

DISQUALIFICATION OF JUDGES FOR BIAS*

Introduction

The right to a fair trial is a cardinal requirement of the rule of law. It is a right to be enjoyed by all parties, whether they are private individuals, companies or public authorities, and in all curial proceedings, whether they are criminal or civil trials, or adjudicative procedures of a hybrid kind.¹

Fairness is, of course, a relative and protean concept. Its content will turn upon the context. However, a fixed and necessary incident of fairness in the context of a fair trial is the requirement decision makers are independent² and impartial. Indeed, the notion judges should stand fair and detached between the parties who appear before them is as old as the history of courts, but its application has evolved and continues to evolve to this day.

This paper maps out the development of disqualification of judges for bias, primarily focusing on the origins, key features and diverging standards that have emerged in the United Kingdom and Australia. The principles of judicial bias in the United States are also

* Justice John Sackar, Oxford, January 2018.

¹ Tom Bingham, *The Rule of Law*, Penguin Books, 2010, p. 90 (*The Rule of Law*).

² As Tom Bingham writes, "It is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence"; Tom Bingham, *The Business of Judging: selected essays and speeches*, Oxford University Press, 2000, p. 54.

briefly examined, but, given its jurisdictional complexities, the United Kingdom and Australia remain the focus of this paper.

Sources and origins of disqualification of judges for bias

Edicts designed to ensure judicial impartiality have been recorded since ancient times. Under early Jewish law, for example, a judge was not to participate in any case in which a litigant was his friend, a kinsman, or someone whom he personally disliked. Pursuant to the Roman Code of Justinian, a party who believed a judge was “under suspicion” was permitted to “recuse” that judge, so long as he did so prior to the time the issue was joined.³

This expansive power on the part of early litigants to effect a judge’s recusal formed the basis for the broad disqualification statutes that generally prevail in civil law countries to this day. The common law judicial disqualification standard was initially advanced by Bracton, writing in the 13th century, who believed a judge should be disqualified on grounds such as kindred, enmity or friendship with a party or because the judge had acted as an advocate for a party. Blackstone, however, expressed the view a judge should not be disqualified for perceived bias or other bias for “suspicion,” and only for pecuniary interest in a cause.⁴

³ Richard E. Flamm, "The History of Judicial Disqualification in America," (2013) *Judges' Journal* 52(3)12-19 at 12-13.

⁴ Professor John Tarrant, *Disqualification for Bias*, Federation Press, 2012, p. 19 (*Disqualification for Bias*); The Hon Grant Hammond, *Judicial Recusal*, Hart, 2009, p. 11-13 (*Judicial Recusal*).

Sir Matthew Hale was one of the earliest judges to articulate precisely how he believed judges should conduct themselves to maintain judicial independence and the appearance of fairness. Sometime in the 1660s, not long after Sir Francis Bacon had been tried and convicted for accepting bribes as the Lord Chancellor and Lord Campbell spoke of “the incorruptibility now common to all judges,”⁵ Hale wrote a list comprising of 18 “things necessary to be continually had in remembrance” (see Annexure A). As a man of deeply-held religious convictions, he lived his ideal. To avoid ostentation he wore extremely shabby clothes, and to avoid gifts he not only refused the customary prerequisites like venison for justices on circuit, but insisted on paying more than the regular prices for his domestic supplies.⁶

Hale’s list should still be regarded sound guidelines for judicial conduct today. He appreciated the role of the judge required serious, single-minded and professional attention and understood the undesirability of taking up any partisan position and suspending judgment until all of the evidence and/or argument was heard. Although judges are not the only guardians of the rule of law, their role in maintaining it is crucial.

Recognising this role, in modern times, a number of countries have also introduced guides on judicial conduct expressly dealing with the issue of independence and impartiality. Further, in some jurisdictions legislation has been introduced to deal with complaints of judicial misconduct which has led in some instances to judges, including some senior

⁵ Simon Shetreet, *Judges on Trial*, North-Holland Publishing Company, 1976, p. 387; see also Edward Heward, *Matthew Hale*, Robert Hale & Company, 1972.

⁶ William Searle Holdsworth, *A History of English Law*, Volume 6, 1932, p. 580.

judges, being investigated and disciplined for misconduct relating to allegations of apprehension of bias. For example, in the United Kingdom in March 2013 a Guide to Judicial Conduct was published. In addition there is the Judicial Disciplines (Prescribed Procedures) Regulations 2006 (UK).

In Australia there is a Guide to Judicial Conduct, prompted by the Council of the Chief Justices of Australia, which is now in its third edition and intended to give practical guidance to members of the Australian judiciary at all levels.⁷ This Guide operates alongside legislation which creates a formalised system of judicial accountability, for example the Judicial Officers Act 1986 (NSW) in NSW.

In the United States, there exists a Code of Conduct for United States Judges which was initially adopted by the Judicial Conference in 1973 and amended over the years. The Code applies to all federal judges except US Supreme Court judges. Alongside this code sits the similar American Bar Association Code of Judicial Conduct which forms the basis of state judicial conduct codes across the country. Both codes purport to articulate ethical standards to be observed by judges and somewhat indirectly the conduct of practitioners making such applications. The enforceability of the code however is dependent upon adoption by individual states.

Further, in all common law jurisdictions judges are also required to take an oath on appointment. A relatively common form is an oath “to do right to all manner of people after

⁷ The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, published for The Council of Chief Justices of Australia (3rd ed, 2017) (***Australian Guide to Judicial Conduct***).

the laws and usages of [this country] without fear or favour affection or ill will". A similar oath is administered for each federal justice or judge in the United States (28 USC Section 453).⁸ Indeed as Lord Bingham said:

*"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."*⁹

Further, in the United Kingdom, article 6 of the Human Rights Act 1998 brought into domestic law a guarantee to an impartial hearing, which many suggest is similar to common law standards relating to bias.

What is bias – on paper and in practice

There is no commonly applied definition of "bias," but generally bias in the judicial context has to do with a judge coming to or approaching a decision with some inclination, derived from emotion, ideology, interests or the like, which disposes the judge to pre-judge an

⁸ *Judicial Recusal*, p. 35. For an interesting history of the judicial oath see; Ellison Kahn, 'The Judicial Oath' (1954) 71 S. African L.J., 22.

