

OF COURTS AND JUDGES: UNDER THE SPOTLIGHT, IN THE LIMELIGHT AND SEEING THE LIGHT

H P LEE*

This article engages in a comparative journey exploring a number of well recorded significant episodes in which courts and judges have been thrust into a storm of controversies. Some of these controversies pertain to judges who have been subjected to investigation for alleged failure to live up to the constitutional standards expected of independent and impartial judicial officers. Others pertain to judges who have drawn themselves into the eye of a storm by being placed in the limelight. The final category of episodes relates to those judges who are confronted with challenges to their impartiality and who have to make decisions as to whether to recuse themselves from adjudicating on a particular dispute.

I PUBLIC INTEREST IN THE JUDICIARY

The judiciary, it has been said, ‘consists of ordinary human beings with their strengths and frailties’.¹ French CJ of the High Court of Australia once said: ‘The courts are human institutions operated by human beings and there must be a margin of appreciation for human limitations.’² It is not easy at times to draw a clear line to define the human limitations; but what is clear is that the line is crossed when there is any whiff that public confidence in the independence and integrity of the institution and any of its members is undermined.

II UNDER THE SPOTLIGHT

Media interest in the work of the judicial institution means that on many occasions the judiciary will be placed under the spotlight. From time to time, the courts and their members find themselves caught up in public controversies or find themselves ‘at the eye of a storm’.³ The spotlight may be cast upon a judge’s conduct within or outside the courtroom. In some instances, the conduct may not have been deliberate or it may involve allegations of criminality. An example of

* Emeritus Professor of Law, Monash University. This article is a revised version of the 2015 George Winterton Memorial Lecture delivered by the author on 19 February 2015 at the University of Western Australia, Perth.

1 H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 14.

2 *Cesan v The Queen* (2008) 236 CLR 358, 381 [72] (‘Cesan’).

3 J J Doyle, ‘Constitutional Law: “At the Eye of the Storm”’ [1993] *University of Western Australia Law Review* 15.

the former is the case of *Cesan v DPP (Cth)*,⁴ where the judge presiding over a jury trial fell asleep from time to time. The two accused — who were convicted of conspiracy to import drugs — appealed, but the NSW Court of Criminal Appeal, by a 2–1 majority, rejected the claim of a miscarriage of justice. Grove J, a majority judge, said: ‘I find the probability to be that, from time to time, the judge was “nodding off” and on other occasions, notably when he was heard to snore, was asleep in a real and practical sense.’⁵ Grove J added: ‘The presiding judge was always physically present. The evidence shows that he returned from sleep either by the operation of his own body mechanisms or by the provocation provided by tapping or the creation of noise by other means such as clearing of throat or movement of books and papers.’⁶ The NSW Court of Criminal Appeal’s majority decision was reversed by the High Court of Australia. French CJ said: ‘The appearance of unfairness in a trial can constitute a “miscarriage of justice” within the ordinary meaning of that term.’⁷

The spotlight can be unrelenting if allegations against a judge pertain to allegations of criminality. From the viewpoint of the observers of the High Court of Australia, 2016 may be an interesting year. You may ask why that is so. Let me unfold the story, as a number of readers may have been in their infancy when this saga began. For those with longer memories, you will recall that in 1984 the ‘Justice Murphy Affair’ erupted with the publication by *The Age* of a series of articles based on transcripts of telephone conversations of a Sydney solicitor by the name of Morgan Ryan; a solicitor who was associated with leaders of organised crime. The transcripts of conversations, which had been taped illegally by the New South Wales police and which had mysteriously fallen ‘off a truck’ into the laps of *The Age* newspaper, revealed conversations between Morgan Ryan and other people. It was alleged that one of the voices was that of Lionel Murphy J.

Lionel Murphy was appointed Queen’s Counsel in New South Wales in 1960 and took silk in Victoria in 1961. In 1962, he was elected to the Senate of the Australian Parliament and five years later became leader of the Australian Labor Party Opposition in that House. When the Whitlam Government won the elections in 1972, Lionel Murphy became the federal Attorney-General and Minister for Customs and Excise. He was appointed to the High Court on 10 February 1975.⁸ His facial features were a delight for political cartoonists. Professor Michael Coper in his gorgeous gem, *Encounters with the Australian Constitution*, narrated the interesting story of how a newly discovered supernova was named after Murphy.⁹ Students of the three Australian National University

4 (2007) 230 FLR 185.

5 Ibid 227 [188].

6 Ibid 229 [193].

7 *Cesan* (2008) 236 CLR 358, 381 [71].

8 See generally Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997); Geoffrey Browne, *Murphy, Lionel Keith (1922–1986)*, *The Biographical Dictionary of the Australian Senate – Online Edition* <<http://biography.senate.gov.au/index.php/murphy-lionel-keith/>>.

