Criminal Trial Case Management: Why Bother ?

Justices P Johnson and M F Latham[1]

AIJA Criminal Justice in Australia and New Zealand - Issues and Challenges for Judicial Administration Conference

7-9 September 2011

Introduction

> "A criminal trial is the prime example of an adversarial proceeding. Its adversarial character is substantially unrelieved by pre-trial procedures designed to limit the issues of fact in genuine dispute between the Crown and an accused. The issues for trial are ascertained by reference to the indictment and the plea and, subject to statute, the Crown has no right to notice of the issues which an accused proposes actively to contest. The Crown bears the onus of proving the guilt of an accused on every issue apart from insanity and statutory exceptions. The Crown must present the whole of its case foreseeing, so far as it reasonably can, any "defence" which an accused might raise, for the Crown will not be permitted, generally speaking, to adduce further evidence in rebuttal on any issue on which it bears the onus of proof: Shaw v The Queen [1952] HCA 18; (1952) 85 CLR 365, at pp 379-380. The Crown obtains no assistance in discharging that onus by pointing to some omission on the part of an accused to facilitate the presentation of the Crown's case or to some difficulty encountered by the Crown in adducing rebuttal evidence which an accused could have alleviated by earlier notice. Even where an accused proposes to raise an alibi, there is no common law duty to give the Crown notice of the alibi. It was necessary to legislate to require notice of an alibi to be given to the Crown before trial, although a failure to give notice of an alibi might result in the Crown being permitted to call evidence in rebuttal if the alibi is first set up during the defence case: Kilhck v The Queen [1981] HCA 63; (1981) 147 CLR 565, at pp 569-570. In a criminal trial, an accused is entitled to put the Crown to proof of any issue the onus of which rests on the Crown without giving prior notice of the ground on which he intends to contest the issue. If the ground be some matter of fact, an accused is entitled to abstain from giving notice of the ground until a witness is called during the trial to whom the matter of fact can and should be put."

Petty & Maiden v The Queen (1991) 173 CLR 95 per Brennan J.

[1] Judges of the Supreme Court of NSW , this paper builds on a similar presentation to the ACPECT Conference in Sydney on 2 September 2010

This statement encapsulates the basis of conventional opposition to attempts in NSW and elsewhere to introduce mandatory disclosure of the accused's case at a criminal trial on indictment, beyond the provision of an alibi notice. The absence of any requirement for disclosure stems from the presumption of innocence, the onus of proof and the right to silence. Generally speaking, it is the last of these that has been most frequently examined in the context of defence disclosure, because it is directly assailed by casting an obligation upon the accused to disclose the basis upon which he/she contests the Crown case. Nothing that the accused might say in answer to a charge directly affects the continuing application of the presumption of innocence or the fact that the burden rests upon the Crown to prove the ingredients of the offence.

In the 20 years since *Petty & Maiden,* a number of developments in the law, technology, medical science and public administration have made significant inroads on the absolutism of that expression of the conduct of a criminal trial. Those developments, and the impact that they have had on the administration of criminal justice, go a long way towards explaining the introduction of a regime of compulsory pre-trial defence disclosure in NSW at the beginning of 2010.

The Move to Case Management

At about the same time that *Petty & Maiden* was reinforcing the primacy of the right to silence in criminal trials, strong statements were emerging from NSW and UK courts with respect to the need to manage cases in order to reduce delays.

> "The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase of the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an increasing responsibility on the part of judges to have regard, in controlling their lists and cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case...The flow of cases through the courts of this State is now managed by the judiciary, and not left to be determined by the parties and their lawyers."

State Pollution Control Commission v Australian Iron & Steel Pty Limited [1992] 29 NSWLR 487 per Gleeson CJ.

> "... in any trial court, it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of the trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."

Ashmore v Corporation of Lloyds [1992] 1 WLR 446 per Lord Roskill.

