After Covid: Now it's the Lawyers' Turn

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On March 22, 2024, law firm PJ O'Brien & Associates filed a complaint with the Chief Justice of the Federal Court, Debra Mortimer, about Justice Helen Rofe (***above***) because she allegedly failed to disclose her connections to Pfizer and the pharmaceutical industry before dismissing an important case, to Pfizer's advantage, in a decision handed down on March1, 2024. The complaint alleges the existence of serious misconduct arising from Justice Rofe's failure to recuse herself or disclose any significant prior relationship with one of the respondents, Pfizer Australia Pty Ltd.[1]

In *Re Dr Julian Fidge v Pfizer Australia Pty Ltd & Anor*,[2] injunctions were sought against the pharmaceutical companies Pfizer and Moderna on the basis that they failed to apply for necessary licences to deal with Genetically Modified Organisms in Australia, pursuant to the *Gene Technology Act 2000 (Cth)* ('GT Act'). The legal team for Dr Fidge sought to present evidence showing the mRNA vaccines produced by Pfizer and Moderna objectively satisfy the legal definitions of Genetically Modified Organisms ('GMOs'), pursuant to section 10 of the Act.[3] The effect of the decision by Justice Rofe is to withhold that evidence from the court having to consider and rule on its merits.

Under section 32 of the GT Act, 'dealing' with a GMO in Australia (like in most other jurisdictions) is a Serious Criminal Offence. The applicant, Dr Julian Fidge, seeks to show that Pfizer and Moderna, in failing to obtain GMO Licenses in Australia prior to seeking provisional approval from the Therapeutic Goods Administration ('TGA'), had committed such an offence (and continue to commit Serious Criminal Offences) as the grant of provisional approval by the TGA would not have cured these ongoing Serious Criminal Offences.[4] Arguably, both Pfizer and Moderna, due to their declared expertise, are understood to have known the existence of the GMO legislation and blind peer-reviewed papers that aim at protecting the public from being exposed to modes of action with the worst possible threats to the human genome (natural).[5] According to the Australian Medical Professionals' Association ('AMPS'):

In the event either company seeks to now assert that it was an oversight, is no excuse. At criminal law both companies have also been 'reckless' and/or 'negligent' about properly investigating and verifying the above legal definitions, and the subsequent peer reviewed papers confirming the destructive effects of their products on the human genome. Where recklessness and/or negligence is shown in experts in a field, those experts are deemed to have always possessed 'knowledge' of their conduct.[6]

In effect, the law firm asked the Federal Court to consider two questions: whether Covid-19 drugs are GMOs, and if so, whether Pfizer and Moderna had knowingly breached the GT Act. The applicant thus sought an injunction to prevent the respondents, Pfizer and Moderna, from continuing to distribute their mRNA vaccines once the court accepts they failed to obtain GMO licences. If the court were to accept evidence that the respondents' products contained GMOs, and that Pfizer and Moderna continued to commit ongoing Serious Criminal Offences by dealing with GMOs without a licence, then the court should find itself compelled to issue an injunction under section 147 of the GT Act. This would effectively prevent Pfizer and Moderna from any further use of their mRNA Covid vaccines in Australia.

However, Justice Rofe summarily dismissed the applicant's case on the grounds that it had no prospects as the plaintiff, Dr Julian Fidge, is not an "aggrieved person" for the purposes of section 147 of the GT Act. As per court order, "the proceedings against the first respondent and second respondent" were dismissed "on the grounds that the applicant has no reasonable prospect of successfully prosecuting the proceedings against the respondents because the applicant is not an aggrieved person … and otherwise has no standing to bring the proceeding".[7]

The applicant, Dr Julian Fidge, is a Victorian pharmacist and General Practitioner. He contends that he has standing in professional, personal, private, and public capacities. "I've been vaccinated with these mRNA Covid-19 vaccines, and I've vaccinated thousands of patients, including my own children", he said at the time of filing. "It's hard to understand how I am not an aggrieved person, when I've not been able to satisfy my legal, moral and ethical obligations to provide informed consent to all my patients that they will receive GMOs in these vaccines", he said to investigative journalist Rebekah Barnett when responding to the court's decision.[8]

Nevertheless, Justice Rofe, relying on this specific technicality, blocked his legal challenge, thus "stalling efforts to raise the alarm over alleged unregulated genetically modified organisms (GMOs), including high levels of DNA contamination, in the vials".[9] Interestingly enough, she apparently failed to disclose a most significant prior relationship with the first respondent, Pfizer. The complaint notes that, when at the Bar, before her elevation to the Federal Court of Australia, Rofe appeared to have directly and indirectly represented Pfizer in at least five separate matters:

