THE FUTURE ROLE OF THE JUDGE – UMPIRE, MANAGER, MEDIATOR OR SERVICE PROVIDER

University of New South Wales
Faculty of Law

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The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of NSW

The organisers of this conference have invited us to survey the judicial landscape for the next 40 years. This gives at least Ron Sackville and I considerable licence. Chances are we will not be around to see whether our crystal balls are accurate. Of course, I am sure Anna will be.

Looking back over the last 40 years there have been many changes in court processes in New South Wales. They have been concentrated in the resolution of civil disputes rather than in crime. In the civil area we have seen, at least in New South Wales, the virtual elimination of juries, the development of the judge as a manager, the increasing use of referees to resolve problems where experts cannot agree, and the very significant growth in the use of mediation.

Although not always obvious, many of the changes have been, at least in part, a response to a significant reduction, in real terms, in the preparedness of government to fund the courts at the level which was previously provided. This, of course,

parallels a retraction of government funding in many areas. The cost to the parties has also increased – a matter frequently commented on by judges. There are other issues. The growth in mediation has also seen, and has perhaps encouraged, a greater preparedness by insurance companies to compromise an arguable claim.

The virtual elimination of juries in civil trials[1] has been accompanied by a significant reduction in the number of criminal trials with a jury. For reasons which relate in part to the cost of jury trials, and in part to a reduction in the available funding, particularly to the Director of Public Prosecutions and Legal Aid to provide advocates for the trial, we have now reached the position in New South Wales where only about 3% of all criminal trials are conducted with a jury.[2] The present reality is that the Director of Public Prosecutions is increasingly unable to resource a trial on indictment.

Where to from here? Although I am sure there will be many other changes there are at least two significant issues which I expect will be confronted in the next 40 years.

The last 40 years have seen a significant increase in the use and complexity of expert evidence in the court room. This has been manifested in many areas. It is largely a product of the extraordinary growth of knowledge in every field of learning. The development of knowledge in medicine is occurring at a rapid rate. There are specialists and sub-specialists in many other areas of learning who are available to assist in almost any dispute which involves issues which can be informed by a body

[1] *Supreme Court Act 1970* (NSW) s 85; *District Court Act 1973* (NSW) s 76A; *Maroubra Rugby League Football Club v Malo* (2007) 69 NSWLR 496 [17] - [18] (per Mason P).
[2] See: New South Wales Bureau of Crime Statistics and Research, Summary Information <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats> accessed 25 November 2011. The New South Wales Bureau of Crime Statistics and Research tallied additional figures on the number of jury trials for the purpose of this paper.

of expert knowledge. Engineers, valuers and builders are now joined by market analysts, economists, media experts, biologists, architects and geneticists and many other professionals.

My experience as a judge in the Land & Environment Court, where every case requires expert evidence, as well as in the civil matters in the Supreme Court common law list, indicates that there is an increasing scepticism amongst experts about the validity of the decisions made by judges. This scepticism is communicated to their clients. The concern is about a judge's capacity to resolve complex issues without input into the actual decision making from a person with relevant expert knowledge. In part, this problem has been addressed by concurrent evidence and the use of referees to report on part, or the whole, of a dispute. For many years it has been common practice to use persons with practical experience in building or engineering to report to the court on the issues that arise in major construction disputes. Many references are presently conducted by a lawyer sitting with one or two professional people who have specialised knowledge directly relevant to issues in dispute. This is sometimes done with valuers or accountants. Accepting, as I believe we must, that there will be a reluctance in governments to increase the proportion of the total budget provided to fund the courts, the use of referees will inevitably increase. This has the effect of moving a significant proportion of the costs of any dispute back to the parties. The State must accept responsibility for funding the mechanisms to resolve disputes between individuals, or corporations, and the State arising either from breaches of the criminal law, or where the welfare of citizens, particularly children, is of concern. But when the parties are in dispute over an alleged breach of contractual arrangements, or the alleged negligent act of one of

them, the imperative for that dispute to be resolved in a court has already been challenged and I believe further change will occur.

We have in the last 40 years developed a complex of tribunals responsible for the review of administrative decisions and the supervision of professional people in the discharge of their professional obligations.[3] In New South Wales we have also significantly changed the process by which workers compensation claims are resolved or compensation for motor accidents is determined. There is no reason why governments may not decide to extend these changes across a broader range of disputes. Provided the courts maintain their traditional supervisory role over the primary decision maker, the changes I contemplate may prove difficult to resist.

If these changes do occur, they will meet the complaint that judges are ill-equipped to resolve disputes involving the expertise of others in various fields of learning. The inevitable consequence will be a growth both in the use of referees and specialist tribunals to make the primary decision in any dispute.

