

Nemo Iudex in Causa Sua:
**Aspects of the No-Bias Rule of Constitutional Justice in Courts and
Administrative Bodies**

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This article explores various aspects of the No-Bias rule in Constitutional Justice. There are three types of bias, namely subjective bias, presumed bias and apparent bias. Four different aspects of the No-Bias rule will be examined in this article. Firstly, the area of subjective bias and its use in the law today will be explored. Secondly, the argument that presumed bias should be adopted in this jurisdiction will be examined. Thirdly, the competing tests for apparent bias will be analysed. Finally, the idea of the 'reasonable observer' in the current test for apparent bias will be examined and discussed.

I – Introduction

It is a fundamental and well established principle, not only in public administration but also in the procedure of courts that the decision-maker should be free from bias so that fair and genuine consideration is given to arguments advanced by the parties. Natural Justice is the source from which procedural fairness flows and in Ireland, natural justice was adopted under the title of “constitutional justice” in the case of *McDonald v. Bord na gCon*.¹

The expression “natural justice” has been described by the English courts as one “sadly lacking in precision.”² One must not get confused with natural law here. As Ormrod J. notes, in *Norwest Holst Ltd v. Secretary of State for Trade*, the word “natural” adds nothing to justice “except perhaps a hint of nostalgia.”³ Keane J. stated in *O’ Brien v. Bord na Móna* that the difference between constitutional justice in this jurisdiction and natural justice in the British context was to be explained “by the absence in England of a written constitution containing express guarantees of fundamental rights and fair procedures in the protection of those rights.”⁴ Therefore, “natural justice” as a common law right to fair procedures may be rebuttable, whereas “constitutional justice” is judicially regarded in Ireland as one of the

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¹ [1965] I.R. 217.

² *R. v. Local Government Board* [1914] 1 K.B. 160.

³ [1978] Ch. 201 at 226.

⁴ [1983] I.R. 255 at 270.

unenumerated rights under Article 40.3 of our Constitution. The significance of this is that it would be unconstitutional for an Irish statute to attempt to exclude the rules of constitutional justice.

Constitutional justice consists of two fundamental procedural rules. Firstly, the decision-maker must not be biased or *nemo iudex in causa sua* and, secondly, that anyone who may be adversely affected by a decision should not be condemned or unheard but rather should have the best possible chance to put forward his side of the case or *audi alteram partem*. Each rule is important but arguably the first rule, aspects of which form the subject matter of this article, is the more important.⁵

A. Areas of Discussion regarding the No-Bias Rule

Possible sources of bias, for and against, are infinitely varied but they can be grouped into four main categories.⁶ The most obvious source of bias is for the decision-maker to have a financial interest in the matter to be decided.⁷ Bias may also arise from the decision-maker's personal attitudes, relationships or beliefs in the case. Thirdly, loyalty to an institution can result in the decision-maker being so committed to the objectives or interests of that institution, that they might be incapable of holding the balance fairly between these objectives and other interests.⁸ Finally, prior involvement in a case or pre-judgement of the issues can also lead to bias.⁹ Whether other relationships between the decision-maker and the parties will amount to objectionable bias so as to disqualify the decision-maker is often a matter of fine judgement.¹⁰

⁵ G. Hogan and D.G. Morgan, *Administrative Law in Ireland*, 3rd ed. (Dublin: Thomson Round Hall, 1998) at 501 [hereinafter Hogan and Morgan].

⁶ Hogan and Morgan, *ibid.*, at 511-525.

⁷ This element of bias will be discussed further in the next Part but for now, it is worth noting, that any decision tainted by a financial interest is liable to be quashed and as we shall see below the courts will usually apply a high standard under this category of bias. See *People (Attorney General) v. Singer* [1975] IR 408; *Doyle v. Croke* (6 May 1988, unreported), High Court (Costello J, as he then was).

⁸ This may occur where there is a contest between the interests of the institution and some individual interest which is being decided by a member of that institution. Note, however, that in practice, this situation may only arise where it is shown that the public body has acted "capriciously" or in a "manifestly unfair manner," as *per* Keane J. in *O' Brien v. Bord na Móna* [1983] I.R. 255 at 269. See also *Ó Cléirigh v. Minister for Agriculture* [1996] 2 I.L.R.M. 12.

⁹ Hogan and Morgan, *supra* note 5 at 520. Hogan and Morgan acknowledge that an overlap exists between this category and the other various classifications but submit that "[a]s a matter of principle, it seems objectionable that a decision-maker exercising quasi-judicial functions should sit with an appellate body to hear an appeal against his own decision."

¹⁰ M. de Blacam, *Judicial Review* (Sussex: Tottel Publishing, 2007) at para 8.10.

This article investigates certain questions in the area of constitutional justice that have been left unanswered in Ireland. Geoghegan J. has suggested in *Orange Communications Ltd v. Director of Communications Regulation* that there are, in effect, three species of bias.¹¹ These are subjective bias, presumed bias and apparent bias. The rule against bias will be examined in the next four Parts. The first two Parts will deal with the first two types of bias while the following two Parts will examine the third category of bias. To elaborate:

(i) Geoghegan J. in *Orange Communications Ltd.* explained that there are rare cases of subjective bias where it is necessary to prove that the judge or adjudicator was subjectively or deliberately biased.¹² The question will be asked in Part II whether this category is still necessary given that an actual mental state is practically impossible to establish directly.¹³

(ii) In England, where the decision-maker has a proprietary or some other definite personal interest in the outcome of the proceedings, there is a presumption of bias.¹⁴ This is referred to as “automatic disqualification.” I will consider whether this should be followed in Ireland in Part III.

(iii) There are cases of apparent bias where a reasonable person may have apprehended bias because of some particular proven circumstance external to the matters to be decided.¹⁵ There are two competing tests for apparent bias, namely the “real likelihood” test and the “reasonable suspicion” test. The development of these tests in Ireland will be examined in Part IV and compared to the tests applied in other common law jurisdictions. It will be argued that the current test here is both prudent and flexible.

¹¹ [2000] 4 I.R. 159 at 252 [hereinafter *Orange Communications Ltd.*].

¹² *Ibid.* at 252.

¹³ In *R. v. Gough* [1993] A.C. 646 [hereinafter *Gough*], Lord Woolf states at 672 that “except in the rare case where actual bias is alleged ... the courts do not regard it as being desirable or useful to enquire into the individual’s state of mind. It is not desirable because of the confidential nature of the judicial decision making, process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.”

¹⁴ *Orange Communications Ltd. supra* note 11 at 252. This category of bias is also known as “presumed bias.”

¹⁵ *Ibid.*

(iv) Part V will then examine the idea of the “reasonable observer”. The test for apparent bias pivots on the idea of the “reasonable observer” in deciding whether there was an appearance of bias. A significant, practical question is how well-informed the reasonable observer must be and what he or she must be aware of. An attempt shall be made to answer all of these questions, in order to create a clearer picture of the state of the law today.

II – Subjective Bias

Subjective bias¹⁶ arises when it is shown that a decision-maker is in fact prejudiced against one of the parties. Bias is seldom obvious and, by its nature, is difficult to prove. A distinction has been drawn between subjective bias, on the one hand, which relates to the actual state of mind of the decision-maker and on the other hand, objective bias which is “whether a person ... being a reasonable person, should apprehend ... a fair and independent hearing.”¹⁷ In the rare case where a decision-maker is shown to have been influenced in his decision by prejudice, predilection or personal interest, his decision of course cannot stand.¹⁸ However, the big point is that allegations of subjective bias are inherently difficult to prove as “it may be impossible to establish the precise state of mind of the adjudicator.”¹⁹

It might therefore be argued that the reason that subjective bias is not a useful tool for succeeding in claims of bias is that there has been a shift in the rationale behind the no-bias rule over the centuries. The rule against bias was originally founded on a principle of fairness and accuracy in decision-making, but it is now founded on the idea that to allow a biased tribunal to make a decision would be to undermine public confidence in the system.²⁰ A major factor in this shift is of course the importance of maintaining confidence in the public administration system.

¹⁶ Note that the terms “subjective bias” and “actual bias” are interchangeable but for clarity the term “subjective bias” will be primarily used in this article.

