BIAS: PRESSURES ON THE WATSON TEST

by J.R.S. Forbes *

In 1976 a judge of the new Family Court of Australia entered upon his duties with enthusiasm. This would not be a court enmeshed in the formal adversary procedures of old. Special ways and means would be devised for each case and, if thought fit, *ad hoc* evidence rules might apply -- for example, a requirement that witnesses be corroborated on all matters in issue. True it is that such a rule is exceptional in criminal cases and virtually non-existent in modern civil proceedings but forcefully if inelegantly the ground rules of *Armstrong v Armstrong* were laid down: 'I simply as the Judge of facts in the matter propose to proceed on the basis that credit is a non-issue because I require corroboration of any issues ... [T]he proceedings in this court are not strictly adversary proceedings ... There is a general inquiry.'[1] So it was determined in advance that each party, insofar as his or her evidence was not corroborated, would be a witness of doubtful credit. Not surprisingly the learned judge was asked to disqualify himself. This he refused to do, and prohibition issued out of the High Court:

> [A] judge should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced or impartial ... If fair-minded people reasonably apprehend or suspect that the Tribunal has prejudged the case, they cannot have confidence in the decision.[2]

This description of apparent bias may conveniently be called the *Watson* test, although it was not new-minted in that case. Four years earlier it appeared in a slightly different form in *Stollery v Greyhound Racing Control Board.*[3] It has been said[4] that Cross LJ devised the formula in 1970[5] but in fact a Western Australian court used it more than sixty years earlier.[6] At all events it is now the definitive test of

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* Reader in Law, University of Queensland.

1 *R v Watson, Ex parte Armstrong* (1976) 136 CLR 248 at 254-255.

2 *Ibid* at 262-263.

3 (1972) 128 CLR 509 at 519.

4 *S and M Motor Repairs Pty Ltd v Caltex Oil Australia Pty Ltd* (1988) 12 NSWLR 358 at 367.

5 *Hannam v Bradford Corporation* [1970] 1 WLR 937 at 949.

6 *Thomas v Hayward* (1907) 9 WALR 212 at 216; see also *Australian Workers Union v Bowen (No 2)* (1948) 77 CLR 601 at 639; *Ex parte Qantas Airways Ltd, re Horsington* [1969] 1 NSWR 788 at 790-791.

disqualifying bias in courts and statutory tribunals in Australia.[7] It is a gloss upon the oft-quoted dictum that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[8]

The *Watson* test is clearly designed to set high standards of judicial and quasi-judicial propriety. In dealing with those tribunals to which the test applies it is unnecessary to allege actual bias. Apparent bias, as a denial of natural justice, is enough to destroy the basis of lawful jurisdiction.[9]

The search for bias is not restricted by an artificial rule built upon the writ of *certiorari*; the error need not and often does not appear on the record of proceedings in the tribunal below. It may reside in the words or actions of the adjudicator, officially recorded[10] or not, or in a moment of indiscretion during an adjournment[11] or in some compromising association with a party or a witness[12] during the hearing[13] or beforehand[14] or in commitment to a 'cause'.[15]

Authority aside, any one of four tests of bias might be adopted. At the objective end of the scale the party alleging bias could be required to prove, to the civil standard, that the decision below was a foregone conclusion -- that the tribunal in fact came to judgment with a mind closed to that party's case. Here there is no question of what the applicant or an observer (reasonably or unreasonably) thought of the tribunal's attitude. Bias is a matter of fact and impression for the court of review. This test would grant the highest degree of immunity to the tribunal under review and place a heavy burden of proof upon an applicant. As appears below the courts do apply this test of bias in some cases.

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[7] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294; *R v Auctioneers and Agents Committee, ex parte Akers* [1985] 2 Qd R 158; *Nickelseekers Ltd v. Vance* [1985] 1 Qd R 266; *R v George & Ors* (1987) 9 NSWLR 527; *Raybos Australia Pty Ltd v Techtron Corporation Pty Ltd* (1986) 6 NSWLR 272; *S and M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358.

