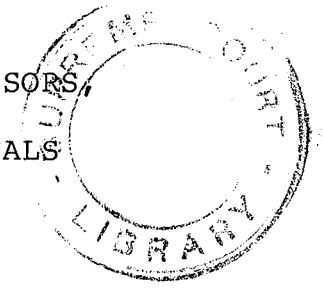

THE ADVERSARY SYSTEM AND THE USE OF ASSESSORS, SPECIALIST JURIES AND SPECIALIST TRIBUNALS

by

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INTRODUCTION

> "I believe we are fast approaching the time when the need for judges to understand complex scientific and technological evidence will make it essential for them to have readily at hand appropriate technical advice."
>
> (Mr Justice Sheppard "New Rules for Commercial Judges")

At the heart of the adversary system of litigation lies the proposition that the trier of fact must determine a dispute, including all technical or scientific matters, solely on the basis of the evidence adduced. In other words, let it be assumed that a dispute involving a defective space satellite were to come on for hearing before a judge who was a communications buff of great understanding and knowledge. He will be permitted to utilise his expertise in following and understanding the evidence of the technical experts called. He will not be permitted to substitute his technical knowledge for the evidence of expertise. Thus, if there is no evidence at all on some point, the party carrying the onus will fail. The trier of fact will not be entitled to reject the evidence on which the experts on both sides are agreed simply by reliance upon his own expertise. In the result, in adversary litigation, even if the litigants should be blessed with a tribunal which

fortuitously possessed expert knowledge in the field of dispute, nonetheless expert evidence would have to be called by both sides and cross examined by opposing counsel. The resultant expenditure of time and money may be very heavy indeed. This is one of the reasons why alternatives to litigation in courts are gaining in popularity.

It is in any event unusual these days for the trier of fact to be the possessor of more than elementary scientific or technical expertise. Two factors have combined in this century to make decision-making, whether by judges or juries, increasingly difficult in areas of technical expertise. First, the average juror, and also, let it be said, the average judge, is not as well rounded in technical and scientific matters as he or she should be. With increasing specialisation, the breadth of knowledge possessed by the average person has become increasingly narrow. Take a person away from his or her usual area of expertise and, more likely than not, he or she will be left floundering, or at least struggling to understand. To illustrate the gravity of the problem only needs reference to the Chamberlain trial and to the evident difficulty which the jury must have encountered in determining which scientific expert to accept. For the trier of fact to prefer the opinion of one expert to another he must understand what they have both said and form a reasoned basis for his preference. The more advanced and experimental a technology, the more risk there is of error.

Often disputes range to the very frontiers of the technology involved. Before judges come, at times, the foremost experts in their field and we must choose between them on matters of significant and technological disagreement. Furthermore, a judge is in a much more difficult position than counsel when difficult technical questions are involved. Just as one example, if in the course of writing his judgment some problem occurs to him he has no one to ask.

The other factor is equally important. Disputes are not only more complex, they take longer to be heard, and the chances of the average juror retaining the minutiae of the evidence without the benefit of transcript is almost negligible. This has been recognised by the thorough work of the Fraud Trials Committee, chaired by Lord Roskill (Fraud Trials Committee Report 1986). The recommendation of the Committee, that, in future, trials of complex fraud cases should be by a tribunal composed of a judge sitting with lay members drawn from a panel of businessmen, was prompted by the interaction of the two factors I have mentioned. The average juror not only has no chance of understanding the complexities of modern day financial juggling but also has little prospect of following and retaining evidence led over weeks. The combination of these circumstances has had the effect that frequently the Director of Public Prosecutions does not even try to indict a wrongdoer against whom there is a sufficiency of evidence

because he considers the chances of conviction insufficiently high. I believe such a decision has been taken in some instances of complex computer fraud. It must be said that the British Government has not accepted the Committee's conclusions and recommendations on the use of assessors. It has also been rejected by the New South Wales Law Reform Commission.

