# *Thoughts About the Role of Juries in Civil Actions*

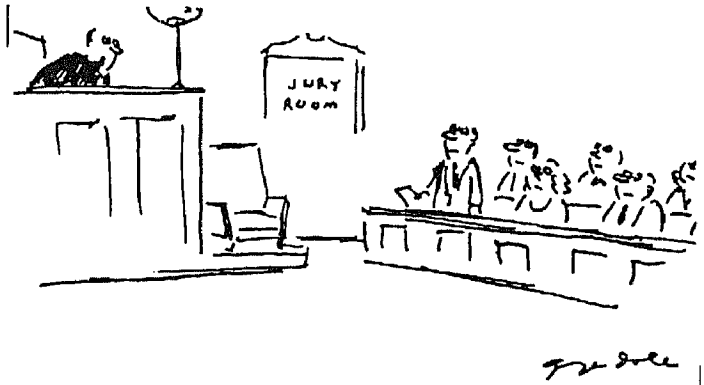
*J W Shaw QC MLC considers the Government's proposals to reform, yet again, the jury system.*

Recent statements of the New South Wales Attorney-General, Mr John Dowd QC, have raised the perennial debate as to the utility of the jury in determining questions of fact in civil litigation. Save for exceptional categories (such as defamation) the New South Wales government proposes to abolish the general right of a litigant to a jury trial whilst preserving a right to apply to the Court to requisition a jury in a particular case. In practice, the judge entertaining such an application is unlikely to be persuaded that, in the ordinary course of events, a jury is necessary. The Attorney contemplates that the jury will be abolished "in most civil cases".

Whilst the New South Wales suggestion has precedents in England, it will provoke a traditionalist response from the legal profession: the argument that the jury as the determiner of fact and the arbitrator of damages is integral to the justice system. The defence of the jury's role is not knee-jerk conservatism. Both arguments of principle and anecdotal material lend support to the notion that citizens have an important role to play in the courts.

The English satirical magazine *Private Eye*, itself plagued by large jury libel verdicts, has pointed to the important role of the coroner's jury in dealing with the inquest into the deaths of 200 people killed in the P & O ferry disaster at Zeebrugge in March 1987. According to *Private Eye*:

> "... arrayed against a battery of top lawyers for P & O and the ferry officers was one rather nervous junior barrister for the families of the bereaved, who argued hesitatingly that the coroner's jury might like to bring in a verdict of unlawful killing. The P & O barristers exploded with indignation. They were joined by [the coroner] himself who summed up in the most categorical way against an unlawful killing verdict. The jury promptly returned a verdict of unlawful killing.
>
> The whole episode proved to the legal establishment how very unsafe juries can be and how the majesty of the law can be imperilled by a handful of ordinary people who are too easily swayed to sympathy at the thought of 200 innocent travellers unnecessarily killed."




*"The verdict should be guilty or not guilty. There's no provision for guiltyish."*

In New South Wales, the introduction of the jury system was the product of long struggle by the colonists, beginning as early as 1791 but culminating in the establishment of the jury trial as the normal mode for the disposition of factual issues at Common Law by the end of the nineteenth century. New South Wales fought for "the privilege of the Common People of the United Kingdom", trial by jury, believing in the (perhaps hyperbolic) language of *Blackstone's Commentaries* that the jury was the "sacred bulwark of the nation".

Since then, tension has emerged from time to time between the virtues of the jury system and considerations of efficient, speedy trials.

In 1961, Wallace J (later President of the Court of Appeal) advanced an argument for the modification of the jury system "in the interests of expedition" (35 ALJ 124). And in 1965, government in New South Wales legislated to provide that running-down cases would normally be tried by a judge alone - the *Law Reform (Miscellaneous Provisions) Act* 1965.

Apart from running-down cases, Section 89 of the *Supreme Court Act* 1970 provided special circumstances in which the jury could be displaced - where prolonged examination of documents, scientific or local investigation rendered the jury inconvenient, the proceedings were in the Commercial list or where all parties consented.

In 1987, a judge of the New South Wales Supreme Court, Clarke J, pointed to the problem of plaintiffs who were dying or very ill and to the tendency of defendants nowadays to apply for a jury. His Honour thought there was a need for trial judges to be given a broader discretion to sit alone where urgency was required (*Peck v Email Limited* [1987] 8 NSWLR 430).

Hence, the government, in 1987, amended Section 89 of the *Supreme Court Act* 1970 to enable the Court (in proceedings other than those involving fraud, defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage) to order "that all or any issues of fact be tried without a jury".

But, in *Pambula District Hospital v Herriman* [1988] 14 NSWLR 387, the Court of Appeal ruled that it was not open to a judge to apply universal considerations to the dispensation application (for example, to hold that it was more efficient or shorter to conduct a case in the absence of a jury) but rather that the judge must address the facts, necessities and justice of a particular case. Moreover, the onus was on the party applying for trial without jury to demonstrate that the other party should be deprived of that mode of proceeding. There was a prima facie right to jury trial.

It is this existing entitlement that the present proposals would challenge. It is timely, then, to reflect upon the conventional defence of the role of the jury.