[8] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259 per Hewart LCJ; cf *Renaud, ex parte CJL* (1986) 60 ALJR 528 at 535.

[9] *Allinson v General Medical Council* [1894] 1 QB 750; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171.

[10] *R v Watson, Ex parte Armstrong* (1976) 136 CLR 248; *In the Marriage of Stiffle* [1988] FLC 91-977.

[11] *R v Justices of Rankine River; Ex parte Sydney* (1962) 3 FLR 215.

[12] *Re Renaud, Ex parte CJL* (1986) 60 ALJR 528.

[13] *Haldane and Transexecutive Airlines Pty Ltd v Chegwidden* (1986) 41 SASR 546 (travelling with party and key witness).

[14] *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*(1988) 12 NSWLR 358 (submission as to judge and former client accepted by Kirby P only).

[15] *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; *Koppen v Commissioner for Community Relations* (1986) 67 ALR 215.

Second, the onus of proof could be somewhat lightened by using this criterion: 'Is it *likely* that the tribunal was biased?' The test is still objective, but no longer need the *factum probandum* be positively established.[16] The question whether something has to be a probability or merely a real possibility in order to be 'likely'[17] need not detain us here. The 'likely bias' test was formerly the orthodox one, and it is to be found in cases of fairly recent vintage.[18] It would be too glib to say that the difference between 'likely bias' and the *Watson* test is merely semantic; applying the former test in 1960 Devlin LJ stated: '[We have] not merely [to] satisfy ourselves that [bias] was the sort of impression that might reasonably get abroad.'[19]

Third, we have the now-established *Watson* test which moves significantly towards the subjective end of the scale. In applying this test it is not necessary to make any overt inquiry about the tribunal's actual or probable state of mind. The question is what a party or observer would *think*, although a degree of objectivity is retained by requiring the observer's view to be reasonable in the opinion of the court of review.

Fourth, it is theoretically possible for bias to depend on the subjective impression of a party or bystander. Here the only question of fact is: 'Did the party genuinely form that impression?' But this test has only to be stated to be rejected as unworkable and anarchic. The stability of decisions has to be safeguarded against 'fanciful and extravagant assertions and demands'.[20] The legal standard of impartiality can hardly depend on the 'suspicions of the ultra sensitive, paranoid or cynical'.[21] Otherwise no judicial or *quasi* judicial ruling would be safe; since there is always the possibility of a 'perversely minded person'[22] there is no adjudicator who 'cannot [reasonably or unreasonably] be suspected'.[23] The requirement that suspicion of bias be reasonable is non-negotiable.

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[16] This is, in any event, a civil issue to be decided according to the civil standard of proof, with due allowance for the seriousness of the allegation: *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Rejfek v McElroy* (1965) 112 CLR 517; *Willcox v Sing* [1985] 2 Qd R 66.

[17] *Tillmans Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 27 ALR 367 at 375, 380; *Czarnikov Ltd v Koufos* [1969] 1 AC 350 at 410; R Eggleston *Evidence, Prof and Probability*, London, Wiedenfeld & Nicholson, 1978 10 ff.

[18] *R v Rand* (1866) LR 1 QB 230 at 233; *R v Cambourne Justices, Ex parte Pearce* [1955] 1 QB 41 at 47.

[19] *R v Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at 187.

[20] *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519.

[21] *S and M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 374 per Kirby P.

[22] *Thomas v Hayward* (1907) 9 WALR 212 at 216.

[23] *Allison v General Council of Medical Education and Registration* [1894] 1 QB 750 at 759 per Lord Esher MR.