⁹ Tom Bingham, *The Business of Judging: Selected Essays and Speeches*, Oxford University Press, 2000, p. 74.

issue in a particular way.¹⁰ In this context, as Balcombe LJ noted, bias is “the antithesis of the proper exercise of a judicial function.”¹¹

In practice, however, as Benjamin Cardozo, among others, has suggested, absolute impartiality is most likely unattainable.¹² Writing in 1921, Cardozo observed:

We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of ‘the total push and pressure of the cosmos,’ which, when reasons are nicely balanced, must determine where choice shall fall.

Similarly, Lord Bingham writing extra-judicially said it is “a truism” that all human beings - judges included - are to some extent creatures of their upbringing education and

¹⁰ *R v Small Claims Tribunal; ex parte Barwiner Nominees Pty Ltd* [1975] VR 831 at 836 per Gowans J; *Disqualification for Bias*, p. 10

¹¹ *Bahai v Rashidian* [1985] 3 All ER 385 at 391.

¹² Benjamin N Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921, p. 12.

experience and that they inevitably hold views, entertain preferences and are subject to prejudices, but it is their duty to lay these aside and approach cases in an impartial and objective way so far as possible and to give the appearance of doing so.¹³

The Species of Bias

Bias takes on more nuanced meaning when the term is broken down into its two main judicial species: actual bias and apprehended bias.¹⁴

Actual bias is rarely alleged, however it entails as a necessary ingredient the operation of unlawful motive or intent in reaching a decision. Evidence amounting to actual bias may consist of actual statements made by the judge said to be biased, together with objective facts and circumstances from which an inference of actual bias may properly be drawn. It is not a necessary component of actual bias that there be an absence of good faith; a person may, in all good faith, believe he or she is acting impartially but that his or her mind may nevertheless be affected unconsciously by bias. As Justice Ruth Ginsburg remarked extra-judicially, “I think unconscious bias is one of the hardest things to get at.”¹⁵

It is also possible to point to the demeanour of the judge in the conduct of a hearing as grounds for actual bias. For example the judge may frequently resort to sarcasm, mockery

¹³ *The Rule of Law*, p. 93

¹⁴ There is some debate as to whether those two categories can or should be maintained as separate species, see *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 2)* (2000) 1 A.C. 119, at 133.

¹⁵ Ruth Bader Ginsburg interviewed by Jessica Weisberg, ‘Supreme Court Justice Ruth Bader Ginsburg: I’m Not Going Anywhere’, *Elle*, 2014.

or the display of high personal indignation which may go part of the way to proving actual bias. The question however is, taking all relevant matters into account: is it possible to determine whether a decision maker has such a closed mind to critical issues in a matter that he or she has pre-judged the case against the party concerned?

The determination of actual bias is not to be examined through the test of the reasonable bystander. If it can be shown the judge acted with such partisanship or hostility so as to point to the conclusion that he or she had made up his or her mind against the applicant was not open to persuasion, then actual bias will be proven.

An allegation of actual bias requires a court to make a finding the relevant judge was in truth biased against or prejudiced in the sense of having pre-judged the case. It involves a finding of judicial impropriety and probably judicial misconduct which in turn would inevitably lead to a finding of a breach of the judicial oath.

An allegation of apprehension of bias provides a much lower threshold, and naturally has been the subject of much greater judicial analysis, which this paper will later turn to. Broadly, and at least in Australia, apprehension of bias only requires a finding a fair minded lay observer might take the view the decision maker might not bring an impartial mind to bear upon the hearing of the case.

The Tests for Bias

The test for bias has developed in an inconsistent way over the past two centuries. Courts have grappled with two factors when developing an appropriate test. The first is whether

the test should be subjective or objective. The second is whether the test should adopt an approach based on the perception of an independent lay observer or the approach of a judge.

The UK and Australia – “a legacy of some confusion”

Prior to the mid-19th century, the courts had not given the issue of judicial bias much consideration. Blackstone believed the very existence and administration of the judicial oath has been thought to be sufficient to rebut any notion of bias,¹⁶ while courts adopted statements of principle such as “a man cannot be a judge in his own cause,” without setting out any test that could be applied.¹⁷

Automatic disqualification for pecuniary interest in a case soon became an established principle giving effect to the maxim a man cannot be a judge in his own cause. While the exact origins of the principle are the subject of some debate,¹⁸ it is clear *Dimes v Proprietors of Grand Junction Canal*¹⁹ was an important case of the 19th century which gave prominence to the principle’s application. The decision, whilst entirely consistent with previous authority,²⁰ was notable by reason of the fact it was the Lord Chancellor who had a pecuniary interest in the proceedings and that the litigation occurred over a protracted period from 1836 to 1853.

¹⁶ William Blackstone, *Commentaries on the Laws of England*, Book the Third, p. 361.

¹⁷ See, for example, *Earl of Derby’s case* (1614) 12 Co Rep 114; *City of London v Wood* (1702) 12 Mod 669.

¹⁸ See Abimbola Olowofoyeku, ‘The Nemo Judex Rule: The Case Against Automatic Disqualification’ [2000] Public Law 456 at 456-458.

¹⁹ (1852) 10 E.R. 301.

²⁰ See, for example, *The Queen v The Commissioners for the Paving of Cheltenham* (1841) 1 Q.B. 467.

The case involved a public company wishing to construct a canal and the company had the statutory power to purchase the necessary land. It entered into an agreement to acquire an interest in some land that was to become the focus of the litigation as early as 1797 and proceeded to construct the canal. Mr Dimes obtained an interest in some of the land in 1831. He was of the view his legal interest in the land prevailed over the canal company. Dimes recovered the land in an action for ejectment but the litigation did not determine what interest in the land was held by the canal company. Once Dimes succeeded in his action for ejectment he erected a movable bar across the canal and had a number of bricks thrown into the canal. The company commenced proceedings in equity, insisting they had an interest in the land and they were entitled to be admitted to the land on the payment of a fine. It also sought an injunction prohibiting Dimes from obstructing the canal. The company was successful before the Vice Chancellor who granted an injunction to restrain Dimes from doing anything to impede navigation on the canal. That order was later confirmed by the Lord Chancellor, Lord Cottenham. There was a further hearing before the Lord Chancellor in which Mr Dimes was again unsuccessful.

