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THE AUSTRALIAN JUSTICE SYSTEM IN 2020 25 OCTOBER 2008

The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of New South Wales

In 1936 Justice Evatt delivered a paper to the Australian Legal Convention entitled “The Jury System in Australia”.¹ It was a scholarly if lengthy defence of the jury system in both civil and criminal trials. Summary trial for criminal offences was criticised. Justice Evatt’s fundamental thesis was that “in modern times the jury system is to be regarded as an essential feature of real democracy”.² His Honour endorsed the words of Lord Atkin who, when speaking particularly of civil trials, described the jury system as “the shield of the poor from the oppression of the rich and powerful”.

Lord Atkin argued that “anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases. Many will think that at the present time the danger of attack by powerful private organisations or by the encroachment of the executive is not diminishing.”³

The Hon R G Menzies responded to Justice Evatt. Not surprisingly they did not agree on some issues. Menzies was forthright. He said:

¹ Justice HV Evatt, “*The Jury System in Australia*” (1936) 10 (Supplement) *Australian Law Journal* 49.

² Justice HV Evatt, “*The Jury System in Australia*” (1936) 10 (Supplement) *Australian Law Journal* 49 at 67.

³ Justice HV Evatt, “*The Jury System in Australia*” (1936) 10 (Supplement) *Australian Law Journal* 49 at 71, citing *Ford v Blurton* (1922) 38 T.L.R. 805.

“I want to say as one who has practised a good deal before civil juries that the civil jury system ought to be abolished. I make no qualifications on that either. I regard the system as incompetent, unessential and corrupt.”⁴

Menzies illustrated his point by reference to the defamation trial *T J Ryan v The Argus*.⁵ He said:

“Reference was made this evening by his Honour to the well known case of *T J Ryan v The Argus*. The first trial came before Mr Justice Isaacs and a jury. Judges when sitting in appeal examine with infinite care the decision of the trial judge. What happens is this. You take a very good point in the evidence and indicate that there should have been a certain summing up in respect of it. Somebody discovers that what the learned judge said had something of the substance of your suggestion. The jury was presumed to have taken in everything they heard from the learned judge but juries have not always the gift of separating the grain from the chaff. His Honour Mr Justice Isaacs having had long experience in that class of dissection and finding himself presiding in the *Ryan case* proceeded to put 35 questions to the jury in black and white, each juryman being provided with a type-written sheet. The jury at once proceeded to make the inevitable botch of them. At the re-trial Mr Justice Rich left them to make a general verdict, knowing that they would decide the case on what they thought of Ryan or the other party.”

Menzies supported the use of juries in criminal trials. His support was founded on the proposition that you get the judgment “of a plain citizen on the plain issue. Did he do it or not?”⁶

⁴ Justice HV Evatt, “*The Jury System in Australia*” (1936) 10 (Supplement) *Australian Law Journal* 49 at 74.

⁵ See *Cunningham v Ryan* (1919) 27 CLR 294 at 295.

Menzies' final contribution to the debate was blunt:

“There is one thing more important than expedition and elimination of appeals, and that is doing justice between the parties, and the sooner we get back to the ideals that justice should be administered according to law and not according to clap trap the better it will be for all.”⁷

It is apparent that Menzies' view has prevailed in civil trials. He recognised, as have many others, the difficulties for a jury in applying complex law to identifiable facts. Menzies' plea for justice administered according to law has echoes today in the claim by many that the object of trials, criminal or civil, should be to establish the truth.

Efficiency and truth – the demand for change

Wayne Martin and I have been asked to address the one topic – “Courts in 2020 – should they do things differently?” The question anticipates an understanding of community aspirations in twelve years time. It will be obvious from the events of recent weeks that the political, economic and social landscape of our communities evolve. Who would have thought that the largest insurance company in the world would effectively be nationalised by the United States of America.⁸ Sometimes changes occur in response to perceived failures in existing systems or philosophies.

⁶ Justice HV Evatt, “*The Jury System in Australia*” (1936) 10 (Supplement) *Australian Law Journal* 49 at 75.

⁷ Justice HV Evatt, “*The Jury System in Australia*” (1936) 10 (Supplement) *Australian Law Journal* 49 at 75.

⁸ A Clarke, “US government steps in to rescue insurance giant AIG”, *The Guardian* (Online), 17 September 2008 <http://www.guardian.co.uk/business/2008/sep/17/marketturmoil.creditcrunch> (accessed 14 September 2008).

Change may be abrupt or at other times an almost imperceptible evolution. When considering whether existing systems of justice are appropriate we can be certain that if the courts do not recognise when change is required and respond to it the legislature will. The failure of courts to reflect community aspirations has resulted in radical reform in many jurisdictions of the compensation provided to victims of motor accidents and workers injured in the course of their employment.⁹ That reform has not only modified the monetary entitlement of an injured person but radically altered the method by which that entitlement is determined.

I recently attended a meeting in Canberra convened by the Commonwealth Government to consider the future of commonwealth criminal law.¹⁰ The discussion expanded to include a range of issues relevant to criminal law in general, including the criminal trial process. The conference coincided with the preparation of a draft report by a committee I am chairing for the NSW Attorney-General which has been looking at issues in relation to lengthy criminal trials and practical methods of alleviating identified problems.

