

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
‘DUTIES OF BAR AND BENCH: SOME REFLECTIONS ON
CASE MANAGEMENT AND JUDICIAL BIAS’
NSW BAR ASSOCIATION CPD CONFERENCE
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1. It is always a pleasure to be invited by the Bar Association to speak at continuing professional development conferences. These are important events not just for ongoing legal education, but also because they provide an opportunity for members of the bar from different chambers and with diverse practices to come together and discuss issues facing the profession. As always, the Bar Association should be commended for putting together what looks to be an excellent program. I hope you also take the opportunity today to discuss some of the broader issues that concern the profession. With that said, I’m sure you will be unsurprised that I have no intention of offering any opinion about Phillip Street’s current topic of the day, which was summed up neatly in a headline from last month, “To QC or not QC”.¹

2. Unfortunately, I have discovered that one challenge of CPD conferences is working out what on earth to talk about. Philip Selth and Chris D’Aeth seem to think that anything I discuss will be of interest to a room of barristers. But I’m sure that isn’t the case, particularly after lunch on a Saturday afternoon. It probably won’t come as a shock that there is generally a scuffle among judicial speakers to secure any topic that ends with “perspectives from the bench”. Sadly on this occasion Justice Perry just pipped me at the post.

* I express my thanks to my Research Director, Haydn Flack, for his assistance in the preparation of this address.

¹ J Whealing, “To QC or not QC” *Lawyers Weekly* (4 February 2014).

3. Instead, this afternoon I want to discuss several issues regarding case management and judicial decision making. It probably seems as if case management is a topic that is constantly wheeled out by judges at these events, and I'm sure it can feel like you are receiving a lecture rather than attending a conference of your own free will. However, I hope what I have to say today won't seem at all like a finger waving exercise. In fact, costs, the use of case management and the nature of modern litigation are challenges that the judiciary and the bar must continue to confront together.

I LITIGATION COSTS AND CASE MANAGEMENT: SHARED OBLIGATIONS

4. I want to frame the issues I am discussing around a number of recent decisions. This approach provides some context and also has the added benefit of making it clear that I am not just reusing old material. As I mentioned, I want to begin by considering litigation costs and case management, particularly in the context of a decision of the Victoria Court of Appeal from late last year in *Yara Australia Pty Ltd v Oswal*.² This case provides a remarkably clear picture of some of the challenges presented by civil litigation today, the duties owed by practitioners, and the need for courts to actively direct and sometimes even constrain the litigation process.
5. *Yara v Oswal* involved an application for security for costs. Yara had applied for leave to appeal against a single judge's decision which set aside an order for security for costs made by an associate judge. The Court of Appeal refused leave and following the publication of reasons asked the parties to put on submissions addressing why there had not been a breach of one of the overarching obligations under the *Victoria Civil Procedure Act*.

² *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 (*Yara*).

6. The obligation in issue requires that a person use reasonable endeavours to ensure that costs associated with proceedings are reasonable and proportionate to the complexity of the issues and the amount in dispute.³ The Court was concerned that the application for leave involved five silks, six juniors, five firms of solicitors and six leaver arch folders of material. The amounts for security sought by the parties totalled just under \$141,000.⁴
7. The Court ultimately found that the level of representation was acceptable, but the filing of excessive materials had breached the obligation.⁵ In doing so, the Court addressed in detail the regime of obligations that was introduced under the Victorian *Civil Procedure Act*. Without going into too much depth it is worth outlining a few of their observations. First, they noted that the overarching obligation regarding litigation costs overrides the duty that practitioners owe to their client to the extent there is any inconsistency. They emphasised that practitioners – both solicitors and barristers – involved in the preparation of pleadings, affidavits and other materials, each have individual responsibilities to comply with the obligation.⁶
8. The Court then considered its powers under the Act to issue sanctions.⁷ They indicated that the Victorian provision is unique in that it provides broader powers to sanction practitioners and parties than legislation in other jurisdictions across Australia. They described the Act as being “clearly designed to influence the culture of litigation”, giving the Court, and I quote:

“...a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.”⁸

³ *Civil Procedure Act 2010* (Vic) s 24.

⁴ See, generally, *Yara* at [1]-[4].

⁵ *Yara* at [39], [52].

⁶ *Yara* at [14]-[15].

⁷ See *Civil Procedure Act 2010* (Vic) Pt 2.4.

⁸ *Yara* at [17], [20]-[22].

