

Canon law principles were applied in English ecclesiastical courts³ and in medieval Scottish courts.⁴

Bracton seems to have suggested that these canon law principles were actually part of the early common law, presumably by incorporation. The better view is that this was not so.⁵ It is true that there were scattered features of the common law which might have supported such a proposition, and it is certainly disingenuous to suggest that the canon law would have had no influence. For instance, the grounds of exception to the competency of witnesses for interest and bias had long been extended to jurors of the grand assize.⁶ Further, by the early 14th century, common law judges were held to be incompetent to preside over cases in which they were themselves parties.⁷ However, a contrary view to Bracton's common law-canon law convergence theory was taken in *Brookes v Rivers*,⁸ where it was held that favour was not to be presumed in a judge. In that case, the Chamberlain of Chester was not disqualified from hearing an action in which his brother-in-law was a party.

Blackstone considered that, as a matter of public policy, the common law rule that judges could not be disqualified for relationships or bias but only for a direct pecuniary interest was absolutely correct.⁹

For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.

The clear reluctance to see judges challenged was tempered by only two rules, which were tolerably well established. First, there was the rule already adverted to: that the common law simply did not permit a judge to determine a matter in which he had a direct pecuniary or proprietary interest. Perhaps the best known authorities for that proposition are *Sir Nicholas Bacon's Case*¹⁰ and the *Earl of Derby's Case*.¹¹ The second proposition was

³ FW Maitland, *Roman Canon Law in the Church of England: Six Essays* (London, Methuen & Co, 1898) 114.

⁴ TM Cooper (ed), *Regiam Majestatem and Quoniam Attachiamta* (Edinburgh, Stair Society, 1947) 324-25.

⁵ RE Flamm, above n 1, 5-6; and H Woolf, J Jowell and A Le Sueur, above n 1, 502. See also *Aetna Life Insurance Co v Lavoie* (1986) 475 US 813, 820.

⁶ R Glanvill, *De legibus et Consuetudinibus Regni Angliae* Bk II ch 11 in R Pound and TFT Plucknett (eds), *Readings on the History and System of the Common Law*, 3rd edn (Rochester, Lawyers Co-Operative Publishing Co, 1927) 143. For the canon law rules themselves, see JH Wigmore, *Evidence in Trials at Common Law: Volume II*, 3rd edn (Boston, Little, Brown and Co, 1940) 678, n 14.

⁷ The early yearbook cases are collected in SE Thorne (ed), *A Discourse Upon The Exposition & Understandings of Statutes with Sir Thomas Egerton's Advantages* (San Marino, Huntington Library, 1942) 73.

⁸ (1668) 1 Hard, 503; 145 ER 569.

⁹ W Blackstone, *Commentaries on the Laws of England* (1768) (Buffalo, William S Hein Co, 1992) 361.

¹⁰ (1563) 2 Dyer 220b; 73 ER 487 (KB).

¹¹ (1614) 12 Co Rep 114; 77 ER 1390 (KB).

confirmed by Sir Edward Coke CJ in *Dr Bonham's Case*:¹² that a judge could not be a judge in his or her own cause.

Even these limited principles caused their own share of difficulties. A judge might be disqualified, as happened in *Dr Bonham's Case*, because he received the fine which he had the power to inflict. In another well-known case, the Mayor of Hereford was 'laid by the heels' for sitting as a judge in an ejectment case in which he was the lessor of the plaintiff.¹³

The principles could however be pushed too far. For instance, in a case involving a pauper, a judge was disqualified for interest because the decision affected his own taxes.¹⁴ But if judges were to be disqualified as taxpayers, some suits would not be able to be decided. Therefore, in 1743, the English Parliament provided that taxpaying Justices of the Peace might sit in these local government taxation cases.¹⁵ The significance of these kinds of cases is that they are the forerunner of the modern rule of necessity: that judges should not decline to sit where no substitute is readily available.¹⁶

Relationship issues were treated in a somewhat peculiar way. Early English courts held that a judge was not disqualified by his relationships, but that in some respects a juror could be. This gave rise to a number of cases in which courts had to decide what *degree* of relationship necessitated the disqualification of a juror. In a 1572 case, the line was drawn at the 9th degree. It was said:¹⁷

All the inhabitants of the earth are descended from Adam and Eve, and so are cousins of one another [but] the further removed blood is, the more cool it is.

UNITED STATES OF AMERICA

In contrast to the situation in England, judicial recusal in the United States became subject to a federal statutory regime at an early stage. This is important when looking at the broad development of recusal jurisprudence, because one question which must be squarely confronted is whether common law judges have done better in developing their own jurisprudence (a form of self-regulation) as opposed to a statutory regime effectively 'imposed' from without (external regulation).

¹² (1610) 8 Co Rep 114a; 77 ER 638 (CP). See also SE Thorne, 'Dr Bonham's case' (1938) 54 *Law Quarterly Review* 543 and TFT Plucknett, 'Bonham's case and Judicial Review' (1926) 40 *Harvard Law Review* 30.

¹³ *Anon* (1698) 1 Salk 396; 91 ER 343 (KB).

¹⁴ *Between the Parishes of Great Charte and Kennington* (1726) 2 Str 1173; 93 ER 1107 (KB).

¹⁵ 16 Geo II, c 18, § 1 (1743).

¹⁶ See ch 12.

¹⁷ *Vernon v Manners* (1572) 2 Plowden 425; 75 ER 639 (KB).

man who becomes obsessed with some imagined injustice and pursues the matter through both the courts and thick and thin against all advice; and Dimes had himself for a client.

This may well have been an overly scathing assessment of Mr Dimes. He knew a great deal about copyhold land, and it is routinely overlooked that the litigation came to an end with the canal company buying out the requisite interest for £700. So in fact Dimes toppled the Lord Chancellor, and in the end, the canal company also paid him out.

What we are presently interested in is what went wrong for Lord Cottenham. It is appropriate to pick up the legal proceedings at the point where the Vice-Chancellor made an order in favour of the canal company. In 1848, Lord Cottenham affirmed that order on appeal. The following year, after discovering Lord Cottenham's shareholding, Mr Dimes petitioned the Queen of England for her intervention. He then filed a motion in Chancery, asking for Lord Cottenham's decision to be struck out on the basis of his interest in the case. At Lord Cottenham's request, this motion was heard by the Master of the Rolls, Lord Langdale. Lord Langdale advised that the decision should be upheld on the ground of necessity.⁵ This was because, as it transpired, there was no other judge of coordinate jurisdiction who could hear the case in the place of the Lord Chancellor.

It was after that decision that Mr Dimes chose to treat all the Chancery decisions as void. He then began some of his extraordinary collateral activities, such as placing a chain across the canal, digging a trench across the towpath, and throwing bricks in the canal.

Mr Dimes did not appeal the advice of Lord Langdale until 1851. In the meantime, Lord Cottenham had again become involved in the case. He issued a warrant for Mr Dimes to be committed for contempt, leading to his imprisonment for several months. Mr Dimes then sought to set aside the order for his committal. He faced the hurdle of the earlier advice of Lord Langdale that there was no ground for setting aside the earlier orders of Lord Cottenham. However, Lord Cottenham 'confirmed' this advice, under the then applicable Chancery procedure and later acceded to a request by Mr Dimes for a writ of *habeas corpus*.

