Trial by Jury : A Matter of Discretion

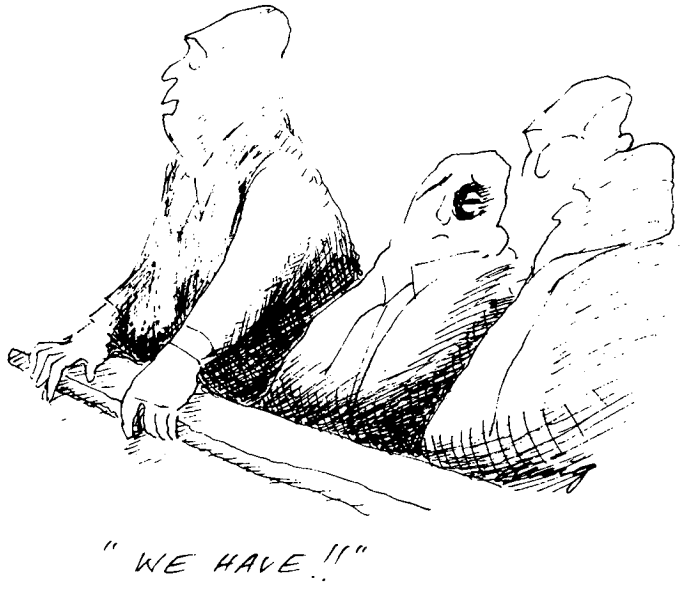
In 1988 trial by jury went to the brink of judicial abolition and back. Graham Ellis and Ruth McColl look at the controversy and the Court of Appeal's solution.

By Act no. 163 of 1987, effective from 18 November, 1987, s.89 of the Supreme Court Act was amended and now provides:

> "In any proceedings on a common law claim (except proceedings to which section 88 applies), the Court may order, despite sections 85, 86 and 87, that all or any issues of fact be tried without a jury".

(The corresponding provision in the District Court Act is s. 79A).

The history behind the amendment may be briefly stated. Faced with a plaintiff suffering from pleural mesothelioma alleged to have resulted from the defendant's negligence in exposing him to asbestos dust and fibre, Clarke J. (as he then was) held that the contested issues involved a "scientific investigation" within the then wording of s.89(1): Peck v. Email Ltd. (1987) 8 NSWLR 430. Thus, a plaintiff with a short life expectancy was able to obtain an earlier hearing via an application which overcame the defendant's requisition for a jury. Having ordered that the issues of fact be tried without a jury, his Honour added:



Reprinted with the kind permission of the Victorian Bar News.

> "I would make this final observation. I am informed that there are a large number of cases presently awaiting trial in which plaintiffs are dying or very ill. In most cases the defendant has applied for juries. As I have said the pressures of business of the Court make it extremely difficult for the Court to provide expeditious jury trials for the concerned parties. It is far easier to order urgent hearings for trial by a judge alone given the greater flexibility of this mode of trial and the judge's ability to adjourn the case from time to time. In these circumstances there is a need, it seems to me, for judges of this Court to be given an unfettered discretion to order trial by judge alone, except in respect of proceedings to which s.88 applies, to accommodate cases in need of an urgent hearing." (emphasis added)

For once the words of the Court were heard beyond the Supreme Court building.

Consequential amendments to s.89 of the Supreme Court Act were debated in the Legislative Assembly on 16th and 23rd September, 1987. Those debates disclose that, whilst the amendments were motivated by Peck's case, the discretion thereby conferred was not to be limited to such cases. The then Attorney-General, Terry Sheahan, explained:

> "In practice, the right of a party to a common law action to elect to have a matter tried by jury will continue, but subject to this new discretion which will allow a Court to direct otherwise. In exercising this discretion, the Court will be able to have regard to all relevant circumstances and be able to make a decision consistent with the needs of justice in each particular case".

In particular he stressed:

> "This legislation provides, not for the abolition of juries but for an increased discretion for judges to dispense with juries". (Hansard, p.4100 emphasis added)

Following the introduction of the amended legislation, a diversity of views rapidly developed amongst Common Law judges in the Supreme Court and in the District Court as to what matters would be considered in applications to dispense with a jury. Issues which became unclear included whether regard may be had to the general state of the list and matters common to all jury trials; whether a judge could dispense with a jury of his or her own volition and whether the applicant (usually the plaintiff) had to show special circumstances.

Cole J., in Smoje v. Trend Laboratories (27 May, 1988 unrep.) considered that the defendant no longer had a "right" to trial by jury and that the plaintiff-applicant did not need to show "sufficient circumstances" to persuade a judge to dispense with the jury.