9. The Court noted that there had been an under-utilisation of the provisions. They emphasised the responsibility of judges to give effect to the obligations, despite any reluctance they might have about initiating inquiries concerning possible breaches in the absence of an application by one of the parties.⁹ The Court ordered that each applicant's solicitor indemnify their client for half of the respondent's costs associated with the excessive application books, and that the solicitors be disallowed from recovering half of the costs of preparing the books. Each of the applicant's solicitors was also required to provide a copy of the Court's reasons to their client.

10. Now, it could easily be said that the reasoning and outcome in *Yara* simply involved an interpretation of the reworked obligations under the Victorian legislation, which in turn has no meaningful implications for practice in New South Wales. That, of course, may very well be true. However, in my view, *Yara* falls into a broader series of decisions that have further articulated and clarified the duties owed by practitioners, the function of case management and the obligation of courts to actively manage the litigation process.

11. In this respect, there is no doubt that the scale and complexity of litigation continues to grow. This is particularly the case with the overwhelming role technology now plays in business, our almost complete reliance on electronic communication and the ease of electronic document retention. For instance, it was reported that in 2010 1.9 billion email users sent 107 trillion emails. Apparently we spend nearly 30% of our time at work reading and answering emails. It has also been estimated that in 2012 there were 2.4 billion global internet users, and that the amount of digital information around the globe that is created and shared is now measured in zettabytes.¹⁰ I have no concept of what that is, but it sounds very large. It

⁹ *Yara* at [25], [27].

¹⁰ See Business Insider (15 January 2011) available at <http://www.businessinsider.com.au/internet-statistics-2011-1>; McKinsey Global Institute, *The social economy: unlocking value and productivity through social*

has also been estimated that it would take one person over six million years to read all the web pages available.¹¹ That figure is from a 2012 publication, so by now I assume they would be settling in for even more reading time.

12. Of course technology and email are not solely responsible for the complexity of litigation and the volume of documents that is sometimes involved. However, at times it does feel as if that is the case. Several examples come to mind: in a recent matter the Court of Appeal was asked to consider more than 20 volumes of documents that had been annexed to an affidavit and provided to the Court electronically. The affidavit had been rejected in the court below and its rejection was one of the grounds of appeal. When I asked about its relevance, I was told 'background'. My response was perhaps unduly terse. However, had I been off the bench, it would have been unprintable. I have also had materials for a case delivered to my chambers on a portable hard drive, and I am led to believe that a recent appeal involved upwards of 55 appeal books. I am certainly not suggesting the material provided by the parties on all of these occasions was not relevant. However, it demonstrates the difficulties that judges and barristers are confronted with on a regular basis.
13. Courts frequently receive electronic bundles and appeal books, and so-called electronic courtrooms with multiple monitors controlled by a single computer are not uncommon. On the other side of the bench, I understand that barristers are increasingly receiving electronic briefs, where documents are provided solely by email or through more sophisticated cloud based storage services. This all makes the single folder briefs held together with red tape that were once delivered to me seem like a relic of the past. I'm

technologies (July 2012) available at http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_social_economy; FEDTECH (12 June 2013) available at <http://www.fedtechmagazine.com/article/2013/06/18-incredible-internet-usage-statistics>.
¹¹ Diane P. Wood, "Adrift in a Sea of Data: Electronically Stored Information", *2012 John Lehane Memorial Lecture* citing R. Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, 64 Fla. L. Rev. 965, 965 (2012).

certainly not saying that these developments are a bad thing. Even if I were, I would be wasting my breath. In my experience, access to electronic materials can at times make case management and judgment writing much easier, as I am sure it can also assist you in preparing cases. However, changes of this nature often have both positive and negative consequences.

14. The Court in *Yara* noted that “[o]verly voluminous...material strains the administrative resources of the Court and the time of judges themselves.” They found that most of the material in the application folders was irrelevant to the resolution of the issues and more than half was entirely unnecessary to the questions raised by the notice of appeal.¹² In my view, there are certainly occasions where documents have been included in court books at trial for the simple reason that there could be a need to point to them in any future appeal. It is not uncommon for judges to be taken by counsel, either in written or oral submissions, to only a fraction of the materials that are actually provided to the court. This can unnecessarily complicate matters and result in the strain on court resources that was referred to in *Yara*. One of the most pernicious results is that courts are left with a huge amount of evidence with no submission as to what should be done with it. Do they put it to one side or read it, and if they adopt the latter course and rely on it, are parties being denied procedural fairness?

15. Now, it may sound as if I am only discussing the obligations of barristers. To broaden things out, I want talk about shared responsibilities. In my view *Yara* needs to be considered in the context of the High Court’s decision in *Aon v Australian National University*, and also their decision from last year in *Expense Reduction Analysts v Armstrong Strategic Management*.¹³

¹² *Yara* at [40], [49].

