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EXTRAJUDICIAL SPEECH AND THE PREJUDGMENT RULE: A REPLY TO BARTIE AND GAVA

Abstract

The precise limits of the rule against prejudgment remain to be determined. It has recently been argued that the rule should be extended to prohibit extrajudicial statements on matters of law, as well as those of fact or evidence at issue in a particular matter. It is argued that this suggestion should be resisted, as neither the existing case law nor underlying principle support such an extension. Moreover, there are strong policy reasons for not doing so.

I Introduction

Susan Bartie and John Gava[1] challenge conventional understandings of the apprehended bias rule, and of the prejudgment doctrine in particular. They do so by arguing that this doctrine should be applied more broadly and that, for a variety of policy reasons, its scope should extend to a wide range of extrajudicial speech. Significantly, their argument forces a clearer conceptualisation of the bias rule and the legal values it protects.

Though far from new, extrajudicial commentary is a growing phenomenon. Judges of the superior courts are in increasing demand as conference speakers, often presenting keynote addresses, and a growing number of them have taken to the academic journals as well. Court websites often list lengthy catalogues of papers delivered by serving judges on a wide range of legal subjects to professional and academic audiences. Those papers range in nature from expressions of broad commentary about the legal system and the role of the courts to tightly argued expositions of a clear view as to the correct resolution of some question of specific legal doctrine.

Moreover, judges are increasingly willing to comment on, and express opinions about, 'hot' legal issues which are likely to be further argued in the nation's courts, perhaps even before their judicial selves. Given this context, Bartie and Gava warn against the possibility of a perception of prejudgment. They argue that 'ordinary human experience'[2] indicates that a position so clearly and publicly expressed will

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1 Susan Bartie and John Gava, 'Some Problems with Extrajudicial Writing' (2012) 34 *Sydney Law Review* 637.

2 Ibid 646.

be difficult for a judicial officer to put to one side when the very same legal issue subsequently falls to be determined in their courtroom.

Bartie and Gava suggest that much, if not all, extrajudicial speech is therefore 'suspect' in terms of displaying prejudgment. They counsel a somewhat formalist remedy, a stony faced Sphinx like judicial silence in all fora other than duly delivered judgments. Judges, they seem to be saying, are best seen and not heard outside their courtrooms.

This article takes a different view. A close examination of the case law demonstrates that the prejudgment rule has never extended to extrajudicial statements made about matters of law, as distinct from suggestions that particular questions of fact at issue in litigation in prospect have been predetermined. Moreover, while Bartie and Gava's suggestion that strong expressions of extrajudicial views on matters of law or matters of fact are equally concerning has some initial appeal, this article argues that there are strong policy reasons for resisting their suggested extension of the bias rule.

II Judgment and Prejudgment

Before engaging directly with the views expressed by Bartie and Gava, it is useful to consider exactly what is involved in judicial decision making. Judgment is a complex process. That said, at its simplest and most routine, it may be seen as being comprised of two key elements. On the one hand, courts must make relevant findings of fact on the basis of both admissible evidence and on a decision as to whether that evidence satisfies the applicable evidentiary burdens. The rules of evidence control this fact finding aspect of the judicial process.

On the other hand, the courts must also determine the applicable legal rules and principles. This involves interpreting relevant case law and statutory provisions to determine the intended judicial or legislative meaning. In relation to case law, questions of authority and persuasiveness must also be considered. Both statutory interpretation and the application of previous case law are complex processes, but neither is governed by the rules of evidence. Rather, judicial officers engage in a mix of inductive, deductive and analogical reasoning, with that mix varying from case to case. The ultimate decision of the court as to the applicable legal rules and principles is determined not by evidence, but by that reasoning process. It involves weighing up factors such as the precise statutory wording, the weight of case authority, and questions of underlying principle and policy.

At its most simplistic, the final determination of rights, obligations and liabilities in a judgment may be seen as a relatively straightforward process of deductive reasoning from the general premises provided by the applicable legal rules. Those rules, once having been determined on the basis of legal argument, are applied to the facts as found on the basis of the admissible evidence. The found facts form the minor premise of the deductive argument. The conclusion of the argument is the final judicial determination of liability or otherwise.