It was in this context that the litigation reached the House of Lords. The Lords made it plain that the reversal of the order of the Lord Chancellor left the order of the Vice-Chancellor, which Lord Cottenham had affirmed, quite unaffected. Their Lordships dismissed Mr Dimes' appeal so far as it related to the merits of the property issue which had been decided by the Vice-Chancellor. But Mr Dimes did win on the point of principle, as to disqualification for pecuniary interest: their Lordships unequivocally held that the Lord Chancellor should not have sat, by reason of his ownership of shares in Grand Junction Canal Company. Nevertheless, in the course of

his judgment, Lord Campbell famously observed that 'no one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern.'⁶

It is not easy to ascertain the exact nature of Lord Cottenham's interests, despite earnest attention by legal historians. We know Lord Cottenham had 92 shares in the company, but they were £100 shares, which would have been very valuable at that time. 17 were held in his own right and 75 in a representative capacity. There is hard evidence that his Lordship received £276 in dividends for the year 1848. That is an interest which it would be difficult to describe as *de minimis*.

Throughout this whole affair, Lord Cottenham had been seriously ill, leading to his resignation from the position of Lord Chancellor, a recuperation period in Malta and his death in Italy in April 1851, on his 70th birthday.⁷ Atlay has suggested that it was the stress of this wretched litigation which led to the Lord Chancellor's relatively early death.⁸

The 'no pecuniary interest' principle as expressed in *Dimes* requires a judge to be automatically disqualified when there is neither actual bias nor even an apprehension of bias on the part of that judge. The fundamental philosophical underpinning of *Dimes* is therefore predicated on a conflict of interest approach.

Dimes also expressed a view that has rolled down the years in English jurisprudence, and which has had the significant implication that *all* public law cases should fall under the same rules:⁹

[Our decision] will have a most salutary influence on these [various] tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to *all inferior tribunals* to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

THE NATURE AND QUANTUM OF THE PECUNIARY INTEREST

The basic proposition in *Dimes*, that a judge who has a pecuniary interest cannot sit, was always going to require considerable qualification in practice. As such, it is too blunt a principle, though it set an important tone for the future.

⁶ Above n 1, 315.

⁷ FA Sharman, above n 1, 86.

⁸ JB Atlay, above n 1, 415. Atlay also says that, at Harrow, Lord Cottenham merely added 'ballast to the ship' and that when he resigned his office, he got an Earldom 'for his resignation rather than his rank'. Who needs an enemy, when one can have a biographer?

⁹ Above n 1, 315 (emphasis added).

⁵ For a more extensive discussion of the necessity principle, see ch 12.

The divergence of opinion between Kirby J and his colleagues on the High Court of Australia in *Ebner v Official Trustee in Bankruptcy* is also instructive.¹⁹ In that case, the majority took the view that there is a distinction between a pecuniary interest *in the company* and a direct pecuniary interest *in the outcome* of the litigation. Kirby J, on the other hand, saw the relevant point as being whether or not the judge had a financial interest in the form of a shareholding in a company that was a *party* to the proceedings before him or her.

The courts have to date shown considerable reluctance to allow the financial interests of a judge's family members to amount to a disqualifying pecuniary interest. In *Bank of New South Wales v The Commonwealth*, the High Court of Australia ruled that Starke J was not disqualified by reason of his wife's shareholding in a bank.²⁰ In another Australian case, the wife of the President of the Industrial Court of Queensland held shares in a mining company which was a party to proceedings before the Queensland Supreme Court. The President himself had never owned shares in the company and had no pecuniary interest in his wife's shares. Relying on *Dimes*, the court held that the President had no direct pecuniary interest. The court then proceeded to apply the alternative test of whether the shareholding generated a reasonable likelihood of bias, and concluded it did not.²¹

A novel attempt by counsel to extend the financial disqualification rule was made in *Muir v Commissioner of Inland Revenue*.²² Dr Muir was a tax lawyer and the originator of a scheme based on forestry investment which would have attracted millions of dollars in tax relief. In earlier litigation, the Court of Appeal held that this scheme amounted to tax avoidance.²³ Dr Muir then sought to challenge the involvement of Venning J, the High Court judge, who had impugned the scheme on a variety of grounds. One was that the judge had an interest as an investor in another forestry block in Southland, New Zealand. The judge had initially held about one sixth of the shares in the relevant company, which subsequently increased to a 25 per cent shareholding. Counsel for Dr Muir suggested that it was likely that the High Court judge's investment would involve similar tax issues to those considered by him in Dr Muir's case. These considerations would be relevant to the value of his investment. The Court of Appeal held that the similarities between the judge's private investment and that which was before him in the present case had not been appropriately made out.

¹⁹ Above n 12.

²⁰ (1948) 76 CLR 1 (Latham CJ).

²¹ *R v The Industrial Court and The Honourable Mostyn Hanger President of the Industrial Court and Mount Isa Mines Ltd* (1966) Queensland Law Reporter 245.

²² *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA). The judgment of the court was delivered by the present author. There was no appeal against this decision.

²³ The decision of the Court of Appeal has been upheld by the Supreme Court of New Zealand in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115.

It had also been suggested that what the judge would 'learn' from his involvement in the *Muir* case would ultimately be beneficial to him. The Court of Appeal rejected that proposition, in these terms:²⁴

The suggestion that a Judge should not 'learn' from things he or she hears in the course of a case is also startling. It must be the experience of all judicial officers (and counsel) that in the course of a case they have to inform, or better inform themselves, on an extraordinary range of matters, some of a highly technical character. Some of this 'sticks' and (mercifully) much of it can be, and is, discarded. The suggestion that the Judge was getting a 'learning benefit', as it were, out of this case, which he could then enhance or apply in his own forestry investment, is fanciful. The learning experience of this case was, and is, that some schemes are hopelessly beyond the pale.

Real problems are likely to continue to arise in the field. Judges own insurance policies, have bank accounts, use credit cards, and own shares in corporations, perhaps directly or through devices like mutual funds. Both practically, and because it is important that judges live 'normal' lives for a deeper personal understanding of the society in which they adjudicate cases, they cannot be expected to put such things aside. Increasingly, the inquiry is likely to become more fact specific: can it fairly be said that the outcome of the proceedings before the particular judge will really affect the judge's interest?²⁵

CONNECTION WITH THE CAUSE OF A PARTY TO THE LITIGATION

The law in this area was reviewed by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, Ex parte Pinochet Ugarte (No 2)*,²⁶ to which reference has been made in Chapter 1.

In the first round of that extraordinary litigation, their Lordships held that Mr Pinochet, the former Chilean dictator, was not immune from the arrest and extradition proceedings brought in respect of his conduct during his time in office.²⁷ Amnesty International, a charitable organisation concerned to educate the public about, and to promote, human rights, had been given leave to appear as an intervenor.

²⁴ *ibid* [87].

²⁵ See also *Clene Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573, 591, where the Victoria Court of Appeal suggested that 'automatic disqualification should not follow merely because a judge has a shareholding in a party to litigation, but that *something more* is required, an interest in the outcome, or the cause itself, or the subject matter of the proceedings' (Charles JA) (emphasis added).

²⁶ *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL).

²⁷ *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, ex p Ugarte* [2000] 1 AC 61 (HL).

held that the judge's 'nominal and indirect interest' did not establish a bar to the judge sitting on the case.³⁷

What these decisions demonstrate is a reluctance on the part of contemporary appellate courts to see a judge automatically disqualified where the interest involved is minimal, or where the connection with the judge is tenuous or quite unlikely to have had any bearing on the resolution of the case itself. This amounts to a kind of screening process, with the reviewing court asking whether a particular interest 'mattered', in a rather pragmatic way.