9 Michael Coper, *Encounters with the Australian Constitution* (CCH, 1987).

astronomers, Dopita, Mathewson and Ford, who had observed the supernova, ‘perceived a likeness between the shape of the supernova and certain prominent facial features of Lionel Murphy’.¹⁰ According to Professor Coper’s account: ‘One student crept into Professor Mathewson’s office in the middle of the night and changed the caption to the photograph in Mathewson’s draft article from supernova remnant N86 to the Lionel Murphy supernova.’¹¹ What the student had done went undetected and the article with the photograph over its revised caption was subsequently published in the American *Astrophysical Journal*. Professor Coper said: ‘In this extraordinary way, a supernova came officially to be named after a person for only the third time in human history.’¹²

However, Lionel Murphy also became the first member of the High Court of Australia who was subjected to the invocation of the removal process under s 72 of the *Australian Constitution*. The protracted saga, which engulfed Lionel Murphy, included the following events:

- The seeking of a report by the then federal Attorney-General, Senator Gareth Evans, from the Australian Federal Police as to whether the contents of the tapes disclosed the commission of any federal offences.
- The seeking of an opinion from the then Director of Public Prosecutions, Mr Ian Temby, as to whether, if the material was authentic, there was ‘misbehaviour’ within the meaning of the constitutional expression in s 72 of the *Australian Constitution*.
- The tabling in the federal Parliament of an opinion on the meaning of ‘misbehaviour’ by the then Solicitor-General, Gavan Griffith QC.

The Senate (in which the government did not command a majority), subsequently appointed a committee to inquire into the authenticity of the tapes and transcripts and whether the conduct of Murphy J as revealed in the tapes and transcripts constituted ‘misbehaviour’ that would warrant his removal from office.

Mr Clarrie Briese, the Chief Stipendiary Magistrate of New South Wales, presented evidence to the committee that Murphy J had sought, through him, to influence the due and ordinary course of justice in relation to committal proceedings against Ryan. Murphy J was aware that Mr Briese was concerned to enhance the independence of the magistracy in New South Wales and that he had made representations to the New South Wales government to improve the position of the magistrates in that State. Murphy J said that he would raise the matter with the State Premier and the in-coming State Attorney-General. A day before the magistrate presiding over the Ryan committal hearings was to hand down his reserved decision, Mr Briese received a telephone call from Murphy J. Murphy J informed him that the State Attorney-General would be proceeding with legislation to protect the independence of the magistracy. This was then followed by an utterance that now occupies a niche in Australian legal

10 Ibid 356.

11 Ibid.

12 Ibid.

history: ‘And now what about my little mate?’¹³ The Senate Select Committee on the Conduct of a Judge, consisting of six Senators, was evenly divided in its conclusion.¹⁴

Following the inconclusive finding of the first committee, a second Senate inquiry called the Senate Select Committee on Allegations Concerning a Judge was established. On this occasion, the committee comprised of four Senators who were assisted by two former judges. A majority concluded that Murphy J had attempted to influence the course of justice in relation to proceedings against Morgan Ryan and that this amounted to ‘misbehaviour’ under s 72(ii) of the *Australian Constitution*.

Murphy J was tried before the Supreme Court of New South Wales and was convicted upon the charge of attempting to pervert the course of justice in relation to the committal proceedings against Ryan. Murphy J’s conviction was quashed by the New South Wales Court of Appeal, which ordered a retrial.¹⁵ He was acquitted at the retrial.¹⁶ Following the publication by the Stewart Royal Commission of its finding that *The Age* tapes were authentic and the raising of more allegations over Murphy J’s conduct, calls for his removal reached fever pitch.

The federal Parliament on 28 April 1986 set up a Parliamentary Commission of Inquiry to examine all outstanding allegations against Murphy J and to determine whether there had been misbehaviour on his part that warranted his removal from the High Court of Australia. Professor Geoffrey Lindell in his learned analysis of the saga observed:¹⁷

‘By the time the Commission discontinued its work it was said to have sifted fourteen out of the forty-two allegations against Murphy J ... Presumably the allegations could not have related to issues dealt with in the trials which led to the acquittal of Murphy J because of a limitation placed on the ability of the Commission to inquire into the guilt or innocence of the judge in relation to the charges dealt with in those trials.

Why is the year 2016 significant in relation to this affair? In view of the revelation that Murphy J had terminal cancer, the Commission was terminated by an Act of Parliament, the *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth). The Act proscribes access to a document ‘that contains material relating to the conduct of the Honourable Lionel Keith Murphy’ until after the end of the period of 30 years after the commencement of the Act.¹⁸ The Act was assented to on 25 September 1986, the date on which the Act commenced operation. That means on 25 September 2016, ‘material relating to the conduct of the Honourable

13 Commonwealth, *Select Senate Committee on the Conduct of a Judge*, Parl Paper No 168 (1984) Appendix 5 [18]. Murphy disputed the use of the words ‘my little mate’: at [19].

