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High Court rules on apprehended bias

In [*Isbester v Knox City Council \[2015\] HCA 20*](#) (*Isbester*) the High Court of Australia has allowed an appeal concerning apprehended bias in a decision that a Staffordshire terrier, Izzy, be destroyed.

The High Court's decision focused on the issue of apprehended bias arising from an 'incompatibility of roles' between a prosecutor and a decision-maker and distinguishes this aspect of apprehended bias from prejudgment.

Background

Ms Tania Isbester pleaded guilty in the Magistrates' Court of Victoria to a charge that her Staffordshire terrier, Izzy, had attacked a person and caused 'serious injury'.

After that conviction, Knox City Council's Domestic Animals Act Committee considered whether the dog should be destroyed. The council officer responsible for investigating the original incident and prosecuting the charge in the Magistrates' Court was also involved in the committee's decision on the fate of the dog.

The dog's owner appealed the committee's decision in the Supreme Court of Victoria on various bases including that, given the council officer was involved in the Magistrates' Court hearing and also in the committee decision, there was a question of apprehended bias.

Court of Appeal decision

The Court of Appeal of the Supreme Court of Victoria considered whether there might be an apprehension that the council officer had prejudged the issue. However, in doing so, it also decided that the interest of the council officer was not sufficient to warrant her disqualification.

In making this decision, the Court of Appeal looked at the nature of the council officer's personal interest in the decision.

The Court of Appeal looked at the nature of the disqualifying interests in matters that the High Court had previously considered. In *Dickason v Edwards* (1910) 10 CLR 243 the plaintiff was a member of a friendly society regulated by statute. He was accused of insulting the district chief ranger of the society. The High Court held that the district chief ranger could not sit as part of the committee to hear the charges brought against the plaintiff.

In *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 the manager of a dog racing association accused a greyhound owner of attempting to bribe him. The manager reported the incident to the Greyhound Racing Control Board, which then held an inquiry. The manager himself was a member of the Board. Although he took no part in the deliberations, he remained present in the room while they were taking place. The decision of the Board was quashed.

The High Court's decision

The question that the High Court considered in *Isbester* was how the principle on apprehension of bias should be applied – in particular, whether a person's involvement in an original matter is incompatible with their participation in a later decision on that matter.

Nature of interest

The High Court thought that the position of the council officer in the charges in the Magistrates' Court was analogous to the positions of Messrs Dickason and Stollery.

However, the decisions in *Dickason* and *Stollery* did not consider the issue in *Isbester* – that is, whether the council officer's interest in the matter ended when the proceedings in the Magistrates' Court came to an end or whether they extended to the committee's decision on the fate of the dog.

The Court of Appeal had found that the disqualifying interests in *Dickason* and *Stollery* were particularly personal interests and that this personal element was absent in *Isbester*.

However, the High Court held that the personal interest identified in *Dickason* and *Stollery* was that of a prosecutor, accuser or other moving party.

The High Court found that in this case the question was one of impartiality of the decision-maker, having regard to the council officer's previous involvement in the matter before the Magistrates' Court. In particular, the question was whether it might be apprehended that a person in the council officer's position would have an interest in the decision that could affect her proper decision-making.

When considering the nature of an interest, the joint judgment said (at [46]):

A 'personal interest' in this context is not the kind of interest by which a person will receive some material or other benefit. In the case of a prosecutor or other moving party it refers to a view which they may have of the matter, and which is in that sense personal to them. The interest of a prosecutor may be in the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment. It is not necessary to analyse the psychological processes to which a person in such a position is subject. It is well accepted, as the two cases referred to show, that it might reasonably be thought that the person's involvement in the capacity of prosecutor will not enable them to bring the requisite impartiality to decision-making.

Test for disqualification on basis of incompatibility

The High Court has previously considered apprehended bias arising from the incompatibility of the interest of a prosecutor and judge. In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (*Ebner*) the Court stated that the test for disqualification on the basis of apprehended bias is whether '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' (at [6]).

In *Ebner* the High Court said that the principle governing cases of possible bias requires 2 steps to be taken. In the first step, it is necessary to identify a matter that might lead a decision-maker to decide a case other than on its legal and factual merits. The second step requires an examination of the logical connection between that matter and the feared deviation from deciding the case on its merits (at [8]).

Significance of the decision

The High Court in *Isbester* said that the first step described in *Ebner* concerns the critical question of the decision-maker's interest. The interest that must be examined includes incompatibility of roles.

To that extent, this case operates as an update and reminder on the principles in *Ebner* and other cases such as *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

However, the decision is also important because it requires decision-makers to be clear on the potential interest they bring to a decision. In particular, a person who is the moving party in a decision should take care before being involved in a separate but consequential decision.

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