The first of these statements was made in an appeal from a decision of the then Chief Judge of the NSW Land and Environment Court, refusing an adjournment to a Crown instrumentality, where that party had allegedly failed to comply with an order for disclosure of evidence before the hearing date and the judge had ruled that in the exercise of his discretion the evidence would be rejected. The question of whether the Crown had failed to comply with an order was not the subject of the appeal. The issue was whether the judge had erred in refusing the adjournment on the grounds that the efficient disposition of the Court's business justified that course. (The proceedings at first instance concerned a summary prosecution under the *Clean Air Act* 1961. Rule 11 of Part 75 of the Supreme Court Rules applied. That rule provides that orders can be made in summary criminal proceedings requiring, in the main, prosecution disclosure of particulars and evidence. The only orders for disclosure that can be made against the defendant relate to alibi and any admission as to facts pursuant to s 184 of the *Evidence Act* 1995.)

Notwithstanding the limited context in which Gleeson CJ made these comments, they have been repeated on many occasions in the course of both criminal and civil cases in this State. Perhaps that is unsurprising, given that the remarks were directed to managing case-flow, not managing individual cases. However, the debate has moved on.

The last of these statements was referred to by Justice Hayne in February 1999, when speaking on "Judicial Case Management and the Duties of Counsel". In the

course of his Honour's speech, he proffered the following advice to counsel, with respect to both criminal and civil proceedings:-

> "It is axiomatic that no person should undertake litigation of any kind unless, first, there is some defined objective in doing so, and secondly, that objective is reasonably attainable. If the client is not confronted with those questions and if they are not answer definitively, that client should not be litigating."

One year later in May 2000, Gleeson CJ, speaking on the topic of "Managing Justice in the Australian Context", noted that case management was an accepted practice throughout Australian courts. His remarks were not confined to civil trials. His Honour observed that, in the case of a criminal trial, judicial impartiality demanded that a judicial officer played no part in the investigation of the crime, or in the decision to prosecute the alleged offender or in the selection and presentation of the evidence. However, beyond those limits, there was "a responsibility to require the parties and their representatives to clarify and refine issues, and to adhere to requirements of relevance and economy in the conduct of cases. The need to maintain both the reality and the appearance of impartiality does not mean that judges are bound, or entitled, to disregard the fact that the resources made available to the litigants are scarce, and, on occasion, need to be rationed."

The application of the same case management ethos to civil and criminal trials was driven in large part by what has been described as a "global public management revolution" over the last two decades of the 20th century. The origins of this change in public administration and its impact upon the courts have been explored elsewhere[2]. Essentially, all arms of government, including the courts, are required to give greater emphasis to economy, efficiency and effectiveness. The active intervention of a trial judge in the management of a case promotes those aims without necessarily compromising the accused's right to a fair trial.

It has also been suggested that "managerial judging" is a by-product of "information asymmetry", that is, the disparity between the knowledge possessed by the client

[2] Spigelman CJ "The New Public Management and the Courts" 27 July 2001

and that possessed by his/her legal representative of litigation processes and procedures. Where clients are unable to assess the need for, and the quality of, legal services, case management plays a part in redressing that imbalance.[3] There is no reason in principle why these factors hold less sway in criminal proceedings than in civil proceedings.

The Imperatives of the Modern Criminal Trial

On a more fundamental and practical level, two of the most compelling reasons for active case management of a criminal trial are the increasing complexity of technical and scientific evidence that is routinely introduced in criminal trials, and the importance of maintaining and strengthening the participation of members of the public in the administration of justice in the form of jury service. The two are often related.

Advances in technology and in science have allowed law enforcement agencies and investigative bodies to employ listening devices, telephone intercepts, surveillance cameras and DNA analysis at an unprecedented level. There is every reason to think that technical and scientific evidence will become increasingly complex.