As the discussion in Canberra developed it became apparent that the participants, who were persons with an interest in criminal justice across a broad spectrum, identified two aspirations for our justice system which had broad support in the general community. One was that truth should be the objective of the system, both criminal and civil. The other was a demand for increased efficiency in the trial process. These aspirations are not easily achieved and may prove difficult to

⁹ *Administration of Justice Act 1968*, See also New South Wales, Parliamentary Debates, Legislative Assembly, 6 December 1967, Administration of Justice Bill, 4331 (Mr McGaw, Attorney-General); s 85 *Supreme Court Act 1970* (NSW).

¹⁰ The Federal Criminal Justice Forum, Canberra, September 2008.

reconcile. That difficulty is greater in a criminal trial under our present form of the adversary system.

If it be the case that the community seeks both efficiency and truth in the justice system it will be necessary to consider change in a number of areas. Some issues require broad community discussion. My endeavour in this paper is not to provide concluded views but rather to raise some of the issues which I believe we all need to consider. There are other issues, particularly the relationship between courts and the community, which I shall leave for another paper.

The demand for efficiency

In recent years there has been more frequent discussion about whether the adversary system continues to meet the needs of contemporary society.¹¹ When parties are left to control their dispute and are allowed whatever court time they require to resolve it the cost, both to the State and the litigating parties, can become disproportionate to the issues at stake.¹² Judges and others often lament the cost of the system and urge that “something be done about it”.¹³

It is common to identify cost and delay as the “twin evils”. My researcher has found more than thirty occasions on which judges have discussed these problems in just the past two decades. The former Chief Justice of the Australian High Court, Sir

¹¹ Justice GL Davies, “*Justice Reform: A Personal Perspective*” (1996) 15 *Australian Bar Review* 109; Chief Justice M Gleeson, “*The role of a judge in a representative democracy*”, Paper delivered to the Judiciary of the Commonwealth of the Bahamas, 4 January 2008.

¹² Chief Justice James J Spigelman, “*Forensic accounting in an adversary system*”, Paper delivered to the 4th Annual National CA Forensic Accounting Conference, Sydney, 4 September 2003.

¹³ Justice GL Davies, “*The reality of civil justice reform: Why we must abandon the essential elements of our system*” (2003) 12 *Journal of Judicial Administration* 155; Justice GL Davies, “*Civil justice reform: Some common problems, some possible solutions*” (2006) 16 *Journal of Judicial Administration* 5.

Anthony Mason, commented that there has been an “erosion of faith” in the adversarial system. In a paper titled “The Future of Adversarial Justice” Sir Anthony commented:

“The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”¹⁴

There are some judges who speak in terms of reluctant acceptance. For them the resolution of disputes is inevitably a time consuming and costly business.¹⁵

Questions of access to justice and fairness may be mentioned and inadequacies lamented but the identified problems are accepted as incapable of an effective response.

Speaking only for New South Wales I can say that problems of delay have now substantially disappeared. Both in the Supreme Court and the District Court, in part because of the abolition of plaintiff’s rights in some cases, the court is able to offer a hearing date almost as soon as the parties are ready. Cost remains a problem. In part the cost of the case is the cost of the lawyers. The courts have more recently largely removed themselves from that issue. Significant criticism has however been made of the use of time billing.¹⁶

¹⁴ The Honourable Justice Peter McClellan, “ADR – An Introduction”, Speech delivered to the Chinese National Judges’ Conference, China in April 2008, citing Sir Anthony Mason, “*The Future of Adversarial Justice*”, a paper given at the 17th AIJA Annual Conference on 6-8 August 1999.

¹⁵ See comments of Lord Woolf in an interview with Richard Susskind in R Susskind (ed), “*The Susskind Interviews: Legal Experts in Changing Times*” (2005) Thomson Sweet and Maxwell, London at 7.

¹⁶ Chief Justice James J Spigelman, Address, The Medico-Legal Society of New South Wales Annual General Meeting, 6 August 1999.

Truth

Truth is an elusive concept.¹⁷ It presents particular problems for the administration of justice. It is sometimes difficult if not impossible to reconcile truth with the common law aspiration of finality. The search for the truth may conflict with the timely resolution of disputes. The common law, in a principle acknowledged by lawyers, but not, I suspect at least in the 21st century understood by the broader community, has never represented that a jury's verdict or for that matter a judge's decision is always synonymous with the truth of the situation.¹⁸ Royal Commissions seek the truth – a jury trial provides a community decision.¹⁹

The role of juries has been the subject of debate amongst practitioners, academics, judges and many from the general community.²⁰ A bibliography would include at least several hundred books or collected papers and numerous articles.²¹ The controversy may abate for a time but inevitably returns. The issues reveal some constant themes.²² Applauded by many as providing an opportunity for the general community to be involved in the administration of justice, its inefficiencies and

¹⁷ Justice P McClellan, "Who is Telling the Truth? Psychology, Common Sense and the Law" (2006) 80 *Australian Law Journal* 655; Justice P McClellan, "Juries – Common Sense and the Truth", Paper presented to the New South Wales Prosecutors' Annual Conference: Law and Order and the Jury System, 25 March 2008.

¹⁸ Lord Denning has conceded that "when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side": *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 411.

¹⁹ Justice H Wootten, "Conflicting imperatives: pursuing truth in the courts" in I McCalman and A McGrath, "Proof and Truth: The Humanist as Expert" (2004), The Australian Academy of the Humanities, Canberra at 16-17.

