Bias by the numbers

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The hearing and bias rules are the twin pillars of natural justice. Each fosters fairness in a different but complementary manner. The hearing rule dictates the array of requirements available to ensure a fair procedure during the hearing or consideration of an issue. The bias rule requires a level of impartiality to ensure that the fair procedure of the hearing rule is administered by a fair decision-maker. Each rule depends heavily on context.[1] Whether a hearing has been fair will depend on all of its wider circumstances.[2] The same is true of bias.[3] A further contextual element in the bias rule is that the level of impartiality required of an official will reflect the character of that particular decision-maker.[4] Elected officials, for example, are given a level of latitude by reason of the particular functions that politicians are required to discharge.[5] The contextual nature of the rules means that rigid principles have not found favour in the laws governing fairness and bias.[6] It also surely helps to explain why legislative attempts to codify the procedural requirements of migration tribunals have proved so difficult.

This article examines a different attempt at rigidity — the use of statistics to demonstrate bias. Several years ago, the Full Federal Court rejected an attempt to found a claim of apprehended bias against a lower court judge on a statistical analysis of the judge's rulings.[7] The Full Court rejected the simple proposition at the heart of the claim, namely that the numbers spoke for themselves. Despite that firm ruling, a version of that same argument was recently resurrected before the Full Federal Court.[8] If the Full Court was surprised, it should not have been. Claims based on statistical evidence are inevitable in the information age. Law students now count laptops and smartphones among their vital organs. Practitioners spend huge amounts of time sorting through electronic documents in due diligence or discovery processes. Courts have also embraced the information age. They accept the need to communicate their processes and, to the extent possible within rule of

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1 As Lord Steyn once famously explained, 'In law context is everything': *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548. This comment remains widely repeated. See, for example, *Rush v Nationwide News Pty Ltd [No 7]* [2019] FCA 496 [480] (Wigney J).

2 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

3 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20] (Kiefel, Bell, Keane and Nettle JJ).

4 See, for example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 460 [70] (McHugh J), 480 [134] (Kirby J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 150 [64] (Kirby J); *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 545 [122] (Kirby J); *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [23] (Kiefel, Bell, Keane and Nettle JJ).

5 See, for example, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 455 [50] (Gaudron, Gummow and Hayne JJ), *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 508 [13] (Spigelman CJ).

6 Beatson LJ has explained that the twin difficulties are the need to avoid both the 'procedural straightjacket' of overly prescriptive principles and overarching ones that are stated at 'a level of generality which is not of use as a practical tool to decision-making': *R (L) v West London Mental Health NHS Trust* [2014] 1 WLR 3103 [72].

7 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30.

8 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.

law constraints, their decisions. Virtually all court judgments are available online, so they can be collated, compared and measured.[9] It is almost inevitable that scholars and lawyers might seek to identify patterns and draw inferences from them. This article considers the extent to which the courts can continue to resist that trend in the area of bias. It argues that sometimes numbers do speak for themselves and that also sometimes courts seem hard of hearing.[10]

Reflection on the law of bias is especially timely because the federal Attorney-General has recently provided a reference on this issue to the Australian Law Reform Commission.[11] That reference requires the Commission to consider whether the existing law governing bias is 'appropriate and sufficient to maintain public confidence in the administration of justice'; whether the law provides 'enough clarity' to decision-makers, the legal profession and the community; and whether the existing mechanisms to raise and decide claims of bias are 'sufficient and appropriate'.[12]

Apprehended versus actual bias

Bias can take many forms but the purposes of administrative law, the hallmark of bias is insufficient impartiality. The notion of insufficient impartiality reflects an acceptance that no decision-maker is a blank canvas. Judges, tribunal members and administrative officials are a product of their own personal history. They inevitably carry life experience, predispositions and other personal qualities that influence their attitudes, conduct and the decisions they make. The bias rule does not require decision-makers be devoid of those qualities.[13] In fact, many argue that the experience and predispositions that can lead decision-makers to hold preconceptions and opinions which could affect their impartiality, especially if that requirement was applied strictly, are also the very qualities that make people suitable for judicial and other such positions.[14] On this view, experience can inform and assist decision-making, rather than obscure or impede it. These general principles are a key reason why the bias rule requires sufficient rather than absolute impartiality.

The vast majority of bias claims are ones of apprehended rather than actual bias. The distinction is important in principle and for practical reasons. A claim of actual bias is more

9 The same is true for statutes. See, for example, Lisa Burton Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48 *Federal Law Review* 159.

10 This phrase is taken from the Hon Robert French, 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87 *Australian Law Journal* 96.

11 The reference was issued on 11 September 2020. The Commission is required to present its final report by 30 September 2021. These are and other aspects of the reference are reproduced by the Australian Law Reform Commission at <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/terms-of-reference/>.

12 Australian Law Reform Commission, 'Review of Judicial Impartiality Terms of Reference' (online) <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/terms-of-reference/>. The quoted words are taken directly from the Attorney-General's terms of reference.

13 In *R v S (RD)* [1997] 3 SCR 484, 504, L'Heureux-Dubé and McLachlin JJ cited with approval the Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) 12, which stated that 'there is no human being who is not the product of every social experience, every process of education, and every human contact'. This means a decision-maker must have an open mind, rather than an empty one: Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 645.

14 Matthew Groves, 'Experience, Empathy and the Rule Against Bias in Criminal Trials' (2012) 36 *Criminal Law Journal* 84, 100.

serious but harder to prove given that it carries a heavy onus of proof.[15] It is more serious because it effectively requires a court to find a decision-maker has a closed mind and is not capable of persuasion.[16] A finding to that effect has been described as a 'grave' one for a court to make.[17] This seriousness means that courts require actual bias to be 'clearly proved' or 'firmly established'.[18] In practice, proof of actual bias is hard to obtain because the claim depends on the state of mind of the relevant judge or decision-maker.[19] In the case of judges, this is the one person who cannot be questioned on the issue of bias.[20]

The less demanding standard of apprehended bias is a subjective one that depends on whether a fair-minded and informed observer might believe that a decision-maker might not approach his or her function with sufficient impartiality. The use of an informed and fair-minded observer is regularly criticised for providing a flimsy veil for judicial views,[21] but it is intended to introduce a level of objectivity that reflects the connection of the bias rule to the wider public.[22] A key rationale for the bias rule is the importance of public confidence in the courts and the wider legal system.[23] The public will have greater confidence in, and be more accepting of, decisions if they are made by impartial officials.

The informed and fair-minded observer provides a device by which judges can gauge, as much as is realistically possible, questions of bias from a distance rather than subjective

15 *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 [97] (McColl JA, Giles and Tobias JJA agreeing). See also *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 123, where Wilcox J held that claims of actual bias required cogent evidence.

16 In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 532 [72], Gleeson CJ and Gummow J described actual bias as requiring proof that a decision-maker is 'so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented'.

17 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71, 127, 133 (Burchett J).

18 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 531 [69] (Gleeson CJ and Gummow J), 546 [127] (Kirby J).

19 *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427, 437–8 [33] (Gummow A-CJ; Hayne, Crennan and Bell JJ).