The *Watson* test appeals to judges in several ways. In emphasising high standards of independence it tends to enhance the status of the courts and tribunals. It also has popular appeal; when applied realistically[24] it assures litigants of a high standard of external fairness, at least. In all but the most blatant cases it saves the court of review the embarrassment of reflecting on the *bona fides* of the tribunal below. 'The courts have always refused, for obvious reasons, to embark upon an inquiry whether a judge will [in fact] determine the issues impartially ...'[25] Whatever reservations are privately held the *Watson* test enables judicial comity to be maintained; formally, at least, a positive application of the *Watson* test implies no serious criticism of the adjudicator. Sometimes, and particularly when the first tribunal has judicial status, this qualification is elaborately expressed.[26] Relief can be given (so to speak) for innocent misrepresentation without going into disagreeable questions of fraud, and in many cases this is entirely appropriate:

> To say of a person who holds judicial office, that he has failed to observe a rule of natural justice, may sound to a lay ear as if it were a severe criticism of his conduct which carries with it moral overtones. But this is far from being the case. ... All their Lordships can remember highly respected colleagues who, as trial judges, have had appeals against judgments they had delivered allowed on this ground, and no one thought any the worse of them for it.[27]

Even cases of actual bias can be satisfactorily dealt with under the rubric of apparent bias.[28] In cases where the evidence seems to leave room for greater sympathy the court of review may decide that the signs of apparent bias are really just 'tentative' or 'exploratory' views, which do not constitute bias at all.[29] A show of willingness to be persuaded in the (unlikely) event of something else coming to light may save the primary tribunal's appearance of impartiality, but not always.[30]

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[24] But see *Re Simpson, Ex parte Morrison* (1984) 58 ALJR 351; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358.

[25] *Re Renard, Ex parte CJL* (1986) 60 ALJR 528 at 534 per Mason J.

[26] See eg *Thomas v Hayward* (1907) 9 WALR 212 at 216; *R v Magistrates Court at Lilydale, Ex parte Ciccone* [1973] VR 122; *R v Watson, Ex parte Armstrong* (1976) 136 CLR 248 at 258 ('further than it was right for the applicant to go.')

[27] *Mahon v Air New Zealand* [1984] AC 808 at 838.

[28] See eg *In the Marriage of Stiffle* [1988] FLC 91-977, where a party was told, before completing her case: 'You are going to need a miracle to win this case, an absolute miracle ... The husband is ... ahead by a mile.' This seems a clear case of actual, albeit unintentional bias.

[29] *In the Marriage of Stiffle* [1988] FLC 91-977 at page 77,070; *Re Lusink, Ex parte Shaw* [1980] FLC 90-884 at pp 75, 585-75, 586; *Re Simpson, Ex parte Morrison* (1984) 58 ALJR 351. For a benevolent view of a prejudiced exclamation in a disciplinary tribunal see *Cooper v Wilson* [1937] 2 KB 309.

[30] Cf *In the Marriage of Stiffle* [1988] FLC 91-997.

The *Watson* test is an irreducible minimum if disappointed litigants are to be kept to their one day in court. But is it sufficient? Recently, in the highly combative jurisdiction of New South Wales, there have been signs of concern lest the *Watson* test get out of hand and render tribunals unworkable, or enable shrewd litigants to pick and choose their judges. In a few cases the test seems to be readjusted to the standard of actual bias or at least to 'likelihood of bias'.[31] It is significant that the courts do not regard 'reasonable suspicion' as a proper test of bias in domestic tribunals.

DOMESTIC TRIBUNALS

In the names of necessity and consensus the standard of natural justice in these tribunals remains more objective (and hence more onerous for an applicant) than the *Watson* standard. In legal theory the authority of a domestic tribunal depends upon the consent of the members or licensees of the association of which it forms part. There are early High Court cases which leave room for consensual rules which reduce or even eliminate normal requirements of natural justice.[32] The law relating to bias in private tribunals was fully argued before the New South Wales Court of Appeal in *Maloney v NSW National Coursing Association Ltd.*[33] The plaintiff was accused of using 'filthy and obscene language' in the presence of ladies and guests on one of the club's glittering social occasions. The disciplinary tribunal, which included one of Maloney's bitterest rivals in club circles subsequently expelled him for 'conduct unbecoming' a member. Glass JA, with whom Hope and Hutley JJA agreed, reviewed a short list of authorities on bias in private tribunals and concluded:[34]

> There is no reference in those passages to reasonable suspicion of bias and its total omission is eloquent ...

