

The Right to a Fair Trial: The Lord Advocate's Problem

Introduction

1. The Lord Advocate, the Hon Lord Wolffe QC, will give a lecture at Laigh Hall on the 9th of December 2016 (Justice Scotland - Human Rights Day Lecture). He will be introduced by the Hon Lady Scott QC who is a Senator of the College of Justice.
2. The lord Advocate's wife, the Hon Lady Wolffe QC, is a Senator of the College of Justice.
3. This paper¹ will briefly explain why the facts contained in the two paragraphs above disqualify all Scottish Judges from sitting at any criminal trial or civil case.

The Lord Advocate's Problem

4. The law states that all judges must be independent and impartial²: It is settled law that if a friend or relation is a party to a case or even a witness then a judge will be unable to judge the case impartially³ and as such is disqualified.
5. So, what about the situation here? After Lady Scott has introduced the Lord Advocate (no doubt in glowing terms) and after they have attended the social gathering following then it will be clear that she can no longer judge impartially. The fair minded and informed observer⁴ will conclude that there is a real possibility that Lady Scott will be biased in any case that involves the Lord Advocate. This is in the sense that she will unconsciously favour him due to them working and socializing together at an event⁵. Additionally, she will be unconsciously bound by the glowing terms of her introduction.
6. And now comes the really important bit: The Lord Advocate's wife is a Senator of the College of Justice. She is a senior member of the Scottish judiciary. What will the fair minded and informed observer think of that? I contend that the fair minded and informed observer will think two things: First, she will conclude that there is a real possibility that Lady Wolffe QC will be biased in any case involving the Lord Advocate or the Scottish Executive. Lady Wolffe will be biased in the sense that she will unconsciously favour the Lord Advocate in any case that he is involved in simply because of

¹ The Fair Trial section at the Scottish Human Rights Union contains this and more detailed papers on bias: www.shru.org

² *Davidson v the Scottish Ministers* 2005 1 S.C. (H.L.) 7 at Paragraph 6

³ *Ibid.*

⁴ The test for apparent bias: *Magill v Porter* [2002] 2 AC 357

⁵ *Davidson v the Scottish Ministers* 2005 1 S.C. (H.L.) 7 at Para 6

their marriage⁶. Secondly, she will conclude that there is a real possibility that any judge who sits in a case that involves or potentially involves the Lord Advocate will be biased. This will be in the sense that all judges in the judicial hierarchy will know or know of Lady Wolffe QC. When her husband appears in front of them, either by himself or represented by some other, they will unconsciously favour the Lord Advocate or his representative as the Lord Advocate is the husband of a colleague, the husband of a fellow judge.

7. **Note:** The Lord Advocate is a member of the Scottish Executive and is responsible for the prosecution of all crimes in Scotland. In civil matters the Scottish Executive represented by the Lord Advocate are either a party, or a potential party, in all trials and civil cases.
8. All judges, especially Lady Scott and Lady Wolffe, must disclose the links that the Scottish Judiciary has to the Lord Advocate.⁷ This must be done before any case that comes before a Scottish court. Remember that the Lord Advocate is involved with or potentially involved with all cases that come before any court in Scotland.
9. The Lord Advocate must disclose⁸ his links to the Scottish Judiciary in any case that he is involved in or potentially involved in. This, again, is any case that comes before a court in Scotland.
10. **The Lord Advocate's problem:** Due to the Lord Advocate's links to the Scottish Judiciary no judge can act impartially in any case that he is involved with or potentially involved with.

⁶ Ibid

⁷ The common law rules on declinature: *Clancy v Caird* [2000] ScotCS 96 at paragraph 10. See also *Davidson* at Para 19.

⁸ *McDonald v. Her Majesty's Advocate (The High Court of Justiciary Scotland)* [2008] UKPC 46 at paragraph 60.