

JUDICIAL RECUSAL IN NEW ZEALAND: LOOKING TO PROCEDURE AS THE PRINCIPLED WAY FORWARD

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The well-documented Wool Board Disestablishment Co v Saxmere Co litigation thrust the often dormant issue of conflicts of interest between a judge and a litigant into the limelight. Now that the dust has settled on the controversy that culminated in Wilson J's resignation, it is pertinent to question the status quo and investigate the potential cause of these events. More importantly, it is critical to consider whether measures need to be taken to prevent, or at least to reduce the likelihood of, another such occurrence.

This article takes a principled approach to analysing judicial recusal law in New Zealand, with a particular focus on procedure. In doing so, a mismatch between process theory and the reality of haphazard self-regulation highlights the procedural shortcomings of the current judicial recusal paradigm. To remedy this, the author applies aspects of process theory to reform judicial recusal procedure and bring it in line with general civil litigation practice. The proposed reform instils some fundamental practices that are presently absent in recusal procedure. To contextualise the article's findings, the author revisits the Saxmere saga first to posit that a lack of procedural safeguards may have contributed to the saga and secondly, to suggest that, had the procedural safeguards proposed by this article been in place, the controversy could have been mitigated, if not avoided.

I INTRODUCTION

Whoever has the legislative or supreme power in any commonwealth ... is bound to govern by established standing laws, promulgated and known to the people (and not by on-the-spot decrees), with unbiased and upright judges appointed to apply those laws in deciding controversies.¹

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¹ John Locke *Second Treatise of Government* (Awnsham Churchill, 1690).

John Locke's 17th century articulation of the need to resolve "legal disputes by impartial and independent judges has been recognised as an essential underpinning of western society".² In New Zealand, an independent arbiter is a fundamental freedom affirmed by the Bill of Rights Act 1990.³ Judges are reminded of the importance of adjudicating impartially upon joining the bench. The judicial oath proclaims that judges must "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".⁴

To be impartial, one must be detached and disinterested so that one's personal views and interests do not weigh in on a matter at hand. Recusal is the means by which judicial impartiality is addressed and maintained.⁵ In accordance with Lord Hewart CJ's well-cited dictum that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done",⁶ judges must not only be impartial, they must appear to be impartial. If a judge does not appear to bring an impartial mind to adjudicating a dispute, litigants may endeavour to have the judge recused. Alternatively, a judge may recuse themselves *sua sponte* if they acknowledge that their impartiality may be, or may appear to be, compromised. While easily preached and often assumed, judicial impartiality can be difficult to ensure and observe. As Professor Charles Geyh observed, "the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial judgment".⁷

This article critiques judicial recusal law in New Zealand.⁸ Its analysis also has international application as much of the substantive law and many of the processes are prevalent in other common

2 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [32].

3 New Zealand Bill of Rights Act 1990, ss 25 and 27. Section 25(a) affirms the right to a fair and public hearing by an independent and impartial court in matters of criminal law. Section 27 affirms the right to observe the principles of natural justice, which Hammond J finds to "undoubtedly [encompass] ... the proposition that judges must be independent and impartial" in *Muir v Commissioner of Inland Revenue*, above n 2, at [32].

4 Oaths and Declarations Act 1957, s 18.

5 Throughout this article, judicial recusal and judicial disqualification will be conflated and used interchangeably. Strictly speaking, there is a technical distinction between the two terms: disqualification usually reflects a legal requirement for a judge to not sit on a case, for instance due to a per se rule of financial interest with a party, whereas recusal usually reflects a judge deciding to not sit on a case *sua sponte*.

6 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259.

7 Charles G Geyh "Why Judicial Disqualification Matters. Again" (2011) 30 The Review of Litigation 671 at 676.

8 The article focuses its analysis on the High Court and the two appellate courts in New Zealand, the Court of Appeal and the Supreme Court. Further, the article concentrates on judicial recusal at first instance, rather than on substantive appeals to higher courts based on grounds of partiality or an incorrectly adjudicated recusal motion. Research from overseas jurisdictions, such as the United States, is referred to at times to provide some psychological research and examples. While acknowledging that the law in New Zealand

law jurisdictions. New Zealand's current Chief Justice, Dame Sian Elias, articulated in a recent speech that "today respect for courts – without which the rule of law is in trouble – has to be earned and re-earned by doing and the doing has to be painstakingly courteous and fully reasoned".⁹ The Chief Justice's remarks provide some relevance to this article's inquiry by posing the question: is judicial recusal law effective in earning the public's respect for New Zealand's courts?

The significance of this article's inquiry is heightened by recent events that culminated in New Zealand's first and only judicial resignation amidst allegations of an appearance of partiality; the resignation of Wilson J (the *Saxmere* saga). The author hypothesises that the prevailing recusal paradigm is inadequate to fulfil its principal role of maintaining an appearance of judicial impartiality. The author opines that an absence of procedural safeguards may have contributed to the *Saxmere* saga and accordingly, that, had procedural safeguards been in place, the controversy may have been mitigated, if not avoided.

This article will first summarise the well-documented *Saxmere* saga to contextualise the ensuing discussion of law, principle and reform. The discussion begins with an overview of the substantive law and procedure of judicial recusal in New Zealand. Thereafter, this article will turn to first principles in looking at how the judiciary's role as society's adjudicatory institution is legitimatised. In doing so, public confidence is found to be one of the judiciary's key legitimising traits with procedural fairness being a primary driver of public confidence. Existing judicial recusal procedure will be compared and contrasted with well-accepted adjudicatory practices in New Zealand's civil litigation environment to find that the former is deficient and out of line with the latter. This article then proposes a number of principled procedural reforms to realign judicial recusal procedure with the civil litigation process. The proposals will be critiqued before finally returning to the *Saxmere* saga to highlight some of the procedural shortcomings that may have caused the controversy and to personify the proposed reform. In doing so, the author postulates that procedural reform holds considerable promise as the way forward for judicial recusal in New Zealand and indeed other common law jurisdictions.

materially differs from that in the United States, the underlying procedures relating to judicial recusal are similar. This is also a reflection of the relative dearth of New Zealand-centric scholarship on judicial recusal.

9 Sian Elias, Chief Justice of New Zealand "Contemporary Issues for Courts – Demystifying the Judicial Process" (Conference of Chief Justices of Asia and Pacific 2013, Supreme Court, Singapore, 29 October, 2013) at 1.

II THE SAXMERE SAGA

The events that culminated in Wilson J's resignation are intended here to contextualise New Zealand's judicial recusal law.¹⁰ This article will revisit the events in Part IX to personify the proposed procedural reforms, and compare and contrast this with New Zealand's current judicial recusal law.

Wilson J,¹¹ then a Judge of the Court of Appeal, was appointed to sit on a case between the Wool Board and Saxmere.¹² Counsel for the appellant, the Wool Board, was Alan Galbraith QC. Wilson J and Galbraith were good friends from their time practising together at the bar. The two were also business partners in a horse stud, Rich Hill.¹³ Wilson J privately telephoned the respondent's counsel, Francis Cooke QC, to inform him of his business relationship with Galbraith. The detail of Wilson J's disclosure to Cooke is unclear.¹⁴ On the basis of the information Wilson J disclosed in the phone call, the respondents had no objection to Wilson J hearing the appeal. The case duly proceeded and the Court upheld the Wool Board's appeal.

Subsequent to the case, the respondents discovered that the business relationship between Wilson J and Galbraith was substantially greater than they had thought. On the basis that Wilson J had not disclosed the extent of his business relationship with Galbraith, Saxmere appealed to the Supreme Court to have the Court of Appeal's judgment set aside.¹⁵ Prior to the appeal, Wilson J accepted an invitation to further disclose the nature of his business relationship with Galbraith to the Supreme Court. The Supreme Court concluded that there was no evidence that Wilson J was " beholden to Mr Galbraith because of the business dimension of their relationship".¹⁶ Thus, the business relationship was found not to give rise to a reasonable apprehension of bias and the appeal was dismissed.

10 See Judicial Conduct Commissioner *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson* (7 May 2010) at [34] for a detailed account of the events.

11 WM Wilson QC is no longer a Judge of the High Court of New Zealand following his resignation from office in 2010. However, for ease, he will be referred to as Wilson J in this article.

12 *Wool Board Disestablishment Co v Saxmere Co* [2007] NZCA 349, [2007] BCL 885 [*Saxmere No 1*]. For ease, the respondents, which include four parties, will be referred to as Saxmere throughout the article.

13 Gerard McCoy "Judicial Recusal in New Zealand" in HP Lee *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 322 at 330: "[Rich Hill] was a really significant enterprise with revenue in the millions of dollars and it owned livestock and land". Nicky Hager "Appeal Court Judge Faces a Question of Judgement" *The Sunday Star Times* (New Zealand, 24 August 2008): the business is "worth tens of millions of dollars".

14 *Saxmere Co v Wool Board Disestablishment Co* [2009] NZSC 72, [2010] 1 NZLR 35 at [17] [*Saxmere No 2*]. Judicial Conduct Commissioner, above n 10, at [34].

15 *Saxmere No 2*, above n 14.

16 At [25].

The Supreme Court's finding that there was no evidence that Wilson J was indebted or otherwise beholden to Galbraith turned out to be crucial.¹⁷ Saxmere applied to the Supreme Court to recall its judgment on the basis that key points regarding the business relationship had been overlooked or not disclosed.¹⁸ Wilson J responded to the Supreme Court's request for further disclosure. It transpired that Wilson J had omitted several key facts that had led to the Supreme Court assessing Rich Hill as a "passive"¹⁹ company that Wilson J and Galbraith made "equal contributions" to.²⁰ In fact, when *Saxmere No 1* was heard in the Court of Appeal, Wilson J was indebted to Galbraith.²¹ In light of these new facts, the Supreme Court recalled its earlier decision and allowed Saxmere's appeal to set aside the Court of Appeal's judgment and undertake a retrial.

Following several complaints to the Judicial Conduct Commissioner, a Judicial Conduct Panel was appointed to investigate Wilson J's conduct throughout the events. Before the Judicial Conduct Panel could deliver its decision, Wilson J resigned. Writing on the saga, Gerard McCoy stated that the Supreme Court's "cachet and prestige ... must have been inadvertently wounded" as a result of the controversy.²² This article does not endeavour to affirm or negate the accuracy of McCoy's observations. Rather, it is concerned with the law and procedure that enabled these events to occur.

In Part IX, the *Saxmere* saga will be revisited to test the author's hypothesis that: first, a lack of procedural safeguards may have contributed to the controversy; and secondly, that had the procedural reform that is to be proposed in this article been in place, the controversy could have been mitigated, if not avoided.

III JUDICIAL RECUSAL IN NEW ZEALAND: THE CURRENT PARADIGM

In New Zealand, there is no legislative oversight for assessing the potentially conflicting nature of a judge's interest with a party to a proceeding. In this regard, the judiciary is self-regulated. Sir Grant Hammond²³ described the current framework as "perched in something of a no-man's land between statutes and common law".²⁴ Without confining discussion to particular types of interests

17 B Robertson "Judicial Ethics" [2010] NZLJ 121 at 121.

18 *Saxmere Co v Wool Board Disestablishment Co* [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere No 3*].

