ought to understand insofar as we are concerned with the question of truth.

Above all Paul Ricoeur in his self appointed role of mediator between Gadamer and Habermas has come closest to a solution and as his work becomes well known a relative consensus may occur. The work of Ricoeur speaks to the interpretation of the legal text and is discussed in detail in the next chapter together with the work of Kaufmann and Tontti in jurisprudence.

Michael Ermath in his study of the transformation of hermeneutics culminating in the work of Gadamer acknowledges with reference to Ricoeur but without elaboration the development of a third position that would combine traditional and philosophical hermeneutics. That work is now addressed, particularly in the context of legal hermeneutics. Tontti provides a preface:

> Hermeneutical philosophy, according to my proposal, has two sides; it is both a transcendental philosophy – explicating the conditions of the possibility of understanding – and a methodological orientation, with which we can clarify the methods through which practical interpretative work is carried out … That is with hermeneutics we can try to answer both the fundamental questions of human Being-there (and ensuing existential-ontological conditions of all interpretation) and explicate the more practical problems of interpretation.

### 5.5 Summary

This chapter is about concurrent interpretation and introduces philosophical ideas that would lay a theoretical foundation and support for the tenability of concurrent

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482 R&P at 4.
interpretation. An effort has been made to bring to the law ideas about language and philosophical hermeneutics in an accessible manner. The response of the common law to those ideas has been explained and assessed.

A perceived problem is then directly addressed. Gadamer tells us that he (and philosophical hermeneutics) does not propose a method and that his real concern was and is philosophic: not what we do or ought to do, but what happens to us over and above our wanting and doing. He has firmly disavowed critique.

Three possible responses are explored. The first response is to take Gadamer whole and at face value, to accept his ontological analysis and accept that philosophical hermeneutics cannot have and does not have anything to say about methods of interpretation or about how we should go about interpretation. The contribution of the thesis is then limited to an empirical critique of what we do in legal interpretation and the bringing to common law philosophical material and analyses that may provide a more complete understanding of legal interpretation and of what is at stake.

I treat as a second response the approach of Kaufmann. He follows Heidegger and Gadamer and proceeds on the basis that if legal interpretation is to be interpretation at all it must embrace philosophical hermeneutics and concurrent interpretation. That is, to do otherwise is a misapprehension whether conscious or not that obscures and confuses the practice of interpretation and a true understanding of legal interpretation.

The third response is to contend that Gadamer was wrong to disavow critique. That is, that whilst Gadamer provides a sound treatment of philosophical hermeneutics building on the work of Heidegger, he diminishes a crucial aspect of philosophical hermeneutics. Conflict and choice of interpretations are fundamental to Heidegger’s conception of Dasein and philosophical hermeneutics and also are fundamental to litigation. Therefore it is legitimate to enquire how we make those choices. This is the response of Ricoeur and Tontti in particular. Philosophical hermeneutics has two sides one explicating the conditions of understanding and the other a methodological orientation.
The thesis proceeds with a discussion of the second and third responses in the next chapter. As it happens the ideas of Kaufmann about legal interpretation inform the work of Tontti including Tontti’s methodological orientation.
Chapter 6

Concurrent interpretation: a legal hermeneutics

6.1 Introduction

The focus of the previous chapter is on philosophical hermeneutics, a claim for a universal and general hermeneutics. In this chapter the claim is for a regional hermeneutics that is, for a legal hermeneutics that learns the lessons of philosophical hermeneutics and applies those lessons to the particular task of the judicial interpretation of statutory texts (in the thesis specifically statutory rules).\(^{483}\)

This chapter follows Chapter 5 in addressing the conceptual aspects of concurrent interpretation and in introducing ideas for concurrent interpretation in practice. The starting point is the perceived problem with philosophical hermeneutics raised and introduced in Chapter 5. Three possible responses to the perceived problem are identified and this chapter is concerned with the second and third responses.

The second response is seen in the work of Arthur Kaufmann. He follows Heidegger and Gadamer and proceeds on the basis that if legal interpretation is to be interpretation at all it necessarily embraces philosophical hermeneutics and concurrent interpretation. To do otherwise is a misapprehension whether conscious or not that obscures and confuses the practice of interpretation and a true understanding of legal interpretation. Further, in the claim to be doing other than concurrent interpretation useful tools are neglected in particular those relating to analogous reasoning.

The third response is to contend that Gadamer was wrong to disavow critique. That is, that whilst Gadamer provides a generally sound treatment of philosophical hermeneutics building on the work of Heidegger he diminishes a crucial aspect of philosophical hermeneutics. Conflict and choice of interpretations are fundamental to Heidegger’s conception of *Dasein* and philosophical hermeneutics. Therefore it is legitimate to enquire how we make those choices. This is the response of Paul Ricoeur and Jarkko Tontti in particular. On their approach philosophical hermeneutics has two sides: one explicating the conditions of understanding and the other a methodological orientation.

This chapter brings to the common law an introduction to the work of Kaufmann, Ricoeur and Tontti. The challenge is to bring to the thesis a large topic. The ideas of any one of them surely would justify a thesis so it is as well to be reminded of the aim of the thesis in undertaking the exploration of philosophical ideas and theory. The aim is to introduce ideas that are not generally well known to common lawyers, to demonstrate the way these ideas interconnect with statutory interpretation and to demonstrate how these ideas support concurrent interpretation. It is inevitable that the treatment in this thesis of the work of all three is selective.484

An aim is to keep legal interpretation to the forefront. As the chapter proceeds ideas relevant to concurrent interpretation in practice are developed and that is particularly the case as the chapter closes.

There are three broad sections that introduce in turn the ideas of Kaufmann, Ricoeur and Tontti. Because Tontti builds on the earlier work of Kaufmann and Ricoeur the treatment of them in this chapter includes references to Tontti. And the chapter closes with nine arguments relevant to concurrent interpretation that incorporate the work of all three.

484 The current interest in and the depth and breadth of the topic are illustrated by the contributions found in Francis J Mootz III and George H Taylor (eds) *Gadamer and Ricoeur: Critical Horizons for Contemporary Hermeneutics* (2011).
6.2 Arthur Kaufmann

6.2.1 Introduction

Arthur Kaufmann (1923-2001) was Professor of Law at Munich University in the field of jurisprudence with a particular interest in legal interpretation. Other major figures in German academia specialising in legal interpretation (Rechtstheorie) are mentioned by Gadamer in TM (see Chapter 5.3.3). Kaufmann is the author of many books and articles in German published between 1965 and 1997. There are two articles and a book chapter translated into English and discussion of aspects of his work together with bibliographic information can be found in R&P. It appears that Kaufmann’s most important work is the book Rechtsphilosophie (1997) apparently not translated into English. I will be relying on Tontti’s references to this book.

I believe that Kaufmann’s ideas are premised on philosophical hermeneutics and that he accepts Gadamer’s position that the principles of philosophical hermeneutics condition the practice of legal interpretation. That is, interpretation is what happens to us over and above our wanting and doing but legal positivists are under a misapprehension about this and purport to do otherwise. Therefore they fall into error with consequences already discussed in respect of prospective interpretation.

Kaufmann’s work follows the German tradition of the legal academics referred to by Gadamer and who have endeavoured to correct practices inconsistent with philosophical hermeneutics. It seems that their position is: if legal interpretation is to be interpretation at all it must fall under the description provided by philosophical hermeneutics and concurrent interpretation. In this task it is necessary to evaluate positivists’ understanding of law and interpretation and demonstrate its ontological deficiency. This is a legitimate task as Kaufmann demonstrates and is now discussed as a second approach to the perceived problem beginning with Kaufmann’s article “The Ontological Structure of Law”.

What is fundamental, then, for the ontology of law is the difference between essence and existence. The implications of this difference I shall now develop.\textsuperscript{486} He proceeds to discuss man’s existence in terms inspired by the work of Heidegger and which resonate with Taylor’s ideas discussed in Chapter 5.2.2. Law exists only because man exists, it is a social artefact and does not have its own essence. Law like language, art and science “share in the nature of man’s essence. Thus law is historical in its meaning as man is.”\textsuperscript{487} “There is never a law that is finished, but always a law which is becoming.”\textsuperscript{488}

The central point is that law assumes the existence of rules of law. There cannot be any legal decision without a norm, without a measure. But law is not found in the static promulgation of a rule whether statutory or judge made but is found in the realisation of law. “Rules are not the full realisation of justice. A rule is a general norm for a variety of possible cases. Justice, on the other hand, decides actual situations here and now.”\textsuperscript{489} As Kaufmann explains, rules are inevitably normative, setting a line or measure for just actions. Inevitably such norms are general and abstract. They are realised as law in application to the particular case and for the particular case.

This does not mean the court can decide according to its own will. The court is in all circumstances tied to law. But this is not the complete source of the law. Explicitly:\textsuperscript{490}

\begin{quote}
A legal decision is not exceptionally, but generally, a creative task, and never a pure application of law in the sense of a subsumption of facts under a logical syllogism. To determine the law is not simply to bring an abstract order of law into existence. It is rather to find the just order in each and every historical situation.
\end{quote}

\textsuperscript{486} Kaufmann “The Ontological Structure of Law” (1963) 8 Natural Law Forum 79 at 85.

\textsuperscript{487} Ibid, at 90.

\textsuperscript{488} Ibid.

\textsuperscript{489} Ibid, at 92.

\textsuperscript{490} Ibid, at 95.
Although this thesis cannot embark on a discussion of natural law theories it should be mentioned that Kaufmann makes the point in a detailed discussion that many of those advocating natural law fall into the same trap as positivists by advocating ideal, overriding, abstract and immutable principles of natural justice and morality as the foundation for a system of natural law. Kaufmann points out: “These are not natural laws, but natural principles. The expositors of natural law should finally recognize this distinction between principles and justice.”\(^{491}\) Kaufmann in “Analogy”\(^{492}\) notes that natural law and positivism share many traits (with which he would not agree) such as belief in the purity of cognitive propositions, an ideological confidence in the idea of rationality as something valuable in itself and in promulgating supra-positive law.

In his book chapter “Preliminary Remarks on a Legal Logic and Ontology Relations”\(^{493}\) Kaufmann proceeds from the ontology of philosophical hermeneutics to a critique of positivism:

> Classical natural law and classical (normativistic) legal positivism are similar in one respect. Both treat the process of realization of law as a thoroughly unhistoric process; a process where nothing happens. Case and law remain as they have always been, unaltered; a substantialist way of thinking. The process is purely deductive.

Method founded on legal positivism is for Kaufmann demonstrably and “totally unworkable and has never been actually practised.”\(^{494}\) In effect legal positivism and deductive reasoning in respect of rules is a misapprehension whether conscious or not that has no conceptual legitimacy. On this basis Kaufmann proceeds to explain what actually happens in legal interpretation. This is both legitimate and necessary because thereby legal interpreters may be persuaded not to do otherwise or at least have a better understanding of their own practices.

\(^{491}\) Ibid, at 93.


\(^{493}\) Kaufmann “Preliminary Remarks on a Legal Logic and Ontology Relations” in Patrick Nerhot (ed), Law, Interpretation and Reality (1990) at 104

\(^{494}\) Ibid, at 107.
6.2.2 Realising law

Kaufmann is primarily interested in how law is realised, “the procedure of its realization.” He describes this procedure as follows:

What happens by the application of law (that is, not just by the application of statute) is the following: On the one hand, what is needed is a construction of the case, i.e. the working out of the essentials of the case in the light of the norm; in other words, the formation of a legally relevant case (Sachverhalt). On the other hand, an interpretation of the norm is required, namely its concretisation in the light of the particular case, the formation of the normative framework that can accommodate reality (Tatbestand). Through both acts of construction and interpretation that do not temporarily follow one another but rather coincide in a relation of mutual conditioning, a correspondence of case and norm in the form of a factual and a legal, normative framework of Sachverhalt and Tatbestand is accomplished. This correspondence does not exist in advance (although there is a tendency in that direction both in the case and the norm). It must be produced in a way that case and norm are made to coincide from the point of view of the ratio juris through an active, moulding, shaping act.

Realisation of law is an event that responds to the historicity of law and is flexible and open to all the circumstances of life. Law is found in the relation between norm and case.

Kaufmann had put forward these ideas in “Analogy”: “Law-finding, then, is a bringing-into-correspondence, an equivalence, an assimilation of the norm and the real-life fact-situation.” This is accomplished from two sides: on the one side by making the real-life fact-situation fit the norm in a process of unfolding the fact-situation from the normative point of view. On the other side making the norm fit the facts. This is commonly called “interpretation”: ascertaining the legal meaning of the

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495 Ibid, at 111.

496 Ibid. Emphasis in original.

norm. But this does not reside in method but in the real life fact-situation that is to be judged. These sides are not separate but occur at once in “a give-and-take progressive unfolding.”

“Though the text of the law remains the same, it changes – with fact-situations of life, and indeed with life itself.” Kaufmann discusses the example of what constitutes a “weapon” for the purpose of the criminal law and points out that something can be a weapon today that did not exist at the time of enactment. This is not about the “meaning of the law” changing because how can it “change when the words of the text remain the same? It is so only and solely because this “meaning of the law” does not lie solely in the law at all but also in the concrete fact-situations of life for which the law is laid down.”

Kaufmann points out that law is found not only in the norm and not only in the case but in their mutual relation. “The norm as a mode of Ought can never produce actual law out of itself, something of ontic nature must be added. An actual law arises only when a norm and a concrete fact-relation of life, the Is and the Ought, enter into correspondence with each other.” This account requires further discussion.

Of course we do think that a statutory rule is a law and it certainly looks like one in its formulation and status as an official text. However on analysis a rule is merely the statement of the norm or norms and a silent guide to conduct. By itself it does not have substance as law. The text of a rule only has substance when we relate it to a real-life fact-situation. We do this by our thoughts and in that way reach a preliminary view of what the law is. A final view of what the law is, is obtained in the judicial decision that brings a case to an end and is a view of what the law is for that case. It may of course

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498 I believe Kaufmann is referring to the deductive method found in prospective interpretation.


500 Ibid, at 388. Emphasis in original.

501 Ibid, at 387.

502 Ibid, at 389.

503 Ibid, at 372.
by analogy influence future decisions where the same rule is invoked and the facts (the narratives) are similar.

Let us look at two commonplace examples. The first is the road user rule requiring a driver to stop at a stop sign: 504

A driver approaching or entering an intersection on a roadway where the vehicles that are moving in the direction in which that driver is travelling are controlled by a stop sign at or near the intersection must –

(a) stop his or her vehicle before entering the path of any possible vehicle flow at such a position as to be able to ascertain whether the way is clear for the driver to proceed; and

(b) give way to any vehicles approaching or crossing the intersection from a roadway not controlled by a stop sign.

It is obvious from reading the rule that there is more to the rule than a mere norm requiring a driver to stop at a stop sign. There is a real-life fact-situation to which the rule must relate or correspond if there is to be a breach of the rule. The rule being a traffic regulation attempts to describe elements of that real-life fact-situation for example, the direction of travel, the stop sign, its location, where to stop, what the driver must then do. In other words the norm has no substance or meaning until by thought or action we engage with the text of the rule in a real-life fact-situation, whether that is imaginary or actual and whether it is something we think about as we read the text or at the point of action or at the point of a judicial decision or sometime in between.

Similarly for the statutory rule that prohibits a person in trade engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. 505 I challenge any reader to think of the phrase ‘in trade’ without attempting to relate it to a real-life fact-situation in a process of prefiguration discussed further below in respect of Ricoeur. Ultimately that phrase can only be given meaning in the judicial decision that decides

504 Land Transport (Road User) Rule 2004 (SR 2004/427), r 4.1(1).

505 FTA, s 9.
a real-life fact-situation. The same applies to the phrase ‘misleading or deceptive or is likely to mislead or deceive.’

Kaufmann in “Analogy” analyses at length the means by which the norm and the real-life fact-situation correspond and coincide.\textsuperscript{506} This is mediation between general and particular, between norm and fact and between ought and is. The mediation is found in the value-quality that exists in all real-life fact-situations. Imagine a system of criminal law in which real-life fact-situations are described in a schedule each of which is pronounced to be unlawful in an attempt to remove normativity and ask if that can work in practice. Kaufmann gives the example of the criminal offence of larceny: try as one might every possible unique situation cannot be anticipated.

We must be satisfied with proposing a \textit{typical} situation. This cannot be a unique situation, what is typical cannot be unique. The task of rules is to describe types (not unique situations), which can never be successfully defined (successfully be given meaning in advance) but can only be described. “The type constitutes an intermediate level between the general and the particular.”\textsuperscript{507} Unlike an abstract general concept a type though not definable is capable of explication. It has a firm core but no firm boundaries. The type then in law is “the mean between the idea of law and the fact-situations of life, around which ultimately all legal thought revolves: the mean between conformity to norms and conformity to the facts.”\textsuperscript{508} “The idea of law” is the rule of law value that people know in advance the content of laws. This cannot be achieved in any absolute sense in respect of statutory rules for the reasons already discussed when challenging the ideas of MacCormick and further discussed below when discussing the ideas of Tontti.

Kaufmann’s conception of types puts statutory rules in their proper place: between on the one hand the legal system with its general concepts (such as rule of law values, separation of powers) and collections of law (including statutory rules) and on the other hand the real-life fact-situations for which there are rules. Seen that way this


\textsuperscript{507} Ibid, at 393.

\textsuperscript{508} Ibid, at 394.
thesis is correct to concentrate on and to discriminate and privilege statutory rules and their judicial interpretation.

6.2.3 Further observations of Kaufmann
Kaufmann also makes a number of interesting observations on topics relevant to the thesis.

1. Tradition
Reference has already been made to pre-understandings and historicity as features of philosophical hermeneutics. Gadamer and philosophical hermeneutics recognise that one can neither interpret nor decide cases without being affected by the tradition of earlier interpretations and the ensuing prejudices. Tontti, referring to Kaufmann, contends for the intertwinement of language and historicity, an inherently interpretative activity. "Law is a tradition and tradition comes into Being as a tale of temporal interpretation."510

Kaufmann of course says that each case is a unique application of the ‘law’ but, as reported by Tontti, recognises that ‘‘law’ applied now has one new interpretative layer added to it, which changes the meaning it may acquire in the future and transmits the tradition onwards with a content which has changed but still contains most of the past in it.”511 Whilst Kaufmann emphasises the actuality of the decision here and now he acknowledges a sense of projecting the tradition forward. ‘Precedents’ are perhaps the most easily understandable form of transmission of tradition in law. Previous decisions are paradigmatic material for analogous reasoning as discussed in Chapter 7. It would be counter to philosophical hermeneutics and Kaufmann’s ideas to elevate precedents beyond their obvious historical effect into premises for syllogistic reasoning.

509 Compare Gadamer’s history of effect: TM at 299-306.
510 R&P at 117. Emphasis in original.
511 R&P at 120.
Tontti further reports Kaufmann’s argument that legal preconceptions include “an ethico-moral intuition about right and wrong … an art of having correct preunderstandings which are made transparent, and reflected thoroughly in the decision-making process.”

2. Norms
Much has been said about norms in the thesis and now is an opportunity to hopefully cast a little light on what are sometimes seen as transcendental entities ‘out there’ awaiting interpretation and analysis. Heidegger, Kaufmann and Tontti would agree that whilst a ‘norm text’ such as a statutory rule may exist as a linguistic formulation (the sense of the text), norms do not exist before interpretation as it is conducted here and now. (Below in respect of Ricoeur there is discussion about sense as distinguished from reference.) Norms come into existence as interpretation and through interpretation of the particular case in the manner described by Kaufmann and also Tontti. Of course this is entirely consistent with the analysis above of the road user and fair trading rules.

