Apprehended Bias and Interlocutory Judgments

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Abstract

In 2011, the High Court handed down judgments in two cases that raised a similar issue: the risk that an interlocutory judgment can create an appearance of bias on the part of a judge. This issue highlights the tension between, on the one hand, the principle that judges must be, and appear to be, impartial; and, on the other, the changes to the judicial role brought about by the demands of efficiency. This article uses the two cases as a basis for examining the way in which the bias rule currently operates in relation to interlocutory judgments. It concludes that the current approach places undue emphasis on a risk of prejudgment of specific matters, and advocates a widening of focus in the application of the test for apprehended bias.

I Introduction

The principle that justice 'should not only be done, but should manifestly and undoubtedly be seen to be done'[1] is deeply rooted in the Australian legal system.[2] This principle, which finds its expression in the rule against apprehended bias, has to be applied 'in the real world of actual litigation'.[3] Consequently, our understanding of what it means for a judge to appear impartial changes as our expectations of litigation practice evolve. Judicial impartiality no longer equates to sphinx-like aloofness.[4] Judges can, and often should, take an active part in proceedings, engaging in dialogue with counsel and expressing tentative preliminary views.[5] A case-managing judge may preside at multiple pre-trial hearings in a single action. When called upon to decide interlocutory disputes, judges have a positive duty to make findings of fact and reach conclusions based on those findings. There is a risk that this can create an appearance of bias that disqualifies the judge from hearing subsequent matters. This article considers the nature of that risk and evaluates the High Court approach in two cases decided in 2011.

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1 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

2 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 ('*Ebner*').

3 *Vakauta v Kelly* (1989) 167 CLR 568, 570 (Brennan, Deane and Gaudron JJ).

4 Cf *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 294 (Jacobs J).

5 See, eg, *Vakauta v Kelly* (1989) 167 CLR 568, 571 (Brennan, Deane and Gaudron JJ); *Antoun v The Queen* (2006) 80 ALJR 497, 503–4 (Kirby J); *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('*Johnson*').

In both *British American Tobacco Australia Services Ltd v Laurie*[6] and *Michael Wilson & Partners Ltd v Nicholls*,[7] the High Court had to decide whether an interlocutory ruling gave rise to an appearance of bias. In *Laurie*, the Court held that a finding of fact made in the course of an interlocutory ruling in different proceedings disqualified a judge from hearing a case. Conversely, in *Michael Wilson* the Court found no appearance of bias where a judge had heard a series of ex parte applications by the plaintiff. These two cases illustrate the operation of the bias rule in the context of two ubiquitous features of modern judicial administration: a specialist jurisdiction (the Dust Diseases Tribunal in *Laurie*), and case management (in *Michael Wilson*).

These two cases reveal that there are problems with the way that the rules of apprehended bias, as currently understood, apply to situations in which the alleged appearance of bias is the result of interlocutory rulings.

This article is divided into five substantive parts. In Part II, I introduce a theme that underlies much of the analysis in the article: the tension between impartiality and efficiency. Part III discusses the reasons why interlocutory judgments might create an appearance of bias. Against this background, in Parts IV and V, I analyse *Laurie* and *Michael Wilson* respectively. This is a basis for exploring, in Part VI, whether the principles of apprehended bias allow for efficiency-driven innovation in court procedure. I suggest, first, that assessment of apprehended bias should take into account all the circumstances of the case — including the imperatives of modern judicial practice — rather than focusing narrowly on the possibility of prejudgment of a specific matter. Second, I consider whether efficiency considerations have a role to play in the established exceptions to the bias rule.

II Impartiality and Efficiency

The issues discussed in this article play out against the background of an 'inherent tension', in the application of the rules of apprehended bias, between 'competing concerns of due process and efficiency'.[8] On the one hand, courts must be, and appear to be, impartial. On the other, in order to provide justice that is reasonably accessible, courts must be efficient. Both principles are crucial to the operation of the justice system. Without impartiality, the administration of justice would be unrecognisable. Without efficiency, it would grind to a halt.

The rule against apprehended bias preserves the integrity of the judicial system, and fosters public confidence in that integrity.[9] In *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ explained the justification for the rule:

> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and

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6 (2011) 242 CLR 283 ('*Laurie*').

7 (2011) 244 CLR 427 ('*Michael Wilson*').

8 Fyfe Strachan, 'Keeping Up Appearances: Apprehended Bias in *Antoun v The Queen*' (2007) 29 *Sydney Law Review* 175, 186.

9 See, eg, *Ebner* (2000) 205 CLR 337, 363 (Gaudron J); *Johnson* (2000) 201 CLR 488, 492 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 502 (Kirby J).

> impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined.[10]

The basic principle that a court must be independent and impartial has been traced as far back as the *Magna Carta*.[11] It is a principle now enshrined in international human rights law.[12] So essential to court procedure are the appearance and reality of impartiality that they have been recognised as constitutionally protected 'defining features' of judicial power.[13]

As important as impartiality is, the practical functioning of the judicial system depends on its ability to ensure access to justice in the face of limited resources and increasing caseloads. Complaints about the cost and time involved in court proceedings are, of course, perpetual themes of critiques of the Australian and English legal systems.[14] Courts and lawmakers have responded to these pressures with innovations such as case management and specialist jurisdictions.[15] Such innovations have become an accepted part of the modern litigation landscape. Courts are not static institutions. They are continually developing new ways of coping with new challenges.

This article tells a small, discrete part of the story of the tension between impartiality and efficiency: the operation of the apprehended bias principle in relation to interlocutory judgments. As discussed in Part III, there are several reasons why interlocutory judgments might create an apprehension of bias, particularly in the modern environment where case management is the norm. Even in this relatively self-contained area, much is at stake. It is crucial that judges remain demonstrably impartial despite changes in the way justice is administered. Yet the efficacy of innovations designed to promote efficiency will be severely undermined if the rule against bias operates too strictly. If, for example, a case-managing judge is disqualified after managing the case for some time, significant cost and delay will be incurred as a new judge is required to become familiar with the case. Specialist jurisdictions with a small pool of judges will become unworkable if judges are regularly disqualified from hearing cases. The rule against bias, therefore, needs to tread a fine line between maintaining the essential quality of impartiality, and accommodating changes in the role of the judge.

