The Right Honourable E.W. Thomas practiced law as a trial and appellate lawyer for 32 years, first in a large law firm and then as a Queen’s Counsel at the independent bar of New Zealand. He was a judge of the High Court of New Zealand for five years and a judge of the Court of Appeal for six. He retired from that court on reaching the statutory retirement age. Since retirement he has maintained an association with a number of academic institutions in England, Australia and New Zealand. He is a member of the Privy Council and an Acting Judge of the Supreme Court of New Zealand.

Judge Thomas’s experience, from the engine room to the bridge, has given him a perspective on the exercise of judicial arts and skills which precludes the possibility of challenge on the ground that he doesn’t know what he is talking about. He does. And he has written a thoughtful and insightful book about judging, particularly about the difficult task of keeping the application of the law just, fair and contemporaneously relevant.

One important thesis runs through this work: that the law is neither rigidly fixed nor absolutely certain. The formalism of strict adherence to precedent, coupled with syllogistic reasoning, may lead away from the result that is just and fair, when the just and fair result may be well within the law’s capacity to deliver, if only the law were properly understood as a developing and principled dispute solver. Justice and fairness are the goals, not absolute consistency.

Judge Thomas therefore has to address the perceived problems of allowing judges to be flexible enough in their approach to precedent without also allowing them to introduce personal and perhaps even idiosyncratic views into the administration of justice. He does so very persuasively, particularly in Chapter 10, headed “The Constraints on the Judiciary” in which he deals with both external constraints and
“internalized” constraints. He also reaffirms a legitimate role for certainty and a justifiable role for precedent, advocating, in each case, that the place of those factors in reaching a decision should be fairly and pragmatically considered, together with all the other relevant factors, in allocating appropriate weight to each factor.

With the rejection of formalism and the relaxation of the doctrine of precedent comes the necessity to explain, to laymen in general and in particular to politicians, both in Parliament and the universities, that what they call “judicial activism” is at the heart of the judicial calling and is required to maintain the contemporary relevance of the law. Its opposite is judicial sterility. Judge Thomas points out that the Supreme Court of the United States under Chief Justice Warren kept the law in touch with a developing society in such decisions as Brown v. Board of Education and Roe v. Wade, but that the Rehnquist Court has been even more “activist” in changing the law through its reversal of decisions of the Warren Court. All judges have to maintain the relevance to a society of the law as that society changes. If they fail in that task, they fail both the law and society. “Judicial activism” is simply the name given to outcomes which try to keep the law relevant to the times, characterized as “activism” by people who don’t like what the times have become.

There are other themes. In the development of the central thesis, the author refers a number of times to the tendency for formalism to lead to an unjust result, which is then explained by the need for legal consistency, often coupled with the advice that if the decision is seen as unfair the solution is through legislation. The starting point for a decision about whether to make a modification to the law should surely be to ask: “How did we get into this mess?” If we got there through legislation which cannot be adjusted through the new interpretive tools, then legislative intervention is probably necessary. On the other hand, if we got there by the untrammelled rules of law and equity then in many cases the courts should be able to put it right without troubling a legislature to deal with a difficulty which legislators do not have the time or inclination to resolve. Judge Thomas takes that question and its answer as a starting point in an insightful discussion of the issue. In the end, judges should not use the possibility of legislation as a fixer-upper without thinking about whether that is the best and surest way to a just law. Often it will not be. That should then drive the judge back to a choice of taking responsibility for an unjust result which ought not to have been reached or, alternatively, thinking again.

Judge Thomas also addresses the difficult question of whether judges, particularly appellate judges, should enunciate rules of law
beyond what is strictly necessary to decide the case in front of them, with the hope that they might give guidelines to those who are ordering their affairs in the relevant field but not precisely on the point of the case in hand. Again his recommendation is to think about the precise problem raised in the context of the particular case. Were the issues on which guidance is to be given argued fully and well? Is the guidance clearly right? Is it needed? There is no single answer for all cases. Before making a decision, however, the judge should always consider the relationship of the case in hand to the whole body of law, with most detailed attention to the parallels with similar problems in other branches of the law, even if the reason is best expressed in the narrowest of terms in the specific case. In a developing field of law, even the highest court has an obligation not to trample over all the tender shoots when it is cultivating only one of them. Rules about unjust enrichment in matrimonial cases were better not expressed in terms wide enough to be necessarily applicable to commercial cases - and the perils of decisions that are too wide and too early in a new field of law have been evident in Charter cases, Aboriginal rights cases, and family law cases, to name a few.

A possible example of the perils of formalism, and of failing to value continued relevance, is provided by the marked decline in the numbers of commercial cases in the British Columbia courts. Commercial issues tend now to go to mediation or, less frequently, to arbitration. The lack of judges experienced in commercial matters and the formalism of judges not experienced and perhaps diffident in commercial matters, has led to a lack of confidence among the commercial community in the court process. Experienced mediators and arbitrators now find the commercial law of British Columbia to be a dwindling and increasingly irrelevant resource, inadequate to support arbitral decisions and to provide a solid foundation for predictable outcomes in commercial matters. This seems to be a telling example of where the formalism which Judge Thomas deprecates may lead.

Judge Thomas has written a thoughtful book which should stimulate both judges and others interested in jurisprudence, provided they read it. I do not think it likely that formalist judges will read it, or that it will ameliorate their rigidity if they do. But judges who are already thinking about the problems which Judge Thomas discusses will find much support and a wealth of careful analysis in this book.

Judge Thomas refers in approving terms to the judicial philosophies of Justice Holmes, Justice Cardozo and Lord Denning. They are exemplars of his central thesis.
There is some repetition of ideas from chapter to chapter. Perhaps the chapters were written as separate essays between other work. Nothing is said more than once, however, that does not deserve to be said more than once.

Judge Thomas is concerned that the law should retain its contemporary relevance in changing times. He has shown how to approach that task with care and deference. We should all think as hard about his advice as he has.