

PUBLIC STATEMENTS BY JUDGES AND THE BIAS RULE

MATTHEW GROVES*

The rule against bias requires that judges approach their task with an open mind though not an empty one. The bias rule does not preclude judges from presiding simply because they have knowledge, experience or views relevant to a case. The question is always one of degree and context. This article examines how questions of bias may arise when judges make public statements outside their reasons for decisions, such as in media interviews, speeches or scholarly publications. It will argue that judges can and should make public statements but that the judicial function necessarily limits what judges can and should say in their public statements.

I INTRODUCTION

The rule against bias requires that judges and other decision-makers approach their task with an open mind. The rule will be infringed if a fair-minded and informed observer might apprehend that a judge or other decision-maker might not be impartial.¹ The bias rule is typically triggered by an interest, association or conduct, including statements, of a judge or other decision-maker — but the rule does not have a hair trigger. The mere fact that judges or other decision-makers have, at some time in their past, said or written something that touches on an issue or a party that comes before them will not alone create a reasonable apprehension of bias.² The question is always one of context and degree.

Most bias claims are based upon prior statements made by judges in their reasons for decisions.³ Those reasons are public statements in the sense that they are easily and widely accessible to parties, lawyers, scholars and the public. Reasons can create a reasonable apprehension of bias if they show a level of prejudgment,

* Law Faculty, Monash University.

1 See, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 437 [31] (Gummow ACJ, Hayne, Crennan and Bell JJ) (*Michael Wilson*). The application of this test involving two separate but related ‘mights’ creates a level of uncertainty but it is clear that ‘use of the word “might” in both limbs ... connotes the concept of a real chance or a realistic possibility, falling short of a probability’: *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, 526 [110] (Basten JA).

2 The important distinctions between claims of apprehended and actual bias are explained in Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 616–19.

3 Although judges normally provide reasons for their decisions, there is no absolute constitutional requirement they must always do so. In *Wainohu v New South Wales* (2011) 243 CLR 181, 215 [56] French CJ and Kiefel J explained that the duty of judges to provide reasons for their decisions ‘does not apply to every interlocutory decision, however minor’ and that the detail required in reasons ‘will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision’.

favour or disfavour by the judge toward relevant issues, witnesses or parties in another case to be decided by the judge. This article examines the effect of public statements made by judges in other instances, such as in public speeches or scholarly books and articles. The few cases which have considered the effect of such public statements suggest that judges must exercise great care when speaking or writing about issues relevant to their judicial duties.⁴ The article also examines a recent case where comments made by a magistrate to a journalist were held to create a reasonable apprehension of bias. It will be argued that the bias rule was applied in that case with a heavy hand and that the judge could have continued to preside in cases involving the complex social problems he spoke about. The article also considers whether the bias rule is applied with such rigour to the statements and writings of judges that it curtails the useful role judges might play in public debates beyond that played in the discharge of their judicial duties. First, however, it is useful to explain the key elements of the bias rule.

II PUBLIC REMARKS BY JUDGES AND THE RESTRAINTS OF JUDICIAL OFFICE

Judicial office confers unique constitutional authority and public prestige upon judges, but a judicial appointment also affects the place of a judge in society in other ways which are not necessarily positive. One is the extent to which a judge should be active in wider society. While it is clear that judges do not enter ‘some form of monastic seclusion’ upon their appointment,⁵ it is also clear that judges are subject to restraints by reason of their office. Those restraints include constitutional restrictions,⁶ and expected standards of behaviour and conventions.⁷ The Guide to Judicial Conduct⁸ (*Australian Guide*) explains that:

4 Although this article is primarily directed to statements by judges, several of the decisions examined are about tribunal members. Although the High Court has made clear that the requirements of the bias rule should be modified when applied to different forms of decision-makers, the cases concerning public statements by tribunal members provide useful guidance to inform wider general principles.

5 *Gascor v Ellicott* [1997] 1 VR 332, 351 (Ormiston JA).

6 Such as those which prevent judges from occupying positions which require them to exercise non-judicial functions. See, eg, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, where the High Court held that the performance by a federal judge of the duties of a commissioner — who was to devise a report to a government minister — required the judge to exercise non-judicial functions that were incompatible with the judicial role. The reasoning of the High Court greatly limited — perhaps even extinguished — the ability of federal judges to conduct commissions of inquiry and the like. The extent to which the *persona designata* doctrine provides an exception remains unsettled in the wake of *Wainohu v New South Wales* (2011) 243 CLR 181. Gummow, Hayne, Crennan and Bell JJ accepted that legislation could be constitutionally invalid if it conferred non-judicial functions upon judges *persona designata* if those functions were repugnant to or incompatible with the exercise of judicial power or the institutional integrity of the courts: at 229 [105]. That reasoning suggested that the *persona designata* doctrine would carry little weight when questions about the constitutional validity of legislation conferring non-judicial functions upon judges arose. French CJ and Kiefel J made that point expressly clear: at 211–12 [50].

7 Those standards and conventions are explained in James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009).

8 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007).

Judges are entitled to exercise the rights and freedoms available to all citizens. It is in the public interest that judges participate in the life and affairs of the community, so that they remain in touch with the community. On the other hand, appointment to judicial office brings with it some limitations on private and public conduct. By accepting an appointment, a judge agrees to accept those limitations.⁹

This and similar statements in the Australian Guide make clear that judges are subject to competing considerations that may be difficult to balance.¹⁰ On the one hand, judges ought to remain active within wider society, so that they are better able to understand the community whose values and interests are central to our legal system.¹¹ On the other hand, judges are not like most other citizens. They occupy a special position and exercise special powers. That position and its powers affect and inevitably limit what judges can and should do outside their judicial role.¹² One important consideration is the need for judges to maintain their impartiality and therefore avoid conduct that might threaten the public perception of their impartiality.¹³ Chief Justice Gleeson explained that the ‘respect and weight’ accorded to the views expressed by judges was given on an ‘understanding by the community that to be judicial is to be impartial.’ He continued:

Judges, as citizens, have a right of free speech, and there may be circumstances in which they have a duty to speak out against what they regard as injustice. But to deploy judicial authority in support of a cause risks undermining the foundation upon which such authority rests.¹⁴

The unique position of judges means that any public remarks they make may carry unusual status and influence. Chief Justice French also acknowledged this status when he recently referred to the ‘social capital attaching to the judicial office’, which appeared to influence the regular legislative proposals to confer

9 Ibid 6 [2.3].

10 Similar statements are made in Judiciary of England and Wales, *Guide to Judicial Conduct* (March 2013) Courts and Tribunals Judiciary, 13 [4.1], 15 [5.1] <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf> (*‘England and Wales Guide’*).

11 This may be one reason why judges regularly express concern that the public appear to think (wrongly, in the view of the judiciary) that judges are out of touch and step with the wider community. See, eg, Chief Justice Murray Gleeson, ‘Out of Touch or Out of Reach?’ (Speech delivered at the Judicial Conference of Australia Colloquium, Adelaide, 2 October 2004) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_02oct04.html>. See also the remarks of the Chief Justice of New South Wales, reproduced in Justice P W Young, ‘Current Issues: Laypeople and the Law’ (2012) 86 *Australian Law Journal* 147, 148–50.

12 That does not mean there is agreement even among judges about the nature and extent of any such limits. The *Australian Guide* states that questions about the standards applicable to judges can ‘give rise to different answers by different judges’: *Australian Guide*, above n 8, 2 [1.2].

13 A member of the Federal Court has explained that such considerations lead many judges to ‘decline investment opportunities available to others, and withdraw from political and social activities’, so that they are less likely to have relationships which might affect their impartiality: Justice Susan Kenny, ‘Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium’ (1999) 25 *Monash University Law Review* 209, 216.

14 Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 129. A similar view is taken in Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 110.

non-judicial functions upon judges.¹⁵ If governments may be cautioned against attempts to harness the particular standing of judges for a purpose that is not strictly within the judicial role, so should judges themselves. Judges should be careful to ensure that they do not inadvertently draw upon their constitutional or official authority to support remarks they might make when speaking in a personal capacity.

The statement in the *Australian Guide* that there ‘is no objection to judges writing for legal publications and identifying themselves by their title’¹⁶ suggests, rightly in my view, that judges should be more cautious when writing primarily for an audience outside the judiciary and legal profession. The *Australian Guide* acknowledges that, while judges can make a positive contribution to the public debate of some issues, any such contribution should not create confusion or misunderstanding about the position from which a judge speaks. It explains that it can be ‘desirable’ for judges to make an appropriate contribution to the wider debate about issues affecting the administration of justice because it might ‘contribute to the public’s understanding of the administration of justice and to public confidence in the judiciary’ and perhaps also ‘help to dispose of misunderstandings, and to correct false impressions’.¹⁷ At the same time, however, the *Australian Guide* cautions that judges should be careful ‘to avoid using the authority and status of the judicial office for purposes for which they were not conferred’.¹⁸ Professor Campbell similarly explained that:

When judges speak or write extra judicially they are clearly not exercising judicial powers, though their status as judges may be considered by some to have endowed judges’ extra judicial pronouncements with particular authority. Many members of the lay public may not appreciate that opinions expressed by judges extra judicially are not authoritative in the way that opinions expressed in court judgments usually are.¹⁹

The possibility that the status of public statements by judges may be easily misunderstood by the public is amplified if judges adopt the trappings of judicial office when speaking. An opinion piece written by a judge for a newspaper may, for example, be accompanied by a photograph of the judge wearing robes and sitting in chambers.²⁰ The use of the trappings of office by judges when they speak or write outside their official duties is directly relevant to the bias rule because the existence of an apprehension of bias is determined by the judgment of a fair-minded and informed observer.²¹ This fictional observer is clearly a member of

15 Chief Justice Robert French, ‘Essential and Defining Characteristics of Courts in an Age of Institutional Change’ (2013) 23 *Journal of Judicial Administration* 3, 7.

16 *Australian Guide*, above n 8, 24 [5.7].

17 *Ibid* 23 [5.6.1]. Thomas, above n 7, 110–12 acknowledges that there is considerable difference of opinion among judges as to whether it is appropriate that they speak in public, and upon what topics.

18 *Australian Guide*, above n 8, 23 [5.6.1].

19 Enid Campbell, ‘Judges’ Freedom of Speech’ (2002) 76 *Australian Law Journal* 499, 511.

20 This very problem occurred in *Hoekstra v HM Advocate* [No 2] (2000) JC 391 (‘*Hoekstra*’).

21 The key Australian case on this issue is *Webb v The Queen* (1994) 181 CLR 41, where the High Court held that bias claims should be determined by reference to the views of the fictional observer and not a judge’s own views. The House of Lords adopted a similar test in *Porter v Magill* [2002] 2 AC 357.

the public, not the bench or the bar, or one of the parties.²² If that observer could easily be confused about the status of extra-judicial remarks and whether the judge is likely to apply such reasoning in the discharge of his or her judicial duties, a reasonable apprehension of bias may be more likely to be drawn.²³ As the next section explains, an apprehension of bias is not lightly drawn but it can certainly be founded upon what judges say and do both within and outside their official duties.