Necessarily, this is an idealised and overly simplistic description of judicial decision making. In many instances, a degree of judicial discretion will have to be exercised as the legal rules and the facts will admit of more than one conclusion. The idealised form of deductive reasoning will also be relatively rare in practice, since a judicial determination will only be called for where there is some degree of dispute between the parties as to either the interpretation of the applicable legal rules and principles or as to the primary facts to which those rules and principles are to be applied. Litigation will only ensue when there is dispute as to one or more of these matters.

Putting this admitted complexity to one side, there remain two essential elements in any judicial determination: the articulation of the relevant law and the finding of the relevant facts. Both may be contested, and both may be complex. Both may be matters to which a judicial officer might not bring a completely open and impartial mind. But they are very different functions, and ones typically performed at differing levels of the court hierarchy. Fact finding is principally a function performed at trial level, in the exercise of original jurisdiction, by a fact finder who has the benefit of hearing the witnesses and assessing their evidence firsthand. It is only in quite limited circumstances that questions of fact are directly redetermined at appellate levels. By contrast, questions of law, though routinely the subject of an initial determination at the trial level, are, equally routinely, the main subject of the exercise of appellate jurisdiction.

The question posed by Bartie and Gava is whether the prejudgment rule is equally applicable to these very different components of the judicial decision-making process. That question may itself be subdivided into two. First, what is the current law on the question? Second, is there a need for a reconsideration of that law?

III The Cases on Prejudgment

To answer the first question, an examination of the decided cases is necessary. This examination yields two results. First, and consistently with the approach advocated by Bartie and Gava, judicial statements in the decided cases on prejudgment, or on the bias rule more generally, frequently make no overt distinction between these two separate aspects of the decision making process. Rather, those statements are couched in generality. In *Livesey v New South Wales Bar Association*[3] the guiding principle was stated as follows:

> a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.[4]

This is the classic statement of the rule against 'apprehended' or 'ostensible' bias, which may arise in a variety of ways, including prejudgment.[5] On its face, the

3 (1983) 151 CLR 288 ('*Livesey*').

4 Ibid 293–4.

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

statement is broad enough to cover prejudgment in relation to issues of law and legal doctrine generally as well as prejudgment of the facts. More recently, in *Michael Wilson & Partners Limited v Nicholls*[6] the High Court reaffirmed that:

> the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (in this case, in the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.[7]

Again, the expression 'the question the judge is required to decide' is broad enough to capture a lack of impartiality with respect to both questions of fact and law.

However, a different picture emerges when one looks more closely at the facts of the cases within which these broad statements were made and the particular circumstances which were alleged to give rise to apprehensions of prejudgment. Consider a later statement of the High Court in the *Livesey* case, where Mason, Murphy, Brennan, Deane and Dawson JJ sought to apply the broad test laid down in that case to the circumstances of the matter before them:

> a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about *a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact*.[8]

First, note that the broad factual circumstance referred to here is a situation in which a judge, sitting at first instance, has previously heard another case. Then note that there are two things the judge may have done in that previous case, either of which might give rise to an apprehension of bias. Either the judge may have expressed, in that previous case, a clear view about a question *of fact* which is a live issue in the subsequent trial matter or, alternatively, the judge may have expressed a clear view as to the credibility of a witness whose evidence goes to this subsequently disputed question of fact.

These statements closely tracked the facts of the *Livesey* matter. In that seminal case the NSW Court of Appeal sat to determine an application that Livesey, a barrister, be struck off the roll of counsel on grounds of professional misconduct. Two of the three members of the Court of Appeal had previously determined proceedings arising out of the same factual matrix. Specifically, they had each held in those earlier proceedings that a key witness was untruthful and that Livesey had been a party to what was described as a 'corrupt agreement' or 'conspiratorial arrangement' with that key

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6 (2011) 244 CLR 427.