3. Easy/Hard cases
Our common ability to identify the nature of the conflict of interpretation to be resolved is a remarkable aspect of language. We may not agree on a particular interpretation or more particularly on the outcome of a judicial process but we usually agree on the questions to be asked. In the same way we agree on the classification of a case as easy/routine or hard. Tontti discusses the classification with reference to Kaufmann and develops two important points. First strictly speaking there are no routine or easy cases at all where law would simply be applied without the need to interpret. The choice of classification easy or hard is an interpretative choice. “A case is routine only after it has been classified and interpreted as belonging to that category.” Second this choice is based on our culturally transmitted pre-understandings. A case appears easy “because it resonates with stereotypical images originating from the cultural, social, political and legal tradition in which we live (and

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512 R&P at 178. Developed further below in section 6.4.5, argument 9.

513 R&P at 152.

514 R&P at 177.
Another way of putting this is to say that the narrative of the particular case is seen as similar to, analogous to, the typical narrative evoked by the words of the statutory rule.

4. Equality

Equality before the law together with impartiality has been mentioned as a rule of law value. Kaufmann is not merely interested in treating citizens alike, for him a central problem is like treatment of cases. “For the idea of law, justice demands equal treatment of equal cases and different treatment of unequal cases.” The there can be no such thing as identity, there can only be “a partial equality and a partial inequality: similarity and dissimilarity” and he makes the important point that equality can only be thought of through finding the relevant similarities between things and cases based on analogy. By analogy a middle route that would promote equality is found between total difference and total identity.

5. Certainty

The same is said for legal certainty. “The constant tension between material justice and legal certainty cannot be resolved.” Rules have elasticity in application that promotes justice but at the expense of certainty. Any attempt to legislate for every conceivable situation is impossible and anyway leads to hair splitting and impracticable results. The best outcome is decision-making that looks to the similarities and differences in analogical reasoning.

Tontti reports that Kaufmann “warns us against the dangers involved in over-emphasising the significance of legal certainty. If it is raised to the position of a dogma it becomes a dangerous ideology, which only upholds the prevailing status quo and hinders all criticism and change in law.”

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515 Ibid.
517 Ibid.
518 Ibid, at 396.
519 R&P at 107.
6. Analogy

This brings the discussion to the important matter of analogy versus syllogism. Kaufmann is adamant that legal decision-making is analogous: “The assumption that law-finding is such a purely deductive procedure is indeed quite widespread, but that does not make it any the more correct.”

His discussion of analogy is a large part of “Analogy” and the 1990 book chapter and is not repeated here. Essentially Kaufmann argues that “all legal decision-making (and, in the end, all practical human thinking) is based on analogical reasoning; finding relevant similarities between instances or cases (or e.g. persons) that are always different in some respects.”

As Tontti explains:

Consequently, as Kaufmann stresses, the key question in all analogical reasoning is … what is chosen as the measuring yardstick in comparison. From what point of view is the comparison made between the two similar (but always also different) instances? Which aspects of the narratively formed factual premises are compared with the typical narrative evoked by the words of legislative texts? This is of course, a situation-dependent question …

The discussion above of the realisation of law by analogous reasoning is not repeated.

6.3 Ricoeur’s development of philosophical hermeneutics

6.3.1 Introduction and sources

Paul Ricoeur (1913-2005) was a philosopher with many and broad interests and a prolific writer throughout a long career spanning from the Second World War to his death in 2005. French educated he acquired a good knowledge of German, and also English during a self imposed exile from France arising from political circumstances.

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521 Reported in R&P at 181.

522 R&P at 182.
when he spent many years in North American universities particularly in Chicago, Toronto and Fort Worth. His thinking and writing is concerned with ethics, politics and justice, good and evil, the will, psychoanalysis, a confrontation with structuralism, discourse and creativity, and from the 1970s language and interpretation. A striking feature of his work contra many other French philosophers is the way it seeks to build bridges between philosophical traditions and the self-effacing way in which Ricoeur quietly and persistently draws out his thoughts rather than loudly proclaim them. Perhaps that is why Ricoeur’s work for all its solidity, consistency and practicality has failed so far to have the impact of that of his contemporaries, for example the work (and personalities) of Michel Foucault and Jacques Derrida.

The synthesis of the ideas of Ricoeur and legal interpretation is a large topic. It is inevitable that the treatment in the thesis of Ricoeur’s ideas is selective. The primary and secondary literature in English translations and English respectively is immense even when confined to interpretation. For example there are six major collections of Ricoeur’s essays specific to interpretation in English, most of which contain introductions. They considerably and confusingly overlap. Another difficulty arises from the way Ricoeur constantly developed and reworked his thinking on interpretation reflected in his very considerable output of written work.

The English language collections are (i) Don Ihde (editor, various translators) Paul Ricoeur The Conflict of Interpretations: Essays in Hermeneutics, 523 (ii) John B Thompson (editor, translator, with introduction and Ricoeur’s response) Paul Ricoeur Hermeneutics and the human sciences: Essays in language, action and interpretation, 524 (iii) Kathleen McLaughlin (Blamey) and David Pellauer (translators) Time and Narrative in three volumes, 525 (iv) Kathleen Blamey and John


525 Kathleen McLaughlin (Blamey) and David Pellauer (trans) Time and Narrative in three volumes (1984, 1985, 1986).
There are further essays less well known but important for the topic of interpretation. The first is a course of lectures given in English at Texas Christian University, Fort Worth in 1973. These have been published in a book *Interpretation Theory: Discourse and the Surplus of Meaning*. The second is a presentation in English at Emory University in 1977 titled “The Narrative Function.”

The extensive secondary literature in English exemplifies the manifold approaches that legitimately may be made to the work of Ricoeur and the problem of finding a best or at least a most relevant and accessible approach. The philosophical and legal background has been summarised above and it is Ricoeur’s response to philosophical hermeneutics that requires consideration. What are his ideas that take philosophical hermeneutics into the realm of legal interpretation? How and on what bases does Ricoeur find critical perspectives for interpretation? The approach adopted in this thesis owes something to Glenda Ballantyne and Tontti.

The discussion is introduced in three themes (i) Ricoeur’s idea of the conflict of interpretations, (ii) his theme of the text as a particular mode of discourse and (iii) the place of narrative.

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530 Ricoeur “The Narrative Function” (1978) 13 Semeia 177.

531 There is also extensive commentary on Ricoeur in European languages other than English. Tontti’s linguistic skills have enabled him to consider the views of many European academics, as is apparent from footnotes and bibliography in R&P.

532 Glenda Ballantyne *Creativity and Critique: Subjectivity and Agency in Touraine and Ricoeur* (2007), in particular ch 4 “Critical Hermeneutics”.

533 R&P in particular chs IV and V titled “Dialectics of Explanation and Understanding” and “Narrative Structures of Texts and Identities.”
1. The conflict of interpretations is a rethinking of the ideas of Heidegger and Gadamer that opens up implicitly critical perspectives for hermeneutics. That is, brings out and extends potential for critique already available within the interpretative framework established by Heidegger and Gadamer.

2. His themetisation of the text as opposed to conversation explicitly expands the possibilities of critique on a second level and thereby the possibilities for methods of interpretation. The particular dialectic of explanation and understanding of a text creates a space of distanciation that permits critique in ways that are explored in more detail below.

3. Narrative is explained as a function of interpretation.

Following the discussion of the three themes reference is made to aspects of Ricoeur’s work that is specifically relevant to legal interpretation.

6.3.2 Conflict of interpretations
Ricoeur in his earlier work had already come to the conclusion that language and meaning are essentially polysemous as a result of which we are condemned not simply to interpretation but also to a conflict of interpretations. Subsequently he critically examined the ideas of Heidegger and Gadamer and embraced their ontological structure of understanding and language, discussed above. However by emphasising the polysemic nature of language and the permanent presence of rival interpretations within any given field of meaning he challenged the possibility of a conception of social relations as harmonious sets of practices based on cultural consensus, an ambition of Gadamer.

Ricoeur’s insight is of particular significance for legal interpretation and legal decision-making. Because of their performative nature legal interpretation and legal decision-making are paradigmatic examples of hermeneutic praxis where the element of conflict conditions the interpretative situation. Even in terms of Gadamer’s ideal of dialogue, this dialogue is in law necessarily composed of views that are different.
Otherwise there would not need to be a dialogue at all. And this dialogue necessarily is a form of linguistic struggle to suppress opposing interpretations and enhance our own interpretations. By definition it cannot be subsumed by empathy or consensus. All interpretative situations contain an authentic choice between possible interpretations. 534

In a lecture to the Cour de Cassation (the French court of appeals) titled “The Act of Judging” Ricoeur reiterates that behind the trial process lies conflict, differences of opinion, quarrels, litigation, and behind conflict lies violence. Law and justice are alternatives that society opposes to violence, violence encompassing actual violence, the individual’s claim for justice for herself, and the struggle for power. 535 Violence in all these respects is forced into language and transforms the actual or possible physical violence into a conflict about the interpretation of texts and of the facts of the case. As aptly summarised by German commentators: “Positive enacted law is not an object of knowledge, but an arena for a struggle about law which takes place in the space of language.” 536

A crucial consequence of the irreducibility of conflict of interpretations is that it legitimates a moment of objectivism so bringing an opportunity for critique (the making of evaluations and choices) into the perspective of philosophical hermeneutics. Ballantyne refers to this as an “element of self-understanding” legitimating “the moment of objective analysis.” 537 This arises from distanciation discussed in the next section.

6.3.3 The text

Having gone this far Ricoeur continues his exploration of philosophical hermeneutics for further possibilities for critique partly in response to the opposition of Jürgen Habermas and others to the conservatism of Gadamer’s philosophical hermeneutics

534 See R&P at 36-7 and 130-131.
536 Reported in R&P at 130-132.
537 Glenda Ballantyne Creativity and Critique: Subjectivity and Agency in Touraine and Ricoeur (2007) at 112.
that is, the perceived problem already discussed. It is not necessary in the context of legal interpretation to go into the dialogue between Gadamer and Habermas. This particularly is so because Ricoeur in a sense has mediated that dialogue and it seems has brought to his own thinking the best of the opposing arguments. The hermeneutics of suspicion of Habermas are subsumed for our purposes by Ricoeur in his own explorations of critique.\footnote{See also R&P ch VI titled “Dialectics of Tradition and Critique.”}

Ricoeur identifies and challenges the model of language that Gadamer deploys. Gadamer’s emphasis is on dialogue (he prefers the word conversation) with its immediateness and directness of communication. Gadamer privileges dialogue because language “has its true being only in conversation in the exercise of understanding between people.” Ricoeur does not question the priority of speech over writing nor the central ideas of philosophical hermeneutics including the idea that discourse always brings into language a way of being-in-the-world that precedes it. However he does argue that the objectification of language in the form of writing remains unexplored and insufficiently accounted for in the work of Heidegger and Gadamer.

In particular Ricoeur holds up the text as having the characteristic of communication of and through distance, a characteristic that is part of our historicity, our human experience and tradition. Tradition oscillates between remoteness and proximity not just in relation to belonging as Gadamer describes but also in distanciation.

Ricoeur’s idea of the hermeneutical function of distanciation is a significant contribution to the development of philosophical hermeneutics. The concept of distanciation is not easily understood and risks being dismissed as mystical. So the following is offered as an explanation. First some background. Ricoeur was able to bring to his analysis of the work of Heidegger and Gadamer his knowledge of the work of their predecessors and his expertise in structural analysis, semantics, discourse and psychology. The primary sources of Ricoeur’s account are found in translation as book chapters titled “The Task of Hermeneutics” and “The
Hermeneutical Function of Distanciation” (1973) and his lectures in English (1976).

One way to access the idea of distanciation is to compare it with ‘objective distance’ an idea familiar to lawyers. We value the idea of being able to stand back as it were and take an ‘objective’ view of a particular situation as a way of enhancing the accuracy of our judgment about that situation. Judges often emphasise the desirability of objectivity and denigrate subjectivity. The problem is, how can we do that if we are so bound up with language and our historicity as described by philosophical hermeneutics so that objectivity is impossible. Is objectivity an unattainable goal and are we fooling ourselves if we purport to do otherwise? I suggest that Ricoeur’s idea of distanciation is a convincing means towards overcoming that problem. I will now endeavour to explain the concept of distanciation as accessibly as is possible in steps.

First Ricoeur explains the realisation of language as discourse. The event of discourse is linked to a speaker and a listener and is about something. This is an event of communication. It is in the linguistics of discourse that meaning is articulated. We want to understand the meaning that endures and not so much the fleeting point of the event. He explains how it is that discourse not language produces meaning. At this point there is already a distanciation between saying something and the thing that is said. And meaning covers all aspects of the event of discourse such as context, intonation and expression. There is a paradox in that discourse is realised as a fleeting event and understood as an identifiable and repeatable meaning.

Second he proceeds to the realisation of discourse as a structured work. A work consists of more than one sentence, it has a genre and it has a style all of which are revealed by the word ‘work’. The style of the work has the effect of drawing together

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539 From Text to Action at ch 2 and 3.

540 Ricoeur Interpretation Theory: Discourse and the Surplus of Meaning (1976).

the two aspects of event and meaning. Style is the unique configuration given to the work by its author, the promotion of a particular standpoint. The subject of discourse takes on the new status of a structured work. The author is more than speaker: the author is the artisan of a work in language.\textsuperscript{542}

The third step takes up the question, what happens when a discourse passes from speaking to writing? The answer is significant and for some people such as ‘intentionalists’ controversial.\textsuperscript{543} The work, now called a text, takes on a life of it’s own. It is emancipated from the author and it is autonomous. “What the text signifies no longer coincides with what the author meant: henceforth, textual meaning and psychological meaning have different destinies.”\textsuperscript{544} The work transcends its own psychological conditions of production and thereby opens itself to an unlimited series of readings themselves situated in different conditions.\textsuperscript{545}

The fourth step is what Ricoeur calls ‘the world of the text.’ This follows from the autonomy of the work: the text has its own world. It is then for the reader to inhabit that world, finding within it situations that would explain her own situation in the process of understanding. This is not the world of conversation.\textsuperscript{546}

The fifth step is self-understanding in front of the work. The reader may recall mention by Glass of this idea. This is the appropriation of the text, its application to the present situation of the reader. Appropriation is understanding at and through distance and is a natural counterpart to the distanciation of the text, which has the effect of divorcing it from the author’s intention. Appropriation is linked to the objectification of the text. There is a temporal distance between the origin of the text and the act of reading.

\textsuperscript{542} Ricoeur “The Hermeneutical Function of Distanciation” in \textit{From Text to Action} at 80-83.

\textsuperscript{543} For example Stanley Fish “There is no textualist position” (2005) 42 San Diego LR 629.

\textsuperscript{544} Ricoeur “The Hermeneutical Function of Distanciation” in \textit{From Text to Action} at 83.

\textsuperscript{545} Ibid, at 83-84.

\textsuperscript{546} Ibid, at 84-86.
The reader appropriates the world of the text not the hidden intention behind the text. In front of the text its world unfolds and it is in that world that by critique the meaning of the text is revealed. For example the reader may see aspects of the text that could not have been foreseen by the author. These aspects may even have been irrelevant or incomprehensible to the author but nevertheless important from the point of view of the reader. Incidentally an author as a subsequent reader may well find that meanings are revealed that had not been thought of by her at the time of composition.

This account leaves open for further discussion below of the important matters for law of appropriation here and now of the meaning of the text in order to decide the case at hand and the explication of the internal sense and also the external reference actualised in the process of reading.\(^547\)

Attention is now given to what Ricoeur means by a text and what he tells us about the relationship between text and speech. He defines a text as any discourse fixed by writing. Of course this could be something already said but the text is not a dialogue in the way that occurs in speech. The text divides the acts of writing and reading. So what is actually fixed by writing? Not an act of speech as such but a discourse that could be said. A text is a text only when it is not merely transcribing an anterior speech but when it instead inscribes in written form what the discourse purports to say. There is already a distance between the text and the author as first reader. I think it is not unknown for an author to return to her text sometime later and either not be able to fully understand it or form the view that it is an inadequate expression of what was ‘intended’.

Statutory rules are clearly texts of a particular genre and style. They will not be read in the same way as a novel or newspaper. Burrows has already told us that. They are public and impersonal and in a legal style. Our historicity has equipped us with particular tools that we bring to the text. The flexible role of the fictional canon of author’s intent,\(^548\) the acknowledgment that a statute is always speaking and above all

\(^{547}\) Ibid, at 87-88 and R&P 50-53.

\(^{548}\) Glass also touches on these matters in “The Author of Common Law Texts” (1995) 8 Ratio Juris. 91.
the design of such texts to provide tools for the resolution of particular and unforeseen conflicts are consistent with the ideas of Ricoeur and indeed provide an exemplary example of interpretive distanciation.

The differences between speaking and writing that crucially lead to the objectification and distanciation that Ricoeur seeks can be summarised as follows.

1. The reader no longer has access to the author, the author’s intention or the author’s world. The text is autonomous in the sense that its meaning can grow and change independently of its author.

2. The text is subject to multiple interpretations by different readers, at different times and in different circumstances. It is no longer confined to its original situation of production.

3. The text creates an imaginary audience and in principle the audience includes anyone who can read.

4. The text is meaningful in that it contains both sense and reference. It both says something meaningful and is about something beyond itself. This follows from the world of the text projected in front of the text. This happens when the reader appropriates the text for her purposes and in her situation and inevitably this may differ in some way over the course of time and with new situations without for all that becoming meaningless.\footnote{Ricoeur “What is a Text? Explanation and Understanding” (1970) in From Text to Action ch 5 and R&P at 51.}

\subsection{6.3.4 Narrative}

Ricoeur’s theory of narrative is a developed and influential contribution to hermeneutic knowledge and extends over the three volumes of \textit{Time and Narrative}.\footnote{Ricoeur \textit{Time and Narrative} in three volumes (1984, 1985, 1986).}

Mention already has been made of the appropriation of the text so that it becomes
one’s own. The question is how do we do that? Ricoeur contends that we do this by constructing narratives to make sense of all the elements relevant to an understanding of the text. This is an imaginary process much like the way we use metaphors.

The construction of narratives is consistent with Ricoeur’s active approach to understanding in contrast to Gadamer’s insistence that the event of meaning is something that happens to us. Ricoeur explains our capacity to invent our own narrations as a means of understanding our world. This capacity includes the idea that we all have of past, present and future even when on analysis there may never be a present (it is always just gone) and past and future are both imaginary.

By narrative capacity we bring some measure of constancy to a transient life or put more simply: we are able to make sense of time. We have many discursive repertoires to hand such as ‘I will do this tomorrow because I just realised … (or) because I was told what happened last week …’ Narrative as part of our historicity opens up opportunities for understanding and is capable of informing all understanding. This is more than a philosophical idea, it is an equipment for living, for coping. The construction of narratives in our attempts to explain things also has the virtue of being something with which we are very familiar.551

We construct narratives by means of emplotment. Emplotment mediates between time and narrative and to do this it has a beginning, a middle part and an end. Emplotment orders actions and provides causal connections. It is not about organising events but is about imitating actions. We have a competence of identifying, ordering and articulating actions. This is the world of ‘as if’.