¹³ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 (*Aon Risk Services*); *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 303 ALR 199 (*Expense Reduction Analysts*).

16. To provide some context, former Justice Dyson Heydon wrote extra-curially in 2007 about the obligations of bench and bar in the following terms:

*“Both courts and counsel have duties to maintain control over the bulk of the evidence and the time which the matter takes to try. Modern conditions have made these duties acutely difficult to comply with. Every aspect of litigation has tended to become sprawling, disorganised and bloated...”*¹⁴

He then listed a range of concerns relating to the preparation of matters, the scope of discovery, the conduct of hearings, and judgments themselves. The passage neatly summarises the related duties of courts and counsel, and some of the difficulties presented by contemporary litigation; although his words are not as descriptive as his criticism in *Aon* that “[t]he torpid languor of one hand washes the drowsy procrastination of the other.”¹⁵

17. In *Aon*, the plurality emphasised that case management is now an accepted feature of the system of civil justice administered by Australian courts. The efficient and cost-effective resolution of proceedings is not only important for the parties to a particular case, but also for other litigants who approach the court to resolve their disputes.¹⁶ This was reinforced in *Expense Reduction Analysts* in the context of inadvertent disclosure during discovery, where the Court reiterated that New South Wales courts must actively engage in case management in order to achieve the purposes of the *Civil Procedure Act*.¹⁷
18. In this respect, it is important to emphasise that the purpose underlying case management is not economic efficiency purely for the sake of efficiency.

¹⁴ The Hon. J D Heydon, “Reciprocal duties of Bench and Bar”, (2007) 81 *Australian Law Journal* 23, 28 extracted in The Hon. M Warren, “The duty owed to the court: the overarching purpose of dispute resolution in Australia” Bar Association of Queensland National Conference (6 March 2011) at 2.

¹⁵ *Aon Risk Services* at [156].

¹⁶ *Aon Risk Services* at [92]. See also *Sali v SPC Ltd* [1993] HCA 47; (1993) 67 ALJR 841 at 849.

¹⁷ *Expense Reduction Analysts* at [42].

Last year I discussed the fact that, in my view, the principal challenge to the separation of powers today is the increasing trend by governments to treat courts as service providers. This tendency undermines the reality and perception of the court's institutional independence, and places pressure on the judiciary to prioritise efficiency over other matters that are equally important to the fair determination of disputes.¹⁸ Courts should only pursue efficiencies if they advance the just and fair adjudication of claims, while at the same time not undermining the essential independence of the judiciary.

19. Case management is certainly not an objective in and of itself; it is directed to purposes well beyond economic efficiencies. The time and cost that can be associated with litigation are undoubtedly barriers that limit access to justice, and case management is one important response to these challenges.¹⁹ It is worth mentioning that the Productivity Commission is currently completing an inquiry into access to justice arrangements for civil disputes. Significantly, the inquiry's scope includes an analysis of discovery and case management. The issues paper released by the Commission poses a number of questions about the effectiveness of case management, how systems could be improved and examples of best practice.²⁰ It will be interesting to see what recommendations come from the inquiry and, in particular, any changes that the Supreme Court can make to its case management procedures. There is no doubt that we can do more to further develop processes to improve access to justice; balancing the competing needs for fairness, timeliness and cost burdens.
20. However, achieving these objectives is a task that must be undertaken by the judiciary and the profession in collaboration. This is reflected in

¹⁸ See Hon. T F Bathurst, "Separation of Powers: Reality or Desirable Fiction?", JCA Colloquium (11 October 2013) at 6.

¹⁹ See, for example, The Hon. R Sackville, "The future of case management in litigation", (2009) 18 *Journal of Judicial Administration* 221, 222; L Anderson, "Does case management undermine the rule of law in the pursuit of access to justice?", (2011) 20 *Journal of Judicial Administration* 240, 240-241.

²⁰ Productivity Commission, *Access to Justice Arrangements* (Issues Paper, September 2013) at 22-23.

Expense Reduction, where the High Court referred to the obligations of both the courts and the legal profession. As I've mentioned, they emphasised that courts in New South Wales should actively use case management, and that minimum delays and expenses are essential to the just resolution of proceedings.²¹ However, the Court went on to criticise the fact that a rule has recently been added to the New South Wales solicitors' rules that deals with the handling of inadvertently disclosed confidential material. The Court said that: first, "such a rule should not be necessary"; second, in the not too distant past it was understood that acting in a way that is consistent with the new rule prevents unnecessary applications; and third, that behaving in this way is an example of how practitioners' professional obligations support "the objectives of the proper administration of justice".²²

21. While these comments were made in relation to the new solicitors' rules that apply in this State, the relationship between the efficient and cost-effective conduct of proceedings and the proper administration of justice certainly requires the same, if not greater, assistance from members of the bar.