¹⁷ *Dublin Well-Woman Centre Ltd. v. Ireland* [1995] 1 I.L.R.M. 408 at 420 [hereinafter *Dublin Well-Woman Centre Ltd.*].

¹⁸ B. Rayment, “Bias: Recent Developments” [2001] J.R. 93 at 93 [hereinafter Rayment].

¹⁹ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992) 89 D.L.R. (4th) 289 at 297, *per* Cory J.

²⁰ In *Ex parte Medwin and Hurst* (1853) 118 E.R. 566 Lord Campbell C.J. held at 567 that: “the slightest real interest in the issue of a suit incapacitates any one from acting as Judge in it, although it may be certain that in fact the interest, from its real or proportionate insignificance, cannot create any bias in his mind.” See further B. Toy-Cronin, “Waiver of the Rule against Bias” (2002) 9 Auckland U.L. Rev. 850 [hereinafter Toy-Cronin] where Toy-Cronin notes at 872 that this seems to be evidence of a shift from a concern for fairness to a concern for public confidence.

The present rationale behind the *nemo iudex in causa sua* doctrine is clearly captured by Lord Hewart C.J. in *R. v. Sussex Justices Ex p. McCarthy* where he famously stated that “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”²¹

The result of this shift is that the policy of the common law is to protect litigants who can discharge the lesser burden of showing objective bias without requiring them to show that such bias actually exists. Goudkamp has recently questioned the reluctance of the courts to make findings of subjective bias and comments that their hesitancy to investigate whether a breach has occurred casts doubt on their commitment to the principle.²² In practice, the evidential barriers to mounting a successful claim of subjective bias are such as to deter challenges in almost all cases.²³ Indeed, it was noted by Sheehan that actual bias is such an immensely difficult one to establish in practice as to be a redundant remedy in all but the most exceptional cases.²⁴

In addition, Kirby J. has commented pertinently in *Re Minister for Immigration and Multicultural Affairs, Ex p. Jia* that “[a] party would be foolish needlessly to assume a heavier obligation when proof of bias from the perceptions of reasonable observers would suffice to obtain relief.”²⁵ This means that a wiser course of action for a plaintiff would be to satisfy the lower standard of showing objective or “apparent bias” rather than trying to prove subjective bias on the part of the decision-maker. If this is the case, and the courts are not actually concerned with showing or proving subjective bias, then one may ask whether there is a need for subjective bias in our law today.

²¹ [1924] 1 K.B. 256 at 259. Similarly, Lush J. commented in *Serjeant v. Dale* [1877] 2 Q.B. 558 at 567, that the purpose of the no-bias rule was “to promote the feeling of confidence in the administration of justice which is so essential to social order and security.”

²² J. Goudkamp, “Facing up to Actual Bias” [2008] 27 C.J.Q. 32 at 39.

²³ K. Malleson, “Safeguarding Judicial Impartiality” (2002) 22 L.S. 53 at 54 [hereinafter Malleson].

²⁴ B. Sheehan, “Biased Judgments: Are Irish Courts too Lenient with Public Maladministration?” (2005) 23 *Irish Law Times* 235 at 236.

²⁵ (2001) 205 C.L.R. 507 at 541.

A. Proving a Case of Subjective Bias

It is true that in the case of *Orange Communications Ltd.*, Murphy J. stated that “a judge may in a particular case reveal an existing bias which should disqualify him from hearing certain cases.”²⁶ Murphy J. submits that the American case of *Berger v. United States*²⁷ provides an unhappy example of such a prejudice, where a plea of subjective bias did succeed. In *Berger*, the appellate court overturned the lower court’s verdict because of the disparaging comments made by the trial judge about the defendant during the course of the trial.²⁸ Landis J. said of the defendants, who were being tried under the *Espionage Act 1917*,²⁹ that “[y]our hearts are reeking of disloyalty. I know a safe blower ... and as between him and this defendant, I prefer the safe blower.”³⁰ Therefore, it seems that Murphy J. is suggesting that a case of proved subjective bias will occur where substantial incontrovertible evidence exists, directly proving the subjective bias to the necessary standard.

It is argued however that this is merely a case of disguised objective bias. The *Berger* case is noted as one of the rare cases of subjective bias but in fact this distinction is not noted in the case. It may be asked whether the comments of Landis J. in *Berger* were enough to prove that the judge was in fact subjectively biased. One could disagree with Murphy J.’s comments in *Orange Communications Ltd.* and submit that *Berger* was merely a case of the judge being expressly impolite. Therefore it is submitted that *Berger* was purely another instance of the deduction of bias from an objective perspective. Perhaps, it might be helpful to analyse other areas of the law as a comparison.

B. Comparisons with Other Areas of the Law

At this point, we need to draw some analogies with criminal law because it is the richest source of comparison as regards subjective intent. In criminal law, all serious crimes and most minor offences require proof that the defendant had the

²⁶ *Orange Communications Ltd.*, *supra* note 11 at 245, *per* Murphy J.

²⁷ 255 U.S. 22 [hereinafter *Berger*].

²⁸ The Supreme Court of the United States in 1921 ruled in a majority of 6-3 that the trial judge in an espionage case was disqualified because of anti-German sentiments he had previously expressed. The trial judge *Berger*, *ibid.* at 28 commented in the course of the hearing that: “[o]ne must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country.”

²⁹ *Espionage Act 1917* (40 Stat. 217, c. 30).

³⁰ *Berger*, *supra* note 27 at 29.

relevant blameworthy state of mind.³¹ This is known as the *mens rea* and is the mental element necessary for a particular offence.³² For example, if one were to go into a bank with a gun with the intention of robbing it, then the onus would be on the prosecution to prove that the accused had a guilty mind. It is not often that intention is actually directly proven and instead intention is deduced from behaviour, *i.e.* that the accused had a gun.

In a case of alleged bias, the court will have to determine whether the bias exists, by inferring it from the circumstances of the case, rather than actually proving bias in the mind of the decision-maker. Fennell defines circumstantial evidence as an evidentiary fact or fact relevant to the issue from which the jury may infer the existence of the *factum probandum* or the fact in issue.³³ The courts, however, have warned about a conviction being based entirely on circumstantial evidence.³⁴ Although a person may in principle be convicted upon circumstantial evidence, the evidence must be highly probative.³⁵

It has been stated by numerous judges that it “is not possible to look into a person’s head to see what was going on.”³⁶ It is the cumulative effect of circumstantial evidence that gives it probative force. In *R. v. Exhall*, Pollock C.B. described the cumulative effect of circumstantial evidence as being similar to a multi-stranded rope, stating that, one strand of a cord of rope might not be sufficient to sustain the weight, but three cords stranded together would provide greater strength.³⁷ Therefore, the more circumstantial evidence that exists in a case, the greater the chance there is of proving intention and many circumstances taken together “may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”³⁸

³¹ D. Ormerod, *Smith and Hogan’s Criminal Law*, 11th ed. (Oxford: Oxford University Press, 2005) at 90.

³² G. Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens and Sons Ltd., 1961) at 31.

³³ C. Fennell, *The Law of Evidence in Ireland*, 2nd ed. (Dublin: Butterworths, 2003) at 65.

³⁴ R. Cannon and N. Neligan, *Evidence* (Dublin: Thomson Round Hall Ltd., 2002) at 124.

³⁵ J. Healy, *Irish Laws of Evidence* (Dublin: Thomson Round Hall, 2004) at 18.

³⁶ C. Hanly, *An Introduction to Irish Criminal Law*, 2nd ed. (Dublin: Gill and Macmillan, 2006) at 89. For example, it was stated by O’Donovan J. in *The People (DPP) v. McDonagh* [2001] 3 I.R. 201 at 212, that “it is not possible to look into somebody’s mind to see what their intentions are”

³⁷ (1866) 4 F. & F. 922 at 929.

³⁸ *Ibid.* at 929, *per* Pollock C.B.

If we are to take the example of a bank-robber once again, evidence of the accused in flight from the bank may constitute circumstantial evidence showing his proximity to the bank at the time of the robbery and thus his guilty behaviour. This could be used indirectly to establish, cumulatively with other evidence in the case, that the accused robbed the bank. If we apply this analogy to a case of alleged subjective bias such as *Berger*,³⁹ then one may propound that the comments of Landis J. in that case may be enough to show a biased state of mind and thus prove subjective bias.

