I: INTRODUCTION

Two rules stand as the twin pillars of natural justice, nemo debet esse judex in propria sua causa (no person can be a judge in his or her own cause) and audi alteram partem (no person should be condemned unheard). The first (the “rule against bias”) can be subsumed within the latter (the “hearing rule”) as the right to a fair hearing assumes that the tribunal will not be biased. However, as a matter of history and of practical application the two rules are treated separately.

The primary concern of this article is the rule against bias and in particular the often recited, but rarely questioned, rule that the parties to a hearing can waive any bias. It is by no means self-evident that the doctrine of waiver should form an exception to the rule against bias. In fact there are strong arguments that the doctrine of waiver does not sit comfortably with the rule.

Part II contains a general examination of the doctrine of waiver as it has operated in the English common law. This is followed in Part III by a discussion of how the doctrine was first applied to the rule against bias. Part IV looks at where waiver has come from. It is then argued in Part V...
that parties should not be allowed to waive bias because the underlying rationale of the rule against bias does not permit waiver. The rule against bias was originally founded on a rationale of fairness and accuracy of decision-making but is now founded on the idea that to allow a biased tribunal to make a decision would be to undermine public confidence in the system. Lord Hewart CJ famously stated: "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done". Though waiver was acceptable when the underlying rationale emphasised accuracy of decision-making, it does not sit well with the public confidence rationale. Nevertheless, waiver has lingered on as an exception to the rule.

In Part VI a comparison is made to waiver of the hearing rule as waiver of that aspect of natural justice is often used as a supporting analogy for waiver of the rule against bias. This is shown to be misconceived, as the hearing rule has separate historical and philosophical origins. In Part VII the suggestion is made that waiver of the rule against bias should not be treated as a 'knock-out blow' at the beginning of the proceedings but, like locus standi, should be one of the many factors that the court considers at the end as going to its remedial discretion.

II: A BRIEF HISTORY OF WAIVER

The case law shows that the rule against bias had been firmly established in its basic form by the eighteenth century. However, at that point there was no suggestion that this fundamental rule could be waived. It was not until 1841, in *R v Commissioners for Paving Lighting Cheltenham*, that a court found that there could be consent to a hearing before a biased tribunal. It is therefore important to understand where the concept was imported from, as it evidently was not, as the modern textbooks suppose, always a natural part of the rule.

A party waives the objection when it is aware that the adjudicator is disqualified but fails either to object or assent to it. Once the objection to bias is waived the party is then bound by the decision. The right of judicial review on the grounds of bias that existed before the waiver is lost to the party. In this sense the party is prevented from what is colloquially known as "blowing hot and cold". Waiver of bias takes

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3 See discussion below in Part III.
4 (1841) 1 QB 467; 113 ER 1211 ["Cheltenham"].
place not only where there is direct spoken assent to the presence of a biased adjudicator, but also applies where there is silence or conduct from which consent may be inferred. If the objecting party fails to insist on its rights, those rights are lost. In this sense the objecting party is prevented from “sitting on its rights”.

The concepts of waiver, consent, election and acquiescence were common to several areas of the law in the eighteenth and early nineteenth centuries. These concepts all differ slightly in their meaning but it is difficult to draw a bright line between them. As Cooke J (as he then was) stated in Coupe v JM Coupe Publishing Ltd:

> The precise lines between estoppel (legal or equitable), acquiescence, assent, waiver, election and conduct precluding equitable or discretionary relief are well known to be difficult to draw and it is not always profitable to try to draw them.

The general idea behind these concepts is that a party intentionally and voluntarily relinquishes a known right either by a positive act or by implication from its conduct. Some are analogous to the application of waiver to the rule against bias and may therefore be helpful in determining the origin of waiver in the rule against bias.

1. **Private Law**

(a) **Land Law**

In the context of land law, landlords were held to have waived their right to forfeiture if they did some positive act to show that the tenancy was to continue. The landlord could reap the benefit of continuing a tenancy despite conduct on the part of the tenant that amounted to forfeiture. However, the landlord could not then insist on the right to forfeiture that existed previously. Notably, in this context there is no room for inferring waiver from inaction on the part of the landlord as there is in waiver of the rule against bias. The courts were insistent that there had to be some positive act. It is similar to waiver of the rule against bias in that it is a unilateral act and that it prevents a party from

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5 [1981] 1 NZLR 275, 278.
6 Doe d Cheny v Batten (1775) 1 Cowp 243; 98 ER 1066; Lord Brewer d Onslow v Easton (1783) 3 Doug 230; 99 ER 627; and Doe d Sheppard v Allen (1810) 3 Taunt 78; 128 ER 32.
7 Doe d Sheppard v Allen, ibid. This case was affirmed in Perry v Davis (1858) 3 CB (NS) 769, 776; 140 ER 945, 948 where Williams J stated: “[M]ere lying by will not do; there must be some positive act of waiver”.

“blowing hot and cold” in the sense that once the election is made a party cannot insist on its pre-existing rights.

(b) Equity

The doctrine of election in equity also has some similarities to waiver of the rule against bias. This doctrine holds that a beneficiary of a will or deed who makes a disposition of property “cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them”. A beneficiary cannot take the benefit of the disposition without also accepting the other conditions, which may effectively alter or extinguish pre-existing rights. Again, it is similar to waiver of bias; a party is prevented from “blowing hot and cold”.

(c) Contract

The doctrine of waiver can also be applied in the context of the law of contracts. Sometimes the waiver will be in the interests of both parties. Frequently, however, one party accedes to the request of the other contracting party and a promise is made that the acceding party will not insist on its strict rights in the original contract. The courts have recognised that this is a common feature of commercial life. A party will not be allowed to insist on a strict contractual right where it has knowingly and without duress waived that right. This is a concept that can be traced back to the nineteenth century. In *Goss v Nugent*, Lord Denman CJ stated that waiver of contractual conditions was acceptable. His Lordship found that:

\[ \text{After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it.} \]

This case was chiefly concerned with whether waiver is effective if not evidenced by a written memorandum but it clearly shows that waiver of contractual terms was an accepted legal practice at the beginning of

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10 (1833) 5 B & Ad 58; 110 ER 713.
11 Ibid 65; 716.
the nineteenth century. The doctrine of waiver is in this context analogous to waiver of the rule against bias in that once waiver has taken place, parties cannot insist on rights that existed before the waiver. It is different, however, in the important respect that it is not a unilateral action but is made with consent by both parties. It therefore forms a weak analogy to waiver of the rule against bias.

The stronger analogy is to election in contract law. Where a party has repudiated a contract the innocent party may elect to affirm or cancel the contract. Once the election has been made it is binding. It is analogous to waiver of the rule against bias as it is a unilateral election that prevents a party from “blowing hot and cold”. Furthermore, affirmation of the contract, as with waiver of bias, can be made only by a party with full knowledge of the facts and may be by words, acts, or even silence.

2. Procedure

The doctrine of waiver can also be found in the law of procedure. In this context the doctrine of waiver is embodied in a legal maxim, *consensus tollit errorum* (the acquiescence of a party that might take advantage of an error obviates its effect).12 Where there is an irregularity in procedure a party may consent to it and cannot later complain of that irregularity. The consent in fact removes the mistake:13

[I]f a party, after any such irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known.

Furthermore, consent to the irregularity can be implied as well as express. Parties were therefore prevented from “blowing hot and cold” and from “sitting on their rights”.

