


The Rule against Bias
Ongoing Evolution and Practical
Conundrums for Tribunals

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Introduction

- ◆ The importance of the ‘rule against bias’
- ◆ A long, long lineage.... the *Magna Carta*!
- ◆ My (more contemporary) focus today:
 - The ‘speciation’ of bias
 - The ‘spectrum’ of bias, and
 - Contemporary conundrums for tribunals

The Species of Bias

- ◆ The redundant distinction between ‘pecuniary’ and ‘non-pecuniary’: *Ebner (2000)*
- ◆ The increasingly strong distinction between ‘actual’ and ‘apprehended’
- ◆ ...and a finer taxonomy? Eg *BAT (2011)*
 - Interest
 - Conduct
 - Association
 - Extraneous knowledge
- ◆ Is there legal significance in these latter subdivisions?

The Species of Bias (cont)

- ◆ A separate test for ‘prejudgment’?

*Jia Legeng (2001); Applicant S20 (2003);
McGovern (2008)*

- ◆ A distinction between ‘incompatibility’ and ‘prejudgment’?

Isbester (2015)

- ◆ Exclusion of ‘incompatibility’ from the *Ebner* 2-step test? ‘Association’ also?

Isbester (2015);

Cf Murlan (2009); Spencer (2012); Hurd (2015)

The Spectrum of Bias

- ◆ Context is critical

*Jia Legeng (2001); Epeabaka (2001); AZAEY (2015);
Hot Holdings (2002); McGovern (2008);
Watson (2010); Duncan (2013); Isbester (2015)*

- ◆ Judges are held to a high standard

– but with a sense of reality:

Glaxosmithkline (2013)

- ◆ Tribunal members?

AZAEY (2015); Tarrant (2015)

– cf however (eg):

Ex parte 'H' (2001); SZRUI (2013); MZZLO (2015)

- ◆ Applicable to all species? *Isbester (2015)*

Conundrums for tribunals

- ◆ Multiple involvements

BAT (2011); Wilson (2011)

- ◆ The shape of the reasonable lay observer

Johnson (2000); Isbester (2015); AB (2016); Zhai (2015); Eastman (2015); ALA15 (2016); Lawrie (2016)

- ◆ Are the judge or member's own reasons relevant?

BAT (2011); Wilson (2011); Zhang (2015); MZZXM (2016); Re Henry (2015)

- ◆ Post hearing conduct / comment?

Epeabaka (2001); Zhai (2015)

- ◆ Multiple decision-makers

McGovern (2008); Isbester (2015)

- ◆ Prejudgment of component issues *Bahonko (2011)*

- ◆ Allegations to be proved or 'plausibly alleged'?

CUR 24 (2012); Horne (2015); Waterhouse (2016)

Conclusions

- ◆ Ongoing speciation...
- ◆ Ever-broadening spectrum
(but more selectively applied)...
- ◆ Accumulating conundrums!