WHOSE APPREHENSION OF BIAS?

The Honourable Justice Debbie Mortimer*

In preparing to speak tonight, I learnt how much has been written about judges expressing opinions outside the courtroom at events just like this and whether this gives rise to various apprehensions of bias. The heat in that debate is enough to make me sit down right now.

So I am not going to speak about the difficulties attending the development of an incredibly knowledgeable and legally well-informed hypothetical lay observer, which has been the subject of considerable academic commentary; nor will I express any views about what kind of connection — causal, rational, direct, indirect — might be sufficient to satisfy the second step of the test in *Ebner*.[1]

Instead, I am going to talk about dogs for a while. I will come shortly to Izzy the dog's brush with a death sentence at the hand of the Knox City Council. But first I thought I would tell you about how, in a previous life, you might have seen me at a dog show. Yes, in the ring, running around with a dog at the end of a lead. As you may or may not know, there are judges in dog shows. I was never that kind of judge. Dog show judges are almost always drawn from the ranks of dog breeders and dog show exhibitors, and they are licensed after a long and intensive training program. However, at base, they remain exhibitors of specific breeds of dogs. So, when a judge breeds golden retrievers and a golden retriever wins best in show on the decision of that judge, well, you can imagine — or at least, if you have seen the movie *Best in Show*, you might have an idea of the reaction.

However, there are express rules about apprehension of bias for dog show judges. For example, when a particular judge is judging, there are rules prohibiting dogs from being shown by individuals who are related to a judge, or individuals who co-own dogs with that judge, and sometimes even dogs bred by that judge cannot be shown when that judge is presiding, so to speak. Those rules are taken very seriously and breaches can lead to judges losing their licences to judge.

Why am I talking about dog shows? The point is this: impartiality, and especially the appearance of impartiality, is not the sole prerogative of the law. That is because, as many authorities on apprehended bias have observed, impartiality is a central indicator, or ingredient, of fairness. In any walk of life where there is choice, competition, successful and unsuccessful applicants, prize winners and runners up and the 'did not place' — in all those situations — our society expects fairness to be a foundational value. And the appearance of impartiality is essential to our sense of fairness. Our community is adept at, and adapted to, testing all sorts of circumstances and events for their fairness. Members of our community are used to viewing impartiality, and the appearance of impartiality, as a necessary aspect of fairness in their interactions with government (large and small), with each other and in the widest range of their activities. They expect no less of the judiciary, but it is important to recall the breadth of members of the Australian community who measure what judges do

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against their own perceptions of fairness and impartiality and also to recall that judges hold no particular monopoly on the content of the concepts of fairness and impartiality.

Some commentators — judicial and academic — have suggested that the principles concerning apprehension of bias were developed only to avoid the need to descend into the murky and unpalatable depths of actual bias. That is not, to my mind, the whole explanation; rather, apprehended bias principles play their own substantive role in serving the values of fairness and impartiality in exercises of public power.

That is because exercises of public power concern how people are treated; and how people are treated is, in part, about how they *feel* they are treated. Being fair is not only about what I *do* as the repository of a power but what is *experienced* by the person over whom the power is exercised.

Fairness is reflexive; so, too, is impartiality. If that is right then those affected by exercises of public power are entitled to *feel* fairly treated and impartially judged. Accepting that there needs to be some objectivity about this, the law allows for the hypothetical lay observer to test whether those affected by exercises of power *should* feel fairly treated and impartially judged and, more broadly, whether the community (which ultimately must accept the authority that accompanies those exercises of power) *should* feel litigants have been fairly treated and impartially judged.

Within this normative framework, two questions arise. First, when we require the appearance of impartiality from our judges, do we sufficiently allow for how judges, as human beings, decide controversies and what they bring to those decisions from their own life experiences and identity? Second, what is it about the background, experiences and perspectives of judges who examine allegations of apprehended bias that makes them reach such a range of conclusions on the same fact situation? Abella J, on behalf of the Canadian Supreme Court, wrote a comprehensive and thoughtful judgment on these issues last year, and I will turn to that in more detail a little later.

But let us not forget Izzy the dog. Izzy's situation does not concern bias in a judicial context, but it is a good example of the second issue I have raised — different judicial perspectives on apprehended bias.

In *Isbester v Knox City Council*[2] (*Isbester*), the High Court overturned a decision of the Victorian Court of Appeal about the role that a local council officer had played in the prosecution of Ms Isbester, the owner of two dogs who attacked another dog and at the same time bit the owner of the victim dog (if I might use that term).