Ricoeur suggests that the narrative imitation of human action can be understood in three phases, which are interdependent. These are mimesis 1, mimesis 2 and mimesis 3 more usefully called prefiguration, configuration and refiguration. In brief these are (i) our pre-understandings and ordinary competence, (ii) emplotment and (iii)

application. The thesis returns to these phases in the course of discussing the appropriation of Ricoeur’s ideas into the legal context.

6.3.5 Ricoeur and law
Ricoeur was not a stranger to legal interpretation and therefore to complete this introduction to his work I refer to aspects that particularly concern the thesis and concurrent interpretation.

In a journal article translated and included as a book chapter titled “Life in Quest of Narrative” Ricoeur explains what he means by emplotment and emphasises that the search is for one story out of multiple incidents that is imaginary but well constructed and draws together all relevant elements. This is configuration. By refiguration there is an intersection of text and reader, the world of the text and the world of the reader. From a hermeneutical point of view this is the fusion of horizons.

*The Just* contains a number of essays about law and justice including one entitled “Interpretation and/or Argumentation”. Ricoeur enters into a detailed discussion of the work of Dworkin and Alexy. I take the reference to (judicial) argumentation to be synonymous with legal justification. It appears on my reading that Ricoeur is puzzled that it might be contended that there is a distinction between interpretation and argumentation. He notes that Dworkin’s general notions of ‘fit’ and narrative coherence might have been developed into a theory of interpretation but finds that Dworkin is deflected by his interest in the moral and political substance of argument to an idea that interpretation must both fit and justify what has gone before. Ricoeur contends that Dworkin “undoubtedly goes too far in affirming that there is always a right answer to the question posed by hard cases” and sees this as Dworkin’s attempt to block the positivist (Hart) recourse to discretionary penumbra.

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553 This appears from his opposition respectively of the operations of interpretation and argumentation.
554 A similar point is made by Tontti when discussing Dworkin’s idea of the chain novel: R&P at 34.
555 *The Just* at 125.
Ricoeur makes the interesting point that the dichotomy drawn between interpretation and justification is parallel with that drawn between understanding and explanation. Both dichotomies are misconceived. The plea is for dialectic between both: “to explain more in order to understand better.”

Earlier in the same essay Ricoeur attacks the idea of the judicial syllogism. “The application of a rule is in fact a very complex operation where the interpretation of the facts and the interpretation of the norm mutually condition each other [before it can be said a rule has been breached]. … we cannot over emphasize the multitude of ways a set of interconnected facts can be considered and, let us say, recounted.”

*The Just* includes another essay titled “The Act of Judging”. Of particular interest to Ricoeur is the fact that the judge in the final analysis must take a stand. There are laws, an institutional framework, the intervention of a qualified legal decision-maker and a trial process where the pronouncement of judgment constitutes the endpoint. The trial process is likened to a drama with several actors (parties, lawyers, judge) but is subject to procedural rules and is more like a game in the sense that none of the participants know (or should know) how the game will end.

Behind the process lies conflict and behind conflict lies violence, the purpose of justice being to provide an alternative to actual violence. There are two aims short-term and long-term. The short-term goal is to put an end to the conflict between the parties and to give judgment on the case at hand. The long-term aim is to maintain social order, what Ricoeur calls “social peace”. Controversially and perhaps unduly optimistically Ricoeur would go further than his ideas require. He claims that the long-term aim also has the effect of making each party including the loosing party recognise that it has participated in a form of social distribution: that the judgment was not itself “an act of violence but rather one of recognition.”

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556 Ibid.

557 Ibid, at 121.

558 Ibid, at 132. A detailed analysis to the contrary is found in R&P at 128-134. This debate is relevant to Tontti’s ontology of law but does not bear on the epistemology of law, the doing of interpretation.
I conclude the introduction to the work of Ricoeur with reference to the last essay in the collection titled “Conscience and the Law”. Having set the groundwork for a critique of Gadamer’s philosophical hermeneutics, Ricoeur in a few sentences makes the case for the method of concurrent interpretation, undermines prospective interpretation and sets out a summary of how one should go about the interpretation of statutory rules:559

To apply a norm to a particular case is an extraordinarily complex operation that implies a style of interpretation irreducible to the mechanism of the practical syllogism. Here again, law constitutes a good introduction to the dialectic of moral judgment in a situation. The complex process at the end of which a case is placed under a norm involves two interwoven processes of interpretation. On the one side, that of the case considered, the problem is to reconstitute a plausible, a reasonable560 history, the history or rather the interweaving of histories constitutive of what we call a case, or better an “affair”.561 The hearing, as the centrepiece of the trial, reveals how difficult it is to disentangle a univocally true narrative from the confrontation between the rival versions proposed by the parties involved in the litigation. The difficulty is no less on the side of the norm. It is not always immediately clear that this case should be placed beneath this norm. What is called the qualification of a litigious act results from a work of interpretation, applied to the norm itself. … Their application therefore lies at the crossroads of a double chain of interpretation, with the facts on one side and the rule on the other. A judgment in situation thus comes about at the point of intersection of these two lines of interpretation. We can say that argumentation and interpretation are inseparable, the argumentation constituting the logical framework and the interpretation the inventive framework of the process ending in the making of a decision.

559 Ibid, at 152-153.

560 I suggest this is a mistranslation of vraisemblable. ‘Likely’ is preferred. Cp. raisonnable.

561 Translator’s quotation marks.
6.4 Theory and concurrent interpretation: Jarkko Tontti

6.4.1 Introduction

Jarkko Tontti (1971- ) is the author of *Right and Prejudice: Prolegomena to a Hermeneutical Philosophy of Law* [“R&P”] to which reference has been made throughout the thesis. The book is the publication of his doctoral thesis in law at the University of Helsinki written in English under the supervision of Kaarlo Tuori. It is obvious from his extensive references (to original texts and not to translations) that Tontti is conversant in Finnish, Swedish, German, French and English (and probably also Italian) and he has made his own translations. It remains a puzzling fact that even today his book has been largely neglected even by academics who embrace or are familiar with philosophical hermeneutics. The only exceptions appear to be two reviews (by English and Australian academics) both favourable and Tuori cites the book in his most recent publications. The puzzlement is compounded by the fact that Tontti himself engages with the ideas of major figures in English jurisprudence including those of Hart, Dworkin and MacCormick.

The book is in three parts. Part One is a detailed analysis of hermeneutical philosophy, Part Two is the construction of a concept of law based on philosophical hermeneutics and Part Three is the epistemology and methodology (knowing and doing) of law. The aim of this chapter is to introduce the work of Tontti relevant to methodology referring mostly but not exclusively to Part Three. Inevitably the introduction will overlap with (and reinforce) many of the ideas already introduced in the thesis. The focus continues to be on concurrent interpretation and on ideas for achieving concurrent interpretation.

Tontti has applied his knowledge of the work of Heidegger, Gadamer and Ricoeur to the perceived problem posed by Gadamer’s treatment of philosophical hermeneutics and I adopt the following:

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563 R&P at 36-37. Emphasis in original, references omitted.
... conflict is necessarily incorporated into every interpretative situation. All interpretative situations contain an authentic choice between possible interpretations and all actualised interpretative moments in the history of Being hide some other possible ways of presenting and interpreting that particular situation, that is they are performative, violent instances of language. It is force that, in the end, stabilises meaning. Or, as Heidegger points out, at the level of fundamental ontology; Being itself ‘quarrels’ or disputes’ ...

Because of their performative nature, legal interpretation and legal decision-making are paradigmatic examples of a hermeneutic praxis where the element of conflict conditions the interpretative situation. Even if the process of interpretation in litigation can be conceived of as a dialogue, as Gadamer developed the subject matter, this dialogue is necessarily composed of views which are different. If they were not, a dialogue would not be needed at all.

In this analysis Tontti questions Gadamer’s commitment to truth without method. It is similar to the approach suggested by Hinman:564

If Gadamer’s understanding of hermeneutics … is to avoid undermining its own distinctive claim to truth, it must begin with a recognition of the necessity of asking the quaestio juris as the question of what understanding, interpretation, and application ought to be. To fail to do this is, in Heideggerean terms, to reduce Dasein to is (sic) facticity and to ignore the fact that Dasein is in each case the kind of being for whom its own being is an issue. The question of how we understand is for us always simultaneously the question of how we ought to understand insofar as we are concerned with the question of truth.

Attention then shifts to the particular event of understanding. In the particular, questions arise and decisions must be made about the productivity of steps to be taken to obtain understanding. That work is now addressed particularly in the context of legal hermeneutics. Tontti provides a preface:565

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565 R&P at 4.
Hermeneutical philosophy, according to my proposal, has two sides; it is both a transcendental philosophy – explicating the conditions of the possibility of understanding – and a methodological orientation, with which we can clarify the methods through which practical interpretative work is carried out, for example in legal decision-making … That is, with hermeneutics we can try to answer both the fundamental questions of human Being-there (and ensuing existential-ontological conditions of all interpretation) and explicate the more practical problems of interpretation.

6.4.2 Tontti’s development of method

I suggest that Tontti’s book is best seen as a progression of ideas about philosophical hermeneutics and interpretation moving from the first orientation of explicating the conditions of the possibility of understanding to the second orientation of explicating methodological hermeneutics. His starting point belongs to Heidegger and Gadamer and he agrees with them “that legal interpretation is a paradigmatic example of a hermeneutic enterprise through which it is possible to gain insights into the structure of all interpretative ventures.”

With regard to the second orientation he makes it clear at the outset: “I make an attempt to establish a theoretical ground for critical legal interpretation, developing further the theme of critical hermeneutics conceived as hermeneutics of suspicion.”

Even in Part One of the book, which is primarily concerned with the first orientation, Tontti in an introduction to that part says “I seek to find out whether there is room for methodological questions in hermeneutics …” and goes on to point out:

Authors such as Jürgen Habermas and Paul Ricoeur have maintained that there are still plenty of important methodological and epistemological questions to be resolved in hermeneutics after the existential and ontological findings by Gadamer and Heidegger.

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566 Ibid.
567 R&P at 5. Emphasis in original.
568 R&P at 8.
569 Ibid.
The book proceeds to a final chapter (Part Three, Chapter III) in which Tontti “suggest[s] a hermeneutical and narrative model for conceiving the processes of legal decision-making, following the arguments presented in Part One …”

The thesis cannot engage in any complete way with the philosophical endeavours of Tontti and as stated in the introduction to this chapter the aim must be a modest one. The emphasis is on practical ideas that assist with the judicial interpretation of statutory rules and is premised on Tontti’s position that critique is legitimate notwithstanding the perceived problem arising from the views of Gadamer. Briefly, Tontti shares Ricoeur’s position already introduced but develops it further into the realm of judicial interpretation. Aspects of Tontti’s work in this regard already appear above. It is inevitable that the treatment in this thesis of Tontti’s ideas is selective and may not satisfy everyone. Of course his book is available for further reading.

On this basis I proceed to Tontti’s discussion of the work of Ricoeur in Part One, Chapter IV. The first paragraph is apposite to the perceived problem and central to the advancement of ideas to improve judicial interpretation in the thesis notwithstanding the perceived problem:

The demand to answer also the more practical aspects of interpretation has been taken seriously in contemporary philosophy by Paul Ricoeur. He accepts, to a certain degree, the existential-ontological turn of Heidegger and Gadamer, but argues nevertheless that this turn left behind many unresolved and important questions concerning epistemology and methodology. Ricoeur’s position in relation to Gadamer and Heidegger – who overlook methodology and stress the task of hermeneutics as an ontological venture – can be defined as an attempt to conceive of the role of hermeneutics through a dialectical relationship between ontology and epistemology (and methodology).

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570 R&P at 5.
571 R&P at 47.
Tontti begins by agreeing with Ricoeur that attempts to conduct an ontological investigation must be based on some methodological and epistemological assumptions and, whereas it would be naïve not to be aware of the necessary transcendental conditions of thinking, it would be arrogant to deny the place of methodological guidelines and epistemological convictions. Tontti continues with a discussion of the ideas of Ricoeur many of which are traversed in section 3 of this chapter and are not repeated. Tontti comes to the conclusion that Ricoeur’s work shows that even if the starting points of Heidegger and Gadamer are accepted “it is possible to develop also a methodologically-oriented hermeneutical thinking, that is, scrutinise the practical problems of interpretation in the various fields.” This is not the methodology of Betti. “Now we focus on texts (and text-like entities), which are interpreted with a special attention to the procedures of apprehension or appropriation of the ‘worlds’ proposed and opened up by the object interpreted.”

In Part One, Chapter V of his book Tontti explains and finds convincing Ricoeur’s account of narrative structures also introduced above. He says in concluding the chapter:

He [Ricoeur] accepts most of the insights presented by Heidegger and Gadamer, but - unlike them – he can write of matters relating to more practical and methodological questions of interpretation in the human sciences. The notion of narrative temporality is the central element with the help of which it seems possible to take part in both discussions.

Narrative temporality enables us to examine law as a story and with a narrative methodology we can scrutinise the stories in law.

It seems to me that Tontti’s particular contribution to the work of Ricoeur is his development of the importance of conflict as a condition of interpretation. We see this

572 R&P at 47-48.
573 R&P at 58.
574 Ibid.
575 R&P at 69.
in the citation at the end of the previous section of the thesis. Ricoeur himself had seen the conflict of differing interpretations as central to hermeneutics contrary to Gadamer’s views.\footnote{R&P at 36 and above section 7.3.2.} Part Two, Chapter III of Tontti’s book is about the “conflicts of interpretation” and includes the theme of power mostly untouched in Ricoeur’s work. The following passage captures Tontti’s position:\footnote{R&P at 126. See also the summary at 134.}

The dimensions of conflict and power are therefore manifestly present in the very structure of all legal thinking … That is, when we ‘do’ law we necessarily compete about being right, about whose interpretation about the tradition and its correct application is approved here and now, and put into action. Legal thinking entails interpretative solutions and thereby cannot escape conflict, power and finally violence at the very heart of it.

6.4.3 Tontti’s ideas for legal interpretation

In Part Three of his book Tontti turns specifically to the methodological orientation (Knowing and Doing Law) “with which we can clarify the methods through which practical interpretative work is carried out.”\footnote{R&P at 147.} He begins by reiterating a point made earlier in the book when discussing Betti’s work. Constructing a set of rules for legal interpretation does not in the end solve interpretative problems. Such rules themselves require interpretation. For the same reason legal definitions even definitions found in statutes can be only a starting point. As Kaufmann and the cases show the meaning of words in statutory rules change over time and with each case though the words remain the same. “The correct legal meaning of a word can never be definitively determined \textit{in advance}; it is only through the act of interpretation and application here and now that the meaning of a legal term is ‘finally’, that is in the specific case to be solved, defined.”\footnote{R&P 148. Emphasis in original.}

I begin with Tontti’s contention for the normative character of law. Tontti divides Part Three into three chapters. The first is an examination of the normative character of

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\begin{itemize}
\item \footnote{R&P at 36 and above section 7.3.2.}
\item \footnote{R&P at 126. See also the summary at 134.}
\item \footnote{R&P at 147.}
\item \footnote{R&P 148. Emphasis in original.}
\end{itemize}
law introduced immediately below, second an examination of the internal character of law by borrowing an analogy of law and theatre not given treatment here and third a proposed “hermeneutical and narrative model for conceiving the process of legal decision-making, following the arguments presented in Part One on narrative hermeneutics”\textsuperscript{580} introduced at some length below.

Tontti proposes that “norms do not exist before interpretation; they come into existence only as interpretation and through interpretation …”\textsuperscript{581} “Knowledge of law then is always normative. All interpretations of the tradition of law are competing proposals of how the present case (actual or hypothetical) ought to be resolved, that is how the tradition ought to be interpreted, applied and actualised in the present, singular and unique situation.”\textsuperscript{582}

This is a challenge to the Is-Ought distinction and Tontti takes on directly the received wisdom of ‘Hume’s Guillotine’, and the separation of Is and Ought accepted by legal positivism. This discussion is not repeated here.\textsuperscript{583} The thesis does not engage with any critiques of concepts of law. However the comment can be made relevant to the thesis that from the perspective of the interpretative accounts the distinction can be characterised as the fact/norm distinction. The syllogism of prospective interpretation seeks to make a distinction between norms (the major premise) and facts (the minor premise) whereas concurrent interpretation conflates these and is supported in so doing by Tontti’s analysis of the purported distinction.

Of particular relevance and interest are the consequences drawn by Tontti from the structure of language as he applies much of what Ricoeur has to say about narrative imitations. Words and sentences form narratives that are understood as configurative narrative imitations because as Ricoeur explains the time the original linguistic utterances were made has already passed. “No meaning takes place outside of a

\textsuperscript{580} R&P at 149.

\textsuperscript{581} R&P at 152. Emphasis in original. This resonates with Kelsen’s view of the retrospectivity of rules.

\textsuperscript{582} R&P at 158.

\textsuperscript{583} R&P at 153-155.
Tontti’s central point is that the words and sentences of a legal text are never neutral, there can be no purely neutral account of the text. He puts forward two grounds to support his point.

First he says “all narratives and linguistic utterances are necessarily selective, only some aspects of the object of interpretation and narration can be, in any circumstances, imitated and expressed in language at any time; several features are necessarily left out.” I understand this to be reference to the fact that when we interpret we necessarily do this by using new words that attempt to give meaning to the original text and we do so in an imaginary or actual context. An example (referred to above) is the phrase ‘in trade’. We are bound to leave ‘unsaid’ something about all the things that could possibly said about ‘in trade’ and this something other might be ‘said’ by another person and so on. “This necessarily selective structure of all narrative presentations (and all linguistic utterances) prevents a purely neutral account of the object of narration and interpretation. That is, the structure of language itself thwarts all attempts to establish a clear-cut distinction between Is and Ought.”

The second aspect follows. There is a conflict of interpretations. The aim of every interpretation is to suppress all competing interpretations. Normativity stems from the constitutive (our already loaded pre-understandings and presuppositions) power relations that reside in all conflicts between interpretations. We interpret because there is a dispute about meaning or more particularly about how to best resolve a conflict. There is an argument as to whether our interpretation should be accepted rather than the interpretation of another person.

Tontti gives an example. He is in a room with other people and as he points his finger at a table says to them ‘this is a table’. What is he doing? First he is naming the object and simultaneously demanding implicitly that the other people he is addressing

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584 R&P at 156.
585 R&P at 156. Emphasis in original.
586 Ibid.
587 Ibid. The example recalls Heidegger’s famous lecture that began with discussion of his lectern.
in the room accept his claim that it is a table. Second the statement presupposes pre-understandings in order for the statement to make sense in the first place. He and his audience already have an idea of what a table is. To develop Tontti’s example further, let us assume the ‘table’ has on it only a laptop, books and writing materials. Might it then be a ‘desk’? Whose interpretation will prevail that is, which narrative will prevail? There is choice and our pre-understandings limit the interpretative choices available: table or desk, not cupboard or chair.

As Tontti says,\(^{588}\)

Knowledge of the law, then, is always normative. All interpretations of the tradition of law are competing proposals of how the present case (actual or hypothetical) ought to be resolved, that is how the tradition ought to be interpreted, applied and actualised in the present, singular situation.

The significance of Tontti’s account of interpretation for statutory rules follows from the fact that prospective interpretations are an attempt to formulate a *neutral* meaning in advance of application. At best prospective interpretations may be equated with prefiguration and as such do not complete the task of getting the meaning of the rule. Knowledge of the law is always normative that is, choices must be made and be made in the judicial process of resolving the particular case.

This brings us to Tontti’s account of that process, which is now introduced in two interdependent parts (i) easy/hard cases and analogous reasoning and (ii) concurrent interpretation in steps.