7 Ibid 437 [31].

8 *Livesey* (1983) 151 CLR 288, 300 (emphasis added).

witness.[9] This key witness was subsequently called by Livesey to retell her previously rejected version of events in the second set of proceedings. Thus, at the commencement of those proceedings involving Livesey, two of the three members of the Court of Appeal presiding had already made findings that the evidence of a key witness was false, and that Livesey knew this and was fully aware of, and indeed a party to, the 'corrupt agreement' or 'conspiratorial arrangement'.[10] As the presence or absence of this arrangement was foundational to the case against Livesey, it was not surprising that the High Court unanimously held that an apprehension of bias might arise in the circumstances and that the two members of the Court of Appeal involved in the previous proceedings should not have sat in the subsequent matter.

Other leading prejudgment cases follow a similar pattern. General statements of the rule against apprehended bias, and against prejudgment in particular, are couched in broad terms apparently capable of referring to statements of legal doctrine as well as matters of fact and credibility. But the second result of any detailed examination of the decided cases is that they focus firmly on the latter. In each instance, the relevant judicial remarks, subsequently found to provide a basis for a reasonable apprehension of bias, have been directed to issues of fact or credibility.

In another classic prejudgment case, *Vakauta v Kelly*,[11] the offending statements were made by a trial judge hearing a personal injuries matter without a jury. Liability having been conceded, the only issue to be determined was the quantum of damage, again a factual question. This was to be assessed on the basis of the evidence of medical witnesses for the parties. Before hearing their evidence, the trial judge made remarks strongly disparaging the credibility of three medical witnesses, famously describing them as an 'unholy trinity' who 'think you can do a full week's work without any arms or legs' and whose 'views are almost inevitably slanted in favour of the GIO [an insurance provider] by whom they have been retained, consciously or unconsciously'.[12] These remarks were held to constitute prejudgment of the credibility of those medical witnesses, and hence of the issue of fact their evidence addressed.[13]

The High Court recognised the reality that a trial judge may well be confronted by witnesses who are repeat players and whose evidence, in an adversarial context, may tend to favour the side that has retained them. Brennan, Deane & Gaudron JJ observed that the rule against prejudgment 'must be observed in the real world of actual litigation'.[14] Their Honours continued:

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9 Ibid 297.

10 Ibid.

11 (1989) 167 CLR 568.

12 Ibid 572 (Brennan, Deane and Gaudron JJ).

13 Ibid 573–4 (Brennan, Deane and Gaudron JJ). The conclusion that an apprehension of bias might reasonably arise was reinforced by additional remarks made by the trial judge in the course of the reserved judgment.

14 Ibid 570.

> That requirement will not be infringed merely because a judge carries with him or her the knowledge that some medical witnesses, who are regularly called to give evidence on behalf of particular classes of plaintiffs (eg members of a particular trade union), are likely to be less sceptical of a plaintiff's claims and less optimistic in their prognosis of the extent of future recovery than are other medical witnesses who are regularly called to give evidence on behalf of particular classes of defendants (eg those whose liability is covered by a particular insurer).[15]

So, an open mind does not mean a completely blank one — a point that will be worth returning to in the context of extrajudicial speech. Importantly for present purposes, however, the impugned remarks of the trial judge focused entirely on the credibility of the witnesses, and hence on the determination of the questions of fact to which their subsequent evidence related.

In the other leading prejudgment case, *Minister for Immigration and Multicultural Affairs v Jia Legeng*[16] the High Court decided that no apprehension of bias arose in the context of remarks made by the then Minister for Immigration to a talkback radio host. Again, those remarks, albeit couched in somewhat general terms, were made in direct response to decisions made by the Administrative Appeals Tribunal in relation to a particular person; decisions which the Minister would shortly be called upon to respond to. Two points are relevant. First, the fact that the impugned remarks were made by a Minister 'who not only has general accountability to the electorate and to Parliament, but who … is made subject to a specific form of parliamentary accountability'[17] rather than a judicial officer, was central to the finding that no apprehension of bias would arise from those remarks:

> The position of the Minister is substantially different from that of a judge, or quasi-judicial officer, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors.[18]

Second, the question allegedly the subject of prejudgment by the Minister, whether or not Mr Jia was of 'good character' for the purposes of s 501,[19] was again a question of fact, or at most a mixed question of fact and law. It was the discussion of Mr Jia's particular case by the Minister which triggered the ultimately unsuccessful allegations of apprehended (and actual) bias.

