Book Review

JUDICIAL RECUSAL – PRINCIPLES, PROCESS AND PROBLEMS by Grant Hammond (Hart Publishing, Oxford, 2009) 183 pp, hardback rrp NZ $90.

I recall meeting Grant Hammond – officially The Honourable Sir Robert Hammond, KNZM - for the first time at the induction ceremony of former colleague Professor Peter Spiller as a District Court Judge in Hamilton in 2009. During the course of our chat, we had identified a mutual interest in judicial matters, and the discussion had turned to recusal. I mentioned that I had recently authored an article on judicial recusal in South Africa; Sir Grant replied that he had just written a hardcover book on recusal in the Commonwealth. Hammond 1, Olivier 0.

Self-deprecating humour aside, Grant Hammond's book is on a topic that hits at the heart of the administration of justice: judicial impartiality and independence. The foreword by Sir Stephen Sedley, a former Lord Justice of Appeal, gets to the nub of the recusal philosophy:

> Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. That makes the law relating to recusal a serious business.[1]

It is a serious business indeed. Recently, judicial recusal has attracted much attention from media and the public in many countries, including New Zealand. The judicial misconduct case against former Supreme Court Justice William McLeod (Bill) Wilson for failing to recuse himself in the Court of Appeal Saxmere wool growers' case because of his having a personal and business relationship with the Wool Board's counsel Alan Galbraith QC, captivated the nation. The Supreme Court ruled in *Saxmere (No 1)*[2] that there had been no apparent bias on the part of Justice Wilson in the aforementioned case, but subsequently – in *Saxmere (No 2)*[3] - the Supreme Court recalled its earlier decision after further information came to light. Wilson resigned in 2010 before the complaints against him could be investigated.

It is accepted that there could sometimes be a measure of bias on the part of a judge, but the question that lies at the heart of recusal is what the line is between acceptable and unacceptable bias? How thick is this line? Hammond's book is useful in examining not only both sides of the line, but also the width and thickness of the line itself.

The author is eminently qualified to write this book. He is well-known not only as a judge of the Court of Appeal in New Zealand, but also as a former practitioner and academic of note, including service as Dean of Law at the University of Auckland. He currently serves as President of the Law Commission. His career exemplifies the three legs of the triangle that makes an ideal lawyer – academic, practitioner and judge. He was also the author of the Court of Appeal's judgment in *Muir v Commissioner for Inland Revenue*,[4] arguably New Zealand's leading judicial recusal case before the *Saxmere* cases.

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1 Foreword.

2 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

3 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* (No 2) [2010] 1 NZLR 76.

4 *Muir v Commissioner for Inland Revenue* [2007] 3 NZLR 495 (CA).

The book is attractively presented. It is in hardcover with a simple background of navy blue. It creates a professional impression that signifies the book as one of gravitas - it is clearly not a student textbook. Inside, the typesetting, text layout and font size aid in making the main text and footnotes easy to read. The margins are justified, which gives a sleek, well-rounded appearance.

The book is divided conveniently into five parts: Introduction; Principles; Process; Some Specific Problem Areas; and the Future of Recusal Law. Each part represents a theme, and has its own chapters. The largest number of pages is devoted to the section on principles, which outlines the law as it presently stands. In total, there are nineteen chapters in the book. The book also contains six appendices, a bibliography, an index and a table of cases.

The book is a monograph, the first one on judicial recusal in the British Commonwealth. It adopts a case law approach to the discussion and analysis of judicial recusal. In his own words, Sir Grant's methodological approach has been to articulate as best he can "the central concepts that courts have seen fit to employ around the common law world, and offer some commentary on them."[5] He does this by addressing the following broad themes: from where the idea of judicial recusal came; how the essential concepts have developed; where the doctrine of judicial recusal presently rests in the common law world; and what, if anything, can be done to improve this doctrine.[6] He issues a number of disclaimers along the way, stating for example that it "is impossible to collate and critically examine all of the law on this topic in several countries".[7] He says that he will be content if the book "stimulates further research and close discussion on a subject matter of importance not just to judges but to the administration of justice, and hence the public at large".[8] I think he can rest assured, for the book is more than merely an initiator of debate; it is a text that makes a contribution to knowledge and understanding in the field. The book's benefit lies in its "big picture" approach to the subject matter, but without losing sight of the detailed pixels that constitute the picture.

Hammond calls recusal a "distinctly difficult and controversial area of the law".[9] He regards an understanding of it as important because it "helps clarify both what the adjudication of legal disputes is all about, and the essential nature of judging within the common law tradition. In short, to understand this doctrine is to better appreciate the judicial function and the role of the judge in society."[10]A particular challenge in studying judicial recusal, says Hammond, is the absence of so-called black letter law and the prevalence of practices, which are not easily determined. As he puts it, "ascertaining what 'really happens' behind judicial doors is not altogether easy."[11] Despite this challenge, Hammond provides a useful comparison between approaches within selected British Commonwealth jurisdictions, which are predominantly common law based, and the United States, which is statute based. There are commonalities of feature between the jurisdictions which Hammond illustrates by answering the following questions: when should a judge withdraw from a given case to which he or she has been assigned? Who decides when that judge should withdraw? What process or procedures should be utilised by the decision maker? This approach makes the

5 Hammond at xii.
6 Ibid, at xii.
7 Ibid, at 11.
8 Ibid, at xii.
9 Ibid, at xii.
10 Ibid, at 3.
11 Ibid, at xii.

book understandable reading. The reader is not challenged to decipher first an inaccessible text before finding its hidden meaning.

