APPREHENDED BIAS

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1. Judicial Definition of Apprehended Bias

(a) The test for determining whether a Magistrate should disqualify himself or herself by reason of apprehended bias is "whether a fair-minded lay observer might reasonably apprehend that the [Magistrate] might not bring an impartial and unprejudiced mind to the resolution of the question the [Magistrate] is required to decide": *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [11]; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21, affirmed in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; [2000] 205 CLR 337, 345; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13; applied in *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; (2011) 244 CLR 427; (2011) 282 ALR 685; (2011) 86 ALJR 14; distinguished in *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2011) 242 CLR 283; (2011) 273 ALR 429; (2011) 85 ALJR 348; (2011) 8 DDCR 426; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71 and *Barakat v Goritsas (No 2)* [2012] NSWCA 36. The authorities have been collected relatively recently by his Honour Johnson J in *Gaudie v The Local Court* of NSW [2013] NSWSC 1425.

(b) In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; [2000] 205 CLR 337, 345; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, the Court described the application of the principle of apprehension of bias in the following terms:

> Its application requires two steps. First, it requires the identification of what it is said might lead a judge ... 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.

2. Test to be applied

> "We conclude that the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery CJ in a test which he laid down in *R v Uxbridge Justices, ex parte Burbridge*, apparently only reported in [1972] Times 21, 20 June 1972, but referred to by him in *R v McLean, Ex parte Aitkens* (1974) 139 JP 261, 266: Would "a reasonable and fair-minded person sitting in Court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?" Assuming therefore, that the justices had applied the test advised by Mr Pearson – do I feel prejudiced? – then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely, the quashing of the conviction would follow."

Per Ackner LJ in *R v Liverpool City Justices: Ex Parte Topping* (1983) 1 All ER 490; (1983) 1 WLR 119; MC 35/1983, 12 November 1982.

3. Magistrates not to readily accede to disqualification applications

Magistrates are required to discharge their professional duties unless disqualified by law. They should not accede too readily to applications for disqualification, otherwise litigants may succeed in effectively influencing the choice of judge in their own cause: see *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 352; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184; *Attorney General of New South Wales v Lucy Klewer* [2003] NSWCA 295; *Ebner v Official Trustee* [2000] HCA 63; [2000] 205 CLR 337, at [19]–[23]; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13; and *Raybos Australia Pty Limited v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272.

4. In-Court Circumstances

(a) Undue interference or questioning of accused by judicial officer

During the hearing, the trial judge questioned the accused closely on some of his evidence. It was submitted that the trial judge in effect cross-examined the accused at considerable length to the extent of one-fifth of the total recorded cross-examination.

Per the Court:

> "As to whether a trial judge interferes unduly in a criminal trial must necessarily be considered as a matter of degree. However a trial judge is always entitled to question a witness, whether he be a witness for the prosecution or for the defence, not only to clear up ambiguities but also for the purpose of testing his evidence, if the judge has reason to believe that the evidence is or may not be in accordance with the truth. In the present case there was no miscarriage of justice brought about by the intervention of the trial judge in questioning the accused in the course of his evidence."

Per Hoare J (Stable SPJ agreeing) in *R v Gardiner* [1981] Qd R 394; (1979) 42 FLR 71; 27 ALR 140; 1 A Crim R 265; MC 22/1980, 8 October 1979.

(b) Questions put to police informant by Magistrate

The Magistrate put questions to the policewoman informant directed as to whether or not she wore glasses, as to whether she had an eyesight problem and then asked her why she had driven into the court carpark that morning against a "Do Not Enter" sign and had driven forward into a 'Reverse Only' carpark and entered a car space for which she had no permit. It appears the policewoman explained that she had been running late for court and could not find a carpark and had never been to the Prahran court before and did not see the signs. The Magistrate then asked the Prosecutor whether he agreed that a police officer would not deliberately do such a thing to which the Prosecutor agreed, and then, the Magistrate said that there would have been a problem with sight on this occasion and dismissed the information without giving any other reasons for its dismissal.

Per Nicholson J:

> "It seems to me to be clear that the learned Magistrate's decision cannot stand. He was faced with uncontradicted evidence as to the commission of the offence in the circumstances where the defendant had not chosen to appear, and in circumstances where there was nothing inherently improbable about the evidence that was given to him.
>
> There is a long line of cases which state that the Court is bound to give effect to such evidence. I need refer only for these purposes to *Read v Nerey Nominees Pty Ltd* [1977] VicSC 677; [1979] VicRp 6; [1979] VR at p47; *Hardy v Gillette* [1976] VicRp 36; [1976] VR at p392; and *Richards v Jager* [1909] VicLawRp 26; [1909] VLR at p140, particularly at p147; [1909] ALR 119 at 122; 30 ALT 163.
>
> It is also apparent from all of those decisions that if a Court decides to refuse to accept such uncontradicted evidence, then the Court is bound to give the reasons why it has done so. It is also apparent that the questions asked by the learned Magistrate as to the informant not complying with the various driving directions applicable in the region of the Court were entirely irrelevant to the matter before him, and indeed his own observations as to these matters were similarly entirely irrelevant and he should not have introduced them into the proceedings at all. I can, of course, appreciate that a Magistrate who is faced, as most Magistrates are, with a particularly heavy workload might perhaps impetuously deal with a matter in a way in which given the opportunity for more mature reflection he would not have otherwise done. I have no doubt that this is what occurred on this occasion.
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> I also agree with the submission put by Mr Weinberg that from the point of view of a bystander there was in this case objective bias even though there may not have been actual bias on the part of the learned Magistrate. Mr Weinberg referred to several cases, including *R v Watson; Ex parte Armstrong*, [1976] HCA 39; (1976) 136 CLR 248 at pp258 *et seq*; [1976] 50 ALJR 778; [1976] 9 ALR 551; and *Livesey v The New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; [1983] 57 ALJR 420; 47 ALR 45, in support of this proposition, and in my view it is amply demonstrated that such objective bias was present in this case. Accordingly, I propose to make the order absolute and remit the information to the Magistrates' Court at Prahran to be dealt with according to law."

Per Nicholson J in *R v Golden & "D"; Ex Parte Attorney-General for Victoria: Re Bruce* [1986] VicSC 71; MC 05/1986, 12 March 1986.

(c) Magistrate stopping inappropriate cross-examination – whether bias shown

A magistrate is entitled and should discipline the legal processes before the Court, including the conduct of counsel. Accordingly, where a magistrate stopped cross-examination deemed to be inappropriate or moved into chambers and exhorted counsel to move expeditiously, bias was not necessarily shown nor was the fair conduct of the trial prejudiced.

Per Nathan J:

> "Prejudice, in the legal context, is not novel and the word itself does not pose any problems. Prejudice simply means that a matter has been prejudged or that a person has approached the tasks of judgment with pre-conceived opinions which, if put into effect, result in a detriment to one side or the other. The classic Victorian case is *R v The Magistrates' Court at Lilydale; ex parte Ciccone* [1973] VicRp 10; (1973) VR 122, in which McInerney J refers to the necessity that Magistrates must approach their task in an even-handed manner so that in fact and in style the charge before them is conducted fairly.
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> Elaborations of this principle are to be found in *R v Watson; ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *Livesey v The New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420, and *Re JRL: ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; (1986) 66 ALR at p239; [1986] FLC 91-738; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184. In the latter case a Family Court Judge had interviewed a counsellor in her chambers during a luncheon adjournment.

The counsellor had, in reports, expressed a strong preference for one of the parties. She declined to disqualify herself from continuing with the hearing and the High Court, by a majority, ordered the order nisi for prohibition be made absolute. Mason J there ruled that:

> "There was a firm basis for a reasonable apprehension that the judge would not bring to bear an impartial and unprejudiced mind on the resolution of the custody issue. The case was plainly one in which the principle that justice must manifestly be seen to be done" –

and if that were not so, it would be appropriate to make the order absolute.

> Now, it is quite plain – and let me make this observation very strongly – that Court processes are not dictated by listing times. A case is to take as long or as brief a period as its merits demand. But, on the other hand, justice is neither priceless nor timeless, and a presiding judicial officer is entitled by virtue of his function to indicate to counsel when cross-examination is unhelpful, when it appears to be repetitive, and in certain circumstances of that kind, to stop it. The presiding judicial officer is entitled and should discipline the legal processes before him, and that includes the conduct of counsel.
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> I am satisfied on this affidavit material that that is what the Magistrate was doing. He moved into chambers in order to apply pressure upon defence counsel to move quickly. There will undoubtedly be circumstances when such pressure passes beyond propriety and would prejudice the fair conduct of the trial. This is not one."

Per Nathan J in *Hawryluk v Gillman* [1987] VicSC 345; MC 36/1987, 20 August 1987.

(d) Questions of principal witness by Magistrate during examination-in-chief – whether hearing infected by apprehended bias

HELD: Order made in the nature of prohibition.

1. The test to be applied in determining whether a judicial officer is disqualified by reason of the appearance of bias, is whether a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial and unprejudiced mind to the resolution of the question required to be decided. The observer is taken to be reasonable, and that the person being observed is a professional judicial officer whose training, tradition and oath or affirmation require the officer to discard the irrelevant, the immaterial and the prejudicial. The presiding judicial officer has a responsibility to see that such evidence comes out fairly and intelligibly and whilst exercising great care to avoid interfering with the course of examination, cross-examination or re-examination, it is permissible and proper practice for the judicial officer to ask a question or questions to elucidate answers given by the witness where the officer considers this course desirable in the interests of justice.

> *Johnson v Johnson* [2000] HCA 48; 201 CLR 488; 174 ALR 655; 74 ALJR 138; and
> *Re Damic* [1982] 2 NSWLR 750; (1982) 6 A Crim R 35, applied.

2. The boundary between on the one hand the permissible elucidation, by questions from the judicial officer, in the interests of justice, of answers given by the witness, and on the other hand an impermissible entry by the judicial officer into the arena of conflict, is a fine line, particularly in a criminal case. Whilst the questions asked by the Magistrate in the present case were intended, as he indicated, purely for the purpose of clarification, those questions were, in the form in which they were asked, such that a fair-minded lay observer, with knowledge of the circumstances of the case, might reasonably apprehend that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide, namely whether the defendant before him had committed the offence with which it was charged. The questions were, as the Magistrate conceded, leading questions; and they appeared to be calculated to remedy deficiencies in the prosecution case. Accordingly, it was appropriate in those circumstances to make an order prohibiting the magistrate from the further hearing and determination of the charge.

Per Balmford J:

> "16. Mr Szabo referred to the authorities as to the particular position of a judicial officer conducting a criminal trial, as was the case here, and relied on the well-known statements of principle in *R v Mawson* [1967] VicRp 23; (1967) VR 205 at 207-8, *Jones v National Coal Board* [1957] EWCA Civ 3; [1957] 2 QB 55 at 63-4; [1957] 2 All ER 155; [1957] 2 WLR 760, *Ratten v R* [1974] HCA 35; (1974) 131 CLR 510 at 517; 4 ALR 93; 48 ALJR 380 and *Yuill v Yuill* (1945) 1 All ER 183 at 185; [1945] P 15; 61 TLR 176 as to the fundamental nature of the adversary system and the dangers of the judge descending into the arena and appearing to take part in the conflict. The Full Court in *R v Mawson* went on to say:
>
> > A departure from due and regular process in any such respect as those mentioned may infringe another fundamental principle of criminal law, namely, that criminal justice must not only be done but must also appear to be done.