WHERE TO WITH AUTOMATIC DISQUALIFICATION?

As indicated, the reception of *Pinochet (No 2)* was somewhat mixed in the United Kingdom. In *Locabail*, the English Court of Appeal was clear that there should not be extensions of the automatic disqualification category 'unless such extension were plainly required to give effect to the important underlying principles on which the rule is based'.³⁸

Even in cases where doubt has been cast upon the automatic disqualification approach (such as in the majority decision of the High Court of Australia in *Ebner*³⁹), the concern has been less with the principle that disqualification for some types of financial interests is essentially automatic than with the idea that the amount of the interest in question is of little or no consequence in determining when a judge should be disqualified. The majority in *Ebner* said:⁴⁰

[W]e accept that, in the practical application of the general test to be applied in cases of apprehended bias, economic conflicts of interest are likely to be of particular significance, and that, allowing for the imprecision of the concept, the circumstance that a judge has a not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation will ordinarily result in disqualification.

Some English commentators have seen the *Pinochet* litigation as extending the 'pecuniary interest' category from situations where the judge's interest in the outcome of a case was financial to much broader situations where other personal interests may be implicated.⁴¹ Other commentators have said that automatic disqualification is merely mechanical jurisprudence that is 'draconian, disproportionate and unnecessary'.⁴² Still others have thought that real uncertainty has been caused in the law by the decision.

³⁷ Above n 14, 906.

³⁸ *ibid* 883.

³⁹ Above n 12.

⁴⁰ *ibid* [58].

⁴¹ Above n 30.

⁴² AA Olowofoyeku, 'The *Nemo Judex* Rule: The Case Against Automatic Disqualification' [2000] *Public Law* 456, 475. See also B Rayment, 'Bias: Recent Developments' [2001] 6 *Judicial Review* 93; P Havers and O Thomas, 'Bias Post-*Pinochet* and Under the ECHR'

As to the issue of uncertainty, Lord Bingham of Cornhill has suggested some factors in *Locabail* which would engage a presumptive automatic disqualification rule. Factors which will likely give rise to a real danger of bias include personal friendship or animosity; close acquaintance with a party; and any other reason for 'doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him'.⁴³ Other factors which would not ordinarily give rise to a real danger of bias include such things as 'religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge'.⁴⁴

The most serious challenge to the automatic disqualification rule has come from the High Court of Australia judgment in *Ebner*.⁴⁵ There, the High Court of Australia went so far as to hold that there is no separate and free-standing rule of automatic disqualification on the basis of a pecuniary interest. The majority in that case preferred to rely exclusively on a unitary 'apprehension of bias' test.⁴⁶ The general test posed by the majority was whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.⁴⁷

In dissent Kirby J supported the continuation of an automatic disqualification for financial interest test, at least where it is direct and not saved by the *de minimis* principle. His extensive reasons for this stance include the benefits of a 'bright line' rule; the firmness of various international covenants, including Article 14 of the ICCPR; the 'commonality' of the rule around the common law world; the compatibility of such a rule with other areas of the law, such as fiduciaries; and perhaps, most importantly, that a bright line rule promotes 'manifest integrity in the judicial institution'.⁴⁸

It is worth interpolating here that in the United States of America, Judge Posner has offered an 'economic' rationale for the orthodox bifurcation: occasional 'silly results may be an acceptable price for a rule ... that is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood'.⁴⁹

In *Muir*, the New Zealand Court of Appeal noted the decision in *Ebner*, but was not required to decide this issue, not least because it had not been

[1999] 4 *Judicial Review* 111. A Zuckerman has argued that the distinction between disqualification for bias and automatic disqualification is now redundant: *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (London, Sweet & Maxwell, 2006) 84–86.

⁴³ Above n 14, [25].

⁴⁴ *ibid*.

⁴⁵ Above n 12.

⁴⁶ *ibid* [54]–[55].

⁴⁷ *ibid* [6].

⁴⁸ *ibid* [161].

⁴⁹ *Union Carbide Corp v US Cutting Service Inc* (1986) 782 F 2d 710, 714.

just so far as you can, not to interject your own personal interests, even your own preconceived assumptions and beliefs.

However, Judge Learned Hand's distinguished realist colleague on the powerful Second Circuit Court of Appeals of that time was sceptical that a mechanical separation was possible, or even desirable. In *Re JP Linahan Inc*, Judge Jerome Frank said:²

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will ... [W]ere those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living.

It seems that Judge Learned Hand had a 'clean slate' model not only as his ideal, but as a distinct working principle. What he appears to have wanted was as nearly as possible an absolutely blank slate on to which the parties' competing assertions would be written and then clinically assessed. Judge Jerome Frank may be thought to go too far in the other direction: given the 'prior writings' on the judge's slate which emanate from his own being and experience, a judge cannot help *imposing* himself or herself on others.

In *R v Gough*, Lord Goff appears to have thought that the real concern is with a bad attitude, really an impermissible sort of public law *mens rea*:³

[H]aving ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

Put another way, this approach focuses on an inappropriate inclination on the part of a judge to decide an issue influenced by some consideration other than its merits.

Contemporary insights brought to the judging process by some insightful women law professors provide a further perspective. For instance, Professor Cain has suggested that:⁴

the act of judging [is] an act which seems to require at least momentary separation. A judge should transcend self to listen, and then a judge should decide with

² *Re JP Linahan Inc* (1943) 138 F 2d 650, 651. See also S Cravens, 'Impartiality: Balancing Personal and Professional Integrity in Judicial Decisionmaking' <http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=sarah_cravens> accessed 18 April 2009.

³ *R v Gough* [1993] AC 646, 670 (HL).

⁴ PA Cain, 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 *Southern California Law Review* 1945, 1955 commenting on an excellent paper by J Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) 61 *Southern California Law Review* 1877. See also AH Young, 'Feminism, Pluralism and Administrative Law' in M Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) 344-49.

empathy and understanding—as a new self, if you will, for having experienced the story of the other.

That sort of mediating insight has considerable attractions.

Later in this work, it will be suggested that the term 'objectivity' may be a more important and useful concept. But for now, the conventional term 'impartiality' is employed.

THE JUDICIAL OATH

In all common law jurisdictions, a judge takes a judicial oath on appointment. A relatively common form is an oath to 'do right to all manner of people after the laws and usages of [this country] without fear or favour, affection or ill will'.⁵

Lord Bingham of Cornhill has said of such an oath:⁶

If one were to attempt a modern paraphrase, it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment.

In the view of another distinguished jurist, Lord Devlin, the essential function of a judge is to remove any sense of injustice. This is something that would be more easily aroused by an apprehension of unequal treatment than by anything else. As his Lordship put it in the fourth Chorley Lecture:⁷

The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.

The existence of the judicial oath, apart from requiring impartiality, is often used to support the notion of a 'duty to sit'. As to such a 'duty', the New Zealand Court of Appeal emphasised in *Muir* that:⁸

[t]he requirement of independence and impartiality of a Judge is counterbalanced by the Judge's duty to sit, at least where grounds for disqualification do not exist

⁵ In New Zealand, see Oaths and Declarations Act 1957 s 18. The oath for each federal justice or judge in the United States is set out at 28 USC § 453.