14 Senators Chipp, Durack and Lewis reached the opposite conclusion: above n 1, 119.

15 *R v Murphy* (1985) 4 NSWLR 42.

16 *R v Murphy* (1986) 5 NSWLR 18.

17 Geoffrey Lindell, ‘The Murphy Affair in Retrospect’ in HP Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 284.

18 *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth), s 6(4) and s 6(6).

Lionel Keith Murphy' may become available in the public arena.¹⁹ I use 'may' because the consent of the President of the Senate and the Speaker of the House of Representatives is required. Light, which is not clouded by partisan views, may be cast upon the nature of the allegations.

The High Court itself was put under the spotlight. During the protracted proceedings against Murphy J, there had been suggestions that the proper course for him was to resign from the High Court. On 31 July 1986, the Chief Justice, Sir Harry Gibbs, wrote a letter to Murphy J stating that it was 'undesirable' and not in the Court's interest or Murphy J's interest for him to take his seat on the bench.²⁰ Sir Harry Gibbs also indicated that he proposed to issue a news release in the following terms:²¹

Mr Justice Murphy has informed me that he is gravely ill. He has also stated that he intends to exercise what he has described as his constitutional right to sit on the Court, notwithstanding that the Parliamentary Commission of Inquiry has not yet made its report. It is essential that the integrity and reputation of any Justice of this Court be seen to be beyond question. That being so, I regard it as most undesirable that Mr Justice Murphy should sit while matters into which the Commission is inquiring remain unresolved, and before the Commission has made its report. Nevertheless, in the circumstances to which I have referred, I do not regard it as appropriate to do more than express that view.

Murphy J responded with the statement that it was 'not for the Chief Justice or any Justice to decide whether it [was] undesirable for any other Justice to sit on the Court', and that it was 'improper for one Judge to publicly express an opinion on the desirability of another to continue as a Justice or to exercise his functions as a Justice'.²²

Murphy J added:

For a Chief Justice to state that if there is a question about a Justice's reputation or integrity, or if there is an inquiry into a Judge's conduct, he should not continue as a Justice, undermines the independence of every federal judge. Significantly, you made no such suggestion when the 2 Senate inquiries were in progress, the second of which included Parliamentary Commissioners. During both of those inquiries I sat and decided cases.²³

Murphy J did sit on the Court in early August 1986 but died on 21 October 1986. On that day a Bench of the Justices of the High Court handed down judgments in two cases in which all seven of their number had participated.²⁴

19 Ibid.

20 Joan Priest, *Sir Harry Gibbs: Without Fear or Favour* (Scribblers Publishing, 1995) 111–12.

21 Ibid 111.

22 Ibid 112. See also Justice Roslyn Atkinson, 'The Chief Justice and Mr Justice Murphy: Leadership in a Time of Crisis' (2008) 27 *University of Queensland Law Journal* 221, 233–4.

23 Priest, above n 20, 113.

24 See *King v The Queen* (1986) 161 CLR 423; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.

The whole episode led McGarvie J of the Supreme Court of Victoria (who later became the Governor of that State) to observe:

When, on the first occasion of modern time in the country, the machinery designed in an earlier era to determine whether a judge ought to be removed, was put into operation in the case of Mr Justice Murphy, it was found quite inadequate to cope with the conditions of today. In a contested case, with political undertones, the traditional parliamentary procedures were unable in any satisfactory way to ascertain what had occurred or whether what had occurred could warrant removal. It was a good illustration of a system which apparently worked in earlier times, but is ineffective in the conditions of today.²⁵

The shortcomings of the constitutional process for removing a federal judge or what reforms should be made to it have been amply covered in many published commentaries, and I do not intend to traverse the same territory. I just want to draw attention to the enactment of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2013* (Cth), which establishes a standing process to augment the removal process under s 72(ii) of the *Australian Constitution*. The Act empowers the federal Parliament to establish a parliamentary commission with the function of inquiring into allegations and gathering information and evidence so the Parliament could be well informed in its consideration of the removal of a judge. A commission would consist of three members appointed on the nomination of the Prime Minister, after consulting the Leader of the Opposition in the House of Representatives. At least one member of the commission must be a former Commonwealth judicial officer, or a judge, or former judge of the supreme court of a state or territory. The Murphy J saga was epitomised by the phrase: ‘And now, what about my little mate?’ But what if Murphy J had uttered instead, the words ‘decide the case properly’?