20 Judges cannot be questioned during the course of a bias claim: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 472 [3]; *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1039 [39] (Lord Mance); *Makucha v Sydney Water Corporation* [2011] NSWCA 234 [9] (Basten JA). See also Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3rd ed, 2017) 3.5(e), explaining that it is 'not appropriate for a judge to be questioned by parties or their advisers'.

21 See, for example, Abimbola Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to *Gough*' (2009) 68 *Cambridge Law Journal* 388; Matthew Groves, 'The Imaginary Observer of the Bias Rule' (2012) 19 *Australian Journal of Administrative Law* 188. See also Andrew Higgins and Inbar Levy, 'Judicial Policy, Public Perception, and the Science of Decision Making: A New Framework for Apprehended Bias' (2019) 38 *Civil Justice Quarterly* 376, 377, who describe the informed observer as a judicial 'puppet' that is 'unlikely to inspire public confidence'.

22 The informed observer was adopted as a device by which to assess claims of apprehended bias in *Webb v R* (1994) 181 CLR 44. Chief Justice Mason and Deane J reasoned that public confidence in the judicial system, which is a core rationale of the bias rule, was 'more likely' to be fostered by a test 'that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question': 51. The House of Lords used similar reasoning when it later also adopted the use of the fair-minded observer and a standard of 'real possibility' to determine claims of apprehended bias in *Porter v Magill* [2005] 2 AC 357.

23 *Webb v The Queen* (1994) 181 CLR 41, 68 (Deane J); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 107 [186] (Gageler J); *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 [55] (Nettle and Gordon JJ).

judicial impression.[24] The observer also provides a convenient means for courts to avoid the direct adverse findings required for actual bias. A finding of an apprehension of bias relieves both the decision-maker and relevant judge from that personal dimension because it only requires the judge to conclude that an observer might find the decision-maker to be insufficiently impartial. This finding is not what the relevant judge believes about the relevant decision-maker, only what an abstract observer might conclude. This face-saving artifice also encourages those claiming bias to frame their claims as ones of apprehended bias. 'A party would be foolish', Kirby J explained, to 'needlessly assume a heavier obligation when proof of bias from the perceptions of the reasonable observer would suffice to obtain relief'.[25] Justice Callinan opined that the easier evidentiary standard of apprehended bias might conceal the uncomfortable truth that some such claims 'may be no more than a polite fiction for no doubt unintended, unconscious and ultimately unprovable, but nonetheless actual bias'.[26] Some academics have argued for the end of such niceties. Professor Goudkamp, for example, suggested that courts should discard these diplomatic fictions and be prepared to make the more honest finding of actual bias in such cases,[27] but that appeal to doctrinal integrity has not been accepted by the courts.

Establishing an apprehension of bias

The prevailing test for apprehended bias is the two-step process adopted in *Ebner v Official Trustee*[28] (*Ebner*). That case saw the High Court reject the longstanding principle of automatic disqualification for pecuniary interest, which treated cases in which a decision-maker held some sort of financial interest in a decision as a separate category of presumptive bias. *Ebner* abolished that discrete category, holding that all claims of apprehended bias should be determined by a uniform two-step approach. The Court explained that two-step process as follows:

24 Chief Justice French acknowledged the limits of the observer in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 307 [48] when he stated the concept was useful because it 'reminds' judges 'to view the circumstances of claimed apparent bias, as best they can, through the eyes of non-judicial observers'.

25 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 541 [111]. See also *SZUEP v Minister for Immigration and Border Protection* [2017] FCAFC 94 [10], where Perram, Robertson and Wigney JJ stated 'it is difficult to see why a claim of actual bias is necessary or appropriate in circumstances where the legislation does not exclude a ground of reasonable apprehension of bias'.

26 *Johnson v Johnson* (2000) 201 CLR 488, 517 [79].

27 James Goudkamp, 'Facing up to Actual Bias' (2008) 27 *Civil Justice Quarterly* 32. Goudkamp's suggestion is arguably counterintuitive to British law, where automatic disqualification for pecuniary and other direct interests still prevails after *R v Bow Street Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119. Automatic disqualification is based upon the presumption that some interests must necessarily disqualify a decision-maker. As long as British courts embrace the arguably fictitious nature of automatic disqualification, it seems unlikely they would favour uncomfortable realism by more readily accepting claims of actual bias.

28 (2000) 205 CLR 337.

> First, it 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. The second step is no less important. 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.[29]

According to this test, the nature or source of an interest alone cannot create an apprehension of bias. Explanation is required of how the interest identified might have the effect suggested. In one sense, this approach simply confirmed the rejection of automatic disqualification because it made clear that no interest, financial or otherwise, would create a 'conclusive inference' of bias.[30] The demise of automatic disqualification has arguably diverted attention from its mirror image — those cases where courts refuse to accept an apprehension of bias may arise, or at least be held by non-judicial observers such as the fair-minded and informed observer. This rarely noticed aspect of the bias rule means that, while Australian courts have firmly rejected the notion that some issues necessarily lead to bias, they also accept that many issues do not usually create an apprehension of bias.

Before those issues are examined, we must consider some of the subtle difficulties in the supposedly demanding test to establish an apprehension bias. The courts issue regular reminders of the serious nature of a finding of apprehended bias, variously describing such claims as serious and ones which will not be upheld lightly.[31] That apparent strictness does not sit easily with the content of *Ebner's* test, which is one of possibility rather than probability.[32] The precise nature of that lesser standard is muddied by *Ebner's* use of 'two mights', which require that the informed observer *might* accept that a decision-maker *might* not be suitably impartial. That double-barrelled use of possibilities has been accepted as setting a 'low threshold'.[33] Just how low is unclear. The Victorian Court of Appeal noted a related difficulty when it explained that *Ebner's* use of two mights meant that:

> the observer may simultaneously consider there is a real possibility that the judge is impartial, and a real possibility that the judge is not impartial. Wherever there is a real possibility that the judge might not bring an impartial mind, the judge should not hear the case.[34]

This approach is a precautionary one because it anticipates recusal or disqualification even when the observer might think the decision-maker will be sufficiently impartial.[35] That caution, at least in the cases about judicial bias, is explicable by the unique nature and constitutional

29 Ibid 345 [8] (Gleeson CJ; McHugh, Gummow and Hayne JJ), 396 [182] (Callinan J agreeing on this point). Gageler J has identified a third step in *Ebner's* test, which may arise from a statement that follows the passage just quoted. The majority noted that, when the explanation was provided in accordance with its second step, 'only then can the reasonableness of the asserted apprehension of bias be assessed': 345 [8]. Gageler J has suggested that this requires the further step of 'consideration of the reasonableness of the apprehension of' the departure of impartiality as asserted by the party claiming bias: *Isbester v Knox City Council* (2015) 255 CLR 135, 155–6 [59]. This third step of *Ebner's* test has not yet gained acceptance within the High Court.

30 The quoted words are the description employed by McHugh J in *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 459 [69].

31 *R v Luskink; Ex parte Shaw* (1980) 32 ALR 47, 50 (Gibbs CJ).