This maxim has strictly limited application. Consent can never cure a defect in jurisdiction. The parties cannot by consent extend the jurisdiction of a decision-making authority. The origin of this rule can be traced back to Bracton’s assertion that the King is the fountain of all justice. Extending jurisdiction by consent challenges the royal prerogative.14 Parties are not competent to consent to jurisdiction, as

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13 Ibid 137.
Unlike in other areas of the law, it is not a private matter. An individual cannot extent the jurisdiction of a tribunal or court.\textsuperscript{15}

3. Summary

It is apparent that well before 1841, when waiver was first applied to the rule against bias, the concept of waiver and similar doctrines existed in other areas of the law. The central idea that underpinned it was that parties were not to "blow hot and cold" or "sit on their rights". The courts would not protect those who did, but would hold instead that they had lost those original rights.

III: EARLY WAIVER OF BIAS CASES

1. Necessity and Waiver

\textit{Cheltenham} saw the first application of the doctrine of waiver to the rule against bias. It is surprising in that the application of waiver in this case was not founded on the idea that a party is not to "blow hot and cold" or "sit on its rights", but instead was based on necessity. \textit{Cheltenham} concerned an appeal from a proceeding where several justices voted or took part in a decision regarding the setting of rates. The justices had properties that would be affected by the rates. This was a clear breach of the rule against bias and the Court so found.\textsuperscript{16} Lord Denman CJ, however, was at pains to point out that the presence of an interested magistrate would not always invalidate proceedings:\textsuperscript{17}

Nor do I say that there may not be cases in which a magistrate who is interested may sit: for, if all parties know that he is interested, and make no objection, at any rate if there be any thing like a consent, or if the magistrate take no part, or if he take a part upon being desired to do so by all parties, in all these cases it would be monstrous to say that the presence of the magistrate vitiated the proceedings.

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\textsuperscript{15} Ibid 51. Dobbs states that the rule is acceptable "partly because it is ... logical and partly because it evokes images of the parties as vigilantes taking the law into their own hands".
\textsuperscript{16} Supra note 4, 474; 1214 per Lord Denman CJ. Patteson J expressed doubt as to whether there had been a breach of the bias rule as he did not agree with having a peremptory rule that the vote of an interested person will vitiate proceedings. His Honour revoked this comment, however, in \textit{R v Justices of Hertfordshire} (1845) 6 QB 753, 757.
\textsuperscript{17} Ibid 475; 1215.
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This is often taken by commentators to be a reference to waiver in the sense discussed above, that the court will prevent a party “sitting on its rights” or “blowing hot and cold”. However, several lines later Lord Denman CJ reiterated the view that parties can consent to the presence of an interested magistrate and provided clarification on why he saw a need for this rule:  

I have already pointed out the exception to the general rule, which I was the more anxious to do, because I can conceive that, if that exception were lost sight of, difficulties might arise, especially at sessions where the Bench consists of very few magistrates. But it is very advisable that no interested person should ever take a part in a decision without stating the fact of his being interested, and enquiring whether any objection be made.

Lord Denman CJ was therefore not importing the rule for a particular doctrinal purpose but for more pragmatic considerations. He was concerned that there may not be sufficient magistrates to hear cases if parties were not allowed to consent to their presence. Hence, the common interpretation that waiver was introduced to the rule against bias to prevent parties from “sitting on its rights” and “blowing hot and cold” is incorrect.

However, Lord Denman CJ’s reasoning in Cheltenham is surprising as there were already two exceptions to the rule against bias in existence at the time the case was decided: the exception of necessity and statutory exceptions. Since the law already addressed the situation where very few magistrates were available, Lord Denman CJ’s reasoning was a poor foundation for introducing the doctrine of waiver by parties to the rule against bias.

The exception of necessity had been developed well before Cheltenham. The concept was a general one but in this context it operated to allow an interested decision-maker to hear a case where no qualified, uninterested person was available to adjudicate. The underlying concern was “the prevention of the failure of justice”. This is what Professor Glanville Williams refers to in his discussion of necessity in a broader sense as “a choice of the lesser evil”.

However, the unavailability of an uninterested party would not necessarily meet the requirements of necessity. In Great Charte

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18 Ibid 476; 1215.
19 Williams, “The Defence of Necessity” (1953) 6 Current Legal Problems 216.
20 Great Charte v Kennington (1742) 2 Stra 1173; 93 ER 1107.
21 Supra note 19, 224.
Kennington, it was found that poor law administrators were prevented from acting if they contributed to the poor law fund. In obiter the Court noted, however, “that if it appeared there were no other justices, it might be allowed to prevent a failure of justice”. The acceptance of necessity was somewhat tentative and limited.

One such limitation is found in R v Allan. A Mr Hodgson was convicted of failing to cease fishing salmon at the season’s end. Some of the convicting justices were members of an association with interests in salmon fishing and were therefore held incompetent to convict, being both parties and prosecutors. Blackburn J stated that there “may be difficulty in finding magistrates in this neighbourhood who are not interested to hear such an information, but members of the Association which institutes the prosecution must not act as Judges upon it”. In discussing this case Tracey explains that this is the category of exception where a conflicting role is voluntarily assumed, and the doctrine of necessity will not operate even if no other qualified adjudicators can be found. Hence, the necessity exception will only operate where no uninterested adjudicator can be found and that interest has not been voluntarily assumed.

The legislature clearly thought that the exception of necessity was insufficiently wide because shortly after R v Allan a statutory exception was introduced. This allowed justices of the peace to make decisions affecting parishes in which they were rated inhabitants. This statutory exception was applied in R v Justices of Essex.

2. Waiver and “Blowing Hot and Cold”

The next time waiver was discussed in the context of bias was two years later in Corrigal v London. In that case it was clear that the justification for importing the doctrine of waiver was borrowed from other areas of the law to prevent parties “sitting on their rights” or

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22 Supra note 20.
23 Ibid 1174; 1108.
24 (1864) 4 B & S 915; 122 ER 702.
25 Ibid 924, 706.
27 Re O’Driscoll’s Application ex parte Frethey [1902] NZLR 317, 356 (CA) provides a further qualification to the application of the exception of necessity. It was held that: “A litigant who has by his own act rendered or assisted to render a Court incompetent to pronounce a judgment cannot claim to retain the judgment of a Court otherwise without jurisdiction because there is no other Court which can pronounce judgment.”
28 (1816) 5 M & S 513, 516; 105 ER 1139, 1140.
29 (1843) 5 Madd & G 219; 133 ER 545.
“blowing hot and cold”. The defendant company constructed a railway within fifty foot of the plaintiff’s house. An order for compensation and compulsory purchase of the house was made. On appeal the defendant company argued, inter alia, that the order was not valid because the sheriff who made it was a shareholder in the company. Tindal CJ did not need to determine the waiver point because pursuant to statute the decision was not void. However, his Honour went on to say that even if an objection to the presence of the sheriff could have been made, the defendant company had waived that objection:30

[It] would be unreasonable that they should lie by and await the result of the proceedings, and raise no difficulty until after they have seen the inquisition, and can determine whether or not it is satisfactory to themselves.

This statement clearly imports the idea that a party to a proceeding should not be permitted to “sit on its rights”. This indicates a shift from the pragmatic concerns of Lord Denman CJ to the rationale that underlies the doctrine of waiver in other areas of the law where it is applied. In fact neither Cheltenham nor any other authority for waiving the bias rule was mentioned in Corrigal v London.