There is a subclass of prejudgment cases which further illustrates the point. This subclass focuses on persistent rudeness, interjection or harassment by a trial judge or

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15 Ibid 570–1.

16 (2001) 205 CLR 507.

17 Ibid 539.

18 Ibid 539 (Gleeson CJ and Gummow J).

19 *Migration Act 1958* (Cth) s 501. The section provides for refusal or cancellation of visas on character grounds.

tribunal member, again suggesting that the credibility of a witness, a party, or their representative has been adversely predetermined. Examples in this category include *Damjanovic v Sharpe Hume & Co*[20] and *Re Refugee Review Tribunal; Ex parte H*.[21]

In *Damjanovic*, an otherwise unrepresented plaintiff sought assistance in the District Court from a friend who was not legally qualified. The District Court judge only reluctantly acceded to this request, at the same time ruling that six separate matters involving the same plaintiff be heard together, with the evidence in each matter to be evidence in each of the others. The course of the trials over several days was marked by 'ever increasing'[22] criticism of the unrepresented applicant and his lay representative, threatening statements as to the likely outcomes of the litigation, abruptness, rudeness, interruptions and sarcastic remarks, apparently uneven treatment between the parties, and more. Events culminated in the judge determining one of the matters before the evidence was complete in all of them, despite having ruled earlier that they were to be tried together.

In *Ex parte H*, a claimant for refugee status was subjected to highly sceptical questioning from the Refugee Review Tribunal member. The transcript of the tribunal hearing showed constant interruptions of the evidence the applicant was attempting to give, and repeated statements by the Tribunal member that they did not believe the applicant. Gleeson CJ, Gaudron and Gummow JJ considered that:

> a fair-minded lay observer or a properly informed lay person, in our view, might well infer, from the constant interruptions of the male prosecutor's evidence and the constant challenges to his truthfulness and to the plausibility of his account of events, that there was nothing he could say or do to change the Tribunal's preconceived view that he had fabricated his account of the events upon which he based his application for a protection visa.[23]

It is unsurprising that in both matters, it was held that a reasonable apprehension of bias, and specifically of prejudgment, might well have arisen. The relevant point for present purposes is that in each of these cases, it is clear that the comments which gave rise to the apprehension of bias were directed to the credibility of the witness, and hence to the version of the facts they were seeking to put forward. *Damjanovic* was a case being determined at the trial level when the impugned remarks were made; in *Ex parte H*, the Refugee Review Tribunal was exercising a merits review jurisdiction, and hence re-deciding the relevant questions of fact for itself.

More recent decisions are similarly instructive. In *British American Tobacco Australia Services Limited v Laurie*,[24] the High Court held, by 3:2 majority, that

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20 [2001] NSWCA 407 (21 November 2001) (Mason P, Sheller JA and Rolfe AJA) ('*Damjanovic*').

21 (2001) 179 ALR 425 ('*Ex parte H*').

22 *Damjanovic* [2001] NSWCA 407 (21 November 2001) [158].

23 *Ex parte H* (2001) 179 ALR 425, 435 [32].

24 (2011) 242 CLR 283.

a judge (once again a trial judge) was disqualified from hearing a matter when he had heard and determined very similar questions of fact and credibility involving the same respondent at an interlocutory stage of a different matter some three years earlier. The dissenting judges, French CJ and Gummow J, based their dissent on the guarded and provisional language used by the judge in that earlier interlocutory decision in relation to those questions of fact and credibility. The majority, applying *Livesey*, considered the language used by the judge to be sufficiently robust as to give rise to the possibility of an apprehension that the judge might not be able to put to one side those earlier opinions as to fact and credibility.[25] Given the narrow majority, and the fact that the impugned remarks took place during the hearing of another matter, the case can be considered to be at the outer limits of the factual circumstances that will found an apprehension of bias via prejudgment.