ASSESSORS

Assessors have been regarded as being similar to expert witnesses in that they are sources of information on matters concerning their own special skill or knowledge. However, they are not called by parties, are not sworn and cannot be cross examined. Customarily, their advice is given to the court in private and only disclosed at the court's discretion, and then usually at the end of the case in the judgment (Dickey "The Province and Function of Assessors in English Courts" (1970) 40 MLR 494).

The assessor is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence (Richardson v Redpath Brown & Co Limited 1944 AC 62, Viscount Simon LC at p 70). However, Dickey (supra p 502) argues that assessors do have a wider function. In The Australia 1926 AC 145, Viscount Dunedin said (p 150), "Assessors may be used to the full for information" and in the same case Lord Sumner said (p 152), "They are not only technical advisors; they are sources of

evidence as to facts." Indeed, it is reasonably well settled in Admiralty that parties are not permitted to call expert evidence in relation to matters within the professional expertise of the assessors sitting with the judge (The St Chad (1965) 2 Lloyd's Rep 1 (CA)).

History reveals frequent changes in policy in the use of and identity of assessors. At times, lawyers have served as assessors to a tribunal of experts; at other times, legally trained tribunals have had the assistance of technical experts as assessors. An assessor probably made a first appearance in Roman times when an experienced lawyer, called an "assessor", was appointed to sit with the governor of a province or other magistrate to assist and advise in the administration of the law.

In mediaeval times the problem of a judge failing to appreciate the technicalities of the trade did not arise in Europe. This was because the merchants themselves were the judges ("The Evolution of the Law Merchant" Journal of Maritime Law & Commerce (1980) Vol 12, p 1 at 15).

In Northern Europe, the privileges of merchants depended on a grant by King or Lord of a franchise of fair or market. The Lord kept the administration of the law in his own hands though frequently assisted by merchants as assessors. By about 1500 the principle had been generally accepted that commercial courts should be presided over by merchants.

Even today in many European countries commercial disputes are tried in courts where the judge is a commercial person ("Oxford Companion to Law" p 727).

In England, from the Middle Ages, courts were presided over by legally trained judges. This occasioned growing discontent in the mercantile community which felt that judges failed to understand the problems of commerce. The Judicature Commission of 1869-74 was told that the City of London desired the establishment of tribunals of commerce such as were found on the Continent. Instead, the Commissioners recommended that commercial cases should be tried before a judge assisted by two business assessors whose duty it should be to advise a judge on technical or practical matters arising during the progress of the case ("Mathew's Practice of the Commercial Court" 2nd Ed, p 2).

As well, in its first report, the Royal Commission into the Operation of the Courts recommended the use of assessors to give assistance to judges in the trial of cases of a scientific or technical character. This recommendation was implemented by the Supreme Court Judicature Act. In the Third Report, dated 21 January 1874, a similar recommendation was made for commercial cases. It was suggested that a panel be established in all places of sufficient importance composed of merchants, shipowners or others conversant with the trade and business of the district and the judge would then select two persons to sit

with him and advise him during the progress of the case on any point upon which their special knowledge would be of use. In special cases it was to be competent for the judge to call in the assistance of assessors who were not upon the panel.

A similar recommendation was made with regard to the determination of the validity of patents. There had been a proposal to constitute a special Patent Court but this was rejected by a Royal Commission into the working of the law relating to letters patent for inventions in 1865. Instead it was recommended that assessors should be used. Their role was discussed at p 332 of the Report. None of these recommendations brought any change in actual practice. Nonetheless, it is clear that proposals for the use of assessors have a long history in England.

To me, surprisingly, the only area in which assessors are currently used in England is in Admiralty. For centuries past, Elder Brethren of Trinity House have sat with the Admiralty Judge and advised him on matters of navigational and shipping expertise. However, their function is purely advisory. They do not have a vote and their views do not bind the judge who is free to reject them (The Australia (supra) p 152). Furthermore, the appellate court is not bound by the assessors in the lower court.