R v Justices of Richmond31 continued the line of authority upholding the doctrine of waiver in relation to the rule against bias. Lord Huntingtower was convicted of wilfully damaging a trestle on a highway that was the property of the vestry of Richmond. His Lordship was ordered to pay a fine to the vestry treasurer. However, the justices who made the decision were vestrymen and therefore had a pecuniary interest in the outcome. Cockburn CJ, with whom Wightman, Crompton, and Blackburn JJ concurred, accepted that waiver could apply in this context and that the rationale was to prevent people “sitting on their rights” and then exercising them at their convenience. The Justices even went so far as to say that Lord Huntingtower and his attorney had to prove that they did not previously know of the pecuniary interest:32

It being an objection that the justices were interested to some small infinitesimal extent in the subject matter of the decision, the fact that the party did not know of such objection at the time must be negatived to the fullest extent.

30 Ibid 247; 558.
31 (1860) 24 JP 422.
32 Ibid 423.
Universe Tankships Inc v International Transport Workers Fed.\textsuperscript{36} His Lordship identified two elements:\textsuperscript{37}

1. Pressure amounting to compulsion of the will of the victim (leaving the plaintiff without reasonable alternatives); and
2. The illegitimacy of the pressure exerted.

Even if no complaint is made of the conduct at the time, economic duress is still operative as "the victim's silence will not assist the bully".\textsuperscript{38}

The law, however, does not acknowledge the potential for duress in the waiver of the rule against bias. This is despite the fact that the circumstances of some cases indicate that a form of duress is operating, leaving a party with no real alternative but to waive its objection to the presence of bias. Duress in these circumstances may be in the form of financial constraints, embarrassment, or fear that raising the objection may cause further bias.

\textit{Auckland Casino Ltd v Casino Control Authority}\textsuperscript{39} is illustrative of this issue. During the hearing for its application for the license to build Auckland's casino, Auckland Casino Ltd ("Auckland Casino") became suspicious that the Casino Control Authority ("the tribunal") had closed its mind to its application. Upon investigation, Auckland Casino discovered, among other things, that some members of the tribunal held shares in Brierley Investments Ltd, the 80 per cent shareholder of rival applicants Sky Tower Casino Ltd. This issue was not immediately raised with the tribunal. When Auckland Casino sought judicial review of the decision after its application was denied, the Court of Appeal found that Auckland Casino had waived the objection. A principal reason for which Auckland Casino failed to raise the objection was its lack of funds. If it had raised the issue it would not have been able to afford a rehearing. Auckland Casino's best option was to hope for a positive outcome. Auckland Casino can therefore be seen to have been labouring under a type of duress when it effectively waived the objection of bias. Rather than making a choice as the doctrine of waiver presumes parties to do, Auckland Casino's will was effectively overborne.

The will of a party may also be compelled where the party fears that raising the issue of bias will cause a greater risk of prejudice than the

\textsuperscript{36} [1983] 1 AC 365, 400.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
\textsuperscript{39} [1995] 1 NZLR 142 (CA) ["Auckland Casino"].
Waiver of the Rule Against Bias

Ex parte the Parish of Illchester\textsuperscript{33} closely followed R v Justices of Richmond. The Court found that the party claiming bias had to show it did not waive the objection, either by failing to object when it knew of the objection or by behaving in a way that suggested it had acquiesced.\textsuperscript{34}

By 1865, only 23 years after the doctrine of waiver was first introduced to the rule against bias, Cockburn CJ found that it was a settled rule. His Honour stated: "[N]othing is better settled than this, that a party aware of the objection of interest cannot take the chance of a decision in his favour and afterwards raise the objection".\textsuperscript{35} It had therefore become settled that the fundamental rule of justice, that no person could be a judge in his or her own cause, was not absolute. Necessity was one limited exception. To this waiver was added to prevent the injustice of a party "blowing hot and cold" or "sitting on its rights".

IV: WHERE HAS WAIVER COME FROM?

1. Waiver in Private Law

It is possible that waiver has been borrowed from the private law. If this is the case it may be problematic: the matter of bias in a tribunal is public in nature and is not simply an issue of private law between parties. However, although there may be a problem with the application of a private law doctrine to the rule against bias, private law can, nevertheless, be instructive in examining how the doctrine of waiver should operate in the context of the rule against bias.

(a) Contrast to Contract Law

It is interesting to note a possible analogy between waiver in contract law and waiver of bias. In contract law a condition of the contract can be waived by one of the parties. However, this waiver does not operate where there has been economic duress. Economic duress is where one party exerts illegitimate pressure on another to obtain agreement. Lord Scarman discussed what constitutes economic duress at length in

\textsuperscript{33} (1861) 25 JP 56.
\textsuperscript{34} Ibid 57.
\textsuperscript{35} R v Rawson (1865) 6 B & S 794, 802; 122 ER 1386, 1389.
originally suspected bias. Jones and de Villars note that raising bias tends to offend the members of the tribunal hearing a case. The word “bias” is loaded and tribunals tend to treat allegations of “reasonable apprehension” of bias as meaning actual bias. The effect of raising bias may therefore be to offend the tribunal and turn it against the complaining party. Kirby P, however, has rejected this as an excuse for remaining silent, at least for a legal practitioner in a superior court. His Honour stated that the solicitor advocate had a duty to “represent clients with courage”. It would not be expected that judges of superior courts would react the way Jones and de Villars suggest tribunals do to an allegation of bias. However, most allegations of bias concern administrative tribunals, not superior courts, and for lay people sitting as members of administrative tribunals the argument holds some weight. Cooke P noted this in Auckland Casino, stating that “[f]actors influencing this election included fear of alienating the Authority”.

That there is in fact a choice to waive may, in some circumstances, be a myth. Financial constraints and the fear of turning a tribunal against it may in reality prevent a party from exercising a meaningful election. In this respect, waiver can be compared to the economic duress exception to waiver in contract law; waiver is invalid if it is procured under illegitimate pressure. The point is that there can be an element of duress when parties ‘elect’ to waive the objection of bias. The courts’ failure to take the possibility of duress into account is unacceptable, especially when it is accepted as part of the doctrine of waiver in contract law.

(b) Necessity Bars Waiver

Though duress has not formed part of the doctrine of waiver for the rule against bias, there is New Zealand authority for the proposition that if a party is forced to go before an interested tribunal because none other is available then waiver of the rule against bias is not permitted (either by the parties or by operation of the necessity exception). This was the finding in Isitt v Quill. The majority of the members of the Liquor Licensing Committee were “prohibitionists”. In 1891 they had refused five out of the eight licences in the area and in 1892 refused the

41 Ibid.
42 Supra note 39, 150.
43 (1893) 11 NZLR 224 (CA).
remaining three, all on the ground that the licensed houses were not needed in the district. The Court held that: 44

On the question of waiver, I do not doubt that the applicant's conduct in putting in his application and attending in support of it, with knowledge of the declared opinions and intentions of the majority of the Committee, cannot be treated as a waiver of that ground of objection. It is true he had the chance of a decision in his favour, but it cannot be fairly said that he 'took' that chance; he had no option; it was the only tribunal he could go to; he was bound to go within a limited time.

When a party is faced with the Hobson's choice of going before an interested tribunal or being unable to be heard at all, waiver will not operate. There is no real choice for the party and it cannot be held to have waived its right to be heard before an unbiased tribunal.

However, the rule that waiver is not to be imputed to parties who out of necessity appear before a biased tribunal, does not seem to operate in New Zealand law any longer. In *Auckland Casino* there was no discussion of *Isitt v Quill* or of the proposition for which it stands. In principle, however, *Isitt v Quill* seems correct. If waiver is to be part of the rule against bias there should be an acknowledgement in the law that the 'choice' of a party is not always freely made. A party placed on the horns of a dilemma through no fault of its own should not be held to have waived the objection to bias.