In South Africa, the Constitution entrusts a Judicial Service Commission with the task of finding whether a judge is guilty of ‘gross misconduct’ and for the judge’s removal by resolution adopted with at least two-thirds majority of the members of the National Assembly.²⁶ John Hlophe, a black man and ‘a very able, highly qualified legal scholar’,²⁷ was appointed a High Court judge at the age of 36 and four years later was appointed Judge President of that court when that position fell vacant. Hlophe J found himself under the spotlight when Mr Zuma, who had been dismissed as Deputy President by President Mbeki, sought to prevent his trial for alleged corruption. Hlophe J found himself in the eye of a mega storm on 30 May 2008 ‘when the judges of the Constitutional Court issued a press statement in which it was alleged that Judge President Hlophe had attempted improperly

25 R E McGarvie, ‘The Foundations of Judicial Independence in a Modern Democracy’ (Paper delivered at the Australian Bar Association Conference, Darwin, 8 July 1990) 12, cited in Lee and Campbell, above n 1, 134.

26 *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 7.

27 Christopher Forsyth, ‘The Failure of Institutions: The South African Judicial Service Commission and the Hlophe Saga’ in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers, 2012) 69, 75.

to influence two of their number to decide the case then under consideration in a manner favourable to Jacob Zuma'.²⁸ Hlophe J had told the two judges that the Zuma case had to be decided 'properly'. The Judicial Service Commission's desire to deal with the complaint against Hlophe was delayed by separate action brought by Hlophe in the Supreme Court. This had the effect of delaying proceedings. A year later, the Judicial Services Commission decided not to take further action, with the weak conclusion that no inference of trying to influence a trial judge could be drawn from the remark to decide 'properly' in contrast to saying 'the magic words: "Decide the case in favour of X"'.²⁹

This widely criticised decision could be explained by the change of circumstances in that intervening year. In that interregnum, in the words of Professor Christopher Forsyth, the Professor of Public Law and Private International Law at the University of Cambridge and the supervisor of Hlophe's Cambridge doctoral thesis, 'the world had changed'.³⁰ Professor Forsyth explained: 'Jacob Zuma had become president and had persuaded the Director of Public Prosecutions to drop the corruption charges against him'.³¹ Furthermore, four members of the Judicial Services Commission had completed their term of office enabling 'the President in consultation with the leaders of the opposition parties' to appoint their replacements.³²

III JUDGES IN THE LIMELIGHT

Public interest in the judiciary is engendered by media focus on judicial appointments, particularly, to the apex court, the High Court of Australia, and on its interpretive role. This focus was manifested from the early days of federation as glimpsed from the pages of *The Argus* newspaper. When Sir Isaac Isaacs was elevated to the office of Governor-General, *The Argus*, in anticipation of the filling of the High Court vacancy by the Labor government, intoned in an editorial in its 5 December 1939 edition:

[I]t is highly desirable that the Bench should consist of men [note the conspicuous absence of reference to 'women'] of the highest quality ... The case cannot be more tersely stated than in the simple truth that the High Court Bench should consist of the highest legal attainments. The Court itself would be affected by the presence of inferior elements on the Bench. Public confidence would be shaken, and the prestige of the court in other countries would be impaired.

The Argus, on 10 December 1930, attacked the appointment by the then Scullin Ministry of Dr Evatt KC, and Mr McTiernan MHR to be Justices of the High

28 Ibid 79.

29 Ibid 81.

30 Ibid 80.

31 Ibid.

32 Ibid 80–1.

Court in strident terms: ‘No intimate association with the administration of justice is necessary to enable it to be said that the qualities required are not to be found in the two young barristers now elevated to the bench.’

The judiciary and its members in general do not seek the limelight. Occasionally some judges find themselves, sometimes perhaps unwittingly, drawn into the limelight. In the wake of the controversial implied freedom of political communication cases, Toohey J, who was a member of the High Court and who participated in the making of the landmark decisions, delivered a speech in Darwin. In his speech Toohey J canvassed the scenario of the High Court constructing a bill of rights based on ‘fundamental common law liberties’.³³ This led to a question posed by Senator Spindler to the federal Attorney-General, Senator Tate, in the federal Parliament: ‘[I]s the Government going to abdicate its responsibilities to the High Court and allow the Court to usurp the role of Parliament?’³⁴ to which Senator Tate responded: ‘We will not allow the High Court to usurp that role.’³⁵

Judges who participate in controversial debates between contending political parties inevitably are courting the limelight. In the early 1980s a great debate occurred in Canada over certain constitutional developments, particularly pertaining to native rights and the place of Quebec in the constitutional scheme. Thomas Berger J of the Supreme Court found himself in the limelight by involving himself in the debate. He criticised the decision of the Canadian Prime Minister and the Provincial Premiers to abandon native rights as one of the prices for agreement on the Canadian constitution to be ‘mean-spirited and unbelievable’ and also the loss of Quebec’s veto.³⁶ He went on to express his own preference for a new formula for amendment of the Canadian constitution. A judge of the Canadian Federal Court complained to the Canadian Judicial Council about the conduct of Justice Berger J.