In *Michael Wilson & Partners Limited v Nicholls*,[26] the hearing of numerous ex parte applications was held not to give rise to any apprehension of bias on the part of the judge in question, therefore not disqualifying them from hearing the subsequent substantive matters. In the view of the High Court, the factual questions to be determined in the interlocutory applications were quite separate, and did not involve the prejudgment of any relevant questions of fact or credibility arising in the later litigation.[27] The focus upon factual questions was clear.

What conclusions can we draw from this? In essence, the decided prejudgment cases focus very much on predetermination of factual issues, whether directly or via prejudgment of the credibility of witnesses to those facts. None of these cases would appear to involve a scenario where the impugned judicial remarks focused upon questions of legal doctrine. Broad statements of the prejudgment rule may appear consistent with the broader scope for that rule advocated by Bartie and Gava, but the decided cases fall within a much narrower compass. This in turn refines our understanding of the bias rule. Particularly in relation to prejudgement, that rule has never been so broad as to refer to any matter that might incline a judge to decide a matter one way or the other; rather, it has focused more narrowly and specifically on prejudgment of matters of fact or credibility.

There are occasional decisions from other jurisdictions that do not fit this pattern. Bartie and Gava identify a decision of the Scottish High Court of Justiciary, *Hoekstra v Her Majesty's Advocate [No 3]*,[28] that falls into this exceptional category. In that case it was held that extrajudicial criticism of the European Convention on Human Rights and its adoption in Scots law could suggest bias that would render any trial adjudicated by that judicial author unfair under Article 6 of that Convention. This result is indeed consistent with the broader position advocated by Bartie and Gava. However, the decision does not seem to have attracted a broad following. The UK Court of Appeal declined an opportunity to follow a similar path, on very similar

25 Ibid 333 [145].

26 (2011) 244 CLR 427.

27 Ibid 448 [73] (Gummow ACJ, Hayne, Crennan and Bell JJ).

28 2000 SLT 605.

facts, a year later in *R v Spear*.[29] In that case, the defendants to a court martial had submitted that their trials violated Article 6 of the European Convention. The Court of Appeal rejected this argument, and also dismissed a suggestion that remarks made by Laws LJ in the course of its hearing, which might have been seen as critical of the Convention, gave rise to any appearance of bias on his part.

In *Locabail (UK) Ltd v Bayfield Properties Ltd*[30] the Court of Appeal summarised the position as follows:

> It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; *or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers)*.[31]

The conclusion to be drawn from this examination of the decided cases is that the current law does not support the position advocated by Bartie and Gava. It would seem a significant extension of the existing rule against prejudgment to sanction judicial commentary that limits itself to debate about relevant legal principle. This article now turns to the second question at issue, the one at the heart of Bartie and Gava's position; is there a persuasive argument in policy and principle terms that the prejudgment rule be widened from its current scope to include a much broader range of extrajudicial statements?

IV Extrajudicial Commentary

Extrajudicial speech comes in a number of forms. Some of these are quite discursive; others resemble some elements of a written judgment in their discussion of the decided cases. Quite appropriately, such utterances rarely if ever focus on disputed matters of fact in pending litigation. However, as Bartie and Gava point out, they may express clear views on a point of law that may well turn out to be decisive in subsequent litigation. It is this observation which makes their suggestion that such extrajudicial statements ought to be regarded as falling within an extended conception of objectionable 'prejudgment' initially attractive.

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29 [2001] QB 804 (Laws LJ, Holman and Goldring JJ).

30 [2000] 1 QB 451.

31 Ibid 480 [25] (emphasis added).

An example of extrajudicial speech not dissimilar to a judgment is the article by the Hon David Ipp, dealing with the proper legal test for the tort of malicious prosecution.[32] This article is, as Bartie and Gava observe, 'the product of careful consideration of all the relevant authorities and is highly polished and tightly reasoned'.[33] Essentially, the piece considers a conflict of authorities and comes down, quite clearly, on one side of the debate. Although policy considerations are mentioned, the burden of the argument falls simply upon the precedential weight of the conflicting authorities. It reads very much like a section of a written judgment wherein the judicial officer carefully reviews the authorities bearing upon the point at issue, displaying a sensitivity to the factual issues at stake in the precedent cases and balancing the weight of the judicial rulings and dicta contained therein. As Bartie and Gava comment, the piece 'could easily be transposed into a judgment with very little alteration'.[34]