2. Waiver and Procedure

An alternative to the theory that waiver was imported from the private law is that it was a natural extension of the doctrine of waiver in the law of procedure. This seems likely, as the two are closely analogous. 45 However, even if the doctrine of waiver was imported into the rule against bias from the more general doctrine in the law of procedure, there is a significant problem with its application in this area. It has been clear from the earliest times that a jurisdictional error renders a decision void. The decision is "therefore, outside the area within which the law recognises the privilege to err". 46 Consent can never cure a defect in jurisdiction: "Consent cannot ... (unless by the express words

44 Ibid 242-243.
45 In the context of procedure the doctrine of waiver is embodied in a legal maxim, *consensus tollit errorem* (the acquiescence of a party who might take advantage of an error obviates its effect): Broom, supra note 12, 135. Where there is an irregularity in procedure a party may consent to it and cannot later complain of this irregularity.
Waiver of the Rule Against Bias

of a statute) give jurisdiction, for a mere nullity cannot be waived.47 The origin of this rule can be traced back to the legal philosopher Bracton's assertion that the King is the fountain of all justice. Extending jurisdiction by consent challenges the royal prerogative.48 On the other hand, a non-jurisdictional error is only voidable and may be waived by the parties. The argument then made is that because bias is waivable it must not be a defect that goes to jurisdiction.49 It is clear, however, from the authorities that a biased tribunal has no jurisdiction. Decisions by biased tribunals are void.50 It was not until Dimes v Grand Junction Canal51 that there was any suggestion that the decisions of a biased tribunal were merely voidable. Rubinstein argues that the Court in that case had a change of heart because for the first time it had to apply the rules developed in the courts below to courts themselves.52 Consequently, the Court relaxed the rules and made bias a non-jurisdictional and therefore only voidable defect. Wade agrees that the difference between Dimes and the preceding authorities is that the decision in question was not that of an administrative body but of a superior court. The difference is not that the Court was going back on its previous position that bias goes to jurisdiction. Instead, voidable here is synonymous with appealtlble. A decision from a superior court can be appealed on its merits. So in this sense it is voidable because it can be appealed.53 This seems to be correct. It is not possible to draw from Dimes the general conclusion that bias is a non-jurisdictional error, either before Dimes or after. It is now accepted that bias is indeed a jurisdictional error and therefore renders a decision void.

This leaves the question of how waiver can be reconciled with the rule against bias. One suggestion has been that by waiving bias there is no breach of natural justice. The waiver cures the problem before the decision has been made and therefore it is made without defect.54 Differentiation is made between a total want of jurisdiction and contingent want of jurisdiction.55 In the latter category the conduct of the parties, including failure to raise an objection to bias when the party has

47 Broom, supra note 45.
48 Dobbs, supra note 14, 50.
49 Rubinstein, supra note 46, 195.
50 Ex parte Medwin and Hurst (1853) 1 EL & BL 609; 118 ER 566; Serjeant v Dale (1877) 2 QB 558; R v Rand (1866) 1 QB 230; and R v Aberdare Canal Co (1850) 14 QB 854; 117 ER 328.
51 [1852] 3 HLC 756 ["Dimes"].
52 Supra note 46, 203.
53 Wade, "Unlawful Administrative Action: Void or Voidable? Part II" (1968) 84 LQR 95, 107.
54 Ibid 109.
55 De Smith et al, supra note 1, 422; Jones v James (1850) 19 LJQB 257; and Moore v Gamgee (1890) 25 QBD 444.
full knowledge of the issue, means that jurisdiction cannot later be a ground for challenge. There is a corresponding contrast between nullities and irregularities. In the mid-nineteenth century, this concept had currency. An irregularity was a defect in a proceeding but “one that [did] not take away the foundation or authority for the proceeding, or apply to its operation”. 56 A nullity on the other hand was more extensive as it rendered the whole proceeding void and incapable of having any effect. 57 When discussing waiver of the rule against bias, reference is sometimes made to it being a mere technical objection placing bias in the category of an irregularity. 58

Wade also suggests that there is room for a conception of voidness which does not prevent waiver but where “waiver is simply one reason which may induce the court to withhold a remedy”. 59 The Court of Appeal offered this as an alternative to waiver in Auckland Casino. Cooke P stated: “[T]he discretionary remedy of judicial review may be refused to an applicant who has not moved with reasonable expedition”. 60 Cooke P was suggesting that by “sitting on its rights” the applicant had lost the right to a remedy. However, the Court instead held that if there had been bias it had been waived. Wade is correct in suggesting that waiver should be a factor that the court considers as going to its remedial discretion. However, this is not how waiver is currently treated in the law. The fact that waiver of bias is permitted is surprising as it has been permitted notwithstanding the rule that there can be no consent to jurisdictional error. This incongruity is not recognised by the courts and is either ignored or it is suggested there is some technical reason that explains it.

V: THE RATIONALE BEHIND THE RULE AGAINST BIAS

The preceding arguments demonstrate that the doctrine of waiver has not been correctly applied in the context of the rule against bias – the constraints that the private law puts on the doctrine have been ignored. Also ignored has been the fact that bias is a jurisdictional error and therefore something to which it is impossible to consent. But the heart of

56 MacNamara, A Practical Treatise on Nullities and Irregularities in Law (1855) 3.
57 Ibid.
58 R v Justices of Richmond, supra note 31; and Ex parte the Parish of Ilchester, supra note 33.
60 Supra note 39, 152.
the issue as to why the doctrine of waiver should not be applied in the context of bias is that waiver is inconsistent with the modern rationale for the rule against bias. Waiver can only operate under certain conceptions of the bias rule. When the rule against bias first evolved, waiver was consistent with the conceptual basis. However, the conceptual basis has since evolved and waiver no longer sits comfortably with the rule against bias.

1. Possible Rationales Behind the Rule Against Bias

(a) Fairness and Accuracy of Decision-making

The purpose of the rule against bias may simply be to promote efficiency and accuracy of decision-making and to guard against unfairness. A decision-maker who has any illegitimate reason to favour one party over another may let this intrude in the decision-making process. This means that the rules that the decision-maker is to follow may not be accurately applied and the outcome may therefore be unfair. As Galligan explains:

[T]he official who acts for improper reasons fails to apply authoritative standards correctly or to exercise discretion properly; as a consequence, the person affected is not treated in accordance with those standards and therefore, is treated unfairly.

The purpose of the rule against bias is therefore to protect a party from an unfair outcome.

(b) Respect for Autonomy

Another possibility is that the concern underlying the rule against bias is the moral requirement of respect for the autonomy of the individual. Maher sees this as underlying all aspects of natural justice. In the case of the right to a fair hearing, Maher argues that fairness and accuracy of decision-making are inadequate to explain the right to a fair hearing, as the rule operates even when its application does not affect the outcome. The rule is therefore really concerned with involving parties in

the proceedings to protect their autonomy. Maher also sees this as the basis of the rule against bias. He argues: 63

In giving up his right each person is entitled to demand that the right of judging one's own cause is given up by everyone else and is not transferred over to some other (interested) party. It is respect for the personality of all, who have given up the right, which generates the right to an unbiased judge in the application of rules or laws.

Respect for autonomy may provide a convincing rationale for other areas of natural justice but it is doubtful that there is a "right to judge one's own cause". The right is really just to have a fair hearing and as just discussed, this requires an unbiased adjudicator.

(c) Public Confidence

The integrity of administrative tribunals and the justice system is the other central conceptual foundation for the rule against bias. The argument here is elementary. The public must have confidence in the administration of justice and if a tribunal is seen to be biased (whether or not the bias is actual), the confidence that the system requires to function is undermined. The rule against bias is therefore essential for maintaining faith in the administration of justice.