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10 *Ebner* (2000) 205 CLR 337, 345.

11 Ibid 343.

12 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

13 *Ebner* (2000) 205 CLR 337, 362–3 (Gaudron J), 373 (Kirby J).

14 See, eg, Jeremy Bentham, 'Principles of Judicial Procedure' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1838–43) vol 2, 5; Charles Dickens, *Bleak House* (1853); Lord Woolf, *Access to Justice: Final Report* (1996) 2; Chief Justice Gerard Brennan, 'Key Issues in Judicial Administration' (1996) 6 *Journal of Judicial Administration* 138, 139.

15 See, eg, Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18 *Journal of Judicial Administration* 211; Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011) 2–3; Sir Jack I H Jacob, 'Access to Justice in England' in Sir Jack I H Jacob, *The Reform of Civil Procedural Law* (Sweet & Maxwell, 1982) 125, 148–53.

III Apprehended Bias and Interlocutory Judgments: The Risks

As is well known, an interlocutory judgment is one that does not finally determine the substantive rights of the parties.[16] Some interlocutory judgments concern procedural matters such as pleadings amendments, discovery, subpoenas and interrogatories. Other well-recognised examples of interlocutory orders include the preservation of assets,[17] the seizure of evidence,[18] security for costs, or preservation of the status quo. The categories are not closed; virtually any aspect of a case, other than final determination of the parties' rights, can be the subject of an interlocutory judgment.

The principles relating to apprehended bias are similarly well established. Apprehended bias exists when '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'.[19] In *Ebner*, a majority of the High Court explained that application of this principle requires two steps:

> First, it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[20]

Their Honours emphasised the importance of the second step: it would be of no use to simply assert that a judge had an 'interest' in proceedings, 'until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated'.[21]

Application of the test for apprehended bias is highly dependent on the facts of each case. The test 'is not always easy to apply for it may involve questions of degree and particular circumstances may strike different minds in different ways'.[22] For this reason, any examination of a case involving apprehended bias will necessitate a detailed examination of the circumstances.

Those circumstances must include an understanding of the role of the modern judge. This role has changed over time, with control of litigation shifting

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16 *Smith v Cowell* (1880) LR 6 QBD 75, 78.

17 See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

18 See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

19 *Ebner* (2000) 205 CLR 337, 344 (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Johnson* (2000) 201 CLR 488, 492; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, 609, 635; *Laurie* (2011) 242 CLR 283, 322; *Michael Wilson* (2011) 244 CLR 427, 437.

20 (2000) 205 CLR 337, 345 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

21 Ibid.

22 *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12, 16 (Aickin J); see also *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, 417 (Kirby P) ('*Spedley*').

from the parties to the court,[23] and judges becoming active case managers rather than passive adjudicators.[24] In *Johnson*,[25] a majority of the High Court considered what this meant for the rule against bias. A judge of the Family Court had, during a property settlement hearing, indicated his intention to rely on independent evidence — rather than the evidence of the parties — to determine where the truth lay. These comments were made in the context of an application to relieve one of the parties (the husband) of discovery obligations that were argued to be 'unduly onerous'.[26] The judge rejected this submission in light of the importance of independent documentary evidence in this case. The High Court dismissed the husband's argument that the judge's remarks created an appearance of prejudgment of the husband's credit as a witness. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ emphasised the importance of an understanding of the modern judicial role:

> [T]he reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.[27]

Ordinary judicial practice today often includes the supervision of a case by a particular judge. A well-known example of this system is the Federal Court's Individual Docket System, whereby each case is randomly allocated to a judge at its commencement. The case remains with that judge through all the pre-trial processes, and the same judge hears the trial.[28] The advantages of this system are widely recognised.[29] A current Federal Court judge has described how the system:

> enables the judge to become familiar with the issues, to help the parties refine them, to ensure that the case is properly managed so that it will be presented at trial in the way that it is most likely to achieve an efficient presentation of the real issues in dispute and their speedy determination.[30]

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23 See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.3]; Chief Justice John Doyle, 'The Machine of Justice — Who is Driving It?' (2007) 28 *Adelaide Law Review* 7, 9.

24 See, eg, Sackville, above n 15, 212; Chief Justice J J Spigelman, 'Citizens, Consumers and Courts' (2001) 60 *Australian Journal of Public Administration* 5, 5–6; Legg, above n 15, 5; Damian McGregor, 'Outsourcing Justice? Court-appointed Examiners and the Management of Complex Litigation in the New South Wales Supreme Court' (2002) 11 *Journal of Judicial Administration* 116.

25 (2000) 201 CLR 488.

26 Ibid 494.

27 Ibid 493 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

28 *Individual Docket System*, Federal Court of Australia <http://www.fedcourt.gov.au/case-management-services/case-allocation/individual-docket-system>.

29 See, eg, Australian Law Reform Commission, above n 23, [7.4]–[7.8].

30 Justice Steven Rares, 'What is a Quality Judiciary?' (2011) 20 *Journal of Judicial Administration* 133, 142.

Other jurisdictions have adopted modified versions of the docket system, whereby certain cases are allocated to a judge for at least the pre-trial stages.[31] Relevantly for this article, any system under which the management of a case is allocated to a single judge will mean that the same judge hears all or most of the interlocutory arguments in the matter. In many cases, that same judge may also preside at the trial.

Against this background, there is a risk that a judge who decides an interlocutory matter may appear to have prejudged issues or to have been exposed to extraneous information in a way that creates an appearance of bias and therefore disqualifies the judge from further hearing the case. There is a further risk that a judge who is intensely involved in the management of a case may lose the appearance of detachment traditionally associated with the judicial role. I will outline each of these risks in turn.

A *Prejudgment of Specific Matters*

In order to make a decision on an interlocutory application, a judge must usually make findings of fact. These may include facts relevant to issues that will ultimately have to be determined at trial. The judge may also need to make assessments of the credit of witnesses who will give evidence at trial. Further, in the course of interlocutory proceedings, the judge may express views on issues of law, or on the strength of the parties' cases in the proceedings as a whole. For these reasons, interlocutory proceedings may create an appearance of prejudgment of disputed issues of fact, credit or law.