However, as McWilliam J. stated in the *People (DPP) v. Douglas and Hayes*, “[u]nless the accused has actually expressed an intent, his intent can only be ascertained from a consideration of his actions and the surrounding circumstances.”⁴⁰ Similarly, Charleton writes that the “mental state is normally proved by an irresistible inference from the circumstances in which the accused committed the external elements of the crime.”⁴¹ Thus, the criminal trial is a comparable area of the law in which in almost all situations, the subjective issue of *mens rea* can be evaluated only by deduction from objective circumstances.

While there are differences between criminal, evidence and administrative law, if we make the assumption that the same logical principles apply, it would seem that subjective bias can be proven only by inference from objective evidence showing that bias existed in the mind of a decision-maker. Therefore, it is submitted that rather than proving that bias existed subjectively in the mind of the decision-maker, what one is in fact doing is examining the circumstances of the case from an objective perspective in order to prove bias, from which an inference may be drawn.

In conclusion, it is clear that it is very difficult, if not impossible, to establish that there was subjective bias in the mind of a decision-maker. Criminal law has had to deal with this problem for centuries but administrative law is only now getting around to these issues. Therefore, it is submitted that allegations of bias should be dealt with under the wider category of apparent bias. This category of bias will be discussed in the next Part.

³⁹ *Berger*, *supra* note 27.

⁴⁰ [1985] I.L.R.M. 25. at 27.

⁴¹ P. Charleton, *Criminal Law: Cases and Materials* (Dublin: Butterworth, 1992) at 12.

III – Automatic Disqualification

According to Delaney, “automatic disqualification,” is where because of the nature of a decision-maker’s interest in the outcome of the proceedings, usually of a financial or proprietary nature, he/she is presumed to be biased and it is not necessary to apply the test for apparent bias.⁴² Craig notes that in England, the courts have consistently held that if a pecuniary interest exists, it is not necessary to consider reasonable suspicion or the real likelihood of bias.⁴³ Therefore, English law has created a separate and especially strict category for cases involving pecuniary or proprietary interests.

The classic example of the automatic disqualification principle in operation can be seen in *Dimes v. Grand Junction Canal*.⁴⁴ Lord Chancellor Cottenham affirmed a number of decrees made by the Vice-Chancellor in favour of a canal company, in which Lord Cottenham was a shareholder, which amounted to several thousand pounds.⁴⁵ The House of Lords set aside Lord Cottenham’s decrees on account of his pecuniary interest and Lord Campbell famously declared that “it is of the last importance that the maxim, that no man is to be a judge in his own cause, should be held sacred.”⁴⁶

⁴² H. Delany, *Judicial Review of Administrative Action: A Comparative Analysis* (Dublin: Round Hall Thomson Reuters, 2009) at 238 [hereinafter Delany]. In some respects the rule of automatic disqualification for pecuniary or proprietary interests is a misnomer, and might be more accurately considered a rule of automatic disclosure. Jones explains that this is because the parties may waive the offer of the decision-maker to recuse himself; T. Jones, “Judicial Bias and Disqualification in the Pinochet Case” [1999] P.L. 391 at 399. Also, Lord Hope pointed out in *R. v. Bow Street Metropolitan Stipendiary Magistrates, Ex p. Pinochet Ugarte (No.2)*, [2000] 1 A.C. 119 at 141 [hereinafter *Bow Street Metropolitan*], that “disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection.” What it means is that “no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable.” *Ibid.*

⁴³ P.P. Craig, *Administrative Law*, 6th ed. (London: Sweet and Maxwell, 2008) at 418.

⁴⁴ (1852) 3 H.L.C. 759 [hereinafter *Dimes*]. The principle that a judge was disqualified from adjudicating whenever there was a real likelihood that he might be biased was not unequivocally established until the mid-nineteenth century. However, it is noted by H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 10th ed. (Oxford: Oxford University Press, 2009) at 501-504 [hereinafter Wade and Forsyth], that at least as early as the 14th century, common law judges were held to be incompetent to hear cases in which they were themselves parties. *See* for example (1371) 45 Lib. Ass. 3, where a party in a case at assizes that had to be heard before two judges, was himself appointed a judge upon the death of one of the two justices of assize: held, he could not judge his own cause. Other early cases include *Sir Nicholas Bacon’s case* (1563) 2 Dyer 220b and *Earl of Derby’s case* (1613) 12 Co.Rep. 114. Similarly, in *Dr Bonham’s case* (1610) 8 Co. Rep. 114, when examining the claim of the College of Physicians to fine its members for malpractice, Chief Justice Coke said that the censors of the College “cannot be judges, ministers, and parties ... *quia aliquis non debet esse Judex in propria causa* ... and one cannot be a judge and attorney for one of the parties.” *Ibid.* at 118.

⁴⁵ *Dimes, ibid.* at 759.

⁴⁶ *Ibid.* at 793.

A. The Expansion of the Automatic Disqualification Rule

In practice, the range of situations in which automatic disqualification will arise has been very limited.⁴⁷ The House of Lords attempted to clarify this area of the law in *R. v. Gough*⁴⁸ which concerned allegations of bias on the part of a juror in a criminal trial. The appellant was indicted on a single count of conspiring with his brother to commit robbery. The brother had been discharged on the ground that there was insufficient evidence against him. However, after the appellant's conviction, it was discovered that the brother's neighbour had served on the jury. The House of Lords discussed many types of bias in this case and subsequently confirmed that a direct pecuniary interest automatically disqualifies a decision-maker from hearing a case.⁴⁹ Lord Goff noted that there was a "compelling need" to set out "some readily understandable and easily applicable principles"⁵⁰ and declared that there was no rule that an interest that falls short of a direct pecuniary interest automatically disqualifies the decision-maker from sitting.⁵¹

It was therefore surprising that in *Bow Street Metropolitan Stipendiary Magistrates*, the House of Lords took the step of extending the principle of automatic disqualification to a case of non-pecuniary interest.⁵² It was held that "[i]f the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved."⁵³ The Law Lords thus decided that in the "very unusual circumstances" of the case, Lord Hoffman's non-pecuniary interest should give rise to automatic disqualification.⁵⁴

⁴⁷ Malleon, *supra* note 23 at 55.

⁴⁸ *Gough*, *supra* note 13.

⁴⁹ *Ibid.* at 673.

⁵⁰ *Ibid.* at 667, 659.

⁵¹ *Ibid.* at 662.

⁵² *Bow Street Metropolitan*, *supra* note 42. The facts of this case are that the House of Lords on the 25th of November 1998 ruled that the former head of state in Chile, General Augusto Pinochet, did not enjoy immunity for arrest and extradition in relation to crimes against humanity allegedly committed whilst in office. Lord Hoffmann, one of the judges hearing the case, was an unpaid director and chairperson of Amnesty International Charity Limited, an organisation set up and controlled by Amnesty International, who were given permission to act as interveners in the case. In December 1998 a newly constituted panel of law lords held unanimously that the relationship between Amnesty International and Lord Hoffmann was such that he was automatically disqualified from hearing the case and the judgment could not stand.

⁵³ *Ibid.* at 135.

⁵⁴ *Ibid.* at 135, *per* Lord Browne-Wilkinson.

B. Other Common Law Jurisdictions

This development has been strongly criticised⁵⁵ and Olowofoyeku asserts that other common law jurisdictions are currently “moving towards restricting, rather than expanding the scope of automatic disqualification.”⁵⁶ In *Wewaykum Indian Band v. Canada*, the Supreme Court of Canada made it clear that “whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada.”⁵⁷ The Australian courts specifically rejected the principle of automatic disqualification in *Ebner v. Official Trustee in Bankruptcy*⁵⁸ where the majority held that there is no free-standing automatic disqualification rule.⁵⁹

In line with these decisions, some jurisdictions have qualified the automatic disqualification rule with a *de minimis* exception. What if, for example, the decision-maker possesses a small shareholding in a company involved in the proceedings, the outcome of which would have a negligible effect on this shareholding? The automatic disqualification rule would suggest that the decision should be set aside but there is now evidence in many common law jurisdictions, that automatic disqualification is not being applied in such a case. In the case of *Weatherill v. Lloyds TSB Bank Plc*, for example, the English Court of Appeal dismissed an application to discharge a judge who had discovered during the course of the proceedings that he was the owner of a small number of shares in the defendant bank.⁶⁰ The judge stated that he was unaware of the shareholding and immediately disposed of the shares. Without the development of the *de minimis* rule he would have been required to recuse himself whatever the state of his knowledge about his interest.