⁶ TH Bingham, 'Judicial Ethics' in *The Business of Judging: Selected Essays and Speeches* (Oxford, OUP, 2000) 69, 74.

⁷ P Devlin, 'The Judge as Lawmaker' in *The Judge* (Oxford, OUP, 1981) 3.

⁸ *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, [35] (CA).

or associations that they have formed may make it difficult for them to judge the case before them impartially.

Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

THE POSITION OUTSIDE THE UK IN THE BRITISH COMMONWEALTH

Reference has already been made to *Webb v R*, the Australian authority which has been authoritative in realigning the test for apparent bias in that jurisdiction.²⁶

Recently, in *Muir*, the New Zealand Court of Appeal expressly adopted *Webb* and rejected *Gough*, holding that the court should make a two stage inquiry.²⁷ First, it is necessary, by rigorous inquiry, to establish the actual circumstances that have a direct bearing on the suggestion that the judge was, or may be seen to be, biased. The second inquiry is to ask whether those circumstances, as established, might lead a fair-minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

In Canada, a 'reasonable apprehension of bias' test has been well established since at least 1978.²⁸ More recently, in *R v S (RD)*, the majority of the Supreme Court of Canada restated the relevant considerations in these terms:²⁹

Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

²⁶ Above n 14.

²⁷ Above n 8, [62].

²⁸ See *Committee for Justice & Liberty v Canada (National Energy Board)* [1978] 1 SCR 369; and P Bryden, 'Legal Principles Concerning the Disqualification of Judges' (2003) 82 *Canadian Bar Review* 555.

²⁹ [1997] 3 SCR 484. For convenience, the headnote, which appears accurate and which summarises lengthy judgments, is adopted.

The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The requirement for neutrality does not require judges to discount their life experiences. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

The test for bias in South African law was set as a 'reasonable suspicion' of bias in *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union*.³⁰ This was confirmed by the Constitutional Court in a judicial recusal case, *S v Basson*.³¹

THE POSSIBLE CATEGORIES OF APPARENT BIAS

British Commonwealth courts have not seen it as appropriate to lay down precise categories as to when bias might be said to arise. Rather, courts have tended to mark out areas which potentially give rise to concern in a more broad-based way.

³⁰ *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673.

³¹ *S v Basson* 2005 (12) BCLR 1192.

the practical consequences of the bar's too ready mounting of personal attacks on the judiciary. This is an unattractive feature of contemporary advocacy.

THE EFFECT OF HUMAN RIGHTS LEGISLATION

For the United Kingdom, the Human Rights Act 1998 brought many ECHR rights into domestic law, including Article 6 as to the provision of a fair trial. Article 6(1) provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Bills of Rights adopted around the British Commonwealth to date also include like provisions. For instance, under section 25(a) of the New Zealand Bill of Rights Act 1990, in matters of criminal law, there is a right to a fair and public hearing by an independent and impartial court; and in section 27—the 'right to justice' provision of that statute—there is a right to the observance of the principles of natural justice in other matters, which undoubtedly also encompasses the proposition that judges must be independent and impartial. There are similar sections in the Canadian Charter of Rights in section 11(d) (the fair and public hearing provision) and, to a lesser extent, section 7 (the fundamental justice provision).⁵³

It has been suggested that the common law standards relating to bias and those under Article 6 are the same.⁵⁴ The present authors of *De Smith's Judicial Review* suggest that 'there certainly is no significant difference between them and they are likely in any event to converge.'⁵⁵

Nevertheless, there is surely much more to be said in this area. First, there was powerful, and with respect justified, criticism of the failure of the

⁵³ For a discussion of the distinction between natural justice and fundamental justice provisions in New Zealand and Canada respectively, see G Huscroft, 'The Right to Justice' in P Rishworth, G Huscroft, S Optican and R Mahoney (eds), *The New Zealand Bill of Rights* (Melbourne, OUP, 2003) 753, 755.

⁵⁴ In *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 (HL), Lord Steyn stated that the purpose of the modification of the common law test of bias in *Porter v Magill* was to bring the common law rule into line with the Strasbourg jurisprudence (at [14]).

⁵⁵ H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial Review*, 6th edn (London, Sweet & Maxwell, 2007) 536. See also A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (London, Sweet & Maxwell, 2006) 72.

House of Lords to take on board sufficiently the human rights dimension of recusal law; in the High Court of Australia, there has been a failure (apart from Kirby J) to consider it at all.⁵⁶ The House of Lords in *Pinochet (No 2)* was described as having 'missed a great opportunity to provide leadership' due to its dearth of discussion on ECHR jurisprudence.⁵⁷ However, in fairness, *Porter v Magill*⁵⁸ has since ameliorated differences between English law and ECHR.

Secondly, Bill of Rights provisions do have the capacity to significantly redefine the relevant issues. An example of this sort of possibility can be found in two cases concerning 'racial bias'. In *US v Brown*, in what must be one of the most appalling judicial statements of all time, the judge had openly said (prior to trial) that he was 'going to get that nigger'.⁵⁹ One would have thought that to be an extreme example of actual bias. But equally, an observation of that kind must surely offend any fair trial provision in a human rights instrument. And, in the Canadian case of *R v S (RD)*,⁶⁰ where a judge referred to the existence of anti-black racism in Nova Scotia Canada as a factor going to whether a judge should recuse, the recusal dimension could more compellingly have been seen as a 'fair trial' issue. For the more direct issue in that case was whether the judge could appropriately even refer to such a factor, and if so on what evidential basis, in deciding whether to accept the evidence of the officer or the accused.

If the prism becomes that of a fair trial rather than bias, or some amalgam of the two, several matters of concern open up. For instance, there are

⁵⁶ Despite ratifying all the major international conventions promoting human rights (including the ICCPR), Australia has not enacted a Bill of Rights. H Charlesworth has described Australia's complacency about human rights as its 'greatest weakness': 'The Australian Reluctance About Rights' in P Alston (ed), *Towards an Australian Bill of Rights* (Canberra, ANU Centre for International and Public Law, 1994) 21. Kirby J argued that the provisions of Art 14(1) ICCPR and Art 6(1) ECHR reflect principles of universal application and should be taken into account in developing the Australian common law on recusal in *Johnson v Johnson* above n 52, 665–66. Yet Kirby J has identified the disconnect between his deployment of international law in Australia and the parochialism of the legal community at large in that jurisdiction: '[t]he provincialism of ... Australian lawyers ... is profoundly discouraging. In Australia they still require a boldness of spirit and a determination to escape the bog of provincial jurisdictionalism.' See M Kirby, 'Implications of the Internationalisation of Human Rights Law' in P Alston (ed), *Towards an Australian Bill of Rights* (Canberra, ANU Centre for International and Public Law, 1994) 298.

⁵⁷ P Catley and L Claydon, 'Pinochet, Bias and the European Convention on Human Rights' in D Woodhouse (ed), *The Pinochet Case: A Legal and Constitutional Analysis* (Oxford, Hart Publishing, 2000) 77.

⁵⁸ *Porter v Magill* [2002] 2 AC 357.

⁵⁹ *US v Brown* (1976) 539 F 2d 467, 468 (5th Cir). As one might expect, there was a context. 'Rap' Brown was a fiery civil rights speaker and leader of the Black Power movement in the late 1960s. His statements, such as 'Violence is as American [sic] as cherry pie', attracted national notoriety. He was usually defended by William Kunstler. See D Langum, *William M Kunstler: The Most Hated Lawyer in America* (New York, New York University Press, 1999) 88–96.

