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BIRMINGHAM CITY UNIVERSITY SCHOOL OF LAW

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JUDICIAL RECUSAL: DIFFERENTIATING JUDICIAL  
IMPARTIALITY AND JUDICIAL INDEPENDENCE?

The Hon. Michael Kirby AC CMG

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*A CONTESTED QUESTION*

The law relating to recusal deals with the circumstances in which a judge (or other independent decision-maker), acting under legal power, should take no part, or no further part, in a decision or in the steps leading to a decision, although he or she has been initially allocated the matter to decide it:<sup>1</sup>

“It rests on the fundamental proposition that a court should be fair and impartial, and that sometimes a judge’s personal or prior ‘connection’ with that case should lead to him or her not sitting on it, notwithstanding the initial lawful allocation.”

In his foreword to Justice Hammond’s book on the subject, Lord Justice Sedley observed that: <sup>2</sup>

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\*\* Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Chairman of the Australian Law Reform Commission (1975-84); Rapporteur, Judicial Integrity Group of the United Nations Office on Drugs and Crime (UNODC) (2000-14).

<sup>1</sup> G. Hammond, *Judicial Recusal – Principles, Process and Problems* (Hart, Oxford, 2009), Preface, xi.

<sup>2</sup> S. Sedley, in Hammond, n.1, *ibid*, x.

“Save in a handful of plain cases, the public and the legal profession will not, of course, know of the occasions when judges, without even entering court, have asked to be taken off a case because some connection they have with it makes them uncomfortable about adjudicating on it. Equally often, however, a judge who feels no such discomfort will disclose a connection (shares in a particular company; knowing someone; belonging to a particular club: the reasons are endless) simply so that it is in the open. Usually no one objects; but occasionally one party or the other does, and it’s then that the problems start to arise...: when should a judge withdraw, who decides and how do they decide? The short answer is that, save in a handful of plain cases, there is no short answer. What there is is a modest body of principle, some of it conflicting, and a very substantial body of case-law, not all of it reconcilable.”

In this article, I explore a contested question that arose before me judicially in the High Court of Australia. By doing so, I do not, of course, intend to doubt the legal effect, within Australia, of the principle established by that decision. With the severance of the last remaining appeals from Australian courts to the Judicial Committee of the Privy Council in 1986,<sup>3</sup> there are no more occasions where a challenge can be brought concerning Australian law from the High Court of Australia to the United Kingdom, even to the respected opinions of the *Modern Law Review*. Instead, this is an examination of a question, relevant to recusal, upon which experienced and well briefed minds have differed. It is therefore a legitimate issue for further reflection and consideration.

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<sup>3</sup> *Australia Act* 1986 (UK and Cth), s11.

The question arose in the decision in *Clenae Pty Ltd and Ors v Australia and New Zealand Banking Group Ltd*.<sup>4</sup> That was one of two appeals, heard at the same time, concerned with aspects of the law of judicial recusal in Australia. They were heard by the High Court of Australia and decided in December 2000. The companion decision was *Ebner v Official Trustee in Bankruptcy*.<sup>5</sup> In *Ebner* the Court unanimously dismissed an appeal from the Federal Court of Australia.<sup>6</sup> It affirmed the decision of that Court rejecting an obligation for recusal. However, in *Clenae* the Court was divided.<sup>7</sup> By majority it held that the judge in question in that case, (Mandie J, in the Supreme Court of Victoria) had not been disqualified so that his decision (and that of the Court of Appeal of Victoria affirming it<sup>8</sup>) should stand. I dissented.

In reaching their conclusion in *Clenae*, the majority held that there was no separate rule of automatic disqualification that applied where a judge had a direct pecuniary interest in a party to a case over which the judge was presiding. Instead of applying a principle framed in terms of the *independence* of the judge from the parties, *Clenae* held that the proper approach was to apply the ‘apprehension of bias principle’ to all cases of suggested recusal. Thus, the test for all cases in which it was suggested that a judge was disqualified, by reason of interest, conduct, association, extraneous information or some other circumstance, was whether the judge might not bring an impartial mind to the resolution of the question which the judge was required to decide. It was thus a test of *impartiality*. Not *independence*.

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<sup>4</sup> (2000) 205 CLR 337; [2000] HCA 63.

<sup>5</sup> (2000) 205 CLR 337 at 346-347; [2000] HCA 63, [13]-[16].

<sup>6</sup> *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353.

<sup>7</sup> Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting.

<sup>8</sup> *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2VR 573.

In my reasons in *Clenae*, I concluded otherwise. I did so, in part, by reference to a long standing legal principle expressed by the House of Lords in 1852 in *Dimes v Proprietors of the Grand Junction Canal*.<sup>9</sup> That principle had been reaffirmed and expanded in the more recent decision of that court in *R v Bow Street Magistrate; ex parte Pinochet Ugarte [No.2]*<sup>10</sup>. Each of those decisions gave effect, in necessarily dramatic circumstances, to the disqualification respectively of a Lord Chancellor and a Law Lord. They did so even after judgment had been given. They acted as they did because of an undisclosed relevant interest in a party which was held to be an impediment to true *independence* of the relevant decision-maker from the proceedings. Absence of *independence*, not absence of *impartiality* as such, was the criterion that the Law Lords applied.

Because decisions of common law courts respond to particular fact situations and because judicial pronouncements and binding precedents tend to arise in response to such situations, it is not uncommon for later courts of high authority to look back at earlier attempts to express principles, thought proper at the time, so as to subsume the earlier endeavours into a later, broader or more conceptual, expression. This is the way that the common law moves from precedent to precedent, evolving in the process towards a more general proposition that is usually simpler and less fact specific. The most famous instance of this evolution is probably *Donoghue v Stevenson*;<sup>11</sup> but there are many more in every common law jurisdiction.