Dimes decided to appeal to the House of Lords, and while preparing his appeal he discovered Lord Cottenham was the holder of 92 shares in the canal company worth several thousand pounds and had held the shares for more than ten years. Mr Dimes (a solicitor) petitioned the Queen of England for her intervention. He then filed a motion in Chancery asking for the Lord Chancellor's decision to be struck out on the basis of his interest in the case. At the Lord Chancellor's request, the motion was heard by the Master of the Rolls, Lord Langdale who ruled the Lord Chancellor's decision should be upheld on

the ground of necessity. This was because as it transpired there was no other judge of coordinate jurisdiction who could hear the case in place of the Lord Chancellor. Mr Dimes, undaunted, declared all previous chancery decisions were void and placed a chain across the canal amongst other things which he thought would obstruct the company's ability to navigate up and down the canal.

Somewhat belatedly Mr Dimes appealed the decision of the Master of the Rolls but in the meantime the Lord Chancellor had issued a warrant for Mr Dimes to be committed for contempt. Mr Dimes was promptly imprisoned but, again undaunted, sought a writ of habeas corpus. It was in this context the litigation finally reached the House of Lords. Whilst Mr Dimes came second on the merits of the property issue, their Lordships unequivocally held the Lord Chancellor should not have sat by reason of his ownership in the shares in the company. Prior to this decision Lord Cottenham, who had taken seriously ill, had resigned from the position as Lord Chancellor, and died in the April of 1851. Lord Campbell however in his speech held that the interest held by Lord Cottenham disqualified him from hearing the matters and further said that "the maxim that no man is to be judged in his own cause should be held sacred".²¹ His Lordship went on to say that the maxim "is not confined to a cause in which he is a party but applies to a cause in which he has an interest".²²

This was an important development because it established in the United Kingdom once and for all, if it needed establishing, that a financial interest however large or small would

²¹ *Dimes v Proprietors of Grand Junction Canal* (1852) 10 E.R. 301 at 315.

²² *Ibid.*

automatically disqualify a judge when arguably there is neither actual bias nor even an apprehension of bias. The policy upon which the decision is predicated is really more based upon the notion of conflict of interest.

The prominence and publicity given to this case alone over the years it was being litigated undoubtedly inspired lawyers to start thinking more carefully and constructively about situations in which an application for disqualification might be made. The beginnings of a more developed test emerged in 1866 with *R v Rand*, where Blackburn J, delivering the judgment of the court which included Cockburn CJ and Shee J, said:

*"Wherever there is a real likelihood that the Judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act."*²³

This initial test was clearly focussed on whether there was a real likelihood the judge was actually biased. It was further held a bias which justified disqualification had to be "real and substantial and such as was likely as to influence the mind,"²⁴ and "an interest or bias in the matter to be litigated".²⁵ Further, the court had to be satisfied that the bias was "real" in favour of one of the parties, or at least a reasonable likelihood of it being real.²⁶ A bare possibility was not sufficient.

²³ (1866) LR 1 QB 230 at 233.

²⁴ *R v Mayor & Justices of Deal; Ex parte Lurling* (1881) 45 L.T. 439 at 441.

²⁵ *Ibid.*

²⁶ *Ibid.* See also *R v Handsley* (1881) 8 QBD 383.

Inquiries regarding the likelihood of actual judicial bias then began to expand to inquiries regarding the perception of bias. This is the context in which Lord Hewart CJ famously remarked “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”²⁷ This maxim was the start of the process of lowering the threshold required in case of disqualification, where reasonable suspicion became sufficient to quash a judicial determination. However, many English courts decided the suspicion, reasonable though it must be, ought to be held by a considerable number of the community concerned and could not be vague, whimsical or capricious and hence unreasonable.

The notion of an apprehension of bias clearly emerged in the judgment of Wills J *in R v Huggins*. His Lordship explicitly posed the test as to whether “there was a reasonable apprehension of bias”²⁸ and in doing so accurately predicted the test which ultimately emerged consistently in the early part of the 21st century.

The test was further developed by the introduction of the notion of a reasonable person being an observer of the proceedings. In *R v Molesworth*²⁹ Williams J introduced the notion of the observer having been subjected to the acts, conduct and demeanour of the

²⁷ *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259.

²⁸ *R v Huggins* [1895] 1 Q.B. 563 at 565.

²⁹ *R v Molesworth* (1893) 23 VLR 582.

Judge and discussing how that might have had an impact on the minds of “those who heard and observed him”.³⁰

However, coming into the 20th century, the question of what standard of likelihood of bias had to exist in the mind of the reasonable person was still the subject of confused debate. Some judges commenced referring to a real probability of bias.³¹ Lord Atkinson, delivering the advice of the Privy Council in *Thompson v NSW Branch of the British Medical Association*³² stated the test in terms of the “possibility of the existence of a suspicion,” while Bankes LJ in *R v Bath Compensation Authority*³³ stated the test as a “real likelihood of bias”. On appeal to the House of Lords, Viscount Cave LC along with Lord Sumner approved the “real likelihood of bias” test.³⁴

Some years later when the matter came before the High Court of Australia in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*³⁵ in the context of a statutory enquiry the court held to demonstrate disqualification for bias “it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties”.³⁶ The judges went on to say that the bias must be “real”. They concluded there must be a

³⁰ Id at 607.

³¹ *R v Halifax Justices; Ex parte Robinson* (1912) 76 J.P. 233, per Vaughan Williams L.J.

³² [1924] A.C. 764.

³³ (1925) 1 KB 685.

³⁴ *Frome United Breweries Co Ltd v Bath Justices* (1926) 586 at 591.

³⁵ (1953) 88 CLR. 100.

³⁶ Id at 116.

high probability arising “of a bias inconsistent with the fair performance of his duties with the result that a substantial distrust of the result must exist in the minds of reasonable persons”.³⁷ On its face, this would appear to be an adoption of the real likelihood test. That same year in the United Kingdom, Lord Goddard CJ in *R v Nailsworth Licensing Justices, Ex Parte Bird*³⁸ held “there must be something in the nature of real bias.”³⁹

By 1955, in the United Kingdom at least, the generally indicated preference was for a real likelihood of bias test. This was made clear by the court in *R v Camborne Justices; Ex parte Pearce*⁴⁰ (**Camborne**) where Slade J delivering judgment for the court commented “the authorities as a whole are almost overwhelmingly in support of the real likelihood of bias test”.⁴¹

Less than a year later an Australian court reviewed the competing tests in *Ex parte Richards; Re Baird*⁴² where Street CJ, Roper CJ in Eq and Herron J said that the reasons of the court in *Camborne* in respect of the “real likelihood of bias” test “commend themselves to us”.⁴³ In a subsequent decision in Australia, this time comprised by Owen J, Roper CJ in Eq and Herron CJ, the court again adopted the real likelihood test, observing “suspicion is not enough and courts will not act on unsubstantial grounds of

³⁷ Id at 116.

