

requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation" (at 570, per Brennan, Deane and Gaudron JJ), it was recognised that "there is an ill-defined line beyond which the expression by a trial judge of preconceived views ... could threaten the appearance of impartial justice" (at 571). In the circumstances of that case, the Court found that the trial judge's comments were such as to give rise to a reasonable apprehension of bias in the mind of a lay observer. The High Court has also found ostensible bias in other circumstances, for example where the appearance of prejudice arose from the expression of views by a judge in a previous case (see eg *Livesey v New South Wales Bar Association* (1983) 151 CLR 288) (although the appearance of prejudice requires more than merely that a particular outcome of the litigation appears likely based on previous decisions of the judicial officer: *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302).

In *Locabail*, the defendant's case on bias in the application in *Timmins v Gormley* "turned" on statements made by the recorder in articles he had published (at 91). Indeed, the recorder was noted to have "written extensively" on personal injury topics, and to have "lectured, appeared on television and acted abroad as an expert on English personal injury law" (at 89).

The Court emphasised that "[it] is not inappropriate for a judge to write in [such] publications" and that there is in fact "a long-established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions" (at 91). However, the Court reminded that "[a]nyone writing in an area in which he [or she] sits judicially has to exercise considerable care not to express himself [or herself] in terms which indicate that he [or she] has preconceived views which are so firmly held that it may not be possible for him [or her] to try a case with an open mind" (at 91).

In the case before the Court, the recorder's publications showed "pronounced pro-

claimant anti-insurer views" (at 92). The Court warned that "[i]t is always inappropriate for a judge to use intemperate language about subjects on which he [or she] has adjudicated or will have to adjudicate" (at 91). While acknowledging that the application caused it "particular concern" (at 88) and was "a difficult and anxious application to resolve" (at 92), the Court concluded that "taking a broad commonsense approach" neither the Court nor a lay observer could have excluded the possibility in these circumstances that "a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant and against the defendant in resolving the factual issues between them" (at 92). Permission to appeal was granted, the defendant's appeal allowed and a retrial ordered.

Of course, as the Court recognised, whether or not the test of ostensible bias is met will always depend on the facts, in the particular circumstances of each case (at 77, 78). Indeed, the Court noted that at least ordinarily an objection could not be soundly based on a judge's extra-curricular utterances, whether in textbooks, lectures, speeches or articles (at 77). However, the decision of the Court emphasises that the test might nevertheless well be met "if on any question at issue in the proceedings before him [or her] the judge had expressed views ... in such extreme and unbalanced terms as to throw doubt on his [or her] ability to try the issue with an objective judicial mind" (at 78).

The decision in *Locabail* is a salutary reminder that in extra-curial papers and articles judges may need to be cautious to remain "circumspect" in the language they use and the tone in which they express themselves (at 91). As Justice Thomas in *Judicial Ethics in Australia* (2<sup>nd</sup> ed, LBC Information Services, Sydney, 1997 at 101) remarked (citing another author):

Judges are paid to be judges, not to do things which disqualify them from acting as judges.

**Dr Philip Jamieson is Adjunct Senior Lecturer at the Faculty of Law, Business and Arts, Northern Territory University. He is taking up an three month appointment as a Judicial Assistant in the English Court of Appeal later this year.**

## ALTERNATIVE LAW JOURNAL - NT EDITION

### Call for Papers

Following the success of the October 1999 edition of the *Alternative Law Journal*, the NT *Alternative Law Journal* Editorial Committee is committed to publishing a further NT Edition in October 2000.

The 1999 Edition was entitled *Territorial Limits* and papers included coverage of the issues of Mandatory Sentencing, Alternative Dispute Resolution and the recently invalidated 'sleeping in public' offence.

The NT Committee has decided on the theme "Who cares about Human Rights?" for the 2000 Edition. Papers need not be in line with the theme, although papers which relate to the Northern Territory are preferred.

The NT Committee is seeking expressions of interest from persons wishing to submit an article, brief, column, book review, mention or letter to the editor, under the chosen theme.

The NT Edition will be published in October, and the Committee is requesting that drafts be submitted no later than 30 June 2000.

If you are interested in submitting a paper, you should do three things:

1. Indicate your interest in contributing by forwarding an abstract (200 words max) to Fiona Hussin at the address below.
2. Ensure that you have a copy of "Guidelines for Authors" which is published by the *Alternative Law Journal* and is on their website at <http://www.austlii.edu.au/au/other/altlj/or> contact Fiona Hussin on 89466963 for a copy.
3. Submit the final draft to the NT Committee by 30 June 1999 at the following address:

Fiona Hussin, NT Editor  
*Alternative Law Journal*  
C/- NTU Faculty of Law  
CASUARINA NT 0909