There are many other reasons why judges arguably ought to exercise caution in their public statements. Some judges may be tempted to speak to the media or make other public statements, to address what many perceive as the unsatisfactory and often imbalanced portrayal of the law or the courts by the media.²⁴ A judge who speaks only once on a single issue may change little, but a judge who speaks frequently may cause more harm than good, not just by what is said but by the adverse perception that may be caused by an apparently attention-seeking judge. Thomas has cautioned that ‘the publicity-conscious judge, although perhaps intending to popularise the judiciary, may actually lower its prestige’.²⁵ He also suggests that ‘[u]nrestrained publicity-seeking may cause distrust of judicial work and may tend to bring the judiciary into disrepute’.²⁶

III APPREHENDED BIAS AND ITS POSSIBLE SOURCES

The principles governing apprehended bias were significantly revised in *Ebner v Official Trustee in Bankruptcy* (*Ebner*),²⁷ when the High Court overturned the longstanding principle of automatic disqualification for pecuniary interest.²⁸ The Court held that the effect of any possible source of bias, including a pecuniary interest, should be subject to a twofold test in which those alleging bias must identify the source of bias and explain how that issue might have its suggested effect. Gleeson CJ, McHugh, Gummow and Hayne JJ explained the two steps of that test as follows:

- 22 Though French CJ has noted that the use of the fictional observer ‘could never disguise the reality that it is the assessment of the court dealing with a claim of apparent bias that determines that claim’: *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306 [48].
- 23 There has been considerable criticism of the level of knowledge attributed to the fictional observer. See, eg, Matthew Groves, ‘The Imaginary Observer of the Bias Rule’ (2012) 19 *Australian Journal of Administrative Law* 188, 192–202; Abimbola A Olowofoyeku, ‘Bias and the Informed Observer: A Call for a Return to *Gough*’ (2009) 68 *Cambridge Law Journal* 388. Despite the tendency of judges to attribute an enormous range of knowledge to the observer, it is most unlikely that attribution would include the specific caution in the *Australian Guide* quoted at n 9 above.
- 24 Kenny, above n 13, 221–2.
- 25 Thomas, above n 7, 111.
- 26 *Ibid.* See also Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 134, who argues that ‘[j]udges are not celebrities’.
- 27 (2000) 205 CLR 337.
- 28 In fact, the High Court did not overturn the automatic disqualification rule but instead held the rule was wrongly adopted in earlier cases: *Ebner* (2000) 205 CLR 337, 355–7 (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing). Kirby J strongly rejected that reasoning as ‘an ahistorical reinterpretation’ of earlier authority: at 378 [132].

First, it requires the identification of what 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. The bare assertion that a judge (or juror) has an ‘interest’ in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.²⁹

One practical obstacle of this test is the requirement that those claiming bias must explain the ‘logical connection’ between the suggested source of bias and its supposed effect.³⁰ A party claiming bias cannot simply point to an alleged source of bias and presume that its effect is so obvious it can be inferred without any real explanation. A claim that does not clearly explain why a source of alleged bias may have the supposed effect is likely to be rejected as a ‘bare assertion’ of an interest.³¹ This second step of the *Ebner* test requires rigour because the courts have stressed that a claim of bias must be ‘firmly established’.³² It is not enough that the facts raised in support of the claim create ‘a vague sense of unease or disquiet’ in the fair-minded and informed observer whose judgment is used to determine bias claims.³³

The source of a bias claim may usually be located within the ‘four distinct, though sometimes overlapping, main categories’ of bias identified by Deane J in *Webb v The Queen*.³⁴ Those categories are interest, conduct, association and extraneous information.³⁵ The category of ‘conduct’ was explained by Deane J as ‘including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias’.³⁶ In most instances, those statements comprise the reasons given by a judge, in either earlier cases or interlocutory rulings prior to the hearing of a substantive case. Most such claims arise when a judge has previously determined

29 *Ebner* (2000) 205 CLR 337, 345 [8].

30 See, eg, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 447, where Gleeson CJ reiterated that ‘[w]hat is required is an identification, and application, of the principle upon which the challenge to the ... decision must rest’.

31 See, eg, *Smits v Roach* (2006) 227 CLR 423, where the High Court rejected a bias claim based upon the fact that the judge’s brother was a partner in a large firm being sued for negligence. The Court held that the claim did not articulate how and why the judge might not be impartial. The Court was influenced by the fact that the case would have little impact on the firm and none on the judge or his brother: at 443–4 [52]–[54] (Gleeson CJ, Heydon and Crennan JJ), 445 [58] (Gummow and Hayne JJ). The New South Wales Court of Appeal reached the opposite view: *Smits v Roach* (2004) 60 NSWLR 711.

32 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J).

33 *Jones v Australian Competition and Consumer Commission* (2002) 76 ALD 424, 441 (Weinberg J).

34 *Webb v The Queen* (1994) 181 CLR 41, 74.

35 These categories were described as ‘a convenient frame of reference’ in *Ebner* (2000) 205 CLR 337, 349 [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing). That statement leaves open the possibility that other categories may emerge.

36 *Webb v The Queen* (1994) 181 CLR 41, 74.

issues relevant to the same parties or witnesses, whether in a related proceeding,³⁷ or an entirely separate one.³⁸ In such cases, a bias claim is essentially one of prejudgment which asserts that the judge has expressed views on a party, witness or issue in sufficiently strong or final terms as to create a reasonable apprehension that the judge cannot approach the issues at hand with sufficient impartiality. The question is always one of context and degree.³⁹ A bias claim will not succeed simply on the basis that a judge has previously considered or ruled upon issues that may arise in, or be relevant to, a new case.⁴⁰ An apprehension of bias will usually be established if ‘the live and significant issue upon which a clear view has previously been expressed ... [is] the same or an inextricably interwoven issue or matter in both proceedings’,⁴¹ and there is a clear basis to accept that the judge may apply those previously expressed views to a case without due consideration of the facts.⁴² It follows that an apprehension of bias will not be established simply because a judge has previously made unfavourable rulings against a witness or party.⁴³

These central elements of the bias rule make no distinction about the form or venue in which prior statements are made by a judge. The previous statements made by a judge do not therefore become more or less relevant if they are made within

37 See, eg, *Michael Wilson* (2011) 244 CLR 427, where the High Court rejected a bias claim based upon findings a judge made on certain issues during interlocutory applications related to the substantive case between the parties that the judge later decided.

38 See, eg, *BHP Billiton Ltd v District Court of South Australia* (2012) 112 SASR 494, where it was held that a lower court judge who had decided a case of workplace negligence against an employer should not hear a similar case involving the same employer because the ‘serious and damaging findings’ he made against the employer in the earlier case concerned a ‘live and significant issue’ that must be decided in the later one: at 504 [39], 507 [44]. Similar reasoning led a majority of the High Court to accept that a judge’s strongly expressed adverse findings against a party in another case created a reasonable apprehension of bias that precluded him from hearing further cases involving that party in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

39 See, eg, *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, 2418 [3] where Lord Hope stated that the fair-minded and informed observer would consider the facts raised in support of a bias claim in their ‘overall social, political or geographical context’. See also *Michael v Western Australia* [2007] WASCA 100 (14 May 2007) [61] where Steytler P explained that the observer would approach a bias claim based upon remarks made by a judge by ‘a fair assessment of the judge’s conduct in the context of the whole of the trial’.

40 A point affirmed in *Michael Wilson* (2011) 244 CLR 427, 447 [68]–[69] (Gummow ACJ, Hayne, Crennan and Bell JJ). Hayne J has also noted that the principles governing bias presume that the relevant issue must be decided afresh in each case, which may not always be so: *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 564 [185].

41 *Westcoast Clothing Co Pty Ltd v Freehill Hollingdale and Page* [1999] VSC 24 (18 February 1999) [23] (Warren J).

42 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480 [25] (‘*Locabail*’); *NTD8 v Australian Crime Commission* (2008) 249 ALR 559, 572 [46] (Reeves J).

43 See, eg, *Knaggs v DPP (NSW)* (2007) 170 A Crim R 366, 387 [95] (New South Wales Court of Criminal Appeal).

reasons for a decision, during a hearing or entirely outside of legal proceedings.⁴⁴ It follows that the scholarly writing of a judge may create a reasonable apprehension of bias because it provides a form of prior statement which, if sufficiently relevant to a case before the judge, can demonstrate prejudice or favour upon issues or parties sufficient to create a reasonable apprehension of bias.

IV SCHOLARLY ARTICLES AS A SOURCE OF BIAS

The possibility that scholarship or other public statements by judges may create a reasonable apprehension of bias does not mean that statements made by judges outside their official duties are a bad thing or should necessarily be avoided. In many cases, those statements or writings can be one of the reasons a judge was appointed.⁴⁵ The considerable personal and professional experience that judges acquire before their appointment can include published works that discuss issues or principles which may be relevant to the parties and issues that come before them as judges. After their judicial appointment, such people might continue to present papers, publish scholarly work or make public comments about issues upon which they are well placed to speak. The few cases which have considered the effect of the scholarship of judges suggest that whether such material can support a claim of bias depends greatly on the tenor of any views a judge has expressed and the relevance of those expressed views to the case at hand. While those cases accept that judges can write scholarly articles about the law, not all judges support the practice. Lord Bingham suggested that it was difficult to draw a distinction between scholarly and other non-official writing by judges.⁴⁶

The English Court of Appeal considered the likely effect of judicial scholarship when it heard several joined claims of bias in *Locabail*.⁴⁷ That case provided a vehicle for the Court of Appeal to provide more general guidance about the growing number of bias claims which were made after the House of Lords expanded the scope of the rule of automatic disqualification in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]* (*Pinochet*

44 On the other hand, there are many cases in which courts have held that comments made by a judge which were intemperate or expressed with a strength that might trigger the bias rule did not create an apprehension of bias when considered in their wider context. See, eg. *Cong Tam Dang v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 29, 50 [97] ('strong and colourful language' from a tribunal member was held not to establish an apprehension of bias); *Barakat v Goritsas (No 2)* [2012] NSWCA 36 (9 March 2012) [53]–[54], [66] ('unseemly' and 'unfortunate' exchange between counsel and judge did not establish an apprehension of bias).

45 This is particularly so for those judges who were formerly academics, such as Justice Finn (of the Federal Court), Justice Neave (of the Court of Appeal of Victoria) and Baroness Hale (of the UK Supreme Court), all of whom were law professors prior to their judicial appointment.

46 Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) 75. Lord Bingham seemed unaware of the irony that he made this suggestion in one of his many scholarly papers, which were reproduced in a commercially published book. The same is true of Justice Hammond, who argues that 'there is still real force in the old adage that the less that is seen of a judge off the bench, the better': Hammond, above n 26, 134. That remark was made by the judge in a scholarly book.

47 [2000] QB 451.