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<sup>9</sup> (1852) 3HLC 759; [10 ER 301].

<sup>10</sup> [2000] 1AC 119.

<sup>11</sup> [1932] AC 562. This point is made in *Clenae*: (2001) 205 CLR 337 at 352; [2000] HCA 63 [42], and at 379 [134]-[136].

One cannot therefore criticise the attempt of the majority of the High Court of Australia in *Clenae* to search for a higher principle and more simple criterion for the guidance of trial and intermediate courts grappling with contested questions of recusal. However, the issue remains whether the attempted reconfiguration of principle was justifiable in principle and successful. Or whether it effectively attempted to conflate two similar but different ideas: that of judicial *independence* (including from the parties) and that of *impartiality* in the discharge of the judicial office.

This is the issue that I wish to explore. An appropriate starting point is an understanding of the facts in *Clenae*. They were not contested by the time the matter came before the High Court of Australia.<sup>12</sup>

#### *THE FACTS IN CLENAE PTY LTD v ANZ BANK*

In February 1994, the Australia and New Zealand Banking Group (the Bank) commenced proceedings in the Supreme Court of Victoria against *Clenae Pty Ltd* and members of the Quick family. The latter were pursued personally and as executors of the estate of their late father. The Bank sought repayment of loans alleged to total more than \$AUD3 million. The defendants counter-claimed against the Bank alleging negligence and unconscionable conduct. The trial was heard over 18 days in the Supreme Court of Victoria between March and May 1996. The judge then reserved his decision on all issues, other than quantification of damage on the counter-claim, should that later become relevant.

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<sup>12</sup> (2000) 205 CLR 337 at 346-7 [13]-[16], [17]-[18] per Gleeson CJ, McHugh, Gummow and Hayne JJ (joint reason) and at 369, [107] per Kirby J. [2000] HCA 63.

On 14 July 1996, whilst the matter stood for judgment the judge's mother died. By her will, she bequeathed her residuary estate to the judge and his brother as tenants in common in equal shares. That estate included 4,800 shares in the Bank and also a debenture for \$200,000 secured over the assets of a subsidiary wholly owned by the Bank. On 1 September 1997, whilst judgment was still pending, a principal witness for the Bank, who had given evidence at the trial, died.

The judge did not disclose his inheritance to the parties before delivering judgment in favour of the Bank in October 1997. Thereafter, by an online search of the share register of the Bank, the defendants discovered the facts of the judge's shareholding and interest. They appealed to the Court of Appeal of Victoria contending, amongst other arguments, that the judge was disqualified by reason of his undisclosed shareholding. The foundation of this argument in the Court of Appeal and, when special leave to appeal was granted by the High Court of Australia, was the decision in the House of Lords in *Dimes*' case.<sup>13</sup>

The appellant submitted that this strict authority had been applied in Australia.<sup>14</sup> It had also been reaffirmed more recently by the House of Lords itself.<sup>15</sup> It was submitted that it had not been subsumed in a broad principle of apprehension of bias which, the defendants (now respondents) claimed, was addressed to a separate question. Even if as a matter of law a judge's shareholding, once disclosed, could be waived as immaterial, that issue did not arise in the instant case. There

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<sup>13</sup> As 9 above.

<sup>14</sup> *Dickason v Edwards* (1910) 10 CLR 243 at 259; *R v Watson; ex parte Armstrong* (1976) 136 CLR 248 at 263; *Webb v The Queen* (1994) 181 CLR 41 at 75.

<sup>15</sup> *R v Gough* [1993] AC 646 and *R v Bow Street Magistrate ex parte Pinochet Ugarte [No.2]* [2000] 1 AC 119.

had been no disclosure and no waiver. Referring to United States authority, it was urged that the judge's failure to disclose his interest alone rendered the judgment in favour of the Bank liable to be set aside on the application of the appellants.<sup>16</sup>

Counsel for the Bank successfully argued that the apprehension of bias test was adequate to address cases that went beyond circumstances where the judge had, as a matter of fact, an *actual* interest in the outcome of the litigation. Because the appellants had conceded that the value of the judge's family interest in the Bank would not have been affected, one way or the other, by his decision in their case, it was held that the judge was not obliged to recuse himself either before delivering judgment (for want of waiver) or thereafter.

The joint reasons of the plurality of judges in the majority in *Clenae*<sup>17</sup> declared that the concept of "interest", that would disqualify a judge, was "protean".<sup>18</sup> They read the *Dimes* case, in which the Lord Chancellor had been disqualified for interest in a party, as having been limited to direct pecuniary or proprietary interest in the outcome of the litigation. However, they noted that such a limitation on the concept of interest had been "reconsidered and rejected, or at least modified" by the House of Lords in *Pinochet [No. 2]*.<sup>19</sup> Nevertheless, the plurality concluded that there was "no justification for having different principles for interest and association". The difficulty of listing cases in Australia where a bank was a party, particularly in the context of bankruptcy practice and in a country having but four major banking groups, made it unwise, in the view of the

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<sup>16</sup> *Commonwealth Coastings Corp v Continental Casualty Co.* 393 US 145 (1968).

<sup>17</sup> Gleeson CJ, McHugh, Gummow and Hayne JJ.

<sup>18</sup> (2000) 205 CLR 337; [2000] HCA 63 at 349 [25].

<sup>19</sup> *Ibid* at 349 [25] referring to *Pinochet [No.2]* [2000] 1 AC 119.



plurality, to adopt a rigid rule on “interest”. The majority concluded that the common law had developed in Australia along lines different from that in England. They held that, in Australia, an issue such as had arisen in *Pinochet [No.2]* would have been resolved by applying the ‘apprehension of bias test’; not a test addressed to the judge’s “interest” or lack of independence from the parties.