⁶⁰ Above n 29.

CONCLUSION

The present rules relating to actual bias have posed no real difficulties. The standard of proof required is very high, and as with allegations of fraud in the civil law, what is relied on must be strictly pleaded and strictly proved.

Apparent bias has, unsurprisingly, created much more in the way of difficulties. One criticism of the present principles relate in part to their vagueness and difficulty of application.

Secondly, there is a consequential concern. The test which has been predominantly adopted throughout the Commonwealth of a fair-minded and well informed observer is a 'second level' rule. Because it is a much less stiff rule than that of actual bias, the test unfortunately lends itself to forensic manoeuvring. There has been increasing concern as to the strategic deployment of apparent bias appeal grounds after an adverse decision. This is due to an unhappy perception on the part of too many members of the bar which requires a mechanical, 'clean slate' indication of judicial impartiality that fails to give sufficient weight to what appellate courts have steadily held, namely that impartiality does not require a totally empty mind. That said, it must be conceded in fairness that where the line is to be drawn is difficult, and context-specific.

Thirdly, the real sting of the criticism of the present apparent bias test is that it is too concerned with formality and appearance, and less concerned with actualities. Provided a judge overtly adopts the 'right' approach, strongly held beliefs, which may be conscious or unconscious, are not directly addressed.⁶⁷ At rock bottom, the argument is that what is involved here is a triumph of form over substance.⁶⁸

Fourthly, against these sorts of concerns, it is appropriate to return to the difficult question as to whether the approach of the High Court of Australia in *Ebner*⁶⁹ was on a sounder footing in adopting a single standard for bias. Under that formulation, disqualification is no longer automatic and instead depends on the circumstances of each case. This gives rise to a context sensitive rule against bias. A court is required to 'articulate the connection between the alleged source of bias and the potential departure from impartiality'.⁷⁰ This involves assessing and evaluating the effect of the interest in question upon the decision maker. To adopt phraseology utilised earlier, the approach becomes one of a 'rule of reason'. The arguments for and against that approach have already been noted.

⁶⁷ For further discussion of unconscious bias, see ch 17.

⁶⁸ This criticism, cast more broadly, is at the center of EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge, CUP, 2005).

⁶⁹ *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337.

⁷⁰ M Groves, 'The Rule Against Bias' in M Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge, CUP, 2007) 316, 320.

The practical problems inherent in standing on a single unitary standard in public law generally can be illustrated from the further High Court of Australia decision in *Minister for Immigration and Multicultural Affairs; ex p Jia*.⁷¹ In that case, a Minister of the Crown spoke on a talk-back radio programme. He explained what it was that might lead him to conclude a person was not of good character for the purposes of migration legislation. Mr Jia had been convicted of several offences, some of which included the sort of behaviour the Minister referred to. Then, as it transpired, Mr Jia's case came before the Minister. The Minister made an adverse determination.

The issue for the High Court was whether the Minister's statement gave rise to a reasonable apprehension of bias. There was also a significant question as to whether the Minister's political activities (which actually required him to provide media interviews and discuss issues falling within his ministerial portfolio) could be taken into account in fashioning the requirements of the rule against bias.

Gleeson CJ and Gummow and Hayne JJ accepted that the principles applicable to judges should be *modified* when applied to the Minister. This is because great care had to be taken with respect to the political responsibilities of the Minister. In their view, there was no reason to conclude that the Australian Parliament intended to impose what might be termed the 'full blast' of standards to be imposed upon a judge, upon the Minister, 'and [indeed] every reason to conclude otherwise'!

This demonstrates the necessarily context sensitive nature of the rule against bias. Perhaps more significantly for administrative law in general, quite what that means for decision makers other than judges has left Australian law in what Groves has described as a 'state of flux',⁷² and arguably contributes a further layer of uncertainty.

⁷¹ *Minister for Immigration and Multicultural Affairs; ex p Jia* (2001) 205 CLR 507.

⁷² Above n 70, 322.

measure of insight, and shows due sensitivity to the need to convince the losing litigant that their position has been heard and understood. But it is not the whole measure.

Social science research on the issue of 'procedural justice' is of great assistance here.³ Judges should not lightly shrug their shoulders when that term is mentioned. In summarising this research, Greacen has noted that the public at large including litigants do not, like judges, see fairness as inherently linked to outcome, but rather consider that fairness is inextricably linked to the process that produces those outcomes.

That is not to suggest that litigants do not care about the outcome of their case. The commercial party who has significant financial interests at stake is going to have a burning interest in the outcome. So too are the Albert Haddocks of this world,⁴ who may have a strong desire to prove that the removal of the bicycle which they had chained to a fence in High Street, Oxford was in fact an unlawful and dreadful trespass on the inalienable rights of bicycle riders in Oxford. However, litigants understand that everyone cannot win in court and will usually comprehend that there are almost always at least two sides to every argument.

If court proceedings are conducted in accordance with a fair process, judges can achieve distinct levels of satisfaction with what occurred, quite apart from the actual outcomes of decisions. A fair process can yield that most satisfying of all results for a trial judge, whereby a losing litigant acknowledges that at least they had a 'fair crack of the whip'. Conversely, it is extremely disquieting for a judge to hear a litigant bemoan that the court process was appalling and inhuman, regardless of the result the litigant received.

Procedural fairness also has a beneficial impact on a party's compliance with court orders. There is empirical evidence that parties in mediation sessions which they regarded as fair were much more likely to implement a mediated agreement six months after the mediation session than parties who rated the session as less fair.⁵ Family law studies have similarly shown that child support was more likely to be paid after a fair mediation, than after the litigation process.⁶

³ A pioneering work on the topic is J Thibaut and L Walker, *Procedural Justice* (Hillsdale, Lawrence Erlbaum Associates, 1975). A useful recent collation of research is K Burke and S Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' American Judges Association White Paper, 26 September 2007 <<http://aja.ncsc.dni.us/htdocs/AJAWWhitePaper9-26-07.pdf>> accessed 18 April 2009.

⁴ Albert Haddock is the alter-ego satirically deployed by AP Herbert, *Misleading Cases in the Common Law* (London, Methuen, 1989).

⁵ DG Pruitt, RS Pearce, NB McGillicuddy, GL Welton and LM Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behaviour* 313.

⁶ RE Emery, SG Matthews and KM Kitzmann, 'Child Custody Mediation and Litigation: Parents Satisfaction and Functioning One Year After Settlement' (1994) 62 *Journal of Consulting and Clinical Psychology* 124.

Trial courts routinely suffer under dreadfully long lists, with resulting time constraints and pressures. This is not a propitious environment for 'kid-glove' handling of litigants. Delay in delivery of some judgments is inevitable. It too becomes a prime factor in litigant dissatisfaction.

As to appellate courts, they all too often live in a harsh and rarefied atmosphere, some of it of their own making. Every appellate judge is all too familiar with the problem of impossible workloads, endless streams of appellants, hopelessly over-loaded briefs, and generalised cries from appellants of a 'dreadful miscarriage of justice' in their particular cases. In such an atmosphere, it is almost inevitable that judges will attempt to cut straight to the chase by identifying the key legal issue early on in proceedings, which can give an impression of undue brusqueness.