The danger of prejudgment is mitigated by the fact that findings made on interlocutory applications are generally of a provisional nature. There is always the possibility that further evidence might be adduced at trial. The hearing may come at a time when the parties are still gathering evidentiary material. Or a party may have tactical reasons for not revealing all the evidence it has. Credit is not necessarily tested in the same way it would be at trial. Important (and contested) evidence may be given by affidavit.[32] Even if a witness is cross-examined, counsel may understandably wish to save a full-blown attack on credit for the trial. For all these reasons, interlocutory findings are often expressed in tentative and qualified language. In *Southern Equities Corporation Ltd (in liq) v Bond*,[33] Bleby J explained that:

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[31] See, eg, *Supreme Court (Miscellaneous Civil Proceedings Rules) 2008* (Vic) O 2; Supreme Court of Victoria, *Practice Note No 4 of 2004 — Commercial List* (2004) 8 VR 480; *Court Procedures Rules 2006* (ACT) r 1402; Supreme Court of Queensland, *Practice Direction No 11 of 2012 — Supervised Case List*; Supreme Court of Queensland, *Practice Direction No 3 of 2002 — Commercial List*; *Supreme Court Civil Rules 2006* (SA) r 115; Supreme Court of South Australia, *Supreme Court Practice Directions 2006*, Direction 5.1; *Rules of the Supreme Court 1971* (WA) O 4A Div 3; Supreme Court of Western Australia, *Consolidated Practice Directions 2009*, Direction 4.1.2.

[32] See, eg, *Federal Court of Australia Act 1976* (Cth) s 47(1); *Uniform Civil Procedure Rules 2005* (NSW) r 31.2; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 40.02(a); *Supreme Court Rules* (NT) r 40.02; *Uniform Civil Procedure Rules 1999* (Qld) r 390(b); *Supreme Court Rules 2000* (Tas) r 458(c).

[33] (2000) 78 SASR 339 ('*Southern Equities*').

> it should not be assumed that, merely because a judge has been responsible for the pre-trial case management of a particular case and will obviously have made decisions adversely affecting one party or another, the judge is necessarily precluded from conducting the trial. Indeed, there would be few interlocutory applications, a decision on which would be likely to give rise to a reasonable apprehension of bias. This is particularly so because most contested applications are decided on affidavit evidence where either the facts are not in dispute or where, as in the case of an interlocutory injunction, the judge merely has to be satisfied that the facts deposed to raise a serious question to be tried. Usually, findings on such issues will be cast in language which could not possibly found a successful submission of apprehension of bias.[34]

Nonetheless, there are cases in which a finding of fact made on an interlocutory basis *will* found an apprehension of bias. This is especially likely when there is a finding of fraud or other *mala fides* relevant to the issues to be determined at trial. *Southern Equities* itself was such a case.[35] In order to grant a *Mareva* injunction, the judge had to determine that there was a risk that the plaintiff, if successful, would be unable to have the judgment satisfied. In making this determination the judge made findings that:

> went directly to the credit of the [defendants], their bona fides, certain important matters of historical fact and the propriety of their conduct in relation to matters relevant to the resolution of the causes of action.[36]

These features of the case meant that the findings did give rise to an appearance of bias. As we shall see, *Laurie* was in some respects a similar case.

B *Extraneous Information*

In a frequently cited passage in *Webb v The Queen*,[37] Deane J set out a series of circumstances which commonly give rise to an appearance of bias. Deane J included the category of 'extraneous information'; that is, 'where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias'.[38] There is a risk that a judge presiding at an interlocutory hearing will be exposed to material that might prove inadmissible at trial.[39] This is because, in some respects, the rules of evidence are relaxed on an interlocutory application. Evidence is usually given by affidavit[40] or by informal means of proof such as simply providing documents to the court.[41] Hearsay is generally

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34 Ibid 368.

35 See also *Kwan v Kang* [2003] NSWCA 336 (9 December 2003); cf *Australian Securities and Investments Commission v Rich* [2004] NSWSC 970 (3 November 2004).

36 *Southern Equities* (2000) 78 SASR 339, 351 (Olsson J).

37 (1994) 181 CLR 41, 74. See, eg, *Ebner* (2000) 205 CLR 337, 348–9 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Smits v Roach* (2006) 227 CLR 423, 457–8 (Kirby J); *Laurie* (2011) 242 CLR 283, 302 (French CJ)

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

39 See, eg, Judith Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374, 408–9.

40 See, eg, *Federal Court of Australia Act 1976* (Cth) s 47(1); *Uniform Civil Procedure Rules 2005* (NSW) r 31.2; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 40.02(a); *Supreme Court Rules* (NT) r 40.02; *Uniform Civil Procedure Rules 1999* (Qld) r 390(b); *Supreme Court Rules 2000* (Tas) r 458(c).

41 See, eg, *Court Procedures Rules 2006* (ACT) r 6007(5)(a).

admissible.[42] As a result, a judge may receive evidence that will not withstand the stricter evidentiary tests necessary for it to be admissible at trial.

There is a straightforward conventional response to concerns about exposure to extraneous material. For the purposes of the apprehended bias test, fair-minded observers are taken to understand that they are observing 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'[43] and 'to decide factual contests solely on the material that is in evidence'.[44] For generations, judges have been accustomed to making decisions about the admissibility of evidence or about questions of privilege or immunity that require them to be exposed to material that ultimately forms no part of the evidence. Concerns about exposure to extraneous material were not raised in either *Laurie* or *Michael Wilson*, and are not addressed further in this article.

C *Close Involvement*

The third risk raised by interlocutory proceedings is more subtle: the possibility that judges will become so closely involved in the case that they lose their detachment and begin to identify with one or more of the parties. This problem is most likely to arise when a judge has been managing a case and has therefore heard multiple interlocutory applications in the same matter. In an early critique of American case management techniques, Judith Resnik described 'managerial judging' as drawing the judge into the case: 'Managerial judges are not silent auditors of retrospective events retold by first-person storytellers. Instead, judges remove their blindfolds and become part of the sagas themselves.'[45]

In a traditional adversarial system, party control of proceedings is a way of preserving judicial impartiality.[46] The danger that, by taking an active, interventionist role in proceedings, a judge will 'descend into the arena'[47] and assume 'the robe of an advocate'[48] is a fundamental criticism of the departure of case management from the traditional judicial model. Such issues have been discussed elsewhere.[49] The inquiry in this article is limited to the extent to which

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42 See, eg, *Evidence Act 1995* (NSW) s 75; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 43.03(2); *Evidence Act 1995* (Cth) s 75; *Evidence Act 2011* (ACT) s 75; *Uniform Civil Procedure Rules 1999* (Qld) r 430(2); *Supreme Court Civil Rules 2006* (SA) r 162(2); *Supreme Court Rules 2000* (Tas) r 502(1); *Supreme Court Rules* (NT) r 43.03(2).

