

Vakauta v Kelly (1989) 167 CLR 568

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Facts

- During the course of a dispute regarding a personal injury claim by a worker, the presiding judge made a number of negative comments about the doctors who had written reports in favour of the insurer.
- Amongst them, he referred to them as "the unholy trinity" and that it was the usual doctors who "think you can do a full weeks work without any arms or legs".
- The insurer's counsel requested that it be put on the record that these comments were made but did not outright accuse the Judge of bias.
- In the judgment, His Honour again referred to one of the doctors negatively, writing the report was "as negative as it always seems to be - and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain"
- The insurer appealed, citing bias.

Issues

- Was the conduct of the Judge such to give rise to, at least, an appearance of bias?

Held

- Brennan, Deane and Gaudron JJ all agreed that while it was understandable that a judge, often hearing the same kind of matters, would form an opinion about certain experts, s/he must be careful not to give the appearance of bias.
- In regards to the first comments, though, although they may have originally given the appearance of bias, the insurer had waived their right to object as they had not actually objected when it happened. You cannot wait until the decision is made and *then* object - it must happen at the time. Simply saying you wanted them on the record is insufficient.
- In respect of the second comments, though, they were handed down in the judgement and therefore counsel had no chance to object. In this instance, a reasonable lay person could think that this made the Judge biased against certain witnesses, and thus there was an appearance of bias.
- Appeal allowed.

Quotes

- "Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable,

attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object." [5]

- "The question is, therefore, not whether the learned trial judge had preconceived views arising from his previous experience, but whether his preconceptions were of such a kind or were so expressed as to lead a reasonable person to apprehend that he was unable to approach the resolution of the case in a fair and even-handed manner without any inclination towards one side or the other."

Read more

Full text is available: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1989/44.html>

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