Such evidence places huge demands upon the whole criminal trial process. Surveillance evidence (the product of listening devices, intercepts and CCTV) generally tends to be voluminous and its significance to the prosecution case cannot be readily understood in isolation. Most often, it is only when the whole of the surveillance evidence is examined against the background of the remainder of the evidence that its probative force is appreciated. It is entirely unhelpful to the jury to present surveillance evidence in a piecemeal fashion, that is, by playing thousands of recordings of conversations or hours of tape footage, when ultimately a fraction, if any, of the recordings are challenged for authenticity or voice identification. In the vast majority of cases, the issue is what meaning should be attributed to the words and images produced by surveillance devices.

[3] See Spigelman CJ "Case Management in NSW" 21 September 2009

DNA analysis presents its own challenges. It is often expressed in terms of a probability ratio, that is, the probability or chance of A's father being a person selected at random rather than being the accused is 147,005:1 against. The judge, but particularly the jury, require considerable assistance in understanding the limits of this evidence.[4] A jury is in a far better position to understand the basis of a challenge to DNA evidence if the respective experts are given the opportunity to confer and agree upon the scope of their disagreement, if any. These observations are equally applicable to any form of expert evidence.

We note in passing that, while the NSW provisions allow for the compulsory disclosure of expert reports, including providing notice of a dispute with any aspect of the opposing party's expert report, the provisions do not extend to mandatory joint conferencing of experts or mandatory joint reports.

It is no secret that the jury system is under threat. Juries in civil trials are a thing of the past, with the exception of defamation proceedings. Summary jurisdiction has been extended to a number of criminal offences that were once able to be tried only on indictment. The jury system is expensive to the State, and to those who serve on juries, not to mention the inconvenience and strain it occasions to jurors whose family and working lives are disrupted, sometimes for months. Judicial officers have a responsibility to ensure that the conscientious application of jurors to the very onerous task of determining the guilt or otherwise of an accused person is not obstructed by a parade of witnesses and a large quantity of evidence that ultimately plays no part in the real issues in dispute between the parties.

It is to be expected that the public lose faith in the administration of justice when the courts appear unable or unwilling to control their own processes. Media reports of trials being aborted because the jury have so lost interest in the proceedings that they have resorted to crossword puzzles and other amusements are far more damning of the administration of justice than they are of the capacity of jurors to pay attention to the evidence. The jury is the critical audience in a trial and the only one that matters , if they cannot fathom the significance of the evidence, if they don't

[4]See R v GK [2001] NSWCCA 413

know why they are hearing it, if they are not told how it contributes to proof of the charge, then counsel are playing to an empty courtroom. If counsel will not or cannot hone their case to maximise their prospects of capturing and keeping the jury's attention, it falls to the judicial officer to do it for them.

Other commentators have noted the changing composition of the modern jury and the implications of changing demographics to the conduct of criminal trials.[5] One demographic change of particular relevance to the efficient conduct of criminal trials is the rise in the number of gen X (born between 1961 and 1981) in the composition of juries. These jurors exercise a measure of control in their daily lives over the selection and reception of information by the use of information technology that has hitherto been absent from juries. Jurors in this age group are habituated to forms of communication that involve "passivity, inattention, lack of continuity and the presentation of information in comparatively 'painless, non-challenging, pureed form using built-in techniques designed to motivate the listener to stay tuned'".[6]

Research in the United States indicates that jurors in this demographic demand both speed and convenience in their sources of information. Therefore, lengthy openings to a jury, elaborate reminders of the detail of evidence which has only recently been given, the regurgitation of evidence and seemingly irrelevant evidence over which the audience has no control are anathema to this age group.