43 *Vakauta v Kelly* (1988) 13 NSWLR 502, 527 (McHugh JA), approved by Toohey J in *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 and by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Johnson* (2000) 201 CLR 488, 493.

44 *Laurie* (2011) 242 CLR 283, 331–2.

45 Resnik, above n 39, 408.

46 See, eg, *Jones v National Coal Board* [1957] 2 QB 55, 63 (Denning LJ).

47 Jacob, 'The Reform of Civil Procedural Law' in Jacob, above n 15, 24.

48 *Jones v National Coal Board* [1957] 2 QB 55, 64 (Denning LJ).

49 For discussion of how case management changes the role of the court, see Resnik, above n 39; Justice Ronald Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (2002) 12 *Journal of Judicial Administration* 5; Sackville, above n 15; Australian Law Reform Commission, above n 23; Peter A Sallman, 'The Impact of Caseflow Management on the Judicial System' (1995) 18 *University of New South Wales Law Journal* 193.

the rule against apprehended bias responds to the close involvement with the case that modern judges must have in order to manage cases effectively.

I have set out the chief factors that may lead an interlocutory judgment to create an appearance of bias. The significance of each factor will, of course, depend on the circumstances of each case. The two 2011 High Court cases, *Laurie* and *Michael Wilson*, illustrate the operation of the apprehended bias rule in relation to interlocutory judgments.

IV Laurie[50]

For 25 years, Donald Laurie was a smoker.[51] In 2006, after being diagnosed with lung cancer, he sued British American Tobacco Australia Services Ltd ('BATAS') in the Dust Diseases Tribunal of New South Wales.[52] Mr Laurie died within months of commencing proceedings, but his widow continued the action as his executor and also sued BATAS on her own behalf as a dependant widow. Mrs Laurie claimed punitive damages on the ground that BATAS had implemented a 'Document Retention Policy' as a device to escape liability by disposing of prejudicial documents. BATAS contended that the Document Retention Policy was an innocent housekeeping policy for classifying, and disposing of, unneeded documents. The purpose of the Document Retention Policy was therefore to be a contested issue at trial.

Judge Curtis was assigned to manage and hear the case. BATAS sought an order that he disqualify himself from hearing the matter, on the ground that the judge had previously, in other proceedings, made a finding that the Document Retention Policy was fraudulent. This was said to create an appearance of prejudgment of an issue in the *Laurie* proceedings.

A *Previous Findings: The* Mowbray *Proceedings*

Judge Curtis' previous finding about the Document Retention Policy had been made as part of a ruling on the admissibility of evidence in the course of a discovery application in separate, unrelated proceedings ('*Mowbray* proceedings') between Mr Mowbray, Brambles Australia Ltd ('Brambles') and BATAS.[53] Brambles sought to support an application for further discovery with some statements made by BATAS' former in-house counsel, Mr Gulson. BATAS claimed legal professional privilege over those statements. Brambles argued that

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50 (2011) 242 CLR 283.

51 Ibid 291.

52 Mr Laurie also sued his former employer, Amaca Pty Ltd (formerly James Hardie & Co), alleging that exposure to asbestos fibres in the course of employment had been a cause of his lung cancer. Amaca entered a submitting appearance in the High Court proceedings. No further mention need be made of its involvement.

53 *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray* [2006] NSWDDT 15 (30 May 2006). Mr Mowbray, another victim of lung cancer, had been exposed to asbestos products while employed by Brambles. He had also been a smoker. His widow sued Brambles, which in turn cross-claimed against BATAS. It is worth noting that Judge Curtis' ruling in the *Mowbray* proceedings was made *after* the commencement of the *Laurie* proceedings.

privilege was lost as the communication was made in furtherance of a fraud, namely the Document Retention Policy.[54] Therefore, in order to determine whether Gulson's written statements were admissible, Judge Curtis had to make a finding about whether the Document Retention Policy was fraudulent.

Gulson was called to give evidence about the Document Retention Policy. Senior Counsel for BATAS cross-examined him, seeking to impugn his credit in general, but did not challenge him on the substance of his evidence.[55] Nor did BATAS adduce any evidence in support of a contrary (non-fraudulent) explanation of the Document Retention Policy.[56]

Ultimately, Judge Curtis found that privilege had been lost. The reasons for decision were framed in language that acknowledged the limitations of findings of fact made on an interlocutory basis. His Honour accepted that there might be good reasons for BATAS' failure to put forward such evidence.[57] Gulson 'had not yet been tested by a contrary version of events',[58] and additional evidence might be adduced at trial. The purpose of the Document Retention Policy remained a 'live issue' for trial.[59] Nevertheless his Honour was required to 'determine the proceedings now before [him] on the evidence now before [him]'.[60] He concluded that, 'on the present state of the evidence', the document retention policy was drafted for a fraudulent purpose.[61]

B *Apprehended Bias?*

When called upon to recuse himself from hearing the *Laurie* proceedings, Judge Curtis declined to do so.[62] He relied on his repeated emphasis, in the *Mowbray* ruling, on the fact that his finding was interlocutory only, and based on incomplete and untested evidence.[63] By majority, the Court of Appeal of New South Wales dismissed an appeal from this ruling.[64]

The High Court allowed the appeal by three to two,[65] finding that there was a reasonable apprehension of bias. Several features of the case persuaded the majority (Heydon, Kiefel and Bell JJ) that the *Mowbray* ruling created an appearance of prejudgment. The finding of fraud was an extremely serious one. Several points in the *Mowbray* ruling suggested that Judge Curtis had reached a high degree of persuasion on the issue. For instance, he commented on the brevity

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54 See *Evidence Act 1995* (NSW) s 125(1)(a).
55 *Laurie* (2011) 242 CLR 283, 292, 325.
56 Ibid 292.
57 *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray* [2006] NSWDDT 15 (30 May 2006) [53].
58 Ibid [52].
59 Ibid [45]. In the event, the Mowbray proceedings were dismissed without going to trial.
60 Ibid [53].
61 Ibid [56].
62 *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14 (27 May 2009).
63 Ibid [14]–[16].
64 *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 (17 December 2009) (Tobias and Basten JJA, Allsop P dissenting).
65 Heydon, Kiefel and Bell JJ; French CJ and Gummow J dissenting.

of the Document Retention Policy compared to its far more detailed predecessor, and on the fact that the policy had been implemented by lawyers rather than scientists, who might be in a better position to assess the utility of scientific documents.[66] Their Honours said that:

> while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge.[67]

These factors led the majority to conclude that there was an appearance of bias, notwithstanding Judge Curtis' emphasis on the interlocutory nature of the finding.