2. The Conceptual Basis in the Nineteenth Century

An examination of nineteenth-century bias cases shows a shift in the conceptual basis of the rule against bias. Up until the beginning of the nineteenth century, the central conceptual foundation was a concern for fairness and accuracy of decision-making. By the end of the nineteenth century this had evolved to include the public confidence rationale.

(a) Eighteenth and Early Nineteenth Century

The origin of the rule against bias is unclear. One suggestion that has been made is that it was imported from canon law. 64 Witnesses in the Christian courts were incompetent by reason of interest and bias. These rules were applied to challenge jurors of the grand and possessory assizes. 65 By the eighteenth century there was a general rule of evidence

63 Ibid 116.
64 De Smith et al, supra note 1, 522.
65 Ibid.
that a witness who was interested in the outcome of a cause was incompetent to give evidence in that cause. 66 This provides some evidence that, in the context of jurors and witnesses, the canon rules against bias were imported into the common law.

Some of the bias cases from this time indicate that the rule against a biased decision-maker was related to the incompetence of interested witnesses. For example, in R v Bishop of Ely, 67 the Court discussed the findings of Holt CJ in City of London v Wood 68 and stated that a judge must be more than a bare trustee to have an interest. The Court went on to state that: “The interest which renders a witness incompetent is, where there is a certain benefit or advantage attending the determination one way.” 69 This case is evidence that there is some relationship between the incompetence of witnesses by reason of interest and the disqualification of interested decision-makers. However, this offers only very indirect evidence that the rule against bias has been imported from canon law. Furthermore, there is no evidence in case law to indicate that the principle was directly borrowed from canon law. 70

More convincing is the suggestion that the rule against bias evolved in medieval times. At that time the concept of natural justice, like the concept of natural law, was treated as divinely created. Natural justice related not only to juridicial relations but also to the regulation of conduct between individuals. The central tenet, borrowed from theology, was to love thy neighbour. The idea of judicial impartiality was related to this. If a person were to act in his own cause, he would prefer his own interests and this would be detrimental to the interests of others. As Pecock explains: “No man ought to be judge in his own cause which he has against his neighbour, neither [did] any man ought to be redressor of the wrong which his neighbour does to him.” 71 Judicial impartiality thus conceived continued into the seventeenth century where scattered references can be found, 72 a well-known example being Dr Bonham’s Case. 73 Lord Coke asserted the principle that no person can be a judge in his own cause and found that if an Act of Parliament violated “common

67 (1788) 2 TR 290; 100 ER 157.
68 (1702) 12 Mod 669, 687; 88 ER 1592, 1602.
69 Supra note 67, 318; 172.
71 Pecock, quoted in Doe, Fundamental Authority in Late Medieval English Law (2000) 88.
72 Sir Nicholas Bacon’s Case (1563) 2 Dyer 220b; 73 ER 487; Earl of Derby’s Case (1613) 12 Co Rep 114; 77 ER 1390; and Anon (1697) 1 Salk 396; 91 ER 343.
73 (1610) 8 Co Rep 113b; 77 ER 646.
right and reason” it could be adjudged “utterly void”. Clearly Lord Coke was appealing to the principle of natural justice as divinely mandated. The early conception of the rule against bias therefore seems to be based on the idea that it was a divine rule.

The rule against bias was not only sourced from natural justice as a divinely created law but by the mid-seventeenth century the concept was also to be found in modern and particularly post-Hobbesian natural law theory. The Hobbesian argument was that in the state of nature there was no civil government and individuals were free from the oppression of one another. This included that no person was a judge in his or her own cause. If individuals were to form a government, then it should reflect this rule and ensure that no one was a judge in his own cause. Locke adopted this idea to show that where there was a dispute between individuals and the government, the government had no authority to decide the dispute as it would be a judge in its own cause.

It is these modern natural law concepts that Holt CJ seemed to be drawing on in City of London v Wood when his Honour stated: “[F]or it is against all laws that the same person should be party and Judge in the same cause, for it is a manifest contradiction”. The grounding of the rule against bias in natural justice theory is also evidenced by judicial comments in other cases of the time. Day v Savadge illustrates that the rule against bias was grounded in natural law. The Court held:

[E]ven an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself, for jura naturae sunt immutabilia [the laws of nature are unchangeable], and they are leges legum [laws that apply to laws].

Great Charte v Kennington also indicates a concern with natural law. In this case it was held that a justice could not join in removing a pauper from his own parish: “[T]he practice could not overturn so fundamental a rule of justice, as that a party interested could not be a judge”. These cases amount to evidence that the rule against bias

74 Ibid 118a; 652.
76 Ibid 2124.
77 Supra note 68, 687; 1602.
78 (1614) Hob 85; 88 ER 235.
79 Ibid 87; 237.
80 Supra note 20.
81 Ibid 1174; 1108.
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evolved from both traditional and more modern natural law theories. The underlying rationale was clearly a concern for fairness.

That fairness was the rationale behind the rule against bias at this time is also evidenced by a preoccupation with determining the actual influence the interested decision-maker had in a case. There was debate as to whether the validity of a decision was affected by the presence of an interested judge who had left the bench before the decision was made. There was also argument over whether a decision was invalid if only one or two out of a large group of decision-makers were interested. This preoccupation shows that the rationale behind the rule against bias was fairness. If an interested decision-maker had no influence then it might be acceptable that he took part in the decision. The following cases illustrate this concern.

In *Cheltenham*, 82 Lord Denman CJ found that there was no need to inquire into whether the interested judge was part of the majority or what the result would have been had the magistrate not been present. 83 To the contrary, Patteson J stated: “I confessed that I look with great suspicion at the general proposition that the vote of any interested person must necessarily vitiate the proceedings.” 84 Two years on in *R v Justices of Hertfordshire* 85 however, Patteson J reflected on his decision in *Cheltenham* and decided his reasoning had been unsound. His Honour stated: 86

I think that it is very dangerous to allow an interested person to join, whether the majority turn on his vote or not. The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decision. The real question is, has an interested person taken any part at all?

The decisions of Coleridge and Wightman JJ in *R v Justices of Hertfordshire* also indicate the concern that any participation by an interested decision-maker could influence the decision, violating the rule against bias. A further five years on Patteson J clarified his position on this question once more, stating: “We do not mean to say that, when so large a body as these commissioners are appointed by an Act of Parliament, the accidental intrusion of one interested person would of

82 Supra note 4.
83 Ibid 474; 1214.
84 Ibid 477; 1215.
85 Supra note 16.
86 Ibid 757.
necessity vitiate the proceedings.”\textsuperscript{87} This discussion indicates that there was a real concern as to whether an interested decision maker had made a substantive difference to the outcome. The issue of public confidence did not enter into consideration. If the supposedly biased judge had not taken part in the decision then there was no need to hold the decision ineffective. This was later qualified as the courts decided that any participation might have an influence and therefore all decision-makers who might be interested must be excluded.