The Council appointed a three-judge panel, which conducted an investigation and, in its judgment in March 1982, found that the complaint of absence of ‘good behaviour’ was well founded.³⁷ The panel said that it was ‘unwise and inappropriate’ for Berger J to ‘embroil himself in matter of great political controversy in the manner and at the time he did’.³⁸ The panel added that if a judge was so moved by conscience to speak out on a political issue of great importance, the judge should not speak with the ‘trappings and from the platform of a judge’.³⁹ Rather, the judge should resign and enter the arena, where he, and not the judiciary, would become the target of those who held opposing views. However, the panel decided not to recommend the removal of Berger J from judicial office.

33 J Toohey, ‘A Government of Laws and Not of Men?’ (1993) *Public Law Review* 158, 170.

34 Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1280 (Sid Spindler).

35 Ibid 1281 (Michael Tate).

36 ‘Report and Record of the Commission of Investigation into the Conduct of the Hon Mr Justice Berger and the Resolution of the Canadian Judicial Council’ (1983) 28 *McGill Law Journal* 378, 390.

37 Ibid.

38 Ibid 391.

39 Ibid 391–2.

In a speech delivered more than six months after the affair, the Chief Justice of Canada, the Honourable Bora Laskin, criticised what Berger J had done. The Chief Justice said that those who take the view that freedom of speech for judges entitled them ‘the full scope of participation and comment on current political controversies, on current social and political issues’ were ignorant of history or principle.⁴⁰ Such a judge would be best advised to resign from the bench. Less than a year later, Berger J did resign from his judicial office.

The Chief Justice, Sir Anthony Mason, about three weeks before his retirement, gave his first ever television interview on the ‘Four Corners’ program on 3 April 1995. The reporter, Liz Jackson, asked Sir Anthony: ‘Do you support a republic for Australia?’ and Sir Anthony replied: ‘I’d regard an answer to that question as inappropriate at the present time.’⁴¹

LIZ JACKSON: ‘Why is that?’

SIR ANTHONY: ‘As Chief Justice, it wouldn’t be appropriate for me to express a view about what is a major political question dividing the Government and the Opposition.’

LIZ JACKSON: ‘Because it could come before the Court or just because ...’

SIR ANTHONY: ‘No. I’m saying independently of whether it could come before the Court. I’m saying it’s inappropriate for a Chief Justice to buy into a current political controversy which is dividing the major political parties.’⁴²

Sir Anthony was obviously conscious of the high judicial office he was occupying. His response was astute. Any other answer would have drawn him into the limelight and also put him under the spotlight.

But not all judges are so reticent. The Hon Michael Kirby has been described by Professor John Williams as ‘atypical of the Australian judiciary in his willingness to engage with the community on an array of judicial and human rights issues’.⁴³ In a 2001 university graduation ceremony speech, Kirby J spoke out passionately in defence of Australia’s public education system and called upon the Commonwealth government to boost funding for state schools. He was roundly criticised by the federal Attorney-General, Daryl Williams, and the Prime Minister, John Howard. The latter said that Kirby J’s comments ‘were a direct intervention into a partisan political debate’ and added: ‘It’s not appropriate for a High Court judge to involve himself in something that is so blatantly and obviously a matter of debate between

40 See Kent Roach, ‘Judges and free speech in Canada’ in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011), 179.

41 ‘Chief Justice comments on fundamental issues facing the judiciary’ in Geoffrey Lindell (ed), *The Mason Papers* (Leichhardt: The Federation Press, 2007), 412.

42 Ibid.

43 John M Williams, ‘Judges’ Freedom of Speech: Australia’ in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 153, 154.

the two political parties.⁴⁴ Michael Kirby J on the eve of his retirement from the High Court in 2009 acknowledged that, in looking back on the incident, it was ‘a mistake’ ... ‘the occasional error, for which [he would] say *mea culpa*’.⁴⁵

Professor John Williams said:

The wisdom of individual judges entering into public discussions of issues beyond the immediate concern of the judiciary is contested terrain in Australia. There is a healthy debate among judicial officers as to the rights that they hold as citizens and the obligations that befall them upon taking the oath of office.⁴⁶

In this contested terrain there is perhaps wisdom in the standpoint of Sir Anthony Mason:

Judicial reticence has much to commend it. It preserves the neutrality of the judge; it shields him or her from controversy. And it deters the more loquacious members of the Judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations.⁴⁷

Judges who ignore the reticence proposition should note the following guideline in the *Guide to Judicial Conduct*: ‘A judge who joins in community debate cannot expect the respect that the judge would receive in court, and cannot expect to join and to leave the debate on the judge’s terms.’⁴⁸

IV SEEING THE LIGHT

Any person who is conversant with the law would be aware of the oft-quoted dictum of Lord Hewart that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’.⁴⁹ Public confidence in the administration of justice is shaken if members of the public perceive a judge to be biased. Lord Denning MR, in his typically lucid way, explained: ‘Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: “The judge was biased.”’⁵⁰ When a claim of bias is raised the presiding judge has to determine whether he or she should recuse himself or herself from the proceedings. If a judge accedes readily to a call for recusal it could lead to a litigant embarking on a ‘judge shopping’ exercise. Making a wrong call on a recusal application may also result in a nullification of a trial by a higher court.