Section 84P(e) of the *Domestic Animals Act 1994* (Vic) empowers municipal councils to destroy any dog seized by the council if the dog's owner is found guilty of an offence under s 29 of the Act, which includes (in s 29(4)) where a dog causes serious injury to a person.

Ms Kirsten Hughes was at this time the 'Co-ordinator of Local Laws' at Knox City Council — a local council in the outer eastern suburbs of Melbourne, where the attack had occurred. Ms Hughes determined that charges, including charges under s 29(4), should be laid and she arranged for drafting of the charges. Ms Isbester entered guilty pleas in the Ringwood Magistrates' Court.

After the guilty pleas, Ms Hughes convened a hearing by a panel of council officers to decide whether the dog that caused the injury should be destroyed. The panel (which was an optional process) consisted of a chairperson, who was authorised to make the decision, another officer and Ms Hughes herself. The panel decided that the dog should be destroyed.

The legal issue was whether Ms Hughes' involvement in the prosecution of Ms Isbester gave rise to a reasonable apprehension of bias when Ms Hughes was subsequently involved in the decision to destroy Ms Isbester's dog.

At trial, it was held that Ms Hughes had insufficient personal interest to give rise to any such apprehension.[3] On appeal, the Court (Hansen and Osborn JJA and Garde AJA) distinguished two types of apprehended bias: prejudgment and conflict of interest.[4] As to the latter, the Court of Appeal held that no relevant conflict existed, distinguishing two cases (*Dickason v Edwards*[5] (*Dickason*) and *Stollery v Greyhound Racing Control Board*[6] (*Stollery*)) in which it had been 'held that a person who is in the position of an accuser cannot also hear and decide the charge in conjunction with other people'.[7]

The High Court did not agree with the Court of Appeal. The plurality (Kiefel, Bell, Keane and Nettle JJ) held that Ms Hughes' participation in the deliberations concerning the destruction of Ms Isbester's dog, after Ms Hughes had been in the position of Ms Isbester's accuser, gave rise to a reasonable apprehension of bias.

The plurality affirmed the two-step test for apprehended bias set out in *Ebner v Official Trustee in Bankruptcy*,[8] which involves:

(i) 'identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits'; and
(ii) 'articulation of the *logical connection* between that interest and the feared deviation from the course of deciding the case on its merits'.[9]

Their Honours acknowledged the distinction between prejudgment situations and 'conflict of roles' situations[10] but held that the only extent to which it might be said that the test operates differently in respect of 'conflict of roles' cases is that, if an incompatibility is identified, the connection between that incompatibility and the feared deviation will be 'obvious'.[11]

The plurality considered *Dickason*[12] and *Stollery*[13] applicable and did not consider the 'rule of justice [prohibiting] an accuser to be[ing] present as a member of a tribunal hearing the charge he promoted'[14] was limited to judicial officers.[15]

It is here that their Honours emphasised the value underlying the law about bias. They said the main issue is whether the decision maker was impartial and seen to be so.[16] It did not matter that Ms Hughes might not have been described as the 'prosecutor' when it came to the panel deliberations: it was 'not realistic to view Ms Hughes' interest in the matter as coming to an end when the proceedings in the Magistrates' Court were completed' and she remained 'the moving force' in the panel's deliberations.[17] Ms Hughes had, the plurality held, a personal interest not in the sense of receiving any material or other benefit but because she might be seen to have a 'view' of what Ms Isbester had done, which was personal to her.[18]

As a footnote, it seems that, as a result of a decision of a new panel convened by Knox City Council, Izzy the dog was sent to the South Australian RSPCA to find a new home.

Isbester shows that, within the application of established principles of apprehended bias, different judges see what would be apprehended about a particular circumstance very differently, reaching (as between the Court of Appeal and the High Court) opposite conclusions. That can only be because their own life experiences and identities affect their perceptions of what is required for impartiality and the appearance of impartiality.