The case of \textit{R v Gudridge}\textsuperscript{88} muddies the waters somewhat as to what is the proper conceptual foundation of the rule against bias. In that case it was found that even though the magistrate gave his vote against his supposed interest it was still held that it should not be allowed. Abbott CJ stated: “We think it the safer course to hold that magistrates should not interfere in cases where they are interested.”\textsuperscript{89} It is unclear whether this changes the conceptual basis of the rule against bias. It just seems to be an attempt to make the rule absolute; a person cannot be a judge in her own cause regardless of how he votes. Making the rule absolute guards against an interested judge voting against his interest, not because he made an unclouded judgment but to be seen by his fellows as not being clouded by his interests. In doing so he might actually overcompensate for his bias. The modern New Zealand case \textit{Russell McVeagh v Tower Corp}\textsuperscript{90} may provide an example to illustrate this. The case concerned alleged unethical practices by law firm Russell McVeagh, which was acting for Tower Corporation against the Inland Revenue Department. The firm simultaneously represented Guinness Peat Group, which was seeking to undertake a hostile takeover of Tower Corporation. The majority of Richardson P and Gault and Henry JJ found that Russell McVeagh had not breached any ethical obligations. Thomas J, a former partner of Russell McVeagh, was the only dissenting justice in the Court of Appeal. The judgment of Thomas J can simply be explained as a valid difference in legal opinion. However, given his connection with the firm he could be accused of having attitudinal bias. He may have been so careful not to be biased or be seen to be biased in favour of Russell McVeagh that he became biased against them.

Despite \textit{R v Gudridge}, in the early-to-mid-nineteenth century there was a preoccupation with the actual influence judges had over decisions. This preoccupation and the origin of bias in traditional and modern

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\textsuperscript{87} \textit{R v Aberdare Canal Company} (1850) 14 QB 854, 866; 117 ER 329, 333.
\textsuperscript{88} (1826) 5 B & C 459; 108 ER 171.
\textsuperscript{89} Ibid 461; 172.
\textsuperscript{90} [1998] 3 NZLR 641 (CA).
\end{flushleft}
natural law theory indicate that the rationale behind the rule against bias at this time was a concern for fairness and accuracy in decision-making. This rationale for the rule against bias was the sole basis for the rule for some time. By the mid-to-late-nineteenth century a shift in the conceptual basis became apparent; the movement was towards a public confidence rationale.

(b) A Change of Conceptual Basis

There are hints in the landmark case *Dimes* that there may be public confidence considerations at work. In the argument for the appellant the Solicitor-General and Mr Smythies argued that:

> The principle of the law is, that no man shall be a judge in his own cause; and it is for the interest, not only of the people but of the Judges themselves, that that principle should be strictly enforced.

Though a modern reading of this statement might lead one to interpret “people” as the general public it is quite likely that what was actually meant by “people” was “litigants”. In his judgment, however, Lord Campbell made a statement that is often quoted as support for the idea that the rule against bias is to protect public confidence:

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.

This passage suggests that the fairness and accuracy justification for bias was not at work. If their Lordships sincerely believed that Lord Cottenham did not exercise any actual bias then on a fairness and accuracy theory of the bias rule, there would have been no reason to find the decision voidable on the grounds of bias as they did. An alternative conclusion to be drawn from the statement is that Lord Campbell thought that public confidence in the administration of justice was the foundation of the bias rule. However, this is not a conclusive indication that concern for public policy was the rationale underlying this statement. *Dimes* is notable for the fact that the decision concerned a challenge to an order made by the Lord Chancellor. Previous bias cases had primarily been concerned with statutory and administrative bodies. The comment may

91 Supra note 51, 768.
92 Ibid 793.
therefore have "reflected a general conviction, perhaps attracting more adherents in the nineteenth century than today, that judges are above prejudice". Moreover, the statement may have been merely politic. It is possible that it was said out of respect for the memory of the Lord Chancellor who had died before the decision was made, some argued because the stress of the "pertinacious suit" brought by Dimes. Dimes therefore may indicate a change in the rationale for the rule against bias, but more likely there were other motivations for Lord Campbell's statement.

In later cases the concern was not what influence a decision-maker actually had in a case. Rather, the focus was on excluding any interested decision-maker. For example, in *Ex parte Medwin and Hurst*, Lord Campbell CJ held that:

[T]he slightest real interest in the issue of a suit incapacitates any one from acting as Judge in it, although it may be certain that in fact the interest, from its real or proportionate insignificance, cannot create any bias in his mind.

This seems to be evidence of a shift from a concern for fairness to a concern for public confidence. Alternatively, this shift may have been motivated by the realisation of the practical difficulties of tracing and then proving whether a judge had any influence. The unseemliness of such an investigation could also be a factor. It is probably these concerns, rather than the concern for public confidence that caused the shift.

The public confidence rationale can more clearly be seen to be at work 25 years later in *Serjeant v Dale*. In that case Lush J stated:

The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to

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94 Ibid 24.
95 (1853) 1 EL & BL 609; 118 ER 566.
96 Ibid 614; 567.
97 [1877] 2 QB 558.
98 Ibid 567.
promote the feeling of confidence in the administration of justice which is so essential to social order and security.

Again this statement is not necessarily conclusive evidence that the rationale for the rule against bias is public confidence in the system. Lush J made reference to the “litigant parties” and it might be to them that the concerns of “suspicion and distrust” were directed. Despite this, there does seem to be a wider concern for the general public creeping into the decision as the reference to “social order and security” would indicate. Nevertheless, this change in focus from looking at the actual impact of bias on decisions to the broader concern about the appearance of bias may not have been motivated by a concern for public interest.

However, by the twentieth century public confidence was clearly established as a conceptual foundation for the rule against bias. In R v Sussex JJ ex p McCarthy the Court famously stated: “[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done”. 99 Public confidence now formed one of the rationales for the rule against bias.

3. The Consequences for Waiver

As discussed, the conceptual foundation for the rule against bias seems to have been the medieval concept of natural justice and the seventeenth-century concept of natural law. The doctrine of waiver sits comfortably with both these theories. The medieval conception of natural justice held that no injustice was committed if a person consented to it. As Pecock stated: “[W]rong and injustice is never done but when the sufferer dissents to the doer; and whenever the sufferer consents to the doer’s deed, the doer wrongs not the sufferer”. 100 The doctrine of waiver would not offend the principles of natural justice, though there is no evidence that waiver did exist at this time. The doctrine of waiver also sits comfortably with the natural law theory that had currency in the eighteenth and early nineteenth centuries. If the sole concern of the court was fairness then there was no reason why waiver could not apply. The parties, aware of the potential for bias, consented to that bias and decided to continue allowing a potentially prejudiced decision-maker to take part. This seems justifiable. As previously explained, waiver was operating in private commercial contexts and also for non-jurisdictional errors in

99 Supra note 2.
100 Quoted in Doe, supra note 71, 87-88.
procedure. The courts therefore saw no disjunction in introducing the concept of waiver to the rule against bias.

Waiver also sits comfortably with Maher's conception of the rule against bias as based on concern for the autonomy of the individual. If the concern is only that each individual is allowed to demand that an unbiased person hear the dispute, waiver of the rule against bias is acceptable. In fact, being allowed to waive the right to an unbiased tribunal may increase the autonomy of the individual. But as previously discussed, Maher's theory as applied to the rule against bias assumes a right on the part of an individual to be a judge in his or her own cause. Such a right does not exist and therefore the theory is inapplicable to the rule against bias.

However, the public policy justification for the rule against bias, that the public will lose faith in the administration of justice if seemingly biased tribunals are allowed to decide cases, is clearly at work in modern cases. This conception of the rule against bias permits no room for waiver. The idea is that justice should be seen to be done. If one party waives the bias then this appearance will be undermined. Furthermore, the nature of decisions that are made are often ones that concern the public interest. The issue is therefore not just between the parties, where waiver can be dismissed as the loss of the fool who waived his right. The loss could be that of the public at large. As Craig states: 101

[T]here may well be a wider interest at issue, in that it may be contrary to the public interest for decisions to be made where there may be a likelihood of favour to another influencing the determination.