²⁰ A number of these arguments are outlined in J Horan, "Communicating with jurors in the twenty-first century" (2007) 29 *Australian Bar Review* 75 at 76ff.

²¹ This issue is particularly contentious in the United Kingdom. In his Review of the Criminal Courts in England and Wales, Lord Justice Auld stated, "If I had to pick two of the most compelling factors in favour of reform, I would settle on the burdensome length and increasing speciality and complexity of these cases, with which jurors largely or wholly strangers to the subject matter, are expected to cope. Both put justice at risk". The *Fraud (Trials without a Jury) Bill* was introduced to the UK Parliament in November 2006. The Bill aimed to solve this problem by expressly providing that complex fraud trials may be conducted without a jury. However, the Bill was rejected by the House of Lords at the second reading stage on 20 March 2007.

²² M Rout, "Jury room saboteurs", *The Australian*, 25 September 2008.

sometimes aberrant verdicts are accepted as a cost which must be borne by individual litigants and the wider community.²³ Although often discussed, and in some jurisdictions changes have been made, the difficulties for jurors required to consider months of evidence in complex criminal trials which may include sophisticated crimes committed by and within corporations and financial market activities have not been resolved.²⁴ Apart from the complexity of some contemporary legislation and the activities made criminal by them, the length of the trials and the difficulty of finding twelve persons with the time to serve on the jury presents a continuing problem.²⁵ The availability of potential jurors reduces, probably significantly, the expectation that jurors will be chosen at random across the broad range of age and socio-economic groupings in the general population.²⁶

It is not difficult to see that as the means by which we identify and receive information changes, jurors will be less inclined to confine their deliberations to the evidence produced by the parties. The internet provides everyone with information on a scale which could never have been anticipated. Everyone can do research. The difficulties experienced in NSW with some jurors accessing the internet and others making their own enquiries at the scene of the crime reflects a desire by jurors to “get it right”.²⁷ The New Zealand jury studies reveal jurors’ frustration with seemingly

²³ Chief Justice James J Spigelman, “*Opening of the Law Term Dinner*”, Address to the Law Society of New South Wales, Sydney, 31 January 2005.

²⁴ New South Wales Law Reform Commission, “*Criminal Procedure: The Jury in a Criminal Trial*” Discussion Paper 12 (1985), Chapter 10; Similar comments were made recently by the NSW Deputy Police Commissioner Nick Kaldas: M Clayfield, “Modern trials too difficult for juries”, *The Australian (Online)*, 10 October 2008 <<http://www.theaustralian.news.com.au/story/0,25197,24473501-2702,00.html>> (accessed 10 October 2008).

²⁵ Justice P Young, “*Current Issues*” (2008) 82 *Australian Law Journal* 71 at 72, Sir Igor Judge, “*The criminal justice system in England and Wales - Greater efficiency in the criminal justice system: Time for change?*”, Speech delivered in Sydney in August 2007.

²⁶ Australian Law Reform Commission, “*Jury Selection*” Report No 117 (2007) [1.5].

²⁷ A summary of recent trials involving juror misconduct is provided in D Boniface, “*Juror misconduct, secret jury business and the exclusionary rule*” (2008) 32 *Criminal Law Journal* 18. See also *R v K*

incompetent counsel and trials where one or other party is believed to have been inadequately represented.²⁸ The community expectation that a trial will reveal the truth is reflected in a changed attitude to double jeopardy. New South Wales, Queensland and South Australia have legislated to allow, in certain circumstances, for the prosecution of persons who have previously been acquitted of an offence.²⁹

A change in approach is evident at another level. In each of the Australian States, jurisdiction is given to an appeal court to review a jury's finding and set it aside if persuaded that it is unreasonable or cannot be supported having regard to the evidence. The relevant issues were discussed in *M and MFA*³⁰ but with some divergence of views. However, the decision in *Weiss*³¹ is clear. An appellate court must "make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty."³²

The decision in *Weiss*, with its emphasis on the view of the appellate court of the relevant facts, reflects the community's concern that a conviction following a trial by

[2003] NSWCCA 406; (2003) 59 NSWLR 431; 144 A Crim R 468; *R v Skaf* [2004] NSWCCA 37; (2004) 60 NSWLR 86; *Folbigg v R* [2007] NSWCCA 371.

²⁸ New Zealand Law Reform Commission, "Juries in Criminal Trials: Part Two" Preliminary Paper 37 – Volume 2 (1999) [3.13].

²⁹ Division 2 of Part 8 of the *Crimes (Appeal and Review) Act* 2001 (NSW); Chapter 68, *Criminal Code* (Qld); Part 10, *Criminal Law Consolidation Act* 1935 (SA). A Bill is currently before the Tasmanian Parliament which aims to abolish the double jeopardy rule in certain circumstances: *Criminal Code Amendment Bill* 2008 (Tas). The reform has not yet been introduced in Victoria, despite recent requests from the Crime Victims Support Association: "Call to abolish double jeopardy rule", *ABC News (Online)*, 7 October 2008 < <http://www.abc.net.au/news/stories/2008/10/07/2383959.htm>> (accessed 9 October 2008).

³⁰ *M v R* (1994) 181 CLR 487; *MFA v R* [2002] HCA 53; (2002) 213 CLR 606.

³¹ *Weiss v R* [2005] HCA 81; (2005) 224 CLR 300.