[No 2]’).⁴⁸ The Court of Appeal made clear in *Locabail* that the rule of automatic disqualification was a limited one and that bias claims would not succeed if based upon certain personal qualities of a judge, such as gender, age, class, ethnic origin or sexual orientation.⁴⁹ The Court of Appeal was less absolute about the many social or professional activities that a judge might engage in prior to, or during, judicial appointment but reasoned that bias claims would not ‘ordinarily’ succeed if based upon matters such as membership of a sporting or charitable association, or ‘extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers)’.⁵⁰

The Court of Appeal made clear that this presumption could be displaced in an appropriate case when it upheld a claim which was based upon the scholarship of a part-time judge who specialised in personal injuries law. The judge had spoken and written extensively about the area but attention fixed on four of his articles which criticised the conduct of large insurance companies, lauded decisions favouring claimants and questioned whether a ‘change of culture’ in personal injury litigation was possible.⁵¹ The Court of Appeal accepted the four articles were only a small part of the judge’s scholarship but conceded they were ‘properly selected’ to support the contention that the judge was ‘a committed advocate of the cause of claimants generally.’⁵² The Court made clear that there was no general rule preventing judges from publishing scholarly works when it explained that such work was in fact often ‘of value’ and could ‘further rather than hinder the administration of justice’.⁵³ The Court of Appeal accepted:

There is 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.⁵⁴

But it also cautioned that:

Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he

48 [2000] 1 AC 119. In the first case, the House of Lords held that Mr Pinochet was eligible for extradition to face trial on charges arising from his time as military dictator of Chile: *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61. It then became known that Lord Hoffmann, who was a member of the majority, had a longstanding and close association with an organisation which intervened in that case. In *Pinochet [No 2]*, a differently constituted House of Lords accepted that the connection of Lord Hoffmann to the intervening party could support a bias claim on the ground of automatic disqualification rather than apprehended bias. The automatic disqualification rule was previously limited to pecuniary interests. The reasoning in *Pinochet [No 2]* did not make clear if or how further instances of automatic disqualification might arise, which almost certainly explains why many English litigants then sought to invite lower courts to recognise further extensions of the automatic disqualification rule.

49 [2000] QB 451, 480 [25]. The *Australian Guide* contains no equivalent list of the personal qualities of judges that might or might not normally create an apprehension of bias.

50 *Locabail* [2000] QB 451, 480 [25].

51 *Ibid* 492–4 [76]–[79].

52 *Ibid* 494 [80].

53 *Ibid* 495 [85].

54 *Ibid*.

has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind.⁵⁵

The Court of Appeal concluded, '[n]ot without misgiving', that the judge's publications could support an apprehension of bias because his 'pronounced pro-claimant anti-insurer' stance meant he could be thought to have 'leaned in favour of the claimant'.⁵⁶ That conclusion was notable for several reasons. One was the Court's acceptance that the adverse views the judge expressed about the tactics used by some insurers might be shared by others.⁵⁷ While an apprehension of bias can be founded upon statements or views that may be understandable or held by many others, the relevant question is not the degree to which the statements or views are widely accepted but the degree to which they are relevant to the issues at hand.⁵⁸ The Court of Appeal also suggested that the writings of the judge raised the same issue as *Vakauta v Kelly* ('*Vakauta*').⁵⁹ The bias issue arose in a slightly different way in each case. The judge in *Vakauta* complained about the evidence of particular witnesses called by an insurer in the case before him. The judge in *Locabail* complained in more general terms about the conduct of some insurers in some cases. In each case the court accepted that practitioners and judges who work mainly in one jurisdiction may develop, and sometimes express, strong views about the conduct and tactics of the people and parties they regularly encounter. But the success of the bias claims in *Vakauta* and *Locabail* also confirms that judges who hold such views can run afoul of the bias rule.

The subsequent Scottish case of *Hoekstra*⁶⁰ concerned commentaries by a judge about a new jurisdiction he had only just begun to preside in. The judge was a member of an appellate court considering the case of several defendants convicted of drug offences. The appeal raised several grounds based upon the human rights contained in the *European Convention on Human Rights*,⁶¹ which had (recently, at that time) become enforceable in British courts by the *Human Rights Act 1998* (UK) c 42.⁶² Just over a week after the appeal was dismissed, the first of several newspapers commentaries written by the judge was published.⁶³

55 Ibid.

56 Ibid 496 [89]. The Court of Appeal applied the prevailing English test that required a 'real danger' of an apprehension of bias: *R v Gough* [1993] AC 646. That approach was rejected by the High Court in favour of a test of a real apprehension of bias based upon the supposed views of a fair-minded and informed observer in *Webb v The Queen* (1994) 181 CLR 41. English law moved to a similar test in *Porter v Magill* [2002] 2 AC 357, 494. The conclusion reached in *Locabail* would almost certainly not be affected by this newer test for bias.

57 *Locabail* [2000] QB 451, 496 [89].

58 The Court of Appeal also made clear that the defendant insurer had not adopted the tactics the judge had complained about: *ibid* 496 [88]. If the judge had found the insurer had engaged in such conduct, the claim could have edged towards one of actual bias.

59 *Ibid*, 495–6 [86]–[87], citing *Vakauta v Kelly* (1989) 167 CLR 568.

60 (2000) JC 391.

61 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

62 Although the Scottish parliament was granted significant autonomous powers the same year that the *Human Rights Act 1998* (UK) was enacted, that statute was one of a handful that the Scottish Parliament was expressly denied any power to amend: *Scotland Act 1998* (UK) c 46, sch 4, pt 1 cl 1(1), (2)(f).

63 *Hoekstra* (2000) JC 391, 395 [7].

The commentaries were highly critical of the operation of European human rights principles in Scottish courts, which the judge described as a ‘Trojan horse at the gates of our courtrooms’. The judge was equally scathing of the ‘crackpots’ who might rely on those principles.⁶⁴

The appellate division of the High Court of Justiciary accepted that the judge’s commentaries established a reasonable apprehension that he might not approach cases involving human rights claims with the required impartiality.⁶⁵ The High Court of Justiciary gave ‘particular importance to the tone of the language and the impression’ which made clear that the judge’s ‘hostility to the operation of the *Convention* as part of our domestic law is both long-standing and deep-seated’.⁶⁶ It also held that the publication of those views so soon after the appeal decision was delivered would lead a fair-minded and informed observer to conclude that the judge held the views expressed in his commentaries when he decided the appeal.⁶⁷ The High Court held that the judge’s views were expressed in such clear and unfavourable terms that they could support a reasonable apprehension of bias, which precluded the judge from deciding the applicant’s remaining grounds of appeal.⁶⁸

The High Court of Justiciary made no direct comment on the judge’s decision to publish his views in a newspaper piece even though it is clear that publications in newspapers are quite different to those in scholarly journals. They are written in completely different styles and directed to completely different audiences. Many, if not most, readers of newspapers might not completely understand that distinction. Most readers of learned journals, particularly law journals, would approach and interpret the publications of judges with some knowledge of the difference between remarks made by judges in their reasons for decisions and elsewhere. Some of the differences between newspapers and journals are more practical but no less important. The moderate style of writing expected in scholarly journals and the longer production timelines would naturally discourage judges from using the inflammatory language used by the judge in *Hoekstra*. The production schedule of journals, which is much longer than the few days or weeks typical of newspapers, provides another useful caution for judges. The much slower schedule of journals would allow judges to read and reflect upon edited versions of their article, which would provide a useful time to review and revise any unwise remarks they may have made.

64 Ibid 395 [9], quoting Lord McCluskey, ‘The Law Laid Bare Part 1: Trojan Horse at the Gates of Our Courtrooms’, *Scotland on Sunday* (Edinburgh), 6 February 2000, 12.

65 That issue was determined in part by reference to some of the very European principles the judge had railed against in his newspaper articles: *ibid* 398 [15].

66 *Ibid* 401 [23].

67 *Ibid* 401 [22]. The close time between the deciding of the appeal and publication of the commentaries made it easy to overcome one practical obstacle in bias claims identified by Hayne J, which is the assumption that a judge will actually apply a previously expressed or held view to the case at hand: *Re Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 564 [185].

68 *Hoekstra* (2000) JC 391, 401 [22], [24]. The appeal raised many complex issues arising from the devolution of Scotland in the late 1990s, under which Scotland and Wales were granted political and legal autonomy from the United Kingdom. The appeal court had considered (and rejected) the grounds based on devolution laws but had not decided several other grounds of appeal.

In *Hoekstra* the High Court of Justiciary made clear that the outcome may have been ‘very different’ if the judge had written ‘an article in a legal journal drawing attention, in moderate language, to what he perceived to be the drawbacks of incorporating the *Convention* into our law’.⁶⁹ The Court accepted that judges had a right to comment upon or criticise the law and noted that they might do so either in their reasons for decision or elsewhere. The Court explained:

Judges, like other members of the public and other members of the legal profession, are entitled to criticise developments in our law, whether in the form of legislation or in the form of judicial decisions. Indeed criticism of particular legislative provisions or particular decisions is often to be found in judges’ opinions.⁷⁰

The Court continued:

But what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such language as to give rise to a legitimate apprehension that, when called upon in the course of their judicial duties to apply that particular branch of the law, they will not be able to do so impartially.⁷¹

The suggestion that judges are ‘entitled’ to discuss and criticise legal issues, but only in moderate terms, appears to strike a sensible balance between the right of judges to speak freely in public about issues and the inevitable constraints of the bias rule. The analogy the court sought to draw between criticisms judges might make of particular decisions or statutes in their decisions and elsewhere is more difficult to accept. When judges criticise cases, statutes or other issues that have arisen in a case in their reasons for decision, they are performing an essential part of their judicial function. While opinions may differ on how strongly judges should criticise statutes or other decisions in their reasons, no-one would surely question the right — or even duty — of judges who think that a case or statute is ill-advised — even wrong — to explain that conclusion in clear terms. Strong language may sometimes be required. Different considerations arise when judges speak elsewhere. All judges are required to decide the issues before them. No judge is required to make speeches or write scholarly articles and books. If judges choose to speak or write when they are not discharging their judicial duties, they are doing something completely different from explaining their judicial actions — whether making oral remarks during a hearing or providing written reasons for a decision — despite any superficial similarity the two activities may have. It follows that judges should be much more circumspect if they choose to criticise or praise any aspect of law outside of their reasons for decision.

Australian courts have accepted that judicial scholarship expressed in moderate language will not preclude its author from presiding over issues discussed in that

69 Ibid 401 [23]. Such an article could have fallen within the scope of the public discussion of issues by judges, which the *Australian Guide* suggests can be acceptable: *Australian Guide* above n 8, 23 [5.61], 24 [5.7].

70 Ibid 401 [23].

71 Ibid.

scholarship. An example is *Newcastle City Council v Lindsay*,⁷² where a judge had written commentary for a commercial publication about the liability of public authorities for accidents on highways and public paths. The judge suggested that the New South Wales Court of Appeal appeared to be ‘firming ... against’ such claims, and that recent decisions from that court were difficult to reconcile with those of the High Court.⁷³ A bias claim was later made against the judge while she presided over a case against a local council, which involved allegations of negligence in the area the judge had written about. The judge reasoned that her publications showed that she did not ‘have an empty mind’, but did not indicate she did ‘not have an open mind’.⁷⁴ The Court of Appeal held that the judge had correctly rejected the bias claim because her articles expressed only ‘mild criticism’ of recent appellate decisions, had not used language that was ‘vehemently or trenchantly expressed’ and did not express a view favourable to either class of party in such cases.⁷⁵ The moderate language and balanced analysis of the trial judge led the Court of Appeal to conclude that her commentary did not even ‘come close’ to demonstrating the required degree of prejudgment to establish an apprehension of bias.⁷⁶

Far more controversial issues were discussed in the scholarship at the centre of *MZWCL v Minister for Immigration and Multicultural and Indigenous Affairs*.⁷⁷ In that case a part-time member of the Refugee Review Tribunal (‘RRT’) who was an academic had published a journal article, arguing that torture could be justified in the limited case where it might yield ‘information to avert a grave risk of loss of life’.⁷⁸ The applicant sought refugee status based in part on claims that he had been and might again be tortured if returned to his country of origin. After his claim was refused by the academic, the applicant claimed that the article could support a claim of bias, essentially because it showed that the academic had views upon torture that made it impossible for him to consider claims involving torture with the required impartiality. Finn J accepted that the argument made in the article ‘may itself engender a sense of unease in the fair minded observer’ but held that it did not create a reasonable apprehension of bias because the author advocated a position on a relatively narrow issue.⁷⁹ Importantly, the article did not sanction the use of torture in general, or doubt that torture was a gross violation of fundamental rights.⁸⁰

Finn J also suggested that the publication of controversial scholarly articles that were ‘likely to attract criticism and condemnation’ was not itself sufficient to

72 [2004] NSWCA 198 (22 June 2004).

