The Jury in Defamation Trials

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INTRODUCTION

1 Historically the role of the jury in defamation matters has been intrinsically bound up with the protection of freedom of speech. Juries acted initially as watchdogs of democratic rights against unrepresentative governments prosecuting critics for seditious libel. But, in more recent times, their role has developed to provide a balance, principally in civil proceedings, between the right of an individual to his or her reputation and freedom of speech and of the press[1].

2 The twentieth century saw a reduction, almost to the point of elimination, in the use of juries in civil trials, including in defamation actions, in much of Australia. At the beginning of that century most cases were tried with a jury. That position was almost entirely reversed by the beginning of this century, where civil jury trials had become a rarity. The impetus behind this change has been, among other things, a perceived need to increase efficiency and reduce costs. The Law Reform Commission of New South Wales asserted in its 1995 report on defamation:

> "A major reason for that decline [of juries] is the realisation that judges are often simply much better and **more efficient** at resolving disputed issues of fact than juries."[2] (emphasis added)

3 But the role of the jury is not so simply dismissed. Lord Atkin once sagely observed:

> "Trial by jury, except in the very limited classes of case assigned to the Chancery Court, is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Anyone who knows the history of our law knows

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1 see too: New South Wales Law Reform Commission, *Defamation* (Report 75, September 1995), par 3.2, citing Holdsworth, *A History of English Law* Volume 10 (2nd ed, Sweet & Maxwell, London, reprint 1996) at 672 – 700

2 New South Wales Law Reform Commission, *Defamation* (Report 75, September 1995), at par 3.9

> that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases." [3]

He noted that the right is enshrined in the American Constitution.

4 There has been much debate during the past two decades as to what, if any, role the jury should play in defamation trials. A significant judicial critic of civil jury trials in recent years has been the present Chief Judge at Common Law of the Supreme Court of New South Wales, the Hon Justice Peter McClellan. He has given thought provoking papers, including one on "*The Australian Justice System in 2020*"[4] on the topic, emphasising the virtues of trial by judge alone of all civil matters, including defamation cases, and exposing what he perceives as weaknesses in trial by jury. His Honour's views are also congruent with those of the Law Reform Commission in its 1995 report[5], which advocated retention of the, now discredited, separate trial by a jury of the issues of what imputations were conveyed and whether they were defamatory i.e. the old s 7A trial.

5 Perhaps where he and I disagree is really, itself, a jury question. For whatever justifications are deployed to support either view, in essence one's adherence to a preferred mode of trial for, at least defamation actions, is the result of a value judgment. To me, the involvement of the community through trial by jury is central to maintaining our concepts of equality before the law and society's acceptance of the law's application by its own members.

6 The current debate about whether Australia should adopt a *Bill of Rights* often provokes the response that unelected judges should not be allowed to use their power to interpret such legislation and, so perform what is the job of Parliaments. That response is without substance, since, every day, judges interpret and apply the law. A *Bill of Rights* is no different. It is a law that merely embodies the value judgments of a Parliament, or referendum of the electors, that is responsible for its enactment.

7 By having juries decide important questions of guilt or innocence, on which a person's liberty depends, our society has involved its own citizenry in the application of its criminal laws. This promotes acceptance that citizens, not aberrant judges, have

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3 *Ford v Blurton* (1922) 38 TLR 801 at 805 per Atkin LJ

4 Justice P McClellan, *The Australian Justice System in 2020*, Speech delivered to the National Judicial College of Australia, Australian Capital Territory, 25 October 2008

5 New South Wales Law Reform Commission, *Defamation* (Report 75, September 1995)

acquitted or convicted the accused. That value judgment, of how best to ascertain guilt or innocence, was initiated in the *Magna Carta*, as Sir William Blackstone pointed out in his *Commentaries on the Laws of England*[6].

8 If one were to accept the argument so well put by McClellan CJ at CL, there is no logical reason to stop at simply removing juries from deciding the important clash between the right to reputation and the right to freedom of speech. Surely, all those reasons for trial by judge alone, are equally applicable to criminal cases. Yet, the importance of maintaining trial by jury in serious criminal cases cannot be gainsaid. Indeed, s 80 of the *Constitution* enshrines that right for trials on indictment against the laws of the Commonwealth. In our Anglo-Australian context, the role of a jury, where liberties and fundamental societal values are involved, has been seen as enabling 4 or 12 numbers of the community, not unelected judges, to decide those important questions.

