

# PREJUDICE – THE JUDICIAL VIRUS

**Justice J.A. Dowsett**

*Presented at the ‘Judicial Reasoning: Art or Science ?’ Conference (February 2009)  
National Judicial College of Australia/ ANU College of Law/Australian Academy of  
Forensic Sciences*

## INTRODUCTION

Dr Bennett’s paper concerning judicial neurobiology and the decision in *Markarian* (*Markarian v The Queen* (2005) 228 CLR 757) provoked an unusual emotion in me – that of embarrassment. How embarrassing it is that the geography and general function of the human brain can be described in one paragraph, whilst an analysis of the reasons of the High Court in a simple sentencing case takes more than 3 pages. That is, to say the least, counter-intuitive. It is even more disconcerting to note that 2 members of the Court took, between them, 32 pages to explain why each, for different reasons, agreed with the other four members of the Court who had taken just 19 pages to give their joint reasons. This somewhat extreme example of judicial reasoning highlights an aspect of the present topic – the importance in our legal system of reasons for decisions – reasons which must reflect the decision-making process itself. It is my thesis that this requirement is a powerful safeguard against prejudice. I will return to that subject.

I understand Dr Bennett’s paper to be about prejudice, conscious and unconscious, and that is the subject which I propose to address, particularly judicial prejudice. I shall use the word “prejudice” to include any factor which may influence a judge in conducting a case, which factor is strictly irrelevant to such conduct. I treat the term as more or less synonymous with “bias”, particularly actual bias as we generally understand it. Prejudice may be conscious or unconscious. I may not always clearly distinguish between the two. If a judge consciously allows his or her judgments to be infected by prejudice, there is little which can be done about it.

I do not propose to focus on the procedure for challenging a decision allegedly infected by actual or apparent bias, or upon the circumstances in which an appellate

court will intervene where such bias is demonstrated. This programme is concerned with judicial reasoning and not with the correction of error. I shall rather focus on the nature of the risk of prejudice in judicial reasoning and how we attempt to minimize that risk, under the following headings:

- The judicial process;
- Sources of prejudice;
- Manifestations of prejudice;
- Detection of prejudice;
- Systemic defences against prejudice;
- Practitioners' role in avoiding prejudice and its consequences; and
- Judicial defences against prejudice.

## **THE JUDICIAL PROCESS**

Being a judge is about “judging” and “judgment”. These terms, although derived from the same root, have different shades of meaning. “Judging” clearly describes the making of decisions – we judge ballroom dancing, dog shows and beauty contests. We have touch judges and diving judges. Those judges “judge” in the sense of making a decision. The word “judgment”, however, implies a degree of discretion or discernment, perhaps involving consideration of whether one should decide at all. Judgment also involves assessment of how one will approach the decision-making approach, and how one will assess relevant considerations. Thus judging, in the curial sense, involves both decision-making and exercising judgment about how decisions are made. Curial judging differs from being a touch judge or a judge in a beauty contest in one other, very significant, respect – the requirement that judges give reasons which satisfy quite high minimal standards.

In my view a major impediment to success in our efforts to get politicians, public servants and the general public to understand many of the problems which judges face, and to maintain appropriate standards in new appointments, is that politicians, public servants and the general public do not understand the rigours of decision-making where comprehensive and cogent reasons must be given, not merely acceptable to half-interested politicians, public servants and the general public, but

acceptable to the parties, one's peers in the courts, the profession and the universities. I venture to suggest that there is no other area of decision-making in the public or private sector where reasons for decisions must be so carefully prepared and are subject to such detailed scrutiny.

Of course, other people make decisions. Ministers, senior public servants and corporate board members make decisions of great importance. Frequently, they do so on the basis of detailed recommendations. But the process generally involves a choice between alternatives advanced in a brief, without having to give anything like a reasoned explanation for that choice. In recent times the law has required non-judicial decision makers to give reasons for the purposes of merits review or judicial review. However such reasons almost invariably leave much to be desired. They would rarely, if ever, pass muster as judicial reasons.

Other professional people, such as medical practitioners and engineers, frequently make serious decisions, based on multiple considerations, but detailed reasons are usually only prepared if lawyers require them for forensic reasons, or if the professional wants to publish. Time and again, we see the difficulties which competent decision makers, including professionals, encounter in court when asked to explain their decisions. No doubt there are other areas in which detailed written reasons for decisions are prepared, but the high level of importance attached to reasons in the judicial process is, I think, almost unique.