One might observe, however, that the hypothetical transposition might just as easily have occurred in the opposite direction. This observation weighs against the broadening of the bias rule advocated by Bartie and Gava, as it reveals the policy implications of such a broadening to be unacceptable. If academic extrajudicial speech, such as the Ipp article, were to be considered as falling within the ambit of the apprehended bias rule, then it would be difficult to exclude any previous judgments delivered by a judicial officer which dealt with the same area of law from also falling within that rule. Both could be considered to display 'prejudgment' of legal issues in the extended sense advocated by Bartie and Gava. As they correctly observe, there is very little that distinguishes the kind of academic discussion of relevant authorities, leading to a reasoned conclusion on a point of law, displayed in this article by Ipp from the kind of judicial reasoning displayed in previous cases. If the one betrays a prejudgment of questions to be determined in subsequent litigation, it is difficult to see that the other does not. The apprehended bias rule should apply, or not apply, equally to both varieties of judicial utterance.

But to cast the net so broadly as to include both would surely make the court system entirely unworkable. A great deal of the work of judges, magistrates and tribunal members involves routine determinations in high volume jurisdictions, such as personal injuries, workers compensation, refugee status determinations and so on, with serial players repeatedly litigating the same key legal issues. Disqualification on the basis that a judge had previously heard a matter raising similar legal issues, and hence was on record expressing a view as to the correct resolution of those issues, would be quite unworkable.

Bartie and Gava suggest that the analogy between extrajudicial speech and previous judgments is not a strong one. They observe that:

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32 D A Ipp, 'Must the Prosecutor Believe that the Accused is Guilty? Or, Was Sir Frederick Jordan Being Recalcitrant?' (2005) 79 *Australian Law Journal* 233.

33 Bartie and Gava, above n 1, 648.

34 Ibid 649.

> The history and tradition of the common law requires judges to commit to certain doctrinal positions in judgments. These commitments are legitimate and are binding in future matters because they are grounded by a fair hearing of the arguments and issues raised by counsel.[35]

It is difficult to see how this makes the case that previous judicial decisions are any less likely to embody 'prejudgment' than extrajudicial speech. If anything, the opposite conclusion might easily be drawn. First, conclusions reached in actual judgments are necessarily the weight of considered reflection on the matter, with the benefit of argument from opposing counsel, and in the light of the particular facts of the matter at hand. That reflection is all the more likely to involve commitment from the judicial officer to the position finally adopted, given the significance of that position for the parties to the litigation. A judicial decision is anything but 'academic', in the sense that it has direct and immediate consequences for the parties to the litigation. It is necessarily the result of the most careful and considered decision by the judicial officer in question. Moreover, considerations of precedent, consistency and comity, none of which apply in the same way to extrajudicial speech, each place pressure on judges to decide new cases consistently with their own previous decisions. Indeed, the argument put by Ipp in relation to the tort of malicious prosecution is at its heart a complaint that insufficient weight had been given to this need to adhere to relevant and applicable precedent.

There are other, more discursive, forms of extrajudicial speech which are not so closely analogous to written judgments. Bartie and Gava's second example is a well-known extrajudicial piece written by the Hon Ian David Francis Callinan, and published some 13 months prior to his retirement as a judge of the High Court.[36] The article, published in *Quadrant*, is the text of an address entitled *International Law and Australian Sovereignty*. In it, Callinan expresses, in quite broad terms, a series of views as to the influence of international law. Overall, those views are hostile to international law and what Callinan sees as its growing influence. This influence is argued to be both anti-democratic and generally malign. International instruments are criticised as being difficult to adapt to new circumstances and are compared unfavourably with common law protections of human rights, particularly in the criminal justice process.

These views are all very general in their nature and fall well short of expressing anything like a decided view on any issue which Callinan might conceivably have been called to decide. A view that the external affairs power may have been over-extended does not translate to a prejudgment as to the validity of a particular piece of legislation made in exercise of that power, any more than a piece of judicial obiter on that topic would do so. This is all the more so, given the weight of pre-existing authority in the Court. At the most, it expresses a degree of scepticism as to the employment of international instruments, and a robust reminder of the conventional wisdom that they do not, absent incorporation, become part of Australian law. These are views that a judge is entitled to hold, without being considered to have prejudged litigation in which they may be tangentially raised.