The fact that waiver does not accord with this conception of the rule against bias is explicitly acknowledged in a few late-twentieth-century cases. In Corrigan v Irish Land Commission,102 the majority upheld the orthodox view that a litigant was not to reserve a complaint of bias to himself and then raise it if the decision was adverse: "The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways." 103 However, Kennedy J dissented, finding that allowing waiver would be contrary to the purpose of the rule against bias. He held the rule against bias is: 104

101 Craig, supra note 1, 459.
103 Ibid 326.
104 Ibid 334.
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One based upon public policy and not upon the rights of the parties. The Courts are concerned that their reputation for impartiality should be preserved and they are equally interested in ensuring that administrative tribunals of all types should observe the standards ... it is not competent for the parties to waive a rule of public policy.

Kirby P has also discussed the implications of the public policy basis for waiver. In a series of cases he found that it was not open to the parties to waive bias because the appearance of impartiality was essential. As his Honour explained in Goktas v Government Insurance Office of NSW:

My own view is that it is not ordinarily open to a litigant unilaterally to waive an appearance of bias on the part of a judge. This is because the existence and appearance of impartiality on the part of judiciary belongs not to the litigant alone but to the public at large and to the legal system of which the judge is a member .... If the litigant can waive (or, by omission to object, lose the right to complain of) a reasonable apprehension of bias .... [t]he confidence of the community in the impartiality of the judicial system is, by inference damage.

Clearly there is judicial support for the idea that waiver does not sit comfortably with the rule against bias when this rule is justified by public policy considerations. Cooke P discussed Kirby P's dicta in Auckland Casino. However, Cooke P seemed uncomfortable in the face of this authority and stated that while the Court of Appeal allied itself with it "to the extent that [a tribunal] displays blatant bias, likely to undermine public confidence in the justice system", waiver was still available to parties in "borderline cases" like Auckland Casino. What Cooke P appears to have said is that if the interested decision-maker had a larger interest (in this case owning more shares), this would have a larger impact on public confidence. This new test of blatant bias is curious. The initial problem is identifying whether a decision-maker was blatantly biased or not. But even if this distinction could be made it is not at all clear that this would be desirable. What can be considered a borderline case that would not arouse suspicion is already decided by what constitutes bias in the first place. If a decision-maker is found to have a

107 Supra note 39, 152.
sufficient interest to be biased then surely this is sufficient to arouse suspicion in the mind of the public. The borderline has already been established. Another borderline between blatant bias and other instances of bias is not necessary or desirable.

4. A Possible Rebuttal of the Argument

It could be argued that waiver still sits comfortably with presumptive if not apparent bias. The original conception of the rule against bias only prevented decision-makers from being “judges in their own cause”. This meant that for the decision-maker to be automatically disqualified, he had to have a direct pecuniary interest in the outcome of the case or had to be both party and prosecutor. Ties of kinship or other associations were not thought to be sufficient. One exception existed to this in Becquet v Lernpriere, where the Privy Council decided that a jurat was disqualified from hearing a case to which the nephew of his deceased wife (though he had married twice since her death) was a party.

However, other authorities show that relationships of kinship or other associations were not sufficient to disqualify a decision-maker. For example, in Brookes v Earl of Rivers, the question arose as to whether the Earl of Rivers was allowed to adjudicate on the title of some salt-pits in Chester. The Earl of Rivers’ wife was the sister of the Earl of Derby, who had an interest in the outcome. Prohibition was refused as the Court found this relationship insufficient to disqualify the Earl of Rivers as “favour shall not be presumed in a judge”. Similarly in Hadley v Baxendale, two judges had links with the defendant but did not disqualify themselves. One judge had represented the defendant as standing counsel and the other judge’s brother had been managing director of the defendant company.

It was not until 1866 that decision-makers were excluded not only when they were judges in their own cause, but “whenever there [was] a real likelihood that [they] would, from kindred or any other cause, have a bias in favour of one party over another”. No explanation was given as to who was to assess the “real likelihood” of bias, but it has subsequently

108 See for example R v Allan, supra note 24.
109 (1830) 1 Knapp 377; 12 ER 362 (PC). See also Cranston, “Disqualification of Judges for Interest or Opinion” [1979] PL 237, 243. Examples are given of Canadian authorities where ties of kinship were sufficient to give rise to disqualification for bias.
110 (1688) Hadres 503; 145 ER 569.
111 Ibid.
112 (1854) Ex 341; 156 ER 145.
113 R v Rand, supra note 50, 233.
been decided that it is the “real likelihood” of bias in the mind of the public. This is therefore the test for apparent bias.

It is often supposed that the public confidence rationale applies to the test of apparent bias and that the accuracy of decision making rationale applies to the test for presumptive bias.\(^{114}\) However, there is no basis for this distinction. As the previous discussion illustrates, the public confidence rationale emerged in relation to the test for presumptive bias before 1866 when the apparent bias test was first introduced. It was held that even where the interest did not in fact prejudice the mind of the adjudicator he was still disqualified. There is no reason why both the accuracy of decision-making rationale and the public interest rationale should not underlie the presumptive bias test. Money cannot always be such a seductive influence that it will actually prejudice the mind of a decision-maker. However, the appearance that it has means that the adjudicator will still be disqualified on the public interest rationale. Furthermore, an interest that causes an apprehension of bias in the mind of the public may not only have appeared to have influenced the decision-maker but may have actually influenced him or her. A complete explanation of the rule against bias therefore needs to take both the public confidence and the accuracy of decision-making rationales into account. Because public interest belongs to both the presumptive and the apparent bias tests, waiver cannot sit comfortably with either.

\section*{VI: A COMPARISON TO THE HEARING RULE}

The rule against bias and the hearing rule are often seen to go hand-in-hand. Waiver of the hearing rule is permissible and it is thought by analogy that the closely related rule, the rule against bias, should also permit waiver. However, the assumption that the rules do go hand-in-hand and waiver for one makes waiver for the other permissible is questionable.

\subsection*{1. Rationale and History of the Hearing Rule}

The hearing rule is much older than the rule against bias. Some have argued that the Magna Carta imported the concept into the English

\footnote{Allars, supra note 93, 19. Allars states that: “The conflict of interests rationale has traditionally been invoked in support of the pecuniary interest test .... By contrast, the public confidence rationale has been invoked in support of the apprehended bias test.”}
It appearing in English case law as early as 1615 in *Bagg’s Case*. But it is evident that the concept is much older than this; the Magna Carta probably just reflected the existing rule. Its origins can be found in ancient society. The requirement, for example, was referred to in Seneca’s *Medea*, Aristophane’s *The Wasps*, and Homer’s *Iliad*. The concept also seems to have belonged to the natural justice and natural law theory of the medieval period. As with the rule against bias, it was conceived as a rule of divine wisdom. The early common law cases reflected both these lines of origin, as is well illustrated by *Bentley’s Case*, in which Fortescue J held that:  

> The laws of God and man both give the party an opportunity to make his defence, if he has any … even God himself did not pass sentence upon Adam, before he was called upon to make his defence. ‘Adam’ (says God) ‘where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?’

The conception of natural law and natural justice as related to divine will gradually lost ground. The rule, however, remained in place. The essential concern of the rule was to ensure that both sides were heard so a fair and accurate decision could be reached.