This emphasis on reasons in the law is no doubt the consequence of three factors which lie at the heart of our legal process – the public administration of justice, the tradition of orality in such administration and the doctrine of precedent. The requirement that the courts operate in public leads inevitably to the conclusion that the real reasons for the decision must be available to the public. It may be thought odd that the tradition of orality should lead to lengthy written judgments. However the emergence of written reasons in place of oral reasons is a quite recent development. Finally, reasons are a necessary element of the system of precedent. A decision is, in itself, of little assistance in other cases unless one knows the facts which were treated as important to it and the view of the law upon which it is based. The reasoning process becomes part of the common store of legal thought and

knowledge available to lawyers. Some of it may even be stored in one of those pockets in the brain which have such curious names.

I have said that politicians, public servants and the public do not generally understand the process of giving reasons. This is because very few people have ever been subjected to the extreme discipline which such a process demands. I suggest that the requirement to give reasons, and to read and understand them, has, itself, shaped the training of lawyers, and therefore of judges. Our approach to decision-making has also been shaped by this requirement. We know that we must put aside prejudice and emotion simply because we know that we will not be able to justify our decisions if we allow them to be influenced by such matters. That is not to say that prejudice and emotion can be totally eliminated. But we develop a kind of personal censor which warns us of our human weaknesses. When we come to prepare our reasons, the censor cuts in, alerting us to problem areas. I am not suggesting that judges avoid every human failing. I am merely saying that we acquire a degree of insight which reminds us that we will have to justify our decisions, and that we are fallible. This insight does not develop overnight. It certainly does not come with one's judicial commission. Old fashioned as the view may be, I believe that it is fostered by the traditional background of the judge – involvement in the court process as a practitioner who must identify the strengths and weaknesses of both sides of the case and be aware of the human weaknesses which may impede its just resolution.

## **SOURCES OF PREJUDICE**

A legal system which relies upon professional judges necessarily accepts that every judge's background will be the product of a unique combination of circumstances— general education – formal and informal; theoretical and practical professional education and training; professional experience; and, as well, the whole range of life experiences – good, bad, common and uncommon. Nobody comes to the bench formed and guided only by a clear and completely correct understanding of the law as it is, let alone as it has been, or will be. Nor is the new judge innocent of any knowledge, experience or understanding of those complex organisms, the individual and combined activities of which he or she is to judge – the human being and human society. Indeed, it is generally thought that judges should have such experience. We

also know that special interest groups within the community are very keen to “educate” judges so that we will appreciate their particular points of view about many matters which we have to consider in our work.

It is often said that the judiciary is, collectively, too male, or too white, or too Anglo-Celtic. Quite recently, I heard an eminent judge suggest that decisions of the High Court in the last 30 years may have been influenced by the fact that many members of the Court had studied under one professor at the University of Sydney. But in the end, even if our formal educational experiences and ethnic backgrounds are broadly the same, they will, in no sense, be identical. To an even greater extent will our personal or professional lives have differed substantially.

It is self-evident that nobody can hope to form a true picture of a judge’s background or how it may shape his or her approach to a particular case, or to cases generally. We can only guess and, in guessing that a judge may have a particular prejudice, we may merely reflect our own prejudices.

It is also self-evident that a judge will not be fully aware of how his or her own background has shaped, and continues to shape, views, attitudes and conduct. Our own views of ourselves are almost invariably untrue or, at least, inaccurate. We cannot hope to understand how we have come to be what we are, what has influenced us and how. I recently came across the following observation by H.L. Mencken concerning the works of Shakespeare:

*Shakespeare was the theatre’s greatest craftsman: he wasted no tortured ratiocination on his plays. Instead he filled them with the gaudy heroes that all of us see ourselves becoming on some bright morrow, and the lowly frauds and clowns we are today.*

Perhaps that is as close to self-knowledge as we can come.