> "An appellate court may make full use of the advice given by assessors in the court below, and will obtain this either from the judgment or, if it were given in writing, from the original statements.

> Thus if an appellate court is assisted by its own assessors it may consider both their advice and that of the assessors of the court below. The resulting situation has been pertinently described by Scrutton LJ concerning an appeal from the Admiralty Court to the Court of Appeal:
>
> > 'It is necessary to point out that the four assessors are a very peculiar sort of witness. The judge in the Admiralty Court talks to them, and gets information from them. The parties do not know what the witnesses are telling the judge; they have no opportunity of cross-examining the so-called witnesses. Indeed, in the Admiralty Court, the practice is not followed which we - in obedience to the direction of the House of Lords - follow, the practice of asking questions in writing, and obtaining answers in writing, and sending them up to the superior Court. We do not know the terms of the questions except from what the learned judge says in his judgment. One starts, therefore, with two witnesses whose evidence the parties do not hear, and whom the parties have no opportunity of cross-examining, and the case then comes to this court, and we have to decide the case with two witnesses whom the judge below did not hear.'
>
> Similarly, when a case which has been heard with assessors reaches the House of Lords, the Law Lords may use not only the advice of their own assessors, but also the advice given by the assessors in the Court of Appeal and in the court of first instance." (Dickey (supra) p 506)

In Australia, s 359 of the Navigation Act makes specific provision for assessors and their role in a Court of Marine Inquiry. By the section, every such court shall be assisted by at least two assessors "who shall advise the Court but shall not adjudicate on the matter before the Court". Regulation 14(3) provides that each assessor assisting a court shall, if he concurs in the decision of the court, sign the decision and, if he dissents from the decision, he shall state in writing to the Minister his dissent and the

reasons therefor. The validity of the regulation and the appropriateness of the practice was questioned by Sheppard J in Re MV TNT Alltrans (1986) 67 ALR 107. His Honour quoted Brett MR in The Beryl LR (1884) 9 PD 137 (at p 112 of his judgment) the latter having said:

> "The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill. They have nothing to do with the credibility of witnesses, unless that credibility depends upon a knowledge of nautical affairs specially. They have nothing to do with whether the evidence proves that vessels were at one distance or another at any given time. That is not their function. All that is to be decided upon the responsibility of the judge, and upon the evidence before him, and upon his view of that evidence."

A Law Reform Committee in 1970 (Cmnd 4489) advised that:

> "We do not think that any general extension of the use of assessors would be likely to lead to any saving of time or cost of litigation or to raise the standard of judicial decision upon matters involving specialised knowledge or experience."

This is somewhat curious. The Committee included Lord Diplock. In 1980, I participated in a conference in London where the following exchange took place:

> "Answer - the Hon Mr Justice Goff [now Lord Goff of Chiveley]
>
> What we may do is this. Any technical case that comes along, and it may not be just computers, it may be marine engineering or all sorts of things, we have the power to transfer to a gentleman called the 'Official Referee', and we do not hesitate to do so. What we sometimes find ourselves doing is dealing with questions of law first, and then sending off the nuts and bolts to the Official Referee. Sometimes we find the issues so inextricable that we just have to try the whole case; but that is unusual. If we can, if we think that the whole List is going to be gummed up with

> what is really a technical dispute, we think that is wrong, and that this should not be holding up the trial of purely commercial cases, and we do send the dispute off to Official Referees.
>
> Answer - The Rt Hon Lord Diplock
>
> I wonder if I may just add this. There is a power for a Judge in any Division, including a Commercial Judge, to sit with an Assessor on technical matters if he wants to, and my own guess is that if I were confronted with a case which involved computer technology, I would do it that way, rather than refer it to an Official Referee, whose knowledge about computers would, I think, be likely to be even less than my own.
>
> Comment - The Rt Hon Lord Justice Donaldson
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> Mr Justice Goff lent across me just now and said, 'Has it ever happened that we have sat with an Assessor?' I have never known it, and the reason is this, that the Bar do not like Assessors. They would much rather know what advice the Judge is being given. The Admiralty Bar are special, they have been brought up, and got used to it. But, as far as the rest are concerned the Bar do not like Assessors because they cannot cross-examine them, and they do not know what poison they are pouring in the Judge's ear. In theory, and in practice, if you can get rid of the Bar, Lord Diplock must be right." (emphasis added)