The second challenge which I sense we will confront is whether we should continue to use lay juries in criminal trials.[4] At one level, and in some cases, this issue raises the same questions as the first issue. If there are difficulties for a judge in resolving disputes between experts these difficulties will be greater for a jury of lay people. Many criminal trials involve medical issues or the sophisticated expertise of forensic scientists. Increasingly, the prosecution of white collar and financial crimes involves

[3] In New South Wales alone some of these include: New South Wales Administrative Decisions Tribunal, Consumer, Trader and Tenancy Tribunal, Dust Diseases Tribunal, Guardianship Tribunal and the Mental Health Review Tribunal.
[4] Peter McClellan, 'Looking Inside the Jury Room' (2011) 10(3) *The Judicial Review* 315, 327 – 331.

accounting issues and an understanding of market transactions. The complexities can be significant, and the issues perplexing, even for experts in the relevant field.

But there are other considerations. Although very often people who have served on a jury report satisfaction (not enjoyment) from their participation in the decision making of the courts, there can be no doubt that resistance to serving on a jury is growing. There are “blog sites” and talk back radio programs devoted to advising people how to avoid jury service. With the increasing length of trials (the median length of a murder trial has at least doubled in the last 20 years) criminal trials are inevitably taking months, not weeks or days. The community resistance to giving up time and having their lives disrupted for inadequate remuneration is likely to grow. The level of remuneration for jurors is a significant issue. Governments will never have the money to address it. The reality is that as trials take longer the cost to the State of maintaining the jury system, funding the courts, the prosecutor, and in many cases the defence, will become an increasing burden. I suspect that as occurred with civil juries, the costs of maintaining juries in criminal trials will become a matter of controversy. A trial with only a judge, or multiple judges, will be far less time consuming and would result in significantly reduced expense to the State.

But there is another issue to be confronted. It has surfaced in the United Kingdom and Europe although it may, at least for a time, remain dormant.

If you are charged with defrauding the State of a modest amount of income tax, you will be tried in the Local Court where the judge must give you reasons for his or her decision. Those reasons both enable you to understand why the judge thought you

should be convicted, and facilitate a challenge to the decision as wrong in law or in fact.

However, if your alleged fraud involves a large sum of money, you will be tried on indictment and the decision will be made by 12 lay people who may never have previously been inside a court room. If you are convicted, you will be given no reasons and will not be able to understand, at least with any certainty, how the jury, much less individual jurors, reasoned to their decision. You may challenge the judge's directions as erroneous in law, but you will never know whether the jury have understood and correctly applied those directions, or correctly understood and analysed the facts.

Over the last 40 years we have developed administrative processes and refined the rules of procedural fairness so that almost every decision made by a public authority, and in many cases by private corporations or individuals, which may adversely affect your rights is accompanied by reasons. Reasons for decision are accepted as a fundamental right in a just society.

My role in the Supreme Court requires me to frequently consider an unreasonable verdict challenge to the decision of a jury. Although the Court has available the submissions of trial counsel and the summing up of the trial judge, there are frequently occasions when the Court is required to form an assessment as to the reasoning process of the jury. This is particularly the case when the trial involves multiple counts, and the jury convict on some counts and acquit on others.

When writing these judgments I am often struck by the fact that of all the decisions in the community which can affect an individual's rights, a decision which can affect their liberty is probably the most significant. In relation to any other issue where a citizen intersects with the executive the review process will result in a reasoned decision. A person will be able to know whether or not the decision maker had jurisdiction and whether that jurisdiction has been exercised in a rational fashion.

This issue has been raised in a number of cases overseas. In *Beggs v Her Majesty's Advocate*[5] the appellant was convicted of murder. He was tried according to Scottish law and was convicted by a majority of the jury. He challenged his conviction as a breach of Article 6(1) of his "Convention Rights"[6] pursuant to the *Human Rights Act 1998* (UK)[7]. He lost. Although the jury did not give reasons, the Court held that the decision was not given in a vacuum.[8] There were the speeches of counsel and the summing up of the judge which allowed the appellant to understand why he had been convicted.[9]

The assumption behind the judgment is that the jury will both understand and be faithful to the judge's directions. Earlier this year under the title "Looking Inside the Jury Room" I published a paper which examined contemporary research into the workings of juries.[10] The common law has always forbidden any publication of the discussion of jurors, recognising that the integrity of the process was likely to be

[5] [2010] HCJAC 27.
[6] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No. 11 and Protocol No. 14.
[7] *Beggs v Her Majesty's Advocate* [2010] HCJAC 27 [196] (per curiam).
[8] *Beggs v Her Majesty's Advocate* [2010] HCJAC 27 [207] (per curiam).
[9] *Beggs v Her Majesty's Advocate* [2010] HCJAC 27 [207] (per curiam).
[10] Peter McClellan, 'Looking Inside the Jury Room' (2011) 10(3) *The Judicial Review* 315.

compromised. However, in recent years various Attorney's General have allowed researchers into the jury room. The results are interesting and occasionally disquieting. I do not have time today to rehearse that paper. However, we can all be sure that now the door to the jury room has been pushed ajar, research is likely to continue at an increased rate.