All of this self-indulgent rambling is, of course, directly related to judicial decision-making. We hope that our decisions are, as far as possible, based on an objective assessment of evidence and law, but it all depends on what is contained in

the phrase “as far as possible”, to paraphrase a common expression in the patent cases. Judging is, inevitably, a very personal thing. Perhaps it would be better if it were less personal, but neither the Industrial nor the Technological Revolution has yet reached the Judiciary. We are a cottage industry, producing hand-crafted products, all of which are “one off” and of varying quality. Judging is labour-intensive and therefore quite expensive. There is great pressure to produce judgments efficiently, which means quickly. Even apart from efficiency, justice delayed is said to be justice denied. One of the ways in which a judge can expedite a decision is by relying on past experience and that of others. In a way that is what the doctrine of precedent is about – exploiting the collective wisdom of the judiciary as reflected in the cases. But is that a form of prejudice or pre-judgment? For example, how does a judge decide whose opinion he or she will adopt? What about a judge’s non-legal experiences? May not they also guide him or her in a particular case? When is a judge using his or her experience of the world (as we tell juries that they should), and when is he or she pre-judging?

Recognition that a judgment may be infected by prejudice is not new, nor is such recognition an insight which is peculiar to lawyers or judges. Society has been aware of the risk for as long as we have been judging one another. When administration of the law was more concerned with the interests of the state, and less concerned with individual rights, prejudice was not always seen as a bad thing, provided that it was in the right direction. But the separation of the judiciary from the executive reflected the increasing importance of individual rights and freedoms. The need to avoid prejudice became more obvious and more important.

We have, over the history of the common law, as in other legal systems, sought and found ways of dealing with the risk of prejudice and the perception of prejudice. We may be able to improve what we do, but I very much doubt whether there will be dramatic new advances. However, if we examine the mechanisms which we now have, we may be able to improve them.

Absence of prejudice is not exclusively a judicial quality. It is part of the notion of fairness which underpins much of our morality and, it is often said, our national character. Thus inculcation of the need for fairness starts in childhood, in the

home, and develops at school, on the sporting field and in the whole range of activities which children undertake. A cricket umpire or a netball umpire has to be fair. That is, perhaps, a child's first experience of a formal arbitration process. Of course there are also informal processes at home, at school and at play. Generally, one hopes, parents and teachers provide ongoing examples of fairness. In any event it would be surprising if a law student had to be told that a judge must not be prejudiced. However it is at Law School that a law student will first become aware of how the idea of prejudice, or apprehension of it, arises in the judicial process and how it is dealt with.

Our system of law has two key characteristics which are drummed into students from the beginning of their studies:

- that the law is substantially to be found in the cases (the doctrine of precedent);  
and
- that the judicial system is adversarial.

Neither characteristic is calculated to encourage students or lawyers to approach a new problem with a completely open mind. A judge cannot, and will not, ignore earlier decisions from which he or she is obliged to distil relevant legal principles. But there is much more in the cases than clear statements of principle. There are attitudes, approaches and language which are frequently creatures of their times. They may or may not be currently valid. They will reflect perceptions of society and of the roles of the law and the courts which may have a conscious or unconscious effect upon our judicial thinking and conduct. It is both understandable and desirable that a judge should see him- or herself as part of the long common law and chancery traditions – as being a current occupant of an ancient office. But it does not follow that a judge may, ought, or even can, act or think as if he or she were Henry II's Chief Justiciar or Henry VIII's Chancellor. I suspect that inflated ego is a common cause of prejudice. Yet much in our history, our system of precedent and our language is calculated to produce that character defect.

If judges are expected to be fair and open-minded, why do so many of us strongly believe and assert that experience in the adversarial context of the Bar is

generally the best training for a potential judge? Indeed one prominent barrister who left the judiciary to return to the Bar once told me that the greatest difficulty in doing so was re-learning not to be fair. We frequently say that some judges continue to be advocates even after appointment. If that is true, then perhaps they are also partisan in their decision-making. As I have previously observed, I nonetheless favour the profession as the primary source of judicial appointments. I will return to this question.

There are many points in the judicial process at which prejudice can intrude. Generally, we speak of its effect upon particular decisions, final or interlocutory. But my present concern is to identify how we can help judges to counter the effects of prejudice. If we focus on formal decision-making we may overlook a large part of the problem. Prejudice is part of the background to be neutralized in the decision-making process, not part of that process.