22. You may be familiar with a number of recent changes that have been made in the Supreme Court to improve case management. In 2012, there was some initial anxiety when a new practice note clarified that for matters in the Equity Division, the Court would not, subject to exceptional circumstances, make orders for discovery prior to the parties serving their evidence. As you are aware, there has been recent criticism of the increase in securities-related class actions. One reform suggested was that evidence be filed prior to discovery. This is a reform that we introduced 12 months ago. Similarly, a new Equity Division practice note in 2012 in relation to expert evidence is intended to encourage discussion between parties, minimise the cost of expert evidence and reduce hearing times. In relation to criminal

²¹ *Expense Reduction Analysts* at [42], [51].

²² *Expense Reduction Analysts* at [64]-[67].

law, an amended practice note for the Common Law Division has altered the timeframes for the disclosure of materials by the prosecution and defence. Finally, I should mention that amendments to Part 3 of the Uniform Civil Procedure Rules regarding electronic case management came into effect last month. These rules address the broad range of documents that can now be filed online and the methods parties can use to submit documents for e-filing. These are simply a few of the steps that the Court has taken to establish straightforward case management procedures.

23. Returning to *Yara*, it is also useful to compare the regimes under the Civil Procedure Acts in New South Wales and Victoria. It is clear that the Victorian provisions which set out the overarching obligations and sanctions that can be imposed, provide courts in that State with a powerful set of tools to exert control over the conduct of parties and their lawyers. However, in my view, I must take some issue with the statement in *Yara* that the New South Wales provisions “remain more aspirational than obligatory”.²³ As you know, the court has general powers to give directions as it thinks fit, to give specific directions regarding the conduct of hearings, and, where there is a breach of a direction, the power to make various orders including orders as to costs.²⁴ When he was President of the Court of Appeal, Chief Justice Allsop observed in *Hawkesbury District Health Services v Chaker* that:

*“Courts are being more demanding about behaviour from clients and practitioners in order to obtain sufficient co-operation among them to enable the real issues in dispute to be litigated with efficiency and civility and in a cost-effective manner. Clients and practitioners can expect these demands for good faith and common sense in their conduct of litigation to continue and to be reinforced by orders, including orders for costs.”*²⁵

²³ *Yara* at [17].

²⁴ *Civil Procedure Act 2005* (NSW) ss 61-62.

²⁵ *Hawkesbury District Health Service Ltd v Chaker* [2010] NSWCA 320 at [2].

24. The Victorian regime undoubtedly contains more detail than the provisions in Part 6 of our *Civil Procedure Act*. However, that does not mean that courts in New South Wales are not sufficiently equipped to manage the progress of cases and step in where parties fail to meet their obligations. Consistent with the cases that I have referred to, courts are required to supervise proceedings and make orders where they are deemed necessary.
25. As a side note, orders for costs are based on the indemnity principle (albeit the indemnity is only partial), and are not intended to operate as a sanction. Now, while I am not expressing a view, it is generally assumed that our system in which the successful party is awarded costs is preferable to the default approach in the United States. The rationale for awarding costs to the successful party is that it is just and reasonable that they be indemnified for expenses incurred as a result of the proceedings.²⁶ However, there may be value in asking whether this approach promotes access to justice? For instance, where cases are arguable but by no means certain, plaintiffs may be fearful of pursuing the matter, particularly in the face of a Calderbank offer, even if it is one in the very low range. In these circumstances solicitors and barristers may also be deterred from advising. In the course of the present inquiry it seems the Productivity Commission will consider the principles that should apply in awarding costs. It will be interesting to see if any recommendations are made as to sanctions, beyond costs orders, that can be imposed by courts to control litigation.
26. What I have said so far clearly indicates that case management remains a work in progress. Courts will continue to develop and adjust case management processes with the objective of controlling costs and delays, while maintaining the highest standards in the administration of justice. This will require ongoing collaboration between the bench and bar as we confront the challenges of modern litigation. As *Yara* illustrates, courts should not be

²⁶ See, for example, *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534, 543.

afraid to actively manage proceedings. However, practitioners – especially members of the bar – must remain mindful of their duties and the effect that time consuming and costly proceedings can have on access to the courts.

