BIAS IN COURT/TRIBUNAL PROCEEDINGS: SOME REFLECTIONS

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Between 1922 and 1940 the office of Lord Chief Justice of England was occupied by Lord Hewart. Prior to his appointment he had been a very successful barrister and politician. He had served as both Solicitor General and Attorney-General.

As a judge Lord Hewart displayed characteristics which might be thought, certainly in the contemporary view of such things, to have been distinctly unjudicial. He was known to write letters while seated on the Bench and ostensibly hearing submissions. One commentator said of him that '…. he lacked only the one quality which should distinguish a judge: that of being judicial … …The opening of a case had only to last for five minutes before one could feel - and sometimes actually see - which side he had taken; thereafter the other side had no chance."' Lord Hewart's own view about his office is put with complete, not to say breathtaking, clarity in something said by him during a speech to the Lord Mayor's Banquet in 1936: 'His Majesty's judges are satisfied with the almost universal admiration in which they are held'.

Were one to stop there in appraising Lord Hewart as a judge, the impression conveyed would have to be that he did not sound like the kind of person to whom one would turn confidently for assistance in understanding anything to do with the topic of judicial and quasi-judicial bias. And yet it is this very same judge who authored what has become a defining statement of principle upon precisely that topic. In *R. v Sussex Justices* [1]Lord Hewart said:

> 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.

There is, no doubt, always some particular exception to every general proposition; but the stark contrast between the two facets, as I have sketched them, of Lord Hewart's judicial personality and temperament seems to me to be a constant factor in any discussion, whether general or particular, of the topic of judicial bias. Lord Melbourne, Queen Victoria's first Prime Minister, once made this celebrated comment about the Order of the Garter: 'I like the Garter; there is no damned merit in it.'

Throughout my own professional lifetime I have never known, and I have never known of, a judge who would even think of saying: 'I like judicial office; there is no damned impartiality in it.' And yet there is a constant trickle of cases in which some aggrieved party or participant makes an allegation of ostensible bias; or, although mercifully much more rarely, of actual bias; and in some at least of those cases the complaint is upheld.

How can that be? The answer cannot lie, at least as it seems to me, in any difficulty in comprehending what the relevant principles actually are. They are well settled; and I shall re-state them presently. The answer seems to me to lie, rather, in the fact that the principles

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have to be applied to concrete situations, no two of which can be expected to be identical; have to be applied, so to speak, on the run; and have to be applied in the context of the rapidly developing circumstances, challenges and stresses of an actual hearing the emotional temperature of which is not infrequently dangerously high because of the nature of the case itself, or the personalities and temperaments of the participants, not excluding counsel and the presiding judge or quasi-judicial officer.

If all of that be essentially correct, then it might be useful to recapitulate the content of the relevant principles; to take note of certain matters which the authorities say do not amount as of course to manifestations of bias; and to suggest some practical considerations that might be helpful in avoiding error by reason of bias.

Before doing that, I should explain that I propose to concentrate upon the case of a judge in the normally understood sense who is sitting in a Court in the normally understood sense. I do so because, first, my own experience as a decision- maker has been confined to the role of a judicial, in the strict sense, decision-maker; and secondly, because the approach keeps within a manageable focus a general discussion which will tend, if not so confined, to become too complicated to be discussed comprehensively in such a paper as the present one.

It is well recognised that propositions which are valid when applied to the case of a decision-maker who is a judge in the normally understood sense of that description, will not necessarily be applicable by way of simple analogy to the case of a decision-maker whose character is otherwise. This point is explained succinctly in the reasons of Hayne J in *Minister for Immigration and Multicultural Affairs v Jia Legeng*[2]. It will suffice to cite in detail two passages:

> The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm. It is true to say that the rules of procedural fairness must be 'appropriate and adapted to the circumstances of the particular case'. What is appropriate when decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court will differ when what is appropriate when the decision is committed to an investigating body.
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> Ministerial decision-making is different again. [183] In the case of a court, it will usually be self-evident that the issue, if an issue of fact, is one which ought to be considered afresh for the purposes of the particular case by reference only to the evidence advanced in that case. Other decision –makers, however, may be under no constraint about taking account of some opinion formed or fact discovered in the course of some other decision. Indeed,….the notion of an 'expert' tribunal assumes that this will be done. Conferring power on a Minister may well indicate that a particularly wide range of factors and sources on information may be taken into account, given the types of influences to which Ministers are legitimately subject. It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker. [565]. [Emphasis added].