Similarly, the New Zealand Court of Appeal recently held in *Auckland Casino Ltd v. Casino Control Authority* that the words “however small” in the formulations of

⁵⁵ Havers and Thomas suggest that it may have been “preferable to have left undisturbed the well-known distinction” between cases where a judge is automatically disqualified by reason of having a pecuniary interest and those cases where actual or apparent bias must be demonstrated by reference to the evidence. See P. Havers, and O. Thomas, “Bias Post-*Pinochet* and Under the ECHR” [1999] J.R. 111 at 113. Rayment submits that “*Pinochet* is not a welcome development.” See Rayment, *supra* note 18 at 94.

⁵⁶ A. Olowofoyeku, “The Nemo Judex Rule: The Case against Automatic Disqualification” [2000] P.L. 456 at 464 [hereinafter Olowofoyeku].

⁵⁷ [2003] 2 S.C.R. 259 at para 72 [hereinafter *Wewaykum*].

⁵⁸ (2001) 176 A.L.R. 644 [hereinafter *Ebner*].

⁵⁹ *Ibid.* at 652. Kirby J. dissenting.

⁶⁰ [2000] C.P.L.R. 584.

automatic disqualification for direct financial interest “should be treated at the present day ... as an exaggeration.”⁶¹ Cooke P. took a more pragmatic approach and commented that “while a firm and realistic rule of pecuniary disqualification is necessary to assist public confidence in the administration of justice and ... impartiality,” there was scope for the application of a *de minimis* rule in cases of this nature.⁶² Similarly, Kirby J. in *Ebner*, endorsed the application of a *de minimis* principle in appropriate cases.⁶³ Olowofoyeku contends that this “has implications for whether we should be abandoning [the rule of automatic disqualification], rather than extending it.”⁶⁴

C. The Position in Ireland

It remains unclear whether the automatic disqualification rule in the case of financial interest exists in Ireland. This uncertainty was created by the comments of Keane C.J. and Geoghegan J. in *Orange Communications Ltd.*⁶⁵ Keane C.J. stated that there was “no room for doubt as to the applicable test in this country.”⁶⁶ He then noted that the English decisions have proceeded on the basis that cases, in which the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings, fall into the special and unique category of automatic disqualification.⁶⁷ The Chief Justice then referred to what he termed “all other cases” which called for the application of the test determining whether there was a reasonable apprehension of bias. The Chief Justice did not state, however, whether he agreed with the expansion of the automatic disqualification principle.⁶⁸ In the same case, Geoghegan J. also referred to the automatic disqualification principle stating that this is “[w]hat the authorities seem to have established” again without stating whether this was the law in this jurisdiction.⁶⁹

⁶¹ [1995] 1 N.Z.L.R. 142 at 148.

⁶² *Ibid.*

⁶³ *Ebner*, *supra* note 58 at 686.

⁶⁴ Olowofoyeku, *supra* note 56 at 470.

⁶⁵ *Orange Communications Ltd.*, *supra* note 11.

⁶⁶ *Ibid.* at 186.

⁶⁷ *Ibid.*

⁶⁸ Delany, *supra* note 42 at 242.

⁶⁹ *Orange Communications Ltd.*, *supra* note 11 at 252.

Delany has suggested that it would be unwise to read too much into what was probably intended merely to be a useful summary of the categories of bias.⁷⁰ I would agree with this sentiment and submit that the judges in this case were merely describing the law in England and did not intend to imply that it was the law here. This is the more prudent approach, in my opinion, because if the automatic disqualification principle exists to safeguard the perception of impartiality, it can be questioned why a different test should apply to pecuniary interest.⁷¹ Similarly, it has been submitted that automatic disqualification is “extreme, outdated, and superfluous”⁷² and also that it is “crude,”⁷³ while the expansion of the principle has been described as “astounding.”⁷⁴ In common law jurisdictions, apart from England, the principle is strictly confined to direct financial interests and many of these jurisdictions are, in fact, moving towards restricting, rather than expanding the scope of automatic disqualification.

Moreover, a new approach was made in *Ebner*, where the Australian Federal Court of Appeal doubted whether the “confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value”⁷⁵ and suggested that confidence was more likely to be shaken “by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest”.⁷⁶ If the public believe that justice was not done because of a “mere technicality,” then the rule of automatic disqualification defeats the purpose of maintaining public confidence in public administration.

In view of this analysis, it would be a grave mistake to adopt the automatic disqualification rule in this jurisdiction. Application of the automatic disqualification rule may well lead to the disqualification of decision-makers simply because a minimal degree of financial interest exists. In the same circumstances however, if all

⁷⁰ Delany, *supra* note 42 at 242.

⁷¹ *Ibid.*

⁷² Olowofoyeku, *supra* note 56 at 464.

⁷³ Malleon, *supra* note 23 at 127.

⁷⁴ Olowofoyeku, *supra* note 56 at 464.

⁷⁵ *Ebner*, *supra* note 58 at para 37.

⁷⁶ *Ibid.* In contrast to this argument, Hanif argues that this is not an entirely convincing argument and submits that it is impossible to envisage a situation whereby public confidence in a system would be properly served by refusing a re-hearing on the basis that it would incur even more costs and time. See S. Hanif, “The Use of the Bystander Test for Apparent Bias” [2005] J.R. 78 at 82 [hereinafter Hanif].

the relevant factors are taken into account, it may well reveal that there was no realistic appearance of bias.

IV – Apparent Bias

As already discussed above, Geoghegan J. has suggested that there are three species of bias.⁷⁷ The law in relation to subjective bias and automatic disqualification has been examined in the previous Parts. This Part will now consider the much more common category of bias, namely apparent bias. Apparent bias is where a reasonable person may have apprehended bias because of some particular proven circumstance external to the matters to be decided.⁷⁸ This is the widest category of bias and captures the majority of cases of alleged bias. Therefore, apparent bias will be dealt with over two Parts. The appropriate test for apparent bias will be discussed in this Part; the idea of the “reasonable observer” will be considered in the next.

What is the test for apparent bias? Much confusion has been caused in the past by the use of differently formulated tests. Moreover, the arguments about the appropriate test for apparent bias in the past few years, have drawn new and conflicting analyses. It has been recognised that previous judgments in respect of the test for apparent bias “are not only large in number, but bewildering in their effect.”⁷⁹

In Ireland, two conflicting tests have been used to determine whether or not the decision-maker should have been disqualified from hearing the case. These tests are the “real likelihood” test and the “reasonable suspicion” test. Throughout the common law world, courts have struggled to determine the relevant characteristics that are to be attributed to each test and to apply these to cases of apparent bias.

Wade and Forsyth state that in the past, many judges applied a real likelihood formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias.⁸⁰ Testing for a real

⁷⁷ *Orange Communications Ltd.*, *supra* note 11 at 252.

⁷⁸ *Ibid.*

⁷⁹ *Gough*, *supra* note 13 at 659.

⁸⁰ Wade and Forsyth, *supra* note 44 at 382.

likelihood of bias is similar to testing for subjective bias in that it attempts to focus on the court's own view of the realities of the situation. This test has been applied in a large number of cases throughout the common law world⁸¹ and was also applied in Ireland at the end of the nineteenth century.⁸²

More recently, judges have employed a "reasonable suspicion" test.⁸³ This test is more concerned with outward appearances and public confidence in the integrity of courts, tribunals and public administrators. The rationale underlying this test can be found in the famous *dictum* of Lord Hewart C.J., in *Sussex Justices*, who stated that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."⁸⁴ The "reasonable suspicion" test for bias which arose from this case appeared to be in conflict with the real likelihood test and existing authority at the time.⁸⁵

A. Other Common Law Jurisdictions

In England, the various tests and authorities in relation to apparent bias were reviewed in the *Gough* case, which settled in favour of the real likelihood test. In other words, the House of Lords rejected the need to take account of the public perception of an incident which raised an issue of bias.⁸⁶ The reasoning underlying the assumption that public confidence in the administration of justice would be

⁸¹ *R. v. Sunderland Justices* (1901) 2 K.B. 357; *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 at 591; *R. v. Camborne Justices, Ex p. Pearce* [1955] 1 Q.B. 41; *Healey v. Rauhina* [1958] N.Z.L.R. 945; *R. v. Barnsley Licensing Justices, Ex p. Barnsley & District Licensed Victuallers' Association* [1960] 2 Q.B. 167 at 187 (Devlin L.J.); *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937.