Of interest for the purposes of this article is the way in which the majority dealt with *Johnson*,[68] in which emphasis had been placed on the active, case-managing role of the modern judge. In *Laurie*, Heydon, Kiefel and Bell JJ had no difficulty distinguishing *Johnson*:

> Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which *Johnson* was concerned. At issue is not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis has found that BATAS engaged in fraud and who has read his Honour's reasons for that finding.[69]

The facts of *Johnson*, as their Honours emphasised, involved an observation made by a judge in the course of argument, rather than a finding of fact. It was, of course, open to the Court in *Laurie* to distinguish *Johnson* on this basis. However, their Honours ignored the obiter dicta in *Johnson* about the significance of 'ordinary judicial practice' and the need for the rule against bias to adapt to 'the exigencies of modern litigation'.[70] I argue that those obiter remarks can, and should, inform the general approach to apprehended bias on the part of judicial officers. As outlined above, modern litigation often involves the management of a case — including the determination of contested interlocutory applications — by a single judge. And, as in *Laurie* itself, modern litigation commonly involves specialist jurisdictions in which a small group of judges regularly encounter similar issues and repeat litigants. The majority in *Laurie* distinguished, and effectively dismissed, *Johnson* in the space of one paragraph.[71]

French CJ and Gummow J dissented in *Laurie*. The Chief Justice was at pains to draw a distinction between an apprehension that a judge might be partial, and 'the anticipation of an adverse outcome'.[72] He stated:

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66 See *Laurie* (2011) 242 CLR 283, 332–3 (Heydon, Kiefel and Bell JJ).
67 Ibid 333 (Heydon, Kiefel and Bell JJ).
68 (2000) 201 CLR 488. See the discussion of *Johnson* in Part III.
69 *Laurie* (2011) 242 CLR 283, 332 (citations omitted).
70 *Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
71 *Laurie* (2011) 242 CLR 283, 331–2 (Heydon, Kiefel and Bell JJ).
72 Ibid 303.

> [T]he fact that a judge who has made a finding of fact adverse to a party on particular evidence is likely to make the same finding on the same evidence, is not of itself indicative of bias. It could be indicative of consistency subject to the judge having an open mind when it came to argument about the effect of the evidence.[73]

Accordingly, French CJ found it significant that Judge Curtis had 'expressly acknowledge[d] the possibility that there might be a different outcome on different evidence or after a full trial'.[74] His Honour considered that the fair-minded observer would take into account the many disclaimers and qualifications in the *Mowbray* ruling, as well as the fact that the finding of fraud had been made on an interlocutory application in separate proceedings, three years prior to the recusal application in *Laurie*.[75]

Gummow J also concluded that, in light of the tentative and expressly qualified nature of the findings in the *Mowbray* ruling, there was no 'logical connection' between the *Mowbray* ruling and the possibility that the judge would not bring an impartial mind to the resolution of the *Laurie* proceedings.[76] His Honour emphasised that 'the understanding to be attributed to the lay observer', from whose point of view the appearance of bias is considered, 'depends upon the circumstances'.[77] Unlike the majority judges, Gummow J relied on *Johnson*, noting that the fair-minded lay observer would be aware of developments in ordinary judicial practice.[78] His Honour quoted, with apparent approval, from the reasons of Tobias JA who had held, in the New South Wales Court of Appeal, that the *Mowbray* ruling did not create an appearance of bias:

> [T]he hypothetical fair-minded observer would have some understanding of the nature of the application with which the primary judge was dealing and, in particular, an understanding of the fact that hearsay evidence in such an application was admissible whereas in other circumstances it was not and that his Honour's findings were only for the limited purpose of allowing inspection of documents which would otherwise be the subject of client legal privilege. That observer would thus be acquainted with the difference between an interlocutory proceeding and a trial and, in particular, of the significant difference between the evidence admissible in the former as distinct from that admissible in the latter. That observer would also understand that, perhaps for perfectly proper tactical reasons, BATAS had decided not to call evidence in the interlocutory proceedings to counter that of Mr Gulson which it might well call at trial, thus putting a completely different complexion on the issue of BATAS' document management policies.[79]

This reasoning displays a keen awareness of the circumstances surrounding findings made on an interlocutory basis, and is consistent with the approach advocated in *Johnson*. This passage does, however, demonstrate one of the

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73 Ibid.
74 Ibid 304.
75 Ibid 308–9.
76 Ibid 320.
77 Ibid 321.
78 Ibid 315–16.
79 *British American Tobacco Services Australia Ltd v Laurie* [2009] NSWCA 414 (17 December 2009) [115], quoted by Gummow J in *Laurie* (2011) 242 CLR 283, 320–1.

perennial difficulties of the fair-minded lay observer test, in that it attributes to the lay observer a detailed knowledge of court procedure and evidence.[80] Gummow J overcame this difficulty by pointing out that the fair-minded observer would have read the reasons on the *Mowbray* ruling, which dealt with issues of hearsay and emphasised the interlocutory nature of the ruling. Attributing this level of knowledge to the fair-minded lay observer is at least consistent with the weight of authorities that have held that the observer understands an 'exceptional amount of detail about the operation of the legal system'[81] and 'can be acquainted with many of the subtleties of legal proceedings that only seasoned players in the law would know'.[82]