32 The question is clearly 'one of possibility (real and not remote), not probability': *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [7] (Gleeson CJ; McHugh, Gummow and Hayne JJ, Callinan J agreeing).

33 *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 508 (Spigelman CJ).

34 *Melbourne City Investments Pty Ltd v UGL Ltd* [2017] VSCA 127 [67] (Warren CJ; Tate and Whelan JJA).

35 This is consistent with the suggestion that recusal is the 'prudent step' in a case of 'real doubt', as an appellate court might easily take a different view: *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [20] (Gleeson CJ; McHugh, Gummow and Hayne JJ, Callinan J agreeing).

importance of judicial power.[36] The real possibility that an exercise of judicial power *might* be perceived as insufficiently impartial, even if it also *might not* be, is enough to warrant recusal. At this point, a new dichotomy arises. Courts often adopt a cautionary and rigorous approach to standards in the bias test, yet in many cases involving judicial and legal norms they remain strangely unwilling to accept that the informed observer will accept conduct and norms as easily as judges and lawyers do. This judicial tendency to overload the observer with knowledge of legal traditions and behavioural norms presents other difficulties. The greater the level of knowledge attributed to the observer, the closer the decision becomes one of what the observer might *actually* think of the facts at hand, rather than what might be apprehended at a more general level.[37] When the observer is overloaded with knowledge and acceptance of the habits and norms of the legal system, it inevitably strips away any real role for the observer. The dilemma is the one faced by Goldilocks — not too much or too little, to reach that obviously vague point of 'just right'.

Some issues are not, however, even placed in the hands of the fair-minded and informed observer. The English Court of Appeal long ago issued a dogmatic list of qualities that could not support an apprehension of bias, with the implication that these were so clear that courts should not allow the observer to consider them.[38] The Court of Appeal held that bias could almost 'never' arise simply by reason of a judge's gender, age, religion, race, class, wealth or sexual preference.[39] The Court provided a further catalogue of factors it thought would 'hardly ever' support a claim of bias, including membership of a professional, sporting or charitable association; extrajudicial writings; the judge's political, social and educational background; any connections arising from the judge's former bar chambers; and any possible Masonic associations.[40] The final list issued by the Court of Appeal, which it held would ordinarily support a bias claim, included family connections, personal friendships and dislikes, and close professional relationships.[41] Fairly similar lists have been suggested in Australia.[42] Of course, exceptions can always occur. Academic and other extrajudicial writings can create

36 The possibility that individual cases in which a court or judge lacked sufficient independence or impartiality could affect perceptions of the judicial system as a whole was accepted in *Ebner v Official Trustee* (2000) 205 CLR 337, 345 [7] (Gleeson CJ; McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point).

37 Kirby J has suggested that 'for a court simply to impute all that was eventually known to the court to an imaginary person ... would only be to hold up a mirror to itself': *Johnson v Johnson* (2000) 201 CLR 488, 506. The greater the level of knowledge attributed, the clearer the reflection.

38 The adjective 'dogmatic' was taken from Michael Taggart, 'Administrative Law' [2003] *New Zealand Law Review* 99, 101.

39 *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480. Justice Kiefel, as her Honour then was, in *Bird v Volker* [1994] FCA 132 similarly held that the observer would think that a judge's gender or membership of a religious group 'would ever enter into the decision making process' of judges. That statement would surely not apply when a judge identified so strongly with such qualities, or those within *Locabail's* 'never' list, as to create a perception that this might affect impartiality.

40 Ibid 480. The inclusion of Masonic association in the Court of Appeal's list is explicable by longstanding public controversy in the UK about the supposed dominance of senior ranks of the police and other agencies by Freemasons. Possible membership of a Masonic lodge was rejected as a basis to claim apprehended bias in *Makucha v Sydney Water Corporation* [2011] NSWCA 234. (Masons have dominated the senior ranks of the Australian judiciary, to the satisfaction of all.)

41 *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480.

42 *Rouvinetis v Knoll* [2013] NSWCA 24 [24] (Basten JA, Barrett and Ward JJA agreeing). See also Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 3.3.4.

an apprehension of bias if a judge has expressed those views in sufficiently rigid terms and they intersect with an issue or party that is relevant to a case before the judge.[43]

The demarcation of various interests and associations that ordinarily will, or may hardly ever, support an apprehension of bias can be partly understood as ground rules for both judges and lawyers. Listing issues that will hardly ever support an apprehension of bias serves to limit hopeless claims from lawyers. Similarly, the list of those issues that will normally support an apprehension serves to remind judges and other decision-makers of those instances that would invite an almost inevitable bias claim were they to preside. While such categories may be sensible, they also constitute a fairly lengthy list of situations in which things are thought so obvious that the opinion of the fair-minded and informed observer should not be called upon. Another category arises from the role of precedent within the common law method, which provides an important element of the backdrop of the bias rule. There are some things that judges (and, by necessary implication, tribunal members as well as other decision-makers influenced by precedent) do that could theoretically be regarded as prejudgment, but adherence to precedent has long been quarantined from use in claims of apprehended bias. Hayne J explained:

> The principles about apprehension of bias must be understood in the context of a judicial system founded in precedent and directed to establishing, and maintaining, consistency of judicial decision so that like cases are treated alike and principles of law are applied uniformly. The bare fact that a judicial officer has earlier expressed an opinion on questions of law will therefore seldom, if ever, warrant a conclusion of appearance of bias, no matter how important that opinion may have been to the disposition of the past case or how important it may be to the outcome of the instant case. Fidelity to precedent and consistency may make it very likely that the same opinion about a question of law will be expressed in both cases. But that stops short of saying that the judicial officer will not listen to and properly consider arguments against the earlier holding.[44]

Precedent is not the only aspect of our legal system known to the informed observer. That person will 'of course consider all of the facts' within their 'proper context',[45] which approach means the observer will find it 'necessary to consider … the legal, statutory and factual context in which the decision is made'.[46] The statutory context will include the 'key elements' of a relevant statute, though not its finely grained detail.[47] This can include general knowledge about how barristers work, including some of their more esoteric commercial habits such as accepting general or special retainers,[48] and that as part of taking instructions they can

43 This principle applies to extrajudicial statements in general: Matthew Groves, 'Public Statements by Judges and the Bias Rule' (2014) 40 *Monash University Law Review* 115.

44 *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302 [12]. This is not the case if the judge has made earlier findings about a party, witness or disputed issue in terms sufficiently strong or adverse as to raise an apprehension that the judge might not approach that same party, witness or issue with sufficient impartiality in a later case. Such a finding created an apprehension of bias in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

45 *Meerabux v Attorney-General of Belize* [2005] 2 AC 513, 528. This context includes the 'overall social, political or geographical context' of a decision: *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 [3] (Lord Hope).

46 *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [20] (Kiefel, Bell, Keane and Nettle JJ).

47 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 [59] (Nettle and Gordon JJ).