19 At [15].

20 At [15].

21 At [15]–[16]. Wilson J was indebted to Galbraith by an aggregate sum of over \$242,000.

22 McCoy, above n 13, at 335.

23 In this article, Grant Hammond is cited both judicially – when he is sitting as a Judge of the Court of Appeal – and when he is writing extra-judicially. He will be referred to accordingly.

24 Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Portland, 2009) at 154.

that may bring a judge's impartiality into question, this article will consider apparent bias generally as the catalyst for judicial recusal *sua sponte* or a judicial recusal motion.²⁵

A *The Substance of Apparent Bias*

1 *The test for apparent bias*

Prior to 2007, the law for establishing apparent bias was "in an awkward state in New Zealand".²⁶ This was due in part to previously inconsistent approaches to the matter in the United Kingdom and Australia.²⁷ Now, notwithstanding "some semantic differences, the test [for apparent bias] in the United Kingdom and Australia have become essentially the same".²⁸ The Supreme Court in *Saxmere No 2* affirmed the Court of Appeal's approach in *Muir v Commissioner of Inland Revenue (Muir)* to bring New Zealand law in line with the United Kingdom and Australia.²⁹ The Supreme Court stated that a judge should recuse themselves:³⁰

... if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

A two-stage inquiry is required. First, "establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased".³¹ The factual inquiry must be "rigorous" to avoid frivolous or unsubstantiated claims of bias. Secondly, the fair-minded lay

25 At 15. Traditionally, bias has been categorised into actual bias and apparent bias. Actual bias dealt with a situation where a judge subjectively had "regard to something other than the true merits of the dispute". On the other hand, apparent bias dealt with a situation where it objectively appeared that a judge may have "regard to something other than the true merits of the dispute". The burden of subjectivity required for actual bias made it notoriously difficult, and in fact unnecessary, to establish. Consequently, litigants and courts have focused on apparent bias as the primary situation when a judge should not sit on a case.

26 *Muir v Commissioner of Inland Revenue*, above n 2, at [44].

27 The approach in the United Kingdom in the late 20th century was articulated by Lord Goff in *R v Gough* [1993] AC 646 at 670, with the question being: "whether ... there was a real danger of bias on the part of [the judge]". A year later, Deane J in the High Court of Australia in *Webb v R* (1994) 181 CLR 41 at 70 stated that the "House of Lords test differs from that accepted in recent cases in this Court", and maintaining that "the fair-minded lay observer" is the standard to be applied in Australia.

28 *Saxmere No 2*, above n 14, at [3]. In Australia, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6], the majority of the Court set out the test as whether a "fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". In the United Kingdom, *Porter v Magill* [2002] 2 AC 357 at [103] Lord Hope asks: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

29 *Muir v Commissioner of Inland Revenue*, above n 2, at [60]–[64].

30 *Saxmere No 2*, above n 14, at [3].

31 *Muir v Commissioner of Inland Revenue*, above n 2, at [62].

observer is considered in determining whether it would "reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case".³² The High Court of Australia emphasised that this "question is one of possibility (real and not remote), not probability"³³ and that "no attempt need be made to inquire into the actual thought processes of the judge".³⁴ Nor should there be any consideration as to whether another judge may be better suited to hear a case; the question is wholly directed at the impartiality of the judge in question.³⁵

2 *Applying the test for apparent bias*

While there is a wide range of interests that could affect a fair-minded lay observer's perception of a judge's impartiality, Dean J articulated "four distinct, though sometimes overlapping, main categories of" interests that may raise a reasonable apprehension of bias:³⁶

- having an interest, including a pecuniary and non-pecuniary interest, in a person or entity that is also interested in the case;
- engaging in conduct that leads to an apprehension of bias, either in the course of, or outside the proceedings;
- being associated, either directly or indirectly, with a person or persons interested in the proceedings; and
- obtaining extraneous information, namely prejudicial knowledge that may give rise to an apprehension of bias.

Key to the apparent bias test is the mind of the fair-minded lay observer. In *Saxmere No 2*, Blanchard J presumed the observer to be: "intelligent and to view matters objectively"; a "non-lawyer but reasonably informed about the workings of our [New Zealand] judicial system"; and "neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision".³⁷ Commentators have viewed the observer as "a paragon of virtue and so unlike the average member of the public".³⁸ The impreciseness of the fair-minded lay observer can clearly lead reasonable minds to

32 At [62].

33 *Ebner v Official Trustee in Bankruptcy*, above n 28, at [7].

34 At [7].

35 *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 65 FCR 215, (2006) 135 ALR 753 at 230–231.

36 *Webb v R*, above n 27, at 74.

37 *Saxmere No 2*, above n 14, at [5].

38 Philip Havers and Alasdair Henderson *Recent Developments (And Problems) In the Law On Bias* (Hart Judicial Review Conference, The Cavendish Conference Centre, London, 10 December 2010) at [9]. Havers and Henderson provide a succinct overview of the fair-minded lay observer at [8]–[18].

differ when assessing a judge's potentially conflicting interest. Faced with a recusal issue, judges must also discharge their duty to sit and consider the doctrine of necessity.

(a) Duty to sit

The judiciary's Guidelines for Judicial Conduct sets out that "[j]udges have an obligation to sit on any case allocated [to them]"³⁹ and "should not accede too readily to suggestions of bias".⁴⁰ Hammond J described the duty to sit as a "counterbalance" that "helps protect judicial independence".⁴¹ Former Australian Chief Justice Mason CJ more thoroughly emphasised the duty to sit:⁴²

[I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

An apolitical judicial appointment process and relatively neutral extrajudicial utterances suggest that "judge-shopping" is not as live an issue in New Zealand as it may be in other jurisdictions. Nonetheless, the weight judges give to their duty to sit is not universal. Geyh observed that "judges of a more traditionalist bent will guard the presumption of impartiality far more zealously than those with ... more 'realist' leanings".⁴³ Traditionalistic views are a hangover from William Blackstone's near irrefutable presumption of judicial impartiality, which was predicated on a judge's ability to follow the law whilst disassociating themselves from any extra-legal influences.⁴⁴ The realist approach more readily acknowledges that judges may be subject to extra-legal pressures. Additionally, the duty to sit may be stronger in appellate courts due to the limited number of judges that may be available to replace a judge if they decide not to sit.

(b) Necessity

There may be instances where, in the interests of justice, a judge must sit on a case even when doing so would invoke an appearance of partiality in the mind of a fair-minded lay observer. The

39 "Guidelines for Judicial Conduct" (March 2013) Courts of New Zealand <www.courtsofnz.govt.nz> at [27].

40 At [29].

41 *Muir v Commissioner of Inland Revenue*, above n 2, at [35].

42 *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352. Mason CJ is referring to "judge-shopping" here which is the idea that litigants may seek to have their case heard by a particular judge on the basis that they may adjudicate more favourably to them.

43 Geyh, above n 7, at 698.

44 At 678, n 27.

necessity doctrine is required on the basis that litigation cannot be *non sequitur*.⁴⁵ Circumstances where necessity may be invoked are limited. The classical example is where a matter concerns the judiciary as a whole, such as questions of judicial remuneration. In New Zealand, the necessity doctrine is almost non-existent because its appellate courts have robust procedures to temporarily call upon judges when a full quorum comprising their permanent judges is not possible.⁴⁶

B Recusal Procedure

In *Muir*, Hammond J remarked that "there is little discussion of this [judicial recusal procedure] issue in the cases, but there are some real difficulties in this area".⁴⁷ In fact, he conceded extrajudicially that "it is difficult to review the procedural law in the recusal area because by and large there is none".⁴⁸ Judicial self-regulation has led to a distinctly informal and ad hoc basis for parties to question a judge's impartiality.

1 Disclosing an interest

Clearly, parties require knowledge of a judge's potentially disqualifying interest before a recusal motion can be made. Otherwise, parties may not be aware of, nor may they have cause to inquire into, a judge's interests. The Guidelines for Judicial Conduct prescribe that judges should disclose any potentially conflicting interest "as early as possible ... in writing and through the Registrar of the Court to counsel for all parties".⁴⁹ The level of disclosure "should ensure that the parties have sufficient information, without unnecessary detail, to decide whether to make a recusal application".⁵⁰ When a party is aware of intricacies regarding a disclosed interest that a judge is unaware of, counsel should disclose the supplementary information through the registrar of the court.⁵¹ However, litigants

45 Hammond, above n 24, at 99: "there cannot be a litigation system in which it is impossible to litigate a given case".

46 Quorum constitution is primarily an issue in a jurisdiction's highest court because a full court is usually required to sit on a case. If a judge is not to sit, then the quorum will not be fully constituted and jurisdictional issues arise. The issue is not prevalent in New Zealand's highest court, the Supreme Court, because temporary judges can be asked to sit on cases where a permanent member cannot sit: Supreme Court Act 2003, s 23. Section 23(1) states: "the Governor-General may appoint as acting Judges of the Supreme Court retired Judges of the Supreme Court or the Court of Appeal".

47 *Muir v Commissioner of Inland Revenue*, above n 2, at [65].

48 Hammond, above n 24, at 81.

49 "Guidelines for Judicial Conduct", above n 39, at [42].

50 At [42].

51 At [42]; and "Court of Appeal Recusal Guidelines" (June 2013) Courts of New Zealand <www.courtsofnz.govt.nz> at 2(d).

are not permitted to question a judge in search of potentially disqualifying interest; disclosure is a judge's duty and burden. As Blanchard J observed:⁵²

[I]t is for a judge who makes a disclosure to ensure that the parties have enough information, shorn of unnecessary detail, to make up their minds about whether to make a recusal application. They and their counsel should not be placed in the embarrassing position of having to seek further information from the judge.

2 *Undertaking a recusal motion*

The procedure for raising issues of partiality and filing a recusal motion is unclear. One commentator recognised that "there is no uniform practice as to the means by which an objection [to a judge sitting on a case] may be raised".⁵³ At first instance, a party may question a judge about a disclosed interest in chambers with counsel present or, alternatively, in open court through the court's registrar.⁵⁴ If a judge continues to sit on a case following discussion, a party may pursue the matter further by filing an originating application supported by affidavits. A judge will then be required to formally respond to the motion. Questions of partiality may arise at different stages of the proceedings.⁵⁵ If a party is aware of a judge's potentially conflicting interest throughout a proceeding but fails to raise concerns about it in a timely manner, that party will be deemed to have provided fully informed consent for a judge to sit on the case and no subsequent appeals can be made on the basis of partiality. In effect, this is an implied waiver by parties to forego considerations of an appearance of bias.⁵⁶

3 *Discharging a recusal motion*

The practice amongst the majority of common law jurisdictions, including New Zealand, is for a challenged judge to determine recusal motions made against them.⁵⁷ Judicial conduct guidelines reinforce this practice. In New Zealand, the Guidelines for Judicial Conduct state that "[t]he question

52 *Saxmere No 2*, above n 14, at [34]. Litigants cannot "fish" for potentially disqualifying interests.

53 Melissa A Perry *Disqualification of Judges: Practice and Procedure – Discussion Paper* (Australian Institute of Judicial Administration, Victoria, 2001) at [2.29]. For an exposition of the varied circumstances that recusal motions may be made, see at [2.29].