After referring to the plethora of judgments of his fellow Judges which had been given as a result of the "weekly" applications to dispense with a jury brought since the amendment to s.89, the absence of any guidelines from the Court of Appeal and the position in England where a practice has developed of a judge alone hearing all personal injury cases, whether motor vehicle or industrial accident, his Honour concluded (p.35) :

> "In my view, the position which had been reached in England by 1964 that in the interests of uniformity, savings

in time, savings in c. t to immediate parties, to other litigants and to the community generally - in short in the interest of justice generally - juries in civil actions arising from industrial accidents should be dispensed with except where special circumstances dictate otherwise, has, in 1988, been reached in New South Wales".

On the other hand, Yeldham J. in Loranz v. George Morman (unrep., 8 July, 1988) spoke of the "prima facie right to a jury". From the judgments of Finlay J. in cases such as Landers v. McPherson & Davies Shopfitters Pty. Ltd. (unrep., 1 December, 1987) and Grady v. White Industries Limited (unrep., 2 December, 1987) it is clear that his Honour considered that juries should not be dispensed with, in the absence of consent, unless special circumstances were shown.

In Croke v. Haines (unreported 8 April 1988) Carruthers J., took into account the general state of the list and did his own calculations based upon figures provided to him by the Senior Deputy Registrar, Courts and calculated that, at the current rate, it would take 34 year to finish the list as it then stood at present. He concluded the hearing of an action in the Common Law Division by a jury was a "luxury".

"...the hearing of an action in the Common Law Division by a jury was a "luxury".

In Begg v. Rice Growers Co-Operative Mills Ltd. (unreported 7 December 1987) Mathews J. noted that if the current state of the Court lists were to be taken into account in each case then it would be hard to envisage a case in which a civil jury would be retained: That being so, it may be argued that considering the state of the Court lists would achieve that which Parliament did not intend, namely the removal of juries in all personal injuries cases.

Given the differences of opinion among the first instance judges of the Supreme Court and six applications to dispense with juries in the Applications list on Friday 8 July, Yeldham J. stated a question for the Court of Appeal pursuant to Part 12 Rule 2(1)(b) of the Supreme Court Rules asking the Court to determine:

> "Whether in relation to the exercise of discretion under Section 89(1) [of the Supreme Court Act]:
>
> (a) the Court can take into account the state of the list;
>
> (b) the Court can take into account the prospects of being heard due to the state of the list;
>
> (c) the Court can take into account general factors affecting a country circuit;
>
> .....
>
> (e) the Court can take into account delay, settlement prospects and increase in costs;
>
> (f) the Court can exercise the said discretion upon any of the matters (a) to (e) above without there being any other factors;
>
> (g) the Court should only exercise the said discretion upon a personal or particular prejudice, injustice or circumstance to which the general litigant is not exposed or by which the general litigant is not similarly affected?

That question was stated in three cases: Whalan v. Blue Mountains City Council, Gallagher v. Slim Dusty Enterprises Pty. Limited & Anor. and O'Sullivan v. R. Booth Pty. Limited. Those cases came to be heard on 15 July, 1988 in the Court of Appeal on the same day as the case of Pambula District Hospital v. Herriman, an appeal from a decision of Cole J. ordering that the proceedings be heard without a jury and the Estate of Williams & Anor. v. Marshall - also a case involving the exercise of the discretion under Section 89(1).

The decision in all of these matters was delivered on 5 August, 1988. Pambula is the main decision. In it Kirby P. and Samuels J.A. (Mahoney J.A. dissenting) held that in exercising the discretion in s.89(1) the judge is required to consider the circumstances of the particular case and not general matters such as the duration and the expense of jury trials and procedural difficulties inherent in such matters. In so finding their Honours recognised that s.89, even as amended, acknowledged the significance to be accorded to a litigant's decision to elect to have a case tried by jury. They distinguished the English position as based upon a policy decision (Kirby P. at 16) or legislation reposing an "even and unweighted discretion" in the judge as opposed to s.89 which recognises an accrued statutory right to a jury (Samuels J.A. at 10). Samuels J.A. said (pp.13-15):

> "The Parliament has decreed that juries are to be retained and that means warts and all. The presence of the warts cannot be used to destroy the picture. They are part of the picture. Accordingly, in order to make good an application to dispense with a jury it is not enough to point to the supposed deficiencies of jury trials. It is necessary to show grounds which are particular to the case in hand. These may of course be produced by the pressure of singular circumstances upon the general character of a jury trial. For example, the state of the jury list, if it entails a delay likely to exceed a plaintiff's life expectancy, would be a matter involving the particular application of a general condition. But the argument (however correct in fact) that to dispense with a jury or two at the top of the list would accelerate hearings at the bottom, would not....
>
> "In approaching the exercise of discretion under s.89 the judge must be satisfied that there are circumstances particular to the case in hand which require an order to be made in order that justice may be done between the parties. In this context,

I think that the doing of justice will usually involve the protection of legitimate expectations. The judge is not to act as a court administrator, seeking to clear the list as expeditiously as possible and seizing upon the removal of jury trial as a means of doing so, without regard to the interests involved in the particular case."