As to the failure of the trial judge in *Clenae* to disclose his supervening interest in the Bank, the plurality judges conceded that “as a matter of prudence and professional practice, judges should disclose interests and associations if there is any serious possibility that they are potentially disqualifying”.<sup>20</sup> However, they concluded that it was “neither useful nor necessary to describe this practice in terms of rights and duties... A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias”.<sup>21</sup> In this way, the majority of the High Court of Australia held that the failure of the trial judge to disclose his acquisition of shares in the Bank was of “no legal consequence”. He had a “clear duty” to deliver the judgment that he had reserved. His silence on the shares “could not reasonably support an inference of want of impartiality.”<sup>22</sup> In these last words, and in their general approach, the plurality of the Court embraced an overall and single criterion of *impartiality*. They were not persuaded of a separate and different criterion of the *independence* of the judge from the parties (absent circumstances of actual interest in the judicial outcome).

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<sup>20</sup> (2000) 205 CLR 337 at 349; [2000] HCA 63 [28].

<sup>21</sup> *Ibid* at 360 [69].

<sup>22</sup> *Clenae* (2000) 205 CLR 337; [2000] HCA 63 at 361 [73].

In an article of this kind, it is not necessary to examine the somewhat differing views of two other judges who joined in the orders proposed by the plurality in *Clenae*. They took a slightly different view from the plurality as expressed in the joint reasons.<sup>23</sup> Nor is it necessary for me to re-express all of the reasoning that led me to dissent in *Clenae*. Suffice it to say that my disagreement was based upon the following considerations, viewed in combination:

- \* The longstanding principle of the common law of England on disqualification for pecuniary interest, as stated in *Dimes*;<sup>24</sup>
- \* That fact that this principle had not been subsumed in the doctrine of apprehended bias in England. It had actually been reaffirmed as necessary to avoid shaking “public confidence in the integrity of the administration of justice”;<sup>25</sup>
- \* The recent reaffirmation of that principle in *Pinochet [No.2]*, most emphatically by Lord Gough of Chieveley, who pointed out that “[A] judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous *Dimes* case itself”;
- \* The repeated application of *Dimes* in Australia over 150 years, both before and after Federation, including emphatically by Isaacs

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<sup>23</sup> In *Clenae*, Gaudron J adopted a constitutional analysis derived from Ch III of the *Australian Constitution*. Applying *Dimes*, she held that any holding or financial interest by a judge in a public company, which could not be fairly described as modest, should be regarded as substantial. Having a substantial shareholding or financial interest automatically resulted in the judge’s disqualification if the company was a party to the litigation: (2000) 205 CLR 337 at 366; [2000] HCA 63 [94]. Callinan J added observations on matters of practice, *ibid*, 396- 398 [183]-[185].

<sup>24</sup> (2000) 205 CLR 337; [2000] HCA 63 at 373 [118]-[122].

<sup>25</sup> *R v Gough* [1993] AC 646 at 661, cited *Clenae* (2000) 205 CLR 337; [2000] HCA 63 at 373 [123].

J in *Dickason v Edwards*<sup>26</sup> when he said that if a “pecuniary interest exists... there is an end to the matter at once and the Court goes no further”;

\* Although some practical reasons could be suggested for modifying such a strict rule, larger reasons apply to suggest adherence to it. These include:

- (a) The separate treatment of *independence* and *impartiality* in international statements of universal human rights;<sup>27</sup>
- (b) The different subject matters with which each of these requirements is taken to deal;
- (c) The maintenance of the distinction between impartiality of attitude and action and independence from the parties had been observed in Scotland,<sup>28</sup> Canada,<sup>29</sup> South Africa,<sup>30</sup> and New Zealand.<sup>31</sup> The lesson to be derived from the move to legislative regulation in the United States of America, which had occurred because “judges did not recuse themselves in such cases unless the interest was so large that a reasonable person might think it could influence the judge’s decision – a standard believed to be too nebulous and unjust”,<sup>32</sup> and
- (d) The adequacy of considerations such as necessity, waiver and *de minimis* to cover and excuse otherwise hard cases;<sup>33</sup>

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<sup>26</sup> (2010) 10 CLR 243 at 257, cited *Clenae* (2000) 205 CLR 337; [2000] HCA 63 at 376 [127].

<sup>27</sup> (2000) 205 CLR 337; [2000] HCA 63 at 382 [144], referring to Art 14.1 of the ICCPR, to which Australia is a party and also to the European Convention on Human Rights, *ibid* at 382-3 [147]-[148].

<sup>28</sup> *Sillar v Highland Railway Co* [1919] SC (HL) 19, cited *Clenae* *ibid* [151].

<sup>29</sup> *Chirardosi v Minister of Highways for British Columbia* [1966] SCR 367 at 373 [152].

<sup>30</sup> *Moch v Nedtravel (Pty) Ltd* 1996 (3) SA 1 at 13 [153].

<sup>31</sup> *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 42 at 148 [154].

<sup>32</sup> *Union Carbide Corporation v US Cutting Service Inc* 782F 2d 710 at 714 (1986) per Posner J.

<sup>33</sup> *Clenae* (2000) 205 CLR 337 [2000] HCA 63 at 386 [157]-[160].