73 Ibid [22], [25] (Tobias JA, Giles JA and McClellan AJA agreeing).

74 Ibid [27], quoting from the reasons of the trial judge. The distinction between an open and empty mind was made by Mason P in *Barbosa v Di Meglio* [1999] NSWCA 307 (31 August 1999) [7]–[9].

75 *Newcastle City Council v Lindsay* [2004] NSWCA 198 (22 June 2004) [36]–[37] (Tobias JA, Giles JA and McClellan AJA agreeing).

76 Ibid [38].

77 [2006] FCA 635 (20 July 2006).

78 This description of the core argument of the article was given by Finn J: *ibid* [38].

79 Ibid [47].

80 Ibid.

attract the bias rule.⁸¹ According to this view, judges or other decision-makers may write about controversial issues or propose controversial ideas so long as they do so in a way that is sufficiently measured to make clear that they hold an open mind on key issues, particularly those on which they may have offered a personal view. But just because judges and other decision-makers can write or speak about such issues does not mean that they should. Finn J suggested that the bias rule ‘curtails freedom of speech, but only measuredly so for its own purposes’.⁸² Professor Campbell similarly remarked that the requirements of the bias rule restrict the ability of judges to speak freely in public, at least to the extent that the issues judges might wish to speak about were relevant to the issues that arise in cases before them. According to this view, judges are more able to comment on wider issues relevant to the judiciary, courts or legal system but should be cautious when commenting upon issues they might be required to consider in the performance of their judicial duties, such as the desirability of certain laws, the soundness of particular decisions or a certain line of reasoning.⁸³ The *Australian Guide* advocates a similar approach.⁸⁴ Such cautions may simply identify the issues most likely to come before a judge, which, for reasons of common sense, judges would be wise to avoid.

The level of acceptance of extra-judicial writing in *Hoekstra* may reflect the British tradition by which judges have taken a more active role in public life and debate. British judges frequently speak on quite controversial issues and do so in strong terms. A recent example is the speech by Sir John Laws — who was at the time the longest serving member of the English Court of Appeal — which questioned whether national or European courts should have the final say on many issues concerning human rights.⁸⁵ Those statements were all the more remarkable because the extent to which British rather than European courts or agencies should decide such issues is currently the subject of intense political debate in Britain. It may even be the subject of a referendum in the near future.⁸⁶

Many Australians might be surprised, perhaps even shocked, if a judge spoke openly about such a controversial issue. The approach of Australian judges when speaking on issues which involve a somewhat similar level of controversy to those discussed by Sir John Laws was well illustrated by Chief Justice Robert French when he spoke to an American audience about the possible adoption of a Bill or Charter of Rights in Australia. His Honour spoke after there had been a

81 Ibid.

82 Ibid.

83 Campbell, above n 19, 502–4.

84 *Australian Guide*, above n 8, 23 [5.61], 24 [5.7].

85 Extracts of the speech are reported in Joshua Rozenberg, ‘Laying Down the Laws: Human Rights Court Shouldn’t Have Last Word’, *The Guardian* (online), 28 November 2013 <<http://www.theguardian.com/law/2013/nov/27/laws-strasbourg-human-rights-convention>>.

86 The Conservative Party, which is the larger member of the current coalition government in Britain, has a publicly stated policy favouring a referendum on whether Britain should remain a member of the European Union: Conservative Party, *Let Britain Decide*, Let Britain Decide <<http://www.letbritaindecide.com>>. This policy is clearly motivated by dissatisfaction within the Conservative Party about many issues, including the rulings of European courts and the wider legal relationship between European and British courts which Sir John Laws spoke about.

federal inquiry on the issue, which was under consideration by the government of the day.⁸⁷ The Chief Justice pointedly declined to comment on the desirability or content of any Bill of Rights, stating that such issues were ‘policy questions to be resolved ultimately in the national parliament’.⁸⁸

The different approaches of Chief Justice Robert French and Sir John Laws are each quite understandable within their particular national context. Australian judges are strongly influenced by constitutional principles which divide the judicial and executive functions in relatively sharp terms. Those constitutional divisions are more fluid in Britain. For example, judicial members of the House of Lords traditionally sat in both the final domestic appellate court but also as members of the upper house of Parliament.⁸⁹ The different constitutional position of British judges appears to have made them more comfortable making public statements which are not necessarily controversial in a political sense, but would clearly strike Australian observers as novel. Two useful examples can be drawn from the scholarly writings of Sir John Laws. The first was the provocative series of articles his Honour wrote about so-called common law constitutionalism, which essentially argues that the courts can properly invoke fundamental or deeply rooted common law values in their judicial review jurisdiction.⁹⁰ The principles invoked by common law constitutionalism may often appear to be interpretative but they impose significant constraints upon legislative and executive power. Sir John Laws clearly believed in the legal validity and moral desirability of common law constitutionalism but appeared to see no difficulty in a sitting judge advocating what could easily be interpreted by others as a claim to great power by the courts.⁹¹ A more prosaic instance of his Honour’s writings arose in relation to the doctrine of legitimate expectations in public law, which in England has increasingly become a means by which government agencies and officials can be held to a policy, statement or representation.⁹² Laws LJ attempted

87 National Human Rights Consultation Committee, ‘National Human Rights Consultation’ (Report, 30 September 2009) <<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Document/s/NHRCReport.pdf>>. The Report is widely referred to as the Brennan Report, in acknowledgement of Father Frank Brennan who was chair of the National Human Rights Consultation Committee.

88 Chief Justice Robert French, ‘Protecting Human Rights Without a Bill of Rights’ (Speech delivered at the John Marshall Law School, University of Chicago, 26 January 2010) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>>.

89 Mark Elliott and Robert Thomas, *Public Law* (Oxford University Press, 2011) 251–5.

90 Sir John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights?’ [1993] *Public Law* 59; Sir John Laws, ‘Judicial Remedies and the Constitution’ (1994) 57 *Modern Law Review* 213; Sir John Laws, ‘Law and Democracy’ [1995] *Public Law* 72; Sir John Laws, ‘The Constitution: Morals and Rights’ [1996] *Public Law* 622.

91 These and other criticisms of the position advocated by Sir John Laws are made in J A G Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 *Modern Law Review* 159 and Thomas Poole, ‘Questioning Common Law Constitutionalism’ (2005) 25 *Legal Studies* 142.

92 This principle can be traced to *R v North and East Devon Health Authority: Ex parte Coughlan* [2001] QB 213. That case allows a substantive rather than procedural approach to legitimate expectations in public law, which appears to be precluded in Australia on constitutional grounds: Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470; Greg Weeks, ‘Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 224, 241–6.

to construct a different and more coherent approach to legitimate expectations in one of his decisions.⁹³ What might otherwise have been an unsurprising attempt by a judge to refine a novel doctrine was remarkable because Laws LJ adopted an argument in his judgment that was strikingly similar to one he had made in a scholarly article a few years earlier.⁹⁴ The similarity between the reasoning used by Laws LJ in his article and subsequent judgment suggests that his Honour may have used the former as a tacit form of draft for the latter.

V CAN SCHOLARLY ARTICLES WRITTEN AFTER A DECISION FOUND A BIAS CLAIM?

In most instances where the public statement of a judge is claimed as the basis for an apprehension of bias, the statement was made before the proceeding in which bias is claimed. The logic of such claims is that what judges have previously said can provide a sound basis for what they might now decide. But what if that order is reversed? What if a judge delivers a decision and then makes a public statement that might raise an apprehension of bias? Two recent decisions of the High Court involving judicial decisions suggest that a later statement might sometimes be able to support a bias claim, though each case also made clear that such cases would be exceptional.⁹⁵

In *British American Tobacco Australia Services Ltd v Laurie*,⁹⁶ all members of the High Court held that the final reasons of a judge were not useful to deciding whether the judge was biased in his determination of bias claims made in earlier parts of the proceedings.⁹⁷ At the same time, however, none of the various judgments suggested that later statements of a judge could never illuminate questions of bias.⁹⁸ In *Michael Wilson & Partners Ltd v Nicholls*⁹⁹ the High Court

93 *R v Secretary of State for Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115, 1129–31. The theoretical problems in this and other English cases of legitimate expectations are considered in Mark Elliott, ‘Legitimate Expectation, Consistency and Abuse of Power: The *Rashid* Case’ (2005) 10 *Judicial Review* 281.

94 Sir John Laws, ‘Public Law and Employment Law: Abuse of Power’ [1997] *Public Law* 455. The attempt by Laws LJ to fashion a new foundation for legitimate expectations was all the more remarkable because the claim could have been dismissed on the basis that the promises relied upon were made by a public official while in opposition rather than government. Legitimate expectations have traditionally attached to the promises, policies and statements of bureaucrats or government ministers: *R v Secretary of State for Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115, 1125 (Peter Gibson LJ), 1134 (Sedley LJ).

95 This aspect of the two cases discussed here is examined in Aronson and Groves, above n 2, 624–6.

96 (2011) 242 CLR 283.

97 The same conclusion is implicit in *Vakauta* (1989) 167 CLR 568, which was discussed above. The successful bias claim in that case was founded upon the strongly unfavourable terms in which the judge spoke about the witnesses for one party in his reasons for decision.

98 Heydon, Kiefel and Bell JJ held that the final reasons of the judge provided ‘nothing of moment to the material’ upon which a bias claim would be decided but did not suggest that would always be so: *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 331 [138]. French CJ (at 309 [52]) and Gummow J (at 316 [83]) also rejected any use of the final reasons of the judge but did not endorse a general rule against the use of later statements to determine questions of bias.

99 (2011) 244 CLR 427.

also rejected a bias claim made against a judge who had decided and refused several bias claims made by a party, before the judge proceeded to rule against that party on the substantive issue. The High Court overturned a lower court's decision that the judge's final reasons tended to 'enhance, rather than diminish, the apprehension' of bias that had arisen,¹⁰⁰ essentially because that reasoning prejudged the issue of prejudgement by assuming its existence.¹⁰¹

If the later decisions of a judge may provide the basis for a bias claim, it is surely possible that statements by judges outside their judicial duties may also do so. Whether judges should subsequently discuss their decisions is another matter. The *Australian Guide* states that judges should not engage in public debate about their decisions, even to clarify any possible ambiguity.¹⁰² Chief Justice Murray Gleeson explained that this restriction is because judges 'give their reasons for their decisions — once. If it were otherwise their impartiality would be compromised'.¹⁰³ In my view, such cautions should not be seen as absolute. It can sometimes be entirely appropriate for judges to discuss their own decisions. Successive Chief Justices of the High Court of Australia have, for example, regularly referred to decisions in which they have participated when talking about the work of the High Court and its constitutional function, or issues affecting the courts and legal profession. No one would question that the public discussion by very senior judges of their own work can be useful, particularly when those judges speak about the place and work of their court in our system of government.¹⁰⁴

A controversial decision of the Supreme Court of Canada illustrates that judges may discuss their more controversial decisions, perhaps seemingly to justify those decisions, but do so in an entirely proper way. In the case of *RDS v R*,¹⁰⁵ the Supreme Court of Canada upheld the acquittal by the only black judge in Ontario of a black juvenile defendant accused of assaulting a white police officer. The only evidence before the judge was the conflicting accounts of the incident given by the defendant and the police officer. The judge alluded in her reasons to the rhetorical question asked by the prosecutor — why would the police officer lie? The judge referred to her own experience of racial tension in the area the incident happened and explained that, sometimes, some police officers overreacted and lied about such behaviour in their evidence. The judge did not find or suggest

100 *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177, 201 [94] (Basten JA, Young JA and Lindgren AJA agreeing on this point).