Even in jurisdictions where the rules of court contemplate the use of assessors, they are hardly ever appointed, no doubt for the reasons mentioned by Sir John Donaldson. There was a celebrated case in Victoria. Mr Justice Barry used an assessor in a dispute as to the parentage of a young girl (R v Jenkins [1949] VLR 277). Blood group evidence was given by two highly reputable and skilled clinical pathologists but the court felt it required assistance in interpreting the expert evidence. Barry J appointed the then Director of the Commonwealth Serum Laboratories as a medical assessor. The use made by the judge of the assessor

and later the way in which the appellate judges handled the expert evidence provoked a good deal of controversy (see plueckhahn "Legal Dilemmas in the Use of Expert Medical Evidence" Paper delivered to the Supreme Court Judges' Conference (1982); M Morris and M Pehrlman (Ed) "Law and Crime: Essays in Honour of Sir John Barry" 1972).

There have been other, perhaps not so widely publicised, uses of assessors in Australia. In Adhesives Pty Limited v Aktieselskabet Dansk Gaerings Industri (1936) 55 CLR 523 at 539, Evatt J said:

> "There are some additional observations which I wish to make. In order to deal with the technical apsect of many of the questions, the parties have provided me with two very skilled assessors, and much of what I have said and am about to say is based upon their opinion and explanation of the results of the experiments actually carried out during the course of the case."

See also pp 571-2. This case went on appeal and Rich J at p 580 said:

> "His Honour at the conclusion of his judgment acknowledges his indebtedness to the scientific assessors. There can be no doubt that the decision of this case must be largely affected by the degree of comprehension of the scientific and industrial information and practice the existence of which was assumed by the draftsman of the specification. Courts cannot hope to obtain the necessary standpoint in matters of this description. This fact has been emphasised in a recent case discussed in Industrial and Engineering Chemistry Vol 26 No 11 November 1934, Editor's p 1125,1126. It is there said that:
>
> > 'If full justice is to be done in the adjudication of patents, the judges should have associated with them in a confidential and intimate capacity unbiased, thoroughly competent, scientific aides. It is becoming more and more apparent that the courts as now constituted can rarely reach just conclusions

> in matters where new and complicated scientific truths must be interpreted and serve as the only guide posts. In the past we believe there have occasionally been competent judges wise enough to realise this situation. They have known intimately scientists who were qualified and who could be called privately to their assistance to help interpret the mass of highly scientific data recorded by experts in the course of a trial. Such judges have been able to reach the right decision, for they understood the law and they found a proper way to have the science interpreted to them.... Apparently the protection of both science and the public interests requires that provision be made so that authoritative, capable, and unbiased scientific aid may be available to the courts in all patent litigation. Such a plan is not untried, for it is practised with success elsewhere and with modifications could be adoted with safety and advantage in the United States'."