³⁸ (1953) 2 ALL E.R. 652.

³⁹ Id at 654.

⁴⁰ [1955] 1 Q.B. 41.

⁴¹ Id at 47.

⁴² [1955] 55 S.R. (NSW) 411.

⁴³ Id at 420.

flimsy pretexts of bias”.⁴⁴ The court further held the test of real likelihood was “an objective one. Would a reasonable man, knowing the facts, draw the inference that the magistrate would be likely to be biased one way or the other.”⁴⁵

By contrast, in the United Kingdom the courts appeared to favour a subjective test, with Devlin LJ explaining in *R v Barnsley Licensing Justices; Ex parte Barnsley and District Licensed Victuallers’ Association*⁴⁶ the real likelihood test “depends on the impression which the court gets from the circumstances in which the justices were sitting”.⁴⁷

A decade later Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon*⁴⁸ adopted the real likelihood of bias test but instead of looking at the real likelihood of bias through the eyes of a judge he looked for a real likelihood of bias through the eyes of right-minded persons. This most clearly shifted the focus of the test to an objective basis.

Lord Denning’s judgment was catalytic, having an immediate effect in Australia. Less than a year after his judgment the High Court of Australia in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group*⁴⁹ (**Angliss Group case**) not only referred to Lord Denning MR’s judgment, but stated:

⁴⁴ *Ex parte Blume; Re Osborn* (1958) S.R. (NSW) 334 at 338.

⁴⁵ *Id* at 338.

⁴⁶ (1960) 2 Q.B. 167.

⁴⁷ *Id* at 187.

⁴⁸ (1969) 1 Q.B. 577.

⁴⁹ (1969) 122 CLR 546.

*“[The] requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the question arising before the tribunal fair and unprejudiced minds”.*⁵⁰

The suspicion test was thus adopted or perhaps readopted. This move was not only unilateral (which the High Court was perfectly entitled to do) but the court wholly aligned itself with the then current authority in United Kingdom.

The debate in the United Kingdom then turned again to a choice between the reasonable suspicion test and the real likelihood of bias test, and thus fundamentally a choice between an objective test on the one hand and a subjective test on the other.

The choice between the two tests returned to the High Court of Australia in *R v Watson; Ex parte Armstrong*.⁵¹ The Court noted the inconsistent approaches in some recent Australian decisions and held the correct approach was the reasonable suspicion test adopted by the court in the Angliss Group case. Their Honours concluded that the reasonable suspicion test was “supported by the balance of authority as it now stands” and was also “correct in principle”.⁵²

⁵⁰ Id at 553 – 554.

⁵¹ (1976) 136 CLR 248.

⁵² Id at 262.

In England the two tests both prevailed with the real likelihood of bias test being favoured in some cases and the suspicion test being adopted in other cases. In yet other cases the two tests were merged.

In *Australian National Industries Ltd v Spedley Securities Ltd (in liq)*, Kirby P articulated the test in Australia as a “double might” test,⁵³ acknowledging there was no final or ultimate formula which had been identified and which could be easily applied. The High Court had earlier expressly adopted that test in *Livesey v New South Wales Bar Association*⁵⁴ (**Livesey**) when it said a judge should not sit if the parties or the public “where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or prejudgment.”⁵⁵

The matter finally came before the House of Lords in *R v Gough*⁵⁶ (**Gough**) in 1993. The suspicion test was rejected in favour of a test which focused not on real likelihood, but on a real danger of bias. Lord Goff observed that the authorities were “bewildering” in their effect and had “left a legacy of some confusion”.⁵⁷ His Lordship held it was desirable the same test should be applicable in all cases of apparent bias whether concerned with justices of members of other inferior tribunals, or with jurors or arbitrators. Lord Goff

⁵³ (1992) 26 NSWLR 411 at 417.

⁵⁴ (1983) 151 CLR 288.

⁵⁵ *Id* at 294.

⁵⁶ (1993) A.C. 646.

⁵⁷ *Id* at 667.

thought it was artificial to include the reasonable person or observer into the test. This was due to the fact that in many cases the court had first to ascertain the relevant circumstances from the available evidence and that knowledge of which would not necessarily be available to an observer in court at the relevant time.⁵⁸ His Lordship preferred to state the test “in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias”.⁵⁹ Lord Wolf agreed.⁶⁰

A year later in *R v Inner West London Coroner; Ex parte Dallaglio*, Simon Brown LJ said in relation to a real danger of bias, “real” meant “not without substance” and a real danger “clearly involves more than a minimal risk less than a probability”.⁶¹

Sir Thomas Bingham MR (as he then was) was of the view that “if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact caused injustice the impugned decision will be allowed to stand”.⁶² This added a further dimension to the real danger test.

However, when the matter was examined in Australia the real danger of bias test articulated by Lord Goff was explicitly rejected by the High Court in *Webb v R*⁶³ (*Webb*) in

⁵⁸ Id at 670.

⁵⁹ Ibid.

⁶⁰ Id at 673.

⁶¹ [1994] 4 All E.R.139 at 151.

⁶² Id at 162.

⁶³ (1994) 181 CLR 41.

favour of continuing with the suspicion test. Deane J in particular commented that to adopt the real danger test would require overruling a series of recent cases which had applied the “reasonable apprehension test”.⁶⁴ His Honour was far from persuaded the test was misconceived or inappropriate. Importantly, his Honour held, citing *Livesey*:

*“...one advantage of the test of reasonable apprehension on the part of a fair-minded and informed observer is that it makes plain that an appellate court is not making an adverse finding on the question of whether it is possible or likely that the particular judge or juror was in fact affected by disqualifying bias. In contrast, the real danger test is focused upon that very question”.*⁶⁵

Mason CJ and McHugh J in rejecting the real danger test explained that it tended to emphasise the court’s view of the facts. They expressed the view public confidence in the administration of justice was more likely to be maintained if the court adopted a test which reflected the reaction of the ordinary reasonable member of the public to the irregularity question. The use therefore of the fair-minded observer ensured that it was the court’s view of the public view not the court’s own view which would be determinative. Further they explained that the reasonable apprehension of bias test concentrated not on whether there was a danger of bias as an objective fact but whether a fair minded and informed person might apprehend or suspect that bias existed. The real danger test is therefore focussed on trying to identify bias in fact whereas the reasonable apprehension test requires a judge to be disqualified if there is a reasonable suspicion that there might be

⁶⁴ Id at 58.