Following an introduction of the essential questions in Part A, in Part B Hammond deals with the principles of judicial recusal law as they apply in the selected jurisdictions. Hammond takes the reader on a journey from past, to present, to future. Along the way, he explains the origins of judicial recusal, including the influence of canon law and the juror disqualification rules on its development. His technique of explaining principles through the cases is effective – and entertaining. For example, the case of *Between the Parishes of Great Charte and Kennington*[12] illustrates the farcical consequences that ensue when the principle of disqualification for direct pecuniary interest goes too far. In this case, which dealt with taxes, the judge was disqualified because of his status as a taxpayer.

In the automatic disqualification chapter, Hammond discusses pecuniary interest, and connection with the cause of the party to the litigation, as grounds for disqualification. His analysis of the impact of *Pinochet (No 2)*[13] is interesting, in particular his views on the mixed reception of the judgment in the United Kingdom and the impact of the *Ebner*[14] judgment of the Australian High Court on the further development of the test for judicial recusal in other jurisdictions. His emphasis on the importance of a jurisdiction's particular context is sound.

A common aspect of the rules governing recusal in the various Commonwealth jurisdictions is that actual bias is not required to meet the standard for recusal; apparent bias will suffice. This is discussed in Chapter 5. The test for apparent bias has been subjected to criticism – from it being too vague and difficult to apply, to it being too concerned with formality and appearance and less with actualities.[15] Hammond traces the less than straightforward development of this test in the United Kingdom, from confusion whether the test was one of a real likelihood of bias or the lesser reasonable suspicion of bias, through the recent cases of *Gough*[16] and *Pinochet (No 2)*, to its culmination in the reformulation of the test by the House of Lords in *Porter v Magill*.[17] In the United Kingdom, the test is now a hybrid one of "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased".[18] In Australia post–*Ebner*, Canada, and New Zealand - after *Muir* in which the test in *Gough* was rejected, and *Saxmere (No 1)* - the test remains one of reasonable apprehension of bias. Hammond states that the test in South Africa is one of reasonable suspicion of bias, but the South African Constitutional Court has ruled that the use of the term "suspicion" in describing the test is inappropriate and that the test is in fact one of reasonable apprehension of bias.[19]

Following a discussion of *Muir*, Hammond expresses concern about a trend whereby "the legal profession has too often endeavoured to impugn a significant judgment after the event, by investigating the judge's private affairs to see whether there might be something which can possibly

12 *Between the Parishes of Great Charte and Kennington* (1726) 2 Str 1173; 93 ER 1107 (KB).

13 *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL).

14 *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337.

15 Hammond at 52.

16 *R v Gough* [1993] AC 646 (HL).

17 *Porter v Magill* [2002] 2 AC 357 (HL).

18 Hammond at 37.

19 See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at [30] and *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II*) at [27].

'tip up' the judgment."[20] He discusses this matter further in Chapter 10, under Part C: Process, but suggests that in this respect a judge should err on the side of candour:

> Many judges will query why they should hand counsel a stick, with which they can then be beaten. But in this context there is a question of judicial ethics, as well as a prudential concern for judicial stewardship of the litigation which is in front of them.[21]

The problem with this approach, potentially, is the extent of the disclosure. How much disclosure would be sufficient to meet this requirement?

In Chapter 6, Hammond provides a concise overview of the application of the federal laws that apply to judicial recusal in the United States of America. Judicial recusal has become a common trial strategy and it is used often by lawyers to have a judge changed to one who may be more sympathetic to their client's case. In federal courts and some state courts, recusal is regulated by statute. Judges of the federal courts enjoy tenure and are not subject to popular election, unlike many judges in United States state courts. An interesting difference from the British Commonwealth is that alleged bias must arise from extra-judicial events, in other words, from things occurring outside the courtroom. Similar to most Commonwealth jurisdictions, the test is a reasonable one and requires the application of an objective standard; also, it is generally the impugned judge who decides the matter.

Part C deals with process. Hammond calls it the "least developed, but arguably the most important, aspect of recusal law ... ".[22] He lists a number of criteria that contribute to procedural justice.[23] To his mind, recusal processes at present fall short of many of these.[24] Primary among these is the adjudication of the recusal application by the impugned judge himself. For a judge, an accusation of bias or lack of impartiality is the unkindest cut of all. However, judges should not become over-sensitive when they become the subject of a recusal application, especially when the application is devoid of merit. The customary argument in favour of this practice is that the impugned judge is in the best position to adjudicate the matter as he is best apprised of the facts and the circumstances. He is privy to the information that is vital to the determination of the issue. It cannot be denied that there are peculiar difficulties with this practice. Hammond deals with the vexing question of whether the challenged judge should decide the matter himself, in Chapter 9 where he makes some specific recommendations (see below for discussion).