For a comparatively recent re-statement of the basic principles applicable in the case of a judge in the normally understood sense of that description, it is convenient to refer to the joint judgment of Gleeson CJ and McHugh, Gummow and Hayne JJ in *Ebner v The Official Trustee in Bankruptcy*[3]. The fundamental rule in the case of alleged ostensible, as distinct from actual, bias is that the relevant judge is disqualified '… if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.' The question thus posed is not directed towards probabilities. It is directed towards possibilities, but always with a clear understanding that those possibilities must be real and not remote. Taking those general propositions as a correct point of departure, it is necessary then to graft on to the

propositions some important qualifications and clarifications. These latter can be summarised conveniently and as follows in point form:

1. An allegation of bias, whether actual or ostensible, does not more or less automatically prove itself. The Judge at whom the allegation is levelled is not only entitled, but is duty bound, to insist that the allegation be put in precise terms properly particularized; and that the allegation be supported by the production of appropriate evidence of the facts and circumstances that are said to establish the allegation.

2. These requirements of the law rest upon foundational propositions that are expressed succinctly by Mason J (as he then was) in his Honour's reasons in *Re JRL; Ex parte CJL* (1986) 161 CLR 248 at [5]:

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases [1]as *Watson* and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established" (*Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, at pp 553-554; *Watson*, at p 262; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12, at p 14; 32 ALR 47, at pp 50-51). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

3. The relevant assessment of the impugned conduct is an objective one. As Hayne J points out in another passage of his Honour's reasons in *Jia Legeng* at [185], there are several distinct contentions wrapped up in an allegation of bias or of apprehended bias; and each requires distinct consideration. The first contention is that the decision-maker does in fact have an opinion upon some relevant aspect of the issue for decision in the particular case before him. The second contention is that the decision-maker is in fact going to apply that opinion to that relevant aspect of the issue for decision. The third contention is that the decision-maker is going so to apply his existing opinion without giving the relevant aspect fresh consideration in the light only of such evidence and of such arguments as may be laid before him in the particular hearing of the particular case before him for decision. The fourth contention is that whatever it is that is said to have been the subject of the impugned pre-judgment is something that the law does require to be given such fresh consideration.

4. The law does not require that a judge embark upon a particular contested hearing with a mind that has been scrupulously cleansed of any opinion of any kind whatsoever about any aspect whatsoever of any issue or potential issue whatsoever that might conceivably arise during the course of the hearing. That proposition is endorsed as follows by Gleeson CJ and Gummow J in their joint reasons in *Minister for Immigration and Multicultural Affairs v Jin Legeng* [4]:

> The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

It seems to me that there is nothing particularly difficult about comprehending the principles that are thus established by the authorities. It seems to me, however, that it is always difficult, and sometimes extremely difficult, to give effect to those principles simultaneously with other principles that are just as clearly established in connection with the proper conduct of a judge in the hearing of a particular case.

I have in mind the following opinion expressed in the joint reasons of Brennan, Deane and Gaudron JJ in *Vakauta v Kelly*[5]:

> It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.

In practically the same breath their Honours add these observations:

> Knowledge of his or her own integrity can sometimes lead a judge to fail to appreciate that particular comments made in the course of a trial may wrongly convey to one or other of the parties to the litigation or to a lay observer an impression of bias.

One simple way of dealing with the reconciliation of the established principles respecting bias, real or apprehended, and the *Vakauta* propositions would be to say, simply, that a judge will do well to keep firmly in mind that if silence is no longer golden, vanity is still the devil's favourite sin. More particularly:

1. I apprehend that any modern-day judge who spoke frankly would acknowledge being under constant pressure, to take some miscellaneous examples of court-management-speak to be 'a strong judge'; to expedite the hearing; to compel the parties and their representatives to get to the 'real issues' in the case; to take a no-nonsense approach to interlocutory applications; and the like. I suggest that a judge or, indeed, any other decision-maker, who tries too self-consciously to present an image of that kind of procedural martinet is courting a disqualification application. For it is, I suggest, just such posturing that is most likely to cause the judge to use language and tone of speech that will convey an image that is not so much appropriately firm as inappropriately peremptory.