54 Hammond, above n 24, at 81.

55 Perry, above n 53, at [1.14]. Perry sets out different stages of the proceedings at which a recusal issue may arise: "at the interlocutory stage, during the course of the trial, during summing up to a jury or in the course of sentencing remarks, after judgment has been reserved, upon delivery of judgment by reason of statements in the judge's reasons, or on appeal".

56 *Saxmere No 2*, above n 14, at [35].

57 Hammond, above n 24, at 148. For examples see: "Guidelines for Judicial Conduct", above n 39, at [29]; and "Court of Appeal Recusal Guidelines", above n 51.

of disqualification is for the judge".⁵⁸ Similarly, the Australian *Guide to Judicial Conduct* states that "[i]f a judge considers that disqualification is required, the judge should so decide" and that "[d]isqualification is for the judge to decide".⁵⁹ Even in appellate courts, where a panel of judges sits, the recusal decision remains with the challenged judge. Judges may consult a potentially conflicting interest with other judges. The *Court of Appeal Recusal Guidelines* state that "[w]here the issue is not clear cut, the Judge should consult ... with other members on the panel".⁶⁰

As alluded to, conflicts of interest may be dealt with in chambers between the parties and a challenged judge. If an originating application is subsequently made, it should be dealt with immediately in open court to minimise the potential for any wasted litigation. Surprisingly, a judge is not required to provide reasons for upholding or dismissing a recusal motion. A judge's decision to dismiss a recusal motion can form the basis of an appeal against a judgment.⁶¹ Alternatively, a litigant may lodge a complaint to the Judicial Conduct Commissioner.⁶²

Justice Melissa Perry of the Federal Court of Australia stated extra-judicially that the apparent ease by which parties can raise questions of a judge's impartiality "masks the complex and difficult issues which impact upon the adjectival aspects of disqualification in the courts".⁶³ The informality generates a lack of clarity in judicial recusal procedure that is unique when compared to other aspects of New Zealand's litigation process.

IV THE PUBLIC CONFIDENCE IMPERATIVE

The judiciary is unlike the other two branches of government, the executive and the legislature, in that its legitimacy is not directly conditional upon constituency approval. The separation of powers doctrine also protects the judiciary from indirect public accountability through the legislature and

58 "Guidelines for Judicial Conduct", above n 39, at [29].

59 The Council of Chief Justices of Australia "Guide to Judicial Conduct" (March 2007) Supreme Court of Western Australia <www.supremecourt.wa.gov.au> at [3.5]. New Zealand's Chief Justice is a part of the Council of Chief Justices of Australia.

60 "Court of Appeal Recusal Guidelines", above n 51, at [2(c)].

61 Hammond, above n 24, at 101.

62 The Judicial Conduct Commissioner was established by the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. The purpose of the Act, set out in s 4, was to "enhance public confidence in, and to protect the impartiality and integrity of, the judicial system". In dealing with complaints, the Judicial Conduct Commissioner may: undertake no further action in respect of the complaint, s 15A; dismiss the complaint, s 16; refer the complaint to the Head of the Bench, s 17; or recommend that the judge complained of be removed, s 18. For example: *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC); and *Muir v Judicial Conduct Commissioner* [2013] NZHC 3507.

63 Perry, above n 53, at [1.11].

executive by virtue of security of tenure⁶⁴ and financial security.⁶⁵ Without public accountability, the judiciary's institutional legitimacy must originate from elsewhere. In considering this issue, Hammond identified public confidence as a source of the judiciary's legitimacy when he stated that:⁶⁶

... society rightly looks to the courts as bastions of the Rule of Law. If the public cannot look with confidence to judges ... the very notion of a "legal system" as a fundamental pillar of western society would collapse.

Philip Joseph recognised the importance of public confidence for the judiciary when he stressed that "justice must be rooted in confidence".⁶⁷ Without public confidence, disgruntled members of society may attempt to resolve disputes themselves, which in turn could compromise the rule of law.⁶⁸ Joseph, in finding that "confidence is destroyed when right-minded people go away thinking 'the judge was biased'",⁶⁹ concluded that "impartiality represents the ultimate value associated with adjudication".⁷⁰ Judges have also recognised the importance of public confidence. For example, when outlining the advantages of the apparent bias test in *Saxmere No 2*, McGrath J highlighted that that test "gives significant weight to the need for public confidence in the integrity of the judicial system".⁷¹ Judicial impartiality is undoubtedly an effective means of promoting public confidence.⁷² Thus, judicial recusal law, with its purpose being to ensure that disputes appear to be decided by impartial judges, inherently serves to promote and protect public confidence in the judiciary.

In order to analyse whether the current judicial recusal paradigm is sufficiently robust to help legitimise the judiciary, it is pertinent to further articulate the public confidence imperative. To do so, public confidence will be broken down into two aspects. First, one must understand who constitutes the public so that, secondly, one can determine how the defined public's confidence is attained and maintained.

64 Constitution Act 1986, s 23.

65 Constitution Act 1986, s 24.

66 Hammond, above n 24, at 5.

67 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 797. Here, Joseph is quoting *Metropolitan Properties Co (FGC) v Lannon* [1969] 1 QB 577 (CA) at 599.

68 For example: Tom R Tyler "The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience" (1984) 18 *Law & Society Review* 51 at 51–52: "a lack of public support leads to a willingness to disobey the law and to engage in anti-system behaviours such as riots".

69 Joseph, above n 67, at 797. Here, Joseph is quoting *Metropolitan Properties Co (FGC) v Lannon* [1969] 1 QB 577 (CA) at 599.

70 Joseph, above n 67, at 798.

71 *Saxmere No 2*, above n 14, at [92].

72 Joseph, above n 67, at 797.

A Who is the Public?

Inaccurately conceptualising the public may inadvertently marginalise the rule of law by encouraging the judiciary to adjudicate according to considerations other than established legal rules. Defining the public as the electorate would be misleading because, as alluded to earlier, the judiciary is not accountable to constituents.⁷³ To conceptualise whose confidence, or lack thereof, may affect the public's confidence in the judiciary, it is useful to analyse the fundamental functions of the judiciary.

1 The judiciary: an instrument

The judiciary may be viewed as an instrument whose role is to maintain society's right to justice by adjudicating disputes in a just manner. It has been noted that the judiciary is not democratically accountable. Nor is the judiciary accountable to the executive and legislature, reflecting judicial independence. However, the prevailing lack of direct democratic or institutional accountability may not be static. If the public's confidence in the judiciary materially decreases due to a perception that the judiciary is not carrying out its instrumental purpose of maintaining society's right to justice, the public may attempt to influence the judiciary via the legislature.⁷⁴ Subjecting the judiciary to politicking is a more prevalent concern in jurisdictions like the United States where the judicial appointment process is less apolitical and judges have the ability to strike down unconstitutional legislation. In New Zealand, judges are independently appointed and judicial power is more constrained, which suggests that the possibility of the legislature interfering with the judiciary is relatively low.

In saying that, it is not inconceivable for the independence of the New Zealand judiciary to be marginalised following a loss of public confidence. For example, judicial sentencing is one area where political pressure on the judiciary is increasing. Recent efforts by bodies like the Sensible Sentencing Trust have sought to limit judicial discretion and increase legislative prescription in criminal sentencing due to public sentiment that punitive sentences were not sufficiently deterring repeat offending. Its lobbying influenced a change in sentencing law with the enactment of the Sentencing and Parole Reform Act 2010.⁷⁵

The notion that the judiciary's instrumental role is to maintain societal justice is a strong one. Conceptualising the public from this perspective leads to different definitions of the public. Geyh observed that, from an instrumental perspective, the judiciary may primarily be concerned about the

73 Geyh, above n 7, at 721–727.

74 At 725.

75 Sentencing and Parole Reform Act 2010, s 3(b): the Act's purpose is to "impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences". The Act's primary change was to enact the "three-strikes" law for repeat offenders.

confidence of those who are "engaged enough to act upon its dissatisfaction" of the court's adjudicatory performance.⁷⁶ While acknowledging that perhaps there is a minority in New Zealand who may look to the legislature to influence the judiciary, the author opines that this is an insignificant minority. Rather, the author postulates a wider definition of the public when looked at from an instrumental perspective. A wide definition is premised on the idea that societal justice affects all of society and so the judiciary's legitimacy may be affected by the confidence, or lack thereof, of any member of society, albeit to a greater or lesser extent, rather than simply those who are sufficiently engaged to actively act upon their dissatisfaction. Accordingly, the public, from the judiciary's instrumental perspective, can be defined as a jurisdiction's whole society, both individually and collectively.

2 The judiciary: a service provider

As a service provider, the judiciary may be viewed as a state-sponsored dispute resolution service. The primary focus of any service provider is its customers and ensuring that they are satisfied so that they will return for repeat custom. Adopting this notion, the "customers" of the judiciary are litigants.⁷⁷ Litigants are whom the bench and bar alike have direct influence over. However, to confine the judiciary's "customers" and influence this narrowly may be misleading. As Simon Shetreet stated "at one time courts were viewed merely as a dispute resolution institution ... [but] today it is widely recognised that the judiciary performs the function of law making".⁷⁸ This suggests that, in resolving disputes, the judiciary is undertaking a de facto law-making function. Thus, if it can be said that the judiciary has a surrogate law-making function, notwithstanding that it is subject to Parliament's sovereignty, its dispute resolution service affects every member of society, not just litigants. Consequently, the judiciary's "customers" should not be limited to litigants, but should encompass the jurisdiction's whole society.

3 The public: generally

One's perspective of the judiciary's role is likely to affect how one conceptualises the public whose confidence may materially impact upon the judiciary's legitimacy. The foregoing discussion demonstrated that the public can be taken to encompass each and every member of society. The ensuing question is: what fosters the public's confidence in the judiciary?

B Fostering Public Confidence in the Judiciary

By adopting a wide view of the public, a wide view of what fosters their confidence in the judiciary may also be required. Judicial impartiality has been recognised as a key driver of the public's

⁷⁶ Geyh, above n 7, at 725.

⁷⁷ Geyh, above n 7, at 725.

⁷⁸ Simon Shetreet "Judging in Society: The Changing Role of Courts" in *The Role of Courts in Society* (Martinus Nijhoff Publishers, Dordrecht, 1989) 467 at 467.

confidence in the judiciary. Impartiality is concerned with how the law is applied, rather than what the law is. This implies that the process of maintaining impartiality, rather than substantive judicial recusal law, is an imperative to foster public confidence in the judiciary.

Researchers at the University of Otago conducted empirical research on public perceptions of the New Zealand court system.⁷⁹ When respondents were asked whether they believed they "would get a fair hearing in the New Zealand court system",⁸⁰ the mean response was a 2.4 out of 5.0.⁸¹ This shows that, on average, more respondents perceived the court system as fair than unfair. From a layman's perspective, these findings may seem counterintuitive because one may assume that people who do not win a dispute would be more inclined to perceive the courts negatively, and vice versa, to average out to an even half-and-half perception of fairness. This suggests that a favourable decision is not determinative of the public's view of fairness. To better understand what aspects of the court system promote perceptions of fairness, it is useful to compare and contrast dispute settlement rhetoric between the judiciary and the public.