In many parts of the British Empire judges were assisted by assessors on matters of local law or custom and appeared to give satisfaction. In Mahlikilili Dhalamini v The King 1942 AC 583, 589, the Privy Council referred to the use of assessors in India, the Gold Coast and Nigeria. This practice subsists to the present day in South Africa where, in criminal trials, judges have been known to receive advice from assessors; "Assessors in South African Criminal Trials" 1976 Criminal L R 107 at 110:

> "In the ordinary company fraud or theft case, the tendency is for the judge to sit alone, but where the issues are of some complexity an assessor may be engaged. For example, Milne & Erleigh, where the accused were charged with sixty-three counts of theft, fraud and contraventions of the Companies Act, one of the two assessors was a chartered accountant. In Heller, an equally complex case of fraud and theft, which lasted twenty months, an accountant likewise sat. Occasionally, too, scientific assessors are summoned. In Preston, where the accused was charged with fraud arising out of engineering projects undertaken for a city

> council, a quantity surveyor sat and in the recent case of Hartmann, where the accused was a doctor charged with the murder of his chronically ill father, one of the assessors was a professor of anaesthetics. Although it has never been expressly decided, it seems clear that the purpose of such assessors is to explain the evidence led to the other members of the court, and not themselves to act as a source of evidence."

I have endeavoured to introduce a rule of court authorising the use of assessors in appropriate cases in the Supreme Court of New South Wales. This proposal met with the most vehement objection from the Bar, much of it misplaced and a good deal of it based on grounds which are highly offensive. The Bar fears that an assessor would make information of an expert nature known to the judge and that the judge would act upon it without the parties having an opportunity to contradict that advice. This implies that a judge would, for one reason or another, be unwilling or incapable of making known to the parties the advice that has been given to him or give the parties an opportunity of meeting that suggestion or advice by expert evidence of their own or by way of submissions. Notwithstanding reassurances that this would not be done, opposition continues. Further, the profession fears that in reality part of the decision making function will be transferred from the judge to the assessor.

A valuable suggestion for a modified use of assessors calculated to meet present objections to their use has been put forward by Ian Freckelton, "Court Experts, Assessors and

the Public Interest" International Journal of Law and Psychiatry Vol 8 161, 186:

> "Accordingly, as an alternative or an augment to the present procedures for appointment of court experts and party-called experts, an extended or alternative form of assessors has been mooted. A role which they could play would be by way of the court appointing one or more assessors when it was of the opinion that their presence could assist in the administration of justice. Their role could be confined to asking questions of expert witnesses testifying for the parties and their duty could be expressed in terms of a role in reducing the technicality of the evidence and crystallising the issues for the tribunal of fact. They could be given powers of cross-examination. However, it would be preferable that otherwise they not be allowed to advise the court in any fashion and, certainly, not without the presence of the other parties. It is important that the assessor, if he or she is to be given any more extensive a role in court proceedings, not act in the traditional admiralty manner. Cross-examination of all who provide evidence wherever possible should accord with the principles of natural justice, allowing the parties to test the information that is being brought before the court."

In Mr Freckleton's opinion, this procedure would overcome the difficulty entertained by lawyers that an assessor may have great sway over the outcome of the case without the parties even realising what views and opinions are being put before the judge. I believe the procedure could be implemented with one proviso. The assessor must be available prior to the hearing to tutor the judge in the scientific field in question - not in the particular dispute, but generally. Further, the assessor must be available to assist the judge in structuring the interlocutory steps in the case to ensure that the real issues are exposed and the appropriate steps taken to

prepare the case for hearing.

It must be acknowledged that finding a suitable assessor can be difficult. Particularly is this the case in a country like Australia, with a small and fairly closely knit scientific and technical community. Again, a really good expert is usually too busy to spare the time.

Nonetheless, as Bingham J said ("Current Legal Problems" 1985, p 25):

> "It could not plausibly be argued that the elucidation of complex technical issues could not be more quickly and economically achieved between judge and assessor out of court than by the laborious processes of question and answer in court. The assessor will not decide the case. The responsiblity of arriving at a judicial conclusion remains that of the judge alone."

Somewhat analogous and somewhere between an assessor and a court expert lies the suggestion by Leventhal in 122 Uni of Penn L R 509, 546 for the use of scientific aides for the courts.