17. A most cogent passage in this regard appears in the judgment of Dawson J in *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657 at 682; 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107, where His Honour said:

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel.

18. Mr Lawrie, for the informant, referred to the passage in *Re Damic* [1982] 2 NSWLR 750 at 762-3; (1982) 6 A Crim R 35 where Street CJ, with whom Slattery and Miles JJ agreed, said:

> It is to be recognized that the power of a judge to call a witness of his own motion involves an inroad upon the ordinary rule that a judge should not descend into the adversarial arena. Upholding the existence of this independent power does not, however, carry over so as to authorize undue intrusion by the judge into the ordinary course of eliciting evidence from witnesses called by the parties. The presiding judge has a responsibility to see that such evidence comes out fairly and intelligibly. Whilst he must exercise great care to avoid interfering with the course of examination, cross-examination or re-examination, it is permissible and proper practice for the judge to ask a question or questions to elucidate answers given by the witness where he considers this course desirable in the interests of justice. . . . It is difficult to be any more specific than to identify this right to ask questions as being exercisable where the judge thinks it desirable in order to elucidate the evidence of the witness or which the witness is attempting to give, being, of course, evidence relevant to a matter requiring deliberation by the jury: cf *Jones v National Coal Board* [1957] EWCA Civ 3; [1957] 2 QB 55 at p64; [1957] 2 All ER 155; [1957] 2 WLR 760.

21. The boundary between on one hand the permissible elucidation, by questions from the judge, in the interests of justice, of answers given by the witness (see the passage from *Re Damic* cited in [18] above), and on the other hand an impermissible entry by the judge into the arena of conflict, is a fine line, particularly in a criminal case. I appreciate that the questions asked by the Magistrate were intended, as his Worship indicated, purely for the purpose of clarification. However, I find, with some reluctance, that those questions were, in the form in which they were asked, such that a fair-minded lay observer, with knowledge of the circumstances of the case, might reasonably apprehend that his Worship might not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide, namely whether the defendant before him had committed the offence with which it was charged. The questions were, as the Magistrate conceded, leading questions; and they appeared to be calculated to remedy deficiencies in the prosecution case. (As to which, see the passage from *Whitehorn v R* cited at [17] above)."

Per Balmford J in *Hoare Bros v Magistrates' Court & Gahan* [2003] VSC 257; (2003) 142 A Crim R 330; MC 17/2003, 4 July 2003.

(e) Police prosecutor in Magistrate's Chambers for 30 seconds looking for a *Government Gazette* – no communication made – whether Magistrate prejudiced

Where in order to search for a copy of a *Government Gazette*, a prosecutor and a court clerk entered the Magistrate's chambers for 30 seconds when the Magistrate was present, but no communication took place between the prosecutor and the Magistrate, neither the defendant nor the public could reasonably have apprehended that that event would have given rise to partiality or prejudice on the part of the Magistrate whereby disqualification was justified.

Per Southwell J:

> "In my opinion, it was most unwise for the prosecutor to have entered the room in which the Magistrate was known to be present, and unwise of the Magistrate not to have asked her not to come in, or to leave. However, (as Mr O'Bryan for the respondent submitted) the fair minded observer, knowing what had occurred, of the unsuccessful search for the *Gazette* in the office, of Mrs Matheson's suggestion that it might be found in the Magistrate's room, and knowing that there had in fact been no communication, could not reasonably have apprehended that this fleeting opportunity for communication, not in fact availed of, would be productive of partiality or prejudice. It was a brief search for a public document. Accordingly, neither the defendant nor the public had reason for that apprehension."

Per Southwell J in *Zderski v Ellis* [1988] VicSC 539; MC 63/1988, 13 October 1988.

(f) Civil proceedings – motor vehicle collision case – magistrate criticised the order in which the particulars were pleaded but made no mention of that in the reasons for decision

(1) Whilst particulars of negligence should be set out with clarity and in a manner which brings the issues clearly before the court, the magistrate was incorrect in remarking that an adverse inference could be drawn from the manner in which the particulars were pleaded and that the solicitor was guilty of professional negligence.

(2) The test to be applied when bias is raised is whether the parties or an independent observer might entertain a reasonable apprehension that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the matter.

(3) In the present case, the remarks of the magistrate could have given rise to the apprehension that the defendant was unlikely to receive a fair hearing. However, the magistrate's order would not be set aside because:

(a) in giving reasons for decision the magistrate's judgment was unexceptional, and;

(b) no objection was taken by counsel at the hearing.

Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, applied.

Per Nathan J:

"The Magistrate indicated that in his view the primary allegation was that the plaintiff's servant changed lanes without indication and that this was not mentioned until the ninth paragraph in the particulars, in his view it was, therefore, not the primary allegation of negligence. The Magistrate said further that the real issue had been buried in a mass of irrelevancy thus hiding from the plaintiff and the court the real issue in the case, this could give rise to the impression that the witness, that is in this case the defendant, could or may have been lying. ...

The gratuitous and irrelevant references to professional negligence are very much to be regretted. Really, they are matters which should not have been raised at all. More so in this case as the remark was legally incorrect. The order nisi cannot be made absolute on this ground as the Magistrate did not in fact find as a matter of law that the particulars required to be prioritised.

I turn to the third and fourth grounds which raise more substantial issues, namely, that the magistrate failed to afford natural justice to the defendant in that the passing of these remarks could be seen by an outside observer to have raised the likelihood of bias in the mind of the Magistrate and thereby taint the judicial process. This case is governed by the principles in law set out in *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 at 598; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, a case which is apposite because the Judge's remarks there followed the bifurcated approach adopted by the Magistrate here. In that case the Judge had passed gratuitous and plainly prejudicial remarks during the currency of the trial. They were not objected to. In a reserved and written judgment he passed further remarks which seems to have adopted the prejudicial remarks made during the currency of the trial and those remarks were impugned after judgment. The distinction is between the remarks passed during the currency of trial and the remarks passed during judgment.

... in so far as the judgment is concerned, the whole court observed that the remarks amounted to ostensible bias because they would lead to the conclusion in the minds of reasonable or fair-minded observers that the Judge was heavily influenced by views he had formed on other occasions and not on the basis of an assessment of the facts in hand. The common law of Australia relating to bias has been well canvassed, and I refer to the useful statement of it contained in *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183. At CLR p20 the statement is as follows:

> "The remarks would have excited in the minds of the parties and in members of the public a reasonable apprehension that the Judge might not bring an unprejudiced mind to the resolution of the matter before him. The test which is to be applied when bias is raised has been clearly laid down. It is whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him."

... However, in this case there is a sharp distinction between the remarks passed by the magistrate in the currency of the hearing and those upon which he founded his judgment, and I need to recite them again. The magistrate said he "preferred the evidence of the complainant only marginally over the evidence presented by the defendant and on the balance of probabilities the complainant should get home."

> It would seem the magistrate when actually adjudicating on the issues of fact before him put to one side the error of law he had previously pronounced and the errors which arose out of it, namely, the possibilities of professional negligence and the inference of disbelief. He seems to have weighed and assessed the narratives of the parties and the term "marginally over the evidence" indicates he was referring to their stories of the motor accident as they were presented to him.
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> Hence, I am confronted in this case with improper remarks made by the magistrate during the currency of the trial, but a judgment delivered in terms which are unexceptional. It follows that if a preference is found for one party over another, then the probabilities rest with the party in whose favour the Magistrate has leant and adjustment will follow accordingly.
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> No objection was taken on the basis of bias when the remarks were made or when judgment was delivered. *Vakauta's case* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, binds me as authority for the proposition that objection on that basis should be made then and there and not at some subsequent time. A party cannot stand aside when bias is displayed and wait to see if judgment is given in his favour, in any event. It was observed by Jacobs J in *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; 50 ALJR 778 that judicial silence is the counsel of perfection. The Magistrate would be well advised to take heed of the admonition. Silence can be golden, but the law is clear, objection should have been taken at the time of the remarks or at judgment to the Magistrate's display of bias. It was not.
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> Although some objection was taken to the Magistrate during trial, no direct objection on the ground of bias was adverted to. Accordingly, even if regretfully, even if unfortunately, the objection cannot be raised before me now. There may be circumstances where the behaviour of a Magistrate is so gross in terms of actual as opposed to ostensible bias, that it could be said his decision must be tainted by remarks expressed during the hearing, that the decision should be set aside.
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> But in this case, the Magistrate seems to have separated himself from the bias displayed during the hearing and the decision making process which he ultimately performed.
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> I cannot say that the decision is necessarily tainted by the remarks which I have spelt out in full. It follows that the orders nisi will be discharged."

Per Nathan J in *Baldwin v Goodman Fielder & Mills Pty Ltd* [1991] VicSC 2; MC 22/1991, 17 January 1991.

(g) Prosecutor conversing with defendant during hearing – Conversation mentioned to presiding Magistrate – Magistrate accepted prosecutor's version without hearing defendant's version on oath – whether hearing tainted or unfair

Prohibition granted. Magistrate restrained from the further hearing of the charges. When the complaint was made by the defendant's counsel, the magistrate was required to properly investigate it in order to determine whether the trial could fairly proceed. In view of the failure to do this together with the making of findings adverse to the defendant, a fair-minded observer would have gained an impression of unfairness. Accordingly, the whole proceeding was tainted and the magistrate restrained from further hearing the charges.

Per Southwell J:

> "As I have earlier indicated, there can be no question but that, upon the version given by the defendant, the prosecutor was guilty of grave impropriety. No doubt there are many ways in which the fair trial of a criminal proceeding can be put at risk, but surely one way is for the prosecutor or anyone on his behalf to so harass the accused between hearings of the accused's cross-examination as is indicated on the material presently before this Court. As I have also indicated, the issue is not really whether there was gross impropriety but whether the fact of that conversation and the manner in which it was dealt with by the Magistrate on 1st June constitutes such a departure from the ordinary rules of procedure in a criminal case and the ordinary standards of conduct that it must be said either that the trial itself was unfair, in that the prosecutor's conduct was such as to render it necessary for the Magistrate to end the hearing, or at least do his best to end the prosecutor's role in it, or whether the Magistrate himself was gravely in error in failing to investigate properly the allegations made by counsel for the defendant.
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> I have little doubt that, if the Magistrate had heard evidence about this matter, he would have been persuaded that there was not only a real issue to be tried as to what occurred, but a real issue to be tried as to whether, if that conversation did occur, the fair trial of the defendant could continue – whether in all the circumstances a prosecutor who had said these things to a defendant ought to be permitted to continue to cross-examine that defendant, who on the defendant's version had given

> some things away, it might be thought, because of the pressure he was put under in that conversation – and pressure, of course, which ought never to have been applied to him. The Magistrate, without hearing the defendant or the independent witness, reached conclusions in a manner which denied him the opportunity of deciding whether in all the circumstances the hearing could continue with the appearance of justice.
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> It is true, as counsel for the defendant has submitted, that the defendant was in this case permitted to give evidence upon the principal issues, and it was further said that the refusal to hear evidence was only a refusal in relation to what is a collateral matter and it did not involve such a grave departure from the fundamental rules governing the conduct of criminal proceedings to justify the intervention of this Court. It has been said many times that the Court must be slow to intervene; that has often been said in relation to such questions as the admissibility of evidence. I have not been pointed to a case having much similarity to the present case, but I am in the end persuaded that the conduct complained of was such as to demand that the Magistrate properly investigate it in order to determine whether the trial fairly could proceed.
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> The Magistrate did not do so, and in my view thereby deprived himself of the material which would have enabled him to form a considered judgment as to whether the trial could proceed. I think that error was compounded by the making of findings which, as I have said, would be regarded by the fair-minded observer as having involved the Magistrate reaching at least some conclusions favourable to the prosecution and adverse to the defendant. His later statement that he was not in any way finding against Mr Pevitt's character or reflecting on the veracity of the defendant cannot, in my view, repair the damage.
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> I do not regard the situation as tolerable. I believe that what has occurred has given the impression of unfairness, and while the Court is, as I have said, slow to act in an interlocutory manner, the discretionary remedy to restrain the Magistrate should go. I might say that I had considered whether, in all the circumstances, at this late stage the defendant ought to accept the risk of conviction against the benefit of a possible acquittal, but, having reached the view that the whole proceeding is tainted, it seems to me that the Court ought not to withhold judgment upon it. Accordingly, relief of the nature sought will be granted, and I shall discuss with counsel the precise form of the order."