In that paper I said:

> "It must be acknowledged that there is a sense of unreality in what we ask jurors to do. Lord Justice Moses described the problems in his recent paper entitled "Summing down the summing up". [Although he recognised that, at least in England, the complete abolition of jury trials was out of the question], he described summing-up as "a lecture in a foreign language about foreign subjects". He said:
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> > "The concepts are alien, far removed from the problems they have to confront in every day life … people in their daily drift are not called on to distinguish direct from circumstantial evidence. Everyday routine, in everyday life, does not require people to distinguish between inference and suspicion and few if any in their everyday lives ask themselves whether they are *driven* to a conclusion."[Emphasis in original.]"[11]

There is one other case, this time from Belgium, to which I should refer. *Taxquet v Belgium*[12]. Taxquet was also convicted by a jury of murder. The jury were instructed to come to their verdict by answering a series of thirty-two questions put to them by the judge.[13] Ultimately, the European Court of Human Rights held that there had been a violation of the offender's right to a fair trial under article 6(1) of the Convention.[14] This was based on the Court's assessment of the way in which some of the questions were formulated. The questions precluded the offender from determining why each question had been answered affirmatively when the offender

[11] Peter McClellan, 'Looking Inside the Jury Room' (2011) 10(3) *The Judicial Review* 315, 329. The except of Lord Justice Moses can be found in a paper presented at the Annual Law Reform Lecture, The Hall, Inner Temple, 23 November 2010, London, at <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-moses-lj-summing-down-summing-up.pdf>, accessed 3 August 2011.
[12] *Taxquet v Belgium* [2010] ECHR 1806.
[13] *Taxquet v Belgium* [2010] ECHR 1806 [63] (per curiam).
[14] *Taxquet v Belgium* [2010] ECHR 1806 [63] (per curiam).

denied all involvement in the offences.[15] The Chamber determined that vague questions that prompted either “yes” or “no” responses might have left the offender with an impression that justice had been dispensed arbitrarily.[16]

The decision was upheld by the Grand Chamber which, although accepting trial by jury to be legitimate nevertheless said that the process, including the questions asked, must be adequate to allow the offender to understand the reason for his conviction.[17]

I appreciate that although the States may provide for trial on indictment to be a trial by a judge alone, section 80 of the Commonwealth Constitution would have to be amended before indictable Commonwealth offences could be tried in this manner. Because of a lack of resources, the initial response may be that we will see a significant increase in summary trials rather than a constitutional amendment. I also appreciate that even the mention of removing trial by jury will bring vociferous opposition from many lawyers. Why it should come from defence lawyers I do not fully understand. Although it removes the possibility of a perverse verdict of acquittal the statistics show that judge alone trials result in significantly higher rates of acquittal than jury trials. Mr Temby QC, when he was recently the Acting Director of Public Prosecutions, criticised judge alone trials because they resulted in more acquittals than trials with a jury.[18] It may also be that judges who are experienced in making the relevant decisions may have a more finely attuned capacity to identify

[15] *Taxquet v Belgium* [2010] ECHR 1806 [63] (per curiam).
[16] *Taxquet v Belgium* [2010] ECHR 1806 [63] (per curiam).
[17] *Taxquet v Belgium* [2010] ECHR 1806 [97] (per curiam).
[18] See: Geesche Jacobsen, ‘Dangers seen in shelving juries in favour of judges’, *Sydney Morning Herald* (online), 18 May 2011 <http://www.smh.com.au/nsw/dangers-seen-in-shelving-juries-in-favour-of-judges-20110517-1erix.html>, accessed 20 November 2011.

room for doubt than a lay jury. It may be that the judges are not so easily swayed by the rhetoric of the skilful advocate. However, given the blogs devoted to how you can avoid jury service, and talk back radio programs dedicated to the same objective, I doubt whether the general community would resist the change.

I do not believe that if the system changes we will move to criminal trials conducted by only one judge. The model used in many jurisdictions is for multiple judges, three or more, to conduct the trial and participate in the decision. I believe this is essential in order to avoid the prospect of an individual forming an unreasonable view about a particular witness or witnesses, or an unfavourable view of the accused. There are various ways in which the court could be constituted. It may be that you would sit a judge together with two or more fulltime assessors, or sit a panel of judges.

As I have indicated there are many other issues we could discuss. Our system is already evolving so that the judge has ceased to be a silent umpire and accepts a significantly greater management role. Although I doubt whether we will have judges, at least at the superior court level as mediators but I am sure that courts will, as they have done in the past, continue to provide a service.