⁶⁵ Id at 72.

bias even if further enquiries would establish there was in fact no bias. In essence the reasonable apprehension test required no enquiry at all.⁶⁶

In Australia following *Webb*, the reasonable suspicion test has become firmly entrenched. In *Johnson v Johnson*⁶⁷ the court said the test “gives due recognition to the fundamental principle that Justice must be done and be seen to be done”.⁶⁸ That test was reaffirmed in the High Court in *Ebner v Official Trustee in Bankruptcy*⁶⁹ (***Ebner***), the details of which this paper will return to later.

The United States

There are two very important disqualification provisions in the United States Code – 28 USC Sections 144 and 455. There are also statutory disqualification provisions in some states. Unsurprisingly with so many states plus a federal system there is extensive case law in the area.

Section 144 of 28 USC is titled “Bias or Prejudice of a Judge” and section 455 of 28 USC is titled “Disqualification of Justice Judge or Magistrate Judge”. The two provisions overlap, and section 144 is effectively subsumed into section 455. If one can draw a distinction between the two provisions for what it is worth section 144 appears to be aimed exclusively at actual bias whereas section 455 deals with both actual bias and conflicts of interest and also appearance of bias.

⁶⁶ *Id* at 51 and 52.

⁶⁷ (2000) 201 CLR 488.

⁶⁸ *Id* at 492-3.

⁶⁹ (2000) 205 CLR 337.

Section 144 only applies to Federal District Court judges and is best thought of as a peremptory disqualification mechanism. It enables a party to a proceeding to file an affidavit which must be “timely and sufficient” alleging that a judge has a personal bias or prejudice either against him or in favour of an adverse party. In such an event the Federal Judge should proceed no further and another judge is then assigned to hear the proceedings.

Notwithstanding what appears to have been a clear intention of the promoter of the Bill and the actual language of the statute, a series of decisions clearly eradicated the intent of a peremptory challenge which lay behind the statute. In the 1921 Supreme Court case of *Berger v US*,⁷⁰ the petitioners who were accused of espionage filed an affidavit for the recusal of the trial judge on the grounds that the judge was biased against German Americans as a result of certain remarks made by him on a previous occasion. The Judge presided at the trial and the defendants were duly convicted and sentenced to 20 years in prison. The Supreme Court decided the Judge was able to review the application for disqualification and accompanying affidavits to ensure there were legally “sufficient” reasons for the recusal.⁷¹ The Court said any affidavit must “give fair support to the charge of bent of mind that may prevent or impede impartiality of judgment”.⁷² The result of the decision was properly interpreted as giving trial judges a very large measure of discretion in deciding whether or not to disqualify themselves.

⁷⁰ 255 U.S. 22 (1921).

⁷¹ *Id* at 32.

⁷² *Id* at 33.

Section 455 stipulates persons must disqualify themselves of their own motion in any proceedings where their impartiality might reasonably be questioned. Under this section, simply an “appearance of impropriety” to an objective observer is enough to trigger disqualification, and the judge does not even have to be aware of the disqualifying circumstances.⁷³

Section 455 has not been as powerful a set of principles as might have been expected. Section 455(a) is a general mandatory provision which requires “any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”.⁷⁴

One significant difficulty – indeed, limitation – is the alleged bias must arise out of extra-judicial events. This of course cuts out claims of bias arising from things arising in the court room. The rationale for the distinction between judicial and personal or extra-judicial biases appears to rest upon the view of a judge’s obligation to reach judicial conclusions on the proceedings before him or her. There was also significant debate in the United States cases to whether questions about a judge’s impartiality should be answered from the vantage point of the applicant party, the judge or a “reasonable person”.

⁷³ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–60 (1988).

⁷⁴ 28 USC s. 455(a).

There is federal appellate authority for each of the propositions but it may be said the majority of federal courts have considered the question is to be determined by an objective standard. Indeed it has been said quite expressly that a charge of partiality must be based on facts that would create a reasonable doubt “concerning the judge’s impartiality not in the mind of the judge or the litigant, but in the mind of a reasonable uninvolved observer”.

For completeness, there is a third Federal Statute dating back to 1948 (28 USC Section 47) which applies only to appellate judges or trial judges who are sitting, by designation, on an appellate panel. Section 47 provides that no judge shall hear or determine an appeal from the decision of a case of issue tried by him.

There is also a common law rule concerning judicial bias stemming from the Due Process Clause in the Fourteenth Amendment to the Constitution.⁷⁵ Pursuant to this Clause:

“Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.”⁷⁶

The Due Process Clause is not regularly invoked in matters relating to judicial disqualification, since those matters ordinarily do not have a constitutional element in the

⁷⁵ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

⁷⁶ *Id* at 532.

United States.⁷⁷ However, a federal cause of action may arise from an allegation of judicial impartiality where the judge is not a federal judge, and thus is not subject to 28 USC sections 144 and 455.

Such an instance arose in 2009 in the “exceptional case”⁷⁸ of *Caperton v. A. T. Massey Coal Co*⁷⁹ (**Caperton**). A claim for judicial disqualification was brought on two grounds, namely under the Due Process Clause, as well as West Virginia’s Code of Judicial Conduct. The issue in *Caperton* was whether a judge ought to have recused himself from participation in a case where one of the parties donated \$3 million to his election campaign to become a judge while the case was pending. Justice Brent Benjamin of the West Virginia Supreme Court of Appeals (the state’s highest court) insisted he did nothing wrong in refusing to remove himself from the case, having determined he had no “direct, personal, substantial, pecuniary interest in this case.”

Justice Anthony Kennedy wrote the opinion for the five majority, and did not challenge Justice Benjamin’s belief, but noted the test for recusal should not be confined to a judge’s own perceptions of his or her bias. Rather, the Supreme Court enunciated a test of “probability of actual bias,” observing:

⁷⁷ *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948).

⁷⁸ *Caperton v. A. T. Massey Coal Co.* 129 S. Ct. (2009) at 2263.

⁷⁹ 129 S. Ct. 2252 (2009).

*“there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.”*⁸⁰

Chief Justice John Roberts wrote one of the dissenting judgments (with Justice Scalia writing the other), objecting principally to the majority on their attempt to create an “objective” standard for bias, contending this standard “fails to provide clear, workable guidance for future cases”, as “a ‘probability of bias’ cannot be defined in any limited way.”⁸¹ The Chief Justice went on to list forty situations where courts would have to determine the issue of judicial disqualification with “little help from the majority”⁸² in *Caperton*.