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[31] Cf footnote 18 and text.

[32] *Macqueen v Frackelton* (1909) 8 CLR 673 at 600-701, 707-708; *Dickason v Edwards* (1910) 10 CLR 243 at 253; *Edgar and Walker v Meade* (1916) 23 CLR 29 at 42; see also *Ex parte Bourke* [1903] AR (NSW) 1; *Daly v Gallagher* [1925] St R Qd 1 at 11-12; *Law v Wellington Working Men's Club and Literary Institute* (1911) 30 NZLR 1198 at 1205; *Fielding Club Inc v Perry* [1929] NZLR 529 at 533; *McMillan v Free Church of Scotland* (1859) 22 Dunlop 290 at 315; *Maclean v The Workers' Union* [1929] 1 Ch 602; *Doyle v White City Stadium Ltd* [1935] 1 KB 110; *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118; *State ex rel Dame v Le Fevre* (1947) 28 NW 2d 349; *Robinson v University of Miami* (1958) 100 So 2d 442. For different views: *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 119; *Dawkins v Antrobus* (1881) 17 Ch D 615 at 630; *Seaton v Gould* (1889) 5 TLR 309 at 311. For a rule applying 'automatic' qualification effectively reversing the onus of proof see *Hughes v WACA Inc & Ors* [1986] ATPR 40-676.

[33] [1978] 1 NSWLR 161.

[34] *Ibid* at 170-171.

> [Domestic tribunal] members cannot, in the nature of things, divest themselves of the manifold predilections and prejudices resulting from past associations with members ... If [reasonable suspicion were] a disqualifying consideration, the enforcement of consensual rules would be largely unworkable.

The presence of Maloney's arch-rival would not invalidate his expulsion unless it were proved that he was actually and invincibly biased, and determined to find Maloney guilty regardless of evidence or argument to the contrary. The court found no such bias and the action was dismissed.

The High Court refused Maloney special leave to appeal.[35] Thirty years earlier, in *Australian Workers Union v Bowen (No 2)*[36], a case in which a leader of a trade union faction sat in judgment upon his chief antagonist, the High Court expressed opinions similar to those of the Court of Appeal in *Maloney*. The difference between the *Watson* test (as it was to become) and the standard of impartiality in domestic tribunals was not treated so explicitly in *Bowen's* case, but several members of the court indicated that in view of the consensual character of the rules, and because of the need to keep them in workable condition an 'apparent bias' test was inappropriate. Latham CJ looked for evidence of 'actual or probable bias' and found none.[37] On that point of fact Rich, Starke and Dixon JJ disagreed with the Chief Justice, but in their opinion the defect of actual bias was cured by a properly conducted domestic appeal.[38] However, on the point of principle Rich J[39] agreed that the test of bias in a private tribunal should be 'entirely different from that applied to judges ... or any ... tribunal ... not chosen by the parties'. Dixon J[40] found 'no substance' in the expelled members' case insofar as it relied upon an appearance or reasonable suspicion of bias:

> The reason lies in the constitution of the union. In choosing as a domestic forum a governing body ... the rules necessarily bring about, if they do not actually contemplate [the] situation [complained of]. Domestic tribunals are often constituted of persons who may, or even must, have taken some part in the matters concerning which they are called upon to exercise their quasi-judicial function.

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35 [1978] 1 NSWLR 171 (note).

36 (1948) 77 CLR 602.

37 (1948) 77 CLR at 617; see also at 640 per Williams J.