\* The existence of residual policy reasons for adhering to the strict rule:

- (a) It is simple, clear and pragmatic and understood by litigants and the public because of their high expectations that judges must be entirely separated from the parties and their causes;<sup>34</sup>
- (b) It maintains and promotes, in itself, manifest integrity in the judicial institution;<sup>35</sup>
- (c) It avoids considerations of appearances to others and concentrates on the fact of the integrity of the adjudicator as such;<sup>36</sup>
- (d) It helps reduce the risk that judges might “adopt the mentality of business” or of other powerful interests to the detriment of other litigants;<sup>37</sup> and
- (e) It conduces to acceptance of both the independence and impartiality of a nation’s courts, tribunals and other formal decision-makers, difficult to regain once lost and important for economic reasons in a time of global business and other disputes.<sup>38</sup>

One of the judges in the Court of Appeal of Victoria in *Clenae* (Callaway JA) rested his reasoning on the view that the trial judge, in the circumstances of the case, was obliged by “necessity” to decide the case. The other judges in that court embraced this alternative or additional construction.<sup>39</sup> I could not accept that view. While it was true

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<sup>34</sup> Ibid at 387-8 [161.1].

<sup>35</sup> Ibid at 388 [161.2].

<sup>36</sup> Ibid 388-9 [161.3].

<sup>37</sup> Ibid 388-9 [161.4], citing R. Cranston, [1979] Public Law 237 at 238.

<sup>38</sup> Ibid 389-390 [161.5].

<sup>39</sup> *Clenae* [1999] 2VR 573 at 603.

that there would be significant disadvantages to all parties of a costly retrial, some of these difficulties had been reduced or eliminated in *Clenae* by a concession of the parties. Thus the appellants agreed that the testimony of the Bank's witness, who had died in the supervening period, as recorded in the transcript of the first trial, should be received in the retrial. Although it was true that the costs of a retrial would be expensive, inconvenient and burdensome for the courts, the parties and the community true necessity was missing. Thus, I concluded:<sup>40</sup>

“Retrial is the price which is paid by our system of law for upholding fundamental legal and civil rights. It is a price worth paying if it reinforces the community's confidence in the administration of justice and demonstrates the important principle that judges, under our law, do not participate in the determination of the rights of parties in which they have a direct, significant and, in this case, undisclosed interest.”

### *LATER JUDICIAL DEVELOPMENTS*

Whilst the respective positions of the highest court of the United Kingdom and of the High Court of Australia remain as stated above, it is worth noting that other courts in those jurisdictions have revisited the overlap and differences between the judicial requirements of impartiality and independence.

A number of recent cases in the Court of Appeal of England and Wales have seen instances of alleged judicial disqualification analysed by reference to the requirement of impartiality. Thus, in *R v C and Ors*<sup>41</sup> a

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<sup>40</sup> (2000) 205 CLR 337; [2000] HCA 63 at 396 [179].

<sup>41</sup> [2013] EWCA Crim 368.

question arose as to whether jurors were prejudiced against the minority ‘traveller’ community, relevant to the case, on the basis of a letter received by the trial judge from a juror suggesting that other jurors were so prejudiced. An appeal challenging the trial judge’s refusal to discharge the jury was rejected by the Court of Appeal. The issue for decision was examined by reference to whether there was a “real possibility or danger of bias”.<sup>42</sup> The question was resolved on the basis, in part, of an analysis of the jurors’ engagement with the trial, and, in part, on the basis of the fact that the judge had given the jurors a very clear direction on the importance of impartiality on their part.

In another case, it was argued that a judge ought to have recused himself because, prior to the substantive trial, he had found one of the parties to have been in contempt of court, sentenced him to imprisonment and criticised him. The Court of Appeal again analysed the case by reference to the requirement of impartiality;<sup>43</sup> not independence from the parties. The Court applied the remarks of Lord Bingham of Cornhill in *Davidson v Scottish Ministers*,<sup>44</sup> in which he had said that “A judge will be disqualified from hearing a case... if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question.” Notwithstanding these references to aspects of independence, in the sense of dissociation from the parties, the criterion applied to resolve the appeal was one of *impartiality*. The question was whether a fair minded and informed observer would conclude,

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<sup>42</sup>Ibid at [33] applying *R v Heward* [2012] EWCA Crim 990.

<sup>43</sup> *JSC BTA Bank v Ablyazov (Recusal)* [2012] EWCA Civ. 1551.

<sup>44</sup> [2004] HRLA 948.

objectively, the presence of apparent bias.<sup>45</sup> The requirement of *independence* of the parties (in the sense of having had no relevant connection with them) was not analysed.

A similar approach was taken by the Court of Appeal in *Resolution Chemicals Ltd v H. Lundbeck A/S*.<sup>46</sup> The appeal in that case concerned the validity of the defendant's patent. A witness, called by the claimant as an expert, had been a research supervisor of the judge when he was a student at university. The judge rejected an application for recusal on the basis that there was no real possibility of actual or imputed bias. This conclusion was attributed to the recognition that the general training and experience of English judges enabled them to "recognise and avoid" partiality, whether subconscious or otherwise. The Court took the opportunity to stress that, where application was made for a judge's recusal on the ground of apparent bias, by reason of past professional or other relationships, it was incumbent on the judge to explain in sufficient detail the content of such associations so that they could be dealt with both at trial and on any appeal.<sup>47</sup> The Court of Appeal concluded that there was "no difference between the common law test of bias and the requirements under Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* of an independent and impartial tribunal."<sup>48</sup> The analysis, however, was offered in terms of the requirement of manifest *impartiality*, not *independence*.

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<sup>45</sup> *Porter v Magill* [2002] 2AC 357 at [103] applied.

<sup>46</sup> [2013] EWCA Civ. 1515.

<sup>47</sup> *In re L-B (Children)* [2011] 1FLR 889 [22].

<sup>48</sup> Applying *Lawal v Northern Spirit Ltd* ICR 856 [14], per Lord Steyn.