48 A finding made by the majority of the Court of Appeal in *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 379–81.

often make strong statements without any attachment to arguments they press.[49] The observer also knows that judges are typically former barristers but accepts that the contacts in chambers are essentially left in the past upon judicial appointment.[50] The observer would also realise that claims of judicial bias involve a 'professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'.[51] This faith in the judiciary is not undying. The House of Lords, for example, accepted that the judicial oath would be relevant to the observer but was not a panacea against bias claims.[52] Such expressions of doubt are rare. Judges mostly affirm their unique professional experience in making and considering arguments in a detached manner, which starts at the bar, then continues and strengthens on the bench.[53] It follows that judges who affirm their professional disposition of impartiality do so with decades of personal experience. This perspective may explain why judges can easily accept their professional disposition to impartiality. It is does not explain why the informed and fair-minded observer is thought to accept the assessment judges make of their own experience without serious question.

At this point, it is useful to note that the judges have readily accepted that the informed observer retains a healthy level of scepticism about other professions. In a case that considered whether police officers could serve on a jury with sufficiently impartiality, when the trial would hear and depend greatly on the acceptance or rejection of evidence from other police officers, Lord Bingham conceded the possibility that police officers would, as jurors, like 'most adult human beings, as a result of their background, education and experience, harbour certain prejudices of which they may be conscious or unconscious'.[54] His Lordship thought that danger was acute for police officers in jury service because of their 'strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition'.[55] The inability of other professions to cast aside their shared experience, bonds of loyalty

49 See, for example, *Setka v Gregor* [2011] FCAFC 64 [13], where Tracey J rejected a bias claim based on his earlier strong cross-examination of a party when he was counsel assisting a royal commission.

50 *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 [24]–[28] (Campbell JA). The Queensland Court of Appeal took a more nuanced view when it suggested that longstanding links made at the bar were diminished rather than extinguished upon judicial appointment: *Markan v Bar Association of Queensland* [2014] 2 Qd R 273, 276 (Muir JA, McMurdo P and Mullins J agreeing).

51 *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 (approving remarks of McHugh JA in *Vakauta v Kelly* (1988) 13 NSWLR 502, 527). Justice McHugh presided in the hearing of the NSW Court of Appeal in *Vakauta* and had been appointed to the High Court when an appeal of that decision was heard by the High Court. His Honour did not, of course, preside in the High Court hearing.

52 *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 [23] (Lord Walker). Lord Mance accepted that the oath of office held great personal force for judges but concluded it was ultimately 'more a symbol than of itself a guarantee of the impartiality' that was ultimately only 'one factor' considered by the observer: [57]. In *Gaudie v Local Court (NSW)* (2013) 235 A Crim R 98 [86] the judicial oath was described as 'not an answer to a claim of apprehended bias … it is a matter which the bystander may take into account'.

53 I put aside the related but important issue of judicial temperament. This concept is often mentioned as a key element for judicial office but it remains quite ill-defined. See, for example, Terry Maroney, '(What We Talk About When We Talk About) Judicial Temperament' (2020) 61 *Boston College Law Review* 2085. For present purposes, the difficult questions about judicial temperament are when and how it arises.

54 *R v Abdroikov* [2007] 1 WLR 2679 [23]. See also *R v Gough* [1993] AC 646, 659, where Lord Goff accepted that 'even though a person may in good faith believe that he is acting impartially, his mind may unconsciously be affected by bias'. This passage was approved by the Western Australian Court of Appeal in *I v Western Australia* (2006) 165 A Crim R 420 [15] (Steytler P; Roberts-Smith and McLure JJA).

55 *R v Abdroikov* [2007] 1 WLR 2679 [24].

and common professional values, stands in stark contrast to what is thought possible and reasonable for judges.

The observer also knows a fair amount of detail about the conduct of cases in general, including an often surprising amount about the case at hand. Justice Callinan suggested it is 'axiomatic that the perception of a lay observer will not be as informed as the perception of a lawyer, particularly a litigation lawyer. But the fictional observer should not be taken to be completely unaware of the way in which cases are prepared and tried'.[56] The observer will understand the differences between modes of hearing that allow non-judicial decision-makers to adopt more novel techniques, such as tribunal members taking a very active approach if the body is more inquisitorial in character,[57] coroners taking a very inquisitorial approach at the early stage of a hearing,[58] or anti-corruption commissioners taking novel procedural steps as part of their novel jurisdiction.[59] The observer will also know and understand the lapses and other foibles that can occur during hearings. Judges can sometimes be exasperated or overly blunt, especially in lengthy or difficult hearings,[60] or express tentative views during a hearing to which they are not committed,[61] without creating an apprehension of bias. Such latitude on the part of the observer recognises the possible 'wear and tear' that can occur during hearings. Pragmatic accommodations of this nature are quite understandable because they reinforce the reasonable nature of the observer's judgment, but they also invite a difficult question. If understandable judicial expressions of humanity occur during the bustle of a hearing, why not elsewhere? Surely it is possible that judges might sometimes be less than perfect in wider issues, such as their singular professional skill for impartiality. Judges may not think so, but it is surely possible that the informed observer might.

That possibility seems natural in light of the careful thought processes the observer is accepted to adopt. In *Johnson v Johnson*[62] Kirby J thought that the observer is a 'reasonable

56 *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 635 [177].

57 See, for example, *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 [30]–[31], where Gleeson CJ, Gaudron and Gummow JJ accepted a migration tribunal member could adopt a style that could 'more readily' create an apprehension in a court. The problem in that case was that the member went too far and became overbearing. See also *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 [3], where Allsop CJ said robust questioning in such cases may not only be allowed but also may be called for, to ensure that key issues are drawn to the clear attention of the parties.

58 *R v Doogan; Ex parte Lucas-Smith* (2005) 158 ACTR 1, 13–4, where it was held the observer would be unsurprised by a coroner's decision to take a view of an area without the parties, as part of preparation for a hearing.

59 See *Duncan v Ipp* (2013) 304 ALR 359 [152]–[156], where Bathurst CJ (Barrett and Ward JJA agreeing) accepted that a commissioner of the New South Wales Independent Commission Against Corruption might sometimes correspond with public officials, without notice to the parties, as part of an inquiry.

60 See, for example, *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 636 [180], where Callinan J thought many exasperated statements of the trial judge were 'unfortunately so' but fell short of creating an apprehension of bias. See also Johnson v Johnson (2000) 201 CLR 488, 508–9 [53] (Kirby J).

61 *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ; Gaudron, McHugh, Gummow and Hayne JJ); *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 610 [112] (Kirby and Crennan JJ). There can be great difficulty in distinguishing those cases where a decision-maker has expressed tentative views to a party in order to highlight important issues for further consideration, as opposed to tentative expressions that appear fixed and thus capable of supporting an apprehension of bias: *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 [27] (Flick J).