1 Dispute settlement from a judge's perspective

Judges are decision makers. The public is a decision recipient. Social science research has found that decision makers and decision recipients view dispute settlement differently. Larry Heuer found that the former pegged their perceptions of fairness to the societal outcomes produced by a decision.⁸² Heuer's findings held when he combined with Diane Sivasubramaniam to investigate the psychology of judges and litigants.⁸³ Their research reiterated that judges are similar to other decision makers in that they "were more heavily influenced by outcome fairness than by procedural fairness".⁸⁴ Perceiving fairness based on a socially just outcome is also termed distributive justice. Due to a lack of substantive knowledge of the law, it may be difficult for the public to properly assess whether a judge delivered a fair outcome. For example, in the judicial recusal context, judges harbour varying views as to how the fair-minded lay observer test should be applied. If judges cannot come to a consensus on whether the law was applied correctly and whether the outcome of a recusal motion was fair, it is unrealistic to expect that the public will.

79 Saskia Righarts and Mark Henaghan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12 Otago LR 329.

80 At 334.

81 At 335: "a 1 represents a 'strongly agree' (a positive response to each question), a 5 represents a 'strongly disagree' (a negative response to each question), and a 3 is a neutral response (neither agree or disagree)".

82 Larry Heuer "What's Just About the Criminal Justice System? A Psychological Perspective" (2005) 13 J L & Pol'y 209 at 214–218.

83 Diane Sivasubramaniam and Larry Heuer "Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness" (2007) 44 Court Review 62 at 65.

84 At 64.

Judicial preoccupation with distributive justice is understandable because judges pride themselves on accurately interpreting law. However, in doing so, there is a danger that judges may not adequately consider how the public, as decision recipients, perceive the fairness of judicial proceedings.

2 *Dispute settlement from the public's perspective*

While distributive justice is undoubtedly important to the public as it may affect them directly, if not indirectly, it can be difficult to objectively assess; distributive justice to one may be distributive injustice to another. Significantly – and perhaps as a reflection of the difficulties in assessing distributive justice – social science research has found that people "care more about the fairness of the process that produces the outcome".⁸⁵ In other words, the public places an equal, if not greater, emphasis on procedural justice as they do on distributive justice. This theory originates from John Thibaut and Laurens Walker's seminal social science research which demonstrated that people's assessments of the fairness of third-party decision making procedures shape their satisfaction with the outcome of decision making.⁸⁶ Tom Tyler further confirmed that "it is clear ... citizen assessments of the justice of the procedures used by legal authorities to make decisions influence reactions to those decisions".⁸⁷ It also reflects the philosophical importance James White placed on procedure when stating that, "we [the public] are entitled not to 'like results' but to 'like process'".⁸⁸ Four factors have been identified as the primary drivers of people's perceptions of procedural fairness: "opportunities for participation; the neutrality of the forum; the trustworthiness of the authorities; and the degree to which people receive treatment with dignity and respect".⁸⁹

Applying the procedural justice notion to judicial recusal, the public is likely to place an equal, if not greater, level of importance on the process by which a recusal motion is adjudicated as it is on its outcome. Therefore, if the process invites participation and appears neutral with a trustworthy judge treating participants with respect, litigants and the public alike are more likely to accept the outcome

85 John M Greacen "Social Science Research on 'Procedural Justice': What Are the Implications for Judges and Courts?" (2008) 47 *The Judge's Journal* 41 at 41.

86 J Thibaut and L Walker *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates, 1975). See generally Greacen, above n 85; and Tom R Tyler "Social Justice: Outcome and Procedure" (2000) 35 *International Journal of Psychology* 117.

87 Tom R Tyler "What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law & Society Review* 103 at 104.

88 James Boyd White *Heraclides' Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, Wisconsin, 1985) at 134.

89 Tyler, above n 87, at 121–122: participation refers to providing parties "an opportunity to make arguments about what should be done to resolve a problem or conflict"; neutrality refers to parties' beliefs "about the honest, impartiality, and objectivity of the authorities with whom they are dealing"; trustworthiness refers to parties being "concerned about the motivation underlying the decisions made by the authority with whom they are dealing"; and treatment with dignity and respect refers to parties "having respect shown for their rights".

of a recusal motion. Increased procedural satisfaction may thus lead to increased public confidence in the judiciary. To assess whether judicial recusal law adequately fosters the public's procedural satisfaction, it is helpful to look for guidance from legal process theory.

V ADJUDICATION: A PROCESS-BASED PERSPECTIVE

Litigation is a form of third-party dispute resolution where parties take their disputes to courts for judges to determine an outcome according to relevant law. Professor John Allison finds that "[m]any procedural elements found in judicial and administrative adjudication perform a surrogate legitimation function".⁹⁰ Allison identified the general procedural elements as "published rules, party participation, reasoned decisions, and communicated rationales".⁹¹ He noted that adjudication processes that exhibit these features usually "have the intended and actual effect of enhancing public perceptions of legitimacy".⁹² Amanda Frost subsequently looked to Allison and other process theorists to extract "five procedural components of adjudication that are universally considered essential to the legitimacy of the final product [the decision]".⁹³ Frost specifically looked to the judicial process when she articulated the components as being:

- (1) litigants initiating disputes;
- (2) the disputes being presented via an adversarial system where the competing parties articulate their conflicting views;
- (3) a reasoned decision should be provided;
- (4) decisions must be consistent with the rule of law; and
- (5) the arbiter must be impartial.

While New Zealanders do not enjoy a constitutional right to due process as Americans do, proper process is nonetheless a fundamental right protected by the Bill of Rights Act 1990.⁹⁴ Frost's five procedural components will be examined to illustrate that they feature prominently throughout New Zealand's civil litigation process.

90 John R Allison "Ideology, Prejudgment, and Process Values" (1994) 28 *New Eng L Rev* 657 at 682.

91 At 682.

92 At 682.

93 Amanda Frost "Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal" (2005) 53 *U Kan L Rev* 531 at 555.

94 There are two due process clauses in the United States Constitution. The fifth amendment to the Constitution guarantees "nor shall any person ... be deprived of life, liberty, or property, without due process of law." The fourteenth amendment to the Constitution guarantees "nor shall any State deprive any person of life, liberty, or property, without due process of law".

A Litigants Initiating Disputes

The judiciary does not initiate disputes in New Zealand. Injured parties must bring disputes to it. The judiciary's passiveness stems from two limitations. First, the courts are fiscally limited to the resources and manpower that the Ministry of Justice affords them. This does not leave residual resources available to investigate and commence proceedings. Secondly, in upholding the doctrine of judicial independence, courts do not have a prerogative to instigate a dispute. Judges have no constituency from whose needs and wants an agenda may arise. Nor may judges have the expertise to isolate and address specific societal problems; they are generalists, a virtue that is more or less revered.⁹⁵

The executive is responsible for bringing claims on behalf of the State. It has the capabilities and the mandate to undertake this role. Requiring parties to originate disputes engages them and increases their feeling of participation – a contributory factor to an appearance of procedural justice, as Greacen identified.⁹⁶ One commentator stated that "[p]articipation clothes the resulting decision with legitimate authority to bind the litigants".⁹⁷ It is standard practice throughout the litigation process for parties to initiate disputes, whether it be a party filing a statement of claim or applying for leave to appeal a decision, it is the plaintiff, prosecution or appellant that commences a dispute.

B An Adversarial System of Presenting Disputes

An adversarial litigation process enables parties to present their arguments and advocate for their respective claims. Christopher Peters articulated the party-centric adversarial model in stating:⁹⁸

Each litigant, not the court itself, locates relevant facts and identifies relevant legal authorities, and each litigant determines whether and how to present those facts and authorities to the court in the form of legal arguments.

The judge remains "relatively passive" throughout this process and only after the parties have put their case will the judge "render a decision that is *responsive* to the proofs and arguments *made by the litigants*".⁹⁹

Frost identified a benefit of an adversarial process by analogising that "[p]arty control over case-presentation is legitimating for much the same reasons that party control over case-initiation is

⁹⁵ The virtues of judicial specialisation is not a debate this article seeks to partake in. Some view specialisation, particularly in certain areas such as commercial or tax litigation as a positive step.

⁹⁶ Greacen, above n 85.

⁹⁷ Christopher J Peters "Adjudication as Representation" (1997) 97 Colum L Rev 312 at 374.

⁹⁸ Christopher J Peters "Persuasion: A Model of Majoritarianism as Adjudication" (2001) 96 NW UL Rev 1 at 20.

⁹⁹ At 21 (emphasis added).

legitimizing".¹⁰⁰ By putting their case, litigants' feelings of participation in the proceeding increase, which contributes to an appearance of procedural justice. The decision maker is also more likely to be better informed if he or she is exposed to the parties' competing views. Fiscal constraints also render it impractical for courts to undertake an inquisitorial or investigative role in proceedings.

C Reasoned Decision Making

Decisions accompanied by logical and coherent reasoning are a vital source of legitimacy for judicial decision making. A number of justifications for the reasoned decision imperative will be discussed.

First, as noted, the judiciary's legitimacy does not originate from a democratic mandate. Rather, it is public confidence that legitimises the judiciary. A reasoned decision illustrates that a judge has considered the parties' arguments and the law, which bolsters the appearance of neutrality. This goes some way in appeasing concerns an unsuccessful party may have about the judge holding prejudicial or arbitrary views that could have materially affected the outcome of the case.

Secondly, Frederick Schauer clearly expresses the cognitive value in providing reasons for a decision. He stated that a legally, socially or morally impermissible result may arise from legally, socially or morally impermissible reasoning.¹⁰¹ Schauer opines that "[p]erhaps there are things we [including judges] can think but cannot write down".¹⁰² Thus, one may more readily reason impermissibly if thought alone was one's only constraint. But, when one has to commit to that thought by way of oration or narration, a further constraint is added; a constraint that limits one's ability to reason impermissibly. When recorded, decision makers must commit to the reasoning that he or she articulates. Due to the possibility of subsequent scrutiny, a decision is less likely to have derived from extrajudicial influences. Accordingly, requiring a judge to provide reasons for a decision imposes a constraint on judicial discretion to adjudicate within a permissible framework that arguably may not otherwise be there if articulated reasoning is not required.

Finally, Schauer proposes that "when we [including judges] provide a reason for a particular decision, we typically provide a rule, principle, standard, norm, or maxim broader than the decision itself".¹⁰³ The decision that results from the reasoning is one of a number of factual matrices that could be decided under that enunciated rule. Accordingly, reasoned decisions encourage more consistent results. Reasoned decisions are also necessary to enable a party to exercise their right of appeal. Without reasons, it is impractical – and realistically untenable – for a litigant to base an appeal

100 Frost, above n 93, at 559.

101 Frederick Schauer "Giving Reasons" (1995) 47 *Stan L Rev* 633 at 652.

102 At 652.

103 At 641.

on the simple notion that the trial judge was "wrong". Elias CJ also highlights the importance of the public having access to decisions as a means of vindicating the judiciary's conduct.¹⁰⁴

D Recourse to the Law

Having recourse to the law in adjudicating a dispute is an uncontroversial constraint on judicial power.¹⁰⁵ In leading the legal process movement, HLA Hart recognised that "rule by arbitrary choice is not rule by law".¹⁰⁶ With the law becoming more complex and indeterminate, judicial discretion plays an increasingly material role in decisions.¹⁰⁷ The neutrality and trustworthiness of a judge are likely to be questioned if he or she exercises this discretion ad hoc without basing it on law. The strong emphasis that the common law places on precedent further constrains a judge to resolve like disputes with like decisions. Parties' perceptions of neutrality will be enhanced if they are confident that a judge has decided a dispute according to law.

