CHAPTER NINETEEN

Recusal of Judges

A Commonwealth Survey of the Applicable Tests

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The English common law, in some form or other, is applied in about 55 countries around the world which house about one-third of the world's population. The courts of these countries show a remarkable similarity in their approach towards judicial bias and the recusal of judges. The variance is in the difference, somewhat slight, in the tests formulated by their superior courts to determine bias or recusal. These tests may broadly be stated as the 'real danger of bias', 'real possibility of bias', 'real likelihood of bias', 'real suspicion of bias' or 'reasonable apprehension of bias' tests. Their application is, of course, entirely situational.

Nevertheless there is near uniform acceptance that the tests are to be applied objectively from the standpoint of a reasonable and informed observer. It reduces the exercise to a matter of perception by the judges who are to put themselves in the shoes of the reasonable bystander. In the result, it often appears that the real test is the perception of the judges influenced by their own experiences and background rather than a clinical application of the legal tests. For example, the handing of a bouquet of flowers by a juror to the murder-victim's mother saw a sharp division of opinion in the High Court of Australia on a 3:2 basis with the majority holding that it was an excusable albeit imprudent act of sympathy and the minority saying it was an act of solidarity that disqualified the juror.1

The only reality may well be the observation by the South African Constitutional Court that 'absolute neutrality is a chimera':2

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I  The Usual Grounds of Recusal

A useful tabulation of the likely circumstances of disqualification was given by Deane J. in his dissent in the Webb case.3 He identified four usual areas of disqualification:

i. disqualification by interest
ii. disqualification by conduct
iii. disqualification by association; and
iv. disqualification by extraneous information.

As Deane J. explained the characterisations above may overlap but they could also be recognised as distinct categories which occur in the following circumstances:

i. On disqualification by interest it is ‘where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment.’
ii. Disqualification by conduct, includes ‘published statements’ and ‘consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias’.
iii. Disqualification by association ‘consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings’.
iv. Disqualification by extraneous information overlaps with the third, but commonly ‘consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias’.

A  The Tests for Recusal

As stated, the tests formulated for judicial bias or recusal in the Commonwealth courts show a remarkable unity or consistency and vary only in degree and emphasis. They relate of course to apparent bias as opposed to actual bias. If it is the latter, as Lord Goff said ‘it is the end of the case’.4

The tests are generally made applicable to all tribunals sitting in a judicial or quasi-judicial capacity without distinction between judges and jurors.

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