This widely cast objective standard for due process-mandated disqualification has yet to be properly revisited, again given the rarity of such matters rising to the constitutional level. However, *Caperton* is also of great interest in that, as “extreme”⁸³ as the facts may be, the case demonstrates the particular challenges of maintaining judicial impartiality in a country where more than thirty nine states elect at least some of their judges.⁸⁴

⁸⁰ Id at 2263–64.

⁸¹ Id at 2267.

⁸² Id at 2269.

⁸³ Id at 2265.

⁸⁴ For issues of judicial independence in the UK, see G. Gee, R. Hazell, K. Maleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge University Press (2015).

Features of the test of apprehended bias in the UK and Australia

Application

The test for applying the apprehension of bias has proved difficult to apply in practice. In Australia, important guidance however for the application of the test emerged in *Ebner*. The High Court of Australia established in *Ebner* two steps to the resolution of an allegation of apprehension of bias. The first step in the application “requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits.”⁸⁵ Secondly there “must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.”⁸⁶

Following the adoption of the reasonable apprehension of bias test in the United Kingdom, certainly after *Gough*, courts in the United Kingdom also adopted a two stage test albeit in somewhat different terms. It was said that first “the court must ascertain all the circumstances which have a bearing on the suggestion that the Tribunal was biased” and secondly “it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility the Tribunal was biased.”⁸⁷

⁸⁵ (2000) 205 CLR 337 at 345.

⁸⁶ *Ibid.*

⁸⁷ *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at 726-727.

The Fair Minded Observer – “a relative new comer”

This construct is obviously very significant in determining what the answer should be in any given case. The two stage test is itself not sufficient to provide any certainty. Indeed there has been disagreement over the years as to what characteristics and knowledge should be attributed to the fair minded observer.

This fictitious person through whose eyes the test is to be applied has been described in a number of ways. Some descriptions include “the lay observer”, the “fair minded observer”, the “fair minded informed lay observer”, “fair minded people”, the “reasonable or fair minded observer”, the “reasonable person”, a “dispassionate observer” and many other variations.⁸⁸ The fair minded observer however is assumed to have certain qualities. Lord Hope in *Helow v Secretary of State for the Home Department* said that the “fair minded and informed observer is a relative new comer among the select group of personalities who inhabit our legal village...”.⁸⁹ His or her qualities have become much more greatly defined since about 2008 in courts certainly in the United Kingdom moved from a subjective to an objective test. It has been said the reasonably minded observer “is not assumed to have a high level of intellectual sophistication” but is someone endowed with “ordinary intelligence knowledge and common sense”.⁹⁰ Importantly it should be remembered the fair minded person is not a judge but he or she has a neutral mind and only forms suspicion when it is reasonable to do so.

⁸⁸ *Disqualification for Bias* at p. 58.

⁸⁹ [2008] S.L.T. 967.

⁹⁰ (1992) 76 LGRA 138.

It is relatively clear however that the fair minded person or observer is an informed one who takes a balanced approach to any information given and takes the trouble to acquire information on all matters that are relevant. The knowledge of the fair minded person will of course vary from case to case. It is undoubtedly necessary to imbue the fair minded observer with knowledge of what has transpired in the case during the hearing before the relevant judge if that is the basis for complaint. If for example the case involved the judge's previous association with a litigant then the fair minded observer needed to have all of the relevant circumstances in which the judge had done that legal work for the person. That in turn would involve for example some knowledge of the way lawyers carry out their work for clients. It would follow the observer is not a lawyer and is not likely to go to great lengths to find the relevant facts. However, whilst the person is not a trained lawyer they at least will have sufficient knowledge as to make an informed appreciation of questions such as impartiality and want of prejudice.

The Judge's reasoning

A further and interesting question that often arises is what relevance the judge's view on the disqualification process should have. In Australia the judge's reasons as to why he or she could continue to sit are regarded as irrelevant. This is particularly clear from the decision of the *High Court in British American Tobacco v Laurie*.⁹¹ Reasons, although always helpful, are not of much use if the decision is by a judge in the ultimate court of appeal in the relevant regime.⁹²

⁹¹ (2011) 242 CLR 283.

⁹² Id at 309, French CJ thought the judge's reasons are generally not relevant but could put the allegedly offending material in context. Gummow J at 313, the reasons may also be relevant for context. The majority (Heydon, Keifel and Bell JJ at 330-331) also thought the reasons may be relevant again for context.

Disqualifying Factors

Broadly speaking, it may be said that there are four distinct but sometimes overlapping categories of cases where disqualification for bias could arise - disqualification by interest, disqualification by conduct, disqualification by association, and disqualification by extraneous information.

It has also been suggested there are limits to the accepted disqualification factors. Lord Bingham CJ, Lord Wolf MR and Vice Chancellor Sir Richard Scott said they could not “conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class means or sexual orientation of the judge”.⁹³ Members of the court went on to say an objection could also not ordinarily be based “on the judges social or educational service or employment of background history nor that of any member of the judges family; or previous political association; or membership of social or sporting or charitable bodies; or masonic associations”.⁹⁴

Clearly, the particular ground for suggested disqualification will be idiosyncratic and will understandably involve matters of degree. However, it is worth making some comments at least in some of the more general and obvious areas of disqualification. One of the earliest disqualifying factors recognised by the courts is where the judge has an actual interest in the outcome of the litigation. That of course does not have to be financial but may in fact be an interest in achieving the same outcome in the litigation as one of the

⁹³ *Locobail (UK) Ltd v Bayfield Properties* (2000) Q.B. 451 at 480.

⁹⁴ *Ibid.*

parties. The question of financial difference has been dealt with differently in the United Kingdom and Australia. The law in the United Kingdom has maintained an automatic disqualification for pecuniary interest whereas in Australia the automatic disqualification rule has been specifically rejected in *Ebner*.⁹⁵

Ebner involved the High Court of Australia hearing two appeals, each of which involved small shareholdings by judges in banks that were other parties to the litigation or had an interest in the outcome of it. The court rejected the proposition that automatic disqualification applied in relation to pecuniary and other interests and said there should be no justification for interest and association.⁹⁶

In contrast, in the United Kingdom not only has automatic disqualification due to pecuniary interest been maintained, but it has been expanded to also capture certain non-pecuniary interests. In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)*⁹⁷ (***Pinochet***), the applicant was the former head of state of Chile who was visiting London and was arrested under warrants issued pursuant to the Extradition Act 1989 (UK). International warrants of arrest had been issued by a Spanish court alleging various crimes including crimes against humanity. The warrants had been quashed by a Divisional Court of the Queen's Bench Division. The matter went on appeal to the House of Lords.