³² *Weiss v R* per the Court at [39] and [41].

jury may not always be the correct conclusion. Apparently motivated by the problems in *Chamberlain*³³ and *Mallard*³⁴ the reality is that juries acquit but judges convict. If a jury convicts there is an appeal as of right. If the appeal court has a reasonable doubt it must acquit. Only if the Crown case withstands scrutiny by the appellate court of the facts will the conviction remain.

The emphasis on truth in the decision making of courts has been stimulated by the development of tribunals where the merit of various administrative decisions can be reviewed. Many tribunals have a judge as the chair of a deliberative group whose members have special qualifications in relevant fields. When assessing the merit of a development application, the refugee status of an individual or the capacity of a person to practice as a doctor, both the individuals involved and the general community expect that the tribunal will identify and base its decision on the “truth” of the situation. If this is the expectation of tribunals it should come as no surprise that the community has the same expectation of both the criminal law and indeed the civil trial process.

Crime

In *Azzopardi v R* McHugh J recognised that although we may have thought otherwise “it is impossible to contend that the common law recognised a general ‘right to silence’ before the middle of the nineteenth century”.³⁵ The right to silence provided protection for the illiterate and unrepresented and came to be accepted as a fundamental right.³⁶ I doubt that, at least by the time of the trial, the right will

³³ See *Re Conviction of Chamberlain* (1988) 93 FLR 239.

³⁴ *Mallard v R* [2005] HCA 68; (2005) 224 CLR 125.

³⁵ *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 per McHugh J at [147].

³⁶ *Petty and Maiden v R* (1991) 173 CLR 95.

continue to be protected. It has already been eroded in New South Wales, Victoria, Western Australia and South Australia.³⁷

Consideration of the trial process in New South Wales has revealed that one source of significant time wasting in some trials is a failure to isolate the issues requiring determination before the trial commences. They are sometimes not identified until final address. This has two consequences. The jurors lose track of the evidence, having no means of appreciating its significance and the issues to which it relates. The trial itself is inefficient. Without knowing the issues the trial judge can exert little influence over the advocates to confine the evidence and discipline the questioning of witnesses.

Early identification of the issues in a criminal trial will ensure that only the relevant evidence is tendered. The form in which the evidence is given must also be considered. Electronic surveillance and other forms of sophisticated investigation have empowered the prosecutor but added to the length of trials. They can impose significant burdens on jurors. In one recent trial the jury became distracted, took to playing Sudoku and were discharged.³⁸ The reason for their distraction was plain. They had been required to listen to some hours of surveillance audio tape including lengthy periods of silence. These problems must be addressed. Provision must be made for the judge to direct the manner and form in which evidence can be given. A

³⁷ Chapter 3, Part 3 Division 3 *Criminal Procedure Act* 1986 (NSW); Part 3 *Crimes (Criminal Trials) Act* 1999 (Vic); Part 4, Division 4 *Criminal Procedure Act* 2004 (WA); Part 9, Division 8 *Criminal Law Consolidation Act* 1935 (SA). Limited defence disclosure of alibi, expert evidence, and whether a person whose representation is relied upon is not available is required in Queensland: Chapter Division 4, Chapter 62 *Criminal Code* (Qld). In Tasmania and the Northern Territory, defence disclosure is limited to alibi evidence only: s 368A *Criminal Code* (Tas); s 331 *Criminal Code* (NT).

³⁸ *R v Lonsdale and Holland* (District Court of NSW, Judge Zahra); M Knox, "The game's up: jurors playing Sudoku abort trial", *The Sydney Morning Herald* (online), 11 June 2008.

judicial capacity to require that evidence be given in summary form (not just a later summary of evidence already tendered be provided to the jury under s 50 of *Evidence Act 1995*) is necessary.

There is no doubt that the length of criminal trials and the modest compensation available to jurors have led to increasing resentment amongst ordinary people to serving on juries.³⁹ We have the recent experience of talk back radio shows in NSW devoted to the topic of how to avoid jury service. There are internet “blogs” devoted to the topic. All trials impose burdens on self employed jurors or the small businesses in which they may be employed. Long trials and those which run inefficiently impose even greater burdens.

Thirty years ago many murder trials in New South Wales were completed in 3 days or less. The average today is 2 weeks and 4 weeks is not uncommon.

Commonwealth offences usually take far longer. The *Petroulias* trial (tax fraud) occupied 6 months.⁴⁰ The terrorist trial in Victoria occupied 115 days and 22 days of deliberations.⁴¹

When Justice Evatt spoke in 1936, from a total NSW population of 2,658,072 in 1935 more than 20,000 persons were summonsed to jury panels for civil and criminal

³⁹ “Call for increase in jury duty pay” *ABC News* (Online), 12 October 2008 <http://www.abc.net.au/news/stories/2008/10/12/2388546.htm> (accessed 14 October 2008); New South Wales Law Reform Commission, “*Jury Selection*”, Report No 117 (2007) Chapter 12, [12.24].

⁴⁰ *R (Cth) v Petroulias* (No. 36) [2008] NSWSC 626.