The question has now become one of immediate concern. There is in the Commercial List a dispute between the supplier of a computer system and a substantial public body. The parties are agreed that the dispute is one of substantial technical complexity. I asked the parties if they would agree to my hearing the case with the assistance of an assessor. Very fairly and reasonably, they agreed to this. I recognise that this decision will involve them in extra expense in payment

of the assessor's fees. Nonetheless, I hope that the quality of decision making and greater dispatch in resolution will justify the decision. Even so, the hearing is estimated at upwards of two months.

There was an initial difficulty in locating a person acceptable to both sides. A person has now been appointed. We have had one meeting so far with the parties to discuss the tutoring that the assessor may give me in general computer knowledge in anticipation of the trial. He will also prepare a memorandum setting out the technical issues thrown up by the dispute. That document will be made available for inspection by the parties. We have not yet resolved whether the assessor will be permitted to ask questions of the technical witnesses directly or whether the questions will have to be put through me. Another matter which will call for resolution will be whether the assessor should attend the meeting or conference of opposing experts which I propose to order should be held in order to narrow and more closely define the difference between the experts and the grounds for the respective views held.

I look forward to the experiment with great anticipation. Successful employment of the services of an assessor should serve to dispel the suspicions of the profession and facilitate the effective disposition of technical disputes.

SPECIAL JURIES

Special juries long held a place in the English legal system. Rosenthal, in "The Development of the Use of Expert Testimony" (1935) 2 Law & Contemporary Problems 403 at 407, says:

> "When the jury as a rational body began to function as an integral part of the judicial system, there arose from time to time occasions when the tribunal had to have knowledge or information of a particular sort in order to decide the issues reasonably. It was the same necessity which today sanctions the employment of expert testimony. Under such circumstances there were two methods of obtaining the requisite specialised knowledge. One was to impanel a jury of persons specially qualified to pass judgment in a particular case; this was really a jury of experts. The second was for the court to summon skilled persons to inform it about those matters beyond its knowledge. If the court saw fit, it would then pass the instructions on to the jury or would be guided by them in making its own findings."

Special jurors, in the sense of specially qualified to hear, understand and weigh evidence, probably appeared first as jurors with a knowledge of a particular trade. Thus, in 1394, a London jury of cooks and fishmongers was assembled to try one who was accused of selling bad food (Thayer "A Preliminary Treatise on Evidence at Common Law" 1898 p 94). Many of the early cases where special juries were used were informations by supervisors of different guilds who brought offenders against trade regulations before the mayor. The mayor then summoned a jury of men of that trade (Henry Thomas Riley's "Memorials of London and London Life in the Thirteenth, Fourteenth and Fifteenth Centuries" Longmans Green & Co 1868).

Special juries were customarily employed in commercial cases. However, there were other instances of their use. In 1345, the court summoned surgeons to aid in learning whether or not a wound was fresh (Anonymous Lib Ass 28 pl 5 28 Ed III). In 1494 "masters of grammar" were called in to help construe a bond (Anonymous 21 H VII 33 pl 30). History records that they did not help very much. Holdsworth says that such witnesses were regarded as "expert assistants to the court". It was in the middle of the seventeenth century that the office of juror became clearly distinct from that of witness. However, at least in mercantile matters, the court continued for some time to summon skilled persons to aid it.

Thayer in "The Jury and Its Development" (Pt 2) (1892) 5 Harv L Rev 295 said (p 300):

> "Assuming eligible persons, there seems always to have existed the power of selecting those specially qualified for a given science.... What we call 'special jury' seems always to have been used".

In 1730, the statute 3 Geo 2 c 25 declared the right of any litigant in either a civil or criminal case to move for a special jury. The most extensive use of special juries came in the second half of the century when Lord Mansfield began to use a trained corps of merchants regularly as jurors in commercial cases. Then, as time went on, there emerged the modern special juror. There was a shift in focus from specific knowledge to personal standing.