44 Ibid 153, quoting ‘PM’s Attack on Judge a First’, *The Australian* (Sydney), 2 May 2001, 1.

45 Ibid 153–4, quoting ABC Radio National, ‘Justice Michael Kirby Steps Down From the High Court’, *The Law Report*, 3 February 2009 (Michael Kirby) <www.abc.net.au/rn/lawreport/stories/2009/2480107.htm>.

46 Williams, above n 43, 173.

47 Sir Anthony Mason, ‘Judicial Independence and the Separation of Powers — Some Problems Old and New’ (1990) 13 *University of New South Wales Law Journal* 173, 181.

48 Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2002) r 5.6.1.

49 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

50 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599.

To assist judges confronted with a bias claim to see the light, different tests have been formulated in different jurisdictions to guide the judges in arriving at a proper decision.

In most instances the bias allegation is raised in the early part of the legal proceedings. Sometimes, however, a claim of bias is raised *after* judgment has been rendered on the basis that new facts have come to light. Thus in the well-known case of *Pinochet (No 2)*⁵¹ the then House of Lords, in an unprecedented move, set aside one of its own judgments. What came to light after judgment had been given in *Pinochet (No 1)*⁵² — which denied immunity to General Augusto Pinochet rendering him liable to be arrested and extradited for crimes against humanity — was that Lord Hoffmann, one of the five law lords in the first case, failed to disclose his connections to Amnesty International, which had been given permission to act as intervener in the first case. Lord Hoffmann ‘was an unpaid director and chairperson of Amnesty International Charity Limited (AICL), an organisation set up and controlled by AI and that his wife was employed by AI’.⁵³ Professor Kate Malleon explained: ‘In December 1998 a newly constituted panel of five law lords held unanimously that the relationship between AI and Lord Hoffmann was such that he was automatically disqualified from hearing the case and the judgment could not stand.’⁵⁴

Lord Hoffmann’s interest was a non-pecuniary interest. Professor Malleon highlighted the emphasis placed by the law lords on the ‘very unusual circumstances’ of the case in requiring automatic disqualification, which before *Pinochet (No 2)* was confined to a case involving a pecuniary interest.⁵⁵ Lord Browne-Wilkinson said that, because of the need to maintain the absolute impartiality of the judiciary, ‘there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit’.⁵⁶ The underlying concern is the fundamental importance of maintaining public confidence in the administration of justice.⁵⁷ Apart from the rule regarding automatic disqualification, the English courts operate a ‘real danger’ test.⁵⁸

Hlophe J, whom I mentioned earlier, was caught up in another controversy at the time when he was still a South African High Court judge.⁵⁹ In this particular incident, Hlophe J gave consent pursuant to statutory powers to a financial firm (Oasis Asset Management) to bring a defamation action against another judge.

51 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119 (*‘Pinochet (No 2)’*).

52 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61 (*‘Pinochet (No 1)’*).

53 Kate Malleon, ‘Judicial Bias and Disqualification after Pinochet (No 2)’ (2000) 63 *Modern Law Review* 119, 119.

54 *Ibid.*

55 *Ibid.* 122.

56 *Pinochet (No 2)* [2000] 1 AC 119, 135.

57 *Ibid.* 597 (Lord Hutton). See Malleon, above n 53, 123.

58 See *R v Gough* [1993] AC 646, 652.

59 See Forsyth, above n 27, 76.

However, it came to light that Hlophe was receiving monthly payments from Oasis ‘apparently made in respect of service as a trustee of a pension fund’.⁶⁰ Under the law, the consent of the Minister of Justice, at that time Dullah Omar, was required for employment outside the judicial role. Hlophe J claimed that oral consent had been given. It has been pointed out that ‘Mr Omar had died some eighteen months before Mr Justice Hlophe’s commenced his employment with Oasis’.⁶¹ A divided Judicial Service Commission, in a controversial decision, decided ‘that there was “insufficient evidence” for any further action to be taken’.⁶²

In Australia, in the case of *Ebner*,⁶³ Gaudron J said that ‘impartiality and the appearance of impartiality throughout the Australian court system’ are mandated by Chapter III of the *Australian Constitution*.⁶⁴ Her Honour also stated that these requirements are necessary for the maintenance of public confidence in the judicial system.⁶⁵ Impartiality in the Australian judicial process is encapsulated in a single test: ‘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’.⁶⁶

There have been instances when even apex judges have not considered a claim of bias in its proper light thereby endangering public confidence in the integrity of the institution. In the United States, in the much publicised ‘duck hunting’ controversy, Scalia J was asked to recuse himself from a trial involving Vice-President Dick Cheney. While the case was in proceeding, it was reported that Scalia J and his daughter had accompanied Cheney to Louisiana on Cheney’s official jet, Air Force Two. Scalia J wrote a 21-page scornful memorandum saying that ‘if people assumed a duck hunting trip would be enough to swing his vote, “the nation is in deeper trouble than I had imagined”’.⁶⁷ Scalia J rejected the application that he recuse himself, and that was the end of the matter. The United States Supreme Court does not review the decision by a member of the Supreme Court regarding whether to recuse or not.