There is much to be said on the other side of this kind of issue. Intermediate appellate courts exist primarily for the purpose of error correction; such courts are reviewing what has happened at trial, and historically have never been much in the business of fortifying a perception of the justice system as being gentle.

It is fairly commonplace, at least in the British Commonwealth, that counsel remark on the more relaxed and wide-ranging review which is conducted in a final appellate court. That would suggest that it is the sheer pressure of workload and efficiency concerns which have much to do with the difficulties of intermediate appellate courts. The vast majority of intermediate appellate courts around the British Commonwealth are not 'leave' courts, which means they have to deal with everything that is put in front of them. A court which does not require leave to appeal has no alternative but to continue to hear the Mr Dimes of this world on all their causes of action and the multiplicity of interlocutory skirmishes which accompany them. Final 'leave' courts are better placed to filter out unmeritorious and troublesome litigation in their selection of cases.

It follows that a fair dose of realism is required in assessing the context in which processes are structured and courts run. But that does not mean that we should not try to better understand and implement processes that will improve litigants satisfaction with their day in court.

ENHANCING PROCEDURAL JUSTICE

In a recent study oriented towards a judicial audience, Tyler noted four essential elements that contribute to perceptions of high levels of 'procedural justice' on the part of litigants.⁷

⁷ T Tyler, 'What do they Expect/New Findings Confirm the Precepts of Procedural Fairness' (2006) *California Courts Review* 22.

What is missing from these rather bureaucratic lists are two qualities that most members of the profession, and likely most judges, would rate as being far more important.

The first is what is sometimes referred to as 'judicial bones', or a sense of what being a judge is really all about. Sadly, some judges, who have been particularly fine advocates and who have exemplary records of service, are never entirely able to shake the fact that they were once, for instance, a prosecutor or a civil rights lawyer. It is almost as if there is an indelible stamp upon them.³

Another quality can be referred to as sound judgment.⁴ This much prized virtue can be broken down into at least two subsets, qualities of mind and qualities of character. Qualities of mind include an ability to think about multiple factors at the same time and to order and weigh the considerations; a tendency to consider the 'downstream' consequences of a decision; and in some situations, the ability to come up with creative alternative solutions to seemingly intractable problems. But perhaps the most significant element is a sense of proportion: the ability to see the relationship between the wrong and the remedy being considered.

There is doubtless room for debate about the qualities of character which go to sound judgment, but they arguably include the following: an intuitive instinct for the pattern of things; a relatively self disciplined approach to the task before them; the quality of being able to separate and prefer a reasoned response to one based on emotion; and an acceptance of the necessity to make decisions, which are quite often based on incomplete data.

Perhaps straddling qualities of mind and qualities of character is the characteristic of prudence. Some academics have seen prudence as a quality of character of a judge, while others have seen prudence as overlapping qualities of mind and character. For instance, Professor Kronman of Yale once described Alexander Bickel's 'philosophy of prudence' as both

pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html> accessed 18 April 2009. In the United Kingdom, as a result of the Constitutional Reform Act 2005, the Judicial Appointments Commission was set up, responsible for the selection of judges and tribunal members in England and Wales. The Commission is required by statute to select solely on merit, select only people of good character, and have regard to the need to encourage diversity in the range of persons available for selection by appointments. See Baroness Prashar, 'Equality in Justice Day', Speech at the Royal Courts of Justice, London, 24 October 2008, 1–2.

³ See, for example, *R v Fotu* [1995] 3 NZLR 129 (CA), where Cooke P noted that 'if the approach to the conduct of a trial followed by the trial Judge in these cases is intended to suggest that there should be some shift away from the New Zealand tradition of a fair trial, in the direction of more active semi-prosecutorial participation by the Judge, it is a suggestion that this Court is unable to find acceptable' (at 142). That was a case of a distinguished former Crown prosecutor becoming altogether too prosecutorial.

⁴ See S Sherry, 'Judges of Character' in C Farrelly and LB Solum (eds), *Virtue Jurisprudence* (Palgrave Macmillan, Basingstoke, 2008) 88–106.

'an intellectual capacity and a temperamental disposition'.⁵ As Sherry has said:⁶

Prudence, or practical wisdom, in turn depends upon what Kronman himself later labelled 'traits of character': those habits of mind and spirit that allow an individual to make judgement *where intellect runs out*.

Probably all judges would like to think that the course they are embarking on does involve strong 'practical wisdom', to use Kronman's phrase.⁷ Even so, just what wisdom requires in a given case can remain distinctly debatable. A good example, at the highest level, concerned the United States Supreme Court's intervention in the 2000 Presidential election. The Justices in the majority in that case seem to have been motivated by a sense of obligation towards the nation's constitutional well being.⁸ In writing for the majority, Justice O'Connor noted the court's 'unsought responsibility'.⁹ Posner defended the majority's willingness to act notwithstanding the risk of endangering its own legitimacy: '[j]udges unwilling to sacrifice some of their prestige for the greater good of the nation might be thought selfish'.¹⁰ But in dissent, Justice Breyer attributed to his colleagues an intent simply 'to bring this agonisingly long election process to a definitive conclusion'.¹¹ This suggests a 'prudential', rather than strictly legal, approach to the case, predicated on whether a continued deadlock would have brought about a genuine national crisis of considerable moment. Reasonable people *can* differ on an issue of that kind.

It surely comes to this. When the then Attorney-General, Nicholas Katzenbach, spoke to the Senate Judiciary Committee about the nomination of Robert Bork to the United States Supreme Court, he advised them thus:¹²

Were I in your position ... the central question I would be asking is this. Is Judge Bork a man of judgement? Not intellect, not reasoning, not lawyering skills, not ideology, not philosophy—simply judgment. Is he a wise person?

That is routinely the judges' burden in a recusal situation: where lies the *wise* course?

⁵ AT Kronman, 'Alexander Bickel's Philosophy of Prudence' (1985) 94 *Yale Law Journal* 1567, 1569.

⁶ Above n 4, 102 referring to AT Kronman, *The Lost Lawyer: Falling Ideals of the Legal Profession* (Harvard, Harvard University Press, 1993) (emphasis added).

⁷ See AT Kronman, 'Practical Wisdom and Professional Character' in J Coleman and EF Paul (eds), *Philosophy and Law* (London, Blackwell, 1987) 203.

⁸ Above n 4, 94.

⁹ *Bush v Gore* (2000) 531 US 98, 111.

¹⁰ RA Posner, *Breaking the Deadlock: the 2000 Election, the Constitution, and the Courts* (Princeton, Princeton University Press, 2001) 161.

¹¹ Above n 9, 158.

¹² Above n 4, 101 citing A Lewis, 'Abroad at Home; Question of Judgment' *New York Times* (New York 27 September 1987) D23.

more compliant process at the initial trial judge level are real, though not insurmountable. It would be undoubtedly easier to construct such a scheme at the intermediate appellate and final court level, because the views of the impugned judge could be 'fed in' to a judgment made by the particular panel, or the court as a whole.

LOSS OF A JUDGE ON A FINAL COURT

A proper concern, if a judge is 'lost' to a final court by recusal, is that it will end up short-handed, and may have no power to substitute another judge or justice. The only final appellate court in the common law world that appears to have this difficulty is the United States Supreme Court, and it has already been noted that this has caused real difficulties in that court.