⁸² *R. (Ellis) v. Dublin J.J.* [1894] 2 I.R. 527; *R. (Findlater) v. Dublin J.J.* [1904] 2 I.R. 75; *R. (de Vescei) v. Queen's County J.J.* [1908] 2 I.R. 285; *R. (Taverner) v. Tyrone J.J.* [1909] 2 I.R. 763; *R. (O'Donoghue) v. Cork County J.J.* [1910] 1 I.R. 271.

⁸³ In *R. v. Sussex Justices, Ex p. McCarthy* [1924] 1 K.B. 256 [hereinafter *Sussex Justices*], Lord Hewart C.J. declared at 259 that: "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." See also *R. v. Gaisford* [1892] 1 Q.B. 41; *Cooper v. Wilson* [1937] 2 K.B. 309 at 324-344; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577 (by Edmund Davies L.J.); *McLean, Ex p. Aikens* (1974) 139 L.G. Rev. 261 (Lord Widgery C.J.); *Liverpool City Justices, Ex p. Topping* [1983] 1 W.L.R. 119 (Ackner L.J.); and in Ireland: *State (Horgan) v. Exported Livestock Insurance Board* [1943] I.R. 600; *O'Donoghue v. Veterinary Council* [1975] I.R. 398.

⁸⁴ *Ibid.* at 259. This *dictum* has been widely accepted in Irish case law. See for example *Orange Communications Ltd.*, *supra* note 11 where Keane C.J. stated at 185 that this maxim "has been repeated so often, both on and off the bench, that it might almost seem superfluous to recall it in the present discussion".

⁸⁵ The reasonable suspicion test was explicitly disowned by the House of Lords two years after *Sussex Justice, ibid.*, when the real likelihood test was affirmed in the case of *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 at 591.

⁸⁶ *Gough*, *supra* note 13 at 659.

maintained was that the public would accept the conclusions of the judge. Lord Goff also held that it was unnecessary for the court to look at the circumstances through the eyes of the reasonable man because the court in such cases personifies the reasonable man.⁸⁷ It was also held that in any event, the court must first ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.⁸⁸ Thus, in *Gough*, the House of Lords held that the appropriate test was whether there was a “real danger,” in the view of the court, that the decision-maker was biased.⁸⁹ In essence, this is the same as the “real likelihood” test, though phrased so as to emphasise that “the court is thinking in terms of possibility rather than probability of bias.”⁹⁰

However, the real danger test was subsequently rejected in all the other common law jurisdictions. In the event of an allegation of bias, the test favoured by the Australian courts, is whether fair-minded people might reasonably apprehend or suspect that the decision-maker might not have applied “an impartial and unprejudiced mind” to the case.⁹¹ The Australian High Court in *Webb* took the view that a “reasonable apprehension” test is the most appropriate test for apparent bias.⁹² The general trend that has emerged from case law in New Zealand has also been the acceptance of a reasonable suspicion test.⁹³ The landmark decision in this regard is *Turner v. Allison*.⁹⁴ Subsequent decisions have also confirmed the acceptance of the reasonable suspicion standard as the applicable test.⁹⁵ Similarly, the test adopted almost universally in Canada, is that of a reasonable apprehension of bias. This test was considered in some detail by the Supreme Court of Canada in *R. v. S.* where L’Heureux-Dube and McLachlin J.J. stated that the presence or absence of an

⁸⁷ *Ibid.* at 670.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 668.

⁹⁰ *Ibid.* at 670.

⁹¹ *Webb v. The Queen* (1994) 181 C.L.R. 41 at 60 *per* Deane J [hereinafter *Webb*].

⁹² The High Court of Australia in *Webb*, *supra* note 91 criticised the approach in *Gough*, *supra* note 13 on the grounds that it tended to emphasise the court’s view of the facts and to place inadequate emphasis on the public perception of the irregular incident.

⁹³ See *Turner v. Allison* [1971] N.Z.L.R. 833 and *Muir v. Commissioner of Island Revenue* [2007] 3 N.Z.L.R. 495.

⁹⁴ [1971] N.Z.L.R. 833.

⁹⁵ In *Muir v. Commissioner of Island Revenue* [2007] 3 N.Z.L.R. 495 at 508, Hammond J. confirmed that the appropriate “window” through which the relevant conduct is to be viewed is one which “emphasises how something might reasonably be regarded by the public, in the form of a reasonable informed observer.”

apprehension of bias should be evaluated through the eyes of “the reasonable, informed, practical and realistic person who considers the matter in some detail.”⁹⁶

Recognising that the real danger test did not command universal approval outside the jurisdiction,⁹⁷ the House of Lords addressed the matter in the later case of *Porter v Magill*.⁹⁸ Lord Hope, with whom the rest of their Lordships agreed, suggested a “modest adjustment” to the test in *Gough* by deleting the reference to a “real danger.”⁹⁹ He therefore re-formulated the test to one where “the fair-minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”¹⁰⁰ This now seems to be the definitive test applicable in England.¹⁰¹ Therefore, English law now seems broadly in line with the other common law jurisdictions examined above.

It is submitted that the growing trend in virtually all these foreign common law jurisdictions has been towards encouraging acceptance of the test of reasonable suspicion or reasonable apprehension. At this point, having examined the various tests for apparent bias in other common law jurisdictions, my analysis will turn to the test that has been adopted in Ireland.

B. The Test for Apparent Bias in Ireland

Traditionally, the real likelihood test was preferred in Ireland.¹⁰² However, support began to develop for the reasonable suspicion test and, in recent years, it has

⁹⁶ (1997) 151 D.L.R. (4th) 193 at 209. See also *Committee for Justice and Liberty v. National Energy Board* (1976) 68 D.L.R. (3d) 716 at 735 and *Wewaykum*, *supra* note 57.

⁹⁷ *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] Q.B. 451 at 467 [hereinafter *Locabail*].

⁹⁸ [2001] U.K.H.L. 67; [2002] 2 A.C. 357. The House of Lords was asked to consider whether a press conference attended by the auditor, in which he stated his provisional view as to the culpability of the respondents, was such as to give rise to an appearance of bias. The respondents submitted that the way in which the auditor conducted himself when he made his statement indicated an appearance of bias on his part which affected all stages of his investigation. See L. Bloom-Cooper, “Bias: Malfunction in Judicial Decision-Making” [2009] P.L. 199.

⁹⁹ *Ibid.* at 494, *per* Lord Hope.

¹⁰⁰ *Ibid.*

¹⁰¹ *Taylor v. Lawrence* [2003] Q.B. 528 at 548; *Meerabux v. Attorney General* [2005] 2 A.C. 513 at 527; *AWG Group Ltd (formerly Anglian Water Plc) v. Morrison* [2006] E.W.C.A. Civ 6; [2006] 1 W.L.R. 1163 at 1166-1167; *Secretary of State for the Home Department v. AF*. [2008] E.W.C.A. Civ 117.