In *Mengiste v Endowment Fund for the Rehabilitation of Tigray and Ors*; *Chubb v Endowment Fund for the Rehabilitation of Tigray and Ors*<sup>49</sup> the trial judge had strongly criticised the appellant’s solicitors for the poor quality of expert testimony tendered by them at trial. The judge then proceeded to consider and uphold an application for a ‘wasted cost order’ against the solicitors. He declined to recuse himself from participating in the cost hearing. When that refusal was brought on appeal to the Court of Appeal, the issue of judicial independence was considered. In her reasons, Arden LJ remarked that, normally a judge who had heard the substantive application would be the most suitable decision-maker to hear and decide an application for a ‘wasted costs order’. However, a point could be reached where the trial judge’s remarks in the earlier hearing were expressed in “extreme and unbalanced terms”.<sup>50</sup> Her Ladyship went on:<sup>51</sup>

“Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially. Judges who have a financial interest in a case are automatically disqualified. Depending on the circumstances, judges can also be disqualified by other matters, such as an involvement with one of the party’s in the past.”

In *Megiste*, the Court of Appeal acknowledged that mere criticism of parties or witnesses would not necessarily indicate partiality. Such criticisms were often part of the performance of the judicial function.<sup>52</sup>

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<sup>49</sup>[2013] 5 Costs LR 841.

<sup>50</sup>*Locabail (UK) Ltd v Bayfield Properties Pty Ltd* [2000] QB 451 applied; [2000] 2 Costs LR 169.

<sup>51</sup>*Mengiste* [2013] 5 Costs LR 841 at [ 3].

<sup>52</sup>*Ibid.*



However, in the circumstances of the case, the criticism voiced by the trial judge in the earlier proceedings had been expressed in such absolute terms (failing to leave the door open for the possibility that there might be some other explanation) and so repeatedly, that the judge should have recused himself from deciding the special costs application that followed. A requirement for recusal was upheld. But although *independence* of the judge from the parties was mentioned in the appellate reasoning, the ultimate determinant appears to have been the judge's demonstrated lack of *impartiality* about the party who then complained.

The highly fact-specific nature of the cases involving judicial involvement in consecutive proceedings affecting the same parties was illustrated in the same year by a case that reached the Supreme Court of the United Kingdom: *O'Neill v Her Majesty's Advocate [No.2]*<sup>53</sup>.

That was a case where the appellants were charged with a number of sexual offences against minors. Later they were charged with murder. The trial judge ordered separate trials of the respective charges, before different juries. At the conclusion of the first trial, in which the appellants were found guilty and convicted, the judge described the appellants as "evil, determined, manipulative and predatory paedophiles of the worst sort". The judge then proceeded to preside in the second trial at the end of which the appellants were also found guilty and convicted of murder. A ground of appeal relied on by the appellants asserted that the judge should have withdrawn from the second trial because the comments made in the first meant had deprived them of their right to fair trial.

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<sup>53</sup>[2013] UKSC 36.

Once again, the analysis followed the line of examining the sequence of events against the criterion of perceived lack of *impartiality*.<sup>54</sup> When the second trial began, no objection had been taken to the participation of the same judge. Unsurprisingly therefore, the Supreme Court analysed the proceedings not by reference to the principle of judicial *independence* of the parties but by reference to the requirement of *impartiality* towards the parties. The comments made by the judge at the conclusion of the first trial were held to have been relevant to the issue of sentencing in that trial. They had not been objected to at the time they were made. They failed to give rise to a perception that the judge lacked impartiality towards the appellants.<sup>55</sup>

Reference was made in this appeal to the way in which (it was suggested) judicial independence, training and the terms of the judicial oath promoted impartiality, so as to deprive earlier remarks of any capacity to suggest bias or to indicate lack of impartiality towards the parties subject to them. In the circumstance of limited judicial resources, reasoning by reference to an entitlement to an independent judge (one who had no prior association whatsoever with the appellants or their cause) did not attract the court.

It can probably be inferred from these cases that the tendency, now apparent both in United Kingdom and Australia, is normally to analyse contested cases, where a judicial requirement of recusal is argued, in terms of the *impartiality* principle. *Independence* is sometimes mentioned in passing. However, save for cases of financial involvement with a party, little attention is generally paid to the latter concept in

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<sup>54</sup> By reference to *O'Hara v HM Advocate* 1948 JC 90 and *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416.

<sup>55</sup> *Loc cit.*

deriving the answer to the suggested need for recusal. How does this conclusion square with the fact that international human rights law suggests that the concept of *independence* of the judge is a separate pre-condition that should be considered and applied in addition to *impartiality*?

## *HUMAN RIGHTS LAW AND ANALYSIS*

If the qualities of “independence” and “impartiality” on the part of a judge are properly viewed as attributes of the one concept, of a want of actual or apparent bias, the expression of the relevant provisions of international and regional human rights law would appear to be anomalous. Both refer to notions of independence and impartiality as if they were intended to refer to different attributes.

Viewing the relevant human rights instruments in the order in which they were adopted, the dual requirement appears for the first time in the *Universal Declaration of Human Rights* (UDHR) which came into operation in 1948<sup>56</sup>. Article 10 of that *Declaration* states:

“Everyone is entitled in full equality to a fair and public hearing by an *independent* and *impartial* tribunal, in the determination of his rights and obligations and in any criminal charge against him.”

The *European Convention on Human Rights* (ECHR) came into force on 23 September 1953. On 8 March 1951 the United Kingdom became the

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<sup>56</sup>Adopted and proclaimed by General Assembly Res. 217A(III) of 10 December 1948.

first state to ratify that Convention.<sup>57</sup> Article 6 contains the requirements of a “Right to a Fair Trial”.<sup>58</sup> Relevantly, Article 6.1 provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing... by an *independent* and *impartial* tribunal established by law.”