### 6.4.4 Easy/hard cases and analogous reasoning

It is a significant aspect of legal training to be able to decide when a case is easy or hard. If a case is easy there is likely to be agreement on the outcome and there will not be a conflict central to the interpretative process that concerns the thesis. It can well be said that from the perspective of philosophical hermeneutics strictly speaking there are no easy cases that is, in the sense there is always a need to interpret. The decision

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\(^{588}\) R&P at 158.
to classify a case as easy or hard is an interpretative choice. What is of more interest is how we go about making a distinction between easy and hard cases. The answer to that question provides a clue to how we should go about the judicial interpretation of statutory rules.

“A case appears as ‘easy’ or ‘typical’ to the law-applying official because it resonates with stereotypical images originating from the cultural, social, political and legal tradition in which we live (and parts of which we are).” ⁵⁸⁹ These are the pre-understandings and prejudices we bring to the decision-making process. This is not exclusively ‘legal’ reasoning but is an aspect of our ordinary coping.

When we in the legal context intuitively search for meaning of a statutory rule we unconsciously ask whether the case at hand is similar to the typical narrative evoked by the words of the relevant rule. The easiness of the case will correlate with the similarity of the case with stereotypical other case or cases and our pre-understanding of the words of the rule. We have seen Kaufmann explain this process. Bernard Jackson also has explored this process in his discussion of semiotics and whilst I make no claim to expertise in this field Tontti does make a connection between Jackson’s ideas for law and philosophical hermeneutics.⁵⁹⁰

Jackson is interested in what makes sense for us in law. One of his examples is a murder case. He demonstrates how the jury was required to interpret the facts in terms of one or other of two stereotypical narratives. One was that of the jealous rejected lover, the other of the victim of a sophisticated frame-up. Jackson suggests three criteria for choosing one of the two narratives: (i) relative similarity (between the facts presented and the stereotypical narrative), (ii) strength of social knowledge of one or other the narratives (which of the stereotypical narratives is more firmly internalised in the minds of the audience and more familiar) and (iii) structural coherence.⁵⁹¹

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⁵⁸⁹ R&P at 177.

⁵⁹⁰ R&P at 176-177.

Riggs v Palmer\textsuperscript{592} is a famous example promoted by Dworkin\textsuperscript{593} and others. In this case a grandson had been convicted of the murder of his grandfather and sentenced to a term of imprisonment. The issue was whether he was entitled to the inheritance provided for him in his grandfather’s last and valid will. A statutory rule required that effect be given to the provisions of a valid will. The court at first instance considered it was bound by the express and clear terms of the rule and found in favour of the grandson. The Court of Appeals by a majority allowed the appeal. For present purposes, and putting the result to one side, the question is why was this a hard case having regard to the clear terms of the statutory rule?

It seems that normal correlations were disturbed. A feeling of confusion or dissatisfaction arose because this was not a normal stereotypical narrative of estate succession.\textsuperscript{594} The most important point here I suggest is that it was not the terms of the rule that made the case a hard case. It was the relationship of the rule to the facts of the particular case that made it a hard case.

This description of the way we distinguish between hard and easy cases is an illustration of analogous reasoning. Before going on to discuss analogous reasoning in more detail it is illuminating to consider briefly what MacCormick and Dworkin have to say about the distinction between hard and easy cases.

MacCormick adopts a ‘pragmatic basis’: a hard case is a problematic case as opposed to a clear case and a case is problematic because a problem has been raised.\textsuperscript{595} He expressly adopts what Bengoetxea has to say on this topic in the text *European Jurisprudence* discussed above.\textsuperscript{596} Bengoetxea says “the clear v hard case distinction is understood in a pragmatic sense and discretion is endemic to hard cases, but criteria of acceptability and canons of procedural rationality constitute an important limit to

\textsuperscript{592} *Riggs v Palmer* (1889) 115 NY 506, 22 NE 188.

\textsuperscript{593} Dworkin *Laws Empire* (1986) at 15-20.

\textsuperscript{594} R&P at 177.

\textsuperscript{595} *Legal Reasoning* at 51.

\textsuperscript{596} *European Jurisprudence* at 183-207. See Chapter 4.3.3.
He proceeds to a description of justification in clear and hard cases. In easy cases it is a straightforward application of deductive reasoning. “Justification in hard cases follows deductive schemes only as a general outline: the final decision is presented deductively, but the intermediate, enthymematic steps cannot be deductively justified, though they can be rationally justified in the law.”

Dworkin’s treatment is more elusive even though the notion of a ‘hard case’ has been (perhaps not now as explained below) a central part of his work. In an early account he seems to say that easy cases (he calls them ‘textbook cases’) are those in which it is possible to “cast the entire argument of the court’s opinion in the form of one or more syllogisms …” In later work Dworkin offers examples of hard cases such as when “no established rule can be found”, “reasonable lawyers and judges … disagree about legal rights”, and “no settled rule dictates a decision either way”. Clearly hard cases are not easy cases.

It is contended that these descriptions of easy and hard cases beg the question of how we make the distinction in the first place that is, before we would decide what interpretative reasoning process would we adopt? And to say that an easy case arises when it is appropriate to employ syllogistic reasoning “amounts to the tautology that syllogistic reasoning is appropriate when syllogistic reasoning is appropriate. This is not much of a definition of an ‘easy case’ in the sense of those qualities of a case which makes the application of the rule straightforward but more a statement of the

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597 European Jurisprudence at 193.
598 Ibid.
600 Dworkin “Judicial Discretion” (1963) J Phil 623 at 625-626. This passage continues with a conventional description of syllogistic reasoning as it might apply to a rule.
601 Dworkin Taking Rights Seriously (1977) at 44.
602 Ibid, at 81.
603 Ibid, at 83.
consequences for judicial reasoning that flow from the prior identification of a case as an ‘easy case’.)*604

Dworkin is aware of this problem and his most recent move is to contend that the distinction need not be drawn at all.605 Under the heading “When Is The Language Clear?” he concludes a discussion of how Hercules should read a statute when the language is not clear “that is, when it does not, as we might say, enforce itself*606, by noting the postponed question of how Hercules decides whether the statute is unclear. Dworkin contends: “The distinction I relied on is just an expository device that need be given no place in Hercules’s final developed theory.” 607 He notes the many different ways or senses in which the text might be said to be unclear: ambiguity, vagueness and the use of abstract words. He goes on to say that none of these fit his two examples, one of which is Riggs v Palmer. In that and the other case (the snail darter case) the words of the relevant statute were clear. Nothing in the language of the statute on succession disqualified murderers or for that matter blue-eyed people. Notwithstanding this apparent clarity it was correct indeed inevitable that the claim should fail on application of Dworkin’s principled approach. It is legitimate to ask why this should be so.

On this apparently new view “the description “unclear” is the result rather than the occasion of Hercules’ method of interpreting statutory texts. We will not call a statute unclear unless we think there are decent arguments for each of two competing interpretations of it.”*608 But having ventured this far is not Dworkin continuing to beg the question (a slightly different question): why do we think there are decent arguments? Dworkin in acknowledging the problem (he expressly footnotes the Hutchinson and Wakefield article609) calls the problem a ‘pseudoproblem’. “Hercules

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605 Dworkin Laws Empire (1986) at 351.
606 Ibid, at 350-351.
607 Ibid, at 351.
608 Ibid, at 352. Emphasis in original.
does not need one method for hard cases and another for easy cases. His method is equally at work in easy cases, but since the answers to the questions it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all.”

This requires Dworkin to acknowledge: “I do not mean that no one will say a statute is unclear unless he has already decided that the acontextual interpretation is the wrong one. He will concede that it is unclear if he thinks the interpretive question is complex or debatable even if in the end he thinks the acontextual interpretation best.” I take Dworkin to be referring to an interpretation made outside of context a dubious possibility according to philosophical hermeneutics. I suggest that Dworkin attempts to answer the “pseudoproblem” with a “pseudosolution”: a case is by definition a hard case otherwise it would not be a case at all (cases by definition resolve conflicts) and thereby Dworkin accepts the philosophical hermeneutic principle that strictly speaking there are no easy cases.

At least it seems that whilst Dworkin is still looking for fit and justification he no longer presents a deductive model of statutory interpretation or links easy cases to syllogistic reasoning. Perhaps in the final analysis Dworkin accepts that for both easy and hard cases we are influenced by our cultural, social, political and legal pre-understandings and traditions and that the process is one of analogous reasoning.

6.4.5 Concurrent interpretation in steps

The thesis continues with the discussion of analogous reasoning and the analysis of Tontti in an attempt to develop in a series of arguments (overlapping, interdependent and somewhat repetitious) for theoretical ideas which if accepted would encourage concurrent interpretation and discourage prospective interpretation.

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610 Ibid, at 354.

611 Ibid, at 353.

612 “Acontextual” is not found in standard dictionaries (yet) but is taken to be like amoral and apolitical.
1. Justice is not blind.

We are familiar with the representations of Justitia goddess of justice who holds a sword in her right hand symbolising the judgments she renders and in her left hand a pair of scales symbolising weighing and balancing and equity and justice. A third common attribute is a blindfold covering her eyes. It is interesting to note that she has not always been represented as having a blindfold but the attribute of a blindfold has become commonplace in the modern Western setting.\(^6\) The blindfold purports to symbolise justice as ‘blind’ and therefore objective, impartial and free of prejudices. The references below indicate that this view is misplaced.

It is argued that there are two myths. The first myth is that justice is ‘blind’. As repeatedly contended above pre-understandings and prejudices (not necessarily unreasonable) are necessary conditions of all processes of interpretation and understanding including legal interpretation and legal decision-making.

The second myth arises from an aspect central to the third attribute of Justitia that is, the idea that justice is also about applying pre-existing law to cases. No matter what thoughts or prejudices she might have Justitia must find and apply pre-existing law otherwise justice has not been done. This is according to the rule of law value that people know in advance the content of laws, which are then located by Justitia independently and free of prejudices.

This rule of law value is a recurrent theme as we make this and the following steps. Therefore it requires further discussion and definition. We need to be clear about what people are expected to know and what is meant by the content of laws in the context of statutory rules.

Statutory rules are on the books as it were as a silent guide to conduct. In a general sense the content is discernible from reading the text of the statutory rule. The text may be the subject of advice and commentary. But it is wrong to claim that all of the

‘content’ of rules is on the books and knowable as an incontrovertible fact for any given particular case in advance. I suggest that people well understand this: they do want to know, and it is desirable that they know, when rules are enacted and what rules say. However, they well understand that how a rule has in the past or will in the future affect a particular real-life fact-situation depends and depends on any number of matters relating to that particular real-life fact-situation including ultimately the judicial process of resolving a particular conflict.

As contended a number of times in this thesis, the rule does not state the norm but sets out textual material from which the norm is constructed. This situation follows from the nature of statutory rules and is not undesirable.

2. Laws cannot determine the reality of the actual circumstances of a particular situation.

As argued above, the second myth is that people can know in advance the content of laws. Some believe that pre-existing laws are always and presently available in the same form, that they have meaning outside of and before application to the particular case. The temporal structure behind the prevailing ideology of law is linked to the belief that a legal decision is justified (even if not reached actually) by our capacity to formulate reasoning as a normative syllogism (deduction). The model of the syllogism with its three elements of major and minor premises and a conclusion is in accordance with the idea that people must know in advance the legal consequences of their actions or omissions.

Syllogistic reasoning is discussed in Chapter 4.3.2 and is not repeated here except to repeat two statements made by Tontti that capture the argument here advanced:614

… whereas the temporality of law is the past, the temporality of a legal decision is the present. Bringing the past to the present, i.e. deciding a legal case, is inevitably a creative and singular act which, by definition and necessarily, departs from the past and creates the present situation of a tradition anew.

614 R&P at 180 and 181. Emphasis in original.
... in every instance of legal decision-making the sense of the law is each time newly determined by the case to be solved.

3. The judicial process is not merely declaratory.
Statutory rules do not contain the norm to be applied but contain the essential materials out of which the norm is constructed for the particular case. The judicial process of constructing the norm is not merely declaratory but is effectively retrospective. These propositions are found in the work of Bell, Kelsen and Kaufmann already referred to. Tontti following Jackson draws attention to the fact that the (mythical) rule of law ideal that people know in advance the content of laws has two requirements, both of which must be met (i) the rule is stated in advance and (ii) must already apply to the particular case, and not retrospectively.

A consideration of the linguistic character of the relationship between general rules and particular applications provides further clarity. It is generally accepted that linguistically ‘meaning’ can be described in two dimensions, ‘sense’ and ‘reference’. We normally associate ‘meaning’ with ‘reference’: the meaning of a word is that to which it refers, there is a correspondence between language and reality. ‘Sense’ is a function of the relationships within a system of meaning of individual sense-bearing elements sometimes called signs. The following two arguments hopefully provide some clarity about this distinction.

4. The meaning of statutory rules cannot be equated with their reference.
Statutory rules cannot refer to the facts of the particular case. At the time the general rule is enacted there is no knowledge of the specifics events to which the rule will refer. MacCormick agrees, as he must, and claims that his account of syllogistic reasoning does not depend on “the presupposition about reference which Jackson attacks (quite rightly) as unacceptable.”615 “It is no wonder that Jackson can trash so effectively the theory of the normative syllogism after he has fixed it with the untenable presupposition about the supposedly referential character of the major premises of such syllogisms in the form of universal propositions of law.”616

615 Legal Reasoning at 57.

616 Legal Reasoning at 60.
5. The meaning of statutory rules cannot be equated with their sense.

MacCormick in his defence of deductivism contends that “the problem of matching major and minor premises in a normative syllogism is the problem of securing sameness of sense of the predicates deployed by both.” Tontti demonstrates that securing ‘the sameness of sense’ requires analogous reasoning. MacCormick anticipates this by acknowledging: “Narrative modes of argumentation can have real value here, but not to the exclusion of other modes. That it is only in minor premisses that predicates are used referentially, with reference to particular features of particular concrete cases, while their use in major premisses is non-referential, poses no difficulty for this [MacCormick’s] theory.” This requires further discussion.

MacCormick puts his position this way. It is a mistake to see the problem as one about reference; the problem is about sense. He uses the well-known Socrates/blasphemy example of a syllogism set out in Chapter 4.3.2 and takes the predicate ‘has blasphemed the gods’. He claims that this predicate has the same sense in both major and minor premises. He says this is the case if there is an implicit decision to treat the facts alleged or proven as properly characterised by the predicate “in the sense in which this term is used in the relevant legal proposition.” He seems to be saying that this occurs as a matter of interpretation (in advance) and not as a matter of classification (of the particular facts and in respect of which “argument by analogy plays a significant part”). “The legal proposition [has blasphemed the gods] is the legal proposition stated or presupposed as legal ground for the decision. The specific case referred to by the decision maker then counts as an instantiation of the relevant legal universal, and this justifies the decision of the case, assuming it to be the duty of the decision maker to act according to the relevant rule.”

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617 Legal Reasoning at 61. MacCormick’s defence of deductivism is discussed in Chapter 4. Tontti refers to MacCormick “Notes on Narrativity and the Normative Syllogism” (1991) 4 IJSL 163. This article forms the basis of ch 4 Legal Reasoning, which was published after R&P.

618 Ibid.

619 Legal Reasoning at 59.

620 Ibid.

621 Ibid.
If interpretation is required then “this is the process of selecting and deciding for one possible sense ascribable to [the predicate] as its legally appropriate meaning, giving reasons for that interpretative choice …” 622 MacCormick has prospective interpretation in mind as he goes on to discuss what might amount to blasphemy and puts forward a number of possibilities, seen as points of law. As will be obvious MacCormick’s argument is informed by his stance that deduction forms a crucial part of the justificatory process of legal argument. It also begs the question of how the selection of a particular sense is made.

The response of Jackson is that MacCormick’s attempt to rescue the rule of law value (that people know in advance the content of laws) effectively is to identify the sense of the predicate of the major premise implicitly with the sense intended by Parliament even while explicitly accepting the problem of reference. Jackson points out that in fact it is still the court in the interpretative decision that now re-creates or re-presents the sense of the legislative discourse. And this takes place retrospectively just as for reference. The temporal element of the normative syllogism still cannot be maintained.623

MacCormick’s rejoinder624 is a reiteration of prospective interpretation that is, the operative predicates in the appropriate sense can be determined in advance as a matter of interpretative argument. This would not defeat the rule of law value “even though the evolved interpretation of a rule departs from what may be thought to have been in the mind of any of the original legislators.”625

Essentially MacCormick would construct the sameness of the predicates not by reference to Parliamentary intention but of the ‘present’ sense of the text of law (the major premise) and the description of a factual situation of the case to be decided (the

622 Ibid.
625 Ibid, at 224.
minor premise). The ‘present’ sense of the major premise is an enduring justification. The construction of sameness is contemporaneous so purporting to avoid the problem of retrospectivity. There are two problems with this ingenious approach. One is that the content of laws exists from the time of enactment and it is between that time and a ‘justification’ arising from the hearing of the case that people would want to know the content of laws. MacCormick’s approach would appear to beg the question of how we get the content of the enduring justification. Then as Tontti points out the construction of sameness “is not deductive reasoning but finding relevant similarities between these two [predicates], i.e. analogical reasoning!”

6. The judicial interpretation of statutory rules is based on analogical reasoning.

Analogical reasoning has been a recurrent theme of the thesis and of course the concurrent interpretation of statutory rules advocated for in this thesis is based on such reasoning. Tontti follows discussion of the theoretical ideas relevant to the first five arguments above with an interesting summary of what analogical reasoning means for legal decision-making. He echoes Kaufmann’s and Jackson’s views that analogical reasoning is central to legal decision-making and as he describes such reasoning is about:

finding, or constructing, similarities and differences. The culturally determined narrative typifications of action, evoked by the words of legal texts … are compared to the facts of the case to be decided (which is also composed and understood as a narrative) and the decision is reached by composing a plausible new narrative text (the decision) where these two seem to have enough analogical similarities so that the narrative text produced can be read by others as a plausible ‘story’.

Jackson expressly distinguishes decision-making from justification and adopts a narrative account conceived “as one of coherence or pattern-making – a question of degree rather than absolutes, of similarities rather than identities.” Kaufmann’s analysis of types and to the same effect has been discussed above and is not repeated.

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626 R&P at 181.

627 Ibid.

628 Jackson Narrative at 58. He refers to premises but on the basis that they conceal narrative form. He makes no reference to Kaufmann.
7. Courts should construct a new reference as if the rule refers to the case at hand.

Courts should accept that the best means of interpreting statutory rules is to construct a new reference as if the rule refers to the case at hand. The judicial task in deciding a case in which a statutory rule is invoked is to appropriate here and now the rule and the facts of the case and to produce a plausible narrative where they resonate. This follows the process of prefiguration and configuration in particular, the imitation of the facts and the correspondence of the text and the narrative.

Tontti describes the process in these terms. We begin with a legal text that only has a linguistic sense that is, internal relations or structure. The text is interpreted when the court constructs a new imaginary reference, a referential illusion that did not exist before interpretation by the court. The court should “construct a new narrative where a new plausible but imaginary reference is constructed onto the legislative text, that is an illusion of as if it were referring to the case to be decided.”

This analysis requires an answer to the questions “How do we construct the narrative of the facts of a case and the narrative originating from legislative texts? How are legal decisions (creating the referential illusion) constructed as narratives where the two stories resonate analogically?”