62 (2000) 201 CLR 488.

member of the public' who is 'neither complacent nor unduly sensitive or suspicious'.[63] The observer will also consider things before making a reasoned rather than snap judgment.[64] In theory, the observer will decide what issues are relevant and how they will be weighed,[65] although in practice these are matters that are carefully controlled by judges. Justice Kirby summarised the observer's key qualities and thought processes as follows:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.[66]

Such a reasonable person exercising such reasonable judgment is clearly an ideal rather than an ordinary or typical person.[67] The observer's collected virtues make that person 'so unlike the average member of the public'[68] and someone with qualities 'many of us might struggle to attain'.[69] In my view, the observer does not represent judicial conceptions of a normal or reasonable person, but instead the kind of person who judges feel is suitable to make key decisions about the bias rule. This creature of virtuous reason is clearly one we would like, as Kirby J suggests, to make decisions which are important to the parties and the community. The difficulty with such reasoning is that it fails to acknowledge the importance of such decisions to judges and the wider legal system. When the observer accepts institutional legal practices, as well as the apparently singular ability of judges to remain impartial, that person is affirming legal traditions, judicial habits and the judges' own perceptions of their abilities. All this is done by the courts in the name of a fictional observer, whose judgment helps to uphold public confidence in judges and our legal system. This is a circular and self-serving form of quality control that would make even our politicians blush. The next section briefly outlines some of the reasons why that should not continue or should at least be reconsidered.

Judges as real people — not better, not worse and certainly not different

The distinction between actual and apprehended bias explained earlier in this article drew attention to the relative nature of impartiality, which has arisen from widespread acceptance that judges, like all other people, are the product of the sum of their life experience. While there is continuing debate about when and why judges may draw openly from their personal

63 Ibid 508. This conception of the observer has been endorsed many times by the House of Lords and Privy Council: *Lawal v Northern Spirit* [2004] 1 All ER 187 [14]; *R v Abdroikov* [2007] 1 WLR 2697 [15]; *Lesage v The Mauritius Commercial Bank Ltd (Mauritius)* [2012] UKPC 41 [48]; *Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago (Trinidad and Tobago)* [2018] UKPC 23 [35].

64 *Johnson v Johnson* (2000) 201 CLR 488, 494 (Gleeson CJ; Gaudron, McHugh, Gummow and Hayne JJ).

65 *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] 1 All ER 731 [17] (Lord Hope).

66 (2000) 201 CLR 488, 508.

67 *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd* (1986) 6 NSWLR 272, 275.

68 Philip Havers and Alisdair Henderson, 'Recent Developments (and Problems) in the Law on Bias' [2011] *Judicial Review* 80, 82.

69 *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416 [1] (Lord Hope).

life experience to decide cases,[70] this movement towards greater realism in the art of judging has led to constructive discussion in judicial writing about the extent to which judges should acknowledge and seek to counteract their own prejudices.[71] Such self-reflection may seem admirable, but its full consequences remain largely unexplored by judges. Those wider consequences include the large and still growing body of behavioural psychological research which suggests that judges are no better able to identify and control their own predispositions, prejudices and other cognitive limitations.

Keith Mason, then President of the New South Wales Court of Appeal, drew attention to this possibility in his illuminating discussion of unconscious judicial prejudice. While much of that analysis was about what Mason termed 'attitudinal prejudices', which are the possible predispositions and prejudices that judges and anyone else can hold without being consciously aware that they do so, he also accepted the relevance of the 'cognitive revolution'.[72] Research into cognition and related issues is challenging to the bias rule because it questions what one study described as 'declaratory impartiality'.[73] These are the principles and assumptions adopted by judges essentially to conclude that they are more able to decide issues objectively or that their training and experience can inure them from the weaknesses that scientific research has shown apply to all people.[74] A small selection of relevant issues can be outlined briefly for present purposes.

A significant body of American research has confirmed that judges are normal in the sense of being no different from other people in their susceptibility to cognitive biases and the difficulties this can cause to thinking and decision-making. One landmark study of American judges concluded that the 'cardinal premise' of judicial impartiality 'that judges are impartial because they can choose to be so — is wrong.'[75] That study concluded that judges have the 'same cognitive realities of human thought that sustain and plague all of us', with the exception that they appear to struggle more than many others to recognise this.[76] Several empirical studies involving American judges established that judicial reactions on issues

70 This is sometimes described as 'contextual judging', which arose from the approach used by L'Heureux-Dube and McLachlin JJ in *R v RDS* [1997] 3 SCR 484, 495–7. Their Honours accepted that judges could draw upon personal life experience, if relevant and not based on inappropriate stereotypes, to help decide the issues before them. This approach was described as a 'contextual judicial method' in Richard Devlin, 'We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialised Perspective' (1995) 18 *Dalhousie Law Journal* 408, 413.

71 See, for example, David Ipp, 'Judicial Impartiality and Judicial Neutrality: Is There a Difference?" (2000) 19 *Australia Bar Review* 212; Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676; Raymond Finkelstein, 'Decision Making in a Vacuum?' (2003) 29 *Monash University Law Review* 11.

72 Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 684.

73 Gary Edmond and Kirsty A Martire, 'Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making' (2019) 82 *Modern Law Review* 633, 663.

74 Mason provides an unwitting example of this in his article when declaring that 'the jury is still out' in this and other areas of psychology: Mason, above n 71, 684. In fact, the jury returned its verdict long ago. There is no scientific doubt that judges are subject to the vast majority of attitudes, psychological weaknesses and blind spots that affect all others. The unsettled issue is why many judges continue to think otherwise. The challenge for such a study is to capture sufficient wild judges for study.

75 Anna Spain Bradley, 'The Disruptive Neuroscience of Judicial Choice' (2018) 9 *UC Irvine Law Review* 1, 6.

76 Ibid 7. That author has applied similar reasoning to decisions by those holding high executive office: 'Cognitive Competence in Executive-Branch Decision Making' (2017) 49 *Connecticut Law Review* 713.

relevant to the legal process, such as emotional responses to witnesses,[77] or subconscious racial prejudice,[78] are not greatly different from those of the general population. These individual studies are consistent with an enormous wider body of research in cognitive and behavioural psychology which has established that the belief that judges hold in their own abilities to identify and manage their own preconceptions and biases is unfounded.[79]

Another of the many behavioural psychology theories relevant to the bias rule is 'anchoring', which in very simple terms refers to the collective gravitational weight that information obtained later in a process can gain when connected to an initial assumption. Things that follow are 'anchored' to what precedes them. The stronger the reliance on an initial assumption, the heavier the anchor.[80] Those anchoring studies involving judges have found they are not immune from its subtle effects.[81] Anchoring has a strong connection to heuristics. These are the mental shortcuts, akin to the use of 'shortcuts' in thinking, which enable people to make good decisions quickly.[82] People typically invoke anchoring under the guise of experience or the adoption of well-settled propositions, ones so well settled that they do not required fundamental review and can thus be adopted quickly so that other more important and difficult issues can be decided. After considering some of the leading research on this issue, Gageler J made a remarkable admission about his 'former practice', explaining:

> I equated my subjective confidence in my ability to arrive at a correct decision with the objective probability of me arriving at a correct answer. Almost certainly, I over-estimated my own ability.[83]

The admission of Gageler J is a rare one among judicial officers, who generally do not reflect on their own processes so openly. If judges considered their own heuristics, they might consider the possibility of anchoring and their own vulnerability to such phenomena. This could in turn lead judges to consider the possibility that many decisions attributed to the informed observer are in fact based on judicial anchoring. Judges make crucial assumptions about their own impartiality, their ability to step aside from personal prejudices and so on, which are then attributed to the informed observer. If the observer began with some basic scepticism about the abilities and habits of judges, even a small amount, the bias rule would

77 Andrew Wistrich, Jeffrey Rachlinski and Chris Guthrie, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93 *Texas Law Review* 855. This study arose from research involving 1,800 judges.