Under section 5 of the Appellate Jurisdiction Act 1867, the House of Lords in the United Kingdom is made up of between seven and 12 Lords of Appeal in ordinary. A panel of three judges is required for a given appeal. More normally five or seven Lords have sat, and very occasionally nine.⁶ With respect to the new United Kingdom Supreme Court, which is being established under the Constitutional Reform Act 2005, there will be twelve 'Justices', including the President and a Vice-President. A panel of at least three justices will be required to sit, but it is thought unlikely that in this area the practice will change much, if at all, from the practice adopted in the House of Lords.⁷

With respect to the Supreme Court of Canada, which has nine justices who usually sit *en banc* on substantive cases, any five of the judges of that court shall constitute a quorum.⁸ It is convenient to note here that under rule 47(1) of the Supreme Court Rules an originating motion shall include, if there is a concern over a judge's previous involvement or connection with the case which would result in it being inappropriate for the judge to sit, a certificate in a prescribed form, setting out the issues giving rise to concern.

In Australia, the High Court of Australia is composed of seven justices. A Full Court may be constituted by any two or more of the justices sitting together.⁹ In constitutional cases a Full Court consisting of less than all the justices shall not give a decision on a question affecting the constitutional powers of the Commonwealth, unless at least three justices concur in the decision.¹⁰ However, it is customary for all seven justices of

⁶ As in *A v Secretary of State for the Home Department* [2005] 2 WLR 87.

⁷ *The Times* (London 20 November 2008).

⁸ RS 1985 c S-26.

⁹ Judiciary Act 1903 (Cth) s 19.

¹⁰ *ibid* s 23.

the High Court to be listed when the constitutionality of a federal statute is contested, unless one of their number does decide to recuse. If the remaining six justices are divided, the decision of the lower court stands. In the exercise of the original jurisdiction possessed by the High Court, the opinion of the Chief Justice or the next most senior judge sitting is to tip the balance.

Some notable recusals in Australia have included Menzies J and Mason J in the important copyright case of *UNSW v Angus & Robertson*¹¹ because both were (unremunerated) Chancellors of major universities (Monash and the Australian National University) that would be affected by the central issue in the case, namely photocopying in universities. Kirby J did not sit in the important constitutional case of *Kruger v Commonwealth* for various proper reasons.¹² Hence the position in Australia is that there could be a split court in significant constitutional cases, as in the United States Supreme Court.

In New Zealand, that potential outcome has been avoided, because the enabling statute of the Supreme Court provides that if one of the five justices recuses, an acting justice can be brought in to constitute the court.¹³ That acting justice will be, in general terms, a retired judge of the Supreme Court or the Court of Appeal.

PROTOCOLS

In an endeavour to assist judges, and enhance the administration of justice as a whole, some jurisdictions have implemented protocols which, if observed, might go some distance to meeting the various concerns that have been raised over recusal issues.

An example of such a protocol is the *Guide to Judicial Conduct*, evolved by the Council of Chief Justices of Australia (which includes the Chief Justice of New Zealand). That protocol is annexed as Appendix A.

It will be noted that under that protocol, disqualification still remains a decision for the judge to whom the concern is directed. However, certain other features of the procedure should be emphasised. First, it will be noted that consultation with judicial colleagues is said to be permissible and may be helpful. Secondly, in cases of uncertainty, an 'open court' hearing should be held with submissions. Thirdly, if the judge does decide to sit, the reasons for that decision should be recorded in open court. Fourthly, the consent of

¹¹ (1975) 133 CLR 2.

¹² (1997) 190 CLR 1.

¹³ See Supreme Court Act 2003 s 23. For a discussion of such provisions, see J Varuhas, 'Acting Judges' (2006) *New Zealand Law Journal* 172; M Kirby, 'Acting judges: a non-theoretical danger' (1998) 8 *Journal of Judicial Administration* 69; and M Taggart, 'Acting Judges and the Supreme Court of New Zealand' (2008) 14 *Canterbury Law Review* 217.

was in contest with the appellant'.² Indeed, the contract was signed soon after the referee's report was signed.

The case is an important one on several points, including the differential expectations which may exist in relation to judicial officers and referees.³ In this instance, the referee was held to be a judicial officer with judicial immunity. This had consequences with respect to costs, which we will refer in due course. Given the referee was found to have been fulfilling a judicial function, Kirby JA said:⁴

If there is any interest or association with the parties which, undisclosed, could give rise to a reasonable apprehension of bias in an impartial observer knowing the relevant facts, that interest must be disclosed ... It is then left to the parties to make submissions as to disqualification or to indicate they raise no objection.

In this case there had been no disclosure of the true situation, either by the referee or through the Minister of Public Works. The appellant knew nothing about the relationship. Further, there was no evidence that this was a trivial, remote or indirect interest.

The Court of Appeal held that the non-disclosure itself gave rise to apprehended bias. Kirby JA said it was 'wholly unthinkable' that a judicial officer would not have revealed such a context, and it was 'most unlikely' that he or she would sit.⁵

The outcome of *Najjar v Hames* was that the court considered that the referee should have disclosed these ongoing and major contracts from the outset. But given the referee was acting as a judicial adjunct, he was entitled to resist being joined as a party to an application for costs against him personally. This may be thought harsh, but not without some diffidence, the court did not award costs to the successful appellant. This was because the referee's resistance to joinder as a party had ultimately been vindicated.

In *Ebner v Official Trustee in Bankruptcy*, it was argued that a trial judge's failure to disclose his acquisition of shares in a bank was either a ground of, or constituted evidence in support of, disqualification. Gleeson CJ, for the majority in that case, drew a distinction between 'considerations of prudence and requirements of law'. It is worth noting his remarks, in full:⁶

As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying. It is common, and proper, practice for a judge who owns shares in a company which is involved in a case in which the judge is sitting to inform the parties of that fact and to give them an opportunity to raise an objection should

² *ibid* 229.

³ See also *Tracom SA v Gibbs Nathaniel (Canada) Ltd* [1985] 1 Lloyds Rep 586.

⁴ Above n 1, 228.

⁵ *ibid* 230.

⁶ (2001) 205 CLR 337, [69]-[72].

they wish to be heard. In most cases, the outcome is that no objection is raised and, by reason of waiver, any potential problem disappears. One reason for the practice is that it gives the parties an opportunity to bring to the attention of the judge some aspect of the case, or of its possible consequences, not known to, or fully appreciated by, the judge.

It is, however, neither useful nor necessary to describe this practice in terms of rights and duties. At most, any 'duty' to disclose would be a duty of imperfect obligation. A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias. A failure to disclose has no other legal significance. In particular it does not, of itself, give a litigant any right to have the judge desist from further hearing the matter or to have the ultimate decision in the matter set aside for want of procedural fairness.

To describe the practice of making disclosure as a matter of right or duty may distract attention from the fundamental question to be answered which is whether the reasonable apprehension of bias test is established. That question will be litigated on appeal from the substantive decision in the matter or in proceedings for prohibition, certiorari or similar relief. Whatever the process which the person alleging reasonable apprehension of bias may adopt, there will, in those proceedings, be a full opportunity to make whatever case for disqualification of the judge the moving party can. Inquiring whether the moving party was denied some opportunity to make submissions on the question of disqualification to the judge in question is irrelevant. The question of disqualification can and will be litigated fully in the appeal or application for prerogative or like relief and no separate question of denial of procedural fairness could arise. The point can be illustrated by what happened in *Clenae*. The fact that the judge did not disclose his shareholding gives no different or additional right to the present appellants. All that they were denied by the fact that there was no disclosure was an opportunity to put an argument which we consider must fail.