In his dissenting decision, Mahoney J.A. held that in exercising the power given by s.89, it may be appropriate for a judge to refer to guidelines or to a general practice appropriate to the kind of case or the occasion, secondly that it may, in the exercise of a particular discretion, be appropriate that it be exercised so as to achieve consistency of judicial adjudication and thirdly, that care should be taken to ensure that the use of guidelines did not convert the discretion into an inflexible or almost inflexible rule. (pp.10-13). It was not, however, appropriate under s.89 for a general ruling to be given that all cases are to be tried with or without a jury.

All of the members of the Court of Appeal were clearly acutely aware of the problem of court delays and the correlation between such delays and jury trials.

In addition, Kirby P. and Samuels J.A. recognised that defendants often requisitioned juries because they were perceived to give lower verdicts than judges and also because the delays which existed in trials presented obvious advantages for underwriters, sometimes inducing settlements for less than full value because of the frustrations of delay (see Samuels J.A. at 15).

Both Kirby P. and Samuels J.A. expressed sympathy with the position which had led judges to dispense with juries upon grounds which reflected their frustration with the serious delays in the court list which had caused hardship and injustice to litigants. They were, however, of the view that it was a matter for Parliament to legislate in such a way as to give judges a wider discretion in respect to trial by jury than was provided in s.89.

The remaining cases which had been heard on 15 July by the court were disposed of on the basis of the principles enunciated in Pambula with the result that the questions asked were answered:

"(a) - (e) : Not as such, except as such matters are shown to have consequences particular to the proceedings in which the application is made.
(f) No.
(g) Yes."

It is gratifying to see a problem which affected many cases in the Common Law Division and the District Court being so expeditiously resolved by the Court of Appeal. It may well be, however, that the position now established by the decision in Pambula is temporary and that a political response to delays in the Common Law Division, both in Sydney and in the Circuit Courts, can be expected from a Government anxious to "clear the backlog". ❑

Gifts

The following gifts were presented to the Association since the last Annual Report:

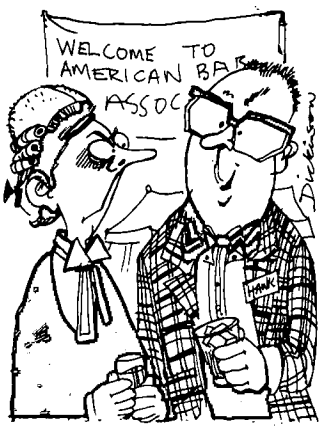
Ian Pearson's oil painting "Hunters and Collectors" in memory of the late Mr. Justice T. O'L. Reynolds by

Mr. Justice J.B. Kearney
W.J. Holt, Q.C.
Mr. Justice J.S. Cripps
J.D. Heydon, Q.C.
Mr. Justice P.A. McInerney
J.R. Sackar, Q.C.
Mr. Justice W.M. Gummow
P.G. Sheldon
Master G.S. Sharpe
R.P. Hennessy
P.J. Kenny, Q.C.
T.P. Lonergan
F.J. Gormly Q.C.
J. Poulos
R.P. Meagher, Q.C.
R.R. Bartlett
L.M. Morris, Q.C.
C.C. Branson
P.R. Capelin, Q.C.
S.M. Hamman
W.H. Nicholas, Q.C.
M.F. McDermott

F. Kaufman's "The Admissibility of Confessions", 3rd editon, by P. McEwen.

Thomson's "The Judges" by B.W. Walker.

Marr's "Barwick"; Ellis' "Lachlan Macquarie, His Life Adventures and Times"; Tennant's "Evatt, Politics and Justice"; Sir John Kerr's "Matters For Judgment, an Autobiography"; The Honourable E.G. Whitlam's "The Whitlam Government 1972-1975". All donated by the Barristers' Clerks Association of New South Wales. ❑



"You mean a solicitor has to employ you, plus a junior, to talk for him? Now that's what I call job creation."