♦ Eli Lily & Company v Pfizer Research and Development Company NV/SA [2003] FCA 988 (19 September 2003)

♦ Eli Lilly & Company v Pfizer Ireland Pharmaceuticals (No 2) [2004] FCA 850 (30 June 2004)

♦ Eli Lilly & Company v Pfizer Overseas Pharmaceuticals [2005] FCA 67 (10 February 2005)

♦ Pfizer Italia SrL v Mayne Pharma Pty Ltd (VID439/2003: discontinued)

♦Pharmacia Italia SpA v Mayne Pharma Pty Ltd [2006] FCA 305 (29 March 2006)

Pharmacia Italia SpA appears to be a joint venture with Pfizer.[10] Moreover, Justice Rofe "possibly represented Pfizer interests in a sixth matter – *Mayne Pharma Pty Ltd v The Commissioner of Patents & Anor* (VID892/205): note the affidavits filed by Pharmacia Italia SpA with whom Pfizer had/has Australian patent licences and other business dealings".[11] These proceedings would presumably have involved considerable payment for services. According to former barrister Julian Gillespie, "it is presently unknown what, if any, other work Her Honour performed for Pfizer." Regardless, he adds, "the above proceedings demonstrate significant prior involvement for monetary reward with a Respondent in the GMO proceedings, which Her Honour failed to disclose".[12]

Furthermore, "Her Honour appears to have enjoyed a good relationship with her departed cousin, Sir Andrew Grimwade", Gillespie says. As he points out, "Sir Andrew was on the board of the Walter and Eliza Hall Institute (WEHI) for 15 years, 14 of those as President, retiring from the Board in 1993." The basic problem with this, he explains, is that from the start of Covid the WEHI received $13 million from the Australian

government for Covid projects. “The WEHI has also received over US$30 MM in grants from the Bill & Melinda Gates Foundation since 2007 … and the Bill & Melinda Gates Foundation has also provided over US$ 180MM to Pfizer, BioNTech, and Moderna”.[13]

The rules about judicial bias are well developed in Australia. When a judge has had prior dealings with one or more parties to proceedings, they are obliged to disclose all details and invite the parties to make submission on whether that judge should recusal. This perceived problem of judicial bias and/or misbehaviour has motivated PJ O’Brien & Associates to write a letter of complaint to the Chief Justice of the Federal Court of Australia, Debra Mortimer. The complaint was served on March 22 and it requests the Chief Justice’s investigation of their complaint that Justice Rofe failed to disclose her “prior and significant relationship with the First Respondent [Pfizer], and close working relationships and familial ties”, which, they say, “creates a perception her Honour intended to conceal her prior relationship with the First Respondent, and ostensibly from the Applicant”.[14] According to Gillespie:

If the orders sought in the Complaint are provided, then the 1 March decision of Rofe will be vacated, a new judge assigned, and the case allowed to start again. Presently there is a question of the Chief Justice trying to force us on to an appeal of the 1 March decision, which we have maintained several times now is impossible, for as the Complaint details, Rofe negated her judicial authority by her non disclosure. Therefore, the 1 March decision lacks any judicial authority as we have a decision that is ‘unappealable’. In such extraordinary circumstances the Chief Justice must vacate the 1 March decision. In the process of vacating she should also be declaring Rofe has committed misconduct”.

The High Court recently articulated these rules in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023). There, Chief Justice Kiefel and Justice Gageler, after mentioning that “impartiality is an indispensable aspect of the exercise of judicial power,” state that “bias, whether actual or apprehended, connotes the absence of impartiality. Leaving to one side exceptional circumstances of waiver or necessity, an actuality or apprehension of bias is accordingly inherently jurisdictional in that it negates judicial power.”[15] The above comment is supported by a previous decision of the High Court. In *Charisteas v Charisteas* (2021), the Court observed:

Where, as here, a question arises as to the independence or impartiality of a judge, the applicable principles are well established, and they were not in dispute. The apprehension of bias principle is that “a judge is disqualified 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”. The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, “it requires the identification of what it is said might lead a judge … to decide a case other than on its legal and factual merits”; and, second, there must be articulated a

“logical connection” between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.[16]

The ‘logical connection’ question would have been applicable to Justice Rofe, had she disclosed her prior relationship, in so far as Dr Fidge’s lawyers would have had to address the question in submissions seeking Justice Rofe disqualify herself. However, according to Gillespie, “as a consequence of Rofe failing to disclose her past relationship, that question of ‘logical connection’ is no longer relevant. the ‘logical connection’ question is asked in respect of past conduct possibly bearing on current proceedings”. “But by failing to disclose”, he continues:

the inquiry instead has now shifted to questions surrounding her current behaviour – the act of non disclosure – where our complaint says that behaviour, the fact of intentionally not disclosing her prior relationship, moves the standard inquiry beyond bias or apprehended bias, to an inquiry concerned with her Rofe’s actual decision to conceal past matters she was positively obliged to disclose .. that act of intentional concealment focuses on her present conduct in the proceedings (no longer concerned with past proceedings), and is conduct far above bias or apprehended bias. The intentional concealment was overt and is in evidence. Such conduct is open to the lay observer to interpret as dishonesty, which is much more than the euphemistic description of ‘misbehaviour’.