Outcomes adhering to law are more likely to provide rational, consistent and predictable decisions. This enables the law to develop logically and in a manner that reflects the changing values of society. Predictability helps guide societal behaviour by distinguishing between what is legal and what is illegal. Consistent decisions are likely to improve litigants' perceptions of due process because, if similar facts produce similar decisions, a litigant would perceive the process by which the decisions was made as fair.

E An Impartial Arbiter

Arguably the most fundamental facet of any adjudicatory process is for an impartial arbiter to resolve a dispute. Judicial recusal is founded on an impartiality imperative: if partial judges were accepted, there would be no need for judges to consider potentially conflicting interests and whether to not sit on a case due to a reasonable apprehensions of bias. As Tipping J enunciated in *Saxmere No 2*, "the rationale for the rule against apparent bias is to ensure that public confidence in the legal system and the impartiality of judges is maintained".¹⁰⁸ Thus if litigants – and the public – harbour a reasonable apprehension of bias of a judge a proceeding's neutrality may be compromised, as well as

104 Elias, above n 9, at 5–6.

105 Joseph, above n 67, at 153–199.

106 Geoffrey C Shaw "HLA Hart's Lost Essay: Discretion and the Legal Process School" (2013) 127 Harv L Rev 666 at 668.

107 This notion goes against the traditional legal formalist theory of there always being one answer to a question and so discretion or morals should not play a part in decision making. Decision making is thus purely based on competency and if judges are competent, they should all come to the same outcome on any given dispute. As the law has developed since this articulation, it is now widely regarded as overly simplistic and unrealistic.

108 *Saxmere No 2*, above n 14, at [38].

the parties' trust in a judge. The effects may further flow on to parties limiting their cooperation and participation in the proceedings and thereby affecting perceptions of procedural justice.

An overview of the cognitive difficulties with self-adjudication illustrates the psychological premise for impartial adjudication. Common sense suggests that a "biased mind rarely realises its own imperfection".¹⁰⁹ Ironically, the more biased a person may be, the more difficult it will be for them to accurately assess their own partiality. Cognitive theory provides a firmer basis for highlighting the inadequacies of self-adjudication.

Researchers at Stanford University revealed that people have a "bias blind spot".¹¹⁰ The blind spot refers to an asymmetry in judging one's cognitive susceptibilities vis-à-vis other people's cognitive susceptibilities. This asymmetry leads to an overly optimistic view of one's competency due to one being unaware of unconscious factors that may affect one's decisions. In Stanford's research, individuals reported that they were "less susceptible than their peers to various cognitive and motivational biases".¹¹¹ Some may argue that the years of training and experience that judges gain in resolving disputes may enable them to exercise superior cognitive abilities of adjudication than the general population. However, regardless of any superior cognitive capability, judges are likely to be susceptible to the same natural biases that all humans are susceptible to. These biases may range from status quo bias¹¹² to over-confidence¹¹³ and false consensus bias.¹¹⁴

F Process-based Adjudication: Generally

Although these five key aspects of adjudicatory procedure have been described independently, the majority are interdependent. For example, it will be more difficult for a judge to be partial if a

109 "Disqualification of a Judge on the Ground of Bias" (1927) 41 Harv L Rev 78 at 81.

110 Emily Pronin, Daniel Lin and Lee Ross "The Bias Blind Spot: Perceptions of Bias in Self Versus Others" (2002) 28 Personality and Social Psychology Bulletin 369.

111 At 374.

112 Jeffrey W Stempel "In Praise of Procedurally Centered Judicial Disqualification – and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities" (2011) 30 Rev Lit 733 at 741, n 24. Status quo bias is an unconscious tendency to interpret something in a manner that maintains the existing situation. In the recusal context, it could mean that more traditionalist judges may uphold the strong presumption of impartiality by overemphasising their duty to sit.

113 At 741, n 25. Over-confidence, as alluded to earlier, is when people, including judges, tend toward excessive optimism and over-confidence. In the recusal context, this may lead to a judge overemphasising their ability to detach themselves from any underlying interests.

114 At 741, n 26. False consensus bias arises when a person assumes that everyone else interprets or perceives something the same way as they do, even if it is ambiguous. In the recusal context, a judge may feel that an interest need not be disclosed to the parties because both parties would simply view it as immaterial, as he or she does.

decision must be accompanied by reasoning as the reasoning can be scrutinised. Moreover, if that decision is subject to precedent, there is even less scope for extra-legal influences to affect an outcome because the case for departing from precedent must be strong. Likewise, if the dispute, the facts and the arguments are solely brought by the parties, it is less likely that a judge's personal agenda or motives can shape the outcome because the dispute must be addressed in the manner that the litigants have put it. Conversely, it may be difficult to assure that a judge has had sufficient recourse to law if no reasons are provided for a decision.

These procedural practices are wholly followed throughout civil litigation in New Zealand. There may be instances, such as interim injunctions, where due process may be marginalised due to temporal urgency, but these instances are few and far between.¹¹⁵ Individually and collectively, these procedural practices help legitimise the judiciary's adjudicative role by fostering public confidence.

VI JUDICIAL RECUSAL: A MISMATCH BETWEEN THEORY AND PRACTICE

With the prevailing judicial recusal paradigm outlined and key procedural practices analysed, it is possible to compare and contrast the former with the latter to ascertain whether judicial recusal procedure aligns with best practice. To do so, legal and psychological rhetoric is used to illustrate the "procedural vacuum" in which judicial recusal operates.¹¹⁶

A Impediments to Litigants Initiating Recusal Motions

Due to information asymmetries, the onus is on a judge, rather than a litigant, to raise any potential conflicts of interest.¹¹⁷ Prima facie, this does not reconcile well with best practice adjudication where parties initiate disputes. However, in disclosing an interest, a judge is not necessarily initiating a dispute. Rather, a judge is merely providing information of an interest that then may form the basis of a recusal motion; it is still the litigant who raises and disputes an issue with a disclosed interest. Further, the usual concerns of fiscal deficiencies and a lack of mandate are absent in burdening a judge with disclosure; the judge inherently has knowledge of an interest and need not conduct further research into an interest.

Unlike issuing proceedings, amending statements of claim or submitting interlocutory appeals, there is little guidance as to how a recusal motion can or should be made. The usual method of giving notice is through the registrar or by filing an originating application. Informality may reasonably

¹¹⁵ In the case of interim injunctions, any marginalisation of proper process is subsequently rectified following a full trial.

¹¹⁶ Frost, above n 93, at 551.

¹¹⁷ "Guidelines for Judicial Conduct", above n 39, at [41]–[45].

conjure some hesitancy in counsel to bring a recusal motion for fear of offending a judge. Richard Flamm analogised questions of partiality with questions of legal error when he observed:¹¹⁸

[Just] as judges generally do not like to admit having committed legal error, they are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality.

An understandably conservative approach to filing recusal motions may ensue. Thus, litigants may be faced with a compromise between fully participating in a proceeding by filing a recusal motion, and a consequent lack of judicial neutrality if the motion is dismissed and the judge is displeased. This is undesirable because litigants should not dissuade themselves from filing recusal motions for fear of subsequent reprisal by a challenged judge.

B A Lack of Adversarial Procedure

Conflicts of interest usually arise between a judge and one party. Thus, to maintain an adversarial process, a judge should offer their views when putting their case to the party that has made a recusal motion as to why recusal is not required. However, a judge rarely responds to a recusal motion as a defendant would respond to a plaintiff's statement of claim due to the judge also being the arbiter of the motion. It goes against common sense and cognitive theory to expect a judge to be able to argue for a particular outcome in a recusal motion and then be able to impartially adjudicate the motion. Without an adversarial forum for parties to articulate their views, there is a danger that a recusal motion could be decided without a judge being exposed to the parties' competing arguments and thus not being fully informed. This may endanger litigants' trust in a judge adjudicating fairly and impartially.

C A Dearth of Reasoned Decisions and Precedent

Recusal decisions provide little insight into the nature of the interest in question, the grounds for which recusal was sought, or a judge's rationale in deciding to sit or not to sit. This is especially so when a judge recuses themselves *sua sponte* before proceedings commence or even before they are listed on a case. Although prophylactic measures to avoid wasted litigation are encouraged, a judge's decision should be subject to scrutiny, as other judicial decisions are. The absence of a decision precludes public scrutiny and cognitive commitment, which may also invite a judge to have recourse to impermissible considerations. Jeffrey Stempel recognised the shortage of reasoning in stating that "the clipped, abrupt, and uninformative manner in which many disqualification decisions are delivered undermines the public confidence the process should inspire".¹¹⁹

118 Richard E Flamm *Judicial Disqualification: Recusal and disqualification of Judges* (2nd ed, Banks & Jordan Law Publishing Co, Berkeley, 2007) at 25.

119 Stempel, above n 112, at 799.

Precedent plays an important role in guiding a judge's decision making. With little to no reasoning provided for recusal decisions, precedents are scarce. The inadequacy is exacerbated by the inclination for judges to provide more reasons for dismissing a recusal motion than for affirming a recusal motion.¹²⁰ This creates lopsided precedent. Without a reasoned recusal decision or reference to precedent, people may more readily perceive a judge to be influenced by extrajudicial considerations.

D The Archetypical Interested Arbiter

A challenged judge self-adjudicating recusal motions is arguably the most glaring deficiency of the current judicial recusal process. Self-adjudication is often justified by the idea that a challenged judge possesses the most knowledge about a potentially conflicting interest and thus they are in the best position to assess whether it will appear to affect their impartiality.¹²¹ This is a flawed proposition that wrongly correlates knowledge with adjudicative ability.¹²² Cognitive theory highlights the challenges associated self-adjudication. Throughout the litigation process, a disinterested judge with less intimate factual knowledge than the parties adjudicates a case. While this bolsters the public's perceptions of neutrality, it is difficult to envisage that self-adjudication of recusal motions has the same effect. When commenting on this practice, Hammond concluded that "there is a hopeless tension between the state-fostered guarantee of a neutral and objective arbiter of a case and the state's current process arrangements for disqualification decisions".¹²³

E The Shortcomings of Current Judicial Recusal Procedure

Notwithstanding that litigants may be discouraged from questioning a judge's impartiality, if a recusal motion is made, an absence of adversarial procedure, reasoned decision-making, precedent and an independent arbiter highlights the discrepancies between best practice adjudication procedure prevalent in civil litigation and the deficiencies of the prevailing judicial recusal paradigm. The fundamental importance of judicial impartiality in fostering the public's confidence in the judiciary justifies a more principled approach to addressing questions of judicial partiality.