¹⁰² *R. (Ellis) v. Dublin J.J.* [1894] 2 I.R. 527; *R. (Findlater) v. Dublin J.J.* [1904] 2 I.R. 75; *R. (de Vesci) v. Queen’s County J.J.* [1908] 2 I.R. 285; *R. (Taverner) v. Tyrone J.J.* [1909] 2 I.R. 763; *R. (O’Donoghue) v. Cork County J.J.* [1910] 1 I.R. 271; *R. (Kingston) v. Cork J.J.* [1910] 2 I.R. 658.

been applied in numerous cases.¹⁰³ For example, in *Dublin Well-Woman Centre Ltd.*, the plaintiff made an application requesting Carroll J., who was hearing the case and also the Chairwoman of the Commission for the Status of Women to discharge herself from the case, as in her capacity as chairwoman of this Commission, she had made a written submission to the Government regarding abortion.¹⁰⁴ The Supreme Court upheld the plaintiff's application on the grounds that the trial judge should not have heard the case because of her association in an extra-judicial capacity with submissions related to the subject matter of the proceedings. Denham J. adamantly stating that there was no real likelihood test, held that the objective test was whether a reasonable person would apprehend that his chance of a fair and independent hearing would be compromised.¹⁰⁵ In addition, Denham J. concluded that it is "of particular importance that neither party should have any reasonable reason to apprehend bias in the courts of justice"¹⁰⁶ Likewise, in *O' Neill v. Beaumont Hospital Board*, Finlay C.J. formulated the test as one of "reasonable apprehension" and held that the benchmark was whether a person in the position of the plaintiff, who is a reasonable man, might reasonably fear that the relevant conduct would prevent a fair and independent hearing.¹⁰⁷ In his judgment, Finlay C.J. expressed the view that, in analysing the facts, he should "take the interpretation more favourable ... to the plaintiff than to the defendant."¹⁰⁸

More recently, Keane C.J. in *Orange Communications Ltd.*, engaged in an in-depth examination to determine whether the real danger of bias test or the reasonable apprehension of bias test was the correct one in this jurisdiction. Keane C.J. stated that "there is now no room for doubt as to the applicable test in this country".¹⁰⁹ He held that a decision will be set aside on the ground of objective bias

¹⁰³ Recent authorities that have preferred the reasonable suspicion test include: *State (Horgan) v. Exported Livestock Insurance Board* [1943] I.R. 600; *State (Hegarty) v. Winters* [1956] I.R. 320; *O' Donoghue v. Veterinary Council* [1975] I.R. 398; *O' Neill v. Beaumont Hospital board* [1990] I.L.R.M. 419 at 438; *Dublin Well Woman Centre Ltd.*, *supra* note 17; *Bane v. Garda Representative Association* [1997] 2 I.R. 449; and *McAuley v. Chief Superintendent Keating* [1998] 4 I.R. 138.

¹⁰⁴ *Dublin Well Woman Centre Ltd.*, *supra* note 17.

¹⁰⁵ *Ibid.* at 423.

¹⁰⁶ *Ibid.*

¹⁰⁷ [1990] I.L.R.M. 419 at 439. See also *Carroll v. Law Society* [2000] 1 I.L.R.M. 161 at 183.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Orange Communications Ltd.*, *supra* note 11 at 186.

where there is a reasonable apprehension or suspicion that the decision-maker might have been biased.¹¹⁰

In *Bula Ltd. v. Tara Mines Ltd. (No. 6)*, counsel for the respondents argued that a higher standard than reasonable suspicion should be applied.¹¹¹ The applicants alleged that Barrington J. and Keane J. (as he then was) had links with the respondents, which were of such a character as to give rise to a perception of bias.¹¹² It was contended that objective bias arose from these connections between the judges and the respondents. McGuinness J. considered all the relevant case law and concluded, with Morris P. concurring, that the test for apparent bias was that of reasonable apprehension.¹¹³ Therefore, the test to be applied “is that of the reasonable person’s reasonable apprehension of bias.”¹¹⁴ McGuinness J. acknowledged that in some of the earlier cases, phrases such as real likelihood were used, but believed that the concepts were similar.¹¹⁵ Denham J. noted, that although statements of the principle commonly speak of “suspicion of bias,” she preferred to avoid the use of that phrase because it sometimes conveyed unintended nuances of meaning.¹¹⁶

The decision in *Bula*, has been reaffirmed in the recent cases of *Kelly v. Visitors of Trinity College Dublin*¹¹⁷ and *O’Reilly v. Lee*.¹¹⁸ Similarly, in *O’Callaghan v. Mahon* the test for apparent bias was once again confirmed to be “whether a reasonable hypothetical person, who was not unduly sensitive and had knowledge of all the relevant facts and circumstances, would have a reasonable apprehension that the decision maker would not be fair and impartial.”¹¹⁹ In short, this string of cases seems to signal a shift towards viewing bias from the perspective of the “reasonable observer.”

¹¹⁰ *Ibid.* See also *Spin Communications Ltd. v. Independent Radio and Television Commission* [2001] 4 I.R. 411 at 431; *Hynes v. Wicklow County Council* [2003] 3 I.R. 66.

¹¹¹ [2000] 4 I.R. 412 at 479 [hereinafter *Bula*].

¹¹² Prior to his appointment to the bench, Barrington J. had acted for the fifteenth respondent in two sets of proceedings relating to the Tara respondents in one case and the applicants in another. He had also advised on legislative reform in the area of mineral mining. He had acted against the Tara respondents in a case and had prepared two sets of advices for the first respondent.

¹¹³ *Bula*, *supra* note 111 at 479.

¹¹⁴ *Ibid.* at 485.

¹¹⁵ *Ibid.* at 480.

¹¹⁶ *Ibid.* at 441, Denham J. was quoting here from *Livesey v. New South Wales Bar Association* (1983) 151 C.L.R. 288 at 293.

¹¹⁷ [2007] I.E.S.C. 61.

¹¹⁸ [2008] 4 I.R. 269.

¹¹⁹ [2008] 2 I.R. 514 at 515.

An important question is whether it is possible for judges to apply a less strict form of the rule against bias to decision-makers exercising administrative functions as opposed to those exercising judicial or quasi-judicial functions. Delany notes that the distinction between quasi-judicial and administrative functions is a very difficult one to make.¹²⁰ While the rule against bias applies to both types of functions, the question arises whether the same standard applies to administrative bodies, on the one hand, and judicial or quasi-judicial bodies, on the other hand.¹²¹

It is assumed broadly speaking that the same standard applies to both administrative and judicial bodies. However, it has been suggested by Wade and Forsyth¹²² that less onerous rules with regard to bias apply to administrative bodies.¹²³ Administrative decision-makers, unlike judicial decision-makers, will often be influenced, formally or informally by policy considerations in their decisions. It is submitted that the fair-minded observer knows this, appreciates that there is no question of personal interest, and does not apprehend bias where there is simply a predisposition to decide one way rather than the other in accordance with previous policies.

In conclusion, the reasonable apprehension test is now firmly established in this jurisdiction and has been applied consistently in recent years.¹²⁴ The flexibility of this test also allows it to be applied regardless of the source of bias complained of or the decision-making authority involved in the matter.

¹²⁰ Delany, *supra* note 42 at 246.

¹²¹ Wade and Forsyth recognise that this distinction has long been a vexed issue but submit that it is now clear that in accordance with general principle, the same approach to bias should be adopted to both administrative and judicial decisions. See Wade and Forsyth, *supra* note 44 at 391.

¹²² *Ibid.* at 391.

¹²³ For example, it was noted by Barr J. in the case of *Aziz v. Midland Health Board* [1995] E.L.R. 48 at 46, that while the Health Board was obliged to abide by fair procedures, a non-judicial body such as this “has no obligation to apply formal court procedures in the investigation and determination of disciplinary charges brought against an employee or office holder.”

¹²⁴ *Dublin Well-Woman Centre Ltd. v. Director of Communications Regulation* [2000] 4 I.R. 159; *Bula*, *supra* note 111; *Spin Communications Ltd. v. Independent Radio and Television Commission* [2001] 4 I.R. 411; *Rooney v. Minister for Agriculture and Food* [2001] 2 I.L.R.M. 37; *Landers v. Director of Public Prosecutions* [2004] 2 I.R. 363; *Joyce v. Minister for Health* [2004] 4 I.R. 293; *Corcoran v. Holmes* [2007] 1 I.L.R.M. 23; *Kenny v. T.C.D.* [2008] 2 I.R. 40 [hereinafter *Kenny*].

V – What are the Characteristics of the Reasonable Observer?

It has already been determined in the last Part that the test for apparent bias in Ireland is that it is essential that a situation should not arise where “a reasonable person would have a reasonable fear that he would not have a fair and independent hearing of the issues which arose.”¹²⁵ Therefore, a crucial question is, who is this “reasonable observer” and what must he or she know in order to apprehend bias? To answer this question, we will begin by examining the idea of the reasonable observer in other common law jurisdictions.