Per Southwell J in *Pevitt v Kolotylo & Anor* [1993] VicSC 343; MC 50/1993, 28 June 1993.

(h) Intimation to counsel that cross-examination of defendant and witness not necessary – defendant's evidence rejected on demeanour – no objection from defendant's counsel

HELD: Appeal allowed. Order set aside. Remitted for hearing before another magistrate.

1. Having regard to the intimation to counsel and the rejection of the defendant's evidence because of the way in which he displayed himself and took the oath, the case was one of ostensible, if not actual bias in the sense of prejudgment and a denial of natural justice or procedural fairness.

R v Watson; ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, applied.

2. The rejection of the second witness' evidence called for some specific explanation by the magistrate. The failure by the magistrate to give adequate reasons meant that the defendant did not know why his case was rejected and accordingly, was denied natural justice.

Sun Alliance Insurance Ltd v Massoud [1989] VicRp 2; (1989) VR 8, applied.

3. The defendant could not be taken to have waived the right to complain of the magistrate's apparent prejudgment because the magistrate's prejudice was not fully apparent until the reasons for decision had been stated.

Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277, referred to.

Per Mandie J:

> "In an oft-quoted passage in *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256 at 259; [1923] All ER 233; 93 LJKB 129, Lord Hewart CJ said that:
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> > "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done ... nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."
>
> ... In my view, however, once the Magistrate had gone on to reject the need to cross-examine Ms Fedden, had failed to express reasons for rejecting her evidence and had also emphasised in his

> reasons his reaction to the manner in which the appellant displayed himself and took the oath, fair-minded people would have reasonably apprehended or suspected on a consideration of all of those matters that the Magistrate had indeed made up his mind in favour of the respondent's case by the time that the appellant had taken the oath and before he gave evidence or, certainly, before Ms Fedden had given evidence. The case is therefore one it seems to me of ostensible, if not actual, bias in the sense of pre-judgment and a denial of natural justice or procedural fairness.
>
> ... In this case the reasonable apprehension of bias or pre-judgment ultimately stems not simply from the conduct of the learned Magistrate during the hearing but upon a consideration of his conduct during the hearing as illuminated by his stated reasons for decision. I do not consider that the solicitor for the appellant was sufficiently or so clearly apprised of the relevant circumstances as to have been able to formulate an appropriate objection prior to the Magistrate stating his reasons for decision.
>
> ... I turn to the submission on behalf of the respondent that the appellant had failed to object to the course being taken by the Magistrate or to ask his Worship to stand down and was therefore debarred from raising the matters relied upon before this Court.
>
> ... To put it another way, I do not think that the appellant can be taken to have waived the right to complain of the apparent pre-judgment because his solicitor had insufficient knowledge of the matters relevant thereto until the reasons had been stated and final orders made. Although the decision was not reserved, there was no realistic opportunity to question its contents. If I am wrong about this aspect, the appellant is entitled in any event to rely upon the Magistrate's failure to state adequate reasons for his decision as an independent ground of appeal which I consider has been made out.
>
> Furthermore, I think that it was in all the particular circumstances of this case a denial of natural justice or procedural fairness (as was submitted on behalf of the appellant) for the Magistrate to rely upon the manner in which the appellant had taken the oath and displayed himself as a critical basis for the rejection of his evidence without giving the appellant an opportunity to explain that behaviour. It may have been attributable to many causes including nervousness (as was submitted before me)."

Per Mandie J in *Croft v Peterson* [1994] VicSC 275; MC 16/1994, 24 May 1994.

(i) Audible dissent by legal practitioner against Magistrate's ruling – conduct disapproved of by Magistrate – no bias shown

1. A member of the legal profession who exhibits open dissatisfaction with a ruling of a court in the court's presence and immediately after the ruling is handed down exhibits extreme discourtesy which may well constitute an act of contempt. In such circumstances, the court has a duty to indicate plainly that such behaviour is unacceptable.

2. Where a legal practitioner visibly and audibly dissented from a ruling of a Magistrate, it was appropriate for the Magistrate to express disapproval of such behaviour. Further, the Magistrate's action was not such as to cause the impartial observer to believe that the Magistrate was unable to deal with the application impartially.

Per Harper J:

> "The position, it seems to me, however, is that His Worship did no more than to appropriately express his anger at Mr Brott's evident dissension from a ruling made by His Worship. Any member of the legal profession who exhibits open dissatisfaction with a ruling of a court and does so in the presence of the court and immediately after the ruling is handed down exhibits behaviour which in almost, if not in every, case could be properly characterised as at the very least of extreme discourtesy and which may well constitute an act of contempt. Certainly in almost every case, if not every case, such behaviour would warrant the intervention of the court in terms which made it quite plain that such behaviour was unacceptable."

Per Harper J in *Birrell v IOOF & Ors* [1994] VicSC 617; MC 36/1994, 18 October 1994.

(j) Magistrate informed of defendant's prior convictions before defence case – no evidence called – whether Magistrate in error in finalising case

Where, before the defence case was opened the Magistrate was informed that the accused had prior convictions and the accused then called no evidence, the Magistrate was not in error in proceeding with the hearing of the charge.

Per Harper J:

> "It is then submitted on behalf of the Appellant that there was put to His Worship before his decision to convict or acquit information that the Appellant had prior convictions. The nature of these convictions was not, however, made known to the Magistrate. Having this information put to him at that time,

> the Magistrate, it was submitted, ought to have disqualified himself. There was before me a dispute about whether the fact that "something was known" about the Appellant was revealed to His Worship before or after the close of the case for the Appellant in the hearing at Wangaratta or indeed before the Appellant's case was opened to His Worship. I am prepared to proceed on the basis that the Magistrate received this information before that opening. As it happened, however, the Appellant called no evidence. The only defence taken was a technical defence to the informant's case. His Worship had decided that point against the Appellant before the question of prior convictions arose.
>
> It was submitted on behalf of the Appellant that the decision to call no evidence may have been taken as a result of the Appellant's legal adviser's apprehension of the Magistrate's bias, bias induced by his receipt of the information that the Appellant had prior convictions. But if so, that apprehension was misplaced. In any event, if an accused has a case to put, that case must be put, to the extent that the rulings of the court allow, at the hearing or trial. Should a conviction follow, any appeal against a ruling of the court can then be taken. Here, no ruling of the Magistrate prevented the Appellant calling whatever evidence he wished in his defence.
>
> Accordingly, it is in my opinion not open to attack the result on the basis that had the information about prior convictions not affected or been thought to affect the Magistrate's mind, a different approach to the presentation of the Appellant's case might have been made. For these reasons, it seems to me that the decision of His Worship to proceed with the hearing, despite the application for an adjournment and despite the information about the Appellant's antecedents, was not a decision which can be attacked at law. For these reasons, the appeal must fail."

Per Harper J in *Brady v Colley* [1995] VicSC 327; MC 20/1995, 30 June 1995.

(k) Intervention order made – application made for extension of the order – before hearing application, Magistrate rejected application

HELD: Orders made by the magistrate quashed. Remitted for hearing and determination by another magistrate.

1. As H. did not consent to the orders being made and the requirements imposed, the making of the orders after the negotiations failed involved a denial of justice because there was no hearing accorded to H.

2. The statements made by the magistrate were made before any sworn evidence had been given. Also, the magistrate made an order against H. and imposed an additional constraint without H.'s consent. These actions of the magistrate provided evidence supporting pre-judgment and a finding of ostensible bias.

Per Smith J:

> "48. It must also be borne in mind that while his Worship had handled the previous applications, at no time had there been any exploration of the facts by sworn evidence and cross-examination before him relating to the past history. It is also relevant to bear in mind that his Worship appears to have, on his own initiative, made the order a ten year order and imposed the additional constraint on complaints to the police. The latter also showed that he had a view as to the substance, or lack of it, in the complaints that she had made to the police and had formed a view about those matters without the benefit of a hearing. These restrictions were imposed without consent and without a hearing, thus providing further evidence suggesting pre-judgment by his Worship and, therefore, a reasonable basis for having an apprehension of bias on his part.
>
> 49. It was submitted for the defendant that if there was any basis for finding apprehended or ostensible bias, Ms Hunter had waived any objection (*Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277). Counsel submitted that at no time was the issue raised. In particular, no application was made to the Magistrate that he disqualify himself. Therefore, it is said, the plaintiff must be regarded as having waived any objection on the ground of apprehended bias.
>
> 50. There is force in this argument, to the extent that it is directed to waiver in respect of events that occurred immediately prior to the return of his Worship to the bench to announce the orders. As I have noted above, however, his actions at that point provided further evidence supporting a finding of ostensible bias. They may be viewed in the context of his earlier conduct *Vakauta v Kelly*, above, at 573, 579, 588. I am satisfied that it is unrealistic to suggest that Ms Hunter might have done anything at that point to raise the issue of ostensible bias.
>
> ... 59. It would seem to me, however, that where a judicial officer with the agreement of the parties acts as a mediator in a proceeding and a settlement is not achieved, the proceeding must ordinarily go to trial."

Per Smith J in *Hunter v Magistrates' Court & Aulich* [2002] VSC 362; MC 23/2002, 30 August 2002.

(l) Civil proceedings – Magistrate derived information from documents not produced nor contents disclosed – counsel given no opportunity to make submissions

HELD: Appeal allowed. Order set aside. Remitted for determination by another magistrate.

1. A general and fundamental requirement of procedural fairness is that a party subject to the possibility of an adverse determination to be made on the basis of particular documents or material, should know the case against it and be afforded an opportunity to respond. In the present case, the magistrate had apparently derived adverse information concerning NEP/L from vaguely identified source documents which were not produced, nor their contents disclosed, to NEP/L's legal representative. No opportunity to read or answer the adverse material was afforded. The magistrate's approach, and his reference to and apparent reliance on such material, did not accord with the requirements of natural justice.

2. The magistrate's statements, his general approach and his refusal of an adjournment (in circumstances where the court had raised illegality of its own motion without notice and concluded that the appellant was guilty of a crime on the basis of unidentified extraneous material) would give rise to a reasonable apprehension in a fair-minded observer, knowing the relevant circumstances of the case, that the magistrate had prejudged the case, and did not bring an impartial and unprejudiced mind to the resolution of the matters before him.