VII A WAY FORWARD: PROCEDURAL REFORM

In keeping with this article's focus on process over substance, the author proposes procedural reform to provide more clarity, certainty and custom for judicial recusal. Reform should be imposed by the judiciary, rather than through legislative intervention. As Hammond emphasised, maintaining

¹²⁰ Frost, above n 93, at 570.

¹²¹ Hammond, above n 24, at 83.

¹²² Geyh, above n 7, at 708. Geyh articulated the fundamental fallacy of judicial recusal law by stating that: "disqualification practice proceeds on two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct. Neither assumption is safe".

¹²³ Hammond, above n 24, at 148.

a separation of powers and judicial independence is vital, particularly in an area such as judicial impartiality which goes to the heart of the judiciary's legitimacy.¹²⁴ To justify a formal regulatory regime, Hammond argued that the judiciary must be "beyond self-redemption".¹²⁵ The author concurs with Hammond in observing that the New Zealand judiciary is not nearing that point. Rather, it has long enjoyed the public's confidence. However, reform should not be predicated upon a crisis of confidence; measures should be adopted *ex ante* to prevent a crisis of confidence and avoid the difficulty of regaining credibility and confidence *ex post*.

A Disclosure and Filing Recusal Motions

1 Disclosure

McCoy observed that "the vulnerability of the parties before the court is their dependence on the timeliness, comprehensiveness and reliability of judicial disclosure".¹²⁶ While the Guidelines for Judicial Conduct provide some guidance to judges as to the importance of disclosure and factors to consider when disclosing an interest, the direction is somewhat abstract.¹²⁷ A register – similar to that which members of the executive and legislature are subject to – whereby judges would be required to periodically disclose their pecuniary interests to the public, has been suggested as a means of improving disclosure and transparency.¹²⁸ The author does not envisage public financial disclosure as a means to symmetrise the asymmetry of information between the bench, the bar and the public. Instead, the author looks to impose greater disclosure obligations on judges to require disclosure of any pecuniary, personal or professional relationships with parties in open court. This is not a significant departure from the status quo; it is a hardening and nuancing of existing disclosure duties.

Currently, judges may withhold information unless, after introspection of the nature of the interest and its proximity to the parties, they perceive the interest to be potentially conflicting. Essentially, this is a negative duty that begins from an assumption that a judge is impartial. The duty departs from this assumption if a judge, in unilaterally undertaking a relevance test of any material interests, considers it necessary. Thus, a judge's introspection determines whether an interest is disclosed.

The foregoing psychological analysis illustrated the cognitive limitations associated with self-assessment, which may lead to an overly conservative approach to disclosure. Judges may unduly

124 At 153.

125 At 153.

126 McCoy, above n 13, at 335.

127 "Guidelines for Judicial Conduct", above n 39, at [41]–[45].

128 Register of Pecuniary Interests Bill 2010 (240–1). See generally Justice and Electoral Committee *Register of Pecuniary Interests of Judges Bill* (21 February 2014); Law Commission *Review of The Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012); and Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests?* (NZLC IP21, 2011).

perceive themselves to be able to detach personal or professional interests from a dispute and adjudicate with an impartial mind. In doing so, judges may also attribute their perceived abilities to the public to conclude that disclosure is unnecessary. John Leubsdorf found that the "appearance [of bias] test invites judges to rest on appearances, instead of looking deeper [during introspection]".¹²⁹ Leubsdorf identified that inadequate disclosure is, in part, due to "systematic inaccuracy caused by unconscious leanings not removable by introspection".¹³⁰

To minimise any such limitations and encourage disclosure, the author hypothesises that the existing negative disclosure duty should be framed more positively with a softer initial position. Some disclosure inertia may arise from the current impartiality assumption. If a more party-oriented starting point is adopted, less emphasis may be placed on judicial introspection. For example, if a judge readily discloses any potentially conflicting interests before unilaterally undertaking a materiality or relevance test of these interests, the possibility of systematic inaccuracy in introspection may be reduced. This approach is expected to widen the ambit of disclosure. The onus that is currently on a judge's introspection will partly be shifted to the parties, which should limit the scope for judicial misjudgement. Although wider disclosure may delay proceedings, minimising the possibility of a material interest being subsequently discovered and the ensuing potential for wasted litigation may counteract that. Moreover, with increased disclosure and transparency, litigants' trust in judges and their neutrality may be bolstered.

2 The process of questioning an interest and filing a recusal motion

A formal and uncomplicated procedure for litigants to file recusal motions should be instilled. Simply raising concerns via a registrar or an originating application does little to explicitly recognise litigants' right to question a judge's potentially conflicting interest. A specific avenue to file a recusal motion, similar to that of an interlocutory appeal, should be sufficient and not overly burdensome to remedy the lack of clarity. Recognising questions of partiality as a standard part of court proceedings may go some way to normalising the practice. As a result, the trepidation litigants may harbour of provoking a judge by questioning their interests and the associated stigma that judges may feel when their impartiality is questioned is likely to be reduced.

Further, a recusal motion should have to be brought as soon as practically possible after a relevant interest is disclosed. The complexity of the interest or the subsequent questioning of a judge that a party may have to undertake will affect the timeliness of filing a recusal motion. The existing implied waiver protocol adequately precludes untimely recusal motions. If material detail regarding a judge's potentially conflicting interest subsequently arises, the implied waiver will not apply and parties will be entitled to file a recusal motion despite the delay. This is intended not only to minimise the possibility of wasted litigation, but also to promote full disclosure of interests as partial disclosure

¹²⁹ John Leubsdorf "Theories of Judging and Judge Disqualification" (1987) 62 NY UL Rev 237 at 278.

¹³⁰ At 262.

may perpetuate a reasonable apprehension of bias if a judge is subsequently found to be withholding material information.

B An Impartial Arbiter

The fallacy of a challenged judge being in the best position to assess a conflict of interest is clear. The New Zealand judiciary has attempted to lessen this untenable position by suggesting that "[i]n cases of uncertainty it may be desirable for the judge to discuss the matter with the relevant head of jurisdiction or another judge".¹³¹ The Court of Appeal Recusal Guidelines also state that "where the issue is not clear cut, the judge should ... consult with other members on the panel".¹³² However, the author is of the view that consultation with other judges is insufficient for three reasons. First, it may be difficult for judges who are not well familiar with the factual matrix of a case to be able to provide reliable counsel ad hoc, particularly when they are unlikely to have the benefit of a motioning party's views to reconcile a challenged judge's views.¹³³ Secondly, consultation may be impractical in trial courts where a single judge sits on a case and other judges on the court may be preoccupied with their own cases. Third, any such consultation is confidential. Parties may not know that a challenged judge has consulted with their colleagues, let alone the content of any consultations. Confidential backroom consultation is unlikely to further an appearance of procedural justice.

To resolve this central procedural shortcoming, recusal motions need to be transferred to and decided by an independent judge.¹³⁴

This article proposes that once a litigant files a recusal motion, an independent judge should be called upon to hear the motion and conduct the necessary proceedings.¹³⁵ In a trial court, a motion should be transferred to a disinterested colleague from the same registry as the challenged judge. A robust method of selecting an independent judge is also necessary. One possibility is to form a standing recusal committee in each registry consisting of two or three judges, depending on the size of the registry, who rotate periodically. If it is impractical for a judge on a standing recusal committee

131 "Guidelines for Judicial Conduct", above n 39, at [30].

132 "Court of Appeal Recusal Guidelines", above n 51, at [2(c)].

133 If a challenged judge wishes to consult a potentially disqualifying interest with another judge in a trial court, the judge being consulted will not be informed of the facts of the interest or the case. The situation is different in an appellate court where a panel of judges will be sitting. Here, a challenged judge may be able to consult with the other panel members in a more informed manner as they will presumably be versed in the facts of the case.

134 When a recusal motion is brought against a judge, their credibility is at stake. Accede to the motion too readily, for example when a fair-minded lay observer would not reasonably apprehend any apparent bias, and litigants may think the judge is "soft" or inept at detaching personal interests. Conversely, if a challenged judge rejects the recusal motion, they are vulnerable to criticism of their impartiality and of course, to a subsequent appeal.

135 Proceedings in a recusal motion could include affidavits from the applicant and the judge, as well as an articulation of both parties' views.

to hear a recusal motion, the next judge due to sit on the committee should be summoned. Of course, the independent judge to whom a motion is transferred can also recuse themselves *sua sponte* if they cannot, or appear to not be able to, bring an impartial mind to adjudicate the motion.

In an appellate court, where a panel of judges sit on a case, the non-challenged members of the panel should hear the motion. A challenged judge should not sit on the panel whilst the other panel members hear the recusal motion. Likewise, in a final court of appeal, where the members of the court sit as a whole, non-challenged members should hear the recusal motion without a challenged judge. In the event of a split decision, the head of the relevant court should rule on the matter. This is unlikely to undermine the validity of proceedings because courts of final instance can often hear procedural matters without a full quorum.¹³⁶ To dampen litigants' fears about a judge taking offence to being challenged, the party undertaking a recusal motion should be anonymous.¹³⁷ To ensure anonymity, all submissions should be made to the registrar in writing, who will then pass them on to the disinterested judge. Oral hearings would reveal the complainant to a judge and so the proceeding should occur in writing.

Under this regime, judges will still be able to recuse themselves *sua sponte*. Although this may seem counterintuitive to the idea of having an independent adjudicator, it is unlikely to compromise the process. If a judge perceives that an interest may raise a reasonable apprehension of bias, it is likely that an independent judge would come to a similar conclusion. Enabling a challenged judge to conduct this *prima facie* assessment saves court resources and limits delays in proceedings.

The prescriptive nature of the proposed transfer regime reflects the desire for harder rules that provide the bench and litigants with more certainty and guidance. It also helps to align judicial recusal with other civil procedures that involve formal processes.

C Positive Externalities of an Independent Judge: Adversary, Reasoned Decisions and Precedent

Transferring a recusal motion to an independent judge enables an adversarial process, reasoned decisions and precedent to develop.

1 Adversarial process

Without having to adjudicate a recusal motion, a challenged judge is in a more practical position to offer their arguments about a potentially conflicting interest. This enables a challenged judge to contextualise the interest in a manner that is currently missing with self-adjudication. This should lead to more informed considerations of whether an apprehension of bias arises.

¹³⁶ Supreme Court Act 2003, s 28.

¹³⁷ See *Part VI.A: Impediments to Litigants Initiating Recusal Motions* for discussion regarding the fear litigants may face in questioning a judge's impartiality due to the potential for subsequent retribution by the judge.

2 *Reasoned decisions generating precedent*

An independent judge adjudicating a recusal motion is well equipped to reconcile the potentially conflicting interest with the hypothetical viewpoint of a fair-minded lay observer. In doing so, the judge should articulate their reasoning. Judges who recuse themselves *sua sponte* should also be required to provide reasons for their decision to not sit on a case. This is particularly important in light of the lopsided recusal precedent that is currently available. Developing a comprehensive body of precedent will not only enhance the uniformity of recusal adjudication but also provide guidance and predictability to litigants with regards to the types of interests that may justify recusal.