There was no controversy, but rather hilarity, when Elena Kagan J, the liberal Obama-appointee, told the story of how she went duck hunting with the conservative Reagan-appointee Scalia J. Kagan J explained that during the judicial confirmation, in order to find out her views regarding the Second Amendment, she was peppered with questions: ‘Have you ever gone hunting? Do you know anybody who’s gone hunting?’⁶⁸ Kagan J replied that ‘if I am lucky enough to

60 Ibid 77.

61 Ibid.

62 Ibid.

63 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

64 Ibid 363 [82].

65 Ibid 362–3 [80].

66 Ibid 344 [6]. See also *Webb v The Queen* (1994) 181 CLR 41, 46–7.

67 Steve Twomey, ‘Scalia Angrily Defends His Duck Hunt with Cheney’, *The New York Times* (online), 18 March 2004 <<http://www.nytimes.com/2004/03/18/politics/18CND-SCAL.html>>.

68 Garance Franke-Ruta, ‘Justice Kagan and Justice Scalia Are Hunting Buddies — Really’, *The Atlantic* (online), 30 June 2013 <<http://www.theatlantic.com/politics/archive/2013/06/justice-kagan-and-justice-scalia-are-hunting-buddies-really/277401/>>.

be confirmed, I will ask Justice Scalia to take me hunting'.⁶⁹ When she got onto the Supreme Court she sought out Scalia and said: 'This is the only promise I made during my entire confirmation proceedings, so you have to help me fulfil it.'⁷⁰ As Justice Kagan narrated, Scalia J cracked up and thought it was absolutely hilarious.⁷¹

There was no jurisdictional impediment in the case of a review by the US Supreme Court of a decision of a lower court. Thus in *Caperton v A T Massey Coal Co, Inc*,⁷² the US Supreme Court 'held that the constitutional guarantee of "due process" was violated when a state supreme court judge cast the decisive vote in a high-stakes case in favour of a litigant who had spent a large amount of money (more than US\$3 million) on advertisements supporting the judge's election'.⁷³

The plaintiffs in the Australian case of *Kartinyeri v Commonwealth*⁷⁴ sought to have Callinan J, who had been sworn in the day before as a Justice of the High Court, disqualified from sitting on the case involving a challenge to the constitutionality of the *Hindmarsh Island Bridge Act 1997* (Cth). The Act was designed to restrict the operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The plaintiffs claimed that Callinan J had, as a barrister, provided advice on the constitutionality of the impugned legislation. On 5 February 1998, Callinan J announced his reasons for not disqualifying himself without consulting other members of the Court. The Court, comprising all seven Justices, after hearing the arguments on the substantive issues, reserved judgment. On 12 February 1998, the plaintiffs sought a review by the High Court of Callinan J's decision. On 25 February 1998, Callinan J voluntarily withdrew from the case in light of further information brought to light by the shadow Attorney-General. If Callinan J had not withdrawn, would the High Court have considered that it would have the jurisdiction to review the decision of Callinan J that he was not disqualified? Lord Hoffmann's case was one of a failure to disclose; Callinan J's case was one of inadvertent error of recollection.

I will now take you across the Tasman to examine the somewhat tragic saga involving Justice Wilson, a member of the New Zealand Court of Appeal who was elevated to the Supreme Court of New Zealand. This was a case of what one would describe as 'drip disclosure'. Justice Wilson sat as a member of the Court of Appeal in the *Saxmere* case.⁷⁵ The Wool Board Disestablishment Co Ltd, a party in the litigation, was represented by Mr Alan Galbraith QC. Apart from being very close friends, Justice Wilson and Mr Galbraith were co-owners and joint directors of a company which owned a horse stud property. I will not go

69 Ibid.

70 Ibid.

71 Garance Franke-Ruta, 'Justice Kagan and Justice Scalia Are Hunting Buddies — Really', *The Atlantic* (online), 30 June 2013 <<http://www.theatlantic.com/politics/archive/2013/06/justice-kagan-and-justice-scalia-are-hunting-buddies-really/277401/>>.

72 556 US 868 (2009).

73 Ibid.

74 (1998) 195 CLR 337.

75 *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 345.

into the minute details of the financial details. Information which subsequently emerged showed that the funding arrangements relating to the operation of the stud property left Justice Wilson significantly indebted to Mr Galbraith. It was the manner of disclosure of the information that led to so much strife for Justice Wilson.