3. The right to object on the ground of bias or conduct giving rise to an apprehension of bias may, in certain circumstances, be waived. In the present case, counsel did not, in terms, make a formal objection or an application that the magistrate disqualify himself for bias. However, NEP/L did not continue to participate in the hearing of the case following the impugned conduct, and subsequently awaited judgment without making any protest. The entire case was disposed of speedily. Accordingly, despite the absence of a formal objection or application, the right to object was not waived in all the circumstances.

Per Dodds-Streeton J:

"23. In the present case, the learned Magistrate had apparently derived adverse information concerning National Exchange from vaguely identified source documents which were not produced, nor their contents disclosed, to National Exchange's legal representative. No opportunity to read or answer the adverse material was afforded.

24. In my opinion, the learned Magistrate's approach, and his reference to and apparent reliance on such material, did not accord with the requirements of natural justice. The first question of law should be answered in the affirmative.

Apprehension of Bias

26. The test for determining whether the conduct or observations of a court or tribunal give rise to a reasonable apprehension of bias is well established. I recently considered the principal authorities in *Mond & Mond v Dayan Rabbi Isaac Dov Berger* [2004] VSC 45; (2004) 10 VR 534 and for convenience, set out an extract from the reasons for judgment.

27. In *Webb v R* [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258, Mason CJ and McHugh J stated:

> "When it is alleged that a judge has been or might be actuated by bias, this Court has held that the proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case. ... The Court has specifically rejected the real likelihood of bias test. The principle behind the reasonable apprehension or suspicion test is that it is of 'fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'."

28. In *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420, the High Court stated:

> "It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at pp258-263; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."

29. In *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, Dawson J observed that the test is:

> " ... whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him. See *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420; *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at pp258-263; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11."

30. As recognised by Toohey J in *Webb v R* [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258, "the underlying principle is the same whether judges, jurors or members of a tribunal are concerned, though naturally its application will differ in those cases".

31. In *Gascor v Ellicott* [1995] VicSC 625; [1997] 1 VR 332, the Court of Appeal upheld the trial judge's rejection of an application to remove an arbitrator for misconduct pursuant to s44 of the *Commercial Arbitration Act* 1984.

32. The appellant sought to remove the arbitrator appointed to determine a payment due by the appellant to the respondent under an agreement for the purchase of natural gas. The appellant alleged that the arbitrator had previously acted as counsel for the producers of the gas product in an earlier arbitration involving some similar issues and had cross-examined expert witnesses whom the appellant intended to call; had acted as an arbitrator in another arbitration and had rejected evidence of persons to be called as expert witnesses for the appellant; and had not disclosed those matters. It alleged that the arbitrator's conduct gave rise to a reasonable apprehension of bias.

33. Tadgell JA observed:

> "There is no suggestion in this case of actual bias. The question of apprehended bias as a disqualification from adjudication in a court of law was most recently considered by this court in *Rozenes v Kelly* [1996] VicRp 20; [1996] 1 VR 320. As it was there stated at 329 the essential issue in such a case is whether in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matters before him".

34. His Honour further stated:

> "Although the criterion of apprehension of partiality or prejudice is [sic] possibility, not likelihood, a reasonable apprehension is to be established to the court's satisfaction: it is a reasonable and not a fanciful or fantastic apprehension that is to be established; and the apprehension is to be attributed to an observer who is 'fair-minded' – which means 'reasonable.'. . . ... Moreover, it is for the court to determine what knowledge the fair-minded or reasonable lay observer is to apply to an appraisal of the situation."

35. He referred to *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 70; (1990) 93 ALR 435; (1990) 64 ALJR 412 where Mason CJ and Brennan J said:

> "In assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances of the case."

36. Tadgell JA also referred to *Webb v R* [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258 where Deane J considered that the hypothetical figure should have:

> "A broad knowledge of the material objective facts as ascertained by the appellate court".

37. His Honour concluded:

> "However one describes the knowledge, the observer whose view the court is to seek is in my opinion to be fastened with sufficient knowledge to enable a rational and reasonable view – not just a perfunctory or superficial view – to be formed. Of course that is really to say no more than that there must be attributed to the fair-minded observer knowledge which would afford an opportunity to consider all the relevant circumstances of the case . . ."

38. In *Victorian Workcare* [1994] VicSC 494, McDonald J stated:

> "The question as to whether a judicial officer of an inferior court has demonstrated bias against one party to the favour or advantage of the opposing side or that the officer is unable to bring an

unprejudiced mind to the resolution of the matter goes to the jurisdiction of the inferior court. It is a question of law to be determined by this court on the facts – *Sankey v Whitlam & Ors* (1977) 29 FLR 346; (1977) 21 ALR 457; (1977) 1 NSWLR 333."

Waiver

48. The right to object on the ground of bias or conduct giving rise to an apprehension of bias may, in certain circumstances, be waived. I recently considered the principles relevant to waiver in that context in *Mond and Mond v Dayan Rabbi Isaac Dov Berger* [2004] VSC 45; (2004) 10 VR 534. For convenience, I set out the relevant extract from my reasons for judgment in that case.

49. In *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VicRp 10; (1973) VR 122, McInerney J found that a magistrate's conduct in accepting transport to and from a view in a car with the respondents' barrister and witness constituted grounds on which reasonable people might conclude that the applicant might not receive a fair and unbiased hearing. His Honour nevertheless held that the applicant had lost whatever right he had to have the decision quashed "by reason of the failure of his counsel to object to the magistrate's continuing to hear the matter".

54. In *Hayden Merrett v The Director of Public Prosecutions and His Honour Judge Dyett* [1996] VicSC 489, No. 6362 of 1996 SCV, O'Bryan J, 18 October 1996, on which the defendants also rely in this context, O'Bryan J ultimately found that there was no reasonable apprehension of bias in the judge as alleged by the appellant. His Honour observed: "I find it curious indeed that experienced defence counsel did not request the learned Judge to disqualify himself before he delivered reasons for decision. If it was obviously clear ... that the learned Judge had pre-judged the appeals ... counsel could have politely asked him to stand aside". He also noted that, as in *R v Magistrates' Court at Lilydale* [1973] VicRp 10; (1973) VR 122, the applicant had waited until the judge delivered an adverse determination prior to making a complaint.

55. In *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-27, a party's counsel took no objection to a trial judge's comments (which the majority held to give rise to an appearance of bias) and made no application in relation to it. The matter proceeded to judgment in which similar comments were repeated. Dawson J (dissenting on some issues) agreed with the majority that a party could waive a right to object by "standing by". He considered that waiver would occur where *"no objection was taken to the continuation of the trial before His Honour, either formally or in effect...I do not mean to suggest that an objection will be waived if it is not made in formal or even explicit terms. The circumstances may be such that it is plain, without it being put into words, that a judge is being asked to consider his position having regard to the requirement of impartiality".*

57. In the present case, Mr Griffin did not, in terms, make a formal objection or an application that the learned Magistrate disqualify himself for bias. He formally protested that the documents referred to by the Magistrate were not properly before the court. Further, when the issue of illegality was raised by the Magistrate, Mr Griffin sought an adjournment, which was refused as being a waste of public moneys over a small sum. The Magistrate expressly invited that the matter be appealed. The claim appears to have been cursorily dismissed.

58. This is not a case where the appellant continued to participate in the hearing of the case following the impugned conduct, and subsequently awaited judgment without making any protest. There was no interval between the hearing of the case and its disposition. The entire case was disposed of speedily. Mr Griffin had sought an adjournment to consider the implications of the newly-raised issue of criminal conduct, which had been refused. He had objected, to no avail, to the learned Magistrate's reference to or reliance on unidentified material to which the appellant had no access.

59. I am satisfied that despite the absence of a formal objection or application, the right to object was not waived in all the circumstances, where the matter proceeded to a summary conclusion although the appellant's legal representative had formally sought, and had been refused, an adjournment to consider the implications of the learned Magistrate's views on illegality.

60. In my opinion, the conduct of the learned Magistrate gave rise to a reasonable apprehension of bias, and the appellant's right to object was not waived. The second question should be answered in the affirmative."

Per Dodds-Streeton J in *National Exchange Pty Ltd v Foster* [2004] VSC 125; MC 20/2004, 5 April 2004.

(m) During Coronial inquest coroner approached witness requesting him to participate in a forthcoming seminar for coroners – such approach revealed to parties in inquest – whether coroner displayed apprehended bias

1. It is common ground that the coroner was under a duty to accord procedural fairness to each of the plaintiffs and that the obligation to accord procedural fairness included a requirement that the coroner's decision-making process be free from actual or apprehended bias. The nature and function of the entity concerned affect the content of the obligation to accord procedural fairness. The relevant test to be applied in determining the existence of apprehended or ostensible bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. The observer is taken to be reasonable and is to be assumed to have a broad knowledge of the material objective facts as ascertained by the reviewing court. At the same time, the observer is not to be assumed to have a detailed knowledge of the law or of the character or ability of a particular judge. The objective observer is to be assumed, however, to have sufficient knowledge to avoid an erroneous view of the particular facts of the case. In applying the test, it is to be remembered that the person being observed is a professional judge whose training, tradition and oath or affirmation require a judge to discard the irrelevant, the immaterial and the prejudicial and the issues are to be considered in the context of ordinary judicial practice.

2. Where a coroner during the hearing an inquest made an approach to a witness to participate in a forthcoming forum for Coroners, it did not necessarily follow that such approach indicated that the coroner thought the witness had been a credible witness in the particular case or that he had been an impartial and objective witness. Having regard to all the material evidence including the way in which the coroner conducted the inquest and the various discussions held between the coroner and the witnesses and comments made, a fair-minded observer would have had no doubt that the coroner would bring an impartial and unprejudiced mind to the resolution of the outstanding questions.

Per Smith J:

> " 31. Generally the transcript reveals the coroner discussing and testing in an open minded fashion with all experts the pros and cons of the different proposals and opinions that they were putting forward. The coroner appeared to articulate his thinking frankly and tested the expert evidence so that the parties knew the way his thinking was developing and what issues were troubling him. It is quite clear that he had not formed a final view about key recommendations advanced by Dr Grzebieta prior to his approach to Dr Grzebieta about taking part in the training forum.
>
> 32. Finally, it is necessary to consider the statement made by the coroner at the time he informed the parties of the contact with Dr Grzebieta. As noted above, he told the parties that they had not discussed the case and he reiterated that his contact did not necessarily mean that he accepted or rejected Dr Grzebieta's evidence and stated that he thought he had indicated to the parties that he was swinging well away from saying that roll-over protection was the answer but that whether it was left to the experts to sort out was another matter. The latter statements were consistent with the statements he had made in October and early November about his thinking.
>
> 33. The fair-minded observer might be expected to approach with caution a statement by the judicial officer seeking to deny the attack upon his impartiality. In this case, however, his statement that his contacting Dr Grzebieta did not mean he accepted or rejected his evidence and that he was swinging well away from saying that roll-over protection was the answer were entirely consistent with his prior conduct in the inquest and confirmed his impartiality.
>
> 34. In conclusion I note that the plaintiffs sought to attach significance to the coroner's acknowledgements of having erred in contacting Dr Grzebieta and the alleged confirmation of that admission by his statement that he would withdraw the invitation extended to Dr Grzebieta to take part in the forum. It was put that the coroner thereby demonstrated that he realized that he had displayed ostensible bias.
>
> 35. In my view, that is reading far too much into what occurred. Hindsight is a wonderful thing. Most judicial officers finding themselves in the position of the coroner would prefer that they had not done what he did because it is the sort of action which can give rise to complaints and difficulties however unmeritorious the arguments put may be. Any conscientious judicial officer would regret creating such a situation and, being honest, would say so. The conduct does not involve an acknowledgment of apprehended or ostensible bias.

