

## BOOK REVIEW

***Judicial Recusal: Principles, Process and Problems* by Grant Hammond (Oxford: Hart Publishing, 2009) pages i–xxiv, 1–183. Price £45.00 (hardcover). ISBN 978-1-84113-260-0.**

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This handsome and excellent monograph provides a learned account of the law relating to ‘judicial recusal’, a body of rules and practices relating to when a judge who has been assigned to sit on a case should stand down from it. The author, who was formerly the Dean of Law at the University of Auckland and who is currently a judge of the New Zealand Court of Appeal, draws on his rich academic and practical experience to produce a thoughtful and scholarly exegesis on an area of law which has rarely been explored in such a comprehensive manner.

The law relating to judicial recusal may appear to many to be an esoteric topic, with not much significance for the administration of justice. Contrary to such a superficial view, this area of law goes to the very heart of the functioning of a robust and liberal democracy operating under the rule of law. An essential characteristic of the rule of law is the existence of an impartial and independent judiciary. The author expresses this in the following eloquent manner: ‘Society rightly looks to the courts as bastions of the Rule of Law. If the public cannot look with confidence to judges ... the very notion of a “legal system” as a fundamental pillar of western society would collapse.’<sup>1</sup>

Judges are individuals who live in the real world: they may own shares in companies; they experience the gamut of human emotions; they may belong to clubs and associations; they may provide voluntary services to charitable organisations; they sometimes engage in public discourse or give speeches on issues of public concern. A number of those who are appointed to senior judicial posts have practised at the Bar or have provided advice to the legislature or executive prior to their judicial appointment. Aspects of this life experience may on occasion constitute the basis of a challenge to the propriety of the judge adjudicating on a particular case. The law of judicial recusal contributes to the quality of the justice system but at the same time can be manipulated by a party to a litigation who is disappointed by the outcome and who is seeking an opportunity to have another bite of the cherry.

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<sup>1</sup> Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, 2009) 5 (citations omitted).

The author highlights a proliferation of recusal cases. A number of these cases have generated a considerable degree of controversy. The case of *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]*<sup>2</sup> easily comes to mind. The failure by the distinguished Lord Hoffmann to disclose his links with Amnesty International was held by a differently composed panel of the House of Lords to render invalid a decision regarding Augusto Pinochet in which Lord Hoffmann had participated. This episode caused considerable excitement, particularly in the common law world.<sup>3</sup> In the United States, Scalia J refused to recuse himself from a case involving Vice-President Cheney even though he had gone on a duck hunting trip with the Vice-President. The stance taken by Scalia J, and in particular his Memorandum of 18 March 2004 explaining his reasons for denying a motion to recuse himself,<sup>4</sup> became the subject of much commentary.<sup>5</sup> Cases involving allegations of bias or of a conflict of interest abound in many jurisdictions around the world.

Over the course of time, a myriad of cases have resulted in an ad hoc approach to dealing with challenges to the propriety of judges sitting on a particular case. The author sets out to clear the thick 'undergrowth' of ad hoc rules and to cast illumination on this area of law and practice by focusing on a 'general principles' approach. The book achieves this stated objective in an admirably lucid manner. The discourse in the book is enriched by the copious references to cases from jurisdictions in the British Commonwealth and by the adoption of a comparative approach, with lessons drawn from the federal jurisdiction in the United States, which provides the lead in statutory embodiments of recusal law.

The author succinctly identifies three basic questions for consideration: 'When should a judge withdraw from a given case to which he or she has been allocated? Who decides when that judge should withdraw? What process or procedures should be utilised by the decision maker?'<sup>6</sup> The author commences his exegesis by exploring the evolution of the current law in the common law world.<sup>7</sup> He then looks at the issue of classification, identifying three subsets of recusal law: 'actual bias', 'apparent bias' and 'automatic disqualification'.<sup>8</sup> The category of automatic disqualification inevitably invokes the oft-cited case of *Dimes v Proprietors of the Grand Junction Canal*,<sup>9</sup> which laid down the rule of automatic disqualification of a judge on the ground of pecuniary interest. The

<sup>2</sup> [2000] 1 AC 119.

<sup>3</sup> See, eg, Kate Malleon, 'Judicial Bias and Disqualification after *Pinochet (No 2)*' (2000) 63 *Modern Law Review* 119; Abimbola A Olowofoyeku, 'The *Nemo Juxta* Rule: The Case against Automatic Disqualification' [2000] *Public Law* 456; Diana Woodhouse (ed), *The Pinochet Case: A Legal and Constitutional Analysis* (Hart Publishing, 2000).

<sup>4</sup> *Cheney v United States District Court for the District of Columbia*, 541 US 913 (2004).

<sup>5</sup> See, eg, Adam Liptak, 'Word for Word/Scalia's Defense: A Case of Blind Justice among a Bunch of Friends', *The New York Times* (New York), 21 March 2004, 5; William G Ross, *Scalia's Explanation for Recusal Refusal Is Unconvincing* (22 March 2004) JURIST Forum <<http://jurist.law.pitt.edu/forum/ross1.php>>; Abimbola A Olowofoyeku, 'Regulating Supreme Court Recusals' [2006] *Singapore Journal of Legal Studies* 60.

<sup>6</sup> Hammond, above n 1, 6.

<sup>7</sup> *Ibid* ch 2.

<sup>8</sup> *Ibid* ch 3.