⁴¹ *R v Abdul Nacer Benbrika & Ors* (Supreme Court of Victoria, Justice Bongiorno, 2008); R Rennie, “Terror trial over: Haddara guilty, no verdict on Kent”, *The Age* (Online), 16 September 2008. <<http://www.theage.com.au/national/terror-trial-over-haddara-guilty-no-verdict-on-kent-20080916-4hok.html?page=1>> (accessed 9 October 2008); K Bice and K Moor, “Muslim cleric Abdul Nacer Benbrika guilty over bomb plot”, *The Herald Sun* (Online), 16 September 2008. <<http://www.news.com.au/heraldsun/story/0,21985,24351760-2862,00.html>> (accessed 9 October 2008).

trials.⁴² The equivalent figure, effectively for only criminal trials in 2007 was 150,000 from a population of 6,926,990 or 2.17% of the population.⁴³

The demand for truth of outcome, resistance to the inconvenience and personal cost of jury service, together with the increasing complexity of some trials may ultimately make demands for modification of the existing adversary jury trial irresistible. There has been discussion about the use of a special jury of qualified persons in trials requiring the resolution of complex scientific, accounting or financial issues.⁴⁴ The idea was recently rejected by the NSW Law Reform Commission. An alternative may be to require assessors to be effectively incorporated into the judicial process.

Although as Robert Menzies pointed out lay persons were adequately equipped to sort out whether the accused robbed the bank or committed the murder, asking the ordinary person, even persons of tertiary education, to understand the intricacies of taxation law or the workings of derivative markets presents considerable difficulties. Many judges lacking detailed background knowledge will have difficulty understanding them. The New Zealanders have recognised these problems and provided for trial by judge alone when complex issues require resolution.⁴⁵ Another response may be a trial before a panel of judges as occurs in many countries with a different legal heritage. We may not follow the New Zealanders but I suggest that with time our jury system will evolve in response to contemporary issues. I do not overlook the potential need for constitutional change.

⁴² Justice HV Evatt, "*The Jury System in Australia*" (1936) 10 (Supplement) *Australian Law Journal* 49 at 58.

⁴³ This is an approximation from the Sheriff's Office of New South Wales.

⁴⁴ Although this was recently rejected by the Law Reform Commission for a number of reasons, including a lack of support, practical difficulties, a lack of empirical evidence and potential conflicts with s 80 of the *Constitution*: New South Wales Law Reform Commission, "*Jury Selection*", Report No 117 (2007) Chapter 12 at [1.53].

⁴⁵ Section 361D *Crimes Act* 1961 (NZ). This section was enacted by the *Criminal Procedure Bill* which received Royal Assent on 25 June 2008. It will commence on 26 December 2008.

Civil trials and the adversary system

The desire for efficiency has led to modification of the adversary system in civil trials. The introduction of case management was viewed as an intrusion into the right of a litigant to pursue their own case as they saw fit.⁴⁶ Most, but not all, accept that the cost to the State of providing a courtroom, the necessary personnel and facilities together with the need to ensure a fair process between parties who may have unequal resources, require courts to intervene and manage the trial, including the pre-trial processes.⁴⁷

Much of the recent intrusion into the adversary system has as its object control of “trial by ambush.”⁴⁸ Seen as inefficient if not unfair, courts have required the exchange of experts reports and the evidence going to damages before trial. In the common law division of the Supreme Court we now require disclosure of all relevant material, including the likely factual evidence, before trial.⁴⁹ All parties are required to provide a statement of the relevant events which will become the primary source of that person’s evidence at the trial.⁵⁰ It has the objective of allowing the experts to proffer an opinion before trial having regard to the likely evidence. Guesswork is eliminated. It also ensures that a party cannot be ambushed by an unexpected

⁴⁶ See comments of Mr JJ Watling, President of the Law Society of New South Wales, in Mr Justice Wallace, “*Speedier Justice (and Trial by Ambush)*” (1961) 35 *Australian Law Journal* 124 at 143-144.

⁴⁷ Chief Justice M Gleeson, “*Some Legal Scenery*”, paper delivered to the Judicial Conference of Australia, Sydney on 5 October 2007.

⁴⁸ Justice P McClellan, “*Courts in the 21st Century: Should we do things differently?*” Paper delivered to the Australian and Court Administrators Group Conference, Courts and Tribunals in the Community: The Role of Administrators, Sydney, November 2005; Justice R P Austin, “*Some reflections on managing corporate and commercial cases*”, Paper delivered to Law Council of Australia, Business Law Section: Workshop for Committee Chairs, Deputy Chairs and Members of the Section Executive, 9 February 2004.

⁴⁹ Supreme Court of New South Wales, Common Law Division, Practice Note SC CL5 – General Case Management List, 5 December 2006.

⁵⁰ Supreme Court of New South Wales, Common Law Division, Practice Note SC CL 5 – General Case Management List, 5 December 2006 at [28].

account of the relevant events. Coupled with a change in our rules, which allows the trial judge to direct when expert evidence will be called, which may require the defendant's witness to be called in the plaintiff's case, these changes have brought not only efficiency gains but a significant increase in the settlement rate of complex cases.⁵¹

Case management still has its critics who complain that it both unacceptably intrudes into the adversary system and imposes unnecessary costs upon the parties.⁵² For my part the intrusion is justified provided it brings efficiencies and cost savings. Not every matter is suitable for management. However, where the matter is complex, experience in the Supreme Court shows that a skilful manager can assist the parties to identify the true issues, eliminate the unnecessary issues and enhance the prospects of settlement. Case management must not be ad hoc. The cases to be managed must be carefully identified in accordance with recognised principles. The managers must identify the objectives for management which must be understood and accepted by the litigators.