I want to say something about particular causes of prejudice in the judicial context. In this I will be reflecting my own views and experiences and the commonly expressed views of others. Do not assume that it is all the product of deep self-analysis, although I cannot deny that some aspects reflect my own views of myself. Please don't try to guess which. It may seem that I believe there to be widespread prejudice in the judicial system, sufficient to undermine any claim which it may have to public confidence. That is not my view. I wish simply to demonstrate the multiplicity of possible sources of prejudice in the judicial process. It does not necessarily follow that every possible source of prejudice leads to an outcome which is infected by that prejudice.

Prejudice may be engaged before a judge knows anything about the substance of a case. The name of a party might promote a particular reaction. The identity of counsel or solicitor may do so. Even the nature of the case may enliven a prejudiced attitude. It is occasionally said that some judges assume, at least subconsciously, that every plaintiff in a personal injuries case is probably genuine or probably a malingerer; that every Native Title claim is either probably meritorious or a complete fraud; that every industrial relations case involves a blood-sucking employer or a lazy and dishonest employee. Such views are partly the product of the adversarial nature

of our system. There may be a grain of truth in such propositions, to the extent that some judges may have some predispositions. But such predispositions are held with varying degrees of tenacity.

One's attitude to a case may be affected by one's perceptions concerning the legal advisers. Some lawyers have a reputation for acting for disreputable clients. Some, but only a few, are thought to be, themselves, dishonest in their professional conduct, and therefore unable to be trusted in the conduct of their cases. Others are thought to be, in some degree, unreliable because of incompetence or a tendency not to prepare thoroughly. These perceptions may be valid. They may cause the judge to exercise particular caution, to proceed in a way which is calculated to protect the court and the parties from adverse consequences. But the line between caution and prejudice may be very fine. It is also possible that a judge may hold a favourable view of a particular legal practitioner. He or she may have been the judge's master or pupil. They may be friends. Or the judge may have formed a favourable view of his or her capacity. Such perceptions cannot be avoided but, again, they may initiate prejudice.

A judge may simply not like a particular category of case or a particular legal approach to a problem. Such feeling may be rooted in academic principle or dislike of, or lack of respect for, other judges, academics or legislatures. One can readily identify examples of this. The doctrine of unjust enrichment has occasionally produced judicial outrage, as did the rapid expansion of equitable estoppel in the 1960s and 1970s. Attitudes to the citation of cases from other jurisdictions is another example. It has been said that if one finds oneself in the Canadian section of the library, one is lost. Differing attitudes to Lord Denning's work is another example. Even in our own relatively short legal history, citation of the views of some judges is readily accepted whilst citation of others is as readily rejected, perhaps without reading them. These perceptions are all capable of producing an unconscious prejudice which may affect the outcome of a case.

Although I have characterized these sources of prejudice as arising prior to actual involvement in a case, many of them may also arise thereafter, either in interlocutory proceedings, during a trial or hearing (including an appeal) or even

while writing a judgment. However, at trial, there are other potential sources of prejudice. Some are obvious – the witness who is, in one sense or another, attractive or unattractive; counsel who is co-operative, quick and well-prepared and counsel who is not; the case which is straight forward, and the case which resists all efforts to simplify it, or reduce it to easily manageable proportions; the case which clearly merits the time, money and effort put into it, and the case which does not. Another possible source of prejudice is a premature conclusion as to the merits of the case.

Prejudice may arise out of conflict between the case in hand and the judge's other commitments. This is a long standing problem. As Pope wrote:

*“Wretches hang that jurymen may dine”.*

At the end of the day, it is unlikely that a judge would consciously prefer his or her personal comfort or convenience to the interests of the parties, but the pressure of another engagement may sub-consciously have that effect. Other court commitments deserve to be balanced against the unreasonable demands of parties who are simply wasting time, but there is still a risk of injustice.

Even in the process of deciding the case, prejudice may be engaged. The desire to give an extempore judgment may cause a judge to overlook a difficult aspect or choose the easier course. By giving immediate judgment, the judge loses the opportunity to allow passions to cool so that conscious or unconscious hostility towards, or preference, for counsel or a party can subside. In preparing a reserved judgment, there will be a greater chance to identify and neutralize any such prejudice.