38 *Ibid* at 619, 632. Cf *Calvin v Carr* [1980] AC 574.

39 *Ibid* at 618-619.

40 *Ibid* at 630.

Maloney's case[41] was applied in *Cains v Jenkins*[42], another trade union case, and in a sporting club case, namely *Sweeney v Committee of the South East Racing Association.*[43] In the latter case Gallop J emphasised the argument from necessity ('[T]he reality is considered')[44] and distinguished *Stollery v Greyhound Racing Control Board*[45] as authority relating to statutory tribunals. It has been suggested that *Maloney* should be confined to evidence of bias arising before the hearing in question, and that the *Watson* test should apply to the actual hearing in private as well as public tribunals.[46] However, it is difficult to see any sufficient reason for adding this element of complexity to the law.[47] *Dale* was not referred to in *Sweeney*[48] or in *Cains v Jenkins.*[49] In the latter case a Full Court of the Federal Court declined to find bias in circumstances which would certainly not have passed the *Watson* test.

Maloney has been criticised for giving undue weight to consent.[50] There is some force in this criticism, particularly in relation to domestic tribunals which affect livelihood, or which operate within associations which people with certain interests are more or less obliged to join. But *Maloney* and the other cases in that line depend more upon the 'principle of necessity' than on what critics regard as the fiction of consent. Implicitly they ask: When rules appoint adjudicators who would always or often fail the *Watson* test, is it politically realistic to render those rules useless? Are associations expected to find officers for their tribunals outside the membership? If so, could they obtain people who would manifestly be independent of influential members? As appears below, the *Watson* test is capable of causing some embarrassment to the courts themselves. The case for imposing it upon private organisations large and small, sophisticated or bucolic, is not persuasive.

SECOND THOUGHTS ABOUT THE WATSON TEST

The combative suitors and counsel of New South Wales are legend and the State is often nominated as the most litigious jurisdiction in the British Commonwealth. There, if anywhere, judges would eventually have to consider whether the *Watson* test tilts the balance too far towards an

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41 [1978] 1 NSWLR 161.

42 (1979) 28 ALR 219.

43 (1985) 75 FLR 191. See also *Armstrong v Kane* [1964] NZLR 369.

44 (1985) 75 FLR at 195.

45 (1972) 129 CLR 509.

46 *Dale v New South Wales Trotting Club Ltd* [1978] 1 NSWLR 551 at 559, 560.

47 *Ibid* at 555 per Hutley JA who was the only member of the court in *Maloney* who heard *Dale* also.

48 (1985) 75 FLR 191.

49 (1979) 28 ALR 219.

50 R R S Tracey 'Bias and Non-Statutory Administrative Bodies: A Wrong Turning' (1983) 57 *ALJ* 80.

aggrieved recipient of a judicial or quasi-judicial decision. Could it bite the hands which nurtured it?

In *Raybos (Australia) Pty Ltd and Anor v Techtron Corporation Pty Ltd & Ors*[51] Dr Rajski, a claimant appearing in person, sought to disqualify the primary judge (and inferentially all or most of the judges of New South Wales) from hearing a matter upon the ground that they could not appear impartial as between himself and certain respondents who were members of two of the largest solicitors' firms in Sydney. In their substantive action Raybos and Rajski alleged that the respondents conspired to present a spurious cross-claim so as to complicate proceedings and make it financially impossible for the former to continue. On the point of bias the suggestion was that the judges, as ex-barristers and fellow-members of the legal profession, were (or were reasonably suspected to be) so impressed by the powerful firms to which the respondents belonged that they could not consider the claim of conspiracy with open minds. And so, while complaining that their opponents were trying to stifle the proceedings with costs Raybos and Rajski sought to end them by a sweeping application of the *Watson* test.