Most recusal applications are made in courts of first instance, but this trend seems to be extending to appellate courts also. A particularly difficult problem lies with the recusal of judges of a country's top court, especially if it sits en banc. It is far more challenging to find a substitute for a judge of a court of final appeal, than a trial court. In New Zealand, the Supreme Court Act 2003 provides for the appointment of acting judges in the event of recusal; the replacing judge is generally a retired judge of the Supreme Court or Court of Appeal. However, in some other jurisdictions where legislation does not provide for substitution in the event of recusal, the matter is not so easily resolved. The contrast between the way recusal operates in practice at the level of final appellate court in the United Kingdom and the United States is illustrated effectively using the examples of Lord Hofmann and Justice Antonin Scalia. It is generally the prerogative of an

20 Hammond at 47.

21 Ibid, at 90.

22 Ibid, at 71.

23 Ibid, at 73-74.

24 Ibid, at 75.

individual Justice to decide whether or not he will sit in a case, a decision which is not subject to review, although the Supreme Court does have a recusal policy (attached to the book as Appendix D).

Hammond deals with some specific problem areas in part D, of which "prior viewpoints" (Chapter 16) is most insightful. In 39 United States states, judges are selected or retained by some sort of public election. It is unfortunate that Hammond does not discuss the election factor's impact on recusal in more detail. His views on questions such as whether campaign financing impact on the way judges rule, or whether judges should recuse themselves automatically if a campaign contributor appears in a case before the judge, would have been instructive. However, in Appendix F, Hammond refers briefly to the recent case of *Caperton v AT Massey Coal Company*[25] in which the United States Supreme Court considered whether a judge of the Supreme Court of Appeals of West Virginia to whose judicial election campaign a party to the proceedings had contributed more than USD$3 million, should have recused himself from the case.

A further interesting discussion deals with extra-judicial writings. Do a judge's extra-curial speeches or writings on a topic disqualify him or her from hearing a matter dealing with that topic? Does this mean that Hammond should recuse himself from all future recusal cases simply because he has authored a text on the subject which includes a statement of his views? The reasonable answer would be that analysis of arguments is acceptable, but not an outright rejection of potential arguments. As long as the judge leaves his mind open to convincing, there should be no reasonable apprehension of bias.

In Part E, attention is given to the future of recusal law. In this section, Hammond suggests possible reforms. He believes that objectivity on the part of the judge is essential and that everything that can practically be done to ensure it, should be done: "Law cannot hope to sustain its internal and external legitimacy in the modern political society it serves without objectivity."[26] As a result, he does not favour "personal judicial determination" at trial court level. He calls the current position "quite indefensible in this day and age"[27] and that "[i]f we assume a visitation from an intergalactic jurist on a fact-finding mission around our galaxy, it is difficult to see how such a jurist would not feel bound to report this feature of recusal jurisprudence as being strange to the point of perversity."[28] Hammond favours a system whereby the recusal application should go to the impugned judge first for resolution, but in the event of a continued dispute there should be mechanisms for review of that decision by another judge or panel. He suggests a number of forms that these mechanisms could take. At appellate court level, particularly courts of final appeal, Hammond again does not favour an application of the "impugned judge decides" rule. He supports the view that it must be "for the court itself to be satisfied that it is constituted in such a way that it will exercise its judicial functions both impartially and with the appearance of impartiality."[29] This is clearly the most sensible approach. (His suggested solution to the "who decides?" problem is outlined in Appendix E.) He makes proposals also for other reforms, including mechanisms for the replacement of disqualified judges. He suggests, correctly it is submitted, that the recusal process is a matter best regulated by judges themselves, rather than by legislators and legislation. The reforms he has proposed should be effected by judges, therefore, not legislators.

25 *Caperton v AT Massey Coal Company* 129 SCt 2252 (2009).

26 Hammond at 146.

27 Ibid, at 148.

28 Ibid, at 144.

29 Ibid, at 113.

It is a pity that the book's purview is not wider. It would have benefited scholarship greatly had the book focused attention not only on first-world countries in the Commonwealth, but had considered the position in developing countries in the Commonwealth also. South Africa and India come to mind immediately as possibilities. The chapter on prior viewpoints, in particular the section on political connections, could have benefited from a discussion of the comprehensive South African case law on this issue. Also, some chapters are somewhat short considering their importance, such as the one on the rule of necessity (Chapter 12).

In the final analysis, the book represents high scholarship of the kind that one would expect from an experienced senior judge and academic. Although the book has a somewhat academic bent, it has a sufficiently practical focus to appeal to a cross-section of readers. It would be of interest and value to anyone involved in the administration of justice in whatever forum, including judges, advocates and tribunal members. I recommend it very highly.

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