Prejudice may arise out of a desire to deal with a particular issue about which one wishes to write. Such desire may lead the judge to decide the case in such a way as to enable him or her to do so. The potential consequences of the judgment –for the parties, the government or otherwise – may also be a source of prejudice. We may say “Let justice be done though the heavens fall”, but there is, usually, an understandable desire to avoid such a catastrophe. On the other hand, it must be acknowledged that some people revel in producing startling effects. This, too, can be a source of judicial prejudice.

## MANIFESTATIONS OF PREJUDICE

Most judicial conduct is not easily characterized as demonstrating prejudice. For that reason parties more frequently allege apprehended bias. By definition, apprehended bias must be identifiable. It deals with the possible perception of injustice and the need to uphold confidence in the legal system. However actual prejudice or bias may produce actual injustice.

As judges we rarely demonstrate prejudice in our words although, occasionally, we do. Frequently, a judge will express a tentative view of a case at a very early stage, although he or she will usually qualify the observation in such a way as to demonstrate that the view is, at most, provisional. Generally, such statements are not evidence of prejudice. They are, and are intended to be, words of advice based on experience, designed to avoid unnecessary cost to the parties and waste of court time. Modern judges are very concerned about the cost of litigation. There is also a perception that legal advisers are sometimes not robust enough in their advices as to prospects of success. Provisional indications are designed to remedy such shortcomings.

Prejudice may manifest itself in more subtle ways. A judge's attitude to taking a case, or type of case, may indicate something about his or her attitudes. Enthusiasm for doing so may sometimes indicate a perception that he or she has something to achieve or to gain, other than simply to decide it. That is not to say that formal or informal specialization necessarily implies prejudice, nor do I intend to discourage general enthusiasm for doing whatever work is going. Conversely, reluctance to take a case, or type of case, may reflect lack of experience in the area, an existing backlog of judgments or, very rarely, laziness. But it may also reflect a dislike of the area of the law and, perhaps, of those who are engaged in it. Such reluctance might even reflect a judge's concern that he or she harbours prejudices about it. Reluctance of this kind may be demonstrated at the time of first assignment or during interlocutory proceedings (in the form of repeated exhortations to settle), reluctance to assign trial dates (further exhortations to settle), enthusiasm for mediation or adjournments (settlement is still a good idea), at the trial (one last

exhortation to settle) and in delay in writing the judgment (Why didn't they settle? They should have settled). Again, enthusiasm for settlement may reflect quite different motives, but you will see my point.

Other behaviour in court may, or may not, indicate prejudice. Even when it does so, the nature of such prejudice may not be easy to discern. A judge will not always be rude to the side which he or she thinks should lose and of sunny disposition to the anticipated winner. That a judge is interventionist, aggressive, or rude does not necessarily, or even usually, mean that he or she is prejudiced in connection with the outcome. Undue delay and obfuscation are just as frustrating when they come from the side which is perceived to have the merits as when they come from the side which seems to lack merit – sometimes more so. As the trial proceeds, the motivation for such judicial conduct may not be prejudice, but rather a reasonable assessment of the case as disclosed. It is artificial to think that a judge must avoid forming a provisional assessment of the case, or of aspects of the case, as it proceeds. Cases are not conducted by way of ambush. There will rarely be big surprises in the course of the evidence.

In some cases a careful analysis of the judge's apparent views about the case and of his or her conduct towards counsel, parties and witnesses may suggest prejudice, but that will be an extreme and rare case. Most judges are experienced enough to be able to conceal prejudice. More importantly, most are sufficiently in control of themselves to recognize the possibility of prejudice and to neutralize it, at least whilst they are in court. After all, most people are able to present an acceptable public appearance.

Prejudice may well manifest itself in the judgment-writing phase. Although we speak of judgment-writing, we should speak of decision-making. A judge should not generally form a concluded view until he or she has fully tested the relevant reasoning. The ultimate decision-making process will proceed in tandem with the preparation of reasons. The processes are inevitably intertwined. If one has difficulty in expressing reasons in written form, it may well be that the thought process has miscarried. One possible reason is unrecognized prejudice.