VIII PROCEDURAL REFORM: A CRITIQUE

In contemplating the proposed reform, there were a number of foregone alternatives. The following section will address potential drawbacks of the proposed reform as well as exploring some alternatives that were considered, but not adopted.

A *Concerns with Transferring Recusal Motions to an Independent Judge*

1 Practical concerns

Increased pressure on already stretched judicial resources is a practical concern with transferring recusal motions to independent judges. Unlike a challenged judge, an independent judge will require time to become accustomed with the potentially conflicting interest in issue. Further, while an independent judge considers a recusal motion, the cases they are sitting on at the time will need to be adjourned. The proposed disclosure regime may go some way to minimising the time an independent judge requires to fully discover facts as all relevant interests should be disclosed at first instance. Thus, holding all else equal, the average length of all cases, whether they involve a recusal motion or not, is *prima facie* likely to increase.

While undoubtedly a real concern, procedural delays can be easy to overstate when the counterfactual is not considered. A transfer to an independent judge will only occur if a recusal motion is filed; there will be no increased delay if a judge recuses themselves *sua sponte*. Further, a judge's ability to synthesise fact and law to come to an efficient solution should not be underestimated; judges are well trained to undertake this task. An argument could also be made that parties may be less inclined to appeal the dismissal of a recusal motion made by an independent judge when compared to a challenged judge dismissing a recusal motion.¹³⁸

It is difficult to quantify the increased resource requirements and procedural delays of transferring recusal motions to independent judges. No common law jurisdiction employs this procedure.

¹³⁸ Seth E Bloom "Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges" (1985) 35 Case W Res L Rev 662 at 697.

Although it may be fruitless to attempt to draw meaningful conclusions regarding an undue increase in demand for court resources *ex ante*, one commentator, when contemplating a similar regime to what this article has proposed, suggested that, on balance, "the overall administrative burden in fact might not increase".¹³⁹

2 *Principled concerns*

Cognitive studies have established that judges, like everyone else, are susceptible to unconscious biases that hinder their ability to self-adjudicate.¹⁴⁰ Bearing in mind that an independent judge to whom a recusal motion will be transferred is a colleague of the challenged judge, is he or she going to be any more effective in applying the fair-minded lay observer test than a challenged judge? Similar to a litigant's hesitancy when making a recusal motion, an independent judge may also be cautious in affirming a recusal motion for fear of offending their colleague.¹⁴¹ Additionally, Geyh theorised that transferring a recusal motion to an independent judge may have a detrimental effect on a challenged judge's credibility because "[a]ssigning disqualification motions to a different judge implies that the target judge cannot be trusted to rule impartially".¹⁴²

In acknowledging that these are cogent concerns about the (in)efficacy of an independent judge adjudicating a recusal motion, it is pertinent to return to first principles to fully address their validity. Impartiality is assessed from the perspective of a fair-minded lay observer. Thus, notwithstanding the substantive merits, or lack thereof, of an independent judge's decision, the public's perception of how that decision was made is the utmost concern. The public is more likely to think that a decision is made impartially if it is made by an independent judge as opposed to it being self-adjudicated by a challenged judge.

Furthermore, judges are accustomed to disagreeing with one another and having colleagues critique their judgments. For example, judges may dissent from the majority or an appellate court may overturn a trial court's decision. Having a decision overturned is arguably more critical of a judge than a finding of apparent bias because the former speaks to a judge's competency and aptitude to adjudicate. While genuine questions remain about the actual benefits of transferring a recusal motion

¹³⁹ At 697.

¹⁴⁰ See *Part V.E: An Impartial Arbiter* for discussion on the psychology of self-adjudication.

¹⁴¹ While this finding should not be taken at face value due to contrast in legal systems between New Zealand and the United States, empirical research from the United States provides an interesting insight into judges' psychology of assessing their colleagues' impartiality. Jeffrey M Shaman and Jona Goldschmidt *Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes* (American Judicature Society, Nashville, 1995) at 70: "under the same circumstances judges ... [have a] stronger tendency to disqualify themselves than to recommend disqualification of a colleague". It is not inconceivable that New Zealand judges may think in a similar vein, especially considering the small size of New Zealand's jurisdiction where judges are more likely to be well acquainted with each other than they are in the United States.

¹⁴² Geyh, above n 7, at 728.

to an independent judge, the perceived benefits should be sufficient to justify transferring recusal motions to independent judges.

B Alterations to the Proposed Reform

1 When should a recusal motion be transferred to an independent judge?

The proposed reform suggests that all recusal motions should be heard by an independent judge. Contrarily, Hammond envisages that, at first instance, all recusal motions should be determined by the challenged judge;¹⁴³ only if a recusal motion is dismissed should it be transferred to an independent judge or, in an appellate court, to other members of the sitting panel.¹⁴⁴ Interestingly, in the latter situation, Hammond saw no difficulties in a challenged judge continuing to sit on a panel and hear a recusal motion even after dismissing it at first instance.¹⁴⁵ Presumably, Hammond was addressing resource constraints in suggesting this method of transferring recusal motions. While this is likely to cause fewer delays and require fewer resources than transferring all recusal motions to independent judges at first instance, principled concerns, similar to those addressed earlier, arise.¹⁴⁶

By maintaining self-adjudication at first instance, the shortcomings of the current recusal regime will continue to prevail.¹⁴⁷ Further, a challenged judge may feel that their credibility is harmed if their decision to dismiss a recusal motion is subsequently overturned by an independent judge – a situation that would be avoided if the recusal motion is transferred to an independent judge at first instance. Most importantly, the cognitive limitations of self-adjudication and the accompanying marginalisation of public confidence will continue to undermine the judicial recusal process. Accordingly, the resources that would be saved by adopting this quasi-independent recusal regime need to be balanced with the ensuing principled compromise.

2 Peremptory recusal

To avoid potential confusion, uncertainty and inconsistency, some commentators have gone beyond procedural reform to help assess recusal motions to a system of peremptory recusal.¹⁴⁸ Under a peremptory recusal regime, upon an allegation of partiality being made, the case is automatically transferred to a new judge without the need to assess apparent bias. Each party is limited to the opportunity to make one claim.¹⁴⁹ Proponents of a peremptory system cite its simplicity, expediency

143 Hammond, above n 24, at 165, appendix E.

144 At 148–149.

145 At 148–149.

146 See *Part VIII.A.2: Principled concerns*.

147 See *Part VI: Judicial Recusal: A Mismatch Between Theory and Practice*.

148 Frost, above n 93, at 587, n 262.

149 At 587.

and the benefit in not requiring an application of the indeterminate apparent bias test. It is based upon the idea that impartiality does not lie on a spectrum; one is either impartial or partial. Thus, when there is even an allegation of partiality, the public may question a challenged judge's impartiality and, since impartiality revolves around public perception, the damage to the public's perceptions of impartiality has already occurred notwithstanding the claim's substantive merits. A peremptory recusal regime is undeniably simpler than applying the apparent bias test to a judge's potentially conflicting interest. However, it also has major shortcomings.

A peremptory recusal regime can lead to a case being reallocated twice to two new judges. While any ensuing delays need to be considered against any delays that arise from transferring a recusal motion to an independent judge, there is potential for the delays to be substantial. Further, without an articulation of the potentially conflicting interest in question, no guidance is provided to ensure that a new judge to whom the case is transferred will be any less partial than the recused judge. By automating judicial recusal, the number of recusals is likely to increase, which may harm public confidence in the judiciary. Frost recognised the dangers of excessive judicial recusal when she stated that "increased frequency of disqualification ... might arguably tend to undermine public confidence in the judiciary by disparaging the general impartiality of judges".¹⁵⁰ Thus, this author opines that the peremptory recusal regime's practical and principled flaws outweigh its simplicity and expediency.

C Focus on Substance Rather than Procedure

This article has looked to procedure as a means of fostering judicial impartiality and thereby maintaining public confidence in the judiciary. Faced with the reality that reasonable minds can differ in determining reasonable apprehensions of bias, principled procedural safeguards, rather than supplementary substantive articulation, have been used in an attempt to curb inconsistencies and increase transparency and uniformity.¹⁵¹ Stempel, while accepting that there is a need for greater procedural mechanisms, suggests that "the legal system and the body politic needs to accept an updated, 'post-modern,' approach to operationalising the appearance standard".¹⁵²

Stempel's proposition was premised on the contradiction between an appearance-based standard theoretically requiring "almost universal [public] agreement that the appearance of impartiality

150 "Disqualification of Judges and Justices in the Federal Courts", above n 109, at 747.

151 See for example Philip Bryden and Jula Hughes "The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification" (2011) 48 *Alta L Rev* 569. Although this is a Canadian survey, the Canadian jurisdiction similarly looks to a reasonable apprehension of bias in deciding recusal motions. The authors proposed hypothetical scenarios to which the surveyed judges responded by stating whether they would recuse themselves or not or whether they were unsure. In over half of the scenarios, no one answer attracted the support of a majority of respondents.

152 Stempel, above n 112, at 808.

standard has been breached"¹⁵³ and the reality of a "modern-post-modern world of diverse communities, differing ideologies, varied background, and competing ideologies"¹⁵⁴ that prevents universal consensus. He opined that recusal law is unduly conservative – and in fact weak – if broad agreement is necessary before a finding of partiality can be made.¹⁵⁵ To remedy this, Stempel set out a need to "expand [the appearance standard] to match the reality of illusive consensus".¹⁵⁶ The importance of substance did not allude Geyh either, as he posited the need for the legal profession and the public to "share a basic understanding of what constitutes an appearance of impartiality".¹⁵⁷

The author acknowledges the merits of Stempel's argument. In the interests of space, the focus of this article has been on procedural reform because the author hypothesises that it is the area that is in most need of attention. This sentiment is shared by other interested parties. For example, when investigating the way forward for judicial recusal, the Law Commission identified that "[t]here is widespread agreement amongst commentators that the least satisfactory aspect of current recusal law lies in the processes adopted, or more accurately, not expressly formulated by courts".¹⁵⁸ The Law Commission went further in concluding that it considers "the best way to deal with potential judicial conflicts of interest is to have clear, robust and well-publicised rules and process for recusal".¹⁵⁹ Moreover, principled procedure can aid substantive clarity. Reasoned decisions build a wealth of precedent that may provide the legal profession and the public with the required clarity to harmonise their understanding of partiality. As Frost deduced, "altering the substance of the recusal standard has proven to be an ineffective method of reforming [judicial recusal law]".¹⁶⁰

D Reform: A Solution in Search of a Problem?

Following the resignation of Wilson J, Dr Kennedy Graham MP introduced the Register of Pecuniary Interests of Judges Bill to Parliament.¹⁶¹ The Bill would require judges periodically to

153 At 808.

154 At 810.

155 At 810.

156 At 811. See at 811–823 for Stempel's take on operationalising a minority recusal standard.

157 Geyh, above n 7, at 676.

158 Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests?*, above n 128, at [2.23]. See also Hammond, above n 24, at 72; and New Zealand Law Society "Submission to the Justice and Electoral Committee on the Register of Pecuniary for Judges Bill 2010" at 13: "current practices are not well understood by litigants and counsel, and they are inconsistently applied".

