Lexcray Pty Ltd v Northern Territory of Australia
[2000] NTCA 5

PARTIES:	LEXCRAY PTY LTD
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT
FILE NO:	AP 22 of 1999 (9303729)
DELIVERED:	16 June 2000
HEARING DATES:	5 - 16 June 2000
JUDGMENT OF:	GALLOP ANGEL and BAILEY JJ

CATCHWORDS:

BIAS – Apprehended as opposed to actual bias – no apprehended bias shown – relevant principles.

Solar Optical Australia v Mills (1987) 163 CLR 628
Australian National Industries v Spedley Securities (1992) 26 NSWLR 411
R v Australian Stevedoring Industry Board ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100
R v London County Council; Ex parte Empire Theatre (1894) 71 LT 638
Livesey v The New South Wales Bar Association (1983) 151 CLR 288

REPRESENTATION:

Counsel:

Appellant:	Mr M Maurice QC with Mr A Lindsay
Respondent:	Mr J Reeves QC with Mr S Southwood

Solicitors:

Appellant:	Cridlands, Northern Territory Lawyers
Respondent:	Solicitor for the Northern Territory

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Ltd v Northern Territory of Australia
[2000] NTCA 5
No. AP 22 of 1999 (9303729)

BETWEEN:

LEXCRAY PTY LTD
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: GALLOP, ANGEL and BAILEY JJ

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 16 JUNE 2000)

[1] **GALLOP J**: This is an application made on day nine of the hearing of this appeal that Angel J disqualify himself from continuing to sit on the appeal on the grounds of apprehended bias. The stage of the appeal which has been reached is that the appellant has completed its submissions and the respondent is about to embark upon its presentation of its arguments as to why the appeal should be dismissed, the appeal being an appeal from a judgment of a single judge of this court in the respondent's favour.

[2] The particular passage which it is alleged gives rise to the apprehension of bias is to be found in the first paragraph on page 471 where after I had given some extempore reasons for granting an extension of time, Angel J, being the next senior judge on the court, gave some extempore reasons before Bailey J gave his reasons. In the course of giving his reasons, Angel J said,

> "I am generally in agreement with the Presiding Judge as to his conclusion. I do not think there is any question that the facts raised by the appellant were material facts for the purposes of s 44 of the Act. In the negligence case taken by the appellant, the facts relied on, which have been referred to by the Presiding Judge, demonstrate the falsity of key representations allegedly made in mid 1983 and early 1984 to the Dunbars by Dr Calley and are central to the appellant's case."

[3] His Honour then went on to say, and this is important,

> "The ultimate success or otherwise of the appellant's case before the trial judge, it seems to me, are irrelevant considerations for the purposes of deciding the issue of materiality. I also agree with what the Presiding Judge has said insofar as the appellant relies on the second leg of s 44(3), that is, the conduct of the respondent.
>
> The fact of the matter is, the appellant's claims are based on proceeding in ignorance of these matters until discovery was made in the action some years after the event and I do not think the appellant can be criticised for being out of time with its proceedings insofar as it is reliant on those matters, in particular the Commonwealth directive of 1987 which was central to the appellant's fiduciary duty case and non-disclosure case and the Vestey approved program matters."

[4] So his Honour is referring expressly to what I had just said and I propose to put his Honour's remarks in context by referring to what I had just said. I quoted what the High Court had said at page 469 about facts material in *Solar Optical Australia v Mills* (1987) 163 CLR 628. I then said,

> "It is, in my view, an error to approach the question of whether the facts relied upon by the appellant here were material to the plaintiff's case by reference to the findings of fact made by the trial judge. The plaintiff's case, in my view, embraced proof of the facts which were outlined by senior counsel, and I have already identified those four matters, and as such, in my view, they were facts material to the plaintiff's case.
>
> I do not accept the submission on behalf of the respondent that the plaintiff, having delayed the application to extend time, is, in effect, stuck with his Honour's findings about whether those facts are material. Those matters, in my opinion, would have been material to the conduct of the appellant's case."

[5] In my respectful view, any disinterested, intelligent observer would have realised that Angel J was referring to that part of my ex tempore judgment in the impugned remarks at page 471 which I have already read out. So, read as a whole, I do not accept the proposition that there was any sign of prejudgment in what his Honour said.

[6] It is necessary, however, to state the test. There is a convenient statement of the law on disqualification in the judgment of Meagher J in the case that we have been referred to, *Australian*

National Industries v Spedley Securities (1992) 26 NSWLR 411 where, at 448, his Honour said this,

> "The law relating to disqualification through bias was stated by the High Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116..."

[7] His Honour then quoted the dicta of the High Court in that case,

> "But when bias of this kind is in question as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be "real". The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that "preconceived opinions – though it is unfortunate that a judge should have any – do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded."

The High Court was citing Charles J in *R v London County Council; Ex parte Empire Theatre* (1894) 71 LT 638 at 639.

[8] However, that strong statement was ameliorated somewhat by the High Court in *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 to which we have also been referred by senior counsel for the respondent on this application. The principle now is as set out in the various judgments of Mason, Murphy, Brennan Deane and Dawson JJ in *Livesey*, at 293-294,

> "The principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."

[9] Their Honours went on to say,

> "Although statements of the principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning."

[10] I should say that Mr Reeves of senior counsel has expressly eschewed any actual bias on behalf of Angel J. I cannot read into the impugned part of his Honour's judgment any indication of prejudgment. I think that what his Honour was merely doing was to refer to the materiality of the matters that I had already referred to just moments earlier.

[11] Of course it is inconceivable that his Honour would have decided any question of fact and, in particular, any falsity issue in the appeal without even hearing the respondent. No person or member of the public or party could entertain a reasonable apprehension that he had done so and that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.

[12] There have been submissions put about the doctrine of necessity, and it is common ground that the doctrine of necessity does not

arise if we are not prepared to find any apprehended bias. That is clear enough from the judgment of Mahoney J in the *Spedley* case at 442-443. I do not think it is necessary to read it out, but it is not very long.

[13] The doctrine of necessity is there described by his Honour as one of the exceptions to the prejudgment principle, and his Honour concluded that, in that case, there was the apprehension of prejudgment. He then went on to consider whether the judge in that case might have, by reason of necessity, determined the matter notwithstanding the existence of that apprehension.

[14] His Honour is making it clear that it is only where the prejudgment apprehension exists that the court would then have to consider the doctrine of necessity. As I say, it is common ground that, in the event that we cannot find any prejudgment, or any apprehended bias, we do not have to consider necessity and I, for one, would not feel it necessary to do so.

[15] I would refuse the application that Angel J disqualify himself.

[16] **ANGEL J**: I agree, and would only add that what I am reported to have said at the top of page 471 of the appeal transcript, did not amount, on a fair reading, to a decision of fact or credibility, and thus no question of prejudgment arises.

[17] **BAILEY J**: I agree the application should be refused for the reasons given by the Presiding Judge.

[18] **GALLOP J**: So the order of the court is the application is refused.