⁹⁵ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

⁹⁶ *Id* at 349.

⁹⁷ 2000 1 A.C. 119 at 133-5.

Before the main hearing, Amnesty International obtained leave to intervene in the appeal. The appeal was allowed by a majority of three to two and one of the warrants restored. Subsequently the applicant's advisors discovered that Lord Hoffman who had been part of the majority in restoring the warrant was an unpaid director and chairman of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International. Lord Hoffman was disqualified by reason of that association and his disqualification was regarded by their Lordships as automatic.

In Australia Lord Hoffman's disqualification would not have been automatic and it would have been assessed on the basis of whether any apprehension of bias arose in the circumstances.

Other grounds which may give rise to an application for judicial disqualification (but not automatic disqualification in Australia) include prejudgment or predetermination which can arise in a myriad of circumstances. For example, an issue can arise where a judge has previously formed a view of a witness in an earlier case and made adverse comments especially as to the witness's credit or perhaps even more generally simply rejecting the witness as a witness of truth. Previous views expressed in either a political context or alternatively an academic one may be, subject to matters of degree, an appropriate basis for an application for disqualification.

Expression of views during the hearing on either witnesses and/or issues in the case may give rise to an application to disqualify. Again it is purely a matter of degree. Judges are not expected to remain mute during the course of a hearing or to accept without question

submissions which are baseless or evidence which may appear to be preposterous. Judges are entitled to not only express tentative views along the way but, in an appropriate way, probe for additional information whether it is from the counsel appearing or perhaps from a witness.

Association with a party or a witness may also clearly be grounds for disqualification. If a judge becomes aware that a party or witness is somebody he or she knows then, depending upon the strength of that association, full disclosure should be made by the judge at the earliest possible opportunity. Especially in cases where the credit of the party or the witness may be crucial, it is imperative that the judge be proactive and either disqualify himself or herself if the association is strong, recent enough, or at least raise the matter for consideration.

Association with a legal representative has certainly given rise to an apprehension of bias, but it is difficult to envisage circumstances in which such an application would succeed. A familial relationship between the judge and the legal representative may give rise to certain difficulties. Again the judge and for that matter the legal representative needs to be quite proactive about the matter. There are some instances where the judge may have had a previous commercial relationship with counsel appearing before him or her. If it is purely historical that may be one thing but if it is not it may be quite another.

A prior connection with the proceedings or the subject matter of the proceedings may also be a disqualifying factor. For example if a party appears before a judge who has been a previous client of the judge then that may give rise to difficulty. A greater difficulty

obviously would arise for example if the judge had previously advised the client on the particular issue or perhaps a related issue before the court.

Making the Application for Disqualification

A party in Australia at least is able to make an application for disqualification without filing a formal motion. Traditionally the question of disqualification has been dealt with in an informal way before the judge against whom objection is or might be taken. A party can seek to have the judge disqualified by drawing the issue to the attention of the Registrar of a court with the appropriate adjustments being made to the listing of the matter. In such cases the issue may be resolved without the need for it to be ventilated in open court.

If a party is unable to resolve the matter informally then the party should file an application seeking the disqualification of the judge. Generally an application should be made as soon as reasonably practicable after the party seeking disqualification becomes aware of the relevant facts. The precise procedure is somewhat unregulated and many judges hear submissions, sometimes take evidence, and almost always deliver reasons.

In hearing the application a judge applies the relevant objective tests and either accedes to the application or refuses it. Where one judge of a number of judges is hearing an appeal is asked to disqualify himself or herself, the orthodox practice is again that it is up to the individual judge to decide that application.

However in *Dwr Cymru Cyfyngedig v Albion Water*⁹⁸ an application was made that Richard LJ be disqualified from hearing an appeal in the Court of Appeal in England, and the recusal decision was made by all three members of the court.

There has been some recent suggestion that it is permissible for a judge who is asked to disqualify himself or herself to ask another judge to hear the recusal application. In *El Faragy v El Faragy & Ors*⁹⁹ Ward LJ suggested that in some circumstances a judge might consider asking another judge to decide a disqualification application. At issue was whether a judge should have disqualified himself for making comments during a hearing concerning a Sheikh who was a party to the proceedings. The judge made references to the Sheikh disappearing on a “flying carpet” and his affidavit evidence being a “bit gelatinous” and a “bit like Turkish Delight”. Ward LJ said current procedure for making disqualification applications was concerning because it required a judge to sit in judgment on his own conduct.¹⁰⁰ That procedure is certainly not the usual in either the United Kingdom or Australia.

This historic practice has unsurprisingly been the subject of criticism. On the one hand the practice seems to be a direct affront to the axiom “no man shall be a judge in his own case.” On the other hand the particular judge is likely to know more about the case. Another judge would have to be brought up to speed and there would be a time and a cost factor which may not be inconsiderable. If the trial judge refuses to disqualify himself or

⁹⁸ (2008) EWCA Civ. 97.

⁹⁹ [2007] 3 FCR 711.

¹⁰⁰ *Id* at 725.

herself in some jurisdictions that refusal can be reviewed immediately. However, in other jurisdictions it is thought that it should await the outcome of the proceedings. That is an entirely inconvenient way forward again because if the apprehension is correctly raised a fair trial will not ensue, and the question of who pays the costs for that is debateable.

In the United States the position is no different in that under both federal and state jurisdiction it is the judge to whom ordinarily the application to disqualify is directed who determines that application.¹⁰¹ There are, however, some statutes that specifically provide for transfer generally or on a discretionary basis to another judge. For instance the State of Illinois has provided that the state or any defendant may move at any time for substitution of a judge for cause supported by affidavit in both civil and criminal cases.

However the overall position in the United States appears to still be heavily in favour of the judge who is sought to be impugned determining the application. The case of Justice Scalia rejecting a motion he recuse himself from a case¹⁰² is an extreme example of this. In short, Justice Scalia's impartiality was questioned when he went duck hunting with the then Vice-President Dick Cheney, while a case was pending in the US Supreme Court about whether the Vice-President had lied about the composition of a White House group that was setting national energy policy.

¹⁰¹ Leslie Abramson, 'Deciding Recusal Motions: Who Judges the Judges?,' 28 *Valparaiso University Law Review* 543 (1994)

¹⁰² *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913 (2004) (mem.).