Many practitioners would argue that the advantages of a civil jury are that:

. non-lawyers comprising the jury can reflect the economic and social climate (community values) more accurately than the judges. They bring to bear the quality of varied experience to the resolution of factual disputes. Legal historian, Sir William Holdsworth, described the jury's role as "constantly

bringing the rules of law to the touchstone of contemporary common sense";

. citizens are involved in the legal process; justice is not seen as a closeted, incestuous determination, but as part of an open, democratic society. One American commentator (K M Magill, in a 1987 article in the *Cooley Law Review*) has claimed that "juries are one of the few truly democratic institutions in our society, and when they rise to the occasion and internalise and apply the law as given regardless of perceived external pressures or internal feelings, they reconfirm the viability of democratic institutions";

. litigants are more inclined to perceive the jury's verdict as legitimate - "the jury has spoken" reflects the notion of a fair trial by the peers of the contending parties;

. juries have advantages as judges of fact - they can resolve "hard cases" without setting legal precedents, and efficiently draw a line between acceptable and unacceptable behaviour;

. the jury is a traditional attribute of British justice. It was Lord Justice Atkin who in 1922 said that trial by jury is "an essential provision of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful" (*Ford v Blurton* (1922) 38 TLR 801 at 805.

Against these factors it is not of overwhelming consequence that contemporary juries award verdicts less than the judges, and that defendants actively seek jury trial. This is a cyclical matter. In the 1960s, juries were more generous than the judges - and the insurance companies agitated against them. Perhaps this just shows a greater sensitivity of the populace to the economic pressures of the day.

Of more importance is the argument that juries unduly delay the finalisation of the case. New South Wales judges have commented that the delay in hearing a non-jury matter was four years from its setting down for trial whereas the delay in a jury trial was nearly six and a half years.

But is this difference sufficient to justify a structural change to the system of real significance? Have other avenues for expediting trials been sufficiently explored?

These questions are particularly relevant in a context where the jury can be dispensed with if the circumstances of a particular case warrant that course being adopted.

In 1926, H V Evatt argued that "the jury system should never be modified or cut down unless a very strong case is made". So far, the New South Wales government has not met that test. The argument is relatively barren of empirical or other material demonstrating a pressing need for change. Of course, the sensible observer will remain open to persuasion on this issue, free from dogmatic commitment. A strongly expressed view within the Bar favours change. Experienced Common Law jury advocates tell of wrongly rejected liability claims, difficult to correct on appeal; of an excessive propensity to find contributory negligence defences made out; of substantial under-calculation of compensation. More insidiously, suggestions are made about adverse results for ethnic plaintiffs as the result of racial prejudice. These complaints must be properly considered in the course of rational public debate, and balanced against the arguments favouring the jury's role in civil actions.

The jury is still out on these innovations. ❑

# SUPREME COURT OF NEW SOUTH WALES

## Appointment of Circuit Sittings for 1991

| Court | Commencing Date | Duration of Sittings |
|---|---|---|
| Albury | Monday 8th July (Civil) | 2 |
| Armidale | Wednesday 3rd April (Civil) | 1 |
| Bathurst | Monday 14th October (Civil) | 2 |
| Broken Hill | Tuesday 11th June (Criminal & Civil) | 3 |
| Coffs Harbour | Monday 29th April (Criminal) | 4 |
| | Monday 2nd September (Civil) | 2 |
| Dubbo | Monday 11th February (Criminal) | 4 |
| | Monday 11th November (Civil) | 2 |
| Goulburn | Tuesday 29th January (Criminal & Civil) | 3 |
| Grafton | Monday 19th August (Civil) | 2 |
| Griffith | Monday 22nd July (Civil) | 2 |
| | Monday 5th August (Criminal) | 4 |
| Lismore | Monday 16th September (Civil) | 2 |
| Narrabri | Monday 2nd September (Criminal) | 3 |
| Newcastle | Monday 4th February (Civil - Jury) | 4 |
| | Monday 4th March (Criminal) | 3 |
| | Wednesday 3rd April (Civil - Non Jury) | 2 |
| | Monday 22nd April (Criminal) | 4 |
| | Monday 20th May (Civil - Jury) | 3 |
| | Monday 17th June (Civil - Non Jury) | 2 |
| | Monday 8th July (Criminal) | 3 |
| | Monday 29th July (Civil - Jury) | 3 |
| | Monday 2nd September (Civil - Non Jury) | 2 |
| | Monday 14th October (Criminal) | 3 |
| | Monday 4th November (Civil - Jury) | 3 |
| Orange | Monday 28th October (Civil) | 2 |
| Tamworth | Monday 8th April (Civil) | 2 |
| Wagga Wagga | Monday 24th June (Civil) | 2 |
| Wollongong | Monday 11th February (Civil - Jury) | 3 |
| | Monday 4th March (Criminal) | 8 |
| | Monday 29th April (Civil - Non Jury) | 2 |
| | Monday 27th May (Civil - Jury) | 3 |
| | Monday 17th June (Criminal) | 9 |
| | Monday 19th August (Civil - Non Jury) | 2 |
| | Monday 2nd September (Criminal) | 5 |
| | Monday 14th October (Criminal) | 5 |
| | Monday 18th November (Civil - Jury) | 2 |

The fixed vacation begins on 20th December 1991 and the first day of term in 1992 will be 3rd February.

## *Young One*

*Coram:* *Young J.*

*Young J:* *Is there any appearance for the defendant?*

*Oakes:* *No your Honour.*

*Young J:* *Then it's just you against me!*