When a judge hears oral evidence, the witness's overall appearance and performance contribute to the formation of an impression of that witness and of his or her evidence. Frequently, almost inevitably, one tends to see a witness in isolation from the rest of the evidence, especially the documentary evidence. In analysing the whole of the evidence for the purpose of preparing reasons, a judge has the opportunity to assess evidence in context and in total. That exercise requires willingness to set aside earlier, necessarily provisional, impressions. A judge should not assess the totality of the evidence in order to confirm his or her view of a witness. Rather, the witness's evidence should be assessed as part of that totality. To fail to do so is to succumb to prejudice. However cleverly the process may be recorded in the reasons, it is to commit the old-fashioned magistrate's sin of trying to dispose of the case by non-appealable findings of fact which are based merely on a preference for one witness or class of witness.

In assessing the evidence, it is important that the judge keep in mind the onus of proof as it applies to the case and to issues within the case. Failure to do this creates the risk that a decision will be "instinctive", in which case it may be the product of an "instinctive" prejudice. Reference to the relevant onus of proof inevitably invites reference to, and weighing of, the evidence, so that the risk of prejudice is reduced.

Frequently, the outcome of a case will depend upon the judge's characterization of the problem. Characterization will determine the principles to be applied, the authorities to be cited and, perhaps, the legislative provisions to be considered. The proper characterization will not always be clear. A choice between alternatives may well, in the end, involve subjective considerations, and therefore be a point at which prejudice may manifest itself.

## **DETECTION OF PREJUDICE**

Although one may suspect prejudice, it is very rarely alleged, let alone proven. We do not encourage allegations of actual prejudice. If such allegations were common it would seriously undermine confidence in the system in the absence of any viable alternative. Further, allegations of prejudice may undermine the policy of the

law which favours finality in litigation. If the allegation is based upon the unreasonableness of the result, the appellate court will effectively have to re-try the case in order to dispose of the appeal. And then, if the appeal succeeds, there may be another trial. If the allegation arises out of extrinsic evidence demonstrating actual prejudice, the appellate court will have to assess its effect given the nature of the case – again involving a degree of re-trial. Further, such an allegation may emerge many years after the decision in question.

A judge makes decisions at various points between his or her acquisition of the case and its ultimate disposition. Decisions may be of a legal kind or merely administrative; they may be interlocutory or final; they may be discretionary or non-discretionary. The decision in *Markarian* is an example of a discretionary and final decision. Appeals from such decisions are traditionally regulated by the decision of the High Court in *House v The King* (1936) 55 CLR 499. In effect, unless the judge overtly demonstrates error (including prejudice), the decision will only be reviewable on appeal if the outcome demonstrates that there must have been error – in a sentencing case, that the sentence is manifestly inadequate or manifestly excessive. Given the complexity of the typical sentencing matrix, particularly the wide sentencing discretion conferred by most criminal statutes, that is frequently difficult to do. Similar comments apply to most discretionary decisions. Prejudice is therefore difficult to correct.

In the case of non-discretionary final decisions, successful appeals on questions of law are more frequent than are appeals on pure questions of fact. Appellate courts are reluctant to enter the factual arena for two main reasons. Firstly, it is usually very hard to re-capture the atmosphere of the trial in order to understand the trial judge's findings. There is also the trial judge's advantage in having seen the witnesses. The other reason is that errors of fact are not as potentially damaging to the overall fabric of the law as are errors of law which may cause a miscarriage of justice, not only in the case in question, but also in later cases, if the decision is followed.

Perhaps the most pernicious aspect of prejudice is that in a reasonably intelligent and well-educated person, it may be unconscious and, to others, virtually impossible to detect. I have been at pains to demonstrate the numerous causes of

prejudice and points at which it may emerge. The effects of prejudice are potentially very serious. As it is difficult to detect, it is of the utmost importance that we seek to avoid, or at least minimize, its occurrence.

### **SYSTEMIC DEFENCES AGAINST PREJUDICE**

I have already mentioned some of the systemic safeguards against prejudice. Obviously enough, the greatest safeguard should be the selection process. Clearly, a judge should be of good character. That may be a safeguard against conscious prejudice, but not necessarily against unconscious prejudice. I have at least implied that the circumstances in which a judge works may create prejudice. Inability to cope with the work load may lead a judge to take shortcuts which may result in prejudice. Lack of knowledge of the relevant law or fear about decision-making may produce similar results. The judge must be sufficiently confident in his or her own ability, learning, experience and capacity for work that there is no temptation to find shortcuts.