2. There is a constant need for a judge or other decision-maker to keep carefully in mind that a decision such as *Vakauta* is intended to encourage a judge or other decision-maker to make proper and properly frank use of the opportunity, presented uniquely by the procedure of oral argument, to test in a serious and measured way with counsel the judges's impressions or provisional conclusions about the evidence, or the witnesses, or the proper definition of the issues remaining for decision, or other and particular problems which appear to be presented by the nature of the case and the course of the hearing. *Vakauta* cannot be thought sensibly to give any encouragement whatsoever to the judicial wisecrack or throwaway line.

3. Even a remark which is not intended consciously to be either a wisecrack or a mere throwaway line but which is cast in briskly colourful language, can bring a judge to grief. For a recent example see: *John Fairfax Publications Pty Ltd v Maurice Kriss* [6] .

It is worthwhile, I apprehend, to take a careful look at the *John Fairfax* decision. The case is a simple one and it is a salutary reminder: first, of how very easy it is for a judge or other decision-maker to cross the dividing line that separates acceptable from unacceptable

judicial intervention during the course of a hearing; and secondly, of how fine a line that dividing line can be. I stress that, in speaking about that particular case, I do not inply and nobody else should infer, any criticism particular to either the trial judge or the reasoning of the Court of Appeal.

The basic facts, as here relevant, are within a small compass. It is convenient to take them from the headnote of the report of the reasons of the Court of Appeal:

> The respondent who had been struck off the roll of barristers made an application for readmission which was granted by a judge. The appellant published an article which contrasted the plaintiff's readmission with the situation of barristers who had been or were about to be struck off for failure to comply with their income tax obligations. A jury … … found that the article conveyed an imputation that defamed the respondent. The balance of the trial came on for hearing before a Supreme Court judge. At the start of the second day of the trial counsel for the appellant asked the judge to disqualify himself. The application was based on comments made by the judge during the opening address of counsel for the respondent, and further remarks made when dealing with an objection to evidence during the respondent's evidence in chief. The judge overruled the objection and the trial continued. The judge delivered a reserved judgment in which he found for the plaintiff … and awarded damages…

The relevant newspaper article carried the heading: *Silk's purse empty*. Counsel for the plaintiff, in opening his client's case, said to the judge that he did not know what the headline was supposed to mean, the more so since the plaintiff had never been a silk. The judge interposed these comments:

> You don't expect a journalist to understand that or care. What do they know? They might know everything, but they don't care. Silk is a good expression for a barrister, and it was a nice pun.

The Court of Appeal held that these particular statements were insufficient to ground a disqualification by reason of ostensible bias. The Court held that, there having been no submission that the judge's tone or demeanour were relevant to the way in which the judge's actual words ought to be construed, the appropriate view was that:

> The judge's statement that 'you don't expect' a journalist to understand the distinction between a silk and a junior only meant that journalists as outsiders may not be aware of professional distinctions. His statement that they don't care, in context, only meant that journalists would think that such professional niceties were not important and should not get in the way of a good headline… The headline was not the basis of a separate imputation and his Honour's remarks were not directed to an issue or a matter relevant to an issue.

As the plaintiff's counsel continued his opening, he commented upon what he described as a campaign that the particular newspaper had been conducting against barristers, especially those who appeared to have paid, for some years, no income tax. The Judge thereupon remarked that the campaign:

> … …was unjustified in that it plainly carried the suggestion that the whole of the bar was involved.

Almost immediately, his Honour added:

> And that's one of the reasons, I think, why the bar as a whole deeply resented those of its members who had acted in this way, because all felt traduced by what had happened. It's obvious that The Herald didn't care much about the distinction.