101 *Michael Wilson* (2011) 244 CLR 427, 446–8 [67]–[73] (Gummow ACJ, Hayne, Crennan and Bell JJ). Their Honours also held that this approach blurred the difference between actual and apprehended bias by edging towards the erroneous view that because one party had lost the judge must have been biased: at 446–7 [67].

102 *Australian Guide*, above n 8, 24 [5.6.2].

103 Gleeson, above n 14, 121.

104 There are several instances in which one or more judges of a court have agreed to participate in television interviews or entire programs, with a view to providing information about the nature of their role and that of the courts more generally. See, eg, the examples mentioned in H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 289.

105 [1997] 3 SCR 484.

that the police officer had in fact lied. She instead concluded that the possibility provided reasonable doubt, which required an acquittal.¹⁰⁶

The Supreme Court was sharply divided on whether the trial judge could and should have drawn from her experience. The dissenting justices held that the judge had mistakenly used her personal experience as a substitute for evidence.¹⁰⁷ The majority justices held that the personal experience of the judge was a useful and permissible influence because ‘judges must rely on their background knowledge in fulfilling their adjudicative function’.¹⁰⁸ The majority also reasoned that judges could ‘be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place’.¹⁰⁹ L’Heureux-Dubé and McLachlin JJ explained this conclusion in part by reference to material published by the Canadian Judicial Council, which suggested that judges should not ignore the sum of experience they had. That publication added that:

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.¹¹⁰

The approach advocated by L’Heureux-Dubé and McLachlin JJ has been described as one of ‘contextual judging’.¹¹¹ It generated great controversy because of its assumption that judges ought to place weight on their own personal experiences. Justice L’Heureux-Dubé discussed contextual judging in a speech about the judicial method which argued, among other things, that judges should remain impartial but not necessarily neutral.¹¹² She argued that judges should be unafraid to identify and address inequality in society.¹¹³ She cited *RDS v R* as an example and explained that her own judgement found the trial judge in that case

106 The trial was conducted by the judge alone.

107 *RDS v R* [1997] 3 SCR 484, 496–8 [10]–[14] (Lamer CJ, Sopinka and Major JJ). Their Honours also found the judge had showed bias by suggesting that white police officers were untrustworthy and racist. They also suggested that the trial judge erred by using her perception of general social norms to draw inferences about what had happened in the case at hand. The majority held that the experience of a judge would be a relevant influence so as long they ‘are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence’: at 501 [29].

108 Ibid 505 [39] (L’Heureux-Dubé and McLachlin JJ, Gonthier J agreeing).

109 Ibid.

110 Ibid 504 [35], quoting Canadian Judicial Council, *Commentaries on Judicial Conduct* (Éditions Yvon Blais, 1991) 12.

111 A phrase taken from Richard F Devlin, ‘We Can’t Go on Together With Suspicious Minds: Judicial Bias and Racialized Perspective in *R v RDS*’ (1995) 18 *Dalhousie Law Journal* 408. Devlin used the phrase ‘contextual judicial method’ to describe the approach of the trial judge: at 413.

112 Justice Claire L’Heureux-Dubé, ‘Reflections on Judicial Independence, Impartiality and the Foundations of Equality’ in Mona A Rishmawi (ed), *CIJL Yearbook: The Judiciary in a Globalized World* (Centre for the Independence of Judges and Lawyers, 1999) 95.

113 A different view of the judicial function is taken by a member of a different court of final appeal in Barak, above n 14, 105–8. Barak argues that the extent to which judges can legitimately take account of their personal views and experience is quite limited. He also states that ‘[d]iverse judges reflect — but do not represent — the different opinions that exist in their societies’: at xv.

had ‘properly taken into account the reality of the inequitable social context in which the alleged offence was committed’.¹¹⁴

The speech of Justice L’Heureux-Dubé could be interpreted as some form of defence of her own judgment, particularly as she did not mention the judgments of the other members of the majority or the dissenting judgements. But the speech could also be viewed as a provocative analysis of judicial method, even if fellow judges and other observers might disagree with much of the speech.¹¹⁵ In my view, there is considerable force in the suggestion that a public speech or scholarly article can be an appropriate forum for senior judges to explain their views on the nature of their function, particularly if the judge discusses ideas that transcend individual cases. It is difficult to criticise judges who discuss such issues at the level of broad principle and draw upon their own decisions as examples. The less attractive alternative is that senior judges should never speak publicly about the judicial method, or do so without any reference to particular cases, or consider (and perhaps criticise) only the decisions of others. If so, the fine line between judges referring to their own decisions in a favourable manner and actually defending those decisions can easily blur.

VI MEDIA COMMENT AS A SOURCE OF BIAS

The cases examined so far in this article have all concerned comments made directly by judges. The recent case of *Gaudie v Local Court of New South Wales*¹¹⁶ illustrates how the reporting by others of selected remarks by a judge may also provide the basis for a successful bias claim, though it is first useful to note the evolution of the conventions surrounding judicial statements to the media. The guiding principle in this area was long one of judicial silence, which can be traced to a statement by Lord Kilmuir. In his role as Lord Chancellor in 1955, Lord Kilmuir firmly declined a request from the BBC to participate in a series of radio broadcasts about great judges in English history. Lord Kilmuir replied to the BBC by letter which explained that the ‘overriding consideration’ of judges was to remain ‘insulated from the controversies of the day’.¹¹⁷ He suggested that any public comment by judges outside their official duties could only lead to their criticism. The only proper course, Lord Kilmuir suggested, was to accept ‘that as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or to appear on television’.¹¹⁸ This reasoning crystallised a longstanding reluctance of English judges to make statements to the media but it also exerted a strong influence on judicial attitudes in subsequent decades. Judges were

114 L’Heureux-Dubé, above n 112, 105.

115 A strong contrary argument is made in Justice D A Ipp, ‘Judicial Impartiality and Judicial Neutrality: Is There a Difference?’ (2000) 19 *Australian Bar Review* 212, 221–2.

116 [2013] NSWSC 1425 (26 September 2013) (*‘Gaudie’*).

117 Lord Kilmuir’s letter is reproduced in AWB, ‘Judges and the Media — The Kilmuir Rules’ [1986] *Public Law* 383, 385.

118 *Ibid.*

unwilling to speak directly to reporters or the media more generally and regularly invoked the ‘Kilmuir rules’ in support of that attitude.¹¹⁹

The rule was slowly eroded, even if judges remained reluctant to speak with the media.¹²⁰ One reason for this change of attitude was the increasing number of sensational media reports about courts and judges. Many judges may have felt the tide of such attacks could be stemmed by judges speaking with the media, to address the imbalance of often unfavourable and inaccurate reporting. But direct responses by individual judges remained rare even as the Kilmuir rules began to slowly lose their force, perhaps because many courts began to employ media advisers and took many other steps to provide greater information about their work to the media and the public.¹²¹ While such measures might largely remove the need for individual judges to respond to the media, *Gaudie* illustrates that unusual cases may still arise.

The unusual facts of *Gaudie* were as follows. The plaintiff was an Aboriginal Australian facing a charge of breaching an apprehended violence order. He claimed that the magistrate before whom he was to appear made statements to a reporter — which were reproduced as part of several stories in a national newspaper — which created a reasonable apprehension of bias because of the views they revealed about the problem of violence — especially domestic violence — in indigenous communities. The magistrate had initially not spoken to the reporter, but instead wrote to the newspaper after it published several stories about the sentencing of indigenous offenders in rural and remote areas around Dubbo. Those reports included several quotes from a particular solicitor who worked with the Aboriginal Legal Service (ALS), which were highly critical of the ‘errant, idiosyncratic and overly harsh sentencing patterns’ of ‘certain magistrates’ who were ‘regularly imposing extraordinarily harsh sentences on Aboriginal Australian youth that simply cannot be justified under the state sentencing law’.¹²²

Although these and other serious allegations were made by an experienced solicitor of the ALS, the stories in which they appeared did not explain whether the sentences complained of had been appealed, or why the conduct of magistrates who were alleged to habitually impose harsh sentences was not raised through

119 It is important to note that the Kilmuir rules do not purport to prohibit judges from making public or media comment, they simply counsel strongly against it. That meant English judges long had the freedom to speak in public, though one English scholar notes that this freedom of individual judges had ‘not prevented them from being chastised by the Lord Chancellor when he considers they have exercised their discretion unwisely’: Diana Woodhouse, *The Office of Lord Chancellor* (Hart Publishing, 2001) 34.

120 See, eg, Sir Daryl Dawson, ‘Judges and the Media’ (1987) 10 *University of New South Wales Law Journal* 17, 17 where the author explained that he declined to be interviewed by the ABC and had always refused such requests but ‘did so less automatically’ than on previous occasions.

121 See, eg, the information provided by the Communications Office of Supreme Court of Victoria, at: <<http://www.supremecourt.vic.gov.au/home/contact+us/media+centre/>>. That link provides guidance on activities of the court and various issues of interest to the media. It also contains copies of media releases by the Supreme Court. The issue by courts of media releases is now common and illustrates how courts have come to accept that they ought to regularly inform the public and media of their work.

122 *Gaudie* [2013] NSWSC 1425 (26 September 2013), [41]–[42].

appropriate official channels rather than media interviews.¹²³ The magistrate may have been mindful of such issues when he wrote to the newspaper, complaining that the stories were one-sided and simplified very complex social and legal issues.¹²⁴ The magistrate's letter was not published but he was contacted by the journalist who wrote the stories which provoked his letter. The two spoke at length and the magistrate explained many of the problems he and his colleagues faced when dealing with domestic violence and other offences in indigenous communities and the wider problems in the criminal justice system. When the journalist complained she had long found it difficult to obtain public comment by judicial officers on such issues, the magistrate explained that most judges were advised not to speak publicly and that he had essentially sidestepped officials within the court — such as the court's media advisers — who normally advised individual magistrates against providing any public comment to the media.¹²⁵ The journalist and the magistrate then discussed what the former described as the 'campaign' of the ALS.¹²⁶ The journalist also asked how the magistrate felt about the comments of the ALS solicitor and the ethical implications of those comments.¹²⁷ The magistrate suggested that the ALS had adopted the 'Bourke defence', by which the ALS advised accused people to plead not guilty for tactical reasons and pressed the police to prove every minute point of their case, and so forfeiting the discount normally provided for early pleas of guilty.¹²⁸

A selection of the comments made by the magistrate was published a few days later in a newspaper article and in a further one published ten days later. Each article was published under somewhat sensational headlines, though it was clear that the selected comments of the magistrate were reproduced accurately.¹²⁹ The magistrate was quoted about the 'Bourke defence' and as saying that '[t]he ALS had "declared war" on the magistracy in the northwest' of New South Wales.¹³⁰ Johnson J concluded that the comments of the magistrate were such that he had become 'a strong public advocate in the media, commenting on a wide range of topics extending beyond the published articles'.¹³¹ His Honour reasoned that the particular issues the magistrate commented upon and the tenor of his remarks were such that:

123 His Honour pointedly declined to comment on the correctness of the statements made by the ALS solicitor but remarked that 'the making of public statements by persons associated with the ALS was likely to give rise to controversy involving the administration of justice. Nothing said in this judgment should be taken as approval or acceptance of the statements made by the ALS': *ibid* [210].