Laurie illustrates the danger inherent in a judge making a finding on an issue that will be contested at trial, particularly on a matter as serious as fraud. For the majority, no amount of caution in the language of the interlocutory ruling was able to remove the impression of prejudgment. The difference between the majority and minority views is partly attributable, as French CJ observed, to the facts of the case simply striking 'different minds in different ways'.[83] It also reflects continuing disagreement about the level of knowledge that the fair-minded observer can be presumed to possess.[84] But it is also attributable to a more deep-seated divergence in the approach to be taken to questions of apprehended bias arising from interlocutory judgments. This divergence could be described as 'a different emphasis on the importance of competing concerns of efficiency and due process'.[85]

V Michael Wilson[86]

The second of the two cases on interlocutory judgments and apprehended bias that the High Court considered in 2011 was *Michael Wilson*. This case arose from a multi-pronged dispute spanning several countries. Michael Wilson & Partners Ltd ('MWP') was a law firm incorporated in the British Virgin Islands. It alleged that a former partner, Emmott, together with two former solicitors (Slater and Nicholls) had conspired to divert business away from MWP. MWP sued Slater and Nicholls in the Supreme Court of New South Wales for breach of contractual and fiduciary duties. At the same time, MWP commenced an arbitration with Emmott in London.[87] 'Satellite litigation' was commenced in jurisdictions around the world,[88]

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80 For a discussion of this difficulty, see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 627–8 [9.90].

81 Ibid 661.

82 Ibid 662. See *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

83 *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12, 16, quoted by French CJ in *Laurie* (2011) 242 CLR 283, 291.

84 For a discussion of the different positions on this point in *Laurie*, see Laura Ann Wilson, '*British American Tobacco Australia Services Limited v Laurie* (2011) — Applying the Apprehended Bias Rule' (2012) 14 *Flinders Law Journal* 37. For a general discussion of the issue, see John Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) 38 *Federal Law Review* 353, 358–9.

85 Strachan, above n 8, 175.

86 (2011) 244 CLR 427.

87 The former solicitors were not party to the arbitration agreement and therefore could not be involved in the London arbitration.

88 See *Michael Wilson* (2011) 244 CLR 427, 435.

and MWP also notified authorities in several countries of possible criminal activity by Emmott.[89]

The allegations of apprehended bias were prompted by a series of ex parte interlocutory applications heard by Einstein J in the NSW Supreme Court proceedings.[90] Early in the life of these proceedings, MWP obtained freezing orders over some of Slater's and Nicholls' property. For the purpose of these orders, Slater and Nicholls were ordered to file affidavits disclosing their assets. Later, MWP applied to the Court for leave to use the disclosure affidavits in civil and criminal proceedings in other countries. MWP requested that the applications be heard urgently, and without notice to the defendants, because of a risk that Slater and Nicholls would dissipate their assets if they became aware that the disclosure affidavits were going to be used in this way. Einstein J agreed, dealing with the applications ex parte, without notice to the defendants, and in closed court. His Honour made the orders MWP sought. The defendants were not immediately notified that these orders had been made. Instead, Einstein J made orders to preserve the secrecy of the hearings, including orders that the documents relating to the application not be kept on the court file. The matter came before his Honour in this manner on seven separate occasions over a period of eight months.

Eventually the defendants were notified that the orders had been made. They then applied, on two occasions, for Einstein J to disqualify himself from further hearing the matter. He declined to do so on both occasions and proceeded to hear the trial, eventually finding in favour of MWP. The Court of Appeal allowed an appeal on the ground of apprehended bias,[91] and MWP appealed to the High Court.

The defendants' argument on apprehended bias was that it might appear that the judge's mind 'had been, at least subconsciously, influenced to accept the "case theory" presented by [MWP] during the interlocutory proceedings'.[92] The fact that the plaintiffs had 'appeared before the judge on seven separate days in closed court'[93] raised the concern:

> that the judge's mind will become familiar with the character of the plaintiff's case to an extent that, consciously or subconsciously, there will be a tendency to place the further evidence within the pre-existing mental structure.[94]

These submissions echo the concern, outlined in Part III of this article, that a judge who is closely involved in proceedings from an early stage will become, in Resnik's words, 'part of the saga'.[95]

The High Court unanimously allowed the appeal, holding that there was no apprehended bias. In a joint judgment, Gummow A-CJ, Hayne, Crennan and

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89 Ibid.
90 For a detailed account of these applications, see ibid 438–42.
91 *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177.
92 Ibid 198.
93 Ibid 199.
94 Ibid (Basten JA).
95 Resnik, above n 39, 408.

Bell JJ[96] made it clear that the mere fact that a trial judge had determined an interlocutory application will not usually give rise to an apprehension of bias.[97] Close attention to the second step of the *Ebner* test was required: what was the connection between hearing the ex parte applications and the possibility that the judge would not decide the case on its merits?[98] The Court found it significant that:

> [i]n none of the applications was Einstein J required to make, and in none of the applications did he make, any determination of any issue that was to be decided at trial ... in none of the applications was it necessary for Einstein J to make any finding about the reliability of any party or witness, and in none did he make such a finding. Nor was Einstein J required to make any choice between competing versions of events. All that was required, and all that was found, was that there was apparently credible evidence of a sufficient risk of dissipation of assets to warrant making the confidentiality orders.[99]

The lack of any determination of an issue that was to be contested at trial was sufficient to distinguish the case from *Laurie*.[100] The majority also found that the interlocutory decisions could not create any appearance of prejudgment of the credit of any witnesses. The credit of the witnesses whose evidence supported the interlocutory applications:

> was not challenged in the ex parte hearings and no decision had to be made about their credit beyond determining that the unchallenged evidence they gave was apparently credible. Nor could the hearing or the disposition of the applications found a reasonable apprehension of prejudgment of the credit of those who had given no evidence in relation to the applications and who first were heard to give evidence at trial. There was, therefore, no sufficient basis to conclude that there was reasonable apprehension that Einstein J might have ... 'put himself into the mindset of accepting that [the plaintiff's witness] is the "good guy" and thus the opponent is otherwise'.[101]

Rebecca Heath has observed that, unlike *Laurie*, *Michael Wilson* contains 'little discussion as to the assumed knowledge of the [fair-minded lay observer]'.[102] That is not to say that this issue was unproblematic in *Michael Wilson*; as Heath points out, the joint judgment appears to assume that the lay observer would understand 'that accepting uncontested evidence in an ex parte application does not amount to accepting the credibility of a witness'.[103]

Heydon J agreed with Gummow A-CJ, Hayne, Crennan and Bell JJ that an appearance of prejudgment could not be created in the absence of determination of facts that would be contested at trial, and where the credit of the witness was unchallenged on the interlocutory application.[104] The High Court found that there was no apprehension of bias.