These remarks were held by the Court of Appeal to evidence ostensible bias in a litigious context of which a significant part was the allegation: that a journalist had written a defamatory article based on a court judgment without taking enough care to get it right.

A little later, and still during the course of the plaintiff's opening, the judge said to counsel:

> Most members of the public I think would, prima facie, take the view they prefer a court report to a reporter's slur, wouldn't they?

These words, too, were held by the Court of Appeal to evidence ostensible bias. The Court said:

> A slur was what the plaintiff was complaining about. A fair-minded lay observer might apprehend this as passing judgment in pejorative terms on statements in the article.

In due course the taking of the plaintiff's evidence commenced. He was taken in chief to the fact that the article referred to him in several places as 'Maurie'. The plaintiff asserted that he had found such a form of reference to be belittling. It was objected by the defendant's counsel that this evidence was not relevant to any imputation pleaded by the plaintiff. The judge remarked that the reference was: plainly belittling and then at once added:

> It goes to two questions here, and the first is the plaintiff's own response of hurt to what he read … … … …that is one way of relevance… … .The next possible sense of relevance is to properly assess the significance of the quotation from the judgment. On one reading of this, everything is belittling, it is unremitting, every sentence is honed with exquisite precision to injure. Counsel for the publisher demurred to the concluding sentence and the Judge responded: I cannot see anything else.

Of these passages the Court of Appeal held:

> Although [the Judge] used colourful language his statement had begun with "On one reading of this" which seemed to indicate that the article could be read another way. In that event the question would be one for legal argument in due course. However when [counsel] demurred to the description the Judge said: 'I cannot see anything else'.

This could be seen as indicating that the Judge had made up his mind and that his adverse view was a considered one.

The relevant facts of the *John Fairfax case*, as previously described, and the relevant reasoning, as previously canvassed, of the Court of Appeal make it pertinent, to say the least, to reflect upon the lessons to be learned from that decision.

My own conclusion in that connection is that the surest aids for avoiding the needless courting of a disqualification application based upon alleged bias, whether actual or ostensible, or at the very least some of them, are:

Gravity: not pomp, circumstance and extravagant protocol; but an atmosphere of seriousness appropriate to the doing of justice in any case in any Court or Tribunal.

Patience: that is to say, a willingness to listen to any reasoned proposition that might be advanced by any party or representative; that willingness being itself based upon a recognition that experience teaches that it is at least on the cards that a reasoned proposition could actually be sound.

Courtesy: neither a frigid formality on the one hand, nor an affected egalitarianism on the other hand; just ordinary civility and good manners.

A sensible question is generally to be preferred to a statement unrelated to such a question: a judge who responds to a submission by saying simply and peremptorily: 'I reject that submission', invites, at least as a general proposition, an objection that he has inappropriately made up his mind.

It would be both better and safer to say some such thing as: 'I have difficulty with that submission. Does the submission not entail …[this or that result]…which seems to be

inconsistent with …[this or that decision]?' Or, in most cases, perhaps nothing more than the question, always relevant and permissible: 'Is there any authority for that submission?' The latter two suggested forms of question are not, of course, in any sense comprehensive examples. What might be thought to be a sensible question in a particular context must be conditioned by that context. My point is, simply, that a sensible question offers much less scope for a plausible disqualification application than does a peremptory, even a sensible peremptory, response to a submission.

There can be no denying that in recent years the burdens resting upon judges and other types of decision-maker have increased steadily and oppressively. One of those burdens is that parties and their representatives, many of whom have been reared in the contemporary culture of rights and grievances, have not the slightest compunction in alleging bias of some kind in the event that they do not get their own way. The worst possible way of meeting that challenge is by either pandering to it or becoming paranoid about it. The best way is to take the advice in Kipling's celebrated poem *'If'* :

'and keep your head when all about you
Are losing theirs and blaming it on you'.

Endnotes

1 (1924) 1 KB 259
2 (2001) 205 CLR 507 at 562 – 565
3 (2000) 205 CLR 337
4 (2001) 205 CLR 507 at [72]
5 (1989) 167 CLR 568 at 571
6 [2007]NSWCA 79