Research in Victoria carried out in 2001[7] indicates that visual aids such as diagrams, photos, plans, chronologies and timelines have the capacity to improve juror understanding of the evidence. Over half of the jurors in this 2001 survey were from gen X. The overwhelming majority of the jurors who suggested that visual aids should be used in the presentation of evidence were under the age of 45 years

[5] See "Speaking to the Modern Jury - New Challenges for Judges and Advocates" The Hon Justice Michael Kirby AC CMG a paper delivered at the Worldwide Advocacy Conference in London, 29 June - 2 July 1998 , Communicating with Jurors in the 21st Century' Jacqueline Horan (2007) 29 Australian Bar Review 75
[6] Speaking to the Modern Jury
[7] Horan, ibid

History

In late 2000, the NSW Law Reform Commission released its report on "the Right to Silence." Recommendation 5 of that report provided for extensive compulsory pre-trial disclosure.

> **RECOMMENDATION 5**
> The defendant shall be required to disclose the following material and information, in writing, unless the Court otherwise orders:
> (a) In addition to the existing notice requirements for alibi evidence and substantial impairment by abnormality of mind, whether the defence, in respect of any element of the charge, proposes to raise issues in answer to the charge, eg accident, automatism, duress, insanity, intoxication, provocation, self-defence; in sexual assault cases, consent, a reasonable belief that the complainant was consenting, or that the defendant did not commit the act constituting the sexual assault alleged; in deemed supply cases, whether the illicit drug was possessed other than for the purpose of supply; in cases involving an intent to defraud, claim of right.
> (b) In any particular case, whether falling within Recommendation 5(a) or not, the trial judge or other judge charged with the responsibility for giving pre-trial directions may at any time order the defendant to disclose the general nature of the case he or she proposes to present at trial, identifying the issues to be raised, whether by way of denial of the elements of the charge or exculpation, and stating, in general terms only, the factual basis of the case which is to be put to the jury.
> (c) All reports of defence expert witnesses proposed to be called at trial In accordance with the general rule, such reports shall clearly identify the material relied on to prepare them.
> (d) Where the prosecution discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.
> (e) Whether prosecution expert witnesses are required for cross-examination. In this event, notice within a reasonable time shall be given.

(f) Where the prosecution relies on surveillance evidence (electronic or otherwise), whether strict proof is required and, if so, to what extent.
(g) In respect of any proposed prosecution exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity,
(h) In respect of listening device transcripts proposed by the prosecution to be used or tendered, whether they are accepted as accurate and, if not, in what respects issue is taken.
(i) Where notice is given that charts, diagrams or schedules are to be tendered by the prosecution, whether there is any issue about either admissibility or accuracy.
(j) Where it is proposed to call character witnesses, their names and addresses. The purpose of this requirement is to enable the prosecution to check on the antecedents of these witnesses. Character witnesses or other defence witnesses identified directly or indirectly by disclosures made by the defence shall not be interviewed by the prosecution without the leave of the court.
(k) Any issues of admissibility of any aspect of proposed prosecution evidence of which notice has been given.
(I) Any issues concerning the form of the indictment, severability of the charges, separate trials or applications for a "Basha" inquiry.

These recommendations led to the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001 (ss 134 - 149 of the *Criminal Procedure Act* 1986),[8] which introduced for the first time a general statutory requirement for pre-trial disclosure in criminal trials in NSW. It did not commence until mid 2003 and was restricted in its application to "complex" criminal trials, a restriction that did not appear in the Commission's report. This initiative was rarely used, and seemingly never in the District Court, where the vast majority of criminal trials are conducted.

8 By the Criminal Procedure Amendment (Pre-Trial) Disclosure Act 2001

The amendments made in 2001 created a discretionary three-step reciprocal disclosure regime consisting of notice of the prosecution's case, notice of the defence response to that case and notice of the prosecution's response to the defence response. The court had the discretion to order such disclosure if it was satisfied of three criteria, namely, that the case was likely to be complex having regard to its length, the nature of the evidence to be adduced and the legal issues likely to arise at the trial.

The operation of these pre-trial disclosure provisions were reviewed by the Legislative Council's Standing Committee on Law and Justice in 2004. The Committee found that as of March 2004, pre-trial disclosure orders had only been made in six matters in the NSW Supreme Court and in two matters in the District Court, where the vast majority of criminal trials are conducted.