On May 31, concerned lawyers sent several members of parliament an Information brief for breaking down the legal issues as they currently stand, being as they are, unique constitutional circumstances. Senators and MPs are now at liberty to bring a motion in the Senate demanding both Houses of Parliament establish a Commission to inquire into the alleged misconduct of Justice Rofe, pursuant to the *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Act 2012 (Cth)* (‘JMI Act’). This motion, writes Gillespie, “would begin the process of righting some of the Covid wrongs brought to bear on the Australian People, while helping to clear the way forward for true justice to be done in the globally significant GMO proceedings”.[17]

By a letter dated May 30, 2024, Chief Justice Mortimer was informed of discussions between senators and members of parliament (MPs) concerned with bringing a motion under the JMI Act, which serves as a prelude to further action under Section 72 of the Australian Constitution. Under Section 72 federal judges “(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity”. Accordingly, the removal procedure of federal judges is solely conducted by both Houses of the Parliament, as provided for in the Constitution. The High Court would be unlikely to interfere with a proposed removal which had complied with the procedure laid down in s 72. The requirement of proof is a matter which is within the sole jurisdiction of the Houses of Parliament, which may be satisfied with proof on the balance of probabilities that there is evidence of misbehaviour.[18]

Associated with this is the question of what type of conduct would justify removal on the ground of misbehaviour. It is considered that such conduct would be commission of a criminal offence of sufficient gravity, or conduct which, though not criminal, would render the Justice unfit to perform the duties of office. Senators and MPs are not required to await the outcome of the investigation by the Chief Justice or any other formal court steps. The powers under the JMI Act and Section 72 can be activated at any time by parliamentarians. In 1984 the Senate appointed committees to inquire into the behaviour of a High Court Justice (Justice Murphy) in relation to allegations that he had attempted to pervert the course of justice. In May 1986, the Parliament passed legislation to establish a commission of inquiry in relation to conduct of the Justice.[19] The Commissioners took the view that 'misbehaviour' in s 72 was not limited to criminal misconduct. When it became clear that the Justice was dying, the commission ceased its investigation.

Under Section 13 of the JMI Act, a Commission established under the Act would empower three persons appointed on the nomination of the Prime Minister. Before nominating a member, the Prime Minister would have to consult the Leader of the Opposition in the House of Representatives. At least one member of the commission would have to be a former federal judge or a former judge of the Supreme Court of a State or Territory. As per Section 10, the functions of the Commission would be to investigate the matter and report to the Houses of the Parliament its opinion of whether there is evidence of the alleged misbehaviour. Thus, in the circumstances of this case, the Commission would be tasked to return a report on the question of whether evidence exists for concluding that Justice Rofe's conduct in the GMO proceedings amounted to 'misbehaviour'.

Significantly, the findings of the Commission are not binding on members of Parliament. They would be allowed a conscience vote, meaning that individual senators and MPs would be free to make up their own minds. Senators and MPs would be required to voice in their individual capacities about whether Justice Rofe's conduct amounted to 'misbehaviour'. They are required to judge such behaviour "in the light of contemporary values."[20] And it is also important to observe that any attempt by the political parties to orchestrate a vote to exonerate Her Honour could be construed as 'perverting the course of justice' and a violation of the doctrine of separation of powers.

The grounds adduced by PJ O'Brien & Associates for impeaching Justice Rofe are that she should have declared her potential conflicts and past professional legal services to one of the respondents, as well as familial ties, which appear to create a perception that she concealed her prior relationship with one of the respondents. As noted by Katie Ashby-Koppens, a solicitor at PJ O'Brien & Associates:

Judges are duty bound to disclose not only potential conflicts, but also perceived conflicts. Failing to disclose this information is not just a breach of common courtesy, but is a breach of the judicial obligations of a sitting judge. There are 17 judges who sit on the Federal Court Melbourne Registry. Justice Rofe was not the only judge available to

hear the matter. [Her] dismissal or our case should be voided and our matter should be heard by a judge with no presenting conflicts, as should all matters in the Australian legal system.[21]