The qualifications for service as a special juror were more exacting than those for service as a common juror: a special juror had to be either an "esquire" or a person of higher degree, a "banker" or "merchant" or an occupier of a house with a rateable value higher than the level at which a person qualified for service as a common juror. Special juries were abolished by the Juries Act 1949, except in cases in the commercial list at the Royal Courts of Justice in the Queen's Bench Division which could be tried by a special jury from the City of London. It was thought that there might from time to time be a case in which the expert knowledge of such a jury would be of great assistance to the judge in charge of the commercial list. The City of London special jury sat only three times after 1949 and was abolished in 1971.

The possibility of using special juries to try complex commercial frauds earned passing mention in the Roskill Report (supra) but was quickly discarded:

> "In our view, the proposal for special juries is ruled out by the following considerations. We have already indicated the complexity of the issues which arise in the type of case under consideration. We do not believe that special jurors would have the degree of special knowledge or expertise which would be required in order properly to grasp the points of concern in a complex case. Even if the special jury were composed of only seven or eight members instead of twelve as has been suggested, we doubt whether it would be practicable to empanel this number of persons with the level of qualifications necessary for the length of time that they would be needed in each case. For these reasons, therefore, we have also rejected the proposal of special juries."

In addition, although a special jury of the City of London type may possibly have a different educational and social background from the average jury, it still does not equip its members for the resolution of a difficult technical and scientific problem. In contrast to the Roskill Report, the Criminal Law & Penal Methods Reform Committee in South Australia, in its Third Report, suggested that special juries be established of persons whose education or training in a particular field better enabled them to follow evidence in certain cases. There were to be a number of lists for persons with particular skills, eg basic scientific knowledge, basic accounting (p 101):

> "A judge should be empowered, either of his own motion or upon the application of the Crown or of the defence, to order that a special jury be empanelled for any case in which there were difficult questions which required an understanding of expert evidence. We do not mean that the jury should be composed of experts in the field. This, in our view, would be a mistake. The jury should not substitute their own expert knowedge for the evidence of the experts, just as a judge trying a civil case should not substitute any expert knowledge which he may have for the evidence of the experts which is placed before him."

A much more radical body was suggesteed by Judge Learned Hand. He proposed an advisory tribunal or board of experts to make decisions on issues of expertise (1902 15 Harv L Rev 40, 56). This body of experts was to make a ruling on matters falling within its expertise and pass that to the judge or judge and jury.

SPECIALIST TRIBUNALS

When a government becomes overwhelmed by the technical nature of disputes in any specific area, the resort at the present time is to a specialist tribunal constituted either by a judge with specialist qualifications or a judge sitting with specialists. The Banks Committee in the United Kingdom on the Patent System (Cmnd 4407) recommended the establishment of a tribunal of the former kind. It suggested a patents court of two scientifically qualified or experienced judges familiar with patents law. It is interesting to note the reason for the recommendation was said to be "the [existing] reluctance to make use of the provisions of the Act for technical assistance".

An elaborate argument for specialist tribunals was advanced by a writer in 67 Virginia L R 887 at 996. The suggested tribunal would be staffed by judges having the legal and technical training necessary to decide the types of cases assigned. For example, anti-trust cases would call for some special training in economics and perhaps accounting. Such tribunals indeed are known in Australia and work very well. Perhaps, the Trade Practices Tribunal is an outstanding example. There, a judge is assisted by an economist and a person with a business background. The judge determines questions of law but each of the three members has an equal vote in the determination of questions of fact. The Administrative Appeals Tribunal is somewhat similar. Having appeared as counsel before the Trade Practices Tribunal I

can readily understand the views of those who preside over it and who feel their task considerably lightened by the presence and assistance of the two experts. On the Mental Health Tribunal, a judicial officer will be assisted by medical experts. However, too extensive a use of specialist tribunals is altogether undesirable. It tends to confine the judicial officer concerned to altogether too narrow an area of specialisation and he or she is detrimentally deprived by the healthy input which a greater area of worldly experience provides.

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