A. Other Common Law Jurisdictions

In Australia, the reference to the observer being “informed” is often omitted. The Australian High Court in *Johnson v. Johnson* questioned “whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.”¹²⁶ It was held in that case by Kirby J. that the observer should not be regarded as unduly neurotic or “complacent nor unduly sensitive or suspicious.”¹²⁷ In Australia, therefore, the observer must be reasonable and cannot be assumed to have a detailed knowledge of the law or the character of the particular judge.¹²⁸ The courts do not attribute to the fictitious bystander highly specialised knowledge and it “would be a mistake for a court simply to impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself.”¹²⁹

¹²⁵ *Carroll v. Law Society* [2000] 1 I.L.R.M. 161 at para 76, *per* McGuinness J.

¹²⁶ (2000) 174 A.L.R. 655 at 658 [hereinafter *Johnson*]. It was held by Kirby J. at 670 that:

[t]here is no simple answer to the foregoing questions. As is usually the case when a fiction is adopted, the law endeavours to avoid precision. The nature of the fiction involved in this instance is illustrated by the many ways in which the hypothesised bystander is described Obviously, all that is involved in these formulae is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public. It is their confidence that must be won and maintained. The public includes groups of people who are sensitive to the possibility of judicial bias.

¹²⁷ *Ibid.* at 671.

¹²⁸ Delany, *supra* note 42 at 230.

¹²⁹ *Johnson*, *supra* note 126 at 669, *per* Kirby J.

Likewise, the Canadian courts have emphasised that the presence or absence of an apprehension of bias should be evaluated through the eyes of “the reasonable, informed, practical and realistic person who considers the matter in some detail.”¹³⁰ Similar statements emphasising that the observer is a “member of the public” can be found.¹³¹ In *Committee for Justice and Liberty v. Canada*, de Grandpré J. expressed the view that the hypothetical observer does not have a “very sensitive or scrupulous conscience.”¹³² However, some Canadian cases have imputed some technical knowledge upon the observer. For example in *R. v. Lippe*, Lamer C.J., Sopinka and Cory J.J. attributed “full knowledge of the Québec municipal court system, including all of its safeguards” to the hypothetical observer.¹³³

In England, there have been many cases that have focused on considering the appropriate level of knowledge to be imputed to the “informed observer.” In *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*, for instance, it was held that “matters outside the ken of the ordinary, reasonably well informed member of the public” should not be relied upon.¹³⁴ For example, it has been suggested that the technicalities of trademark law do not need to be fully understood by the reasonable observer.¹³⁵

Yet, in some cases, the courts have attributed quite detailed knowledge of the workings of the judicial system to the reasonable observer. In *Taylor v Williamson*, a memory lapse caused the trial judge to write and circulate his judgment before considering the closing submissions of the parties’ legal representatives.¹³⁶ Ward L.J., in deciding whether there was bias, imputed to the observer knowledge of a procedural rule, which had been recently reformed, as well as the cases interpreting that provision and its predecessor.¹³⁷ Therefore, it seems that under English law, the

¹³⁰ *R. v. S.* (1997) 151 D.L.R. (4th) 193, at 209, *per* L’Heureux-Dube and McLachlin J.J. This test was considered in some detail by the Supreme Court of Canada in *R. v. S.* Cory J. stated at 224 that “fairness and impartiality must both be subjectively present and objectively demonstrated to the informed and reasonable observer.”

¹³¹ *Canada (Minister of Citizenship and Immigration) v. Tobias* [1997] 3 S.C.R. 391 at para 97.

¹³² (1976) 68 D.L.R. (3d) 716 at 736.

¹³³ [1991] 2 S.C.R. 114 at 152.

¹³⁴ *Locabail*, *supra* note 97 at 477.

¹³⁵ *Hart v. Relentless Records* [2002] E.W.H.C. 1984 (Ch).

¹³⁶ [2002] E.W.C.A. Civ. 1380.

¹³⁷ *Ibid.* at para 54. In rejecting the contention that the judge’s mind might have appeared to have been closed, Clarke L.J. remarked at para. 52 that “[i]n my opinion the informed observer would know that the judgement sent to the parties was not a final judgement in the full sense, but was a judgement of the kind described by Brooke L.J. in *Prudential Assurance Co. Ltd. v. McBains Cooper* [2000] 1 W.L.R. 2000 at 2008.” His Lordship thereby imputed to the observer knowledge of a highly technical procedural rule.

hypothetical observer is not considered to be a layperson. Similarly, a high level of knowledge of the substantive law has been attributed to the fair-minded and informed observer. In *Hart v. Relentless Records*, for example, it was held that the observer would understand aspects of the law relating to misrepresentation, causation and security for costs, as well as the meaning of “goodwill.”¹³⁸ This is significant as these concepts are far from straightforward or widely understood.¹³⁹ In short, therefore it seems that the informed observer is to have knowledge not only of the “facts of the case in question” but also legal practices, legal procedures, and even points of law.¹⁴⁰

B. Who is the Reasonable Observer in the Irish Context?

In Ireland, there has been very little discussion of the knowledge that should be attributed to the reasonable observer. For example, in the case of *Dublin and County Broadcasting v. Independent Radio and Television Commission*, the plaintiff’s major argument was that Mr. O’Donovan, one of the ordinary members of the respondent Commission had an interest of a pecuniary nature in one of the successful applicants.¹⁴¹ This individual owned shares in a company but in fact, as a matter of strict law concerning the assignment of shares, Murphy J. accepted that, unknown to Mr. O’Donovan, he had retained some residual legal interest in the shares.

Murphy J. held that the Commission member had sought to divest himself of his shares several months before the relevant time and that he had *bona fide* believed he had done so.¹⁴² In addition, the judge held that the vast majority of people would

¹³⁸ [2002] E.W.H.C. 1984 (Ch). at para 31.

¹³⁹ *Ibid.* the court stated that:

[t]he observer is not only fair-minded but informed. He is taken to understand the underlying facts relating to an incident said to require recusal and their significance. This means he has to have been informed as to the relevant substantive and procedural rules...he must be taken to know what the case was about, namely, so far as relevant here, passing off. He must be taken to know that what either claimant had to prove is that it had a goodwill in the name ‘Relentless,’ that the use by the defendant amounted to a misrepresentation, and that there was resulting damage. I do not think he would have to know much about the technicalities of trade mark law other than it can be complicated.

¹⁴⁰ *Berg v. I.M.L. London Ltd* [2002] 1 W.L.R. 3271 at 3277, *per* Stanley Burnton J.

¹⁴¹ (12 May 1989, unreported), High Court (Murphy J.) [hereinafter *Dublin and County Broadcasting*].

¹⁴² *Ibid.*

have believed that this was the position.¹⁴³ Hogan and Morgan note that this private transaction was accepted as crucial, yet there was no attempt to consider whether the reasonable observer would have known this.¹⁴⁴ Similarly, it was not investigated whether the reasonable observer would have known that this transaction was defective or that the defect was not relevant in equity.¹⁴⁵

It was stated in this case that the question of bias must be determined “on the basis of what a right-minded person would think.”¹⁴⁶ Murphy J. further elaborated on this point when he held that the case should not be decided on the basis of a suspicion of a person who is “ill-informed and did not seek to direct his mind properly to the facts.”¹⁴⁷ This reference to the ‘facts’ suggests that the reasonable observer would be aware that Mr. O’Donovan had retained a residual legal interest in the shares, a highly technical point in equity law.

In *Kenny v. T.C.D.*, the plaintiff applied to the Supreme Court for an order vacating an earlier Supreme Court order on the ground of objective bias.¹⁴⁸ The plaintiff argued that one of the Supreme Court judges, namely Murray J. (as he then was), who heard the first defendant’s application to dismiss the claim, was a brother of an architect in the firm of architects which was responsible for the design and execution of the development, the subject matter of the proceedings.¹⁴⁹ Fennelly J. spoke of “the hypothetical reasonable person”¹⁵⁰ which he described as “an independent observer, who is not overly sensitive, and who has knowledge of the facts.”¹⁵¹ This independent observer would know the facts both in favour and against the conclusion that there was a risk of the possible apprehension of bias. Therefore, the individual would know that the judge and a senior architect in the firm were

¹⁴³ *Ibid.* at 16. The trial judge’s crucial finding on the facts was that “I would also accept that the vast majority of people would believe that such was the case and he could not as a matter of law or honour resile from the action he had taken and he has shown no indication of any intention to do so.”