II JUDICIAL BIAS

27. As I mentioned, my aim this morning was to avoid anything that sounded like a reprimanding lecture; although I'm not sure how successful I have been so far. To ensure I am striking a balance, I thought I would say a few words about judicial decision making and, in particular, judicial bias.
28. It is worth noting at the outset that there is a close connection between case management and the issue of bias. As we move toward increasingly active case management, there is the potential for proactive intervention by judges at interlocutory stages to raise concerns about prejudgment. As promised, to take a recent example, this scenario arose in a decision of the Full Federal Court from last December in *GlaxoSmithKline Australia v Reckitt*.²⁷
29. In *Reckitt*, the primary judge dismissed an application to transfer the matter to another judge's docket. The application concerned certain remarks the judge had made in relation to one of the expert witnesses' evidence at a directions hearing and during an application for an interlocutory injunction. The comments were said to give rise to a reasonable apprehension of bias.
30. The Full Court found that there was nothing in the judge's statements that might cause a fair-minded observer to reasonably apprehend that the judge might not bring an impartial mind to the issues in dispute at the final hearing. In doing so, the Court made several important observations about the relationship between case management and claims of apprehended bias.

²⁷ *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Limited* [2013] FCAFC 150 (*GlaxoSmithKline*).

31. The Court emphasised that an allegation of apprehended bias must be considered in the context of ordinary judicial practice. Picking up language from *Johnson v Johnson*, they indicated that judges cannot be expected to sit in silence during argument, and will often form tentative opinions about the matters in issues. Importantly, the process of raising opinions during the course of proceedings is meant to draw a response from counsel that may assist the judge to clarify an issue or correct a mistaken view.²⁸ The Court accepted that there had been a debate between bench and bar about the expert's evidence. However, they rejected the proposition that the debate showed prejudice or a view held by the judge that could not be altered. In this respect they found the fair-minded observer would appreciate that robust debate can form part of the process of testing counsel's arguments.²⁹
32. A possible perception of bias can arise from the increasing need for judges to manage the progress of cases, while at the same time remaining neutral arbiters. While the use of case management has grown, the participation of judges in the course of hearings is not new. For instance, it has been the position for many years that judges should not sit silently through proceedings.³⁰ For centuries judges have been telling counsel, sometimes in particularly strong terms, if they think a submission or course of action is unlikely to succeed.³¹ At one end of the spectrum, I remember in my early days at the bar that appearing in the Court of Appeal was often a terrifying prospect, where commentary and criticism from the bench could politely be described as 'frank'. I certainly hope the experience of advocates today is characterised by polite and constructive discussion between bench and bar.

²⁸ *GlaxoSmithKline* at [36] referring to *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488.

²⁹ *GlaxoSmithKline* at [45]-[47].

³⁰ See, for example, *Vakautu v Kelly* [1989] HCA 44; (1989) 167 CLR 568, 571.

³¹ See *Antoun v The Queen* [2006] HCA 2; (2006) 80 ALJR 497 at [27].

33. The point I am trying to make is that case management and the conduct of modern litigation – be it through a docket system or otherwise – will continue to raise issues regarding the possible appearance of prejudgment, and will also affect the concept of apprehended bias and the way courts apply it. For instance, in *Johnson v Johnson*, the plurality explained that the rules of judicial practice are not frozen. They said the rules, and I quote:

“...develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.”³²

34. As I have mentioned in relation to *Reckitt*, the test for apprehended bias is easily stated: you ask whether a fair-minded lay observer might reasonably apprehend that the decision maker might not bring an impartial and unprejudiced mind to the resolution of the question in issue.³³ Unfortunately, while the test seems straightforward, it is not always easy to apply.³⁴ With that in mind, I want to refer to three specific matters in relation to applying the test for apprehended bias that may be of some interest.

35. First is the issue of logical connection. It is important when applying the test that practitioners bear in mind the two step approach set out by the High Court in *Ebner*. Broadly speaking, the second step involves asking whether there is a logical connection between the conduct complained of and the alleged departure by the decision maker from deciding the matter on its merits.³⁵ This requires the applicant to show an association between the

³² *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 568 at [13].

³³ See *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [31]; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [6].

³⁴ See, for example, *R v Lusink*; *Ex parte Shaw* (1981) 55 ALJR 12, 16 (Aikin J in dissent); *Kirby v Centro Properties Ltd (No 2)* [2008] FCA 1657; (2008) 172 FCR 376 at [17].