159 Law Commission *Review of The Judicature Act 1908: Towards a New Courts Act*, above n 128, at [6.58].

160 Frost, above n 93, at 534.

161 Register of Pecuniary Interests Bill 2010 (240–1).

disclose their pecuniary interests in a public register.¹⁶² Although it looked to reform by way of disclosure rather than procedure or altering the substantive test for bias, the legal profession vehemently opposed it. The Chief Justice (on behalf of the New Zealand judiciary), the New Zealand Law Society and the New Zealand Bar Association all stated that a pecuniary interests register is unwarranted and unnecessary.¹⁶³ They, along with the Law Commission and the Justice and Electoral Committee, cited there was "no evidence of a lack of public confidence in the judiciary" to justify reform.¹⁶⁴

This article does not refute that the New Zealand judiciary enjoys a high level of public confidence. However, the author suggests that it can be misleading to assume that the end (being public confidence in an impartial judiciary) justifies the means (being judicial recusal law). It is worth noting a speech delivered by New Zealand's former Chief Justice, Sir Thomas Eichelbaum, where he stated that the judiciary is not "a bastion which will suddenly fall. The danger lies in the risk of an insidious weakening of the castle foundations over a period of time."¹⁶⁵ That risk, in the recusal context, is a reoccurrence of a publicly condemnable conflict of interest between a judge and a party such as that between Wilson J and Galbraith. The foregoing principled analysis belies suggestions that the prevailing judicial recusal regime is sufficient and that reform is unnecessary.

IX SAXMERE REVISITED, FOLLOWING REFORM

It is pertinent to contextualise the mismatch between process theory and the realities of recusal procedure by returning to the *Saxmere* saga. In doing so, the author looks to substantiate his hypothesis that: first, a lack of procedural safeguards may have contributed to the controversy; and secondly, that had procedural safeguards, namely the procedures proposed in this article, been in place, the controversy could have been mitigated, if not avoided.

A Disclosure

Disclosure, or lack thereof, played a major role in the *Saxmere* saga. While Wilson J's attempted disclosure, being at the beginning of the proceeding, was timely, it was in private and the details

162 See generally Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests?*, above n 128; Law Commission *Review of The Judicature Act 1908: Towards a New Courts Act*, above n 128; Justice and Electoral Committee, above n 128.

163 See generally New Zealand Bar Association "Submission to the Justice and Electoral Committee on the Register of Pecuniary for Judges Bill 2010"; New Zealand Law Society "Submission to the Justice and Electoral Committee on the Register of Pecuniary for Judges Bill 2010"; and Sian Elias (on behalf of the judiciary) "Submission to the Justice and Electoral Committee on the Register of Pecuniary for Judges Bill 2010".

164 Justice and Electoral Committee, above n 128, at 3.

165 Thomas Eichelbaum, former Chief Justice of New Zealand "Judicial Independence Revisited" (Neil Williamson Memorial Lecture, Christchurch, 13 August 1997).

revealed were imprecise. If Wilson J had followed the guidelines, the disclosure should have been made through the court's registrar. The author posits that the soft nature of the existing disclosure obligations, with its negatively framed duty and heavy emphasis on introspection, may have been a material cause of Wilson J's minimal disclosure.

Beginning with an assumption of impartiality from which to introspect whether the Rich Hill business association should be disclosed, Wilson J must have unilaterally undertaken an internal assessment of the interest's materiality to the proceeding. Notwithstanding that he clearly saw sufficient relevance to attempt disclosure, the method perpetuates the cognitive difficulties he may have faced, like everyone would have, in assessing his own interests – defined earlier as a "systematic inaccuracy caused by unconscious leanings not removable by introspection".¹⁶⁶ By starting from a softer assumption of impartiality, and shifting the emphasis from introspection to a more positively framed and open disclosure duty, the author opines that the proposed disclosure regime may have led to a more forthright revelation by Wilson J of the potentially conflicting interest at first instance. The onus to consider whether a reasonable apprehension of bias arises shifts to the parties, namely Saxmere, rather than remaining a part of Wilson J's introspection. Disclosing in open court would have minimised the uncertainty and negative connotations associated with a private phone call. Further, had the particulars of the business relationship been disclosed, the implied waiver of failing to file a recusal motion in a timely manner would have precluded Saxmere's ability to appeal to the Supreme Court on that basis.

To emphasise that the *Saxmere* saga was not a one-off failure by Wilson J to disclose his business relationship with Galbraith, it is helpful to analyse subsequent cases in which the two appeared on the bench and bar, respectively. Of the four cases where this scenario transpired before the *Saxmere No 2* appeal was made, only once did Wilson J disclose to counsel his business relationship with Galbraith.¹⁶⁷ His rationale for non-disclosure was that he "did not see it as creating" a conflicting interest and in any event he was confident that counsel in the proceedings already knew his business relationship with Galbraith.¹⁶⁸ Without undertaking to validate Wilson J's latter assumption of counsels' knowledge, the author views the former rationale as an embodiment of the frailties of the current disclosure duty.

While it is uncertain whether Wilson J would have disclosed more adequately under the proposed regime, the author hypothesises that, at the very least, disclosure would have been fuller than it was under the existing regime.

¹⁶⁶ Leubsdorf, above n 129, at 262.

¹⁶⁷ Judicial Conduct Commissioner, above n 10, at 30–31, appendix 1.

¹⁶⁸ At 30–31, appendix 1.

B Filing a Recusal Motion

In light of Wilson J's indeterminate disclosure, Saxmere may have wanted to inquire further about the relationship to ensure that it did not raise an apprehension of bias. However, Saxmere may have been hesitant to undertake any additional inquiries or file a recusal motion for fear of annoying Wilson.

The existing ad hoc and informal process for raising questions of partiality reasonably invites some trepidation from litigants. Under the proposed regime, making inquiries to better understand a disclosed interest and to guide the decision whether to file a recusal motion will be framed as another common part of civil procedure, similar to interlocutory appeals. Institutionalising this practice should lessen litigants' fears of reprisal. Thus under the proposed regime, Saxmere may have been more inclined to question Wilson J further about the business relationship and subsequently file a recusal motion. This may have minimised, if not eliminated, the subsequent appeals and wasted litigation.

C An Independent Judge and its Associated Benefits

With greater disclosure, Saxmere presumably would have filed a recusal motion considering that its grounds of appeal in *Saxmere No 2* were based on imperfect knowledge of the potentially conflicting business relationship. Existing recusal procedure would have left Wilson J to adjudicate the recusal motion. Although he may have discussed the recusal motion with the other two judges on the panel, William Young P and Glazebrook J, the decision would have been his to make. Under the proposed regime, the recusal motion would have been decided by William Young P and Glazebrook J. The transfer would have facilitated an adversarial process whereby Wilson J could have responded to the motion with his views as to why the business interest did not warrant recusal. Even if William Young P and Glazebrook J arrived at a similar conclusion to Wilson J and dismissed the recusal motion, the public is likely to be more accepting of a decision made by independent judges rather than one made by a challenged judge.

Further, had the recusal motion not been transferred and Wilson J left to self-adjudicate, if a comprehensive body of precedent had been available, he would have had more guidance from which to make a decision. Presumably, the precedent would have indicated that the unequal nature of the business relationship and Wilson J's indebtedness to Galbraith warranted a finding similar to that the Supreme Court in *Saxmere No 3* came to: that a reasonable apprehension of bias arose and Wilson J should not have sat on the case. Requiring a reasoned decision not only reduces the chance of a judge making a hasty and unconsidered decision to sit or recuse themselves, it builds a body of precedent to better guide judges and litigants alike.

Evidently, judicial conduct guidelines did not provide the necessary guidance to Wilson J as he had, but presumably did not take, the opportunity to discuss the extent of the potentially conflicting

interest with William Young P and Glazebrook J.¹⁶⁹ Significantly, Wilson J sat on the panel that adjudicated the *Muir* case which suggests that he would have had intimate knowledge of the law and protocol relating to recusal and yet he failed to adequately apply this knowledge in practice.¹⁷⁰ This indicates that despite being well acquainted with judicial recusal law, its soft and imprecise nature can lead to inconsistent application.

The foregoing application of proposed reform to the *Saxmere* saga illustrates the remedial potential of proper process in the area of recusal. The parties would have saved a substantial amount of costs that had to be incurred to relitigate the case, not to mention the time delay. Most importantly, the transparent, structured and principled nature of the proposed reform may have averted what the Hon David Parker described as "a very sad day when we have this taint on our judiciary – and it is a taint. We have to acknowledge it is a taint."¹⁷¹

X CONCLUSION

Judicial impartiality is assumed and thus rarely features at the forefront of the legal profession's mind. However, the *Saxmere* saga thrust it into the limelight with a series of events that culminated in the resignation of a Supreme Court justice, Wilson J. Since the dust has settled on the controversy and the intense public scrutiny has receded, it is pertinent to question the status quo and investigate the potential cause of the events and, more importantly, whether measures need to be taken to prevent another such occurrence.

This article has adopted a principled approach to analysing judicial recusal law in New Zealand, with a particular focus on procedure. In doing so, a mismatch between process theory and the reality of haphazard self-regulation highlighted the procedural shortcomings of the current recusal paradigm. To remedy this, the author applied aspects of process theory to reform judicial recusal procedure and bring it in line with general civil litigation process in New Zealand. The proposed reform instils some fundamental practices that are presently absent in recusal procedure. To contextualise the article's findings, the author revisited the *Saxmere* saga to: first, posit that a lack of procedural safeguards may have contributed to the saga; and secondly, to suggest that had the procedural safeguards proposed by this article been in place, the controversy could have been mitigated, if not avoided.

169 The 2013 Judicial Conduct Guidelines, above n 39, referred to in this article are a revised version of a set of guidelines that were initially approved by New Zealand judges in 2003. Thus, at the time of *Saxmere No 1*, Wilson J would have had a set of judicial conduct guidelines at his disposal, as well as the Judges' Benchbook, which is not publicly available.

170 *Muir v Commissioner of Inland Revenue*, above n 2. As mentioned, the Supreme Court in *Saxmere No 2* affirmed the Court of Appeal's approach in *Muir*, which brought New Zealand in line with Australia and the United Kingdom's judicial recusal laws.

171 (9 November 2010) 668 NZPD 15085.

Looking back at Elias CJ's statement that "today respect for courts ... has to be earned and re-earned",¹⁷² this article's analysis has questioned judicial recusal law's ability to do just that. To apply the Caesar's wife's principle, "it is not enough that they [judges] give fair, impartial and reasoned judgments. They must bend over backwards to be seen to be doing so."¹⁷³ While the New Zealand judiciary enjoys the public's confidence, it should not rest on its laurels and view the *Saxmere* saga as an exception to an otherwise satisfactory judicial recusal regime. It should serve as a wake-up call that significant deficiencies in recusal law exist. In the author's opinion, procedural reform holds considerable promise in providing a robust and principled basis from which judicial impartiality can be – and most importantly, can be seen to be – maintained.

172 Elias, above n 9.

173 Andrew Geddis "No More Buddy Buddy, No More Messing Around" (2010) Pundit <www.pundit.co.nz>. The Caesar's wife principle states that one must be completely above suspicion.