124 The magistrate's letter, which explains the difficult and often tragic circumstances of sentencing decisions for indigenous offenders in rural and remote New South Wales, is reproduced in the reasons: *ibid* [43].

125 *Ibid* [45]–[55].

126 *Ibid* [56].

127 *Ibid* [60]–[61].

128 *Ibid* [63].

129 The relevant articles were: Natasha Robinson, 'Kids Prefer Jail to Abuse at Home, Says Magistrate', *The Australian* (Sydney), 8 January 2013, 1; Natasha Robinson, 'Magistrate Attacks ALS over Rash of Not Guilty Pleas', *The Australian* (Sydney), 18 January 2013, 25.

130 *Gaudie* [2013] NSWSC 1425 (26 September 2013), [69]–[70], quoting Natasha Robinson, 'Magistrate Attacks ALS over Rash of Not Guilty Pleas', *The Australian* (Sydney), 18 January 2013, 25.

131 *Ibid* [211].

The bystander would likely form the view that the Magistrate moved from a more guarded approach as the interview commenced to a less guarded one as the interview continued, involving the expression of strong views concerning the ALS.¹³²

He continued:

Had the Magistrate's comments been confined to general comments about domestic violence, the bystander would not likely conclude in favour of the Plaintiff. Judicial statements in sentencing remarks concerning domestic violence in Aboriginal communities bear similarities to the comments made by the Magistrate, and the material contained in the Equality Before the Law Bench Book would also be pertinent to this issue. The fact that the Magistrate made his comments in a letter and an interview, and not in a court judgment, would not be an especially significant factor in the mind of the bystander.¹³³

There are several notable features of this reasoning. First, Johnson J held that the informed observer would not draw a significant distinction between a judge's reasons for decisions and other public statements of a judge. The important point is therefore not where a judge speaks but what is said. The most crucial issues for the bias rule are whether and to what extent judges' remarks suggest that they have essentially 'made up their mind' about a person or an issue. When judges appear to have made up their mind, or expressed themselves in terms so firm that it would place an unfair burden upon a party who seeks to argue to the contrary, the precise source of that problem is of little importance. Secondly, the apparent ability of the journalist to coax responses from the magistrate about increasingly controversial issues as their interview proceeded highlights the obvious dangers for judges who communicate with the media by way of an interview rather than letter. A letter is a relatively controlled form of communication, in which its author determines precisely what is said and what is not.¹³⁴ An interview is inevitably a more dynamic process which gives the journalist much more control over the issues that are discussed. Judges who agree to be interviewed not only enter a less controlled environment, they enter the natural terrain of journalists. Judges who agree to be interviewed should therefore expect that the interview is more likely to cover what the journalist wants to hear, rather than what the judge wishes to say.¹³⁵

132 Ibid [182].

133 Ibid [183].

134 The Chief Justice of Canada noted that courtrooms are, by contrast, 'heavily regulated spaces' in which judges exercise great control: Chief Justice Beverley McLachlin, 'The Relationship Between the Courts and the News Media' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 24, 31.

135 This is not intended to criticise the journalist. In fact, the many passages of the interview which were reproduced by Johnson J suggest the journalist was very skilful. She spoke about less controversial issues and appeared to make the magistrate feel comfortable, but then moved deftly to much more controversial issues which the apparently relaxed magistrate was (perhaps unwittingly) more willing to speak about. Much of the interview was an admirable illustration of the effective use of leading questions.

Although Johnson J did not suggest that judges could or should never give interviews to the media, his Honour made clear that judges who were tempted to do so in response to apparent criticisms of their decisions or court would be wise to follow the *Australian Guide*. That document suggests that judges should not enter any public debate about their decisions, even to correct any perceived uncertainty or ambiguity about decisions. The *Australian Guide* explains that:

On occasions decisions of a court may attract unfair, inaccurate or ill-informed comment. Many judges consider that, according to the circumstances, the court should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such response should be dealt with by the Chief Justice or other head of the jurisdiction.¹³⁶

This approach is notable for its absence of any reference to the Attorney-General. That may reflect the apparent decline of Attorneys-General as the natural defenders of the judiciary. One Attorney-General of the Commonwealth asserted that the elected and political role occupied by Attorneys-General is such that they cannot be expected to maintain that role and that this function now falls to the judiciary itself.¹³⁷ While the weight of scholarly opinion may suggest otherwise,¹³⁸ the *Australian Guide* reflects the reality that a court may often have to defend itself or its judges. One advantage of leaving that function to the head of the court is that any response can be made on behalf of the court itself. A more practical advantage of leaving any response to ill-informed criticisms to the head of a court rather than the judge or judges who were the subject of the criticisms, is that the head of the court may be better able to act with detached reflection. That detachment may be especially important when deciding whether a response should be made. Johnson J appeared mindful of that possibility in *Gaudie* when he conceded that the magistrate's 'upset' at the article was 'understandable'.¹³⁹ But his Honour concluded that the consequence of the comments made by the magistrate showed 'the difficulties which may occur where the approach advised

136 *Australian Guide*, above n 8, 24 [5.6.2]. The equivalent English document refers to another document providing guidance for instances where cases and judges are misreported, however that document is not publicly available: *England and Wales Guide*, above n 10, 21 [8.1.2].

137 Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252, 261–2. That article provoked an entirely negative reaction from legal scholars and practitioners, though one political scientist conceded that it most likely reflected the realities of modern Australian politics: Paul Donegan, 'The Role of the Commonwealth Attorney-General in Appointing Judges to the High Court of Australia' (2003) 29 *Melbourne Journal of Politics* 40. A similar debate has occurred in England about the role of the Lord Chancellor, though it seems that convention requires the Lord Chancellor to take a more active role in both discouraging politicians from making inappropriate criticisms of judges and protecting judges from criticisms from politicians and others: Graham Gee, 'What are Lord Chancellors For?' [2014] *Public Law* 11, 23. The possible tension between the political office held by the Lord Chancellor (as Secretary of State for Justice) and his traditional role as leader and supposed defender of the judiciary has led to calls for a thorough review of the office: Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review*, House of Lords Paper No 174, House of Commons Paper No 868, Session 2013–14 (2014) 10–12 [18]–[23].

138 Those arguments are well captured in Thomas, above n 7, 131–3 [7.37]–[7.38].

139 *Gaudie* [2013] NSWSC 1425 (26 September 2013), [210].

in the Guide is not adopted. The restraints that come with the acceptance of judicial office pointed strongly here in the direction of compliance with the Guide'.¹⁴⁰

Johnson J did not suggest that judges could not respond to criticism of their decisions or their court but that they generally should not. That restraint is a practical one designed to ensure that judges do not become entangled in the unpredictable results that might occur if they respond directly to criticisms of their decisions or court. This aspect of *Gaudie* suggests that, the more particular the statements or responses of a judge to the media, the more likely they are to trigger the bias rule.

VII OTHER PUBLIC STATEMENTS BY JUDGES AS A SOURCE OF BIAS

The statements or conduct which previous cases have suggested might give rise to an apprehension of bias are examples of wider rules and should therefore not be viewed narrowly. The decision of *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka*¹⁴¹ illustrates that the core questions raised by the bias rule remain unchanged when judges make public statements by new or novel means. The public statement in that case was made on the personal website operated by a member of the Refugee Review Tribunal (RRT), where the member provided his thoughts on a wide range of personal, social and political issues, including the work of the RRT. The member made despairing comments about the tasks faced by the RRT. He stated that many applicants to the RRT 'lie through their teeth' to assist their claim, but was also highly critical of many governments, migration officials and lawyers involved in refugee decisions.¹⁴² The comments were posted several months after the member had decided (and rejected) Epeabaka's claim and were argued to have created a reasonable apprehension of bias because of their negative assessment of many applicants. The High Court rejected that claim and found that the many strong statements made by the member did not, when considered as a whole, show a predisposition or prejudice against applicants.¹⁴³

The reasoning of the High Court is useful beyond the unusual circumstances of the case for several reasons. The first was the relevance of time, or rather the lapse of time, which arose because the member's comments were posted several months after he decided Mr Epeabaka's case. Gleeson CJ, McHugh, Gummow and Hayne JJ accepted that an apprehension of bias could be based on conduct and statements made well after a decision was delivered but cautioned that 'a substantial interval between such conduct and the decision might make the case harder to establish'.¹⁴⁴ That statement reflects the obligation of those claiming bias to articulate how the alleged source of influence might exert the suggested

¹⁴⁰ Ibid [211].

¹⁴¹ (2001) 206 CLR 128 ('*Epeabaka*').

¹⁴² Ibid 133–4 [13].

¹⁴³ Ibid 139–40 [34] (Gleeson CJ, McHugh, Gummow, and Hayne JJ), 158–9 [91]–[93] (Kirby J).

¹⁴⁴ Ibid 139 [29]. Kirby J made similar remarks: 153–4 [75]–[76].

effect.¹⁴⁵ Any difficulty in meeting that requirement would increase with the passing of time between the remarks of a judge that were argued to establish an apprehension of bias and the judge's decision, though much would surely depend on the strength of any remarks made and their relevance to the issues to be decided by the judge.

There was a clear difference of opinion in *Epeabaka* about the member's decision to maintain a personal website. Kirby J suggested it was not unusual that the RRT member maintained a personal webpage or that this included material about the member's work, though his Honour accepted it was unusual that the member had made 'direct remarks' about issues which went to 'the heart of the exercise of the Tribunal's jurisdiction'.¹⁴⁶ Kirby J thought that a greater use of the internet by judges, though perhaps in ways more cautious than the tribunal member whose conduct gave rise to the case before the High Court, could bring many benefits. He reasoned:

The existence of electronic communication of ideas, and the discussion by judges and tribunal members of issues relevant to their vocations, is less shocking today than it would have been in earlier times. Then it would have been unthinkable. Now, prudently performed, it may contribute to a more informed understanding of matters of legitimate community concern if a better appreciation of professional issues relevant to the administration of justice and greater transparency in government generally.¹⁴⁷

Kirby J gave the example of the (then) Chief Justice of British Columbia, who maintained a personal website upon which the judge welcomed comments and questions from members of the public, and suggested that such a practice 'may become unremarkable in years to come'.¹⁴⁸ In fact, that practice has not been followed by subsequent Chief Justices of British Columbia or any other member of the Supreme Court or Court of Appeal of that jurisdiction.¹⁴⁹ The absence of such interactive pages for judges on official court websites arguably confirms

145 This is the second step of the test for apprehended bias established in *Ebner* (2000) 205 CLR 337, 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

146 *Epeabaka* (2001) 206 CLR 128, 156 [82].