8. Narratives are constructed by using Ricoeur’s three-level scheme of prefiguration, configuration and refiguration.

Ricoeur’s narrative scheme is introduced in section 6.3.4 above. Now the thesis is directed to Tontti’s analysis (following Ricoeur) of narrative in the context of judicial interpretation. He reminds us “the narrative imitation of reality and human action is always structured as a story with a plot, that is, it contains emplotment.” Plot structures have a temporal dimension.

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629 R&P at 183.
630 R&P at 184.
631 Ibid. Emphasis in original.
There is a constant movement between configuration and refiguration. In the concrete phase of writing the judgment, the legal decision “takes the form of a mediator between individual, singular events and the unity of the plot.” Refiguration, the event of reading “fills in the discrepancies and inconsistencies in the narrative.”

Conflict is a necessary constituent of all interpretative situations. All narratives contain what Ricoeur calls ‘a concordant discordance’. Discrepancies and disconnected elements of the narrative are taken into account in the mediation so that even seemingly disconnected facts of a case and components of typical narratives evoked by the words of the rule can be made into a coherent whole with plot structures and the illusion of narrative continuity.

“There are always multiple legally possible answers in every legal case, and finding the hidden possibilities of traditions in question is a critical task that can be realised also in practical legal decision-making. This entails critical distanciation and posing the question why. Why does this particular decision seem appropriate or ‘self-evident’?” Strategies to locate hidden agendas, tacit presuppositions and different perspectives may be appropriate.

9. Tradition limits the judicial choice.
We have already seen that preconceptions and ‘prejudices’ are necessary conditions of interpretative understanding. Gadamer calls these the history of effect which indicate that one can neither interpret nor decide legal cases, without being affected by the tradition of earlier interpretations and the ensuing prejudices. The history of effect of tradition has a hold over judges, whose choices of interpretation are thus limited; and these legal pre-understandings are not formed by the ‘law in

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632 Ibid. Emphasis in original.
633 Ibid.
634 R&P at 185. Emphasis in original.
force’ … but stem from the whole cultural, political and social heritage of the community.

I suggest that notably in this respect the interpretative tools play their part. Of course “the tradition (s) of law does not offer straightforward answers, it only limits the options within reach.”

As Tontti reports, Kaufmann shares this view of the history of effect. Kaufmann argues that such preconceptions “have to do with Rechtsgefühl, an ethico-moral intuition about right and wrong … an art of having correct pre-understandings, which are then made transparent, and reflected thoroughly in the decision-making process.”

The ethical component of such decision-making requires further consideration. Philosophical hermeneutics neglects this, but is the source of one idea: because the interpretative situation is fundamentally violent, the only acceptable stance is to reduce violence, and the unconditional demand when reducing violence is that decision maker must be ethical.

Another idea is that language, as a social construct, contains ethical components: through conceiving collective consciousness through language we acquire ethical and other abstract concepts.

636 Ibid.
637 R&P at 178.
638 R&P at 159. Particularly in taking into account all contestable proposals and silencing none.
639 Gianni Vattimo in The End of Modernity: Nihilism and Hermeneutics in Post-modern Culture (1988) at 133-139 indicates this idea. This is a matter beyond the scope of the thesis. It is interesting to note that Iris Murdoch (Charles Taylor was her student) whilst accepting Heidegger’ treatment, emphasises that human beings are creative users of language and not simply participants of a linguistic system and as users bring ethical responsibilities to our world. Iris Murdoch Metaphysics as a Guide to Morals (1992) at 194 and see Maria Antonaccio “The Virtues of Metaphysics” in Justin Broackes (ed) Iris Murdoch, Philosopher: A Collection of Essays (2012) at 159-163.
6.5 Summary

Concurrent interpretation has continued to be the theme of this chapter. I contend that the ideas of Kaufmann, Ricoeur and Tontti and for that matter of any one of them confirm the tenability of concurrent interpretation and challenge the tenability of prospective interpretation. This means that prospective interpretation is either (i) a misapprehension whether conscious or not that obscures and confuses the practice of interpretation and a true understanding of legal interpretation, that should be recognised for what it is and not be promoted or followed (following Kaufmann) or (ii) prospective interpretation is not a tenable and complete account for the judicial interpretation of statutory rules (following Ricoeur and Tontti). At best prospective interpretation is merely prefiguration and true judicial interpretation requires all of prefiguration, configuration and refiguration.

It does not follow that a radical change in the judicial approach to statutory rules is required. Indeed examples have been given in the thesis of cases in which concurrent interpretation has been satisfactorily adopted by courts and we have seen how concurrent interpretation need not impinge adversely on rule of law values and indeed promotes such values. Analogous reasoning and the interpretative tools continue to play their part and are given proper emphasis. The target is interpretation in advance and the rewriting and promulgation of tests as justifications. I suggest that the conceptual material introduced in this and the preceding chapter expose prospective interpretation as untenable, incomplete and of dubious utility and promote the tenability, completeness and utility of concurrent interpretation.

In the next chapter I seek to provide further support for concurrent interpretation by reference to cases concerning statutory rules in an answer to the question: Why is concurrent interpretation better practice? There is also further discussion of the interpretative tools and analogous reasoning in practice.
Chapter 7

Why concurrent interpretation is better practice

7.1 Introduction

It will not have escaped attention that the thesis is an argument for concurrent interpretation and against prospective interpretation. Already it is indicated that there are good rule of law and theoretical reasons to prefer concurrent interpretation and practical problems with prospective interpretation are raised. But does it matter in practice? Why should we think concurrent interpretation is better practice? Related to these questions are practical ideas about how concurrent interpretation can and does work in practice. These matters are explored on a number of interconnecting levels in this chapter.

First is the presentation of a typical scenario that gives context to a subsequent discussion of the application of the rules contained in s 6 CRA and s 9 FTA and of the prospective interpretations of those rules in Savill and Heaven. The scenario is intended to provide a vivid display of the consequences of prospective interpretations by reference to those cases and of the adverse effects of prospective interpretations. The need to interpret judge-made criteria so undermining the idea that prospective interpretation increases certainty is illustrated in practice. And substance is given to the effect prospective interpretations have on the rule of law values that the public should have advance notice of laws and that laws be accessible.

The scenario is followed by an analysis of leading cases which have ‘interpreted’ the rules: (i) s 6 CRA which provides entitlement to damages640 “if a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract” and (ii) s 9

640 CRA, s 7(3)(a) provides a right to cancel if the same criteria in s 6 are met.
FTA which provides “No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.” These rules are probably the two rules most frequently invoked in conflicts requiring adjudication in the contract and commercial settings.

The leading cases are Savill v NZI Finance Ltd641 in respect of the CRA and AMP Finance Ltd v Heaven642 in respect of the FTA. These cases are paradigmatic examples of the prospective interpretation of statutory rules and both cases establish tests for future application of the rules that effectively replace the statutory words. The process in each of those cases of adopting and using prospective interpretations is described and the reasoning, legitimacy and effect of the interpretations are analysed. This treatment includes discussion of subsequent cases. In respect of s 9 FTA the different approach in Australia where the High Court of Australia now insists on concurrent interpretation of a rule equivalent s 9 FTA is also discussed.

It is demonstrated with reference to these cases that there is a marked difference in approach and result depending on whether the judicial process is one of prospective interpretation or of concurrent interpretation. This treatment challenges the tenability, completeness and utility of prospective interpretation and encourages concurrent interpretation. Not only is there a reduction in accessibility and of the due notice of laws but also policy considerations have been allowed to intrude and the new criteria promulgated in each case have the effect of chilling the prospects of success of potential claimants in ways Parliament could not have anticipated. The doctrine of separation of powers is called into question.

The discussion proceeds to four topics that are relevant both to why concurrent interpretation is better practice and to ways the utility of concurrent interpretation may be enhanced. These are (i) an exploration of the interpretation of so-called ordinary words, (ii) a comparison between two cases concerning the interpretation of statutory rules in criminal law one decided by the New Zealand Supreme Court and the other by the High Court of Australia, (iii) a practical illustration of analogous reasoning and

641 Savill v NZI Finance Ltd [1990] 3 NZLR 135 (CA) [“Savill”]

642 AMP Finance Ltd v Heaven (1997) 8 TCLR 144 (CA) [“Heaven”]
(iv) a discussion of the practical utility of the interpretative tools by reference to s 6 CRA.

### 7.2 Scenario

Ms Neufarmer entered into an unconditional agreement for sale and purchase of a pastoral farm property she intended to convert to dairy production. She kept this intention secret because otherwise it might drive up the price. Water supply for irrigation was vital to her plans. She made a thorough site inspection with the vendor’s agent Mr Beaver, including of two wells with pump, water tank and drinking troughs for stock. At this point she asked the agent as casually as possible some general questions about the water supply and was told that water supply in this region was no problem. He said he had sold neighbouring properties and seen valuations that confirmed this.

Mr Beaver added: “There must be a good easy-to-get water table for the farms round here.” All farms in the region were pastoral farms so far unaffected by the demand for dairy conversions. It was not known to the vendor, the agent or the public generally that the water table was rapidly diminishing as a result of other works upstream. Following settlement and considerable outlay Ms Neufarmer found that the water supply was inadequate for dairy production. It was not even adequate for supplying irrigated water to pastoral farms.

Ms Neufarmer went to her solicitor Mr Goodlawyer for advice. She told him all of the above and that she had been to the library to see what the law says about a claim against the vendor or the agent. She had read s 6 CRA, which seemed to fit her case perfectly. “There was a contract and I had been induced to enter into it by a misrepresentation made to me on behalf of the other party” she told Mr Goodlawyer holding up a photocopy of the section. “And it didn’t matter if the misrepresentation was innocent” she added. “Look I would never have bought the farm if I had known

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643 This scenario and the accompanying analysis of the CRA first appeared in Christopher Walshaw “The Judicial Process in the Application of “Induced By” in the Contractual Remedies Act 1979” (2010) 16 NZBLQ 268 [“Walshaw CRA”].
the truth about the water supply. I wish he hadn’t said anything. Then I would’ve made other enquiries.”

Mr Goodlawyer checked the agreement and could see nothing relevant to this matter at all. He cautiously said, “but it’s not as though they knew the true position themselves”, to which his client replied “well they shouldn’t have said anything. I’m not saying there was fraud. I don’t have to prove that”. “But wasn’t this just a casual comment, like an opinion, as you went round the farm? After all the agent didn’t know you were going to convert.” “But he said it, it was wrong and whether the agent knew it or not I relied on what he said and signed up. Section 6 is clear isn’t it?”

Mr Goodlawyer responded: “but I’m not sure you can prove that the vendor intended to induce you or was deliberately using words that would have that effect. And another thing, it could be argued that no reasonable person would have relied on what the agent said.” “Oh, where does it say that in s 6?” “Well actually it doesn’t say that but the courts have been interpreting it as saying that. It might be that we can satisfy these requirements but you must understand that there is some risk.” “Where do the courts get this interpretation? After all, it says the misrepresentation may be innocent or fraudulent.” “It’s the words ‘induced by’, the way the courts look at the word ‘induced’. “Oh the law. I had this feeling it wouldn’t be as simple as I thought. I suppose I’m going to have to spend a lot of money going to court.” “Yes. We might be able to settle, but I know the vendor won’t be very happy about this. Perhaps he can sue Mr Beaver. Perhaps the agent is insured.” Ms Neufarmer was despondent.

The lawyer went on to discuss potential, but risky claims against the agent for conduct that is misleading or deceptive or likely to mislead or deceive in breach of the rule set out in s 9 FTA. “I don’t think we can get the vendor for that because his conduct wasn’t in trade, this was a one off private sale as far as I can see, though the agent was in trade. Anyway the agent would argue that because he was ignorant of the true position he did not consciously engage in misleading conduct and again you would have to prove it was reasonable to have been misled. Also there are complicated interpretations about damages that won’t help you. I suppose we can check to see if there could be claims for negligent misstatement or against the vendor for mistake. But the CRA replaces claims for negligent misstatement and I cannot see any mutual
mistake. What say we write letters, detailing your claims and see what response we get? And we can instruct a barrister”, Mr Goodlawyer recommended. His client agreed.

Shortly after, Mr Goodlawyer made an internet search of s 6 CRA and related cases and sure enough the Court of Appeal case **Savill** was a much cited authority. On its account of the law it must be shown that the representation was such as to induce a reasonable person and that the representor intended to bring about the result (entry into the contract) or that the representor “wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did.” And some of the cases following **Savill** seemed to ask for proof that the representor must have understood the effect of his words and even proof that the representor knew the true facts.

Mr Beaver’s search of s 9 FTA was no more encouraging. Another Court of Appeal case **Heaven** dominated the search windows. In that case the Court promulgated a three-step test requiring proof (i) that the pleaded conduct was capable of being misleading (ii) that the conduct did in fact mislead and (iii) that it was reasonable to have been misled. The test routinely was cited and followed in subsequent cases. And there were cases where intent on the part of the representor has been a relevant factor: the lack of intent to deflect the representee from making her own enquiries may indicate that there was not conduct that was misleading or deceptive or likely to mislead or deceive.644

Thinking aloud Mr Goodlawyer tested how the evidence might turn out. Mr Beaver would say, “I made an innocent mistake and I did not give the information with the intention that Ms Neufarmer enter into the contract. Yes, I did use the language mentioned but in no way did I calculate that this would cause her to enter into the contract. I didn’t know about her ideas for a conversion. I was just stating the obvious as it affected pastoral farming. Don’t forget I didn’t know about the true situation.”

“But Mr Beaver a normal person hearing those words would have been induced.”

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“But my words were not calculated to have that result. No person would have thought I intended Ms Neufarmer to enter into the contract on the strength of what I said.”

“Mr Beaver you cannot have had anyone else in mind.” “Yes, but anyway, no reasonable person would have thought like she did, taken the risk on the strength of a few casual words. I certainly didn’t think that could happen.”

The scenario demonstrates the rule of law implications of prospective interpretation. In particular accessibility to law is markedly reduced as Ms Neufarmer finds out. Mr Goodlawyer’s struggle with the judge-made criteria shows that prospective interpretation undermines rather than enhances determinacy and the attempt to increase certainty.

_Savill, Heaven_ and related cases are now discussed.

### 7.3 _Savill_ and prospective interpretation

#### 7.3.1 The case

_Savill_ was the first opportunity for a consideration by the Court of Appeal of the statutory rule contained in s 6 CRA. Unpromisingly this was a case heard on the papers by way of summary judgment. In defence of a claim by the lender that the appellants honour their guarantee the appellants said they had been induced to enter into the contract of guarantee by a misrepresentation made by the solicitor (and agent) for the lender that a related agreement for sale and purchase was unconditional whereas it was not and the purchasers did not complete. In fact the solicitor had relied on information supplied by the appellants who had their own legal representation and at most the solicitor for the respondent had agreed to advise the respondent that the information supplied was satisfactory to the lender.

Short work was made of this defence by Holland J in the High Court\(^{645}\) and by Bisson J in the Court of Appeal. Holland J was satisfied that the appellants did not rely on the

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\(^{645}\) _NZI Finance Ltd v Savill_ HC Christchurch CP 499/87, 2 March 1987.
respondent’s solicitor in regard to confirmation of the contract for sale. Bisson J found it difficult to regard the solicitor’s response as a misrepresentation rather than being confirmation of advice he would be giving to the respondent. The solicitor had relied on an undertaking to complete, perhaps unwisely, a fact known to the appellants. “This was certainly not a misrepresentation to Mr and Mrs Savill that they had an unconditional contract.” Both solicitor and appellants relied on an undertaking to complete. As to inducement the only inference to be drawn from the evidence was that they did not rely on the solicitor’s response but relied on the undertaking.

This direct route to resolution of the conflict did not appeal to Hardie Boys J. His Honour set about interpreting s 6 (and s 7(3)(a)) CRA and it is instructive to examine the process. In advance of application he set about a densely compressed analysis of the criteria in the statutory rules with the object of finding their meaning. It was only after this task was complete that he turned to the facts of the case and then endeavoured to apply his understanding of the meaning of the rules to those facts. Typically and as happened in this case the process engendered steps to be satisfied that are essentially a rewriting of the criteria in the statutory rules. His Honour’s “understanding” of the meaning was substituted for the statutory criteria with the problems apparent from the scenario. This is a clear example of prospective interpretation. Let us look at how this works.

His Honour undertook a detailed analysis of the words of the statutory rule bringing to the task considerable extraneous material found in the common law and apparently overlooking the reform process that lead Parliament to simplify and codify the law of contractual misrepresentation. For example the concept of ‘materiality’ is explored and ‘inducement’ is found to indicate an element of intent. An emphasis was placed on ‘the objective approach’.

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646 Savill at 142-143.

647 Details and critiques of this analysis are found in DW McLauchlan “Materiality and Intention to Induce – Are They Requirements for Actionable Misrepresentation?” [1990] New Zealand Recent L Rev 271 and DW McLauchlan “Intention to Induce: Should it be a Requirement for Actionable Misrepresentation?” (2001) 7 NZBLQ 43 and Walshaw CRA.

648 The report of this Committee “Misrepresentation and Breach of Contract” (1967) (reprinted 1978) and the Second Reading Debate (12 June 1979) 422 NZPD 623-5 are important materials for an understanding of the CRA.
The outcome was that Hardie Boys J (Casey J agreeing\textsuperscript{649}) formulated a new two-step test of inducement requiring proof:

1. That the representation was such as to induce a reasonable person to enter into the contract, and

2. That the representor intended the representee to act upon his representation, or is held to have so intended because he wilfully used language calculated, or of a nature to have that result.

Following his analysis of the statutory rules Hardie Boys J considered the facts of the case before the Court. His Honour was of the view that there was an arguable case as to whether or not the Savills could meet the first of the two-step test (reasonableness). However there was no prospect of the Savills being able to establish the second of the two-step test, an intention to induce.

It is clear that both steps of the new judicial two-step test must be met: that is the ratio decidendi. It is also clear that they are considered to be discrete and require separate evaluation. A representee may meet one of the steps but fail the other so failing to establish inducement. Because the Savills could not establish the second step, an intention to induce, it followed that they had no defence to summary judgment.

Of course this was also the conclusion of Holland J in the High Court and Bisson J in the Court of Appeal by a direct application of the statutory words. However the prospective interpretation of Hardie Boys J (supported by Casey J) produced consequences now discussed.

\textsuperscript{649} Casey J expressly agreed with the conclusions reached by Bisson and Hardie Boys JJ “for the reasons they have given.” Puzzling but lending substantial authority and importance to the views of Hardie Boys J. Savill at 137.
7.3.2 Consequences of Savill

Subsequently trial judges have considered themselves bound to apply each step of the two-stage test. The chilling effect is demonstrated in an empirical study made of thirty-two cases that required judgment on the issue of inducement, found in Walshaw Contractual Remedies at 275-280. The study also demonstrates that when courts promulgate a test this test itself requires “interpretation” and nuances (i) as to weight to be given to each of the steps and (ii) within the second-step as between actual and constructive intent. Some of the cases illustrate how convoluted the reasoning on the meaning of Savill, rather than on the meaning of the rule, can become. In some of the recent cases Judges have been prepared to effectively ignore Savill and adopt concurrent interpretation, notably Heath J in Best of Luck Ltd v Diamond Bay Investments Ltd (No 2).650

The test has also been expressed in different terms, most notably by Richardson P for the Court of Appeal in Richards v Murgatroyd:651

Next, as to inducement, the issue in dispute on the evidence was whether the plaintiffs had shown that the defendant vendors intended the particular representation to be acted upon or, in the circumstances, that the representation was of a kind a reasonable person in that situation would rely on (Savill v NZI Finance Ltd [1990] 3 NZLR 135).