Depending on the outcome of the law firm's approach to the Chief Justice of the Federal Court, the decision in *Re Dr Julian Fidge v Pfizer Australia Pty Ltd & Anor* might be declared void and of no judicial effect, and precisely because of this choice by Justice Rofe to not disclose her prior relationships with one of the parties. As the complaint details and subsequent letters to the Chief Justice reaffirm, the 1 March decision becomes 'unappealable', so there is no appeal process to wait upon. Instead, the Chief Justice would be required to vacate the March 1 decision, allocate a new judge, and allow the GMO proceedings to start again. Finally, there would appear grounds for the impeachment of Justice Rofe by the federal parliament, pursuant to the Section 72 of the Australian Constitution.

This story is far from over. Stay tuned.

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Moens and Zimmermann are the authors of several joint books, including 'The Unlucky Country' (Locke Press, 2024) and 'Foundations of the Australian Legal System: History, Theory and Practice (LexisNexis, 2013).

[1] PJ O'Brien & Associates, 'Constitutional complaint brought against Federal Court Judge for concealing pharma connections', Media Release, at https://julesonthebeach.substack.com/p/gmo-case-constitutional-complaint?utm_source=profile&utm_medium=reader2.

[2] Re *Julian Fidge v Pfizer Australia Pty Ltd & Anor* (VID510/2023).

[3] 'Australian Federal Court being asked two questions: Are Covid-19 drugs properly GMOs; and if so, have Pfizer and Moderna broken the law?', Australian Medical Professionals' Association – AMPS, at https://amps.redunion.com.au/australian-court-covid19-drugs-gmo-pfizer-moderna-law.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] *Re Dr Julian Fidge v Pfizer Australia Pty Ltd & Anor* (VID510/2023).

[8] Rebekah Barnett, ‘Breaking: Australian Federal Court throws out Covid mRNA vaccine challenge,’ 1 March 2024, at https://news.rebekahbarnett.com.au/p/breaking-australian-federal-court.

[9] Ibid.

[10] See: https://www.medpages.info/sf/index.php?page=organisation&orgcode=263114

[11] ‘Complaint against Her Honour Justice Helen Rofe, Re Dr Julian Fidge v Pfizer Australian Pty Ltd & Anor (‘the Fidge proceedings,’ Letter to Chief Justice Mortimer, PJ O’Brien & Associates, 22 March 2024, at https://julesonthebeach.substack.com/p/gmo-case-constitutional-complaint?utm_source=profile&utm_medium=reader2

[12] Julian Gillespie, ‘GMO decision. When is a Judge not a Judge?,’ Jules on the Beach, March 3, 2024, at https://julesonthebeach.substack.com/p/gmo-decision-when-is-a-judge-not?utm_source=profile&utm_medium=reader2

[13] Julian Gillespie, ‘GMO decision, Appearances. Family, friends and professional acquaintances,’ Substack, 4 March 2024.

[14] ‘Complaint against Her Honour Justice Helen Rofe, Re Dr Julian Fidge v Pfizer Australian Pty Ltd & Anor (‘the Fidge proceedings,’ Letter to Chief Justice Mortimer, PJ O’Brien & Associates, 22 March 2024, at https://julesonthebeach.substack.com/p/gmo-case-constitutional-complaint?utm_source=profile&utm_medium=reader2

[15] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 [26] (17 May 2023)

[16] *Charisteas v Charisteas* [2021] HCA 29 [11]; 273 CLR 289 (6 October 2021)

[17] Julian Gillespie, ‘One Nation to bring a Motion in the Australian Senate Calling on both Houses of Parliament to empower a Commission of Inquiry into the conduct of Justice Helen Rofe seen in the GMO proceedings,’ Substack. 22 May 2024.

[18] See John Trone, *Lumb, Moens & Trone: The Constitution of the Commonwealth of Australia Annotated*, 10th ed, LexisNexis, 2021, 349-351.

[19] See Parliamentary Commission of Inquiry Act 1986; *Murphy v Lush* (1986) 65 ALR 651; 60 ALJR 523

[20] Former High Court Justice Nettle essay Removal of Justice from Office, quoting the Honourable Sir George Lush from the Parliamentary Commission of Inquiry into Justice Lionel Murphy, when ruling on the meaning of ‘misbehaviour’.

[21] PJ O’Brien & Associates Press Release, ‘Constitutional complaint brought against Federal Court Judge for concealing pharma connections’, Media Release, at https://julesonthebeach.substack.com/p/gmo-case-constitutional-complaint?utm_source=profile&utm_medium=reader2.