The Committee noted that a possible reason for the small number of pre-trial disclosure orders was that some judges considered a trial could only be considered "complex" if it met all three criteria[9]. The Committee therefore recommended that the legislation be amended to clarify that the court need only be satisfied that a case was complex having regard to one or more of the three criteria[10]. The Act implementing this amendment was the *Criminal Legislation Amendment Act* 2007[11].

In 2008 the Government formed the Trial Efficiency Working Group made up of members of the judiciary, representatives of the legal profession, and government and non-government bodies, to propose measures designed to streamline criminal trials.

The Working Group concluded that the existing Division[12] of the *Criminal Procedure Act* 1986 dealing with pre-trial case management remained valid but that its provisions should be expanded to ensure the efficient disposition of all trials in NSW. The Working Group agreed that the test (as to whether a trial could be considered

[9] Standing Committee on Law and Justice, report 26, p.14
[10] Standing Committee on Law and Justice, report 26, p18
[11] Which was introduced into Parliament in October 2007 and received assent on 15 November 2007.
[12] Namely Division 3

"complex") unnecessarily restricted those matters which could potentially fall within the scope of the provisions and proposed that the provisions be amended to:

- impose disclosure obligations without requiring a court order;
- make the regime for court-ordered disclosure more generally available in criminal proceedings;
- refocus the requirements of defence disclosure; and
- permit binding pre-trial rulings on evidence.

A suggested form of legislation reflecting the proposed pre-trial model was attached to the Working Group's report and this formed the basis upon which amendments to Division 3 of the *Criminal Procedure Act* 1986 were made. The *Criminal Procedure Amendment (Case Management) Act* 2009 implemented these amendments and applies in respect of proceedings in which the indictment was presented or filed on or after 1 February 2010.

Criminal Procedure Act 1986

The current Division 3 of Part 3 of the *Criminal Procedure Act* 1986 states that its purpose is to "reduce delays in proceedings on indictment"[13] by requiring certain pretrial disclosure by the prosecution and the defence and enabling the court to undertake case management where suitable. The court has a discretion to determine which (if any) case management measures are suitable and on or after the commencement of the trial, the court may make such orders, determinations or findings, or give such directions or rulings as it thinks appropriate for the efficient management and conduct of the trial[14].

Sections 136, 137 and 138 require the prosecutor, at a time to be specified by the judge at the first mention of the matter (namely arraignment[15]) to give to the accused person notice of the prosecution case, and for the accused person to give a response to the prosecutor's notice. It should be noted that the court has a

[13] Section 134
[14] Section 149E
[15] Arraignments are held on the first Friday of each month in Sydney (Practice Note SC CL 2) before me as arraignments judge

discretion to determine the time frames within which these notices must be given. If the court does not make a specific direction (or waives the requirement to do so), then Practice Note No SC CL2 sets out the standard directions which are to apply.[16]

Among other things, the prosecution notice is to include a statement of facts, and copies of any documents and reports the prosecution proposes to adduce at trial. The defence response is to include notice of any consent to be given under section 190 of the *Evidence Act* 1995[17], and statements as to whether the accused intends to give a notice of alibi or a notice of intention to adduce evidence of substantial mental impairment.

Section 139 enables the court to order the prosecutor and accused person to attend one or more pre-trial hearings. The court may make various orders and rulings during those hearings, including as to the admissibility of evidence and/or questions of law that might arise at the trial. These will be binding on the trial judge unless, in the opinion of the trial judge, it would not be in the interests of justice for the order or ruling to be binding. If a pre-trial hearing was held and a matter was not raised at the hearing, the leave of the court is required before that matter can be subsequently raised at the trial.

Section 140 similarly enables the court to order the prosecutor and accused person to attend a pre-trial conference to determine whether they are able to reach agreement regarding the evidence to be admitted at trial.