<sup>9</sup> (1852) 3 HL Cas 759; 10 ER 301.

author explores ‘conflict of interest’ situations arising from other jurisdictions. In particular, he highlights the ‘one test for all cases’ approach of the High Court of Australia in *Ebner v Official Trustee in Bankruptcy*.<sup>10</sup> The Court in that case propounded a unitary ‘apprehension of bias’ test, a test that relies on an examination of the circumstances of each case.<sup>11</sup>

In chapter 13, the author discusses the implications posed by the refusal of a lower court judge to recuse himself or herself when asked to do so, points to ‘difficult procedural and substantive questions ... about rights of appeal’<sup>12</sup> and proposes possible ways out of the appeal dilemma. If it is left to the impugned judge alone to decide whether he or she should sit, the dilemma becomes more acute in ‘final’ courts, such as the Supreme Court of the United States and the High Court of Australia. The author gives the example of *Kartinyeri v Commonwealth [No 2]*,<sup>13</sup> in which Callinan J of the High Court of Australia, in response to a contention that he should disqualify himself for apprehended bias from participating in a controversial case, determined that there was no basis for any reasonable apprehension of bias on his part arising out of an opinion he had provided to the Senate Legal and Constitutional Affairs Committee when he was at the Bar. Before the High Court could hear an application for review of Callinan J’s ‘decision’, the judge decided to withdraw from the case.<sup>14</sup> The author also narrates a fascinating account of a more controversial episode involving Black J of the Supreme Court of the United States who had refused to recuse himself in the famous case of *Jewell Ridge Coal Corporation v Local No 6167, United Mine Workers of America*,<sup>15</sup> and the unpleasant ramifications flowing from that episode.<sup>16</sup>

The book discusses many other aspects of the law relating to judicial recusal, such as the processes which should be adopted to deal with recusal applications and the practice rules and protocols operating in various jurisdictions, issues of ‘waiver’ and ‘necessity’, judicial misconduct, unconscious bias, and extra-judicial statements by judges. The penultimate chapter (‘Possible Reforms’) contains an engaging and thoughtful excursus on what practical measures can be deployed to address the identified flaws in the system. The concluding chapter discusses whether changes should be effected from within the judiciary or by external regulation. The author observes that ‘the tide in the affairs of judges on this issue is slowly on the turn’.<sup>17</sup> The means of change should not boil down to a choice between two extremes. He writes: ‘And the judge of character will know that often one gets things done in the real world through compromise, and the adoption of sensible intermediate positions.’<sup>18</sup>

<sup>10</sup> (2000) 205 CLR 337.

<sup>11</sup> Hammond, above n 1, 29, 52.

<sup>12</sup> *Ibid* 101.

<sup>13</sup> (1998) 72 ALJR 1334.

<sup>14</sup> Hammond, above n 1, 113.

<sup>15</sup> 325 US 161 (1945).

<sup>16</sup> Hammond, above n 1, 109–11.

<sup>17</sup> *Ibid* 155.

<sup>18</sup> *Ibid*.

The author provides a succinct account of federal recusal law in the United States. He draws attention to the interplay between judicial recusal and judicial misconduct arising from provisions of ethical codes of conduct and the *Judicial Conduct and Disability Act of 1980*,<sup>19</sup> with the observation: ‘It is when judges are not properly recusing that matters can escalate to the disciplinary end of the scale.’<sup>20</sup> This observation is prescient when considered in the context of a major controversy that erupted in recent times in New Zealand and which attracted national attention. The controversy stemmed from the participation of Wilson J, then a member of the New Zealand Court of Appeal, in a 2007 decision of that Court involving litigation between Saxmere Co Ltd (‘Saxmere’) and the Wool Board Disestablishment Co Ltd (‘the Board’).<sup>21</sup> After the Court found in favour of the Board, Saxmere appealed, arguing that Wilson J should not have sat on the case because of his friendship and business relationship with the counsel for the Board. The New Zealand Supreme Court initially rejected the appeal,<sup>22</sup> but when more details of the business relationship between Wilson J and the counsel emerged,<sup>23</sup> the Supreme Court took the unprecedented step of ‘recalling’ its earlier decision.<sup>24</sup> The protracted and unedifying ‘Justice Wilson saga’, which led to a complaint being lodged with the Judicial Conduct Commissioner, ultimately resulted in the resignation of Justice Wilson from the Supreme Court.<sup>25</sup> In the wake of this saga, the New Zealand Law Commission (of which Justice Hammond is currently the President) has recently published a report regarding a proposal for a register of judges’ financial interests.<sup>26</sup>

Overall, this is an admirable book which should be a valuable addition to the ‘must’ library collection of judicial officers and all those who have an interest in the healthy functioning of the justice system in a liberal democracy.

<sup>19</sup> 28 USC §§ 351–64 (2006).

<sup>20</sup> Hammond, above n 1, 68.

<sup>21</sup> *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 349 (15 August 2007).

<sup>22</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35.

<sup>23</sup> Particularly the fact that Wilson J indirectly owed the counsel a substantial sum of money due to an imbalance in the shareholders’ accounts of the company they jointly owned.

<sup>24</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [No 2]* [2010] 1 NZLR 76.

<sup>25</sup> Judith Collins, Attorney-General (NZ), ‘Justice Wilson Resigns’ (Media Release, 21 October 2010) <<http://www.beehive.govt.nz/release/justice-wilson-resigns>>.

<sup>26</sup> See New Zealand Law Commission, *Towards A New Courts Act: A Register of Judges’ Pecuniary Interests?: Review of the Judicature Act 1908 First Issues Paper*, Issues Paper No 21 (2011) <<http://www.lawcom.govt.nz/publications>>.