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35 Ibid 655.

36 I D F Callinan, 'International Law and Australian Sovereignty' (2005) 49 *Quadrant* 9.

In a similar vein is the discussion by Bartie and Gava of the UK decision in *Pepper v Hart*[37] and the subsequent criticism of that decision made extrajudicially by Lord Steyn.[38]

In that celebrated decision, the UK House of Lords decided that it was permissible to have recourse to extrinsic materials in order to assist in the clarification of legislative intent, a practice which has become relatively non-controversial in Australia. In the UK, however, the decision was the subject of strong criticism. It was said to be contrary to existing precedent and, in the view of its critics, to constitutional principle, as well as potentially adding to the length, complexity and cost of litigation. Lord Steyn was a strong voice amongst those judicial and academic critics, though far from alone, and wrote a number of pieces developing his concerns, which led ultimately to his concluding ' … it follows that *Pepper v Hart* is not good law'.[39]

It is this conclusion, based upon what Bartie and Gava describe as 'a number of pages of carefully reasoned argument' during which Lord Steyn 'states his position as a clearly delineated legal rule'[40] that they see as exemplifying prejudgment.

But let us consider again the issue in *Pepper*. The issue to which Lord Steyn directed his criticism was the use of extrinsic materials. No court will be called upon to rule on that issue in abstraction. *Pepper* itself illustrates the point, where the actual question before the House of Lords was whether some schoolteachers were to continue to receive the benefit of perks, in the form of cheap schooling for their own children at a greatly reduced tax rate, where the legislation apparently removed this long standing 'fringe benefit'.

In order to determine that question, the Lords had necessarily to determine the intended meaning and purpose of the legislation in question. It was argued that statements of the relevant Minister cast light on that issue. Controversially, the Lords decided that it was indeed permissible to refer to those statements, and did so. Accepting for the purpose of argument that the admitted material was indeed determinative of the statutory interpretation issue, and thus ultimately dispositive of the litigation, the two issues remain entirely separate in nature. They were ultimately connected in this litigation, but only by a series of argumentative steps. In reaching its ultimate decision in *Pepper* the House of Lords had at least to do the following:

(i) reach factual conclusions, on the basis of the admissible evidence (in practice, the factual disputes are usually settled in the lower courts);

(ii) identify interpretive issues arising in the applicable legislative provisions;

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37 [1993] AC 593 ('*Pepper*').

38 Johan Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59.

39 Ibid 70.

40 Bartie and Gava, above n 1, 647.

(iii) decide whether it was appropriate to admit extrinsic material and have regard to it in order to resolve those interpretive issues;

(iv) determine the meaning of the applicable legislative provisions, in the light of the admitted extrinsic material; and

(v) determine the ultimate question of tax liability for the schoolteachers by applying the relevant statutory provisions, as interpreted with the assistance of the admitted extrinsic material, to the facts as found.

The issue which so animated Lord Steyn in his subsequent commentaries was the third of these — whether extrinsic material should be admitted into evidence to assist in the determination of the legislative meaning. It was, and is, a general issue of procedure that may, or may not, arise in the course of any litigation involving the application of legislation to a particular set of facts. Arguably, it will seldom be determinative of the litigation in question. Even in those instances where it is determinative, it remains an analytically distinct issue from the actual question of rights, obligations and liabilities before the court. It is one thing to say that a judge, in this instance Lord Steyn, has expressed strong views on this issue; it is quite another to say that he has prejudged the question of actual liability. It is utterances directed to the latter question which most clearly give rise to apprehensions of prejudgment. If, for example, those members of the House of Lords determining *Pepper* were to announce, prior to hearing the case, firm views as to the liability or otherwise of the schoolteachers to pay the additional tax, then that would indeed smack strongly of prejudgment.