Although on occasions litigation is supported by a litigation funder, and that trend is increasing, without legal aid for civil matters individuals, including small private companies, must either fund the litigation themselves or depend upon the generosity of lawyers prepared to "spec" the case.⁵³ Inefficiencies of process or an inability to

⁵¹ See Division 2, Part 31 *Uniform Civil Procedure Rules* 2005 (NSW), in particular rule 31.20.

⁵² J Resnik, "*Managerial Judges*" (1982) 96 *Harvard Law Review*. 374 at 423; Law Reform Commission of Western Australia, "*Review of the criminal and civil justice system in Western Australia*", Project No 92 (1999), Chapter 12.

⁵³ The majority of litigation funding is concerned with insolvency work and commercial litigation with large claims (over \$500,000). Litigation funding is generally not used in personal injury claims, given the costs and risks associated with bringing such a claim: Standing Committee of Attorneys-General, "*Litigation Funding in Australia*", Discussion Paper, May 2006 at 4

identify the real problem and provide a true answer all operate to discourage persons from seeking redress and undermine the community's confidence in the justice system.

Civil trials - defamation

By abolishing jury trials in civil claims the legislature sought to overcome the perceived inefficiencies and cost of the jury process.⁵⁴ Although the opposition was strident the changes have passed into history without the destruction of citizen rights or corruption of the trial process.⁵⁵ The problem area which remains is defamation.

Perhaps the greatest benefit for litigants in abolishing civil juries was that recognised by Robert Menzies, although it was not a primary motivation for reform.⁵⁶ A judge must give reasons which can be reviewed in the appellate process. A jury verdict remains substantially impenetrable. The jury's verdict may bring finality but may not reflect a true understanding of the facts or the correct application of legal principle. Errors if made will be hard to detect. This is not to say that juries do not mostly get it right – but sufficient decisions of judges are overturned on appeal to suggest that juries must sometimes get it wrong.

http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_dp (accessed 14 October 2008).

⁵⁴ For example, see the second reading speech to the *Courts Legislation (Civil Juries) Bill*, delivered by the then Attorney-General Bob Debus on 28 November 2001 to Parliament on 28 November 2001.

⁵⁵ See comments following Mr Justice Wallace, "*Speedier Justice (and Trial by Ambush)*" (1961) 35 *Australian Law Journal* 124 at 140ff, in particular Mr JR Kerr QC at 145.

⁵⁶ Justice HV Evatt, "*The Jury System in Australia*" (1936) 10 (Supplement) *The Australian Law Journal* 49 at 75.

Defamation law is the one area where a civil trial in New South Wales is still conducted with a jury.⁵⁷ I have sat as the judge in defamation trials under the previous legislative regime in New South Wales where the jury's role was confined to determining whether a defamatory imputation was published.⁵⁸ I have also sat as a judge under the recently enacted uniform law.⁵⁹ My experience persuades me that the return to requiring the jury to determine all but the quantum of damage was a mistake. Appeals under the former regime expose the potential problem.⁶⁰ The complexity of defences under the current Act, in large part reflective of the developed common law, will inevitably produce error. Errors made by a judge who must give reasons are far more readily corrected than errors made by a jury. Apart from the potential for error the length of defamation trials based on our recent experiences is likely to be three times greater than if conducted as a judge alone trial.⁶¹ When considered with the statutory cap on damages there is a potential to inflict very considerable injustice.⁶² Many persons who have been defamed will have limited resources to pursue the vindication of their reputation. If the likely cost is three times greater with the risk that a loss will require them to meet their own costs and almost

⁵⁷ Section 85 of the *Supreme Court Act* 1970 (NSW), which provides that "proceedings in any Division are to be tried without a jury, unless the Court orders otherwise", does not apply to defamation proceedings: section 85(6).

⁵⁸ Section 7A, *Defamation Act* 1974 (NSW) (repealed).

⁵⁹ Section 21(1) of the *Defamation Act* 2005 (NSW) provides that either party may elect for the proceedings to be heard by a jury. Section 22(2) of the Act provides that the jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established. Section 22(3) provides that the judicial officer is to determine the amount of damages that should be awarded; See *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693.

⁶⁰ Since 1999, 43% (13 cases) of challenged jury verdicts have been overturned by the Court of Appeal. See for example, *Gardener v Nationwide News Pty Limited* [2007] NSWCA 10; *Mahommed v Channel Seven Sydney Pty Ltd* [2006] NSWCA 213, *Aleksandra Gacic & Ors v John Fairfax Publications Pty Limited & Anor* [2006] NSWCA 175; (2006) 66 NSWLR 675; *Charlwood Industries Pty Ltd v Brent* [2002] NSWCA 201 and *Boniface v SMEC Holdings Limited and Others* [2006] NSWCA 351.

⁶¹ This is confirmed by the recent defamation proceedings conducted in *Judy Davis v Nationwide News Ltd* and *Mercedes Corby v Channel Seven Sydney Pty Limited*.

⁶² Under section 35 *Defamation Act* 2005, damages for non-economic loss are currently limited to a statutory cap of \$280,500.

certainly the costs of the defendant, including fees for senior and junior counsel, only the rich or speculatively funded poor will embark on litigation. And that is a process which fails the community. It is one matter to say the community through a jury should make decisions in defamation cases. It is another matter when that ideal operates to deny the average person access to redress at all.