147 *Ibid* 156 [83].

148 *Ibid* 156 [82].

149 The website of the Supreme Court of British Columbia contains information about individual judges but no judge has a personal website. See British Columbia Superior Courts, *About the Supreme Court of British Columbia* (29 January 2009) The Courts of British Columbia <http://www.courts.gov.bc.ca/supreme_court/>. The Canadian Judicial Council, *Ethical Principles for Judges* (2004) is silent on the question of whether judges ought to maintain personal websites.

that, while all Australian courts have accessible and user friendly internet sites,¹⁵⁰ individual judges have not stepped into the age of Facebook.¹⁵¹

Gleeson CJ, McHugh, Gummow and Hayne JJ made no direct finding on the use of personal websites by judicial or other decision-makers but remarked that the member ‘allowed enthusiasm to outrun prudence’ when posting what appeared to be an unedited, and arguably ill judged, stream of consciousness.¹⁵² That comment highlights the dangers of internet postings by judges and other decision-makers. The informality that is common in many internet postings can lead its users to make and publish remarks quickly and without the opportunities for reflection and review which are typical in the process of writing reasons for decisions. The normally slower, more reflective process judges take when writing reasons allows ill-advised comments to be detected and removed from a draft judgment.¹⁵³

While Kirby J thought that public statements by judges could usefully inform the public about the law and its process, Gleeson CJ, McHugh Gummow and Hayne JJ appeared more mindful of the potential problems that might arise if judges adopted an ‘open door’ policy with the general public. Their Honours stated that:

For people who hold judicial, or quasi-judicial, office to set out to give the public ‘some idea of where [they are] coming from’ might be regarded by some as reflecting a commendable spirit of openness; but it has dangers. It may compromise the appearance of impartiality which is vital to public confidence in the administration of justice. It is the recognition of such a danger that has traditionally caused judges to exercise caution in their public conduct and statements.¹⁵⁴

An important aspect of *Epeabaka* was the emphasis of the High Court on the relevance of the specific legislative procedures and functions of the RRT to the bias rule. The High Court explained that, just as the question of what might create a reasonable apprehension of bias was decided by reference to the particular framework within which the RRT operated, so too would the conduct of a judge presiding over adversarial litigation.¹⁵⁵ The majority gave no clear indication of

150 The Chief Justice of Victoria has explained (in this volume) that the Supreme Court of Victoria regularly uses Facebook and Twitter ‘to increase public understanding about the work of the Court’: Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’ (2014) 40 *Monash University Law Review* [pg], [pin].

151 The Canadian experience may be different. The issue by that country’s peak judicial body of guidelines for the use of Facebook suggests that enough Canadian judges use Facebook to warrant guidance. See Martin Felsky, *Facebook and Social Networking Security*, Canadian Judicial Council (17 January 2014) <<http://www.cjc-ccm.gc.ca/cmslib/general/Facebook%20security%202014-01-17%20E%20v1.pdf>>. That document notes that Canadian judges have access to a private social networking site called JUDICOM: at 10. This social network is a restricted one for judges only, though the CJC document reminds judges to be cautious about what they say on the site.

152 *Epeabaka* (2001) 206 CLR 128, 133 [12].

153 This presents a parallel with newspaper and scholarly articles. It was explained above, however, that the process of writing newspaper articles provides less time and opportunities to edit and remove indelicate remarks that might be included in a first draft.

154 *Epeabaka* (2001) 206 CLR 128, 133 [12].

155 *Ibid* 138 [27] (Gleeson CJ, McHugh, Gummow, and Hayne JJ). Kirby J reasoned that the nomenclature by which tribunals are often described, such as ‘adjudicative’ or ‘inquisitorial’, was not helpful to deciding the legal requirements to which the tribunal was subject: at 149 [63].

how similar conduct by a judge might be viewed, except to caution that it ‘might not have the same result’.¹⁵⁶ That remark is consistent with other decisions of the High Court which have made clear that the distinct nature of tribunals enables them to engage in practices, such as assertive questioning of a party, which would clearly infringe the bias rule if conducted by a court during a more traditional adversarial hearing.¹⁵⁷ According to that line of reasoning, the High Court may have been more reluctant to find that a website containing remarks like those of the RRT member in *Epeabaka* did not create a reasonable apprehension of bias if made by a judge.

There are other instances in which judges quite properly make public statements as a part of their judicial duties but still create a reasonable apprehension of bias. An example is a submission to a law reform inquiry about procedural issues affecting the courts. That occurred in *Bahonko v Moorfields Community*,¹⁵⁸ where a judge made a submission to a parliamentary committee that was conducting an inquiry into vexatious litigants. The submission was prepared at the request of the Chief Judge of the County Court of Victoria and lodged by the judge as a member of that court.¹⁵⁹ The judge’s submission complained about the problems caused by vexatious and other difficult litigants. It referred to ‘a case in point’ and made scathing criticisms of the way the applicant had conducted that case.¹⁶⁰ The submission did not name the applicant but there was no doubt she was the subject of the judge’s comments. A short time later, the judge dismissed the applicant’s claim for compensation. The Victorian Court of Appeal accepted that the submission established a reasonable apprehension of bias. The Court held it did not matter that the submission addressed procedural matters about the wisdom of the applicant’s conduct of her case rather than the ultimate question of her entitlement to compensation, because the criticisms strongly doubted the mental condition and credibility of the applicant, both of which were crucial to her case.¹⁶¹ The Court of Appeal held that an apprehension of bias was not drawn simply because the judge had singled out the applicant, or simply spoken unfavourably about her, but because his views ‘were expressed as final, rather than tentative or provisional, conclusions’.¹⁶²

156 Ibid 138 [27].

157 See, eg, *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, 435 [30]–[31], where Gleeson CJ, Gaudron and Gummow JJ accepted that a tribunal which was granted many inquisitorial powers, and had unrepresented parties appear before it, could question an applicant in a way that was not unlike a robust cross-examination without infringing the bias rule. The problem in that case was that the tribunal member crossed an ill-defined line and made the applicant feel ‘overborne or intimidated’.

158 (2011) 34 VR 342 (*‘Bahonko’*).

159 Ibid 344 [9]. The conduct of the judge was clearly consistent with the approach suggested by the *Australian Guide*, which states that it can be appropriate for judges to make submissions to law reform inquiries and that the head of the relevant court should be consulted: *Australian Guide*, above n 8, 22 [5.2].

160 *Bahonko* (2011) 34 VR 342, 344–5 [12]–[13]. For the full submission see Judge Philip Misso, Submission No 10 to Law Reform Committee, Parliament of Victoria, *Inquiry into Vexatious Litigants*, 18 June 2008.

161 *Bahonko* (2011) 34 VR 342, 346 [19] (Buchanan JA, Redlich and Mandie JJA agreeing).

162 Ibid 345 [17] (Buchanan JA, Redlich and Mandie JJA agreeing).

The decision of the Court of Appeal did not address the effect of parliamentary privilege, which arguably should have prevented it from considering the submission or drawing an apprehension of bias based upon it. The judge's submission was subject to privilege because it was made to a parliamentary committee which, like all such committees in Victoria, extends parliamentary privilege to submissions accepted during an inquiry.¹⁶³ Article 9 of the *Bill of Rights 1688*,¹⁶⁴ which applies in one form or another to all Australian jurisdictions, greatly restricts any use in the courts of statements made and documents tabled in parliamentary proceedings.¹⁶⁵ Such materials which are subject to parliamentary privilege cannot be questioned or led in evidence in the courts. The courts cannot, for example, draw inferences from privileged materials.¹⁶⁶ That restriction applies to the proceedings of parliamentary committees, including the one to which the judge in *Bahonko* made his submission.¹⁶⁷ The failure of the Court to address this issue was most likely because the parties simply did not realise the privilege applied.¹⁶⁸

The fact that the judge's submission would most likely have been protected by absolute privilege does not mean it should have included remarks critical of a particular party whose case was listed for hearing before the judge. The courts regularly explain that the bias rule operates to ensure public confidence in the

163 A point confirmed in Parliament of Victoria, *Making a Written Submission* (1 November 2013) <<http://www.parliament.vic.gov.au/committees/get-involved/making-a-submission#privilege>>. People cannot simply claim privilege by lodging a submission to a parliamentary committee. The conferral of privilege remains within the power of the committee and is exercised when a committee formally accepts a submission.

164 *Bill of Rights 1688*, 1 Wm & M sess 2, c 2, art 9.

165 Article 9 has either been adopted, or the protection it provides replicated, in all Australian jurisdictions: *Australian Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Imperial Acts Application Act 1969* (NSW) s 6, sch 2 pt 1; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 6(1); *Imperial Acts Application Act 1984* (Qld) s 5, sch 1; *Parliament of Queensland Act 2001* (Qld) s 8; *Constitution Act 1934* (SA) s 38; *Constitution Act 1975* (Vic) s 19; *Imperial Acts Application Act 1980* (Vic) pt II div 3; *Parliamentary Privileges Act 1891* (WA) s 1. Article 9 may apply without such legislation to a Parliament established by British Imperial Decree: *Gipps v McElhone* (1887) 2 LR (NSW) 18, 21 (Martin CJ), 24–5 (Manning and Windeyer JJ); *Chenard and Co v Arissol* [1949] AC 127, 133–4 (Lord Reid); *R v Turnbull* [1958] Tas SR 80, 83–4 (Gibson J).

166 See, eg, *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 (parliamentary privilege precluded receipt by court of a question and its answer made in Senate proceedings); *Hamsher v Swift* (1992) 33 FCR 545 (privilege precluded receipt of parliamentary statement of minister in court for the purpose of drawing inferences from that statement).

167 See, eg, *Constitution Act 1975* (Vic) s 19 (extending the privileges enjoyed by the British House of Commons to both Houses of the Victorian Parliament and their committees); *Parliament of Queensland Act 2001* (Qld) s 9 (conferring parliamentary privilege on both the Assembly of the Queensland Parliament and its committees). See also *Parliamentary Privileges Act 1987* (Cth) s 16(2) which defines 'proceedings in Parliament' to include appearing before, giving evidence or making a submission to, a parliamentary committee.

168 The Court of Appeal did not consider the narrow instances in which parliamentary privilege might be waived. In *R v Chaytor* [2011] 1 AC 684, 711 [61], Lord Phillips, with whom Lords Hope, Brown, Mance, Collins, Kerr and Baroness Hale agreed, held that the privilege created by article 9 was absolute and could not be waived except by express legislation. The possible waiver of parliamentary privilege in Australia is examined in Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 124–43.

courts and the administration of justice.¹⁶⁹ Even if parliamentary privilege should have precluded consideration of the submission by the Court of Appeal, it could not overcome the fact that the submission had been made. Public confidence in the courts could have been severely diminished if a judge could, by reason of an ancient form of privilege that few members of the public would understand, make strong criticisms of a party and then preside over a case involving that party. The judge should simply have made no reference to any party who was listed, or likely to appear, before him.