Justice Scalia found the applicants had not shown his impartiality might reasonably be questioned pursuant to 28 USC s 455:

“Why would that result follow from my being in a sizeable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.”¹⁰³

Justice Scalia’s decision was essentially a self-defence argument, as there was no capacity to review by an appellate court. Without making any comments on the legal merits of Justice Scalia’s decision, the case demonstrates the perils of judges being the ones to judge their own impartiality, or appearance of impartiality.

Exceptions to the Disqualification Principles

Waiver and Acquiescence

The most common exceptions to the disqualification principle are waiver and acquiescence. Waiver requires some action, whereas acquiescence implies inaction.

¹⁰³ Id at II.A.

There is some academic support for the proposition that the doctrine of waiver should not apply to cases of bias. In *Vyvyan v Vyvyan* the Master of the Roll Sir John Romilly held that waiver:

*“presupposes that the person to be bound is fully cognisant of his right and that being so he neglects to enforce them or chooses one benefit instead of another, either, but not both of which he might claim”.*¹⁰⁴

Atkin LJ in *Shrager v Basil Dighton Ltd* said for waiver to apply there needs to be “full knowledge of the material facts”.¹⁰⁵

Nonetheless, in Australia, the doctrine of waiver is firmly established in the context of disqualification for bias. In *Vakauta v Kelly*¹⁰⁶ the High Court said that where a judge makes comments that could be objected to:

*“a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment.”*¹⁰⁷

¹⁰⁴ (1861) 30 Berv 65 at 74.

¹⁰⁵ (1924) 1 KB 274 at 287.

¹⁰⁶ (1989) 167 CLR 568.

¹⁰⁷ Id at 572 per Brennan, Deane and Gaudron JJ .

Waiver often arises in the scenario where a judge discloses a matter which may disqualify him or her from determining a matter. It is settled practice, and part of most guidelines for judicial conduct,¹⁰⁸ for judges to disclose any information which may lead to disqualification, both for purposes of judicial transparency and to avoid the cost and delay which may arise from belated disqualification when the trial is well advanced, or indeed, even complete.¹⁰⁹ Disclosure serves to give the parties an opportunity to waive an objection to the judge hearing their matter. However, as noted by the Canadian Judicial Council, disclosure may place the parties in a difficult position:

“By disclosing the matter and seeking consent to continue, the judge is in essence saying that no reasonable person should apprehend a lack of impartiality. Therefore, if counsel fails to counsel, counsel (or their clients) may appear to be taking an unreasonable position.”¹¹⁰

No question of waiver will arise where a party decides to continue to participate in proceedings after having objected and having had an application for disqualification rejected.

¹⁰⁸ See, for example, guideline 3.3.1 of *Australian Guide to Judicial Conduct*.

¹⁰⁹ Melissa Perry, *Disqualification of Judges: Practice and Procedure, Discussion Paper*, Australian Institute of Judicial Administration Incorporated, 2001, [2.4]-[2.15].

¹¹⁰ Canadian Judicial Council, *Ethical Principles for Judges* (1998) 45 [E14] cited in *id* at [2.8].

Necessity

There has long been a rule of necessity in the common law which operates as an exception to the bias principle. It is thought that the earliest case concerned the Chancellor of Oxford in 1430, where, although he was a party to the case, it was held that the Chancellor could sit because there was no provision for the appointment of another judge.¹¹¹

In *The Vernon*, Cockle CJ said in some cases “from necessity, an interested party is allowed to adjudicate it being considered a less evil that he should do so then there should be a failure of justice altogether”.¹¹²

Pollock distinctly stated the rule in these terms:

*“The settled rule of law is that although a judge had better not if it can be avoided take part in the decision of a case in which he has any personal interest yet he not only may, but must do so if the case cannot be heard otherwise.”*¹¹³

In cases of necessity, all of the parties can consent to the judge hearing the case and thereby waive their right to object later. But consent is not always required because if the judge considers it is a case of necessity, then he or she can proceed to hear the case

¹¹¹ Mark S Hurwitz, ‘Judges and the Rule of Necessity: *Ignacio* and the Ninth Circuit’s Judges,’ 28(2) *The Justice System Journal*, (2007) 241 at 241.

¹¹² (1864) 1 QSCR 119.

¹¹³ F Pollock, *A First Book of Jurisprudence for Students of the Common Law*, Macmillan, 1896.

regardless of any objection. It has been said necessity should only apply to the extent that necessity justifies. It should not of course be confused with convenience.

The operative effect of the rule of necessity is to override the disqualification of an adjudicator which would otherwise arise. An obvious example of necessity would be where all of the judges of a particular court are subject to the same disqualifying characteristics, for example where judges need to preside over litigation about judicial remuneration or benefits and all judges would be effected by the outcome.

Conclusion

The vigorous maintenance of impartiality and its appearance is crucial in the maintenance of the rule of law. Judges are clearly accountable in that regard. It is necessary for every judge to remain vigilant and acutely aware of any factors which might reasonably give rise to an apprehension of bias. Maintaining the balance between a duty to sit whilst giving the appearance of impartiality is sometimes a difficult licence, but judges do well to be and remain proactive so that the integrity of their court is seen to be beyond reproach.

Annexure A - "Things necessary to be continually had in remembrance"

Sir Matthew Hale

1. That in the administration of justice, I am entrusted for God, the King and Country; and therefore
2. That is be done (1) Uprightly (2) Deliberately (3) Resolutely.
3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.
4. That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked.
5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions.
6. That I suffer not myself to be prepossessed with any judgement at all, till the whole business and both parties be heard.
7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.
8. That in business capital, though by nature prompts me to pity, yet to consider that there is also pity due to the country.
9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgement.
10. That I be not biased with compassion to the poor, or favour to the rich in point of justice.
11. That popular or court applause or distaste, have no influence into any thing I do in point of distribution of justice.
12. Not to be solicitous what men will say or think, so long as I keep myself exactly

according to the rule of justice.

13. If in criminals it be a measuring cast, to incline to mercy and acquittal.

14. In criminals that consist merely in words when no more harm ensues, moderation is no justice.

15. In criminals of blood, if the fact be evident, severity in justice.

16. To abhor all private solicitations of whatever kind soever and by whomsoever in matters depending.

17. To charge my servants (1) Not to interpose in any business whatsoever (2) Not to take more than their known fee (3) Not to give undue preference to causes (4) Not to recommend counsel.

18. To be short and sparing at meals that I may be fitter for business.