It was the case that before the commencement of the trial before the Court of Appeal, Wilson J had telephoned counsel for Saxmere and told him about his business association with Mr Galbraith. What was disclosed in the conversation to counsel for Saxmere was unclear. Nevertheless, counsel for Saxmere did not raise an objection, and the Court found in favour of the Wool Board. Saxmere's appeal to the Supreme Court was dismissed. Saxmere appealed a second time, this time invoking an allegation of a reasonable apprehension of bias. Again, the appeal was dismissed. The Supreme Court relied on a written statement supplied by Wilson J outlining his interests. However, Wilson J had not fully disclosed the features of the funding arrangements relating to his indebtedness to Mr Galbraith, which, if they had been disclosed, were capable of suggesting a reasonable apprehension of bias. In an extraordinary development, the Supreme Court took the unprecedented step of recalling its judgment and setting aside the orders it made dismissing Saxmere's appeal. Wilson J was permitted by the Supreme Court to furnish a further statement, which acknowledged that he had not fully disclosed his interests.

The affair did not end there. In New Zealand there are statutory procedures designed to 'enhance public confidence in, and to protect the impartiality and integrity of, the judicial system'.⁷⁶ Complaints were made to the Judicial Conduct Commissioner who conducted investigations and recommended that the Attorney-General should appoint a Judicial Conduct Panel. The Attorney-General recused himself because he was previously a partner with Wilson J at a law firm. The recommendation by the Commissioner and the decision by the Acting Attorney-General to appoint a panel were challenged by Wilson J. The High Court found a number of errors of law in the Commissioner's recommendation and remitted the matter to the Commissioner so that he could revise his recommendation. Before this happened, Wilson J resigned from the Court. If Wilson J had seen the light earlier, this sorry saga would not have arisen. Before leaving this saga, I wish to add a side note, and that is, a judge should not find 'some personal reason for standing down every time a difficult case comes along'.⁷⁷ Sir Stephen Sedley recounts 'an occasion when a member of the court of appeal disclosed at the start of the hearing of a very boring and complicated patent case that he held shares in one of the companies involved'.⁷⁸ Sir Stephen narrated how the presiding judge said: 'If my brother thinks ... that he can escape from this case on a ground as tenuous as that, he is mistaken.'⁷⁹

76 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ), s 4.

77 Sir Stephen Sedley, 'Judicial Ethics in England' (2003) 6 *Legal Ethics* 29, 32.

78 *Ibid.*

79 *Ibid.*

V CONCLUSION

I have provided a conspectus of a number of episodes. Some observations are proffered. In the case of Hlophe J, a ‘demographic transformation of the South African judiciary’⁸⁰ was about to commence in the post-apartheid era, and Hlophe, a highly qualified black man, was timely positioned for the ‘glittering prizes’ that were laid before him.⁸¹ He was appointed a High Court judge at the age of 36. Four years into his High Court role the position of Judge President of the Court fell vacant. He went for the position and was appointed. Professor Christopher Forsyth said that he could and should have waited and remarked that Hlophe’s ‘youth was both a blessing and a curse’.⁸² In the case of Murphy J, in our book *The Australian Judiciary*, Professor Enid Campbell and I remarked: ‘Although to have judges with some political experience on the High Court is useful, the wisdom of appointing a serving politician straight into the court without an appropriate “cooling-off period” is highly questionable.’⁸³

In 2008, the Labor federal Attorney-General Robert McClelland, introduced non-statutory based advisory panels to screen prospective members of the Federal Court and the then Federal Magistrate (now Circuit) Court and to help draw up a short list. Such a measure apparently has been quietly expunged by the federal Attorney-General George Brandis. Judicial appointments still literally remain the gift of the executive government in power. As far as Australia is concerned I am yet to be fully convinced that supplanting the current process of judicial appointment by an independent appointments commission is a desirable thing. I can only re-assert this view:⁸⁴

Governments, at federal and State levels, owe a duty to the people of Australia to ensure that appointees are of the highest calibre. Judicial independence can be diminished by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity, experience and integrity, or who cannot shake off a sense of gratitude to the appointing authority.

The episodes and events discussed, when seen in the context of the long history of the judicial institution, are in truth rather rare occasions. They should not detract from the unsung manner in which judges across the land are daily carrying out their essential role seeking to render justice. Michael Kirby J in his 1983 Boyer lectures aptly said:⁸⁵

The Judges are and always have been the central actors of [our legal] system. They have human weaknesses and foibles ... But let there be no

80 Forsyth, above n 27, 74.

81 Ibid 75.

82 Ibid.

83 Lee and Campbell, above n 1, 119.

84 Ibid 107.

85 Justice Michael Kirby, ‘The Judges’ in *Boyer Lectures* (Australian Broadcasting Corporation, 1983) 79.

doubt the judiciary also has great strengths. Personal integrity, intellectual ability and diligence are chief amongst these. These strengths deserve to be celebrated. In a changing world they remain a sheet anchor for our civilisation.