¹⁴⁴ Hogan and Morgan, *supra* note 5 at 533.

¹⁴⁵ In *Dublin and County Broadcasting*, *supra* note 141, it was held at 15-16 that the plaintiff’s argument failed on the ground that the pecuniary loss or gain must be a real possibility and “one which is known to the person exercising the judicial function, if it is to invalidate the decision.”

¹⁴⁶ *Dublin and County Broadcasting*, *supra* note 141 at 16.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Kenny*, *supra* note 124.

¹⁴⁹ The plaintiff alleged that that firm of architects had participated in the concealment of material from the High Court in the leave application.

¹⁵⁰ *Kenny*, *supra* note 124 at 45.

¹⁵¹ *Ibid.*

brothers, but would also know that the architect brother had no involvement in the development.¹⁵²

Therefore, according to Fennelly J., the question was whether a “reasonable observer might have a reasonable apprehension” that a judge, hearing such allegations being made against the firm of architects in which his brother was an employee, might find it difficult to maintain complete objectivity and impartiality.¹⁵³ This observer had to take into account the fact that the brother was not in any way directly involved in the subject matter of the litigation.¹⁵⁴ In addition, the firm of architects was not a party to the action and was only a witness in the proceedings. However, Fennelly J. concluded that the test of objective bias was satisfied.¹⁵⁵ Clearly then, a very strict approach was taken by the Supreme Court in *Kenny*. It is contended that this was not the correct outcome to the case, as a reasonable and fair-minded observer would not perceive any bias on the facts presented in that case. The court suggested that it must “err on the side of caution” when setting aside one of its own decisions.¹⁵⁶ This could be a significant underlying reason for the decision and may suggest that the decision was a “once off” because Caesar’s wife must be above suspicion. Therefore, surely there is a danger that the test for apparent bias may become obscured if the knowledge of the reasonable observer is not properly assessed in this jurisdiction. The implications of attributing too much or too little knowledge to the reasonable observer will now be discussed.

Atrill contends that the focus on the characteristics of the hypothetical person has been controversial and has generated a confusing jurisprudence.¹⁵⁷ This is because imputing too much or too little knowledge to the reasonable observer could have various implications for the test against apparent bias. There is a danger

¹⁵² *Ibid.* Counsel for the first defendant did not dispute at the hearing that, if that brother had actually been involved in the facts of the development, the test for objective bias might well be met. Fennelly J. remarked at 45 that “[h]owever, the hypothetical independent reasonable observer would also know the substance and tenor of the allegation made in the proceedings.”

¹⁵³ *Kenny*, *supra* note 124 at 46.

¹⁵⁴ *Ibid.* Fennelly J. asked whether such an observer could be concerned that the allegations were of a nature to cast doubt on the integrity of at least one member of the firm and that a judge should not adjudicate on such a dispute? He stated that “[a]pplying the most favourable interpretation of the facts from the plaintiff’s point of view, and bearing in mind that the court should be especially careful where it is considering one of its own judgments, I believe that the test of objective bias should be held, in all the circumstances, to be satisfied.” *Ibid.* at 46.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ S. Atrill, “Who is the ‘Fair-Minded Observer’? Bias after *Magill*” [2003] C.L.J. 279 at 281.

that if the reasonable observer is uninformed, then the test for apparent bias may become obscured. For example, what if it was unknown, during the course of a case that the decision-maker and a party were half-brothers, although they had different surnames? It would be unsatisfactory if important information such as this was not attributed to the reasonable observer. This is because the rule against bias was originally founded on a rationale of fairness and accuracy in decision-making.¹⁵⁸ Thus, facts which would suggest bias on the part of the decision-maker, but are not known by the hypothetical observer, would result in an unfair outcome for the applicant.

Attributing too much information to the reasonable observer, however, will effectively put the observer in the court's shoes. There is usually no way of knowing how much information the applicant had. Consequently, the view of the informed observer therefore becomes dangerously close to being the view of the court.¹⁵⁹ This means that the test becomes closer to the real likelihood test which of course is the very problem the reasonable apprehension test was designed to avoid. Consequently, the temptation to impute this kind of specialised knowledge risks divorcing the test of bias from the interests it is meant to advance, namely, the confidence of the non-specialised public. For as Denham J. wisely remarked in *Bula*, the premise on which decisions are based is that in the administration of justice, public confidence is more likely to be maintained if the courts adopt a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question.¹⁶⁰

VI – Conclusion

In an area of growing importance, as witnessed in the growing number of recent cases, this article has made suggestions for improving and clarifying the law on four practical points upon which the law needs to be clear. To address the points outlined in the introduction:

¹⁵⁸ Toy-Cronin, *supra* note 20 at 851.

¹⁵⁹ Hanif, *supra* note 76 at 81.

¹⁶⁰ *Bula*, *supra* note 111 at 486, *per* McGuinness J. See also *Kenny*, *supra* note 124 at 46 where Fennelly J. noted that when investigating bias the courts “should err on the side of caution.” This rationale is instrumental as the protection against bias is conceived as a device through which the public confidence in the administration of justice is achieved.

(i) Subjective bias is outdated in the law today. This is because it is extremely difficult, if not impossible, to prove subjective bias in the mind of a decision-maker. In practice the court merely objectively draws inferences from the actions of the decision-maker in order to show the appearance or possibility of bias.¹⁶¹ It is concluded that allegations of bias should be dealt with under the wider category of apparent bias. This would mean treating every case of bias using the objective test of apparent bias.

(ii) If the automatic disqualification rule is applied in financial cases, it may well lead to the disqualification of decision-makers in situations where a closer inspection of the circumstances would reveal that there was never any realistic possibility of bias. Consequently, it is argued that this category of bias is crude and therefore unwelcome in this jurisdiction. There is nothing that can be achieved by automatic disqualification that cannot be achieved by the application of a reasonable observer test for apparent bias.

(iii) The test for apparent bias in Ireland is now objective and is “whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues.”¹⁶² It is postulated that this objective test is a prudent approach to investigating allegations of bias as it is both flexible and upholds the idea of maintaining confidence in public administration.

(iv) Finally, the idea of the reasonable observer in the reasonable apprehension test leads to the important question of what the reasonable observer must be taken to know. Irish case law has established that a “reasonable and fair-minded” observer must apprehend bias on the part of the decision-maker.¹⁶³ It is posited that if too much knowledge is attributed to this hypothetical observer, then the court will effectively put the observer in the court’s shoes. It is argued that the temptation for the courts to create a

¹⁶¹ In *U.S. v. Cooley* 1 F. 3d 985 (10th Cir. 1993) at para. 40 it was held that a “judge’s actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue” and “the inquiry is limited to outward manifestations and reasonable inferences drawn therefrom.” *Ibid.*

¹⁶² *Bula*, *supra* note 111 at 441 where Denham J. added further that “[t]he test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person.”

¹⁶³ *Ibid.* at 486.

highly-detailed and knowledgeable observer would drag the test for apparent bias away from the reasonable apprehension test and towards the position of the real likelihood test. Therefore, it is important that the courts strike a balance between attributing too much or too little knowledge to the reasonable observer so as to avoid, in effect, reverting to the real likelihood test.

Public confidence is clearly established as the conceptual foundation for the rule against bias.¹⁶⁴ While a high level of fairness is to be expected both in the courts and in organs of public administration, it may be difficult to achieve the impartiality of the mythological Greek figure, Rhadamanthus, who in reward for his exemplary sense of justice, was made a judge of the underworld after his death.¹⁶⁵ Of course, in the real world there are practical difficulties and a compromise must be reached between Rhadamanthus and these practical difficulties. Taking this realistic approach in relation to the law, it is concluded that the *nemo iudex in causa sua* rule is developing into a particularly useful and well rounded doctrine.

¹⁶⁴ Toy-Cronin, *supra* note 20 at 873.

¹⁶⁵ See P. Lagasse, L. Goldman, A. Hobson and S. R. Norton, eds., *The Columbia Encyclopaedia*, 6th ed. (New York: Columbia University Press, 2008).