78 Andrew Wistrich, Sheri Lynn Johnson, Jeffrey Rachlinski and Chris Guthrie, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195. This study also found that judges can largely overcome this issue if sufficiently informed and motivated, though it also found that overconfidence and time constraints can make the task difficult.

79 The wider literature is usefully analysed in Jeffrey Rachlinski and Andrew Wistrich, 'Judging the Judiciary by the Numbers: Empirical Research on Judges' (2017) 13 *Annual Review of Law and Social Science* 203; Andrew Wistrich and Jeffrey Rachlinski, 'Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do about It' in Sarah Redfield (ed), *What Judges Can Do about Implicit Bias* (American Bar Association, 2017).

80 The pioneering study was conducted by Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1131.

81 See, for example, Birte Englich, Thomas Mussweiler and Fritz Strack, 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32 *Personality and Social Psychology Bulletin* 188.

82 Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Strauss and Giroux, 2011). That author won a Nobel Prize for his work in behavioural psychology, notably anchoring.

83 Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189, 199.

not be cast adrift. But it could enable the informed observer to reach a view in difficult cases that judges would struggle to accept. The next section considers two such instances.

ALA15 and *CMU16*

ALA15 v Minister for Immigration and Border Protection[84] (*ALA15*) was an appeal against the refusal of a primary judge to disqualify himself on the ground of apprehended bias. The bias claim was based on the judge's history of decisions in migration cases, particularly claims for protection visas. Statistical material was provided to the Full Federal Court, drawing on the first six months of the judge's appointment to the Federal Court of Australia. During that time, the judge decided 286 cases and 254 of these were migration claims. All of the migration cases were delivered ex tempore — all 254.[85] The judge found in favour of the applicant in only two cases. In each of those cases, the Minister had conceded that a jurisdictional error had occurred.[86] The combined effect of those statistics meant that the judge decided 100 per cent of migration cases ex tempore, decided only 0.79 per cent of all claims in favour of applicants and did not decide a single contested claim in favour of an applicant. Statistics drawn from the annual reports of migration tribunals revealed that, around this time, 10.8 per cent of decisions by the Migration Review Tribunal and 12.2 per cent of decisions of the Refugee Review Tribunal were set aside by the Federal Circuit. This stood in striking contrast to the 0.79 per cent rate of the judge complained about.[87]

The primary judge rejected the claim of apprehended bias as 'not relevant' to establishing an apprehension of bias,[88] holding that:

> the use of such statistical evidence is not evidence of conduct in respect of which the fair-mind[ed] observer might believe that the Court might not bring a fair, impartial and independent mind to the determination of the matter on its own merits.[89]

That decision contained no substantive analysis of the laws governing bias, or the novel nature of this claim, and was, perhaps unsurprisingly, delivered ex tempore.[90]

The Full Federal Court gave greater consideration to questions of principle when finding there was no apprehension of bias against the trial judge, providing five reasons why an apprehension of bias was not established, although its reasoning on each point was rather sparse. The first reason was raw statistics would 'normally … need to be accompanied by a relevant analysis of the individual' decisions, so that the 'statistics were placed in a proper context'.[91] The Full Court noted that detailed analysis could reveal that many or even all of the decisions were rightly decided, but it added the quite remarkable comment that:

84 [2016] FCAFC 30.
85 In almost two-thirds (64.96 per cent) of the judge's cases, he delivered the ex tempore reasons at the first scheduled hearing date: ibid 11(f).
86 The two cases were *ABT15 v Minister for Immigration and Border Protection* [2015] FCCA 1051; and *Kautoga v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 1679.
87 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [11(h)].
88 *ALA15 v Minister for Immigration and Border Protection* [2015] FCCA 2047 [10].
89 Ibid [11].
90 A related decision rejecting the applicant's request for an extension of time was also delivered ex tempore: *ALA15 v Minister for Immigration and Border Protection (No 2)* [2015] FCCA 2048.
91 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [38].

> even if some or all of the judgment were wrongly decided, that may be the consequence of human frailty on the part of the judge and not prejudgment, a consideration which a fair-minded observer would take into account.[92]

The Full Court also held that attempts to compare the relevant judge with others on the same court 'does not generally indicate prejudgment'.[93] Support for this finding was drawn from *Minister for Immigration and Multicultural Affairs v Jia Legeng*[94] (*Jia*), where Gleeson CJ and Gummow J reasoned that the mere fact it was easier to persuade one judge than another did not suggest either was biased.[95] The third reason of the Full Court was the more technical one that comparison of the judge's decision-making was drawn from annual reports of migration tribunals in the years immediately before the judge's appointment. The Full Court did not mention the point that annual reports for later years, which would have covered the times when the relevant judge had been presiding, were not available. The fourth reason of the Full Court relied upon *Vietnam Veterans' Association of Australia* (*NSW Branch Inc*) *v Gallagher*[96] (*Vietnam Veterans*), where Heerey J held that statistical evidence about a tribunal member who decided veterans' pension cases could not reveal an apprehension of bias because:

> All such evidence could show is that, because a decision-maker has decided a particular kind of case in a particular way in the past, he or she is likely to decide a case of the same nature in the same way in the future. Even if that be accepted as a conclusion of fact, it does not make out a case of apparent bias. The law is not so ignorant or disdainful or human nature as to assume that judges or quasi-judicial decision-makers are automatons.[97]

Justice Heerey drew attention the listing practices of the tribunal, which randomly assigned cases to members. He added:

> it is no use tendering statistical evidence, or any other evidence, to show merely that a judge is likely, from what could be colloquially called a track record, to decide a case in a particular way. To permit that to be done would be effectively allowing a party to shop for the judge of his or her choice and would, apart from anything else, raise endless disputes with opposing parties contending for judges more suited to their own interests.[98]

The Full Court acknowledged that the statistics in *Vietnam Veterans* revealed a much lower level of supposed partiality but concluded that the case remained relevant for its rejection of statistical evidence for a lack of explanatory analysis.[99] But the Full Court took an important further step that Heerey J did not, declaring that 'raw statistics are generally likely to be irrelevant to the knowledge and information which is imputed to the hypothetical observer'.[100] This bold statement was neither supported by clear authority nor accompanied by any explanation. The Full Court's reliance on *Vietnam Veterans* meant it did not consider questions that were not before Heerey J, such as whether statistics might be viewed differently if they were larger in number and much more one-sided in what they appeared to

92 Ibid [38].
93 Ibid [38].
94 (2001) 205 CLR 507
95 Ibid 532 [72].
96 (1994) 52 FCR 34.
97 Ibid 41.
98 Ibid 42.
99 *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 [44].
100 Ibid [43].

suggest. The even more difficult question that the Full Court did not confront was the effect of possibly changing public attitudes. Since the more than two decades after the decision of Heerey J, is it likely that the informed observer would continue quickly to reject statistical material about judges and other officials?