³⁵ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [8].

conduct and the fear that the judge will not decide the case impartially. As one commentator has put it, the party must “essentially ‘join the dots’”.³⁶

36. The need to establish a logical connection was central to the decision in *Duncan v Ipp* last year, which, as you are no doubt aware, arose from allegations of apprehended bias on the part of the Commissioner of ICAC.³⁷ The principal question was whether there was a connection between the Commissioner’s conduct – including communication with and advice to the Executive and the Department of Premier and Cabinet – and the possibility that the Commissioner had a closed mind about the outcome of the inquiry.
37. In my view, which I expressed in *Duncan*, it is not necessary for the logical connection to be absolutely certain. All aspects of the test – for instance, the two ‘mights’ that I have referred to – are framed in terms of ‘possibility’. In that sense what is required is that the fair-minded observer might perceive a logical connection between the conduct complained of and the judge’s possible departure from deciding the matter impartially. In addition, when assessing if there might be a logical connection, it is appropriate to look at alternate possibilities as to why the decision maker took a particular course of action. Considering other explanations may affect whether the fair-minded observer might see a logical connection. However, the fact there are other possibilities does not mean that the fair-minded observer might not conclude that there was the possibility of bias.³⁸
38. I realise this sounds complicated. However, as you probably imagine, applying the test for apprehended bias, including the two step process in *Ebner*, will depend almost entirely on the facts. Perhaps the simple message is that it is always necessary to identify the link between the

³⁶ M Groves and H P Lee (ed), *Australian Administrative Law* (Cambridge University Press, 2007) at 320.

³⁷ *Duncan v Ipp* [2013] NSWCA 189; (2013) 304 ALR 359, special leave to appeal to the High Court refused in *Duncan v Ipp* [2013] HCATrans 157.

³⁸ See *Duncan v Ipp* [2013] NSWCA 189; (2013) 304 ALR 359 at [147]-[150].

alleged conduct and the possibility of bias – to join the dots so to speak. This does not mean that the conduct complained of *must* lead to the alleged bias. However, as *Ebner* dictates, it is important to consider and articulate how that connection might lead the fair-minded observer to perceive bias.

39. This leads to the second issue concerning the knowledge of the lay fair-minded observer. The objective test, which is often simply referred to as the ‘double might’ test, has lowered the bar for proving apprehended bias, as compared to the subjective ‘real likelihood’ test that continued to be applied in the United Kingdom and New Zealand until the late 1990s and 2000s.³⁹ However, the extent and detail of the knowledge that is attributed to the fair-minded observer is one aspect of the test that has proved complicated.
40. Many useful resources have summarised the positions taken in a litany of cases regarding the knowledge that the fair-minded observer would have about a range of matters.⁴⁰ This includes some knowledge of the facts and circumstances of the proceedings, the nature of the relevant body (be it a court, tribunal or commission), and the professional ethics of judicial officers. It is worth pausing to mention that there are various criticisms of the hypothetical fair-minded observer; particularly in relation to the extent of the knowledge they are considered to have. In fact, several judges have themselves recognised these shortcomings, including concerns that the observer is simply a thin façade for the judge’s own personal views.⁴¹
41. For my part, I am sure there will be ongoing scrutiny about the nature of and knowledge that is attributed to the fair-minded observer. However, despite criticisms, it seems to me that the fair-minded observer provides a valuable

³⁹ See J Tarrant, *Disqualification for Bias* (Federal Press, 2012) at 52-56.

⁴⁰ See, for example, J Tarrant, *Disqualification for Bias* (Federal Press, 2012) at 61-66; M Aronson and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) at [9.80]-[9.90]; M Groves, “The imaginary observer of the bias rule”, (2012) 19 *Australian Journal of Administrative Law* 188, 190-199.

⁴¹ See, for example, *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423 at [95]-[96] (per Kirby J); *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [48]-[51] (per Kirby J); *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2; (2011) 242 CLR 283 at [48] (per French CJ in dissent).

position from which to consider claims of apprehended bias. The objective observer reflects the fact that claims of bias, at their very essence, concern the public's perception of the judiciary. It gives effect to the requirement in our system that justice should both be done and be seen to be done. In this sense, it is important that the analysis of claims regarding allegations of bias occurs from the standpoint of the public, even if that involves some degree of artificiality. Furthermore, we know that a range of legal tests employ notions of reasonableness and the reasonable person. While it may present some difficulties, it seems the fair-minded observer is just as useful as the passenger on the Clapham omnibus or the Bondi tram is in other contexts.⁴²

42. Finally, a series of recent publications have addressed the correct protocol for communicating with judges and members of their staff.⁴³ This is an important reminder that unilateral contact between a decision-maker and a party or their legal representative can form grounds for disqualification on the basis of apprehended bias. The general position is that a judge should not receive any communication regarding a case that the judge is to decide, where that communication is made with a view to influencing the conduct or outcome of the proceedings.⁴⁴ As Sir Anthony Mason explained in *Re JRL*, one of the cardinal principles is that a judge should try a case "on the evidence and arguments presented...in open court by the parties or their legal representatives and by reference to those matters alone".⁴⁵ Consistent with what I have said already, claims of apprehended bias arising from inappropriate communications are assessed according to the double might test.