A recent decision from the New South Wales Court of Appeal is a further example of

contrasting judicial evaluations of apprehended bias claims. The decision is *B v DPP (NSW)*.[19] In that decision the appellant had been convicted[20] of having sex with a woman without telling her of the risk of contracting HIV, while knowing that he had HIV. B said he had told his partner; she said he had not. One ground of appeal was that 'the judges had preconceived perceptions about people living with HIV so that they would have found him guilty regardless of the evidence that was adduced'.[21]

The statement said to show bias was the District Court judge's statement, on appeal, that he 'agree[d] with the learned magistrate that no *normal* woman *in her right mind* would have unprotected sexual intercourse with a man she knew to be HIV positive'.[22] Beazley P, with whom Tobias AJA agreed,[23] pointed out that the magistrate had not, in fact, said such a thing and, rather, that this should be seen as the District Court judge's own opinion.[24]

While finding that the appellant could not prove actual bias, a majority of the Court of Appeal found there was a reasonable apprehension of bias based on this statement.

Accepting the starting point that, as Beazley P put it, 'judges do not enter upon their decision-making task as if they had no experience of life. Nor are they devoid of opinions',[25] her Honour nevertheless considered that an apprehension of bias was made out. Her Honour pointed out that, as a 'matter of common experience, people react in a variety of ways to different situations, including when personal, emotional and sexual matters are involved'.[26] She considered that the remark of the judge 'involved the appearance of a preconception of how a person would react in the circumstances underlying the case' rather than being a conclusion based on the evidence.[27] Nor could it be described as an aside: it was a material reason he gave for his conclusion.

Barrett JA dissented on the bias issue. His Honour cited a list of cases in which common experience formed the basis of a finding and considered that all the judge had done by his remarks was to test, against common experience, a conclusion the judge had 'independently reached'.[28] While he described the 'normal woman in her right mind' aspect of the reasons as 'unfortunately blunt', he considered the remarks would not cause the fair-minded lay observer to apprehend the judge had approached the matter according to some impermissible preconception.[29] Clearly, two very different fair-minded lay observers were at work in this case.

Hindsight is a wonderful thing, and the outcomes in these two decisions might not now seem surprising (other than to the Victorian Court of Appeal and to the District Court judge). But the division of judicial opinion, between intermediate and ultimate appellate courts and between judges in the New South Wales Court of Appeal, demonstrates that these are not easy lines to draw. Much depends on who is doing the apprehending: on how particular judicial minds conceive of that hypothetical fair-minded lay observer and conceive of what constitutes a sufficient disqualifying connection with the issues to be decided.

If there are no easy or definitive answers, and yet if we take impartiality as such a central value in our judicial system, might our conception of when there is an appearance of partiality change as our community changes? What do we expect, in 2016, of the individuals who hold judicial office and are responsible for the integrity of those institutions? Would a remark such as that by the District Court judge in *B v DPP (NSW)* have been decided the same way in the 1950s or 1960s?

The Supreme Court of Canada looked at these issues last year in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*[30] (*Yukon*). Yukon, a territory in northwest Canada, is still often referred to as a 'frontier' area. Almost a quarter of its population (of about 50 000 people) comprises Canada's First Nations people. In a

publication on the Yukon government website that I found, Yukon is described as having a 'strong and active Francophone community'.[31] This case was about Yukon's only French language school.

The Yukon Francophone School Board made a claim against the Yukon government claiming it had breached s 23 of the Canadian Charter of Rights and Freedoms,[32] alleging there were deficiencies in the provision of French minority language education in Yukon.[33]

The trial judge upheld the Board's claims under s 23 and went further, also ordering the Yukon government to communicate with and provide services to the Board in French in compliance with what he considered to be its statutory obligations. Now that is some court order.

On appeal the Yukon government claimed the trial judge's decision was affected by a reasonable apprehension of bias on two bases: first, the judge's treatment of counsel for Yukon and some of the rulings he made; and, second, the judge's involvement in the francophone community in Alberta both before and during his time as a judge, together with the fact that the judge was, while holding judicial office, the governor of a charitable foundation whose mission was said to be to 'enhance the vitality of Alberta's francophone community'.[34] This charitable foundation was not directly involved in the activities of the school in the litigation and was not affiliated with any organisation implicated in the trial.

For present purposes, I need not dwell on the long catalogue of rulings and remarks by the trial judge that both the Court of Appeal and the Supreme Court held gave rise to a reasonable apprehension of bias, such as the trial judge's accusations that counsel made submissions that 'lacked conviction or sincerity'.[35]

It is the second basis which is relevant. The Court of Appeal had found that the trial judge's background and involvement in the francophone community in Alberta both before and during his time as a judge did *not* give rise to any reasonable apprehension of bias; indeed, the Court of Appeal said:

> The fact that the judge in this case had experience in the provision of minority language education was, in fact, a positive attribute. He was able to approach the issues with important insights gained from his experience.[36]

However, the Court of Appeal found that the judge's ongoing position as a governor of the charitable foundation was inappropriate because that foundation promoted a particular vision of the francophone community which would 'clearly align it with some of the positions taken by the [Board] in this case'.