I was the trial judge for the recent defamation action brought by Ms Judy Davis.⁶³ I split the trial, requiring the jury to determine the defamatory imputations, if any, which had been published before later determining issues of malice and the defences. The jury found only two of the nine primary pleaded imputations. When it came to defences, following the procedure developed in this State many years ago, the jury was asked to return answers to a series of questions. Those questions covered 11 pages, with 18 possible questions. If all of the pleaded imputations had been found by the jury the questions would have covered at least 50 pages. Perhaps the approach of Mr Justice Rich in *Ryan* of requiring only a general verdict is to be preferred. But would this be acceptable today? I venture not.

Expert Evidence

In recent years I have written on a number of occasions about the problems with expert evidence.⁶⁴ Both because of frequent perceptions of bias in experts who give evidence but, more significantly, the reluctance of the best experts to become

⁶³ *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693.

⁶⁴ See for example, Justice P McClellan, “*Two contemporary challenges: The role of deterrence in sentencing and the effective use of experts*”, Paper delivered to the Association of Australian Magistrates Annual Conference, 7 June 2008; Justice P McClellan, “*Contemporary challenges for the justice system – expert evidence*”, Paper delivered to the Australian Lawyer’s Alliance Medical Law Conference, 20 July 2007; Justice P McClellan, “*Expert evidence – Aces up your sleeve?*” Paper delivered to the Industrial Relations Commission Of New South Wales Annual Conference, 20 October 2006; Justice P McClellan, “*Courts in the 21st Century: Should we do things differently?*” Paper delivered to the Australian and Court Administrators Group Conference, Courts and Tribunals in the Community: The Role of Administrators, Sydney, November 2005.

involved in an adversarial trial our accepted methods have been challenged by some and much criticised by others.⁶⁵ There have been at least two responses: the single expert and concurrent evidence.

The discussion about effective use of expert evidence has taken place in the context of civil trials.⁶⁶ It is also an issue in criminal trials as the conviction of Lindy Chamberlain made plain.⁶⁷ The justice system must ensure that the leading experts on relevant issues accept a role in the dispute resolution process. Second rate experts will result in inferior justice and an erosion of confidence in the entire system. I have previously written of the reluctance and, for many, the complete refusal of experts to give evidence in an adversarial trial where as they perceive it, probably correctly, the objective of the parties, or perhaps one of them, is not to identify the true position but to reward a winner in a contest. They refuse to subject themselves to a process where a skilful advocate is briefed to destroy the expert's opinion, who is confined to answering the advocate's questions which have been carefully crafted to expose the client's case and obfuscate or deny the opponent's position. Whatever be the benefits of the adversary process, we ignore the response of contemporary experts at the risk of the loss of public confidence in the civil justice process. In my view we must modify our processes to accommodate both single experts and concurrent evidence. We have already taken this step in the Supreme Court in New South Wales.

⁶⁵ These concerns have been outlined in many articles, see for example, Justice P Heerey, *"Expert evidence in intellectual property cases"* (1998) 9 *Australian Intellectual Property Journal* 92 and Justice P McClellan, *"Expert evidence – Aces up your sleeve?"* Paper delivered to the Industrial Relations Commission Of New South Wales Annual Conference, 20 October 2006.

⁶⁶ Justice P McClellan, *"Expert evidence – Aces up your sleeve?"* Paper delivered to the Industrial Relations Commission Of New South Wales Annual Conference, 20 October 2006; Justice P McClellan, *"The new rules"*, Paper delivered to the Expert Witness Institute Of Australia and The University Of Sydney Faculty Of Law, 16 April 2007.

⁶⁷ *Re Conviction of Chamberlain* (1988) 93 FLR 239.

Other issues will have to be addressed by 2020 or soon thereafter. The problems which courts are required to resolve after consideration of the learning of others have become increasingly complex. This is a direct reflection of the extraordinary development of knowledge particularly, but not limited to, developments in medical science. This increase in knowledge will continue and, in all likelihood, will occur at an accelerated rate. It is possible that even with modified processes for the reception of expert evidence judges will not be able to resolve the problems raised by the dispute in a manner which is acceptable to those with specialist knowledge and accordingly the general community. Courts will have to consider an increase in the use of specialist referees to consider and report on either part or all of the dispute. It may also be necessary in some matters to consider whether judges should sit with expert assessors to advise and assist. The latter may not be compatible with the present level of public resources given to the courts. Nonetheless the issue must be addressed.

Private adjudication

There is a persuasive argument that if, as must be anticipated, the proportion of public resources available for dispute resolution continues to diminish, the courts will have to more carefully identify the priority for their allocation. There is no question that the criminal process which involves the enforcement of the law requires adequate funding. In some respects this is also true of administrative and revenue law disputes where the conflict requiring resolution involves the interests of an individual and the State. However, beyond these matters, as the changes in workers compensation, motor accident liability, the development of various grievance bodies

in the form of ombudsmen and alternative dispute resolvers and counsellors makes plain, the community already accepts that a court need not be the primary decision maker. It is not difficult to predict that an increasing number of disputes will be resolved outside of the conventional court system with a judge or judges being available to review the process and intervene if the outcome is not faithful to the law and the interests of justice.

I was the trial judge required to decide whether Kerry Packer or Kerry Stokes owned the “Logies”.⁶⁸ Justice Sackville was required to resolve a dispute between similarly resourced litigants, but on a much larger scale, in C7.⁶⁹ Both disputes could have been resolved, at least at first instance, before a court appointed referee with the parties required to fund both the decision maker and the venue.