Conclusion

36. As I have indicated, in my view the inference sought to be relied upon about the view formed by the coroner about Dr Grzebieta was not reasonably open on the evidence. Alternatively, at its highest, it was no more than a possible inference and, was contradicted by the other evidence referred to above. Thus the critical first step in the plaintiffs' argument is not made out. As to the ultimate question, I am satisfied that a consideration of all the material evidence would have left a fair-minded observer with no doubt that the coroner would bring an impartial and unprejudiced mind to the resolution of the outstanding questions."

Per Smith J in *Honda Australia Motorcycle & Ors v State Coroner & Anor* [2005] VSC 387; MC 31/2005; 29 September 2005.

(n) Order made by judge refusing to revoke bail of accused during trial – accused failed to attend trial – bail forfeited and surety ordered to pay amount of bail within a certain time – application to original judge by surety to vary or rescind bail orders – application that judge disqualify himself on grounds of perceived bias – principles to apply when such an application made – whether the reasonable, fair-minded observer would conclude that the judge might not bring an impartial and unprejudiced mind to the resolution of the application.

1. The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require the judge to discard the irrelevant, the immaterial and the prejudicial'. Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation.

Johnson v Johnson [2000] HCA 48; (2000) 201 CLR 488; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21, applied.

2. In the present case the test was not whether the impartial observer may think that it was unfair that the judge refused to revoke the bail, and then refused an application to vary or rescind the order forfeiting bail and ordering the surety to pay a substantial sum of money and, in default, imprisonment. The test is that a judge should not sit to hear a case "if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it". The reasonable hypothetical observer seated in the back of the Court and having the necessary knowledge of all relevant matters, would not entertain a reasonable apprehension that the judge could not bring an impartial and unprejudiced mind to the resolution of the questions involved in the application.

Per Gillard J:

"28. The most recent High Court case is *Antoun v The Queen* [2006] HCA 2; (2006) 224 ALR 51; (2006) 80 ALJR 497; (2006) 159 A Crim R 513. In that case, a judge sitting alone informed the accused's counsel, before any submission was made, that a no case to answer submission would fail. He repeated that observation on two other occasions. This was a case of a judge pre-judging a matter and making that very clear to the parties before they had an opportunity of addressing him. This was a straightforward example of pre-judgment and the High Court held that the judge should have disqualified himself.

34. One other matter must be stated and emphasised. That is that a judge should not too readily accept recusal because one of the parties to the matter requested it. In *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, Mason J said:

"It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson* and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is

> a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."

(Emphasis added).

35. His Honour's observations have often been stated and applied in the cases. One of the reasons for his Honour's observations is that in the administration of law in this country, as a general proposition, no party has any entitlement to choose which judicial officer will conduct the trial. This observation has been applied often. Kirby J said in *Johnson v Johnson*:

> "Such considerations lay behind the salutary warning given in *Re JRL; Ex parte JRL* that judicial officers in Australia were obliged to discharge their professional duties unless disqualified by law. They were told not to accede too readily to suggestions of an appearance of bias, lest parties be encouraged to seek such disqualification without justification. Applications of that kind might sometimes be made in the hope of securing an adjudicator more sympathetic to a party's cause. Or they might be made because of the strategic advantage that may thereby be secured, especially the interruption of lengthy proceedings and the delays consequent upon obtaining a fresh start in a busy court or tribunal."

36. In respect to the warning by the High Court not to readily accede to such applications, I refer to the decision of the High Court in *Re Polites; Ex parte Hoyts Corporation Pty Ltd (No. 2)* [1991] HCA 25; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114. In that case, Deputy President Polites and others were sitting as a Full Bench of the Australian Industrial Relations Commission hearing a number of matters relating to the terms and conditions of employment of employees of the Hoyts Corporation Pty Ltd. Mr Polites, when he was a solicitor, had advised Hoyts and he acceded to an application that he should disqualify himself from sitting. On appeal, the High Court held that he should not have disqualified himself.

37. It is not said that I have said anything or done anything which could conceivably amount to pre-judgment of any of the issues in this application. It is not said that I have any association with any of the parties and accordingly could not bring an impartial mind to the resolution of the issues. It is not said that I have some bias through interest in any of the issues. It is put that the reasonable fair-minded observer sitting in the back of the Court would think it unfair if I refused the application, taking into account that on the Friday before the principal disappeared, I had refused to revoke bail. It is said that the surety would rely upon the fact, namely, that the judge refused to revoke the bail, as a form of comfort and security to her that the principal would honour his bail. That may or may not be so and that may be a fact relevant to the issues.

38. But in considering that fact in the application, in my view, it does not involve any question of criticism of the reasons why the judge refused to revoke the bail. The fact was that I did so on the material before me. It is said that I may be seen to be punishing the surety because later events showed that the refusal to revoke the bail was wrong, and this would be seen to be unfair.

39. However, in my view, that is not the test. It is not whether the impartial observer may think that it was unfair that the judge refused to revoke the bail, and then refused an application to vary or rescind the order forfeiting bail and ordering the surety to pay a substantial sum of money and, in default, imprisonment. The test is that a judge should not sit to hear a case "if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."

40. Mr Lasry disavowed any suggestion of actual bias. I can say categorically that I will have no difficulty in considering and determining the issues raised in this application in accordance with the law and the facts as I find them, and I am not in any way embarrassed in performing my judicial function by reason of the fact that later events showed that my failure to revoke bail was wrong.

41. In my view, the reasonable hypothetical observer seated in the back of the Court and having the necessary knowledge of all relevant matters, would not entertain a reasonable apprehension that I could not bring an impartial and unprejudiced mind to the resolution of the questions involved in this application. If the application is refused and that is the outcome of it, it does not follow that it would be unfair. In my view, it would not be viewed as unfair by the fair-minded observer with knowledge of the material objective facts. The fact is that the bail was not revoked, and the surety seeks to rely upon that fact in the present application. On the basis that it is relevant to an issue in the application, she is entitled to do so. It does not appear to me to be relevant to any issue in this application that the reasons given by the judge turned out to be wrong. If she was aware of the reasons given then she may be able to rely upon them. No doubt she can rely upon them, if relevant, to show that the judge did not see any concern about the principal's attendance at Court the following week.

42. In my opinion, the reasonable, fair minded observer would not conclude that in the circumstances,

I might not bring an impartial and unprejudiced mind to the resolution of the issues in the application. Accordingly, I reject the application and the matter will proceed before me."

Per Gillard J in *R v Mokbel (Application By Surety)* [2006] VSC 221; MC 20/2006, 2 June 2006.

(o) Civil proceedings – motor vehicle accident – party not allowed to speak at times – finding against defendant – whether apprehended bias shown by magistrate

HELD: Appeal dismissed.

1. In relation to the allegation by V. that the Magistrate was biased, the test for apprehended bias is whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".

Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, applied.

2. The fact that V. considered that he was not allowed to speak at certain times during the hearing did not substantiate the ground that the Magistrate was biased against him. In considering the transcript of the proceedings before the Magistrate there was no basis to support these submissions. A fair-minded lay observer would not reasonably apprehend that the Magistrate did not bring an impartial or unprejudiced mind to the resolution of the dispute between V. and Y. The test for bias was not met.

Per McMillan J:

"20. Mr Velissaris' first ground of appeal was that the Magistrate was biased against him.

21. The submissions made by Mr Velissaris in support of this submission were, essentially, that he believed that the Magistrate cut him off from speaking during the hearing and told him he was lying.

22. It is unclear whether Mr Velissaris alleges actual bias, or apprehended bias. The test for actual bias is a stringent one: *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209; (2008) 251 ALR 558; (2008) 72 NSWLR 504, 517; (2008) 161 LGERA 170, per Basten JA. In this case, it is sufficient for this Court to apply the test for apprehended bias, which has a lower threshold.

23. The test for apprehended bias is whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide": *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 344; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

24. In my view, the fact that Mr Velissaris considered that he was not allowed to speak at certain times during the hearing does not substantiate the ground that the Magistrate was biased against him. I have considered the transcript of the proceedings before the Magistrate and I conclude that there is no basis to support these submissions.

25. In this case, I find that the test for bias is not met. The transcript of the proceeding before the Magistrate was in evidence before me and, after considering the whole of the transcript, in my view, a fair-minded lay observer would not reasonably apprehend that the Magistrate did not bring an impartial or unprejudiced mind to the resolution of the dispute between Mr Velissaris and Mr Yang.

26. Accordingly, I find that Mr Velissaris has not demonstrated any error of law on the part of the Magistrate in respect of the first ground of appeal."

Per McMillan J in *Velissaris v Yang* [2012] VSC 257; MC 22/2012, 19 June 2012.

(p) Civil proceeding – application by defendant for person to appear for him via a power of attorney – refused by Magistrate – assertion by defendant that Magistrate cut him off and did not allow reasonable discussion – whether Magistrate displayed bias

In relation to the submission that the Magistrate displayed actual bias or a perception of bias, actual bias required evidence of same. Perception of bias is not the subjective perception of the party, but must be established on the basis of what a reasonable person in that party's position would perceive. On a reading of the whole of the transcript it showed at most that the magistrate was abrupt. But there was no real prospect of success in W.'s contention that the transcript showed either any actual bias or that objectively, that was to a reasonable person, the magistrate appeared biased against the plaintiff. On the contrary, the magistrate immediately permitted Mr McDonald to be a McKenzie friend for the plaintiff, on the plaintiff's request, and also immediately moved on the plaintiff's application for adjournment.

Per Lansdowne AsJ:

Bias

"44. Bias may be established either as actual bias or perception of bias. It is not entirely clear on which limb the plaintiff relies, and so I will consider both. The plaintiff refers to particular portions of the transcript in support of his contention, asserting that the magistrate cut him off or did not allow reasonable discussion.

45. Actual bias requires evidence of same. Perception of bias is not the subjective perception of the party, but must be established on the basis of what a reasonable person in that party's position would perceive. I have read the whole of the transcript, including the portions on which the plaintiff relies. On my view, that reading shows at most that the magistrate was abrupt. There is no real prospect of success in my view, in the plaintiff's contention that the transcript shows either any actual bias or that objectively, that is to a reasonable person, the magistrate appeared biased against the plaintiff. On the contrary, the magistrate immediately permitted Mr McDonald to be a McKenzie friend for the plaintiff, on the plaintiff's request, and also immediately moved on the plaintiff's application for adjournment.

46. The plaintiff asserts that the fact that the magistrate allowed a full day's costs thrown away for a short appearance and a sum in excess of scale without enquiry also show bias. I do not consider there is any real prospect of success in this contention. As set out below, a foundation for the costs orders can be found in the circumstances of the adjournment, and are not explicable only by bias.