The *International Covenant on Civil and Political Rights* (ICCPR) entered into force in March 1976.<sup>59</sup> It went further than the two preceding statements. Article 14.1 introduced the additional prerequisites of “competence” on the part of the tribunal and the obligation that it should be “established by law”:

14.1 All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, *independent* and *impartial* tribunal established by law...”

Each of the added requirements of *competence* and *legality* is important. But neither is relevant to the issue in hand. That issue relates to the inclusion in each of the foregoing statements of fundamental rights of the

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<sup>57</sup> A. Lester, D. Pannick and J Herberg, *Human Rights Law and Practice* (3<sup>rd</sup> Ed.) LexisNexis, London, 2009, 7 [1.22].

<sup>58</sup> *Ibid*, Chapter 4 [4.6.1]. Emphasis added.

<sup>59</sup> Adopted and open for signature, ratification and accession by General Assembly Res 2200 A(XXI) of 16 December 1966; (entered into force on 23 March 1976). Emphasis added.

differentiated necessity that, to measure up to the universal standard, the tribunal in question must be both *independent* and *impartial*.

On the face of things, the repeated inclusion of the two requirements suggests that each of them is viewed as distinctive and separately applicable. If all that were meant by the notion of *independence* were that the tribunal must be, and appear to be, free of bias (and thus manifestly *impartial*), it would have been simple for the drafters, or at least one of them, to have deleted the separate criterion of *independence*. Clearly a tribunal that lacks independence of, say, the government (such that members receive and act upon telephone instructions from a minister or requests from governmental officials) this idea would arguably have been adequately covered by confining the criteria in the successive instruments to *impartiality*. Upon ordinary interpretive principles, having regard to the language repeated in the instruments coming into force in the 1940s, 1950s and 1970s, the use of the two stated qualities suggest that something additional was intended by adding “independence” to the essential criteria of formal decision-making in a tribunal measuring up to universal standards.

The contents of the requirement of *independence*, in the case of the judiciary, was further elaborated in the *Basic Principles on the Independence of the Judiciary* endorsed by the General Assembly of the United Nations in 1985.<sup>60</sup> This instrument includes, in its second recital, a reference to the UDHR and its requirement of the right to a “fair and public hearing by a competent independent and impartial tribunal

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<sup>60</sup>Adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and Treatment of Offenders held in Milan, Italy on 26 August 1985 – 6 September 1985 and endorsed by the General Assembly in Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985

established by law”. In fact, as has been shown, the reference to the requirement of competence does not appear in Article 10 of the UDHR. It was first introduced by Article 14.1 of the ICCPR.

However, the 1985 *Basic Principles* contain seven paragraphs elaborating what the drafters felt was necessary to “assist member states in their task of securing and promoting the independence of the judiciary.”<sup>61</sup> These “principles” were stated to be “formulated principally with professional judges in mind.”<sup>62</sup> They were also said to apply “as appropriate to lay judges where they exist”. The ensuing principles appear mostly appropriate to the notion of the independence of the judiciary from “inappropriate or unwarranted interference with the judicial process”.<sup>63</sup> The principle of the independence of the judiciary is said, in the *Basic Principles*, to be that:

“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, any improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.”

As well, the principle is said to entitle and require:

“... the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”<sup>64</sup>

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<sup>61</sup> Independence of the judiciary, par 4. See also [8]: “... conduct themselves in such a manner as to preserve the dignity of the office and the impartiality and independence of the judiciary.”

<sup>62</sup> Ibid 2.

<sup>63</sup> Ibid [6].

<sup>64</sup> Ibid, Art.15-16.

Again, an overlap between *independence* and *impartiality* is expressly envisaged. But in dealing with the criterion of *independence*, many of the basic principles are addressed to conduct by other branches of government affecting the judiciary. They deal with such matters as qualification, selection and training;<sup>65</sup> conditions of service and tenure; and secrecy and immunity and;<sup>66</sup> discipline, suspension and removal.<sup>67</sup> All of these are matters involving potential activities of the legislature and executive as they might impinge upon judicial independence. The entitlements vis a vis other parties or their interests are reflected in few of the basic principles. In some, they are mentioned only indirectly and not by name.<sup>68</sup>

Against this background, it is not surprising that most of the consideration of the meaning of the requirement of *independence* appearing in Article 6(1) of the ECHR has been addressed to the constitutional or governmental posture of the relevant tribunal in its relations with the other branches of government.

Thus, several cases have concerned the procedures for the appointment of members to courts and tribunals, to their term of office and to the existence of their guarantees against outside pressures and to the question whether the body presents an appearance of independence, as required by Article 6(1).<sup>69</sup> Considerations that had arisen in this context have included the acceptability of short-term or part-time judicial officers and whether such tenure is compatible with the requirement of

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<sup>65</sup>Ibid, [17]-[20].

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, [15]-[16].

<sup>68</sup>Ibid [2].