⁴² See, for example, *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 36.

⁴³ See, for example, G Ulman and A Southwell, "Judicial impartiality and communications with the court" (March 2014) 36 *Law Society Journal* 46; R Lilley and J Carter, "Communications with the court" (2013) 87 *Australian Law Journal* 121; M Groves, "Emailing judges and their staff" (2013) 37 *Australian Bar Review* 69.

⁴⁴ *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34; (2011) 276 ALR 221 at [12].

⁴⁵ *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 350.

43. Communication with the courts and with individual chambers has become increasingly easy, first through the introduction of fax machines, which already seem virtually redundant, and now email. This has simplified many court processes, from listing matters, right through to providing materials prior to a hearing. To pick a couple of basic examples, a new return date for a subpoena can be requested using a specific court email address, and lists of authorities in the Court of Criminal Appeal can be submitted via email. Achieving efficient case management also relies on effective communication between the parties, their legal representatives and the court.⁴⁶ However, the need for more regular contact between judges and parties, along with the ease of that contact, has the potential to create an apprehension of bias.
44. Practitioners need to be mindful of their professional obligations in relation to communications with the court: counsel under rules 53 to 55 of the recently amended Barristers' Rules and solicitors under rules 22.5 to 22.7 of the revised Solicitors' Rules, both of which are in the same terms. Courts and the profession should be working together toward the goals of effective case management and efficient communication. However these objectives must be viewed in the context of the overarching need for impartiality. You should be careful to not let the ease of modern communication distract from the cardinal principle that was referred to by Sir Anthony. While there are many advantages to instantaneous means of contact like email, you should keep in mind that correspondence with the court or a judge – whatever form that happens take – is a communication with the court like any other. The procedures that govern contact between the court, parties and legal practitioners are arguably more important today than ever before.
45. These types of concerns are certainly very different to earlier days where judges' salaries were sometimes supplemented by court fees. In fact I'm led to believe that up until 1924, associates at the High Court were able to

⁴⁶ See *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34; (2011) 276 ALR 221 at [26]-[28].

sell copies of the Court's judgments to increase their wage.⁴⁷ I assume this may well be a system that my Associate would be keen to reintroduce.

46. It seems there has been an increase in the past few decades in the number of applications for recusal made on the basis of apprehended bias. There are no doubt many reasons that may have led to this, including the acceptance of an objective test and an increase in the number of litigants in person,⁴⁸ which is a topic that I want to turn to briefly in just a moment. Whatever is the case, it is important to bear in mind that claims of bias must be considered having regard to ordinary judicial practice, which includes the increasing use of case management. Judges and practitioners must also be mindful of the possible appearance of prejudgment during interlocutory proceedings, and practitioners in their communications with the court. Ultimately, there are ongoing challenges in applying the test for apprehended bias, and I have no doubt that the practice of litigation will continue to throw up new issues that require further consideration.

III SELF-REPRESENTED LITIGANTS

47. In the few minutes that I have remaining I would like to say a few words about self-represented litigants. I am sure that many of you have faced what is often a difficult task of appearing against a litigant in person. In the criminal context an unrepresented accused has been described as being disadvantaged in a number of ways: first, because they almost always have insufficient legal knowledge and skills; and second, because they are generally unable to dispassionately assess and present their case in the same way as opposing counsel.⁴⁹ This situation presents challenges not only for the litigant in person, but also for the court and for other parties.

⁴⁷ The Hon. K Mason, *Lawyers Then and Now* (Federation Press, 2012) at 241-242.

⁴⁸ See *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [44].

⁴⁹ *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 at 302.