VIII BIAS BY THE ENDORSEMENT OF, OR ASSOCIATION WITH, THE VIEWS OF ANOTHER

Judges may sometimes appear to endorse the views of another rather than directly assert those views themselves. The difficult question in such cases is when the silence of a judge can suggest the judge might agree with, and be influenced in his or decision-making, by the views of another. The decision of the House of Lords in *Helow v Secretary of State for the Home Department*¹⁷⁰ suggests that, for the purposes of the bias rule, judges must take some active steps before they may be associated with the views of another. The judge in that case was a member of an international organisation of Jewish jurists. A Palestinian asylum seeker whose case was rejected by the judge claimed a reasonable apprehension of bias, not simply on the judge's membership of the organisation but also from the articles in its newsletter which expressed strong hostility to the Palestinian cause. The House of Lords held the newsletter contained a range of views which were so divergent that the newsletter as a whole could not support a reasonable apprehension of bias against the Palestinian people. The range of views in the newsletter was so wide there was no clear support for one view in particular. The Lords also held that the judge had not said or done anything to associate herself with the more extreme views contained in the newsletter,¹⁷¹ which meant it was not possible to attribute a selection of the views to the judge.

The House of Lords left open the question of whether the views of an organisation or group could be attributed to a judicial member when the judge had not actively endorsed those views. Lord Mance reasoned that membership of an association itself 'connotes no form of approval or endorsement of that which is said or done by the association's representatives or officers'.¹⁷² But his Lordship conceded that there might be instances 'involving words or conduct so extreme that members might be expected to become aware of them and disassociate themselves by

169 See, eg, *Johnson v Johnson* (2000) 201 CLR 488, 492–3 [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 300 [33] (French CJ).

170 [2008] 1 WLR 2416.

171 *Ibid* 2418–19, [4]–[5] (Lord Hope), 2421–2 [17]–[18] (Lord Rodger), 2423 [27] (Lord Walker), 2423 [28] (Lord Cullen), 2433 [53] (Lord Mance).

172 *Ibid* 2434 [54].

resignation if they did not approve or wish to be thought to approve of them'.¹⁷³ The difficult aspect of that reasoning would be in determining when the words or conduct was sufficiently 'extreme' to require a judge to take active steps to disassociate him or herself from those views.

Different issues arise if judges choose more actively to associate themselves with the words or views of another with whom they may otherwise have no connection by, for example, launching or praising the work of another. Much depends on the particular words used by the judge. The *Australian Guide* cautions that a judge who agrees to either write a preface for a book, or to launch a book, should carefully consider both the nature of the work and any relationship the judge might have with its author 'to avoid any perception that the judge may be promoting a particular cause or taking a political stance'.¹⁷⁴ Those issues were central to the bias claim in *NTD8 v Australian Crime Commission* ('*NTD8 Case*').¹⁷⁵ The judge in that case had, prior to his judicial appointment, been a member of the federal government's Northern Territory Emergency Response Taskforce which was created to oversee a radical program involving indigenous people in the Northern Territory (the NT Intervention). Members of the Taskforce gave media interviews to explain their work and engage in the fierce debate it had generated.

The bias claim was based on three public statements the judge made prior to his judicial appointment.¹⁷⁶ The first was made when he launched a book by a noted writer which addressed many of the problems facing indigenous people in northern Australia.¹⁷⁷ The (future) judge commended the author's bravery for addressing such difficult issues and predicted that he would have to 'withstand the inevitable attacks from the usual suspects' alleging he was 'racist, or ignorant or similar'.¹⁷⁸ The next day the judge presented a conference paper which mentioned the legislation enacted to support the Taskforce and its work.¹⁷⁹ The statute was over 500 pages long but the judge made only a brief reference, describing it as 'bold ... complex and ... detailed'.¹⁸⁰ A week later, the judge gave a radio interview where he was questioned about these earlier comments. He described the legislation as 'sensible' and answered questions about whether a political consensus could be reached on the problems the Taskforce sought to address.¹⁸¹ The judge noted that a federal election was underway, lamented that Ministers of the Northern Territory government had apparently made political attacks upon

173 Ibid 2434 [55].

174 *Australian Guide*, above n 8, 24–5 [5.9].

175 (2008) 249 ALR 559.

176 The judge made no public comment on this issue after his judicial appointment: ibid 562 [6].

177 Ibid 563 [13]. The book was Louis Nowra, *Bad Dreaming: Aboriginal Men's Violence against Women and Children* (Pluto Press, 2007).

178 Extracts of the remarks were quoted in *NTD8 Case* (2008) 249 ALR 559, 563 [14].

179 *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

180 *NTD8 Case* (2008) 249 ALR 559, 564 [15].

181 Ibid 564 [17].

the Taskforce during that campaign, but expressed hope that a bipartisan solution could be reached after the election.¹⁸²

The cumulative effect of the judge's statements were claimed to support an apprehension of bias because they showed he supported key elements of the NT Intervention and also that he was hostile to people perceived to be attacking that program. The possible hostility of the judge toward those seen to attack the program was crucial to the case at hand, because the party claiming bias sought review of a summons issued by the Australian Crime Commission to force production of medical records concerning alleged family violence affecting indigenous people.¹⁸³ The implication was that this challenge to the summons was in fact a wider one upon the program.

The *NTD8 Case* proceeded on the assumption that the statements made by a judge prior to appointment could support a bias claim. That assumption is surely correct. Whether statements claimed to create a reasonable apprehension of bias can satisfy the twofold test of *Ebner* does not depend on the office their maker may have held at the time. The more relevant issues are the strength with which the statements were expressed, how long ago they were made and how relevant they are to the issues at hand.¹⁸⁴ It was this last issue — the relevance of the statements to the issues to be decided — which led Reeves J to reject the bias claim.¹⁸⁵ His Honour held that his prior comments could not reasonably be interpreted as referring to the applicant as an individual or member of a group who had attacked those who spoke out about the issues that sparked the NT Intervention.¹⁸⁶ He also concluded that the applicant was not 'attacking' the NT Intervention simply by 'legitimately commencing proceedings' to question a decision of an official of the Intervention.¹⁸⁷ These various findings meant the bias claim did not satisfy the second step of *Ebner* because neither the applicant nor his claim fell within the scope of the judge's previous public comments.

Reeves J also drew attention to the wider context in which his earlier comments were made. His remarks at a book launch and subsequent media interviews were 'in circumstances far removed' from the legal question he was subsequently

182 Ibid.

183 Ibid 566–7 [26]. The compulsory production of medical records was one of the many issues surrounding the NT Intervention which had generated considerable public debate. The substantive decision of Reeves J to set aside the notice was overturned by the Full Court of the Federal Court: *Australian Crime Commission v NTD8* (2009) 177 FCR 263.

184 These are factors used by the courts to decide whether the professional relationships of judges prior to appointment can support an apprehension of bias after their appointment. See, eg, *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 369 (Kirby P).

185 His Honour did so after holding that the applicant had not waived the claim. He held that the applicant's solicitor did not know of the comments, even though they were made in public and widely reported, which meant the 10 month period between the comments and the bias claim did not constitute waiver: *NTD8 Case* (2008) 249 ALR 559, 568–9 [33]–[36]. Reeves J was more hesitant to find that the 10 days which had elapsed from when the applicant's solicitor became aware of the statements and his barrister made the bias claim were sufficient to find or presume waiver. He concluded that the several days taken to make the claim was not sufficient to find waiver, though made clear that the solicitor should have signalled the possibility of a bias claim sooner: at 569 [38]–[39].

186 Ibid 575 [59].

187 Ibid 575 [60].

required to decide in his judicial capacity, which was whether the decision to issue a summons to compel production of medical records involved a failure to take account of a relevant consideration.¹⁸⁸ Those remarks, he reasoned, had been made ‘in a public forum and in the national media, about matters of current affairs, that are, at their highest, only very generally connected to the issues in these proceedings’.¹⁸⁹

That passage does not mean that remarks made to, or reported by the media, cannot support a bias claim. It instead highlights the problem that judicial comments about wide ranging issues of public concern can present to the second step of the *Ebner* test. The broad terms in which such matters are typically discussed makes it difficult for a party claiming bias to articulate how such *general* comments might create a reasonable apprehension that a judge might not approach the *particular* issues of a case that fall within the same broad area with sufficient impartiality.

IX CONCLUDING OBSERVATIONS

The contextual nature of the bias test means that findings about the existence of an apprehension of bias may easily give rise to disagreement. Those claiming bias must identify an alleged bias and also explain how that issue might lead a judge or other decision maker to decide a case other than on its merits. Courts must determine these questions through the eyes of a fictional observer who is a fair-minded member of the public and informed of the key elements of the case. The difficult judgments that courts must sometimes make about such issues, particularly when peering through the eyes of a fictional observer, are made even more difficult when a bias claim is based upon the public statements of a judge. Any assessment of a bias claim in such cases requires a judge to adopt the position of the fair-minded and informed observer to determine the effect of the public statements of a judge. It cannot be easy for a judge to deduce what a fictional observer might make of statements he or she made outside of court and in a quite different context to the hearing in which objection was taken to the remarks.

These difficulties do not mean that judges should never speak in public outside their official duties. There are many instances in which judges can, and arguably should, make public statements, such as in speeches about important issues affecting the judiciary and legal system. The public can only be better informed about the legal system if judges speak about their work in moderate terms and at suitable occasions. But judges should be mindful of the spectre of the bias rule. The more likely it is that an issue may arise for decision before a judge, the more reluctant the judge should be to speak on that issue, but that cautious approach will not be sufficient. It is difficult to predict what parties or issues may present themselves to a court. In many instances, no amount of caution or experience can prepare a judge for the events they may face in court.

¹⁸⁸ Ibid 575–6 [61].

¹⁸⁹ Ibid.

Isolation is not the solution. After all, judges live in the same world as the parties who appear before them. Judges are better placed to understand the people and issues that come before them if they participate in that same society. But the extent to which judges can participate in public life is limited by the need to preserve the impartiality of a judge. According to the *Australian Guide*, that limit is one of the restraints that judges accept in consequence of their appointment. In my view, any restraint which attaches to judicial officers is not one that arises directly from the judicial oath or the inherent qualities of judicial office. The true source of restraint is the bias rule, but that rule does not prevent judges from speaking in public. Judges remain free to speak publicly outside their judicial role, even upon controversial issues and in controversial terms. Judicial office does not necessarily restrict a judge's freedom of speech. The bias rule instead restricts the freedom of judges to preside in cases involving parties, witnesses or issues if judges have spoken about them in terms which suggest that they may not approach the parties, witnesses or issues before them with sufficient impartiality. That restriction on the freedom to preside is arguably justified because it applies only to those judges who have chosen to speak or write extrajudicially, and only to the extent that the issues upon which a judge has spoken are real and live ones for decision by the judge in a later case.

One last guiding point can be drawn from *Gaudie*. That case involved a unique combination of quite serious accusations made by a solicitor about the judiciary to the media rather than a judicial conduct body, a strong response from a judge who felt that he and his court had been unfairly criticised, and a reporter who skilfully prised information from both. While it is easy to understand why all three acted as they did, a depressing consequence of *Gaudie* is that a judge and solicitor who clearly shared a common concern about the appalling problems faced by many indigenous Australians in rural areas appeared to become protagonists in a public discussion of an issue both clearly care about deeply. But when the judge responded to the more specific claims of the solicitor, he moved from speaking with the reporter about wider issues, to those involved in them. The consequences by way of the bias rule were inevitable. Perhaps the lesson is that judges who feel strongly enough about issues to speak to the media are those who need the most caution about doing so.