This Samsonian effort was rejected by the Court of Appeal. There was nothing in the submission that Powell J (the primary judge) was disqualified by apparent bias. Priestly JA, with whom Hope and Glass JJA agreed, accepted that Dr Rajski held a 'subjective apprehension' but 'objective appraisal ... [did] not support a conclusion of actual bias ... or a reasonable apprehension' thereof.[52] A reasonable observer would be aware of the traditional monopoly which barristers hold over judicial appointments, and would share

> public knowledge and long acceptance of the fact that judges will often know to a greater or less degree the counsel and solicitors who appear before them ... [W]hen, as not infrequently happens, members of the legal profession are involved in litigation, it is inevitable that their cases will be decided by other members of the legal profession.

Certainly a judge should not sit when he has some significant personal connection with a party or a witness but that was not the position in this case.

Raybos was decided in September 1986. Two months earlier the High court heard an application to prohibit a judge of the Family Court from continuing to hear a case[53] and by majority granted the order sought. Mason J, who was in the majority, delivered certain *dicta* which at first

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[51] (1986) 6 NSWLR 272.

[52] *Ibid* at 275.

[53] *Re Renaud, Ex parte CJL* (1986) 60 ALJR 528.

sight seem gratuitous, but which may have been inspired by other species of the *genus Raybos*, unreported but well known in judicial circles:

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *R v Watson, Ex parte Armstrong* ... has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves ... It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially ... rather than that, he will decide the case adversely to one party. ... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[54]

This passage was quoted with appreciation by the Court of Appeal in *Raybos*.[55]

In *R v George & Ors*[56] three accused were jointly tried and convicted of conspiracy to corrupt one Rex Jackson, a Minister of the Crown in the right of New South Wales. It was a ground of appeal that the Trial judge appeared to be biased, in that, before the trial and in an administrative capacity, he had authorised police to use a listening device against one of the accused. However, the investigation in which the device was used had nothing to do with the present charge. Street CJ, with whom Yeldham and Finlay JJ agreed, turned once more to the dicta of Mason J in *Renaud*, above. Street CJ proceeded:[57]

> It is plain from the law as stated in [*Renaud*] that ... judges should not too readily respond to protests advanced on the basis that they may not be able to discharge their judicial duties properly ... The reasonable apprehension of bias, which is the core of the test, turns very much upon the adjective 'reasonable'. It is not enough that there be some apprehension to some uninformed and uninstructed persons.

His Honour added that judges have various administrative and interlocutory duties which only the uninstructed would regard as compromising their judicial detachment. Besides, the final decision a

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[54] *Ibid* at 531-532.

[55] (1986) 6 NSWLR at 275-276.

[56] (1987) 9 NSWLR 527.

[57] *Ibid* at 536.

criminal trial is made not by the judge but by a jury. The dependence of juries upon judicial attitudes and guidance, often stressed in criminal appeals, was not explicitly considered on this occasion.

It appears, then, that any tendency of the *Watson* test to give energetic, not to say vexatious litigants too much encouragement is controllable as follows: Add to the requirement of common reasonableness such standards of knowledge and education as to the court of review seem meet. Thus the borders between the reasonably suspicious, the *un*reasonably suspicious, and the clinically paranoid acquire a degree of flexibility.

It would be difficult to question the determination of the court in *Raybos*[58] that the applicants must not be allowed to paralyse the judicial process. It is not fanciful to attribute to the ordinary citizen knowledge of the fact that lawyers monopolise judicial positions. If the citizen does not readily accept this prerogative (the argument based on consent) there remains the fact that if lawyers are not eligible to hear cases involving other lawyers a constitutional crisis would soon arise (the principle of necessity). However, it is less obvious that Mr George and his co-accused[59] should have known and allowed for the fact that judges have certain administrative and interlocutory functions which may seem incompatible with judicial detachment but which, when fully understood, turn out to be compatible after all. In any event, and with due respect, the next case involves a test of reasonableness which is implausibly demanding.