48. There is a general perception that an increasing number of litigants are representing themselves in Australian courts and tribunals.⁵⁰ However, accurately calculating the number of people who are acting for themselves presents a range of challenges. For instance, some jurisdictions encourage self-representation and only allow legal representatives to appear where permission is granted. In the Supreme Court, it is difficult to precisely gauge the extent of self-represented litigants. Some parties file their own documents that may or may not have been prepared by lawyers, some are represented for a portion of the proceedings, while some appear in person at interlocutory hearings and are then represented at the final hearing.
49. There have been a great many inquiries into access to justice that have considered the needs of self-represented litigants.⁵¹ It is highly likely that the Productivity Commission will also consider the extent and impact of self-representation, and how those who are representing themselves can be best assisted by government, community bodies and the courts.
50. The courts are acutely aware of the needs of self-represented parties. *Cachia v Hanes* contains an early statement by the High Court in relation to the challenges they can present. In *Cachia*, the plurality observed that while it is a fundamental right to appear in person, the presence of self-represented litigants in increasing numbers is creating a problem for courts. They noted that litigation involving a self-represented person is usually less efficient and tends to be prolonged, can transfer costs to the opposing party and is a drain on court resources.⁵² At this point I should again reiterate that it is a fundamental right to appear in person; indeed, there are many

⁵⁰ See E Richardson and T Sourdin, "Mind the gap: making evidence-based decisions about self-represented litigants" (2013) 22 *Journal of Judicial Administration* 191.

⁵¹ Inquiries and studies are canvassed in detail in E Richardson, T Sourdin and N Wallace, "Self-Represented Litigants: Literature Review", *Australian Centre for Court and Justice System Innovation* (2012); E Richardson and T Sourdin, "Mind the gap", above n 49.

⁵² *Cachia v Hanes* [1994] HCA 14: (1994) 179 CLR 403 at 415-416. See also *Kenny v Ritter* [2009] SASC 139; (2009) 263 LSJS 158 at [14].

people who elect to represent themselves despite being in a position to access legal help. There are of course others who have no such choice.

51. In addition to the difficulties referred to in *Cachia*, the presence of a self-represented litigant can create a further concern for judges that ties in with what I have already said today. As you have probably experienced, it is at times necessary for judges to provide assistance to self-represented litigants so they understand the proceedings and to ensure the trial is conducted fairly. This, it has been said, should be limited only to advice and assistance that is required to diminish the disadvantage that the self-represented party will ordinarily suffer when appearing against a lawyer.⁵³ However, determining the extent to which advice and assistance should be offered to a litigant in person in a particular case is a difficult task. Providing too much assistance can compromise the court's impartiality and potentially create an appearance of bias. In this sense, there is a tension between the duties of the court to act impartially and to ensure a fair hearing.⁵⁴
52. This is a challenge that judges confront on a regular basis. However, in my view, the progress of cases involving self-represented litigants is a further area in which the courts and the legal profession share a similar goal. I understand that a second edition of the Bar Association's guidelines on dealing with self-represented litigants was released in late 2011. Can I encourage you to review this document and reflect on the approach that you take when dealing with and appearing opposite a litigant in person. The guidelines provide a great deal of practical advice about preparing for and presenting cases in which there is a party who is self-represented. The way in which judges preside over such cases, along with the preparation and conduct of counsel appearing, can help to alleviate some of the challenges

⁵³ *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal, 16 July 1986, unreported) extracted in *Caladine v The Commissioner, New South Wales Health Care Complaints Commission* [2007] NSWCA 362 at [55].

⁵⁴ See Australian Institute of Judicial Administration, *Litigants in person management plans: Issues for courts and tribunals* (2001) at 5-6. See also *Kenny v Ritter* [2009] SASC 139; (2009) 263 LSJS 158 at [19]-[20].

that I have referred to. Ultimately, I am sure we share a common hope that focus will remain on the needs of litigants who are not self-represented by choice. Can I commend the efforts of those here today that donate time to the Legal Assistance Referral Scheme and the Duty Barrister Scheme.

IV CONCLUSION

53. To conclude, there are many areas in which the courts and legal profession can work in collaboration. Case management is certainly one such matter. The decision in *Yara* illustrates the need for judges to actively manage litigation, and the obligations of parties to facilitate the just, quick and cheap resolution of proceedings; particularly in light of challenges posed by evolving technologies. The conduct of litigation today, including the use of case management requires constant monitoring by courts. As I have mentioned, the active management of civil litigation can present difficulties in respect of creating an appearance of prejudgment. While in very different circumstances, similar challenges can arise in relation to assistance given by judges to litigants in person. These are areas where courts and the bar can assist one another. Courts by managing litigation in a way that achieves the objectives of the *Civil Procedure Act*, and barristers through considered preparation and presentation of matters.

54. I hope you find the remainder of today's program stimulating and that you take the opportunity to discuss broader issues concerning the law and the legal profession. One of the main reasons that I enjoy coming to speak at these conferences is they give me an opportunity to hear your concerns and answer some questions about the operation of the Court. In those circumstances, and while it is a large group, I would be delighted to answer any questions you may have in the short time that is remaining.