This suggests the desirability of knowing how a potential appointee has performed in broadly similar circumstances. Experience suggests that selection from the practising profession is probably the most reliable way of finding good candidates, although it is not the only way. Despite the theoretical and practical criticisms of such an approach, to some of which I have referred, the truth is that very few appointments of the traditional kind have proven to be bad appointments.

Once a judge is appointed, the system must provide an environment in which he or she has the necessary resources, including time, to discharge his or her duties. This is an area in which governments try to make economies. They are generally happy (or not very unhappy) to pay quite high salaries to judges, but they have difficulty in understanding that the cost of providing a good work environment and appropriate staff will maximize the efficient use of that most valuable resource – judicial time. For reasons which I have given, such false economy also threatens the quality of the judicial product – a reasoned decision. One deficiency may well be prejudice.

Needless to say, the principles of judicial independence are also designed to minimize the risk of prejudice. A judge must not be fearful of governmental or public reaction to a decision. Nor should the judge be attracted by the favours which others may offer. In this context, too, it is important to stress the need for individual independence within the court structure. A head of jurisdiction must not be allowed to place pressure on judges in their judicial work by trying to influence the outcome, by imposing unreasonable work loads or by discriminating in the way in which both work and resources are distributed. Indeed, the primary role of a head of jurisdiction should be to ensure that the judges have a work environment in which their independence is guaranteed.

The collegiate nature of the court structure will assist the individual judge to maintain an independent attitude and to neutralize prejudice. If the ethos of the court is sufficiently strong and favourable to the proper disposition of its work, the judge will be constantly reminded, directly and indirectly, that he or she must strive to ensure that justice is done.

I have previously referred to the role of written reasons in neutralizing prejudice. If the judge must expose his or her reasoning process, then it is likely that prejudice will be identified in the writing process and, hopefully, remedied. Alternatively, there is a better chance that it will be identifiable on appeal. Inadequate reasons may well indicate a defect in the underlying reasoning process. Not infrequently, the defect will be attributable to some form of conscious or unconscious prejudice.

Finally, fair treatment by appellate courts will encourage judges to be frank and comprehensive in their reasons, and therefore more likely to identify any underlying prejudices. Appellate judges should demonstrate their understanding of the trial process and of the “rough and tumble” found there.

## **PRACTITIONERS' ROLE IN AVOIDING PREJUDICE AND ITS CONSEQUENCES**

The truth is that practitioners can do very little about this matter. They do not usually intend to attract judicial displeasure directed at themselves, the parties whom they represent or their witnesses. Nor can they reasonably be expected to know how or why a judge may be prejudiced. With research and hard work, they may narrow the areas in which prejudice can be engaged, but it is a big task. Further, the adversarial nature of their work may incline some practitioners to seek to exploit real or imagined judicial prejudice. Everybody has either done so, or claimed to have done so. It makes a good story.

## **JUDICIAL DEFENCES AGAINST PREJUDICE**

I speak now of the individual judge and how he or she can identify and neutralize personal prejudice. I have already said a little about this topic. Just as diligence by counsel in mastering facts and law will assist a judge in deciding a case, the judge's own diligence in those areas will tend to minimize the risk of prejudice. Conscious prejudice is rare. It is likely that a disciplined approach to the case will lead to such an understanding of it that there will be reduced room for unconscious prejudice. That proposition depends upon the assumption that judges generally try to do the right thing. I have seen no evidence to the contrary in my legal career, although I have frequently disagreed with judges' views as to what might be the right thing in a particular case. Good intentions are not safeguards against unconscious prejudice. The only true safeguard is the development in each judge of a healthy degree of insight into his or her own self and a degree of scepticism about his or her own motivations and capacity for self-delusion. As Thomas de Quincy said:

*“When a prejudice of any class whatever is seen as such, when it is recognized for a prejudice, from that moment it ceases to be a prejudice. Those are the true baffling prejudices for man, which he never suspects for prejudices.”*

## **CONCLUSION**

Earlier in this paper I referred to a statement by H.L. Mencken concerning Shakespeare's characters. When I inserted it I was not sure why, but I thought that it had something to do with the topic. I now see its relevance. Judicial independence and all of the other doctrinal and material trappings which surround the judiciary in the common law system are intended to serve Shakespeare's purpose – to remind the lowly frauds and clowns who are appointed to judge that we must try to bring to our judgments the qualities of better men and women than we really are.