Two other Court of Appeal cases Buxton v The Birches652 and Snodgrass v Hammington653 have not been given the attention they deserve and sit uneasily with Savill and Richards v Murgatroyd. They both involve straightforward evaluations of inducement in the causative sense. In Buxton v The Birches it was held that there was

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651 Richards v Murgatroyd CA30/00, 21 August 2000, Richardson P, Heron and Goddard JJ at [4]. Emphasis added. The two steps are presented as alternatives.

652 Buxton v The Birches Time Share Resort Ltd [1991] 2 NZLR 641(CA), Somers, Bisson and Hardie Boys JJ.

653 Snodgrass v Hammington CA254/93, 22 December 1995, Cooke P, Thomas and Penlington JJ.
no evidence of inducement. Hardie Boys J delivering the judgment of the Court of Appeal had this to say about inducement:654

For there to be inducement in terms of s 7(3)(a) the representation must have been causative. It must in a real sense have been at least one of the factors that led the representee to enter into the contract. …

As an alternative to the analysis prompted by the prospective interpretation in Savill there are well-established and useful interpretative tools for a concurrent interpretation. Many of these have specific application to cases about misrepresentation. These are discussed in section 7.8.

7.4  **Heaven and prospective interpretation**

7.4.1  The case

Mr and Mrs Heaven undertook a subdivision of their property on Kawau Island and for that purpose borrowed money from AMP Finance. A loan facility agreement (“LFA”) was prepared by AMP’s solicitors. It gave the misleading impression that AMP was agreeing to make a series of loans to the Heavens not exceeding $5,631,214 rather than just a one-off advance made in the sum of $257,650. The evidence showed that AMP intended to make only one advance but relying on the impression that there would be further advances sufficient to enable them to complete their project the Heavens proceeded with the subdivision, which became a financial disaster. They succeeded with their claim invoking s 9 FTA in the High Court, the trial judge finding that the terms of the LFA misled the Heavens because as AMP’s subsequent actions demonstrated it never intended to make more than one advance. AMP appealed. There were a number of grounds of appeal but of interest to this thesis is the principal submission made on appeal that there had been no breach by AMP of s 9.

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654 *Buxton v The Birches Time Share Resort Ltd* [1991] 2 NZLR 641 (CA) at 647.
Tipping J for the Court of Appeal engaged in prospective interpretation by first considering the meaning of s 9. His Honour put the submission that there had been no breach in these terms: “On the Fair Trading Act part of the case, AMP made the following submissions. Mr Farmer argued first that the LFA was not objectively misleading.” And later in these terms:

AMP’s contention is that no reasonable person in the Heaven’s shoes and possessed of their knowledge actual or imputed should have been misled. Any reasonable person would have realised, so it was argued, that the person drafting the LFA had adopted an erroneous form of document quite inappropriate to capture the transaction upon which the parties had agreed.

The ingenuity of learned counsel for AMP may go some way to explain the formulation by the Court of Appeal of a three-step test by which to address the question of whether or not there is a breach of s 9:

We consider that the question whether there has been a breach by AMP of s 9 should be addressed in three steps. The first step, which focuses on the conduct in question, is to ask whether that conduct was capable of being misleading. The second step is to consider whether the Heavens were in fact misled by the relevant conduct. This step focuses on the effect of the relevant conduct on the Heaven’s minds. The third step requires consideration of whether it was, in all the circumstances, reasonable for the Heavens to have been misled. This is where, as with the first step, the objective dimension comes in. It is not enough for the Heavens to show they were misled if reasonable people in their shoes would not have been misled.

Tipping J went on to apply the test to the facts, holding “[t]here can be no doubt that the LFA was capable of being misleading” and “equally no doubt, on the Judge’s

655 *Heaven* at 151.

656 *Heaven* at 153.

657 It is also possible that this submission was a response to a formulation of the three-step test already addressed to counsel in argument. The test does not appear in any previous cases in New Zealand and Australia. A transcript of the argument is not available.

658 *Heaven* at 152.
assessment of the evidence, that the Heavens were misled. The more difficult issue is the third, namely whether it was reasonable for them to be so misled.”\(^{659}\) Essentially the argument for AMP was that the Heavens as reasonable people should have realised the mistake made by its solicitors as to the form of the LFA. Tipping J discusses this argument at some length before concluding that it was not unreasonable for the Heavens to have been misled.

7.4.2 Consequences of Heaven

Again the Court of Appeal effectively undertook a rewriting of the criteria in a statutory rule. It is also a fine example of reasoning by assertion in that there is no judicial analysis or reference to other materials that might justify the three-step test.

The test has been routinely cited in New Zealand cases concerning s 9 FTA as a frame into which to post claims in the expectation that the correct result will be delivered. “That approach is now the standard one employed by the New Zealand Courts.”\(^{660}\) Rather than apply the statutory words courts have been applying the test often describing the three steps as “elements”, or “requirements.”\(^{661}\) Instead of an enquiry of whether or not the defendant has engaged in conduct that was misleading or deceptive or likely to mislead or deceive the focus has been on the conduct of the plaintiff sometimes with unfortunate results.

A much cited example is the claim of Mr and Mrs Harrison.\(^{662}\) They had 20 years experience in small businesses including dairies, a coffee lounge and a taxi business and became interested in acquiring a “Tender Care” laundry business. The vendor gave them a booklet titled “Tender Care Laundry Proposal”. The booklet included a “Sample Balance Sheet” a one-page sheet indicating projected income, expenditure and net annual profit in excess of $23,000. The booklet was assumed to be accurate and no further information was sought. The Harrisons were impressed and entered

\(^{659}\) Ibid.


\(^{662}\) Harrison v Amcor Trading (NZ) Ltd HC Auckland HC-167/97, 13 May 1999.
into a contract to purchase the business. It quickly failed before they had paid all the purchase price. The vendor sued for the money still owing and the Harrisons counterclaimed to recover their outlay in excess of $200,000 invoking s 6 CRA and s 9 FTA. There was a trial that lasted nine days. It was proved that the balance sheet in the Booklet was grossly inaccurate. But the Harrisons’ claim was dismissed as was their appeal because the trial and appellate judges thought that no reasonable person would have taken the balance sheet seriously. Although it was accepted that the document was made available for the obvious purpose of promoting the sale and had this effect the purchasers should have made other enquiries. Deficiencies in the document were emphasised. After all the Harrisons had business experience and “It must have been apparent to all that they were not straight out of school and had not spent a life-time herding goats.”

There can be no doubt that the focus given by New Zealand courts to the reasonableness of the claimant’s conduct has had an adverse effect on the success rate of s 9 claims. Following Heaven and in particular adopting the test as to reasonableness the Court of Appeal has been stringent in its examination of the claimant’s conduct in a number of recent cases including David v TFAC Ltd, Janus Nominees Ltd v Fairhall, Ellis v Red Eagle Corporation Ltd, and Pae (New Zealand) Ltd v Brosnahan. In all four cases the claimant failed, the trial judge being overruled in three of them.

The thesis is not the place for a detailed review of those cases and mention now is made only of explicit appeals to policy considerations that were perceived as justifying application of the reasonableness test against the plaintiffs. In these cases the Court

663 Ibid, at 10.
664 David v TFAC Ltd [2009] 3 NZLR 239 (CA).
667 Pae (New Zealand) Ltd v Brosnahan (2009) 12 TCLR 626 (CA).
of Appeal emphasised the commercial and business nature of the transactions in question. Arnold J for the Court of Appeal went this far: “This was a transaction between sophisticated parties who were independently advised. To impose liability under s 9 in a case such as this would cut deeply into the principle of caveat emptor.”

The obvious point is that s 9 and indeed the FTA do not make any distinction between conduct that might be called commercial on the one hand and consumer on the other hand. Plainly s 9 is directed to all conduct in trade. Concerns about intrusion of s 9 into arm’s length commercial transactions and the doctrine of caveat emptor are simply matters of opinion. The obverse is to ask why business people should be exempt from a regime obviously designed to ensure fair trade. Such opinions add nothing to the meaning of s 9.

In any event a brief analysis demonstrates both fundamental conceptual problems with the Heaven test and the perils of prospective interpretation. Section 9 FTA is a rule that prohibits the conduct described therein. This includes conduct that is likely to mislead or deceive. It follows that it is not necessary to show that the conduct in question actually deceived or misled anyone. This step is plainly contrary to the words of s 9. The same can be said for step three. There is nothing in s 9 that says anything about reasonableness. These steps may have relevance to s 43 (has here been loss or damage by the contravening conduct?) but that is a different matter and a reading of ss 9 and 43 does not permit a conflation of the two sections. The FTA puts remedies in a separate part of the Act. A breach of s 9 does not necessarily generate a remedy.

The question might then be asked: what difference would concurrent interpretation make? The answer is found in recent Australian cases.

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669 Janus Nominees Ltd v Fairhall [2009] 3 NZLR 757 (CA) at [58].


671 See the discussion in Trotman and Wilson “Stairway from Heaven: s 9 FTA” [2010] NZLJ 310 at 310-312 andWalshaw Red Eagle at 144-147.
7.4.3 Australian alternative to *Heaven*

In nearly 40 years of application of statutory rules equivalent to s 9 the High Court of Australia has come to recognise that the task is “[t]he application of a statutory text, expressed in general terms, to particular facts.” 672 This approach was approved recently in *Campbell v Backoffice Investments Pty Ltd.* 673 French CJ in his treatment of an equivalent of s 9 describes the court’s task as one of “characterisation of the conduct.” 674

French CJ sets out the relevant statutory framework and then considers the characterisation of conduct as misleading or deceptive. His description of the interpretative process is instructive and includes the following (references omitted): 675

> Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error. … it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective.

Following a description of the “practical distinction” between the approach to characterisation of conduct as misleading or deceptive when the public is involved on the one hand and where the conduct occurs in dealings between individuals on the other the following advice was given: 676

> … In the case of an individual it is not necessary that he or she be reconstructed into a hypothetical “ordinary” person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct. The state of knowledge of the

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672 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [80].

673 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

674 Ibid, at [24]-[33].

675 Ibid, at [25].

676 Ibid, at [26] and [32].
person to whom the conduct is directed may be relevant, at least in so far as it relates to the context and circumstances of the conduct.

It is important in considering whether conduct is misleading or deceptive to identify clearly the conduct to be characterised. …

In a joint judgment in the same case Gummow, Hayne, Heydon and Kiefel JJ expressly approve a citation from the judgment of McHugh J in Butcher v Lachlan Elder Realty Pty Ltd:

“The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation’s conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. …

Surely this is a species of concurrent interpretation.

7.4.4 New Zealand Supreme Court and Heaven

The Supreme Court in Red Eagle Corporation Ltd v Ellis has taken the opportunity to reconsider claims under s 9 FTA. It declined to apply the Heaven test. In particular Blanchard J for the Court made it clear that the first task is to decide whether the claimant has proved a breach of s 9. “Then, with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage “by” the conduct of the defendant.”

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678 Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304 at [102]. Emphasis in original.


680 Red Eagle at [29].
The Supreme Court would appear to confine *Heaven* and encouragingly is critical of prospective methodology, Blanchard J saying:681

We do not understand the Court of Appeal in *Heaven* to have intended that its formulation would apply in all situations to which those sections [9 and 43] may reach. It is not desirable to attempt to formulate a methodology to be applied prescriptively by a court whenever the application of these provisions is in issue, for the circumstances are too variable. The approach to be taken in a particular case will depend upon the type of situation under scrutiny; …

From these promising beginnings Blanchard J goes on to formulate a new approach for the application of s 9.682

Richardson J in *Goldsbro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in *a case of this kind* is accordingly whether a *reasonable* person in the claimant’s situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, there has been a breach of s 9. It is not necessary to prove that the defendant’s conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical *reasonable* person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so.

“Case of this kind” incorporates by far the most common type of situation in which s 9 is invoked – that is in conflicts arising between parties to dealings in trade. The other kind of case is conduct directed to the public at large such as in misleading advertising.

The *Heaven* test included step three as to reasonableness and regrettably it appears that there is still life in this test. Three similar expressions of this test follow.

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681 *Red Eagle* at [26].

682 *Red Eagle* at [28]. Emphasis added.
1. The *Heaven* test: a consideration of whether it was, in all the circumstances, *reasonable* for the claimant to have been misled.

2. A *Red Eagle* test (1): whether a *reasonable* person in the claimant’s situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived.

3. A *Red Eagle* test (2): if the conduct objectively had the capacity to mislead or deceive the hypothetical *reasonable* person.

Already the new tests have been expressly set out as the starting point for consideration of s 9 at trial in a number of cases, two of which are now discussed. In *WaikatoLink Ltd v Comvita New Zealand Ltd* 683 Harrison J following an assessment of facts that were far from simple and given over 8 days of hearing took up the question of whether WaikatoLink’s statements were misleading or deceptive. His Honour began by reference to *Red Eagle* and set out *Red Eagle* test (2): “An objective approach is to be adopted: did the statements have the capacity or tendency to mislead or deceive the hypothetical reasonable person?” 684

His Honour found that on an objective analysis WaikatoLink’s conduct was misleading or deceptive in three respects and there follows a lengthy analysis of the statements and their affect on Comvita. There is no express mention of reasonableness in the course of this analysis.

In *McKeown Group Ltd v Russell* 685 French J expressly using the word “test” sets out *Red Eagle* test (1). 686

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684 Ibid, at [58].


686 Ibid, at [57].
As explained by the Supreme Court in *Red Eagle* … this [whether Russell’s conduct was likely to mislead or deceive] requires an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The test to be applied is an objective one, namely whether a reasonable person in McKeown’s situation – that is, with the characteristics known to Mrs Russell or of which Mrs Russell was aware – would likely have been mislead or deceived.

Her Honour had already discussed the evidence which had been heard over three days and required complex findings of fact under the heading “Did Mrs Russell make the promises in the terms alleged and what were her intentions at the time she made those promises?” She reiterated those facts relevant to the test and expressed her finding in favour of the plaintiff in this way: 687

In those circumstances, the representation did in my view have the capacity to mislead or deceive. Someone in McKeown’s position could reasonably place trust in Mrs Russell’s current intention to keep her word.

Consideration was then given to the characteristics of the McKeowns including banking advice they had received and Her Honour found that “the breach still had the capacity to mislead or deceive someone with Mr Hamilton’s background given the context.”

I have suggested that the use of the word “reasonable” by Blanchard J in the course of his judgment has a simple explanation: an anxiety to emphasise objectivity. 689 It appears from the treatment by courts of statutory rules at least in New Zealand that there is an anxiety to emphasise objectivity, an anxiety that is quite unnecessary and which leads to all sorts of complications. The court decides for itself. Conceptually judicial interpretation cannot be other than an objective exercise. 690 This anxiety is

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687 Ibid, at [59].

688 Ibid, at [62].

689 *Walshaw Red Eagle* at 148.

690 Ibid, and see Joseph Raz *Between Authority and Interpretation* (2009) at 226 and the citation from *Butcher v Lachlan Elder* at the end of the previous section of this chapter.
apparent in *Hamid v England*. Whata J is to be commended for directing his attention to causative issues but makes repeated reference to the need for an objective assessment.

I have asked why the New Zealand Supreme Court in *Red Eagle* did not discuss, not even make reference to, the recent judgments of French CJ and other members of the High Court of Australia discussed above. This is particularly so because the FTA and subsequent Australian State legislation is modelled on, in respect of s 9 is essentially a copy of, the Trade Practices Act 1974 (Cth). Also one of the key reasons behind this development was compliance with Article 12 of the Closer Economic Relations Act 1982 which contains a general commitment by both New Zealand and Australia to the harmonisation of the principles of commercial law in the two countries. That treaty remains in force but a corporation trading in both Australia and New Zealand would be foolish to engage a Sydney law firm to advise on a New Zealand situated Fair Trading claim such has been and remains the divergence in interpretation and application between the prospective interpretations in New Zealand and the concurrent interpretations in Australia. Separation of powers and the rule of law values of due notice of laws, accessibility and consistency are challenged.

### 7.5 ‘Ordinary’ words

Discussions of statutory interpretation often include reference to so-called ordinary words the implication being that the interpretation of such words is a special case. The distinction made in legal practice between law and fact lends support to the special treatment of ordinary words. The law/fact distinction is discussed in Chapter 3.2 in which it is argued that the distinction is for strategic purposes and reference is made to *Brutus v Cozens*, a case said to be authority for the proposition that the interpretation of ordinary words is a question of fact. This case and the debate arising

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691 *Hamid v England* [2011] NZHC 1149. See [41]-[52].

692 *Walshaw Red Eagle* at 145-146.

from it has much to say about statutory interpretation by courts and I think there are
advantages of clarity when discussed outside the parameters of the law/fact distinction.
An interesting and typical aspect of the legal debate is the tendency to ‘doctrinate’ and
categorise the interpretation of so-called ordinary words. I argue that if concurrent
interpretation is adhered to there is no separate case for the interpretation of ordinary
words. The inevitable problems that follow from separate treatment of ordinary and
non-ordinary words and their respective interpretation then dissolve.\textsuperscript{694}

In the course of an anti-apartheid protest Brutus had invaded a tennis court during a
Wimbledon match. He blew a whistle, threw leaflets and when asked to leave sat
down on the court. Spectators were upset and hostile. He was removed by police and
charged that he used insulting behaviour whereby a breach of the peace was likely to
be occasioned. Magistrates found that the behaviour was not ‘insulting’. The
Divisional Court allowed an appeal on the ground that the magistrates had come to a
wrong determination on a point of law and remitted the case to the Magistrates to
continue the hearing on a question of law certified as follows:\textsuperscript{695}

\begin{quote}
Whether conduct which evidences a disrespect for the rights of others so that it is
likely to cause their resentment or give rise to protests from them is insulting
behaviour within the meaning of [the statute.]
\end{quote}

The House of Lords did not agree with this approach and restored the Magistrates’
decision. Their Lordships were unanimously of the view that there was no question of
law. One can see that the context of the case was the question of law posed by the
Divisional Court and therefore the interpretative question was answered in terms that
make a distinction between law and fact. This has sown the seeds of a ‘doctrine’ that
where the word in question is an ordinary word of the English language it “is for the
tribunal which decides the case to consider, not as law but as fact, whether in the
whole circumstances the words of the statute do or do not as a matter of ordinary

\textsuperscript{694} Another good argument is that complex aspects of the law cannot be eliminated by mere
simplification of language: Rabeea Assy “Can Law Speak Directly to its Subjects? The Limitation
of Plain Language” (2011) 38 Journal of Law and Society 376.

\textsuperscript{695} Recorded in \textit{Brutus v Cozens} [1973] AC 854 (HL) at 860.
usage of the English language cover or apply to the facts which have been proved." A corollary of the doctrine is that a distinction may be drawn between the finding of the true meaning of a word and the application of that meaning to the facts. Only if the word is ‘ordinary’ may the court proceed immediately to application, indeed should do so.

The devil is in the way Lord Reid premised his opinion: the Magistrates’ decision was one of fact because the word was an ordinary word. Lord Morris of Borth-y-Gest appears to have had a different view that resonates with concurrent interpretation: “The words ‘insulting behaviour’ are words that permit of ready comprehension. Having found the facts it was for the magistrates applying rational judgment and common sense to reach a decision.” And Lord Kilbrandon in agreeing that the word was “an ordinary uncomplicated English word” not requiring judicial definition said: “It would be unwise, in my opinion, to attempt to lay down any positive rules for the recognition of insulting behaviour as such, since the circumstances in which the application of the rules would be called for are almost infinitely variable.” There is much else in Lord Reid’s opinion to similar good effect when taken out of the context of the law/fact distinction including the following:

No doubt the court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different.