There are criticisms made of “private justice” including mediation. One criticism, which resonates with some lawyers but which would be rejected by the community, is that mediation rather than adjudication inhibits the development of the common law.⁷⁰ That may be, although for my own part I believe the claim is exaggerated. But we cannot justify a system which imposes costs on individuals to serve some speculated higher objective.

A more significant issue is that organised “private justice” may carry a risk of bias in the decision maker or mediator who depends upon a continuing flow of business from one of the parties or their representative in a particular dispute. Peter Murray

⁶⁸ *ACP Magazines Pty Ltd v Southdown Publications Pty Ltd & Ors* [2002] NSWSC 901.

⁶⁹ *Seven Network Limited v News Limited* [2007] FCA 1062.

⁷⁰ J Gruin, “The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent” (2008) 19 *Australasian Dispute Resolution Journal* 206.

discussed these problems in his article “*Viewpoint*” published in *Judicature* this year.⁷¹ Although the concern is legitimate, where a number of qualified and competent decision makers are available and both the litigators and litigants come from a cross-section of the legal and business communities, I doubt that the problems will materialise. It would be a problem if, for example, cases involving primarily one insurer were being resolved in this manner. It is another matter when the litigants are all well resourced and well represented.

Time management

On occasions commentators have spoken of the need for time management of trials.⁷² “Stopwatch trials is the common phrase.⁷³ Although talked about it is rarely used, I believe it should be utilised. In some complex trials in the common law division of the Supreme Court we have required the parties to justify the time estimate for a trial by drawing up in advance a “timetable” which allocates an identified portion of the hearing to each issue or witness. Consistently with the interests of justice the timetable must be accepted by the judge and adhered to by the parties. This approach is currently being used by Gzell J in the *James Hardie* case.⁷⁴

⁷¹ PL Murray, “*The privatisation of civil justice*” (2008) 91(6) *Judicature* 272.

⁷² Justice K Mason, “*Changing Attitudes in the Common Law’s Response to International Commercial Arbitration*”, Keynote Address at International Conference on International Commercial Arbitration, 9 March 1999.

⁷³ There is an option to use stopwatch trials in the Commercial List and Technology and Construction List: See Supreme Court of New South Wales Equity Division, Practice Note SC Eq 3 – Commercial List and Technology and Construction List, 30 July 2007 at [50]-[53].

⁷⁴ *Australian Securities & Investments Commission v Peter Donald Macdonald & 11 Ors* (Supreme Court of NSW, Gzell J).

The use of the telephone and internet

As we all know the internet is in the process of transforming all our lives. It must have been the same for previous generations when the telephone came into use or radio broadcasts began. Although we have sophisticated communication methods available to us courts have been reluctant to utilise them. There is the problem of open justice. However, court rooms and our processes can be readily adapted to the use of the telephone and a video image. A telephone with a video image will be common place before long. We must come to accept that a doctor or for that matter any expert, especially when the issue is routine, may give evidence by telephone or video facility.

I believe it inevitable that we will routinely have paperless litigation. Computer systems will continue to evolve to allow better management and use of documents. Familiarity of the user (which will not be my generation) will mean that the keyboard will replace the pen and the screen the paper used to write on. Having access to and using the net will be for the 21st century what the spread of literacy was for the 19th century. The litigant without access to the internet will be akin to the illiterate litigant of former generations.

Judgment writing

Over recent decades the effective use of government resources has come under increased scrutiny and in some cases intense pressure. As a consequence in many courts the process has been modified so that each judge is more productive. This inevitably imposes increased burdens on judges, with complaints by some judges about their workload and the potential effects upon their health. It can lead to the

retirement of experienced judges well before the mandatory retiring age. Many judges work at least twelve hours in a day and often for six or more days in a week. The work is intense, hearings are conducted in public often in an aggressive and charged atmosphere. At the same time, but this is a self inflicted problem, judges feel obliged to write at increasing length in both trial judgments and at the intermediate appellate level. Although we may commend the scholarship of the judgment which discusses the origin and development of legal principle, it is well to remember that it is probably of no interest to the litigant, of limited interest to the litigator and if there is an appeal is likely to be repeated again, sometimes in multiple judgments which pay little if any acknowledgment to the trial judgment or, if it progresses to the High Court, to the labours of the intermediate appellate court. The issue has been commented on but I do not believe we have done much about it.⁷⁵

To address these issues we need to redefine excellence in judgment writing. Rather than generate an expectation that trial judgments or intermediate appellate judgments reflect the level of research and discursive consideration of the law found in a judgment of the High Court, we must recognise excellence in the shorter judgment which efficiently disposes of the problem presented by the parties. The expectation must be that the issues which the parties define and the law which they each submit to be relevant to their resolution will be the foundation for the judgment. Scholarly discussion should generally be the object of conferences such as this one and published in appropriate journals.

⁷⁵ Chief Justice M Gleeson, *"The Role of the Judiciary In A Modern Democracy"*, Opening Address to the Judicial Conference of Australia Annual Symposium, Sydney, 8 November 1997. Justice Thomas Gault, President of the New Zealand Court of Appeal has stated, "I think there could be a considerable increase in efficiency if the community were prepared to accept abbreviated judgments in appropriate cases. So long as reasons are given, I see in that no inroad into the important values our judicial system must retain.": Justice T Gault, *"Whose day in court is it anyway?"* [2002] *Victoria University of Wellington Law Review* 46.