The final reason of the Full Court for finding that no apprehension of bias arose was that the statistics ended on the date that a differently constituted Full Court delivered one of many decisions that overturned the lower court judge in unusually blunt terms.[101] The twin assumptions in this finding of the Full Court were that the judge's conduct before he was overturned in rather frank terms could not be compared to his conduct afterwards and also that the informed observer would accept such a distinction. Neither assumption was explained by the Full Court in any real detail. If both assumptions had been considered, the question that might have arisen would have been an especially difficult one for the Full Court. Would the informed observer accept that earlier findings marked the turning they were thought to be in *ALA15*? The Full Court appeared to have thought that its earlier decisions had some sort of corrective or educative effect on the trial judge. Whether the informed observer would think that is another matter.

The subsequent case of *CMU16 v Minister for Immigration (No 2)*[102] (*CMU16*) was another appeal from the same lower court judge. It was also a migration case in which the judge ruled against the applicant, although that decision was not delivered ex tempore. The applicant raised several grounds of appeal, including both actual and apprehended bias, as well as other grounds not presently relevant, such as jurisdictional error and inadequate reasons. The Full Federal Court, composed differently from the one that determined *ALA15*, rejected all grounds of appeal.[103] This article will consider only the claims of bias, which were based upon different material from that offered in *ALA15*. That material comprised extracts from three unrelated migration cases in which the appellant's counsel represented a migration claimant before the lower court judge — reasons said to be from the first 10 migration cases decided by the judge in September 2017 and a further 10 decisions of the Full Federal Court which were 'said to be critical of the primary judge'. The Full Court noted that a further eight of its decisions were also referred to.[104] Various common themes were highlighted in each of the 10 cases from the trial judge and those of the Full Federal Court. Those claimed aspects of the trial judge's decisions included his dismissal of cases without adequate reasons and his failure properly to consider evidence or accord procedural fairness to appellants. The Full Federal Court decisions were also said to confirm such errors by the judge.[105] The respondent Minister objected to the introduction of such evidence, mainly on the ground of relevance. The Full Court gave several reasons why the material was not admissible and also appeared to suggest more generally that such a claim was hopeless.

The first reason the material was rejected arose from the various exclusionary provisions in the *Evidence Act 1995* (Cth). The Full Court focused on the tendency rule, which provides that evidence about the 'character, reputation or conduct of a person, or a tendency' the person

101 The relevant cases were *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301; and *SZWBH v Minister for Immigration and Border Protection* (2015) 229 FCR 317.
102 *CMU16 v Minister for Immigration (No 2)* [2017] FCCA 1948.
103 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104.
104 Ibid [13].
105 Ibid [14]–[17].

had, or has, to act in a particular way or to hold a particular state of mind is inadmissible unless the court thinks the evidence has significant probative value.[106] The same essential requirements attend to the coincidence rule, which enables the introduction of evidence to dispel claims that a person's states of mind over different events were not coincidental.[107] The Full Court referred to an earlier decision of a differently constituted Full Federal Court, which rejected not dissimilar evidence about the same judge. In *CDD15*, that earlier decision held that tendency evidence was irrelevant to a claim of apprehended bias because:

> In the context of such a test, the concept of tendency makes no sense. The ostensible bias issue does not relate to an inquiry into whether a judicial officer has a tendency to behave in any particular way. Rather, it is concerned with whether the way in which the judicial officer has behaved might generate a particular apprehension. The Appellant's invocation of s97 in relation to the ostensible bias case is, therefore, misconceived. That does not mean that the evidence of the other cases is necessarily irrelevant; rather, it just means that it is not relevant on a tendency basis. For that reason, we would not receive this additional evidence under s 97 in relation to the ostensible bias case in respect of which, as tendency evidence, it has no probative value.[108]

The Court in *CDD15* then added:

> Different considerations apply in respect of the actual bias case. Here the tendency argument would be that the other two cases are evidence that his Honour had a tendency to decide cases adversely to refugee applicants regardless of their merits. However, for largely the same reason as that just given, it is not possible to gauge the correctness of that proposition without knowing a lot more about the cases and, in particular, about their merits. For that reason, we would not accept that the proposed evidence has significant probative value for the purposes of s97(1)(b) of the Evidence Act (Cth) and would not receive it as tendency evidence in relation to a case of actual bias. We would be prepared to accept, as a matter of theory, that the evidence could bear upon a case of actual bias in a way which did not involve the use of tendency reasoning. Again, however, we do not see that this could occur without, as we have already noted, some consideration of the underlying merits of the two cases.[109]

The Full Court found in *CMU16* that this reasoning was correct, should be followed and provided a strong basis to reject the claims of actual and apprehended bias before it. The value of such material to claims of actual bias was dismissed in quick terms by the Full Court, holding that the 'ultimate fact in issue' in claims of actual bias was the judge's actual state of mind, rather than his character, reputation, conduct or tendency. Thus, the material did not fall within the exceptions to tendency evidence[110] and was based on a small number of cases that were too selective and lacking in detail to provide any useful or relevant guidance to the Court.

The Full Court also found the material proffered for the claim of actual bias to be inadmissible and unhelpful for largely similar reasons. The Court commented on what it described as the 'impossible task' the appellant had set himself. That critical description was based

106 This greatly simplifies the content of s 97 of the *Evidence Act 199*5 (Cth) but it captures all details relevant for the present discussion.

107 This explanation of s 98 of the *Evidence Act 1995* (Cth) is provided with the same caveat made in the previous note.

108 *CDD15 v Minister for Immigration and Border Protection* (2017) 250 FCR 587, 599 [75] (Perram, Robertson and Wigney JJ).

109 Ibid 599–600 [77].

110 Section 94(3) of the *Evidence Act 1995* (Cth) provides that Pt 3.6 (on tendency and coincidence) does not apply to evidence about a person's character, reputation or conduct if those things are a fact in issue.

partly on the highly selective nature of the cases chosen and the absence of any real detail about them, but the Full Court suggested that no amount of detail would be sufficient. This could only occur through a full review of the earlier cases, without which an appellate court 'could not possibly satisfy itself that such evidence was relevant or had significant probative value'.[111] The Court continued:

> In order to overcome the problem of selectivity, the appellate court would have to be willing to conduct *de facto* appeals within an appeal involving potentially all cases in which the primary judge has decided a migration application in order to decide if the evidence does have relevance or significant probative value. That is to say, the appellate court would have to decide for itself the merits of every such case before it could possibly conclude that the evidence met the tests of relevance or significant probative value. Moreover, the appellate court would have to be willing to do so without hearing from any of the parties to those cases, which would be a fraught exercise in any event. This is not the function of the appellate court, which has to determine the instant appeal, not hypothetical appeals.[112]

At other points in its decision, the Full Court acknowledged the possibility left open in *ALA15* — namely, that statistical data with sufficient explanatory information could provide the basis for a claim of apprehended bias[113] — but the passage just quoted appears to close that door very firmly. In my view, this aspect of *CMU16* is misconceived for several reasons. One is the quite mistaken reference to the need for an appellate court to 'satisfy itself' that statistics about, or an appraisal of, earlier cases need to satisfy a court. A claim of apprehended bias requires the informed observer to form a view about how a judge *might* behave, not what *would* convince a court.[114] Another is the very invocation of the tendency rule. If this is thought relevant to claims of apprehended bias, it must surely apply in a general manner to issues such as the value of the judicial oath, the high standards of judges and barristers. The selective invocation of the tendency rule may exclude evidence of some judicial tendencies, but it invites questions about others.