The Supreme Court did not agree. The Court's judgment was delivered by Abella J. Her Honour found that the charitable foundation was 'largely a philanthropic organization rather than a political group'.[37] She held that, while it is important that 'judges [avoid] affiliation with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest':[38] 'The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", *they are not required to abandon who they are or what they know*.'[39]

Her Honour emphasised the values of impartiality in actuality and in appearance[40] but then quoted some passages from an earlier Supreme Court decision, where two of the Justices said:

> [J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. …
> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.[41]

Abella J added:

> Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, *they require that the judge's identity and experiences not close his or her mind to the evidence and issues*.[42]

To that, perhaps more critically, we must add that the judge's identity and experiences *do not appear* to close her or his mind.

There is then a rather lovely series of propositions from Abella J that I would like to share with you, as well as two quotations her Honour cites.

First, Abella J says this:

> A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand 'life' — their own and those whose lives reflect different realities.[43]

'Justice is the aspirational application of law to life' is rather a wonderful sentence.

Abella J then quotes a passage from an article by Martha Minow, Dean and Professor at Harvard Law School. The passage is a little long, but worth repeating and repays careful consideration.

> None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending *not* to know risks leaving unexamined the very assumptions that deserve reconsideration.[44]

And, finally, Abella J refers to a passage from the judgment of Cameron J of the South African Constitutional Court:

> '[A]bsolute neutrality' is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. … Impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views that is the keystone of a civilised system of adjudication.[45]

Abella J went on to say:

> We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.[46]

Her Honour was not persuaded that the trial judge's involvement with an organisation, whose functions were largely undefined on the evidence, could be said to rise to the level of a contributing factor such that he should not have sat on the trial.

What might we discern from all these thoughtful observations in *Yukon*? I venture to suggest that the judgment shows an awareness, and recognition, of two matters.

First, with greater diversity in the judiciary comes a more obvious diversity of background, experience and outlook. As the broad uniformity of the judiciary (gender, race, background, religious belief) breaks down, so, ironically, the challenges to the appearance of impartiality may be perceived to increase. Differences in experience, background and attitude are apparent for all to see. Will it trouble one party, or the 'fair-minded lay observer', if a Muslim judge sits on a terrorism case with a Muslim accused? Will it trouble a party, or a 'fair-minded lay observer', if an Aboriginal judge sits on a case such as the one I am currently hearing about the events on Palm Island in November 2004? Will it trouble one party, or the 'fair-minded lay observer', if a judge who is a publicly declared atheist determines a claim of religious discrimination?

Second, judges themselves may need to become more astute to consider how they may be viewed by others who are not like them, not of their background, with different life experiences and attitudes and with different beliefs and values. The range of activities it was once thought quite conventional for judges to be involved in (for example, membership of governing bodies of religious institutions, board membership of private schools and membership of the armed forces) may require reassessment. It may be that the attributes invested in the 'fair-minded lay observer' are changing as our community changes. That, too, is a consequence of diversity.

What will not change is the proposition that impartiality, including the appearance of impartiality, is a core value in the proper exercise of public power. But what is involved in maintaining the appearance of impartiality, it seems to me, is the contemporary challenge for the judiciary, and one we must continually review.

As Aharon Barak observed, a person 'who is appointed as a judge is neither required nor able to change his skin'.[47] We will never know completely what drives an individual judge to a particular decision. Indeed, the intuitive and internal nature of the reasoning process means that the judge herself or himself may not be able *wholly* to explain why one conclusion, or one argument, seems more appropriate or more persuasive than the competing conclusion or argument. That is why different judges, looking at the same set of facts and the same series of competing legal propositions, can reach quite different conclusions. It is the intuitive and the internal aspects of our reasoning which are most strongly the products of who we are, our background and experiences, and which inevitably influence the conclusions we form. As the *Yukon* judgment contends so eloquently, to a point that is as it should be.