<sup>69</sup>*Bryan v United Kingdom (1995) 21 EHRR 342 (ECtHR) at par [37]. See also R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UK HL 23; [2003] 2AC 295.*

independence. In the United Kingdom, the post of temporary sheriff in the High Court of Judiciary in Scotland was held incompatible with Article 6 of the ECHR.<sup>70</sup> Whilst I would have followed this reasoning in a later Australian case, it was not applied (admittedly in a different constitutional setting) when the validity of the appointment of short-term State District Court judges fell for decision.<sup>71</sup>

So far as the provision in the ICCPR for tribunal *independence* is concerned, the jurisprudence of the United Nations Human Rights Committee (HRC), established by the ICCPR, is likewise substantially (but not wholly) addressed to the requirement of independence from other branches of government. In General Comment No.32, addressed to Article 14.1 of the ICCPR, the HCR observes that:<sup>72</sup>

“The requirement of competence, independence and impartiality of the tribunal... is an absolute right which is not subject to any exception. Requirement of independence refers, in particular, the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until the mandatory retirement age or the expiry of their term of office, where such exists, the conditions governing promotion, transfer, suspension and cessation of their functions, and the

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<sup>70</sup> *Stavis and Chalmers v Procurator Fiscal* [2000] HRLR 191 followed by Privy Council in *Millar v Dickson* [2001] UKPC 24; [2002] 1WLR 165.

<sup>71</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [2006] HCA 44 at 128-130 [212]-[215].

<sup>72</sup> General Comment 32 of the Human Rights Committee. See S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (3<sup>rd</sup> Ed.) (Oxford UP, Oxford, 2014) 460 [14.48].



actual independence of the judiciary from political interference by the executive branch and legislature.”

It will be noted that the foregoing General Comment treats the requirement in Article 14.1 as a composite one in which each of the qualities of “competence, independence and impartiality” is interdependent upon the others. Nevertheless, the HRC proceeds to deal separately with “the requirement of independence”. Most of the communications that have been determined by the HRC on this issue have concerned instances of oppressive or inappropriate conduct by the executive government in relation to the judiciary.<sup>73</sup> Nevertheless, the treatment by the HRC of the criterion of *independence* has not been confined to governmental intrusions. In one matter, involving observations on a communication from Brazil, the HRC insisted that the judiciary must be protected from threats and reprisals from discontented litigants.<sup>74</sup> In a like manner, the European Court of Human Rights, whilst repeatedly insisting on the independence of tribunals from the executive and parliament, has also observed that ‘independence’ extends to independence from the parties.<sup>75</sup> Because of the generality in which the adjective “independent” is used in the text of the ECHR, this broader ambit seems unarguable.

### *ACADEMIC AND OTHER COMMENTARY*

In light of the extension of the obligations of tribunal independence to independence from the parties and other actors, and beyond

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<sup>73</sup>*Bahamonde v Equatorial Guinea* (468/91), *ibid* at [14.49] and *Bandaranayake v Sri Lanka* (1376/05) *ibid* [14.50].

<sup>74</sup>UNHRC, Concluding Observations on Brazil (1996) UN doc DCPR/C/79/ADD.111, para [10].

<sup>75</sup>*Lester et al* above n. 56, 324 [4.6.55] referring to Application 17178/91, *Bryan v United Kingdom*, above n.69.

independence from the executive government and the legislature, the failure to elaborate, and contrast, the different functions that *independence* and *impartiality* are respectively intended to perform for the purposes of recusal is striking. Certainly the vast majority of the elaborations of the notion of judicial independence are addressed to aspects of governmental independence whereas in all of the international treaties the word is used in its generality.<sup>76</sup> Only a few sources can be found that latch on to the differential purpose of the requirement of *independence* and seek to elaborate and isolate that word and the work it is intended to perform.

In the context of the independence of a tribunal (as distinct from a court) a number of decisions of the Supreme Court of Canada have addressed the issue in the course of elaborating the meaning of the guarantee of an “independent tribunal” in section 11(d) of the *Canadian Charter of Rights and Freedoms*. Thus, in *Valente v The Queen*,<sup>77</sup> Le Dain J derived from this requirement a number of elements which, he said, were commonly reduced to an individual and a collective aspect.<sup>78</sup> He said:<sup>79</sup>

“It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, is reflected in its institutional or administrative relationship to the Executive and legislative branches of government.”

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<sup>76</sup>Rebecca Ananian-Welsch and George Williams, “Judicial Independence from the Executive”, Judicial Conference of Australia, 2013. See also B. O’Connor, *Tribunal Independence*, AIJA, 2013, 6-7.

<sup>77</sup> [1985] 2 SCR 373.

<sup>78</sup> [1985] 2 SCR 673 at 685, 687.

<sup>79</sup>*R v Beaugard* [1986] 2 SCR 56 [23] applied.

In *R v Lippé*<sup>80</sup> the Supreme Court of Canada had to decide whether the guarantee of an “independent tribunal” in the *Canadian Charter*, meant that it had to be independent only from the government or also from the parties to the dispute. Three of the participating judges (Lamer CJ; Sopinka and Cory JJ agreeing) concluded that, in the context of Canada’s constitutional tradition, the principle of “independence” was limited to independence from ‘the government’. This included the legislative and executive branches and any person or body acting under the authority of the state.<sup>81</sup> However, a majority of the judges (Gonthier J, with La Forest, L’Heureux-Dubé and McLachlin JJ agreeing) contested this view. They held that such a narrow opinion was not consistent with the unlimited ambit of word in the text of the *Charter*; international usage; and the broader view stated by Dickson CJ in *R v Beauguard*:<sup>82</sup>

“Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, *pressure group*, *individual or even another judge* – should interfere in fact, or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision.”

Australian judges have also generally favoured the broader view, whilst acknowledging that, in practice, the largest dangers to judicial independence usually come from other branches of government,

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<sup>80</sup> [1991] 2 SCR 114

<sup>81</sup> [1985] 2 SCR at 673 at 685, 687

<sup>82</sup> [1991] 2 SCR 114.

principally the executive.<sup>83</sup> Whereas Professor Stephen Parker perceived judicial independence as “a set of arrangements designed to promote and protect the perception of impartial adjudication”,<sup>84</sup> Le Dain J in *Valente* insisted that impartiality and independence were conceptually distinct values. This was so however closely related the two notions might be in their functional purposes. Thus, *impartiality* referred to a state of mind on the part of the decision-maker which is free of actual or perceived bias. *Independence*, on the other hand:<sup>85</sup>

“... Connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.”