Or the court could frame a definition. But then again the tribunal would be left with words to consider.

696 Ibid, at 861. Lord Reid.
698 Brutus v Cozens [1973] AC 854 (HL) at 863.
700 Ibid, at 861.
Lord Kilbrandon refers to Boswell’s defence of Dr Johnson against a charge of obscurity in his definitions by quoting from the preface to the famous English dictionary: “To explain, requires the use of terms less abstruse than that which is to be explained, and such terms cannot always be found ... The easiest word, whatever it may be, can never be translated into one more “easy.””701

Lord Hoffmann in _Moyna v Secretary of State for Work and Pensions_ agrees with Lord Kilbrandon and Dr Johnson and makes the point that Lord Reid’s “observations have been given a much wider meaning than the author intended.”702 His Lordship tells us that in his opinion Lord Reid was making703

two very pertinent points. First, he was drawing attention to a feature of language; namely that many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning.

In Lord Hoffmann’s opinion Lord Reid “insisted that, whether the statute used simple words or difficult ones, its construction was a question of law.”704 Lord Hoffmann goes on to explain how this appears from the distinction Lord Reid was in fact making. This is “the well-known distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary, and the meaning which the author of an utterance appears to have intended to convey …”705 The latter also includes syntax, context and background. In either case if the meaning has legal significance it is a question of law.

701 Ibid, at 867.
702 Moyna v Secretary of State for Work and Pensions [2003] 1 WLR 1929 (HL) at [23]. Lords Nicholls, Steyn, Rodger and Walker expressly agreed with the reasons and result proposed by Lord Hoffmann.
703 Ibid.
704 Ibid.
705 Ibid, at [24].
Lord Hoffmann concludes his discussion on this first point with the following important statement: “… in trying to ascertain the legislator’s meaning, it is seldom helpful to make additions or substitutions in the actual language he has used.”

The second point I take to be a reference to the usage of the law/fact distinction as indicative of the willingness of an appellate court to substitute its own judgment for that of the tribunal appealed from or reviewed.

Taking the two points, the House of Lords in *Moyna* allowed the appeal because with regard to the first point it was unhelpful for the Court of Appeal to add words to the statutory language (relevant to a claimed disability) and with regard to the second point the decision of the Tribunal (whose decision was overturned on appeal) was within the bounds of reasonable judgment.

I suggest that the wise words of Cooke J (as he then was) for the Court of Appeal in *R v Robinson*709 align with those of Lord Hoffmann. This case concerned the activities of the appellants: did they amount to ‘prostitution’? There was reference to previous cases in an exercise of analogous reasoning and it was found that the word ‘prostitution’ has more than one ordinary meaning. Reference was made to *Brutus v Cozens* in respect of which Cooke J made the following observations:710

> It would be contrary to Lord Reid’s own approach to case law to treat his speech in *Brutus v Cozens* as if it were an exhaustive exposition of principle, to be applied whenever some word in a statute can be said to be used in an ordinary meaning.

> Lord Reid’s observation in *Brutus v Cozens* cannot be regarded as laying down an invariable and sharp dichotomy: viz, ordinary meaning, question of fact on the one hand and unusual meaning, question of law on the other hand. … *Brutus v Cozens* is a

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706 Ibid.
708 Ibid, at [28].
709 *R v Robinson* [1978] 1 NZLR 709 (CA).
710 Ibid, at 716-717.
salutary warning against composing elaborate definition of an ordinary word in the English language, if the statutory context does not show that the word is used in an unusual sense. But in the case of a word having a number of ordinary senses it may be possible to infer from the statute which one of a number of them was intended by the legislature.

Burrows in his reflections on *Brutus v Cozens* provides an illuminating discussion of the advantages of Lord Reid’s approach before considering the perceived disadvantages. Points are made which are echoed in his later writing and stem from the recent proliferation of statute law. He says as long ago as 1975:

> Despite the proliferation of statute law in recent times persons trained in the common law find it difficult to stop thinking in terms of Judges and cases. It is not too much of an exaggeration to say that we do not regard a statute as having “arrived” as part of the legal system until it has been subjected to judicial interpretation and discussion. And when this has happened we tend to accord the decision, and the Judge’s words, weight at least equal to the words of the statute. The result is that Judge’s para-phrases of statutory words are sometimes quoted rather than the words themselves, and even the simplest statutory provisions become encrusted with judicial decisions which they carry round with them till their repeal.

*Brutus v Cozens* is seen as a determined effort to curb this tendency. Another advantage of the approach is in ensuring that a statute “is able to keep pace with the times, and to keep abreast of modern attitudes.”

The warning found in *Brutus v Cozens* and many other cases against attempts at judicial definitions and paraphrases recently is well-expressed by Hammond J:

> A consequence of the judges falling upon a statue can be that there is the difficulty of trying to produce a seamless web of jurisprudence across dozens of appellate authorities. This bogs down courts in their day-to-day work and all too often deflects

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712 Ibid. The ambulatory approach.

713 *R v Munro* [2008] 2 NZLR 87 (CA) at [240].
judges from their proper endeavour … Yet the appropriate principles are stated in the parliamentary language itself.

What are the disadvantages? In *Burrows Statute Law* including earlier editions Burrows expresses the view that “much difficulty has been caused by the case *Brutus v Cozens*. … the case involves formidable difficulties.” 714 It appears that this view has been very influential, for example with regard to the treatment of ‘disorderly’ and ‘offensive’ behaviour by New Zealand courts so much so that the comment has been made: “Perhaps the Courts in this country are satisfied that the decision of *Brutus v Cozens* is adequately demolished by Professor Burrows.” 715

I discern that Burrows sees three main difficulties. The first is the difficulty in distinguishing an ‘ordinary’ word from a word that is ‘not so ordinary’. A simple answer is that there is no need to make any such distinction and Lord Hoffmann seems to say as much. This leads to the second difficulty said to arise from “the consequences that flow from holding that the meaning of a word is a question of fact.” 716 These two difficulties dissolve if we take the matter of legal interpretation out of the debate about the distinction said to exist between questions of law and questions of fact. Essentially the making of that distinction is a strategic and useful device that has little to do with statutory interpretation. Again Lord Hoffmann appears to agree.

The third perceived difficulty requires more discussion. This is the legitimate concern for consistency in the interpretation over time of a particular word (or text). Of course this concern does not relate only to ‘ordinary’ words. It is just as important when interpreting words and texts that are not so ordinary. I suggest that again the distinction between ‘ordinary’ and ‘not so ordinary’ words conflates.

714 *Burrows Statute Law* at 186 (*Moyna v Secretary of State for Work and Pensions* is not referred to) and see Burrows “Some Reflections on Cozens v Brutus” (1975) 4 Anglo-Am LR 366 at 372-382.


716 *Burrows Statute Law* at 187.
The concern is expressed that interpretations would not provide binding precedents. In a sense this is an argument for syllogistic justification in respect of statutory rules already discussed at length in Chapter 4. Burrows claims: “if Lord Reid’s dictum were universally right, decisions on such ordinary words would not be binding precedents. This would lead to undesirable diversity of decision.”

The premise for this claim is that “decisions on such ordinary words” are binding precedents.

With regard to precedent in the context of statutory interpretation Burrows makes a number of points, including a reminder that “the only thing in a case interpreting a statute that binds later courts is the actual decision applying the words of the statute to the facts of the case and not the judge’s dicta on the construction of the Act.”

Further, ‘precedents’ that is, previous cases about the same or a similar rule are best seen as analogous material. It is in fact rare for the facts of a case to be duplicated by a later one. And as Burrows also says:

the ultimate question in any case is always “do the statutory words cover what has happened here?” Therefore discussions of the meaning of words are directed towards, and influenced by, the particular facts of the case.

Burrows provides an instructive example, the case of a man steering a car while disqualified: was he driving? It is an offence to drive whilst disqualified pursuant to a statutory rule. The relevant statute does not provide a definition of ‘drive’ or ‘driving’. In \( R v Clayton \) the appellant had been convicted of driving whilst disqualified after he had been seen sitting beside his wife who was in the driving seat in a motor vehicle in motion and he was seen operating the steering wheel. His appeal was dismissed because he had played a sufficiently active part in the operation of a moving vehicle so as to constitute driving (in accord with the direction to the jury). The judgment of

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717 Burrows Statute Law at 188.
718 Ibid, at 190-196.
719 Ibid, at 192. References omitted.
720 Burrows “Some Reflections of Cozens v Brutus” (1975) 4 Anglo-Am LR 366 at 376. Citation omitted.
721 \( R v Clayton \) [1973] 2 NZLR 211 (CA).
McCarthy J for the Court of Appeal is interesting as a classic example of analogous reasoning. Previous cases in England, Australia and New Zealand with features similar to the case in question are discussed and found to be of more or less assistance largely depending on the degree of similarity between the facts of the previous cases and the one in question.

I suggest that is the crucial point. Consistency can be achieved by analogous reasoning (and by use of the tools of judicial interpretation discussed below) and without the risk of judicial exegesis overcoming the statutory words. The same applies when lawyers give advice. They can point to previous cases not as precedents because it is rare that the actual decision applying the words of the statute to the facts of the case will be on all fours with the client’s case but because by analogous reasoning similarities and differences may indicate (no more than that) the prospects of success of a claim invoking a statutory rule. Anyway the same process of interpretation applies to judicial exegesis. The concern expressed by Burrows about the precedential effect of judicial interpretations effectively dissolves in concurrent interpretation and the use of previous decisions as good analogical material.

Perhaps there are policy factors that work against the Brutus v Cozens approach (just as there are policy considerations in its favour) and Burrows discusses them. These factors are not reasoned arguments contrary to the views expressed in Brutus v Cozens and the other cases referred to above. They merely explain why those views are sometimes not adhered to. Certainly none of the factors militate against concurrent interpretation. I suggest that it is when courts do fall upon a statute and supply their own exegesis that problems arise, not least in the interpretation of the exegesis but also in reducing accessibility.

722 Burrows “Some Reflections on Cozens v Brutus” (1975) 4 Anglo-Am LR 366 at 377-378 and see Burrows Statute Law at 188.
7.6  *Brooker (NZSC) compare Pollock (HCA)*

7.6.1 Preface

Another practical perspective of the effect of concurrent interpretation compared to prospective interpretation can be seen in a comparison of the approaches of the New Zealand Supreme Court and the High Court of Australia in two recent cases in criminal law. Both courts had the opportunity to look afresh at statutory rules that had a considerable history. The New Zealand Supreme Court engaged in the prospective interpretation of “disorderly behaviour” although urged by the Solicitor-General not to do so and with unfortunate results. On the other hand the High Court of Australia when considering the statutory defence of provocation required concurrent interpretation and effectively removed complex judicial exegesis. In so doing they removed an injustice occasioned by the application of prior judicial tests.

7.6.2 *Brooker v Police*

In New Zealand a statutory rule prohibits and penalises by fine a person “who, in or within view of any public place, behaves in an offensive or disorderly manner.” These words appear in section 4(1)(a) Summary Offences Act 1981 one of a series of offences under the heading “Offences Against Public Order”. The rule has a long history that predates the 1981 Act and has kept courts busy at trial and on appeal so that “it might be supposed that the clearer the guidelines from superior courts, the better [for court time and public purse] it is for the courts of first instance …”

The section contains two rules, one prohibiting offensive behaviour and the other prohibiting disorderly behaviour. The following brief discussion is confined to the judicial process in the interpretation of ‘disorderly’. There was a history of judicial explanation of the meaning of disorderly behaviour by New Zealand courts before the New Zealand Supreme Court gave leave to appeal in *Brooker v Police* so for this reason and also because of the division of opinion in the Court of Appeal in *Brooker*

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724 *Brooker v Police* [2007] 3 NZLR 91 (SC). The approved ground for granting leave to appeal from the Court of Appeal (*Brooker v Police* [2004] NZAR 680 (CA)) was whether the appellant’s conduct was capable of being disorderly: [2005] NZSC 61.
and the potential impact of the Bill of Rights Act 1990 it was understandable that leave was granted.\footnote{Ibid, at [113].} This was an opportunity to start afresh and provide clear guidance as to the parameters and nature of the interpretative task similar to the recent approach of the High Court of Australia in \textit{Pollock v The Queen}\footnote{\textit{Pollock v The Queen} (2010) 242 CLR 233.} discussed below. In this way the slate of judicial exegesis would be wiped clean.

Instead in \textit{Brooker} the five Judges of the Supreme Court undertook separate analyses of ‘disorderly behaviour’ collectively stretching to 288 paragraphs and 237 footnotes and were divided three to two as to the outcome. We will see that each of the Judges supplied their own judicial exegesis. The appeal was heard on 7 December 2005 and the judgment of the court was delivered on 4 May 2007. The resulting confusion has been well documented by Margaret Briggs\footnote{Briggs “Cases: A. Disorderly behaviour” [2008] NZ L Rev 567.} and is not repeated here. Indeed the confusion has been such that the confused messages of the Court have flowed into the subsequent treatment of ‘offensive’ behaviour so much so that the Supreme Court recently revisited this rule\footnote{\textit{Morse v Police} [2011]} with consequences that have been the subject of considerable criticism.

Of particular interest for the thesis is that in \textit{Brooker} the Solicitor-General appearing as counsel for the Police, put \textit{Brutus v Cozens} at the forefront of his submissions: “I would say disorderly means disorderly.”\footnote{\textit{Brooker v Police} SC 40/2005. Transcript of hearing in the Supreme Court on 7 December 2005 (84 pages) at 54.} But first a brief summary of the prospective interpretations of disorderly behaviour pre-\textit{Brooker} is necessary. The leading case had been \textit{Melser v Police}.\footnote{\textit{Melser v Police} [1967] NZLR 437 (CA).} Various tests were formulated in that case:
not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present.\textsuperscript{731}

Disorderly conduct is conduct which is disorderly; it is conduct which, while sufficiently ill-mannered, or in bad-taste, to meet with the disapproval of well-conducted and reasonable men and women ... [and] tend to annoy or insult such persons as are faced with it – and sufficiently deeply or seriously to warrant the interference of the criminal law.\textsuperscript{732}

\ldots the appellants’ conduct here was unnecessarily disorderly and objectionable. It was likely to engender considerable annoyance \ldots\textsuperscript{733}

District Courts that have heard such cases and the High Court on appeals have been bound by these formulations. It is hardly surprising that over time there has been increasing dissatisfaction with applications of formulations that include ‘tendency to annoy others’,\textsuperscript{734} and ‘right-thinking person’, sometimes referred to as a ‘person of decent instincts’.\textsuperscript{735} The Solicitor-General in his submissions in \textit{Brooker} did not support \textit{Melser} and instead advocated that there should be no test; that it was “extremely difficult” to come up with another description of what would be properly characterised as disorderly conduct.\textsuperscript{736}

It is clear that the idea of not replacing the \textit{Melser} tests with new tests was of little appeal to the Supreme Court Judges with the possible exception of Thomas J. As Tipping J said: “It may be difficult but are you inviting us not to try? Because this seems to me quite significant because if we don’t try we just simply say disorderly

\textsuperscript{731} Ibid, North P at 443.

\textsuperscript{732} Ibid, Turner J at 444.

\textsuperscript{733} Ibid, McCarthy J at 446.

\textsuperscript{734} Summarised in \textit{Brooker v Police} [2007] 3 NZLR 91 (SC) at [12] and [84].

\textsuperscript{735} Ibid, at [112].

\textsuperscript{736} \textit{Brooker v Police} SC 40/2005. Transcript of hearing in the Supreme Court on 7 December 2005 (84 pages) at 54-63.
means disorderly, it will be one of the shortest judgments on record.”

Elias CJ said: “… I accept one shouldn’t try and find synonyms for a language like this but it still leaves open the question what order are we talking about? Is it the composure of an individual or is it the, is the public peace. (sic) Is it public order?” It should be mentioned there was consensus that the assessment of disorderly by a court is an objective exercise, one that depends on the particular facts of the case as a balancing exercise and is a matter of public order. A process of concurrent interpretation should and would address those parameters of the rule when invoked in the particular case. The Solicitor-General by reference to English cases endeavoured to illustrate how the courts would deal with the rule case by case but he seems to have made little impression.

The members of the Court did overrule the tests in *Melser* but replaced them. Elias CJ thought disorderly behaviour meant behaviour seriously disruptive of public order. This would include behaviour that amounts to intimidation, victimization or bullying, causing others to withdraw from or avoid a public area, inhibiting normal public use. Blanchard J pointed to behaviour that substantially disturbs the normal functioning of life in the environs of the public place, a disturbance to good order that in the particular circumstances any affected member of the public could not be expected to endure because of its intensity and/or duration.

Tipping J provided two tests. For ordinary cases: if as a matter of time, place and circumstance it causes anxiety or disturbance at such a level which is beyond what a reasonable citizen should be expected to bear. For civil rights cases: a balancing of competing interests when assessing the level of anxiety or disturbance a reasonable citizen should be expected to endure.

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737 Ibid, at 70.

738 Ibid, at 71.

739 For example ibid, at 64-65.


741 Ibid, at [45].

742 Ibid, at [56].
citizen should be expected to bear. 743 McGrath J said the offence of disorderly behaviour must be restricted to conduct that amounts to a sufficiently serious and reprehensible interference with the rights of others to warrant the intervention of the criminal law. 744 Thomas J expressly accepted the submission of the Solicitor-General: the behaviour that may disrupt public order is as unbounded as human imagination 745 and went so far as to say: “The pitfalls of trying to essay a firm definition are evident in the attempt of the Chief Justice to do so.” 746 However it appears that His Honour was not deterred from formulating his own “appropriate test” of the perdurable reasonable person: a person behaves in a disorderly manner if he or she causes a disturbance or annoyance to any person or persons or interferes with the rights or interests of another person or persons to such a degree that a reasonable person would regard as disorderly. 747

It is legitimate to ask if these tests improve on the statutory words, and if they provide guidance to District Courts, appellate courts, the police and the public. The tests have different nuances and of course also require interpretation.

Williams J heard an appeal after Brooker against a conviction for disorderly behaviour. 748 As he said the Supreme Court was divided on its guidance and His Honour settled for the formulation: “behaviour that objectively and sufficiently disrupts public order.” 749 I do not think he was being facetious when he observed that “there must be a serious question about whether the Justices in the District Court applied the correct test as set out in Brooker ...” 750 He pointed out: “Disorder cases are
always intensely contextual. They will usually involve questions of degree. In such cases the facts are everything."  

Deliberately the facts in *Brooker* so far have not been discussed and of course the thesis is not about the criminal law. However mention of some features of the facts may allay the fears of some that concurrent interpretation would have been unsatisfactory. Mr Brooker was engaged in a protest against the issue of a search warrant issued against him apparently at the instigation of a particular policewoman. His activities outside the home of the policewoman lead to his arrest for loitering with intent to intimidate. Similar activities outside the police station resulted in no action. The District Court Judge found that the evidence did not establish intent to intimidate and he reduced the charge to one of disorderly behaviour and found the conduct came within the *Melser* tests. Appeals to the High Court and Court of Appeal were dismissed.