The reassurance we can give litigants, and the community in general, is that judges will be sensitive to perceptions of fairness and impartiality about our internal reasoning processes and those of judges whose disqualification decisions we are required to review, where a

judge's statements, background, activities and experience cause questions to be asked — that we will try to see it from the perspectives of others as well as our own. After all, that is part of having an open mind.

Bearing in mind the Canadian Supreme Court's observations in *Yukon*, that will develop a concept of impartiality that encourages diversity in the judiciary rather than one which frustrates it.[48]

Endnotes

1 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
2 (2015) 255 CLR 135.
3 *Isbester v Knox City Council* [2014] VSC 286, [111].
4 Ibid; see *Isbester v Knox City Council* (2015) 225 CLR 135, 144–5 [15]–[19].
5 (1910) 10 CLR 243. In this case, the plaintiff, 'a member of a friendly society regulated by statute[,] … was accused of insulting the District Chief Ranger of the society. It was held that the District Chief Ranger could not sit as part of the committee to hear the charges brought against the plaintiff': *Isbester v Knox City Council* (2015) 255 CLR 135, 149 [35].
6 (1972) 128 CLR 509. In this case, a greyhound owner was accused of attempting to bribe the manager of an association which conducted dog racing. The manager reported this to the Greyhound Racing Control Board, of which he was a member. He was present for the deliberations, although he took no part in them. The High Court quashed the decision of the Board.
7 *Isbester v Knox City Council* (2015) 255 CLR 135, 145 [17].
8 (2000) 205 CLR 337, 345 [8].
9 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [21] (emphasis added).
10 Ibid. Their Honours noted that '[o]nly the question of Ms Hughes' possible conflict of interest remains relevant' and distinguished *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 and *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209 on the basis that those cases dealt with prejudgment situations: at 145 [16], 148 [28].
11 *Isbester v Knox City Council* (2015) 255 CLR 135, 152–3 [47]–[49].
12 Ibid 149–50 [35]. The facts of this case are set out above at n 5.
13 Ibid 150 [36]–[37]. The facts of this case are set out above at n 6.
14 Ibid 150 [37], citing *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 526–7 (Gibbs J).
15 Ibid 150 [38], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 358 [59]–[61]; cf 154 [54] (Gageler J).
16 Ibid 148–9 [31].
17 Ibid 151 [42]–[43].
18 Ibid 152 [46].
19 [2014] NSWCA 232.
20 Under s 13(1) of the *Public Health Act 1991* (NSW).
21 *B v DPP (NSW)* [2014] NSWCA 232, [10].
22 Ibid [45] (emphasis added).
23 Ibid [78].
24 Ibid [58].
25 Ibid [54].
26 Ibid [58].
27 Ibid.
28 Ibid [68].
29 Ibid [76].
30 [2015] 2 SCR 282.
31 Yukon government, 'Yukon at a Glance', <http://www.gov.yk.ca/pdf/yukon_at_a_glance.pdf>.
32 *Constitution Act 1982*, pt 1. Broadly, s 23 provides certain guarantees to citizens of Canada whose first language is 'that of the English or French linguistic minority population of the province in which they reside' in relation to education in that language.
33 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 290 [3].
34 Ibid 313 [56].
35 Ibid 311 [52].
36 Ibid 294 [17], quoting [2014] YKCA 4 [181].
37 Ibid 313 [58].
38 Ibid 313 [59].
39 Ibid 300 [34] (emphasis added).
40 Ibid 299 [31].
41 *R v S (RD)* [1997] 3 SCR 484, [38]–[39] (L'Hereux-Dubé and McLachlin JJ), quoted in ibid 299–300 [32].

42 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 300 [33] (emphasis added).
43 Ibid 300–1 [34].
44 Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *William and Mary Law Review* 1201, 1217, quoted at ibid 300 [34] (emphasis added).
45 *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] 3 SA 705, [13], quoted in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 301 [35].
46 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)* [2015] 2 SCR 282, 316 [61].
47 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 103–4.
48 This presentation ended with an account of a retiring New Zealand District Court judge and one of his last cases, which might have raised novel questions concerning his impartiality (*Collections Unit v La Rue* (Unreported, District Court at New Plymouth, Roberts DCJ, 21 January 2016)). An account of it can be found at <http://thespinoff.co.nz/18-04-2016/that-moment-when-youre-in-the-dock-and-the-judge-makes-you-read-your-facebook-post-in-which-you-call-him-a-fn-ct/>.