Disclosure of association may raise more difficult questions than are presented by the straightforward case of ownership of shares in a corporation. It is impossible to identify all of the kinds of association which might be thought to reveal a serious possibility of being potentially disqualifying. As we have said earlier, the application of the apprehension of bias principle requires identification of what it is said might lead a judge to decide a case other than on its legal and factual merits, and the articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.

In a separate judgment, Kirby J (by now sitting in the High Court of Australia) said:⁷

Many authorities emphasise the prudence and desirability of disclosing to the parties any facts or circumstances which could lead to a disqualification for bias. Moreover, in some circumstances, failure to disclose such an interest will not only remove the possibility of an informed waiver but will lead to a sense of disquiet,

⁷ *ibid* [171].

A good articulation of the rationale for waiver can be found in the High Court of Australia decision in *Vakauta v Kelly*:³

By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.

To be effective, any waiver must be free from any reasonable fear that objecting to the judge would have disadvantaged a party in some way, and also free of pressure from the party's own legal representatives to accede to the judge's suggestion.

In *Millar v Dickson*,⁴ four accused appealed a decision holding that they had waived their right to a trial before an independent and impartial tribunal because they were unaware that they had a valid objection to being tried by temporary sheriffs. Lord Bingham of Cornhill said that 'in most litigious situations the expression "waiver" is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise'.⁵ As Lord Browne-Wilkinson had put it in *Pinochet (No 2)*, waiver can only run on the basis that the person who is said to have so waived 'has acted freely and in full knowledge of the facts'.⁶ Applying these principles to *Millar*, it simply could not be said that the accused had voluntarily elected not to raise an objection; they were simply unaware that it was open to them to do so.

In the United States, Flamm puts the principle of express waiver in very much the same way:⁷

[I]f all of the parties to a proceeding agree, the judge is willing to handle the case, and the disqualifying circumstance does not involve a matter of public policy, the parties may expressly consent to allow a judge who would otherwise be disqualified to continue to sit in a matter; and, thereby, waive a statutorily prescribed ground for disqualification.

³ *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ).

⁴ *Millar v Dickson* [2002] 1 WLR 1615 (PC).

⁵ *ibid* [31].

⁶ *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 137.

⁷ RE Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, 2nd edn (California, Banks and Jordan Law Publishing Co, 2007) 583.

In the federal courts, however, an express waiver may not be accepted unless there has been a full disclosure by the judge of the basis for his possible disqualification, and the parties and their counsel have agreed in writing, and independently of the judge's participation, that the judge's relationship is immaterial or that his financial interest is insubstantial.⁸

IMPLIED WAIVER

As a matter of legal doctrine, implied waiver is a particularly difficult area. It most commonly arises late in the proceedings, regularly on appeal, and all too often it stems from a distinct dissatisfaction with the outcome of the given proceedings. The matter which has been of most concern to the courts has been forensic manoeuvring: the employment of the sort of 'cards-up-the-sleeve' tactics to which reference has already been made in attempts to unhorse judgments in trial courts after an adverse result.

Courts do not look favourably on these sorts of activities. As Sedley LJ said recently in *Amjad v Steadman-Byrne*:⁹

We would stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and because of the expense that a recusal will inevitably throw upon one or both parties, neither of whom will ordinarily be to blame for what has happened. The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome.

The English Court of Appeal has laid down guidelines which are designed to avoid the scope for 'late' objections in a potential waiver situation. It is worth setting these out in full:¹⁰

- (i) If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter than risk a complaint of bias. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.

⁸ *ibid* 585. See the United States Notice Concerning Waiver of Judicial Disqualification in MA Perry, *Disqualification of Judges: Practice and Procedure—Discussion Paper* (Victoria, Australian Institute of Judicial Administration Inc, 2001) 86.

⁹ *Amjad v Steadman-Byrne* [2007] 1 WLR 2484 (CA).

¹⁰ *Jones v DAS Legal Expenses Insurance Co* [2003] EWCA Civ 1071, [35].

- (ii) Some time should be taken to prepare whatever explanation is to be given to the parties and if one is really troubled perhaps even to make a note of what one will say.
- (iii) Because thoughts that the court may have been biased can become festering sores for the disappointed litigants, it is vital that the judge's explanation be mechanically recorded or carefully noted where that facility is not available. That will avoid that kind of controversy about what was or was not said which has bedevilled this case.
- (iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. Secondly, an explanation should be given as to why the problem had only arisen so late in the day. The parties deserve also to be told whether it would be possible to move the case to another judge that day.
- (v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.
- (vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented. If there is a litigant in person the better practice may be to rise for five minutes. The litigant in person can be directed to the Citizens Advice Bureau if that service is available and if he wishes to avail of it. If the litigant feels he needs more help, he can be directed to the chief clerk and/or the listing officer. Since this is a problem created by the court, the court has to do its best to assist in resolving it.

More recently, in *Smith v Kvaerner Cementation Foundations Ltd*, Lord Phillips CJ emphasised that 'the vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to them, and given a fair opportunity to reach an unpressured decision.'¹¹

This is an area of recusal law where a number of appellate courts have seen judicial economy and administrative convenience to be of real importance. A trial, whether civil or criminal, does not commence the day the judge walks into court. Indeed the whole thrust of contemporary procedural reforms has been to see that the issues to be litigated are carefully

delineated; that the run up to the hearing is carefully managed; and that judges appreciate that the efficient dispatch of a case turns at least as much on adequate preparation before a trial as post-trial reflection. If a trial goes off because of a late claim of bias or disqualification, there is routinely a very significant waste of judicial resources, which include the effort that the first judge has already put into the case as well as the 'gearing up' of another judge.

That said, it has to be acknowledged that there are appellate court decisions in the British Commonwealth and the United States in which it has been said that judicial economy and administrative inconvenience are not appropriate factors to take into account at all. For instance, in *People v Walker*, it was said that 'the vindication of such rights often entails inconvenience for some. This is the small price paid for upholding the letter and spirit of our law.'¹² And in a California appeal, it was suggested that the parties' and court's expenditure of time and resources was 'weightless'.¹³

It would however be a brave counsel who assumed that all appellate courts could be persuaded to take that point of view. This is particularly so in those jurisdictions which have rules of court that emphasise the importance of the efficient dispatch⁴ of court business. Appellate courts can then quite reasonably point to the legislative imperative, and maintain that waiver arguments are part and parcel of bending the knee to the will of Parliament.

Finally, it should be noted that there are some serious unresolved constitutional issues relating to waiver. One concern is that waiver should not be possible at all where there is bias. Some commentators have suggested that whilst waiver is a personal thing, there is often a larger public interest which is at stake, and which should not be ignored.¹⁴

¹² *People v Walker* (1988) 519 NE 2d 890, 896.

¹³ *United Farm Workers v Super Court* (1985) 170 Cal App 3d 97, 107 where the court held that 'while the waste of eight trial weeks would be unfortunate, the parties' right to a fair trial cannot be compromised by such considerations'.

¹⁴ See B Toy-Cronin above n 2; E Campbell, 'Waiver of judicial disqualification for bias or apprehended bias—a constitutional issue' (1999) 2 *Constitutional Law and Policy Review* 41; and P Craig, *Administrative Law*, 6th edn (London, Sweet & Maxwell, 2008) 425–26.

¹¹ *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370, [29].