47. I do not consider that the plaintiff has any real prospect of success in relation to complaint 2 in his originating motion."

Per Lansdowne AsJ in *Waddington v Magistrates' Court of Victoria & Kha* [2013] VSC 101; MC 09/2013, 13 March 2013.

On appeal:

In the circumstances, the magistrate did not refuse to exercise his power to control the processes in his court in the interests of justice and the exercise of any discretion to hear from Mr McDonald did not miscarry. There was no basis upon which an allegation of actual bias could have been made out based on what occurred at the hearing in the Magistrates' Court. Furthermore, a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question or to the adjudication of the civil claim brought by W.

Per Emerton J:

"51. Ground 2 is that the magistrate is biased against Mr Waddington. Mr Waddington seeks to have the adjourned proceeding referred to a different magistrate for hearing and determination. I take it, therefore, that Mr Waddington apprehends that the magistrate may have a predisposition (or bias against him) affecting not only the decision to refuse permission for Mr McDonald to appear, but also affecting Mr Waddington's claim for damages in the Magistrates' Court more generally.

52. Mr Waddington makes no distinction between actual bias and apprehended bias. As a result, the Associate Judge proceeded on the basis that both were alleged, but concluded that there was no factual foundation to enable either allegation to succeed, having carefully read the transcript and formed the view that, at most, the conduct of magistrate towards Mr Waddington could be described as 'abrupt'.

53. I have also read the transcript.

54. Like the Associate Judge, I find that the magistrate treated the Mr Waddington abruptly. He dealt with the request for Mr McDonald to appear for Mr Waddington very shortly. However, having made the decision that Mr McDonald could not appear, the magistrate sought to give Mr Waddington an opportunity to present his case (by offering the assistance of the court and permitting Mr McDonald to assist Mr Waddington as a McKenzie friend) or to apply for an adjournment. Having regard to the pressures faced by magistrates in running a busy court, the restrictions on representation in s100(6) and the measures available to the court to assist unrepresented litigants, the steps taken by the magistrate were unremarkable.

55. Bias, as the learned authors (Mark Aronson and Matthew Groves) of *Judicial Review of Administrative Action* at p610 have observed, is both a loaded and open word. It is an open word because it may encompass many different things. However, it is usually associated with a lack of partiality or predisposition in favour or against one of the parties on an issue for reasons unconnected with the merits of the issue. (*Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Viv 1117, [28]). It is unnecessary to make out actual bias in order to have a decision set aside. It is sufficient

to show that a fair-minded lay observer might reasonably apprehend that a judicial officer might not bring an impartial mind to the resolution of a question he or she is required to decide. The question is one of possibility (real and not remote), not probability.

56. In *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; 63 ALD 577; 75 ALJR 277; (2000) 21 Leg Rep 13, the High Court of Australia set out a two-step process for applying the 'apprehension of bias principle':

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. 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.

57. The two-step test in *Ebner* required Mr Waddington to identify what he says might have led the magistrate to decide the question of representation and/or the question arising in his civil claim other than on its legal and factual merits and then to show a connection between that matter and the deviation from deciding the question on the merits. For the first step, Mr Waddington points to rudeness, abruptness and an unwillingness to listen. However, Mr Waddington has made no connection between what he perceived to be rudeness or abruptness and a predisposition or prejudice against his case for reasons unconnected with the merits. Unfortunately, judicial officers are sometimes rude or abrupt and may seem to be unwilling to listen to everything the litigant wishes to say. That may well be a function of 'grumpiness' and a burdensome workload rather than a sign of predisposition or partiality. As a general rule, it would not, without more, give rise to an apprehension that the judicial officer might not bring an impartial mind to the resolution of a question he or she is required to decide.

58. Mr Waddington also relies on the manner in which the magistrate dealt with the question of costs. The costs order was made, as the Associate Judge found, in accordance with the principle that a party will usually be entitled to their costs thrown away as the result of an adjournment sought by another party. The fact that Mr Waddington was ordered to pay the defendant's costs thrown away could not, in and of itself, constitute bias or give rise to an apprehension of bias. Furthermore, the fact that the magistrate did not accede to the application for an order that costs be reserved is also unremarkable, given the circumstances in which they were incurred.

59. Mr Waddington contended that the amount of the costs order was exorbitant and that this displayed bias. However, he did not put before the Associate Judge or before this court, any material to show that the costs awarded were in fact out of the ordinary.

60. In any event, whether or not the costs were out of the ordinary, I do not consider that the amount of costs awarded is evidence of bias. The fact that the magistrate accepted without question the figure put forward by the solicitor for the second respondent might be evidence of impatience or unreasonableness, but so much would not amount to bias. The magistrate asked the solicitor for the second respondent what his actual costs were, he received an answer, and he fixed the costs in that amount. The magistrate did not, in my view, display any partiality or predisposition in making the costs order and a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question.

61. In my view, there is no basis upon which an allegation of actual bias could be made out based on what occurred at the hearing in the Magistrates' Court. Furthermore, and a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question or to the adjudication of the civil claim brought by Mr Waddington.

62. Ground 2 is not made out."

Per Emerton J in *Waddington v Magistrates' Court of Victoria & Kha (No 2)* [2013] VSC 340; MC 32/2013, 28 June 2013.

(q) Family Court proceeding – Comments made by Judge from the Bench

1. It not being shown that the trial judge had acted upon a wrong principle, had given weight to extraneous or irrelevant matters, had failed to give weight or sufficient weight to relevant considerations, had made a mistake as to fact, and it not being shown that the result was so unreasonable or plainly unjust that it could not stand, the appeal ought to be dismissed.

Aust Coal & Shale Employees' Federation v Commonwealth [1953] HCA 25; (1953) 94 CLR 621, and

Edwards v Noble [1971] HCA 54; (1971) 125 CLR 296; 45 ALJR 682; [1972] ALR 385, followed.

2. It is not unknown for a trial judge, in order to stimulate counsel or to obtain arguments for or against, to act as an *advocatus diaboli* [The Devil's Advocate]. However it does not follow from comments falling from the bench acting in such a role that the trial judge should be taken as forever holding those views nor that he had in any way prejudged the case.

Per Watson SJ: Suggestions that comments of the trial judge amounted to prejudgment leading to bias misconceived the judicial process. Section 97(3) of the *Family Law Act* 1975–1976 places a duty both upon the court and counsel and it is common practice for judges in family law cases to make preliminary comments during the hearing as to what they are thinking at that stage. Judges are to be presumed to act with integrity and the rules of natural justice will not be infringed unless the suspicion that the judge has prejudged the case, or is biased, or will act unfairly is a reasonable one in all the circumstances. It must be a suspicion that a right-minded person would form.

R v Watson; Ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, and

R v Judge Leckie; ex parte Felman (1977) 18 ALR 93; (1977) 52 ALJR 155, referred to.

Asche SJ:

> "His Honour said that he would like some information as to whether the wife's occupancy of her present unit at Pearce was permanent, and he commented that, "if she does have permanent occupancy and she is getting the pension and, as well has $3,000 in the bank she is doing very nicely indeed, it would seem".
>
> Then there was further discussion between his Honour and counsel who appeared for the wife, and from what Mr Williams suggested that his Honour in that discussion took the view that if there were to be any contribution by the husband of a financial nature, it would result in the husband being forced to sell his home, and that would thereby work an injustice to the husband.
>
> As I understand Mr Williams, he puts it to us that his Honour there was looking solely from the husband's viewpoint and not taking into proper account the situation of the wife, and that his Honour was so concerned with the injustice which might flow to the husband if he had to sell the home that he failed to observe the injustice which might flow to the wife if she did not receive a financial return from the matrimonial home.
>
> It seems to me that his Honour was doing no more than highlighting one particular aspect of the case which appealed to him at that time and inviting counsel to take cognizance of that factor. But to suggest that his Honour thereby formed and never resiled from a specific point of view, which point of view was wrong and which point of view coloured the whole of his subsequent judgment, seems to me too far much of what could be little more than stichomythia. Mr Williams, in my view, has an almost impossible task to suggest that by those remarks, his Honour can carry possible error in hypothetical remarks into firm judgment after having heard all the evidence and having heard the arguments.
>
> It is not unknown for a judge to go much further than his Honour went and it is not unknown for a judge, in order to stimulate counsel or to obtain arguments for or against, to act as an *advocatus diaboli*; and to suggest that when a judge does that to obtain guidance and instruction he is thereby to be taken forever as holding those views, which he put forward for argument, in my view does not show proper realization of the sort of remarks which do come from the bench from time to time. In my view, it does not appear that his Honour prejudged the case, as was suggested by Mr Williams in another of his submissions, and it does not appear that his Honour acted on a wrong principle."

Per Watson SJ:

> "I agree with my brother Asche that his Honour was obviously thinking aloud, and bringing to the attention of counsel matters which were troubling him. To attribute such comments to prejudgment leading to bias misconceives the judicial process . Section 97(3) places a duty upon both court and counsel, and counsel in family law cases are frequently subjected to preliminary comments during the hearing as to what the judge is thinking at that stage."

Per Asche and Watson SJJ in *In the Marriage of Palezevic (J & N),* (1978) 34 FLR 321; [1978] FLC 77,771 (¶90-524), MC 11/1980, 26 June 1978.

(r) Magistrate alleged to have become an advocate for a party

Per Beach J:

> "35. Fourthly, any suggestion that the Magistrate somehow improperly entered the arena and became an advocate must be rejected. At worst, the transcript discloses that the Magistrate was endeavouring to make the conduct of the trial before him more efficient by hastening counsel towards the issues that were disclosed in the material put before him. In modern trial management, such an approach is to be lauded.
>
> 36. Further, the absence of any complaint by counsel for the appellant, during the trial, about his Honour's interventions (or indeed his Honour's conduct of the trial generally) tells against the complaint now being made. One would have expected that if the Magistrate had somehow improperly assumed the role of an advocate for the respondent, then the appellant would have made the appropriate bias application. This was not done. And no doubt for the very good reason that there would have been no basis for any such application. In any event, it is now too late to make this complaint.
>
> 37. Grounds two and four must be rejected.
>
> **Conclusion**
>
> 38. The appeal must be dismissed."

Per Beach J in *Helou v Shaya* [2013] VSC 297; MC 28/2013, 11 June 2013.

5. Circumstances arising outside the hearing

(a) Informant's counsel associated with prosecution witnesses – whether Magistrate should have disqualified himself

Per Miles CJ:

> "It is plain that the suggestion before the magistrate, put from the Bar table, that counsel for the informant had been associated in some undefined way with prosecution witnesses, could in no way lead to a conclusion that a reasonable person, whether a party or a member of the public, might suspect that the magistrate might not bring a fair and unprejudiced mind to bear on the issues before him. It was suggested in this Court by counsel for the third respondent that his client entertained a belief that he was being persecuted as the victim of a conspiracy and that that belief was strengthened in that the proceedings in this Court were oppressive and an abuse of process, but that suggestion adds nothing. I adopt the words of Moffitt P in *Sankey v Whitlam* (1977) 29 FLR 346; (1977) 21 ALR 457; [1977] 1 NSWLR 333 at 350 that there is just no basis upon which a reasonable person could suspect on this basis or any other basis a reasonable bias on the part of the magistrate."

Per Miles CJ in *R v Dainer & Ors; Ex Parte Cooke* [1986] ACTSC 308; [1986] 84 FLR 305; MC 61/1987, 24 September 1986.