There can be no doubt that the Supreme Court was correct to overrule *Melser* and it may well be that the majority were right to think that the appellant’s behaviour should not be characterised as disorderly. It is also pleasing that specific parameters were confirmed: that the assessment of disorderly by a court is an objective exercise, one that depends on the particular facts of the case as a balancing exercise and is a matter of public order. After that cases are inherently fact specific and over time a body of case law can be expected to develop that will provide analogous assistance as to what might be characterised as disorderly. The attempt at further judicial exegesis does not assist with case-by-case characterisation and instead raises new issues including issues of interpretation. It is telling that the Solicitor-General, on behalf of the police who more than any other institution is required to make judgments on the appropriate application of the charge of disorderly behaviour on a regular basis, expressly submitted that there be no attempt at judicial exegesis.

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751 Ibid, at [35].

752 It is interesting that the NZSC favours this approach to the admission of propensity evidence pursuant to s 43 Evidence Act: not right “to elaborate in the abstract …A body of case law is likely to grow up providing guidance.” *Fenemor v R* [2011] NZSC 127 at [12].
7.6.3 *Pollock v The Queen*

The Criminal Code of Queensland provides in section 304 (unchanged since 1899) that provocation is a partial defence reducing a charge of murder to manslaughter when a person who “unlawfully kills another … does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person’s passion to cool.” Over time judicial exegesis arising from judicial interpretation of s 304 produced a sevenfold test of provocation that is, of seven propositions any of which would *exclude* the defence of provocation and at Mr Pollock’s trial written directions were distributed to the jury in terms of the test and without elaboration in the summing up.\(^{753}\) The test had become a checklist and was incorporated in the bench book as model directions on provocation.

Proposition 5 ruled out the defence if “the loss of self-control was not sudden.” The jury asked in a formal question what was meant by ‘sudden’. The judge resorted to the dictionary but made the point that “if there was another word that was better, another word would have been used.”\(^{754}\) And proposition 7 also ruled out the defence if “when Andrew Pollock killed Murray Pollock there had been time for his loss of self-control to abate.”

Following a long history of abuse and following an attack by the father in the appellant’s bedroom that continued in the garden the appellant found a rock with which he killed his father. The prosecution case was that provocation was excluded by the ‘slow boil’ of the appellant’s hatred of his father so raising nice questions as to the distinction between intentional killing in an uncontrolled emotional state induced by the deceased’s provocative conduct or alternatively induced by a desire for revenge.\(^{755}\) In particular propositions 5 and 7 appeared to leave open *exclusion* of the defence in any circumstance where there was an interval in time between the provocative conduct and the emotional response to it.

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\(^{754}\) Ibid, at [40].

\(^{755}\) Ibid, at [33].
The response of the High Court of Australia was to make clear that s 304 provides a composite concept incorporating loss of self-control not necessarily excluded if there was an interval between the provocation and the emotional response to it and is not susceptible to discrete propositions. The task of the trial judge is to identify the actual issues of the case with reference to the words of the section. Earlier authority to the contrary was overruled. This case illustrates both (i) the problem when judicial exegesis takes over and (ii) an appropriate response to that problem.

7.7 Analogous reasoning in practice – an example

Recent trends in the interpretation of statutory rules by Australian courts indicate a grasp of and a preference for concurrent interpretation and this is seen in the discussion in section 7.4.3 of the Australian interpretation and application of the rule prohibiting misleading or deceptive conduct. I suggest that analogous reasoning and the encouragement of it is a significant aspect of that approach. The purpose of this section is to provide a brief illustration of analogous reasoning in the same statutory context.

In Chapter 3.4 there is discussion of Body Corporate 202254 v Taylor756 an attempt to address the criteria that the conduct impugned by s 9 FTA be “in trade” in the course of hearing an appeal arising from strike out applications. The approach in that case may usefully be compared to the recent treatment by the High Court of Australia of ‘in trade or commerce’ in s 9 FTA 1999 (Victoria) in Houghton v Arms.757 This case provides an instructive example of the actual judicial process of ordinary reasoning in the course of argument leading to a straightforward interpretation of the phrase in question. It may be recalled that there are two possibilities one that the phrase qualifies not just the conduct but also the status or description of the person whose conduct is in question.

756 Body Corporate 202254 v Taylor [2009] 2 NZLR 17 (CA).

Mr Arms wished to market the products of small to medium size wineries by direct marketing via the internet for reasons of promotion and the reduction of the incidence of sales tax and for this purpose engaged WSA Online Ltd. Mr Student was employed by WSA as project manager and Mr Houghton another employee was introduced as the “guru of interactive website design and development”. In short the system they recommended as “perfect” for the requirements of Mr Arms’ business and as requiring minimal paperwork in respect of the provision of banking details proved to be complex and without the anticipated savings of sales tax. Mr Arms was obliged to set up a completely different system and it was found that he had lost $58,331 being seven months of profitable trading because of the set back in development.

At trial in the Federal Court WSA was found liable on the basis of the misleading or deceptive conduct of its employees but not Messrs Houghton and Student. It was said neither of them could be said to have engaged in trade or commerce on his own account as distinct from being an employee of WSA. “No independent trading or commercial interest can be imputed to [them]”. The claim for accessorial liability had been discontinued. On appeal the Full Federal Court disagreed and considered Messrs Houghton and Student to be directly liable under the equivalent of s 9. Their appeal to the High Court of Australia was dismissed in a joint judgment. The conclusion was that acts of an individual may be both corporate acts and the separate acts of the actor as an individual and that this was envisaged by s 9.

Of interest for the thesis is the transcript of argument, which displays the thought processes relevant to the approach to concurrent interpretation as the following passages indicate, in particular analogous reasoning. The Court discussed with Appellants’ counsel (Mr O’Callaghan SC) the case of the insolvent company and coextensive liability of servants.

758 Arms v WSA Online Ltd [2005] FCA 943 at [109].


Gleeson CJ: “I was not really suggesting that it was a case of lifting the corporate veil; I was just suggesting that it is a question of the reach of the norm of behaviour, whether it is intended to govern the conduct of people in the position of your client …”

Gummow J: “I would just read s 9 and without slipping in words it seems to be you are in trouble, your clients are in trouble. … You have to get very metaphysical to get your clients out of the plain words of s 9.”

Heydon J: “It is not for judges to impose limits on parliamentary language. Judges have to obey what parliaments do … not say, “It’s rather too broad and I think it should be narrowed down a bit.”

Hayne J: … [do you propose s 9 read] “as incorporating some sort of organic theory of corporate behaviour and if someone does something in the capacity of servant that person does not act, the corporation acts?” [Counsel concurred].

The discussion turned to the position of different types of employees. 762

Gleeson CJ: “The problem is that in its possible application to the position of employees of corporations, s 9 deals indifferently with the position of a casual salesperson behind the tie counter at David Jones and the sole employee of a one-person company who happens to be a person as well.”

Hayne J: “Well, what is the difference between … the treasurer who says, “Deal with Pyramid Building Society. They’re safe, and the position of Mr Houghton and Mr Student saying, “Deal with WSA on this basis?” What is the difference?”

Mr O’Callaghan: “But Mr Houghton and Mr Student never said to Mr Arms, “Deal with WSA on that basis.” Houghton and Student only ever spoke to Arms as WSA, your Honour. It is an important distinction, we would say, because to cloud it means that one clouds the division between corporate liability and personal liability. …”

The court returned to the casual worker behind the tie counter during submissions by counsel for Mr Arms (Mr Riordan SC). Counsel pointed out that it depends on the

762 Ibid, at 23-25.
facts and that no such previously decided case of liability of low-level employees had been found.\textsuperscript{763}

Hayne J: “Just test the proposition a little further, let it be assumed that the tie counter salesperson turning the tie over sees “Finest Quality Rayon” in very large letters all over the label of the tie and then proffers it to the customer saying “100 per cent silk”, why not caught? Misleading or deceptive conduct.

Gummow J: “As distinct from handing the tie over in the package which says “100 per cent silk” whereas it is rayon.”

Hayne J: “Just so.”

Mr Riordan: “With respect, as I stand here, I am inclined to accept what Justice Hayne says that if there it says “Rayon” and he says “Look, this is silk”, then there is no reason why he should not be liable for that. He is putting his or her gloss on it in such a way that he is not promoting fair trade practices.”

Gleeson CJ: “What if he goes to the manger of the department and says, “What is this tie made out of?”, and the manger says silk, so he goes back to the customer and says that is a silk tie? That would be misleading or deceptive conduct, would it not?”

Mr Riordan: “… This person has not been misleading or deceptive. He has done nothing more than passed on information.”

Gleeson CJ: “That may well be the answer to the problem. …”

The judges have explored the characterisation of conduct to see whether or not in respect of particular examples the conduct is ‘in trade’. This process reinforces their view that the rule conditions the conduct and not the status of the person whose conduct is in question and having come to that view their discussion makes it clear that whether or not the conduct is ‘in trade’ depends on the particular life fact situation.

\textsuperscript{763} Ibid, at 37- 38.
7.8 The interpretative tools – an example

An aspect of both prospective interpretation and concurrent interpretation is the use of interpretative tools. Mention has been made in the thesis of tools (not rules) that assist with the judicial interpretation of statutory rules. Reference also has been made to the statutory rule that provides remedies for contractual misrepresentation contained in s 6 of the Contractual Remedies Act. The interpretation of this rule provides an instructive example of how interpretative tools, when properly used as such, do assist with concurrent interpretation and are not confined to prospective interpretation. In a sense the following treatment builds on what is said about Savill and related cases in section 7.3 above.

At common law and under the CRA a minimum requirement is that the representee prove that she was induced by the misrepresentation. In other words there must be a causal link between a misrepresentation and the representee’s decision to enter into the contract. “We are here concerned with whether the representee actually relied on the statement, or can be taken to have done so; not whether it was reasonable for him to rely.” As was said by the Court of Appeal in Buxton v The Birches and repeated in Snodgrass: “… the representation must have been causative. It must in a real sense have been at least one of the factors that led the representee to enter into the contract …” this being a question of fact and degree. That is the core question, which sits well with the words of s 6 CRA and not with the judicial exegesis in Savill.

The representor’s state of mind may be significant if fraud is alleged but as John Cartwright says:

… in relation to the other remedies [including for innocent misrepresentation], it means only that the representor, in making the statement, realised that his statement


765 Buxton v The Birches Time Share Resort Ltd [1991] 2 NZLR 641 (CA) at 647.

766 Cartwright Misrep at [3.49] (emphasis added).
would be received by the representee and that he might therefore act upon it. It serves more to define the range of potential claimants – defining those who are entitled to sue on the representation; the statement was consciously directed at the claimant.

This fits with the following: “the core question is whether the representee was entitled to take the statement seriously and so rely on it in deciding whether to enter into the contract.”767 Obviously the representation must be directed to the representee and the wording of s 6 CRA makes this clear. Also there must be substance in the content and circumstances of the representation. Causation may not be present if the representations are merely “puffs”768 and eulogistic commendations. Examples are the talk about herbicides in Ware v Johnson769 and the information given about plans and prospects for development in Buxton v The Birches.

Usually there are many reasons why a person enters into a contract and a court is not expected to analyse the workings of the mind of the representee. Therefore the courts have developed a number of useful tools to assist with evaluation of the core question. They include an evaluation of (i) the content and context of the representation, (ii) materiality in the sense was the representation by its nature capable of having influenced a representee and (iii) reasonableness in the sense was it reasonable to have been so influenced. Each go to establishing causation.770 However these matters either separately or together are not determinative of the core question (that the representation be causative) or for that matter of what constitutes an actionable misrepresentation but are useful tools. Sometimes these are called evidentiary tools, shifting the evidentiary onus of proof in the course of the trial as happened in the case now discussed.

That reasonableness (the first of the two-step test in Savill) is not determinative of inducement is illustrated by an English case: Museprime Properties Ltd v Adhill

767 Cartwright Misrep at [3.12]. Adopted by Mance LJ for the CA in Primus Telecommunications PLC v MCI WorldCom International Inc [2004] 2 All ER 833 at [30].


769 Ware v Johnson [1984] 2 NZLR 518 (HC).

770 Cartwright Misrep at [3.53].
Properties Ltd\textsuperscript{771} in which a purchaser by auction of a commercial property was allowed to rescind for innocent misrepresentation by the auctioneer that higher rents could still be negotiated when in fact the rents had been fixed for the next rent review period. It was specifically held that it was sufficient for the bidder to show that his bid had actually been affected by the representation and that it did not have to show that a reasonable bidder would have allowed it to affect its bid. Reasonableness may at most affect the evidentiary onus of proof. Scott J (later Lord Scott of Foscote) in making his evaluation assumed that the reliance on the representation was unreasonable “in which case the onus is on [the purchaser’s representative] to satisfy me that that factor did induce him …”\textsuperscript{772} Notwithstanding his assumption of unreasonableness he found on the evidence that the bidder had satisfied the onus of proving that the representation was a factor that did induce him.

The position is similar for an evaluation of the content of the representation. The High Court of Australia succinctly set out the approach to this evaluation in Krakowski v Eurolynx Properties Ltd\textsuperscript{773} albeit in respect of claims of fraudulent misrepresentation and misleading or deceptive conduct:\textsuperscript{774}

The words or conduct by which a representation is made may be understood by a reasonable person in the position of the representee in one sense, by the representee in a second sense and by the representor in a third sense. Or the representee may understand them, albeit not in the sense in which a reasonable bystander would understand them. The differing senses in which words or conduct are understood, must be borne in mind in determining whether the several elements of deceit are proved.

The sense in which a representation would be understood by a reasonable person in the position of the representee is prima facie the sense relevant to the question whether the representation is false. The sense in which a representation is understood by the

\textsuperscript{771} Museprime Properties Ltd v Adhill Properties Ltd (1991) 61 P & CR 111 (ChD).

\textsuperscript{772} Ibid, at 124.


representee is relevant to the question whether the representation induced the
representee to act upon it. And the sense in which the representor intended the
representation to be understood is relevant to the question whether the representation
was made fraudulently.

I suggest that these examples of the use of interpretative tools sit with the words used
in the statutory rules and their concurrent interpretation rather than as a means to
promote judicial exegesis in the course of prospective interpretation.

At this point mention is made of the pessimism expressed by Burrows about the
judicial treatment of the CRA and which has proven well-justified:775

So the object of this codification had to be to simplify the law and provide direct
routes to justice. This the new Act does, and provided it is accorded a sympathetic and
liberal interpretation by the courts, it should succeed in its purpose. However codifiers
of the common law tend to be a sorry lot, for their efforts normally run into some
degree of initial difficulty, and normally there will be a transitional period where those
who have to use the new Act will complain that it creates as many problems as it
solves.

7.9 Summary

This chapter is about the judicial interpretation of statutory rules in practice. It begins
with the scenario of Ms Neufarmer which provides a context in which to examine the
application of two commonplace statutory rules by courts to resolve conflicts.

By reference to the leading cases of Savill and Heaven the process of adopting and
using prospective interpretation is described. In each case the statutory criteria is
replaced by the formulation of compulsory steps (new Judge-made criteria) that must
be met by a successful claimant. It is demonstrated that from an analytical point of
view the reasoning in these cases is suspect and also that justice is not served. There is
a lack of transparency and of due notice of laws. It is also demonstrated that policy

considerations intrude and the new criteria promulgated in each case have the effect of chilling prospects of success in ways Parliament could not have anticipated.

Further, the new criteria themselves require interpretation. The analysis has demonstrated the confusion that arises from prospective interpretation. A lawyer asked to advise on prospects of success is no further advanced in this task by the new criteria. Certainty and determinacy are demonstrably not promoted by prospective interpretation.

The very different and direct Australian interpretative approach of concurrent interpretation in the same context is examined in section 7.4.3 and in the context of a discussion of the very recent New Zealand case Red Eagle in section 7.4.4. The New Zealand Supreme Court seems at one moment to grasp concurrent interpretation only to cloud its interpretation with further exegesis with the effect on subsequent cases described above.

The interpretation of so-called ordinary words is clarified. Rather than such interpretations being a special case with consequent problems it is demonstrated that the interpretation of ‘ordinary’ words is not different to the interpretation of other words whether they be not so ordinary, unusual or the like. It is suggested that much confusion is thereby resolved.

The clarification of ‘ordinary words’ provides an opportunity to develop a discussion of Brutus v Cozens a case that is important for the way it encapsulates many different ideas about legal interpretation. This analysis is directly relevant to the discussion of the judicial process in Brooker. It is demonstrable that the various prospective interpretations adopted in Brooker are not complete and are of marginal utility. The work of the Supreme Court in that case is compared to that of the High Court of Australia in Pollock. Essentially the argument of the thesis is that Brooker was a lost or postponed opportunity to overrule prior judicial exegesis and return to the concurrent interpretation of the statutory words of the rule in the manner adopted in Pollock.
Much has already been said in previous chapters about analogous reasoning but the opportunity is taken in section 7.7 to provide a practical example of such reasoning. This is followed by a description of how tools of interpretation are available in the task of judicial interpretation. Concurrent interpretation sits easily with such tools and there is no suggestion that courts not utilise them. To the contrary, in constructing the narratives described in Chapter 6 analogous reasoning and the tools are of particular use. Of course the tools are not rules but are flexible instruments and it is hoped that the description in this chapter shows how they do their work in the judicial process of concurrent interpretation.

Finally in answer to the question ‘Does the interpretative account make a difference?’ it is demonstrated that there are significant differences between prospective interpretation and concurrent interpretation in respect of approach, response and outcome. The choice of interpretative account affects the way in which a case is argued, the way in which the facts are presented and may affect the outcome.

Prospective interpretation challenges the primacy of the statutory words, the separation of powers and the rule of law principle that citizens have due notice of the content of laws and the accessibility of laws.
Chapter 8

Conclusion

It is not for me to tell courts how they should interpret statutory rules. Parliament itself has been restrained in so doing. Section 5 of the Interpretation Act 1999 under the headings “Principles of interpretation” and “Ascertaining meaning of legislation” simply says (and without reference to courts but speaking generally):

1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

These statutory principles are sufficiently bland so to sit with either prospective interpretation or concurrent interpretation.

Instead the thesis attempts a synthesis of philosophical ideas and an analysis of legal practice in the specific and significant context of the judicial interpretation of statutory rules. The aim is to introduce ideas that are not generally well known to common lawyers, to demonstrate the way these ideas interconnect with statutory interpretation and to demonstrate the relevance of these ideas to the judicial interpretation of statutory rules.

More ambitiously the thesis also attempts a sustained argument for the concurrent interpretation of statutory rules by courts described by me as follows:
In interpreting a statutory rule one first identifies the rule relevant to the conflict before the court. Then the rule and the real life situation are concurrently brought into correspondence, the facts are identified and characterised in terms of the rule and the words of the rule in terms of the situation. In this process the meaning of the rule is realised in application and in effect retrospectively.

Measured against the yardsticks of tenability, completeness and utility, concurrent interpretation is better than prospective interpretation (the attempt to find meaning in advance of application) as a description of what legal interpretation is and should be and as better practice. The tenability and utility of concurrent interpretation I suggest is incontrovertible and I advocate concurrent interpretation as the complete account for the judicial interpretation of statutory rules.

There are three matters fundamental to good legal practice that support concurrent interpretation: (i) the separation of powers which vests in Parliament the creation and formulation of laws, (ii) the rule of law principles and values, in particular those that require citizens have due notice of laws, that they be accessible, clear and as predictable as is possible and (iii) the good practices that promote the best ways to get the meaning of rules for particular cases, including analogous reasoning, the interpretative tools and the production of narratives.

I hope that at least the matters traversed in the thesis are interesting and prompt reflection on the important matter of how we go about interpretation in law.
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