Section 141 gives the court a broad discretion to order pre-trial disclosure (including an order that the prosecutor give notice of its case and the accused person give notice of the defence response) in accordance with a timetable determined by the court.

[16] Namely that
- the prosecution is to give the accused notice of the prosecution case no later than 6 weeks before the trial date,
- the defence is to respond no later than 4 weeks before the trial date,
- the defence is to provide notice of alibi within the period prescribed by section 150, and
- the parties are to hold a pre-trial conference before the trial judge pursuant to section 140 one week prior to the trial date to determine whether the parties can reach agreement regarding the evidence to be admitted at trial

[17] Waiver of rules of evidence, eg Hearsay, admissions, documents

If an accused person is required to provide notice of the defence response in accordance with section 141, the notice must include statements as to the facts alleged by the prosecution that the defence intends to dispute, and notice of certain matters that the defence intends to raise in relation to the evidence proposed to be adduced by the prosecution (section 143). This includes a requirement to give notice as to whether the admissibility of any proposed evidence disclosed by the prosecution will be disputed, and the basis for the objection.

Section 145 enables the court to dispense with the formal proof of certain matters in proceedings where the matters were not disputed in the course of pre-trial disclosure and section 145(3) enables the court, on the application of a party, to allow evidence of two or more witnesses to be adduced in the form of a summary, provided the summary is not misleading and it does not result in unfair prejudice to a party. This is potentially the most far-reaching power, particularly in cases where numerous police officers carried out surveillance over weeks or months. It allows for the production and admission of a schedule, stating the name of the officer, the date, time and the nature of the observations.

Section 146 allows the court to refuse to admit evidence that was not disclosed in accordance with the pre-trial disclosure requirements of the Division and to exclude expert evidence where a copy of the report of the evidence was not provided to the other party in accordance with those requirements. The court may grant an adjournment if a party seeks to adduce evidence not previously disclosed that would prejudice the case of the other party to the proceedings. The court cannot use its powers under the section to prevent the accused person adducing evidence unless the prosecutor has complied with the pre-trial disclosure requirements.

Finally, section 149D provides that, with exceptions, the prosecutor is not required to disclose anything in a notice under the Division if it has already been included in the brief of evidence or otherwise provided or disclosed to the accused person. Similarly the accused person is not required to include in a notice anything that has already been provided to the prosecutor.

These provisions have been used in a number of long trials in NSW to excellent effect, most recently in a murder trial at Parramatta involving eight accused from rival bikie gangs.[18] This trial was listed to take six months, but will conclude within five months, largely because of pre-trial management.

Conclusion

Opposition to case management of the kind outlined above is by no means new. Very strong objections were raised in 1974 to the introduction of the provision requiring post-committal disclosure of the intention to rely upon alibi, including notice as to the names of any witnesses supporting the alibi. This was the first step towards compulsory pre-trial disclosure. It was in part designed to meet the practice of adjourning the trial to allow the Crown to investigate an alibi revealed for the first time after the close of the Crown case.

In truth, the move towards active case management in criminal trials over the last 30 years represents a recognition of the fact that an accused now participates fully in the trial process. One hundred and seventy years ago, at the time of the introduction of a jury of 12 in NSW trials, the accused was incompetent to testify on his/her own behalf, although he/she was able to give a statement from the dock. Defence counsel had no right of address in felony trials until 1861. The right of an accused to give sworn evidence was not established until 1891. The dock statement was not abolished in NSW until 1994.

One caveat applies to effective case management: the identity of both counsel for the Crown and counsel for the accused must be known well in advance of the trial date, in order to allow meaningful and binding decisions to be taken about the presentation of evidence. This requirement imposes its own costs. However, if legal aid agencies and prosecuting authorities moved resources to the preparation stage,

[18] See also *JSM v R* [2010] NSWCCA 255 ; *R v Nguyen* [2010] NSWCCA 97

the costs associated with conducting an unfocussed and tedious trial would be saved.