(b) President of Equal Opportunity Board disqualified herself due to her candidature for Parliament

Order that the Board continue to hear and determine the complaint.

1. Expression of comment or opinion will not, *ipso facto*, establish bias unless there is a ground for concluding from the expression that there is a real likelihood of pre-judgment or lack of impartiality. Firmly established and reasonable apprehension means that the expression in the context in which it was made manifested lack of required judicial impartiality.

R v Watson; Ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, referred to.

2. In the present case, W.'s candidature did not show bias out of interest because the questions to be decided by the Board did not involve any political implications. The questions required findings of fact with no political overtones. There was no real likelihood of bias engendered in the minds of the parties and fair-minded members of the public would not reasonably suspect that the Board's decision would be likely to be influenced by W.'s political aspirations.

Per Kaye J:

> "In the cases to which I have referred, the Court was concerned with bias which was self-evident from statements of interest of parties. But expression of comment or opinion will not *ipso facto* establish bias unless there is ground for concluding from the expression that there is a real likelihood of pre-judgment or lack of impartiality. Firmly established and reasonable apprehension, as I understand the words used by the authorities, means that the expression in the context in which it was made manifested lack of required judicial impartiality.

> Applying these principles, I do not consider that the President of the Board, by her candidature as a Liberal Party member for the seat of Kew (could be said to show) bias out of interest. The three questions of discrimination to be decided by the Board do not involve, nor was it suggested by Mr Woinarski, counsel who appeared for the State of Victoria, would involve, any political implications. Those questions require simply findings of fact, with no political overtones. In the event of the Board being satisfied of any one of the alleged complaints of discrimination, the board will be required to consider and determine what ought to be done to redress the complainant's grievance....
>
> In my opinion the test is what fair-minded members of the public would consider, and they are persons not primarily with an interest in the outcome of the hearing of the complaint. I am satisfied that fair-minded persons could not reasonably suspect that any decision by the President would be likely to be influenced by her political aspirations or ambitions. Further, in disqualifying herself the President acted prudently and fairly. Indeed she manifested a desire to be fair and place herself beyond suspicion. A member of the public, with knowledge of the self-disqualification, could not reasonably suspect or fear the President might determine the complaint with political bias and otherwise than upon the material properly before the Board.
>
> I therefore consider that the disqualification of the President of herself, on the ground of bias, was not justified. In so judging, however, I am not to be understood in any way as criticising her. Indeed, notwithstanding what was said in the passage of the judgment of Mason J *In re JRL; Ex Parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, cited by Miles CJ in *R v Dainer; Ex parte Cooke* [1986] ACTSC 308; (1986) 84 FLR 305, I consider she acted prudently."

Per Kaye J in *Power v The Equal Opportunity Board & The State of Victoria* [1988] VicSC 66; MC 14/1988, 23 February 1988.

(c) Warrant issued by judge – when charge of another matter later listed, judge not biased.

1. A judicial officer should not too readily respond to protests of bias and should not disqualify himself unless there is a reasonable apprehension apparent to or entertained by a reasonable person with a full comprehension of the circumstances of the case, that the judicial officer will not decide the case with an impartial and unprejudiced mind.

Re JRL; Ex parte CJL [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, followed.

2. Where a judge issued a warrant authorising the use of a listening device in relation to a person subsequently arraigned before the judge in respect of another matter, no actual bias nor a reasonable apprehension of bias was shown on the part of the judge.

Per Street CJ (with Yeldham and Finlay JJ agreeing):

> "It is plain from the law as stated in this passage that the circumstances of each case are all important and that judges should not too readily respond to protests advanced on the basis that they may not be able to discharge their judicial duties properly in a particular matter coming before them. The reasonable apprehension of bias, which is the core of the test, turns very much upon the adjective, "reasonable". It is not enough that there be some apprehension to some uninformed and uninstructed person. It must be a reasonable apprehension and it must be an apprehension which would be apparent to or entertained by a reasonable person with a full comprehension of the circumstances of each case.
>
> A judge presiding at a trial – albeit, as Mr Roberts emphasised, that he is called upon to make rulings during the course of the trial which can affect the course of its progress and hence affect directly the accused person – is not the ultimate decider of facts on the matter of guilt. If judges who are presiding at trials were to be insulated from all other activities involving the administration of the criminal law and associated fields, the administration of justice would be placed in wholly unnecessary watertight compartments. For example, bail applications are commonly heard by judges involved in trials. Indeed, during the course of a trial, particularly a lengthy trial such as this, the trial judge quite frequently considers whether bail should be allowed during the course of a trial, and in the course of considering a matter of that sort in the absence of the jury all sorts of prejudicial material is properly made known to him.
>
> In the course of *voir dire* proceedings in trials material not proper to put before a jury is, without the faintest suggestion of concern regarding inducing unfair prejudice on the part of the judge, placed before the judge. When evaluated in its entirety and with particular reference to the absence of any association with this particular case an the absence of any suggestion of actual bias, I find this ground not to be one that has been made out. Indeed, the whole of the period of this trial was, in my view, characterised by manifest concern by the judge to ensure fairness by all concerned. There

> is not the slightest indication anywhere in the case of his Honour having been unfairly prejudiced against any of the accused persons."

Per Street CJ (with Yeldham and Finlay JJ agreeing) in *R v George & Ors* (1987) 9 NSWLR 527; (1987) 29 A Crim R 380; MC 15/1988, 19 June 1987.

(d) Magistrate had previously made an order in relation to sub-poenas and heard a case in which the defendant's counsel was a defendant – Magistrate did not display ostensible bias

The authorities establish that a person accused of serious criminal offences is entitled to be represented by competent counsel. That does not mean a particular counsel, although circumstances may arise, when to retain counsel other than the individual of particular choice might create injustice. The charges in the present case did not reveal a fact-situation or complexities of any novelty. Nor were there any special circumstances or an area of legal expertise which warranted retaining counsel and him alone. The magistrate had a statutory duty to proceed with the hearing of the case and the obligation lay with P's solicitor to retain counsel who would not be personally embarrassed by appearing before the assigned magistrate. In those circumstances the fair-minded and informed observer knowing that the magistrate had previously made findings adverse to counsel and knowing the nature of those offences, would not consider that the magistrate would betray his oath and make findings adverse to, or exercise a discretion against, any person in a subsequent case for whom that counsel appeared.

Per Nathan J:

> "25. In this case Mr Perkins perceived he might be personally embarrassed if he were to appear in a case before Mr Couzens. The embarrassment had nothing to do with the individual defendant Mr Pham. Rather it was an embarrassment attaching to counsel. It is inappropriate now for Mr Pham to contend as he does through Mr Nash, that because Mr Perkins was embarrassed to appear before Mr Couzens therefore Mr Couzens should have excused himself, rather than the other way about.
>
> 26. It was always appropriate for Mr Perkins to decline the brief or withdraw as he eventually did. It must be recalled that the magistrate had a statutory duty to proceed with the cases listed before him. It was not his function to list those cases nor indeed did he do so in this case. He merely accepted those cases assigned to him by the criminal co-ordinator at Dandenong. Having been assigned the case and Mr Kuek having been made aware of that fact, the obligation lay with a responsible solicitor to retain counsel whom would not be personally embarrassed by appearing before the assigned magistrate. As from 10 February Mr Kuek and Mr Perkins both knew that Couzens M would hear the case as a fixture over three days. They created the circumstances which led to embarrassment, an embarrassment wholly unjustified.
>
> 27. No special circumstances attach to this case, nor is there an area of legal expertise which would warrant retaining Mr Perkins and him alone. The charges are anything but novel. I glean from the witness statements that the method of detection through a police informer were anything but novel. The police brief delivered to Mr Kuek in response to his request for particulars does not reveal a fact situation or complexities of any novelty. Accordingly it cannot be suggested that Mr Perkins' retainer was so essential to the plaintiff's defence that any other counsel would not do. To the contrary the Victorian Bar is well serviced by many junior criminal barristers and many who have great familiarity with the Act.
>
> 28. The argument reduces itself to the contention that Mr Couzens should disqualify himself from any case in which Mr Perkins is retained regardless of whom the defendant or any instructing solicitor might be."

Per Nathan J in *Pham v Taylor & Anor* [2000] VSC 53; MC 17/2000, 1 March 2000.

(e) Civil proceeding – Magistrate hearing matter indicated that prior to his appointment as a Magistrate he had been a partner in a law firm who had previously acted for the defendant – matter mentioned in Court – no objection by defendant to Magistrate hearing the matter – magistrate subsequently disqualified himself – whether Magistrate in error

1. There was no basis upon which the Magistrate should have disqualified himself when the matter was first raised. The link was extremely remote, he was no longer a member of the firm in question and had not been for some two years and the defendant indicated that he did not want him to disqualify himself.

2. The rulings of the Magistrate were justified and the Magistrate did not demonstrate bias in the way he had conducted himself subsequently in the proceedings.

3. In relation to the role played by the notes relating to the conversation with a Deputy Chief Magistrate, there was a connection in time, but the Magistrate acted as he did because the defendant now relied upon the connection with the solicitors, an issue which the Magistrate had raised the previous day.

4. In relation to the making of the cost orders, the Magistrate revealed neither actual bias nor provided a reasonable basis for concluding apprehended bias. In fixing the costs, he was discharging a role required of him. He did nothing more than address the obvious and did not give any biased assistance to counsel for the plaintiff solicitor or do anything that would support a conclusion of apprehended bias. Accordingly, nothing occurred that should have given any independent reasonable observer any concern about real or apprehended bias on the part of the Magistrate. There was no denial of natural justice. As events unfolded, all the relevant decisions of the Magistrate, including the costs order, were reasonably open to him.

Per Smith J:

> "14. In essence, the issues raised for the plaintiff were first that his Honour should have disqualified himself when the issue was first raised and only did so after he had a behaved in a manner that demonstrated bias or gave rise to a reasonable apprehension of bias. It was put that it was only after he had seen the notes of Mr Muling indicating the options available to the plaintiff that his Honour chose to disqualify himself. In those circumstances, it was put that there was no basis upon which his Honour could have properly ordered the plaintiff to pay the costs wasted over the two days. It was also argued, as I understood it, that in finalising the details of the orders and, so, while making them, he revealed actual bias or acted in such a way as to give rise to a reasonable apprehension of bias. It was also submitted that Mr Slaveski was denied natural justice.
>
> 15. As to the first issue, there was no basis upon which his Honour should have disqualified himself when the matter was first raised. The link was extremely remote, he was no longer a member of the firm in question and had not been for some two years and Mr Slaveski indicated that he did not want him to do so. On the second morning, Mr Slaveski asserted that he had not said that he had no concern in the initial discussion but had said "no, I said I will see how we go" – this was not so. In reaching the above conclusions, I reject the assertion made by Mr Slaveski that from the outset he had sought orders from the Magistrate that he disqualify himself.
>
> 16. As to the next aspect, that his Honour had demonstrated bias in the way he had conducted himself subsequently in the proceedings, what emerges from the transcript is that his Honour attempted to keep the hearing within relevant limits which was extremely difficult because of the way Mr Slaveski conducted his case. Mr Slaveski either did not appreciate what was relevant or did not want to confine himself to relevant issues and evidence and, in the course of discussion, often talked over his Honour. Mr Slaveski returned to the issue of bias with a changed attitude after His Honour had ruled against him on issues of relevance in particular. The rulings, however, were justified.
>
> 17. As to the role played by the notes relating to the conversation with Mr Muling, there was a connection in time, but his Honour acted as he did because Mr Slaveski now relied upon the connection with the solicitors, an issue which his Honour had raised the previous day.
>
> 18. As to the arguments that, in making the cost orders, he revealed either actual bias or provided a reasonable basis for concluding apprehended bias, that was not so. I also do not accept that he, in asking questions, guided counsel for the plaintiff solicitor. In fixing the costs, he was discharging a role required of him. He did nothing more than address the obvious and did not give any biased assistance to counsel for the plaintiff solicitor or do anything that would support a conclusion of apprehended bias.
>
> 19. I am satisfied that nothing had occurred that should have given any independent reasonable observer any concern about real or apprehended bias on the part of his Honour. There was no denial of natural justice.
>
> 20. As events unfolded, all the relevant decisions of the learned Magistrate, including the costs order, were reasonably open to him. Mr Slaveski has been unable to demonstrate any error on the part of the learned Magistrate in this matter. The application should therefore be dismissed."