I agree with this view. It is also reflected in the *Bangalore Principles of Judicial Conduct*,<sup>86</sup> adopted by the Judicial Integrity Group (JIG) on which I have served as a member. Those principles were developed in a series of meetings involving leading judges from both common law and civil law countries. In the result, six values were identified as essential to judicial integrity. These were Independence; Impartiality; Integrity; Propriety; Equality; and Competence and Diligence. In a *Handbook*, issued by the JIG, the principle of judicial independence is stated as “a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in

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<sup>83</sup> JJ Spigelman, “Judicial Appointments and Judicial Independence” (2008) 17 *Journal of Judicial Administration* 139 at 141; M. Warren, “Does Judicial Independence Matter?” (2011) 150 *Victorian Bar News* 12 at 12-14.

<sup>84</sup> Stephen Parker, “The Independence of the Judiciary” in B. Opeskin and T Wheeler, (Eds.) *The Australian Federal Judicial System*, (MUP, Melbourne, 2000) 62 at 71. Ibid, 40 [24].

<sup>85</sup> [1985] 2SCR 56 [23].

<sup>86</sup>United Nations Office of Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, UN, Vienna, 2007. The *Bangalore Principles* were adopted at the 2<sup>nd</sup> meeting of the Judicial Integrity Group (JIG) held in Bangalore, India, in February 2001. The author was Rapporteur of the JIG.

both its individual and institutional aspects” This classification cites the opinion of Le Dain J in *Valente*. The JIG then attempts a differentiation of independence and impartiality:<sup>87</sup>

“The concepts of “independence” and “impartiality” are very closely related, but are yet separate and distinct. “Impartiality” refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” connotes absence of bias, actual or perceived. The word “independence” reflects or embodies the traditional constitutional value of independence. As such it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive branch of government, that rests on objective conditions or guarantees.”

The way in which “independence” expresses a vital feature of courts and tribunals was further explained by Chaskalson P. in *S v Makwanyane*.<sup>88</sup> That distinguished South African judge suggested that the notion went even beyond independence from government and parties. It included independence from public opinion. Unless the relationship of judges to the state, to the parties and to public opinion were at once detached and separated, an essential attribute of a manifestly independent decision-making would be missing. The judges in question might feel (or even might actually be) impartial in their own minds. However, they would lack an imperative requirement, essential to the authority and acceptability of judgments, orders and decisions. By the same token, the JIG has pointed out that judicial independence does not demand complete isolation from society. However, an essential severance from

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<sup>87</sup> *Bangalore Principles*. Commentary, above n.86, 57 [51].

<sup>88</sup> 195 (3) SA 391.

other branches of government, lobby groups, political parties, parties to litigation and influential personalities, was critical to allowing one group of individuals to decide legal disputes affecting others without the need for bloodshed, violence or disaffection.

Summing up the relationship between the respective principles of *independence* and *impartiality*, the JIG, observed: <sup>89</sup>

“Independence and impartiality are separate and distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office. Independence is the necessary precondition to impartiality and is a prerequisite for obtaining impartiality. A judge could be independent but not impartial (on a specific case by case basis); but a judge who is not independent cannot, by definition, be impartial (on an institutional basis).”<sup>90</sup>

### **CONCLUSION: SEPARATE VALUES**

On the basis of the foregoing analysis, the preferable view (it is suggested) is that, in understanding the core values of a fair trial of contested issues in a rule of law society, both *independence* and *impartiality* are essential characteristics of the decision maker established by law to resolve conflicts (courts, tribunals and like decision-makers). Whilst independence and impartiality are mutually reinforcing, they represent separate and distinct obligations. Each must be present at the same time if a fair trial is to be attained. They do not merge into a single notion requiring only that such office-holders be free of bias. Applying an impartiality analysis alone would lose an element

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<sup>89</sup> Bangalore Principles, Commentary, above n 86, 57 [51].

<sup>90</sup> Citing reference re *Territorial Court Act NWT*, North West Territories Supreme Court Canada, (1997) DLR (4<sup>th</sup>) 132 at 146, per Vertes J.

essential to the attainment of the necessary standards. These standards are required not only by the text of so many international statements of human rights but also by a functional analysis that is responsive to community expectations and the manifest attainment of the rule of law.

I conceive of the distinction between independence and impartiality spatially. *Impartiality* refers to what goes on (and appears to go on) in the mind of the decision-maker, sitting in the judgment seat. *Independence* on the other hand, concerns the actual and apparent positioning of that seat. In order for the decision to enjoy the requisite quality and acceptability to the parties, the community and the world, the judgment seat must be separated from all material connections with other branches of *government* (legislative, executive, military or official); with the *parties* (financial, associational or empathetic); and with other outside *influences* (political parties, lobby groups, incompatible associations and even public opinion).

All of which is to reach the same conclusion as was expressed by Lord Justice Sedley in his foreword to Grant Hammond's excellent book on *Judicial Recusal*,<sup>91</sup> with which I opened this article. The comment derived a little help from the text of the oath (or affirmation) that judicial officers throughout the common law world commonly take before embarking on judicial, tribunal and other significant forms of independent and impartial decision-making:

“The ... office... is to do justice ‘without fear or favour, affection or ill-will’”. Fear and favour are the enemies of independence, which is a state

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<sup>91</sup> S. Sedley, *op cit*, above n.2, at ix.

of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. This makes the law relating to recusal a serious business.”