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96 Heydon J delivered a separate concurring judgment.
97 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 447.
98 Ibid.
99 Ibid 448 (citations omitted).
100 Ibid n 51.
101 Ibid 448, quoting *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177, 205 (Young JA).
102 Rebecca Heath, 'Casenote: *Michael Wilson & Partners Ltd v Nicholls*' (2012) 19 *Australian Journal of Administrative Law* 119, 122.
103 Ibid.
104 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 460.

The judgments in *Michael Wilson* read as straightforward applications of established principles relating to prejudgment. There is no real consideration — or even acknowledgment — of the complexities inherent in the role of a case-managing judge who must remain impartial while at the same time taking a highly active role in proceedings. This case demonstrates the importance of the second step in the *Ebner* test — the 'logical connection'. It is clearly not enough to point to the fact that the judge may have come to identify with one of parties; the matter alleged to give rise to an appearance of bias must be linked to the resolution of a particular issue at trial. Assertions that the judge has become familiar with one party's case theory, or has come to see a party as the 'good guy', are too imprecise to form the requisite 'logical connection'. In one sense, this is a welcome result. Given the prevalence of case management in Australian courts today, it is important that the rule against bias be flexible enough to tolerate extensive and relatively informal pre-trial contact between the judge and the parties. But *Michael Wilson* was no ordinary case management situation. There *is* something unsettling about a judge holding a series of secret hearings in which one party made submissions that the other parties had engaged in criminal activity and were likely to dissipate their assets. A fair-minded observer might well perceive that the judge had, in effect, chosen a side. The approach taken by the High Court, focusing on prejudgment of particular issues, fails to accommodate concerns of this kind.

VI Areas for Further Development

Two concerns about the approach taken in *Laurie* and *Michael Wilson* emerge from the above analysis.

First, in both cases the Court focused on prejudgment of specific issues, to the virtual exclusion of other circumstances. In *Laurie*, the *Mowbray* ruling proved fatal despite the judge's best efforts to emphasise the preliminary nature of the findings. And in *Michael Wilson*, the absence of prejudgment of any specific issue drew attention away from the risk that the judge would view the plaintiff in a generally positive light: a risk that is less obvious, but no less concerning, than the risk that a question of fact will be prejudged. Whether an appearance of bias exists should depend on *all* the relevant circumstances. This calls for a broad focus. There is a risk that a one-dimensional focus on prejudgment will reduce the test of apprehended bias to a simple inquiry about whether the judge appears to have prejudged any of the issues to be decided at trial. This would be an oversimplification of a test that needs to take into account the full scope of factual circumstances.

The second concern is that the judgments in *Laurie* and *Michael Wilson* are insufficiently sensitive to the role of the modern judge in interlocutory hearings. An interlocutory hearing is a step towards resolution of the proceedings, and is generally conducted in a relatively informal way. As the joint judgment in *Johnson* states, 'the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice'.[105] All of this points to an

[105] *Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

approach to apprehended bias that ought to be more than usually tolerant of statements made or findings reached in interlocutory proceedings, especially when those views are expressly stated to be preliminary, as they were in *Laurie.*

There are two exceptions to the bias rule that may ameliorate the effects of the rule in the situations with which this article is concerned. The first is the doctrine of necessity.[106] In *Laurie*, the Court of Appeal had considered, and rejected, an argument based on necessity.[107] While the issue was not argued before the High Court, Heydon, Kiefel and Bell JJ appeared to agree that this was not a situation of necessity, noting that '[w]hile the Tribunal is a small one and is currently constituted by three judges, the persons qualified to be members of the Tribunal include Judges or Acting Judges of the Supreme and District Courts of New South Wales'.[108] It is implicit in this remark that the doctrine of necessity would not operate unless all members, and potential members, of the Tribunal would otherwise be disqualified. This view effectively confines the principle of necessity to situations in which no other decision-maker can be found. On this view, the principle of necessity has little work to do in circumstances where a case-managing judge is alleged to appear biased; it is not strictly 'necessary' for a case-managing judge to continue to manage a case as long as another judge in the jurisdiction is available.

A more flexible approach to necessity appears in the obiter remarks of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner*. Referring to a case in which a key witness, whose credit was in issue, had died after the trial, their Honours asked:

> What interest, private or public, might be served by a rule that, in the circumstances, required the judge to disqualify himself, and required the parties to embark upon a fresh hearing of the case before a new judge? Such a consequence would not promote public confidence in the administration of justice. It would have the opposite effect.[109]

The principle of necessity would, therefore, have meant that the judge would not have been disqualified if there had been an appearance of bias. This passage arguably reflects concern that the bias rule should not operate when this would not only cause less *effective* decision-making (the judge in a fresh hearing would not have had the benefit of seeing the key witness give evidence) but would also cause great *inefficiency*. An approach along these lines would address the concerns raised in this article. It may enable a case manager, or a member of a specialist jurisdiction, to avoid disqualification despite an appearance of bias arising from an interlocutory judgment, if no other judge was in as good a position to hear the case. The case-managing judge in a complex case, for instance, may have developed an understanding of the issues that could not easily be achieved by a judge coming to the case at a later stage. The High Court's treatment of necessity in *Laurie* does

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106 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 88–9 (Mason CJ and Brennan J), 96 (Deane J); *Ebner* (2000) 205 CLR 337, 359 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

107 *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 (17 December 2009) [119].

108 *Laurie* (2011) 242 CLR 283, 334.

109 *Ebner* (2000) 205 CLR 337, 359.

not, however, bode well for the expansive and flexible use of this principle in future.

The second exception to the bias rule that may be employed in this area is the 'special circumstances' exception. In *Livesey v NSW Bar Association*, Mason, Murphy, Brennan, Deane and Dawson JJ said that there were three exceptions to the bias rule: 'necessity, special circumstances or consent of the parties'.[110] Their Honours did not elaborate on the content of the 'special circumstances' exception, and it does not appear to have been successfully invoked in any reported case since.