V Conclusions

It has been argued above that even quite strongly expressed views as to legal doctrine that may ultimately prove dispositive of a particular matter should not be seen as raising legally objectionable apprehensions of bias in relation to that, or any other, particular matter. The key reason is that such statements are simply not directed to any particular matter. Rather, they are expressions of broad general views. It is argued here that it is expressions of opinion as to the *facts* of a matter, prior to the reception of all the evidence on that matter that rightly raise concerns as to prejudgment.

The law of procedural fairness has always been particularised in the sense that it is directed to the provision of a fair and impartial hearing to an *individual* in the context of a *particular*, usually adverse, decision to be made with respect to that individual. Thus, the right to a 'fair' hearing, the right to be heard, has never developed into a broad right of citizens to be consulted on matters of governmental policy. Similarly, the right to an 'impartial' hearing is a particularised one. The impartiality which the rule against bias protects equates to a right that a particular person's guilt or liability be determined only on the basis of admissible evidence,[41] and not be prejudged prior

41 Accepting, of course, that the rules of evidence are not directly applicable to non-judicial decision makers.

to that evidence being heard. It is no breach of that principle that a judge has a strong view as to the *law* to be applied to the case prior to hearing it, so long as an open mind as to the facts is retained until all the evidence is in.

As noted above, a contrary view would not only rule out extrajudicial speech, but would also necessarily see previous judicial decisions as indicative of prejudgment. The closer the facts, the stronger that indication will be. This, after all, is the doctrine of precedent. Those previously decided cases give a much stronger indication of the way subsequent 'similar' matters are likely to be decided than can be gleaned from comparatively abstract and generalised academic writing.

It is useful to also consider the other key rationale for procedural fairness doctrines. Neither the hearing rule nor the bias rule is simply about providing 'fairness' to an individual, important though that is. Rather, these doctrines are also instrumental, in that they aim to achieve greater accuracy in decision making by ensuring that a decision maker is more fully informed when they come to make their decision. This rationale is particularly pertinent when it comes to prejudgment of the facts of a matter, since these facts are usually quite outside the private knowledge of the judicial officer in question. Hence, the insistence of the prejudgment rule that a judge keep an open mind and not make any determination of the facts of a particular matter until all the evidence that might assist in that determination has been duly received in court. It is also in this context that the rules of evidence become significant, designed as they are to ensure that, as much as possible, the determination of the facts is made only upon the basis of the most reliable evidence.

By contrast, judicial officers are fully expected to have expert legal knowledge, and are appointed to their courts on that basis. The rules of evidence do not apply to the acquisition of that knowledge. Whilst a court will certainly hope for the assistance of counsel in determining contested legal issues, it is unlikely to be starting from a blank slate.

In conclusion, let us consider Bartie and Gava's suggested remedy. They counsel 'judicial silence',[42] but this can only mean one of two things. With respect, both are equally unsatisfactory.

The first possible meaning is that judges should not have opinions — that their minds should be empty. This of course is neither possible nor desirable. It is inevitable that judges will be aware of doctrinal issues and the competing arguments that surround them. They will have considered such matters from their formative days as students, then as barristers and very commonly in previous cases they have decided. They are appointed to the bench principally on the basis of their years of accumulated knowledge and experience of the law. To suggest that all this is somehow to be put aside is implausible. Neither would it be desirable. If a judge is finally called upon to decide a contentious point, it is surely desirable that they are able to bring as much well-informed reflection as possible to the arguments put to them by counsel.

42 Bartie and Gava, above n 1, 639.

It would not be a good thing to require judges to be entirely free of preconception or education, even if it were possible and it would hardly be to the benefit of litigants. For this reason, the bias rule has never required that a judge bring an empty mind to matters they are required to determine, but only that they bring an open mind, in the sense of a mind being open to persuasion. An impartial mind is not an empty one.

More probably, what Bartie and Gava are suggesting is that judges should keep the opinions that they will inevitably possess strictly to themselves. But this would be a superficial change only. Silence might remove the appearance of predisposition on legal questions, but could not remove its actuality. Such concealment would not serve the interests of justice or of litigants. Far better for judicial views to be on the record, so that counsel can be alerted to them and can address them specifically. It is submitted that fairness requires no less.