Per Smith J in *Slaveski v Rotstein & Associates & Anor* [2009] VSC 111; MC 09/2009, 3 April 2009.

(f) Approach to be adopted where a judicial officer has previously acted for one of the parties – 58th day of trial – no proper basis advanced for disqualification of the judge.

1. A judge is disqualified if there is actual bias or if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That is often called apprehended bias to distinguish it from actual bias, where the judge is actually biased.

Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, applied.

2. A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. Further, when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is – not may be – an issue to which a disqualifying factor is relevant.

Re Polites; Ex parte Hoyts Corporation Pty Ltd [1991] HCA 31; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114, applied.

3. A fair-minded lay observer would not reasonably apprehend that, because the judge in the present case advised some government departments or the Police Association while he was in practice, he might not bring an impartial mind to the resolution of the questions in this case. If that were the position, there would be few judges of the Supreme Court who would be able to hear any case involving the State. Further, the fact that the judge made several rulings which were adverse to the applicant party did not demonstrate bias or a reasonable apprehension of bias.

Per Kyrou J:

"10. According to *Ebner v Official Trustee in Bankruptcy,* [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13, a judge is disqualified if there is actual bias or 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.' That is often called apprehended bias to distinguish it from actual bias, where the judge is actually biased.

11. The approach to be adopted where a judge has previously acted for one of the parties before him or her was discussed in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* [1991] HCA 31; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114). In that case, Mr Polites, while a solicitor, provided a letter of advice to Hoyts about some industrial relations issues. He was later appointed a Deputy President of the Australian Industrial Relations Commission. He sat as a member of a full bench of three to hear an industrial dispute between Hoyts and a union which touched on some of the issues that were covered in the letter of advice.

12. On the twenty-seventh day of the hearing, after 96 exhibits had been tendered and the transcript had numbered some 2500 pages, the union objected to Mr Polites continuing to participate in the hearing because of his letter of advice. The High Court held that the fact that Mr Polites had previously given legal advice to Hoyts did not prevent him from continuing to participate in the hearing.

13. The High Court said:

> A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit.

14. The High Court added:

> when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is – not may be – an issue to which a disqualifying factor is relevant.

15. In my opinion, the principle in *Hoyts* applies with greater force where, as in this case, the judge's former client is not a single individual or company but a government, which has many departments and agencies, with different roles and legal issues.

16. The circumstances of this case point more strongly than the circumstances in the *Hoyts case* to there being no basis for any suggestion of my having to disqualify myself. I have not provided any letter of advice or oral advice to any of the police defendants or the State on the kinds of issues that are raised for determination in this case in any context that is remotely comparable to this case. The advice that I have given has nothing to do with the claims against the police or the claim against the State in this case. Furthermore, as at the time of the application, the trial had reached the fifty-eighth day, the transcript had reached page 7448 and 153 exhibits had been tendered.

17. A fair-minded lay observer would not reasonably apprehend that, because I advised some government departments while I was in practice, I might not bring an impartial mind to the resolution of the questions in every case involving the State. If that were the position, there would be few judges of this Court who would be able to hear any case involving the State.

18. There is simply no connection between the parties and issues in this case and the advice I have previously given to the State, and therefore there is no basis for arguing that there would be a reasonable apprehension that I might not be capable of impartially resolving the issues in this case.

19. The same considerations apply to the advice that I provided to the Police Association around 1988. That was so long ago that, irrespective of its subject matter, the advice has no relevance to the parties in this case or to the issues that I have to determine in order to resolve it.

20. As I do not know the police defendants or their witnesses and have not advised them or Victoria Police on the issues that arise for resolution in this case, a fair-minded lay observer would not apprehend that I might not bring an impartial mind to the resolution of this case.

21. As for the second ground advanced in support of Mrs Slaveska's application, namely that several rulings I have made demonstrated bias against Mr Slaveski, I will say only that the rulings were made on their merits after hearing submissions. The reasons I have given for each ruling speak for themselves. It would be inappropriate for me to seek to further explain or justify the rulings. The fact that they were adverse to Mr Slaveski does not demonstrate bias or a reasonable apprehension of bias.
22. As Mrs Slaveska failed to establish any proper basis for me to disqualify myself, I refused to do so."

Per Kyrou J in *Slaveski v State of Victoria & Ors* [2010] VSC 97; MC 12/2010, 30 March 2010.

(g) Civil proceedings – pre-judgment of issues in a civil trial – trial judge expressed views as to the credit and mental condition of a party prior to trial – whether judge prevented from bringing an impartial mind to the conduct of the trial and its resolution.

Where, before the trial of a proceeding in which the appellant was not legally represented, the judge made a submission to the Law Reform Commission in relation to litigants who were not legally represented, the conclusions expressed by the trial judge might have led a fair-minded observer to think that the judge had prejudged issues at the heart of the appellant's claim and was thus prevented from bringing an impartial mind to the conduct of the trial and its resolution.

Buchanan JA (Redlich and Mandie JJA agreeing):

"7. The appellant has appealed from the dismissal of her proceeding. It is necessary to canvass only one of the grounds of appeal. It is:

> The trial judge was disqualified by apprehended bias arising from the views expressed in a submission made by the trial judge to the Inquiry into Vexatious Litigants received by the Law Reform Committee on 18 June 2008.

8. This Court should deal with the issue of bias first. (See *Concrete Pty Ltd v Parramatta Design* [2006] HCA 55; (2006) 229 CLR 577, 581-2 (Gummow ACJ), 611 (Kirby and Crennan JJ); 231 ALR 663; (2006) 81 ALJR 352; [2007] AIPC 92-241; 70 IPR 468).

9. On 18 June 2008, a few days before the commencement of the appellant's proceeding in the County Court, the Law Reform Committee, conducting an Inquiry into Vexatious Litigants, received a written submission from the trial judge. The submission was prepared at the request of the Chief Judge of the County Court.

10. His Honour identified a problem which he described as:

> ... self-represented litigants who have little or no capacity to understand the nature of the litigation they have embarked upon, the function of a Court and the powers of a judge and who make demands which are unrealistic and when those unrealistic demands are not met their frustration

> is taken out on registry staff often leading to more litigation.

The judge said that typically self-represented litigants were not able to engage a legal practitioner '... because either there is no cause of action which is actionable in a Court or the litigants had evidenced a propensity to be difficult, demanding and unmanageable.'

11. He continued:

> These litigants only see the result which they want and then interpret any perceived adverse action to the litigation, as they have formulated it, to be unjust and 'the system' working against them.

The judge said that it was 'often impossible to have these litigants behave and think rationally'.

12. The trial judge then described 'a case in point', which the respondent accepted was drawn from the judge's experience of the interlocutory steps in the proceeding conducted by the appellant.

13. His Honour said that the statement of claim drawn by the appellant, 'did not plead a cause of action against the tortfeasor, but was a long and turgid piece of writing ...'. The judge described some of the features of the way in which the appellant prosecuted the litigation, including 'making repeated allegations ... which had no foundation', 'applying for interlocutory relief repeatedly which was almost always absurd', and making 'applications to disqualify judges who this litigant perceived not to be sympathetic to this litigant's cause'. His Honour said 'none of the interlocutory applications [made by the appellant] has had any merit and should not have been made.' His Honour said that the appellant was accorded a degree of courtesy and latitude 'because it was easier to appease this litigant where it was quite apparent that it was impossible to have this litigant understand how to conduct litigation in a conventional way.'

16. It appears that the appellant learned of his Honour's submission after the dismissal of her proceeding. The failure to disclose his published views was unfortunate. (See *Gascor v Ellicott* [1995] VicSC 625; [1997] 1 VR 332, 361-2 (Ormiston JA)).

17. It is evident from the submission made to the Law Reform Committee that before the commencement of the trial of the appellant's proceeding, his Honour had determined that the appellant made allegations without any foundation, sought relief which was absurd, made applications which had no merit and did not understand how to conduct litigation conventionally. I would infer from the structure of his submission that his Honour was of the opinion that the appellant belonged to a class of litigants who saw only the result which they wished to achieve and interpreted any perceived adverse reaction to be unjust. The judge was of the opinion that it was often impossible to make such litigants behave and think rationally. These views were expressed as final, rather than tentative or provisional, conclusions.

18. Counsel for the respondent submitted that the submission to the Law Reform Committee did not disclose a pre-judgment of the appellant's entitlement to compensation. As Gleeson CJ, McHugh, Gummow and Hayne JJ said, in *Ebner v Official Trustee and Bankruptcy*, the principle is that:

> ... a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. (Emphasis added.)

19. Although the trial judge had not expressed any views as to the appellant's entitlement to weekly payments, it was evident that he had formed views as to the mental condition of the appellant and as to matters likely to affect the credibility and accuracy of her evidence. The appellant's mental state and her credibility were critical issues in the proceeding. The trial judge appeared to have prejudged the appellant's credit and mental condition to her disadvantage. (Cf *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, 553-4; 43 ALJR 150). I think it is stating the principle of apprehended bias too narrowly to say that the possibility of prejudgment applies only to the ultimate conclusion of liability.

20. Counsel for the respondent submitted that apprehended bias is not established by the manner in which the judge conducted the trial or his reasons for deciding the case. He said that those matters bore upon the question of actual bias. In my opinion, however, his Honour's reasons do throw light upon the question whether a fair-minded lay observer might reasonably apprehend that the judge might have prejudged issues in the case. In any event, I think that a reasonable apprehension of bias was established by the submission made by the judge to the Law Reform Committee and the issues upon which the appellant's entitlement to compensation depended.

> 21. For the foregoing reasons, I am of the opinion that the conclusions expressed by the trial judge before the commencement of the proceedings might have led a fair-minded observer to think that his Honour had prejudged issues at the heart of the appellant's claim and was thus prevented from bringing an impartial mind to the conduct of the trial and its resolution.
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> 22. Accordingly, I would allow the appeal, set aside the judgment and orders of the court below and order that the proceeding be retried by another judge."

Per Buchanan JA (Redlich and Mandie JJA agreeing) in *Bahonko v Moorfields Community & Ors* [2011] VSCA 259; MC 29/2011, 1 September 2011.

Patrick Street LL B, Dip Crim
16 March 2014; updated 4 October 2014