The special circumstances exception has some potential to be moulded into a way of accommodating efficiency-driven innovations in judicial procedure. This view finds support in the dissenting judgments of Gleeson CJ and Samuels JA on a five-judge bench of the New South Wales Court of Appeal in *Spedley*.[111] Gleeson CJ and Samuels JA would have applied the special circumstances exception to allow a judge to continue to manage a series of at least 10 separate actions involving overlapping factual issues.[112] The judge had determined that certain findings of fact and credit made in one action would apply to the other actions as well. Samuels JA noted that, while it would have been possible to find different judges to hear each of the separate actions, the result would have been 'a dozen or so judges hearing *Spedley* matters in what would be a spectacularly clumsy and incompetent method of case flow management'.[113] Gleeson CJ agreed with the primary judge in the case that a finding of bias would bring about 'a scandalous waste of judicial resources and a ludicrous and unacceptable imposition from a costs viewpoint upon litigants'.[114] But the majority judges in *Spedley* did not agree that the special circumstances exception could be invoked.[115]

In *Laurie*, Heydon, Kiefel and Bell JJ dealt with the issue of special circumstances very briefly:

> *Livesey* left open the question whether special circumstances may ... amount to an exception to the rule. This appeal does not raise for consideration what special circumstances might justify a judge sitting to determine a case despite being reasonably suspected of having pre-judged an issue. The fact that Judge Curtis took evidence of the late Mr Laurie at his bedside is not relied upon in this respect. In circumstances in which the evidence was transcribed and video-recorded, such a contention would have been forlorn.[116]

Their Honours appeared to contemplate that the special circumstances exception might apply where a judge had heard evidence that could not be replicated on a subsequent hearing before a different judge.[117]

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110 *Livesey v NSW Bar Association* (1983) 151 CLR 288, 300.
111 (1992) 26 NSWLR 411.
112 See ibid 425 for the parties', and the judge's, views of how many separate actions were involved.
113 Ibid 429.
114 Ibid 413.
115 Ibid 422 (Kirby P), 446 (Mahoney JA), 448–9 (Meagher JA).
116 *Laurie* (2011) 242 CLR 283, 335 (citations omitted).
117 This was, in fact, a situation that Gleeson CJ, McHugh, Gummow and Hayne JJ (Callinan J agreeing) would have held to be one of *necessity* in *Ebner:* see *Ebner* (2000) 205 CLR 337, 359.

The special circumstances exception, if deployed thoughtfully, has the potential to apply where a strict application of the rule against bias would lead to grossly inefficient results, and where the appearance of bias — arising from a tentative finding made on an interlocutory basis — is minimal. But there seems little prospect of the exception developing this way. As the authorities stand, the very existence — let alone the content — of the special circumstances exception is in doubt.

VII Conclusion

The danger that interlocutory judgments will create an appearance of bias has real consequences for contemporary Australian courts. It is a danger that has the potential to undermine some of the mainstays of modern litigation, such as docket systems and specialist jurisdictions. Complex issues surround the interaction between the bias rule and the modern judicial role. Resolving these issues is not simple. So much is clear from the fact that the High Court in *Laurie* split 3:2, while in *Michael Wilson* the unanimous decision of the High Court overturned the unanimous decision of the New South Wales Court of Appeal.

Subsequent decisions of intermediate courts demonstrate that *Laurie* and *Michael Wilson* have, at least, brought some clarity to the resolution of these issues. Apprehended bias is likely to exist when a judge has previously made findings about the credit of an important witness,[118] or about critical contested issues of fact,[119] even if those findings were made on an interlocutory[120] or preliminary basis,[121] or were expressly stated to be made for limited purposes only.[122] There is unlikely to be an appearance of bias when a judge has previously determined factual issues that are merely similar to those in dispute.[123] Further, findings or comments made in the course of interlocutory proceedings are unlikely to offend the rule against apprehended bias if they are not directly related to a disputed issue.[124]

The fact that the principles are reasonably clear, however, does not necessarily mean that they are satisfactory. *Laurie* and *Michael Wilson* illustrate

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118 *BHP Billiton Ltd v District Court of South Australia* (2012) 112 SASR 494; *Kruger v Kruger* [2011] FamCA 898 (22 November 2011); *Murray v Tomas* [2011] FamCAFC 81 (15 March 2011); *Esteem Holdings Pty Ltd v Caratti* [2012] WASC 260 (13 July 2012); *R v El-Zeyat* [2012] NSWSC 340 (26 April 2012).

119 *Kirby v Centro Properties Ltd (No 2)* (2011) 202 FCR 439; *Gacic v John Fairfax Publications Pty Ltd* [2012] NSWSC 793 (10 July 2012).

120 *Murray v Tomas* [2011] FamCAFC 81 (15 March 2011); cf *Iphostrou v Iphostrou (No 4)* [2011] FamCA 220 (31 March 2011).

121 *Gacic v John Fairfax Publications Pty Ltd* [2012] NSWSC 793 (10 July 2012).

122 *Kirby v Centro Properties Ltd (No 2)* (2011) 202 FCR 439.

123 For instance, in *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 3)* [2012] FCA 198 (9 March 2012), a judge had found that claims by one producer of chicken products about the conditions in which its chickens were raised amounted to misleading and deceptive conduct. This did not disqualify the judge from determining a claim of misleading and deceptive conduct against a different chicken producer who had made similar (but not identical) claims, and raised its chickens in similar conditions.

124 See *Barakat v Goritsas (No 2)* [2012] NSWCA 36 (9 March 2012); *Iphostrou v Iphostrou (No 2)* [2011] FamCA 84 (21 February 2011).

the difficulties of applying the established principles of apprehended bias in the context of contemporary pre-trial litigation management. A wholesale revision of the rules of apprehended bias is unnecessary; the *Ebner* test is, generally speaking, well suited to achieving the aims of the bias rule. Rather, the application of the bias rule requires a holistic view of all the circumstances, instead of a narrow focus on whether a particular matter appears to have been prejudged. In this way, the established principles on apprehended bias could be reorientated in a way that would allow the rule against bias to strike the delicate balance between vigilant protection of public perceptions of judicial impartiality and sensitivity to modern judicial practice.