Other rationales have also been offered for the hearing rule. As discussed previously, Maher has attempted to identify a common rationale underlying all rules of natural justice. He acknowledges that one of the rationales underlying the hearing rule is that accuracy of decision-making is encouraged by correctly discovering the facts through hearing both sides: “To infringe the rule of *audi alteram partem* is simply not to take seriously the law’s own method for truth-finding.” However, Maher suggests that fairness and accuracy of decision-making are inadequate to explain the right to a fair hearing, as the rule operates even when its application does not affect the outcome. For example, consider *Ridge v Baldwin*. In that case, Ridge, a Chief Constable, despite having been found not guilty of a charge of conspiring to obstruct the course of justice, was dismissed by the watch committee without a hearing. When Ridge sought judicial review, the watch committee suggested that there was no need to hear from the appellant because

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115 Galligan, supra note 61, 110.
116 (1615) 11 Co Rep 93b; 77 ER 1271.
117 Kelly, “Audi Alteram Partem” (1964) 9 Natural Law Forum 102.
118 *R v Chancellor of the University of Cambridge (Bentley’s Case)* (1723) 1 Str 557, 567; 93 ER 698, 704. Reference was also made to Seneca’s *Medea*.
119 Supra note 62, 107.
120 [1964] AC 40 (HL).
nothing the appellant said could have made any difference. Lord Reid replied that it was "at least very doubtful whether that could be accepted as an excuse".121 If the justification for the hearing rule is a concern for fairness then the excuse would have been sufficient. That it is insufficient indicates that there must be another justification.

A more complete rationale for all rules of natural justice, including the hearing rule, is respect for the autonomy of the individual. When a person is singled out to have rules applied to her, respect for her autonomy dictates she must be given the opportunity to put forward her case. A person who has had this opportunity will feel as if she has had her "day in court" and be more willing to accept the outcome of the decision. This provides the explanation as to why a fair hearing should be granted even when it will not affect the outcome. Moreover, where the authority simply assumes the case to be so clear-cut that there is no need to hear a person, the appeal is to the accuracy of the decision-making. Until both sides have been heard there is no way to determine whether an argument will make any material difference. A person must always be given the opportunity to speak in his own defence; he may have a defence even if the case appears to be clear-cut. The hearing rule therefore seems to be strongly grounded in the idea that both sides must be heard so a fair and accurate decision can be made and also grounded in respect for the autonomy of the individual.

2. Implications for the Doctrine of Waiver

The doctrine of waiver has traditionally applied to the hearing rule, as it has to the rule against bias. The hearing rule can be waived, as long it is waived voluntarily and with full knowledge of the entitlements that have been waived. However, unlike the rule against bias, the underlying rationale of the hearing rule does not appear to be public confidence. The doctrine of waiver is therefore not at odds with the hearing rule. If the justification for the hearing rule is the accuracy of decision-making, it remains a matter between the parties. There is no obvious reason based in public confidence to assert that waiver should not be permitted.

This is not to say that waiver of the hearing rule should be permitted. There is also some authority to suggest that some breaches of the hearing rule will be so serious that they are not capable of waiver.122 However,

121 Ibid 68.
122 Mayes v Mayes [1971] 1 WLR 676, 684; and Escobar v Spindaleri (1986) 7 NSWLR 51, 56 per Kirby P but contrast 62 per Samuels JA dissenting. See also Rosenfeld v College of Physicians [1970] 2 OR 438 (HC).
this concern is not based on public confidence, but rather that a jurisdictional error cannot be cured by consent.\textsuperscript{123}

The consequence is that the hearing rule stands separately from the rule against bias. Although the rule against bias may conceptually be subsumed within the hearing rule (the right to a fair hearing contains within it the right to be heard before an unbiased tribunal), they are rules that have evolved separately, been applied separately, and in the twenty-first century appear to have different conceptual foundations. Therefore, the fact that waiver may apply to the hearing rule does not justify its application to the rule against bias. Waiver may not belong to the hearing rule either, but for different reasons, and the investigation of those reasons is beyond the scope of this article.

\section*{VII: LOCUS STANDI AND WAIVER OF THE RULE AGAINST BIAS}

Clearly there is a risk that crafty participants can acquiesce to being heard before a biased tribunal hoping for a favourable result and then request judicial review if the outcome is not the one for which they had hoped. To say that the doctrine of waiver has no place in the rule against bias would risk people taking advantage of the system. Accordingly, the argument is that waiver should not operate as a 'knock-out blow' at the beginning of the proceedings, there being no good reason why waiver should not instead be considered as one of the factors that the court takes into account at the end of the proceedings for the purpose of exercising its discretion. This is how the doctrine of locus standi operates in New Zealand.

Locus standi, or standing, is required before a party can bring a case before a court. If it is found that a party does not have standing in relation to a dispute, the hearing cannot proceed. The question of locus standi usually arises in public law litigation involving a challenge to the validity of an administrative action. This is because administrative decisions do not interfere with private rights. However, when an administrative body acts ultra vires or fetters itself, it is a matter of public concern. The question therefore arises as to who has standing to challenge the decision. During the nineteenth century, for the remedy of certiorari, the court had the discretion to grant locus standi to a 'stranger'

\textsuperscript{123} See discussion on 'Waiver and Procedure' in Part IV of text.
Waiver of the Rule Against Bias

to the proceedings if it was in the interests of justice. For mandamus, however, there was no discretion and the court applied a very mechanical approach.

Since the 1980s it has been part of New Zealand law that the courts will not address the question of standing as a preliminary point. Instead it is an issue to be considered at the end of the proceedings as part of the court's residual discretion. As Lord Wilberforce held in Inland Revenue Commissioner v National Federation of Self-Employed & Small Business Ltd, standing is not simply “to be considered in the abstract or as an isolated point”. The New Zealand Court of Appeal took a similar approach in Finnigan v New Zealand Rugby Football Union Inc, where it was held that standing should not be disposed of as a mere technicality but instead all the merits should be considered.

The suggestion therefore is that waiver should be considered, not as an isolated preliminary issue, but as a component of the proceedings as a whole, taking into consideration the merits of the case. As discussed previously, the parties who waive the rule against bias are not just the crafty, who seek a favourable outcome while intending to seek judicial review if the result is unfavourable. To consider waiver as a component of the proceedings as a whole would allow the possibility of a favourable outcome where appropriate. The courts do acknowledge that there are circumstances where waiver is not necessarily a “choice”. For example in Auckland Casino, Cooke P delivering the judgment of the Court found that waiver of bias “is sometimes stigmatised as keeping an objection up a party’s sleeve, but the description may be harsh if a party through no fault of its own has been confronted with an agonising choice”. However, currently waiver is not treated as going to the remedial discretion of the court. In this way waiver of the bias rule illogically deviates from locus standi, as it acts as a ‘knock-out blow’ at the beginning of proceedings while the latter is one among several factors that the court considers at the end.

124 Wade, supra note 1, 673.
125 Ibid 675.
127 Ibid 630.
128 [1985] 2 NZLR 159.
129 Supra note 39.
130 Ibid 151.
VIII: CONCLUSION

The doctrine of waiver, as it is currently applied to the rule against bias, is unsuitable. An examination of the doctrine of waiver in other areas of the law shows that waiver should not be available to parties where there is bias, as it is a jurisdictional error and therefore an error to which parties cannot consent. Alternatively, the doctrine of waiver should be modified to take into account the fact that parties do not always have a free choice whether or not to waive bias and may out of necessity be forced to go before a biased tribunal.

A historical examination of the rule against bias has shown that although waiver may have sat comfortably with the rule against bias as it was initially conceived, the current rationale behind the rule leaves no room for waiver. Even modifying the doctrine of waiver to account for the possibility of duress is not sufficient. The doctrine of waiver as applied to the rule against bias is an anachronism that should be abolished. The fact that a party “sat on its rights” when it became aware of the presence of bias is a factor that should not be treated as waiver but should go to the court’s remedial discretion. This would eliminate the current anomalies in the law and be fairer to parties who may have waived bias not by choice, but out of necessity.