Are things as clear as the Full Court believes?

On one reading, the decisions in *ALA15* and *CMU16* are unremarkable examples of the common law method. Each considered whether well-settled principles of apprehended bias were satisfied by fairly novel statistical claims. Each answered that question in the negative. Perhaps the most curious silence in the decisions of the Full Federal Court was the absence of any mention of the publicity surrounding the Federal Circuit Court judge who was the subject of both decisions. That judge has been the subject of many media reports which make strongly unfavourable comment about the judge's decisions. The judge is regularly referred to as 'controversial'.[115] The gravity of errors that the Full Federal Court found to have been established in various cases decided by that judge has also been the subject

111 *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104 [42].
112 Ibid [43].
113 Ibid.
114 References in the quoted passage about the 'fraught' nature of the inquiry the Full Court thought would be needed can perhaps be best described as a modern, imperfectly polished, version of the floodgates argument.
115 See, for example, Helen Davidson, 'Asylum Case Rejected by Controversial Judge Sandy Street Will Be Reheard', *Guardian Australia*, 22 August 2019 <https://www.theguardian.com/law/2019/aug/22/asylum-case-rejected-by-controversial-judge-sandy-street-will-be-reheard>.

of repeated, very unflattering, media commentary.[116] The reasoning in *CMU16* suggests that such material would be rejected as irrelevant and inadmissible for technical reasons associated with evidence legislation. Such reasoning would be much more convincing if judges applied the same technical dogma to the many norms and habits of the judiciary and legal profession that are well accepted by the informed observer. Put another way, hurdles drawn from evidence legislation seem to be placed before applicants seeking to articulate claims about possible judicial errors, but the many virtues of the bench and bar never seem to face such obstacles.

The rejection of statistical material in *ALA15* invites questions on other grounds. On the one hand, the Full Court in *ALA15* found the statistical evidence presented was lacking because comparisons with other judges were not legally relevant, and figures drawn from annual reports were not a 'valid control measure' because they did not align with the appointment times of the relevant judge. This suggests that a level of rigour is required in any statistics presented to a court. On the other hand, the Full Court made the extraordinary assumption, without reference to any legal or other authority, that the informed observer would take into account the possibility that a judge might decide well over a hundred cases in a particular jurisdiction wrongly but that this could be explicable by reason of 'human frailty'. This reasoning evidences many things, intellectual and evidential rigour not among them. One flaw in this aspect of *ALA15* is the obvious failure of the Full Court to distinguish between what a judge might apprehend and what members of the public might. Another is the distorted reference to human frailty. That concept was mentioned in *Ebner*, when the High Court accepted that the bias rule 'admits the possibility of human frailty. Its application is as diverse as human frailty'.[117] That reference was as much about judicial as human frailty[118] and clearly intended to indicate that the test for apprehended bias can and should err on the side of caution (in favour of recusal) because it is often difficult openly to discuss predilections, unconscious preferences and how outsiders might perceive conduct.[119] The Full Court entirely distorted that notion by its acceptance that the observer would somehow accept, as a consequence of human frailty, the possibility that a judge might decide countless cases wrongly. An observer said to be fair-minded would almost certainly reject such reasoning. The observer might instead ask why such obviously subjective judicial opinions were sought to be justified as reasoning that others might think plausible.

Concluding observations

One consequence of the uncertain standard of *Ebner's* test for apprehended bias, noted earlier this article, is the possibility that the fair-minded and informed observer could conclude

116 See, for example, Nicola Berkovic, 'Court in Controversy', *Weekend Australian*, 6 March 2018, 11; Nicola Berkovic, 'Judge Has 47 Rulings Reversed in 3 Years', *Weekend Australian*, 6 March 2018, 7; Nicola Berkovic, 'Judge Mentored after Rulings Rejected', *The Australian*, 3 September 2019, 7; Hagar Cohen, 'Almost 99 Percent of Protection Visa Review Applications Fail when Heard by Controversial Judge New Figures Reveal', *ABC News*, 6 September 2019 <https://www.abc.net.au/news/2019-09-06/almost-99-per-cent-fail-when-heard-by-judge/11457114>. Those articles are just a selection of the media commentary on the relevant judge.

117 (2000) 205 CLR 337, 345 [8] (Gleeson CJ; McHugh, Gummow and Hayne JJ), 396 [182] (Callinan J agreeing on this point).

118 The frailty mentioned in Ebner was equated with human nature by Heydon, Kiefel and Bell JJ in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 331 [139].

119 *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 [132]–[133] (Edelman J).

that a decision-maker might accept that an official was not sufficiently impartial, while also accepting that the official might not be.[120] The same may be true for the criticisms made of the Full Federal Court decisions of *ALA15* and *CMU16* in this article. Perhaps both of those Full Court decisions are correct, but so also are the criticisms I have made of them. That possibility alone should provide pause for thought. The possible value of statistics is one reason for pause. The assertion of the Full Federal Court in *ALA15*, that statistics do not speak for themselves and instead require detailed explanation, is entirely plausible. But sometimes there may be another reason statistics do not speak. It is because they shout — loudly enough for it to be possible that an informed observer *might* consider that those figures necessarily say something. Sometimes statistics are so extreme, so one-sided, that their sheer weight alone *might* say something even in the absence of a detailed analysis of the cases that comprise the statistical set. The difficult question that follows is whether courts can even conceive of that possibility, let alone hear it.

Judicial cautions about the limits of the informed observer are regularly made, including the need to ensure that courts do not ascribe that fictional construct with 'a knowledge of the law and the judicial process which ordinary experience suggests is not the case'.[121] Despite those cautions, the courts regularly imbue the observer with surprising knowledge and acceptance of judicial practices. This judicial practice reveals a circularity in the supposed connection of the bias rule to public confidence in the legal system. We are told that, if the observer is satisfied of the impartiality of judges and other officials, he or she is more likely to accept the integrity of the wider legal system. At the same time, however, the observer is often attributed with specialist knowledge, and genial acceptance, of the processes and norms of that very system. This is anchoring of the most obvious kind. The uneven nature of the observer's quest for explanation is also curious. The Full Federal Court would have us believe the observer can only draw conclusions about statistics when accompanied by very detailed analysis. But the same observer has no such curiosity about legal processes and norms. These and other such contradictory assumptions made by the Full Federal Court should be questioned.

120 A paradox noted in *Melbourne City Investments Pty Ltd v UGL Ltd* [2017] VSCA 128 (at n 34 above).
121 *Webb v The Queen* (1994) 181 CLR 41, 52 (Mason CJ and McHugh J).