In *S and M Motor Repairs Ltd v Caltex Oil (Australia) Pty Ltd*[60] the Court of Appeal considered an association between a judge and one party which was clearly closer and more specific than any connection in *Raybos*. During the hearing of a motion to attach *S & M's* appellant's directors for contempt they learned for the first time that the presiding judge had often acted as counsel for Caltex before his elevation to the Bench. The directors then asked the judge to disqualify himself but he refused and in due course they were adjudged guilty of contempt. On appeal it was accepted that the primary judge had left the Bar only about twelve months before the subject motion came before him, and that he had appeared for Caltex frequently, over a lengthy period of time. However, the Court of Appeal (Priestley and Clarke JJA, Kirby P dissenting) held that no reasonable suspicion of bias could arise. This remarkable view did not determine the appeal because the majority joined Kirby P in allowing it on another ground. However, according to Priestley and Clarke JJA, the appellants' apprehension of bias was unreasonable because they did not have the understanding of a successful barrister's life and philosophy

[58] (1986) 6 NSWLR 272.

[59] *R v George & Ors* (1987) 9 NSWLR 527.

[60] (1988) 12 NSWLR 358.

which they should have had before they allowed a suspicion of bias to cross their minds.

Judgments nowadays tend to be more readable. Helpful sub-headings, for example, are no longer taboo. Material from texts and learned journals is more often acknowledged, as judicial authorities always have been. Nevertheless the majority judgment in *S and M Motor Repairs* offers exceptional literary interest and, if one may say so, a modicum of entertainment. It illustrates, the vital difference between an 'uninformed and uninstructed'[61] observer and an appropriately educated (and therefore reasonable) bystander in a neo-Socratic dialogue. In the following excerpts the reasonable observer, with 'some (*sic*) knowledge of the way barristers and solicitors work'[62] appears as Second Citizen:

First Citizen.

> Having done a lot of work for Caltex and presumably having been paid a lot of money for it, might make [this judge] feel kindly to the organisation.

Second Citizen.

> Do you think so? It is a big business, dealing in petrol and oil. Why would working for it and being paid by it, make him more inclined to feel kindly than unkindly towards it?

First Citizen.

> It would be natural to do so ...

Second Citizen.

> You said the judge had been the Caltex barrister. But did you hear him say that he had never had either a special or general retainer from Caltex?

First Citizen.

> Yes, I heard that but I did not know what it meant.

Second Citizen.

> It means that for any case at all in which Caltex were concerned, they could brief any barrister they wanted, and

[61] *R v George & Ors* (1987) 9 NSWLR 527 at 536.

[62] *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 379.

> the judge, if he had been asked by the other side to appear against Caltex, was quite free to do so ...

First Citizen.

> ... [But]ut surely he might have become friendly or at least have some feelings of goodwill to the people he had come to know in Caltex, and who had given him work ...

Second Citizen.

> Well, if you haven't any reason for thinking the judge has any particular acquaintance in Caltex, I must say that I don't see the position your way. ... I can't see that it's reasonable, on the grounds you have, to think the judge might in fact be biased in favour of Caltex.[63]

The majority added:[64]

> For the apprehension of the parties or the public to be reasonable, we think it must arise upon an understanding of the actual circumstances in which the claim of possible bias is made. In the present case, a reasonable person knowing nothing in the way in which barristers do their work might ... apprehend possible bias. We do not think such a judgment would be reasonable, because founded on insufficient knowledge ...

Kirby P, dissenting, held that the 'duration, variety, intensity and proximity of His Honour's connection with the "Caltex interests" [did] raise a reasonable apprehension of bias'.[65] He also pointed out[66] that in cases much less clear than the present one judges frequently disqualify themselves lest observers, informed or uninformed, suspect bias. His Honour noted that the association between Caltex and the primary judge (as counsel) extended over ten years, and that he held his last Caltex brief less than three years before taking office.[67] Special care should be taken to avoid a suggestion of bias in any case in which liberty is at risk, including proceedings for contempt.[68]

The learned President had more to say. A celebrated case during World War II was *Liversidge v Anderson.*[69] A majority of the Lords held

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[63] *Ibid* at 379-380.

[64] *Ibid* at 380.

[65] *Ibid* at 374.

[66] *Ibid* at 375.

[67] *Ibid* at 375; cf *Raybos*, where the corresponding time was nine years.

[68] *Ibid* at 370.

[69] [1942] AC 206.

that the identification of 'security risks' depended upon the subjective opinion of the Minister, whose reasons for interning people could not be examined by the courts.[70] Lord Atkin, after reading the opinions of his brethren in draft, publicly deplored 'the attitude of judges ... more executive-minded than the executive' and wittily referred to *dicta* of Humpty Dumpty in Lewis Carroll's *Through the Looking Glass.*[71] Lord Simon unsuccessfully besought Atkin to drop these delightful passages and Lord Maugham, who presided in *Liversidge*, unwisely rebuked Atkin in a letter to the *Times.*[72] Kirby P added the following postscript to his dissenting judgment in *S & M. Motor Repairs* without provoking (one hopes) such judicial rebutters and surrebutters as were exchanged after *Liversidge*:

> Since writing the above, I have read with admiration the way in which Priestley and Clarke JJA have explained the path by which they come, on the same facts, to the opposite conclusion. I would only observe that the Second Citizen ... has had imputed to him (or her) a ... knowledge about the law and its ways which I believe to be quite atypical ... The dialogue, with every respect, strikes me as more reminiscent of the hushed tones and cloistered atmosphere of a Bar common room or judicial luncheon table than the robust discussion between ordinary reasonable citizens on [a West Sydney] omnibus.

Perhaps the *Watson* test is a little overweening in its anxiety to enhance the judicial 'image'. With the benefit of hindsight it may have been better to retain the more objective standard of *likelihood* of bias. But this is not the time to retreat towards actual bias as the test of partiality in public tribunals, as *Re Simpson*[73], *R v George & Ors*[74] and particularly *S & M*

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[70] The whiff of cordite made some judges very anxious not to obstruct the War Effort; see also the executive-minded decision on Crown (now 'public interest') privilege in *Duncan v Cammell Laird & Co* [1942] AC 624, quite contrary to *Robinson v South Australia* [1931] AC 704 and now discredited: *Conway v Rimmer* [1968] AC 910; *Sankey v Whitlam* (1978) 142 CLR 1.

[71] 'I know of only one authority which might justify the suggested [subjective] method of construction: "When I use a word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more not less" ... ': [1942] AC at 244-45.

[72] G. Lewis, *Lord Atkin*, London, Butterworths, 1983, 139, 143-144, In *S & M Motor Services* [(1988) 12 NSWLR at 375-376.

[73] (1984) 58 ALJR 351. This is a decision of Gibbs CJ, in which a Family Court judge fares better than those in *Watson* and *Renaud*. Gibbs CJ did not think that there was any room for reasonable apprehension of bias where the primary judge insisted on hearing a matter to which a legal practitioner was a party after the judge had remarked that in such cases it was "not inappropriate for members of the legal profession to pay whatever is the proper award and perhaps ten per cent more".

[74] (1987) 9 NSWLR 527.

Motor Repairs[75] appear to do. Sensible and consistent application of the *Watson* test, even to the occasional embarrassment of the courts themselves[76], is not likely to open floodgates of vexatious litigation. After all the very purpose of the *Watson* test is to maintain the ordinary citizen's respect for courts and public tribunals. That purpose is not served by adjusting the test to accommodate the views of only the suitably 'informed and instructed'. It should be possible to have a reasonable view of court proceedings without knowing the finer points of the retainer rules of the Bar.

[75] (1988) 12 NSWLR 358.

[76] Which embarrassment, as we have often been told, is strictly unwarranted: see footnote 27 and text.