9 Usually, institutions survive over time because, as they evolve, they secure the confidence of the society in which they exist. The ironic wisdom of Sir Winston Churchill's defence of democracy can equally apply to the institution of trial by jury. He said:

> "Many forms of government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time."[7]

But, even he also said: "*the biggest argument against democracy is a five minute discussion with the average voter*".

10 What this signifies is that not all justifications for our important institutions of government are susceptible to detailed rational explanation. Trial by jury has worked for centuries. It has led to the entrenchment of the freedoms of speech, opinion and the press and the right to one's reputation which we value and are able to enjoy today. Its importance in the administration of our criminal law in serious matters is inestimable. It is not lightly to be abandoned.

OUTLINE

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6 Sir W Blackstone, *Commentaries on the Laws of England*, 14th ed: London 1803, Book IV p 349

7 Speech in the House of Commons (1947-11-11), The Official Report, House of Commons (5th Series), 11 November 1947, vol 444, cc 206-07

11 The topic of juries in defamation trials has been much discussed in the academy and in the profession. There is a plethora of research material relating to the asserted benefits and deficiencies of the system. I do not propose to cover them all, or even every aspect of jury trials in defamation cases. I do intend to address the following:

- The current role of the jury in defamation trials in the five States, other than South Australia, in which juries may hear such trials, and the use of juries in the Federal Court of Australia.
- My decision in *Ra v Nationwide News Pty Ltd*[8]. This was the first time that the Federal Court has ordered a jury trial. However, it will not be the first jury trial in the Court because, after the order was made, a registrar of the Court successful mediated a resolution.
- Whether defamation trials should be trials by jury.

THE CURRENT JURY SYSTEM AND THE FEDERAL COURT OF AUSTRALIA

12 In an earlier paper I discussed possible ways in which the Federal Court may have jurisdiction in "*pure*" defamation actions.[9] The Parliaments of the five States that have retained trial by jury for defamation recognised the desirability of having jurors decide the issue of libel or no libel on all liability issues, with the exception of qualified privilege. However, in every Australian jurisdiction except, possibly, in the Federal Court, damages must be determined by the trial judge.

Juries in The Federal Court of Australia

13 The commencing point for considering a jury trial in a defamation action brought in the Federal Court is the *Federal Court of Australia Act 1976* (Cth) ("***the Federal Court Act***"). That Act provides in ss 39 and 40 for trial by jury in exceptional cases. I say "*exceptional*" because, generally, by force of s 39 the ordinary mode of trial is by judge alone. But s 39 creates a power of the Court to direct a trial of the whole matter, or of particular issues, by a jury. Thus, while the Parliament has evinced a general policy in s 39 of the *Federal Court Act* of a trial in the Court to be by judge

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8 [2009] FCA 1308

9 Steven Rares, *Defamation and Media Law Update 2006: Uniform National Laws and the Federal Court of Australia*, (2006) 28 Aust Bar Rev 1

alone, that policy informs but does not overwhelm the exercise of the discretion to order a trial by jury. The terms of ss 39 and 40 are:

> **"Section 39 Trial without jury**
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> In every suit in the Court, unless the Court or a Judge otherwise orders, the trial shall be by a Judge without a jury.
>
> **Section 40 Power of the Court to direct trial of issues with a jury**
>
> The Court or a Judge may, in any suit in which the ends of justice appear to render it expedient to do so, direct the trial with a jury of the suit or of an issue of fact, and may for that purpose make all such orders, issue all such writs and cause all such proceedings to be had and taken as the Court or Judge thinks necessary, and upon the finding of the jury the Court may give such decision and pronounce such judgment as the case requires."

14 Under s 41(1) of the *Federal Court Act*, the laws that apply for the purposes of civil proceedings tried in the Supreme Court of the State or Territory in which the Court is sitting relating to, among other things, the number of jurors and procedural matters dealing with the constitution of a jury will apply in civil proceedings in the Federal Court. For example, if an order is made by the Federal Court for trial by jury in New South Wales, s 20 of the *Jury Act 1977* (NSW) will be applicable in considering whether a jury of 4 or 12 should be ordered.

Election for a trial by jury under the Uniform Defamation Acts

15 Substantially uniform *Defamation Acts* were enacted by each of the States and Territories in 2005 and 2006. However, one area in which these Acts are not uniform is the use of trial by jury. In New South Wales, Victoria, Queensland, Western Australia and Tasmania, s 21(1) allows any party in a defamation case to elect for a trial by jury. But there is no such provision in the legislation in South Australia, the Australian Capital Territory or the Northern Territory.

16 For example, the *Defamation Act 2005* (NSW) provides that this election is for a trial by jury of all issues, other than damages. The ability to elect for a jury trial exists unless the trial would require a prolonged examination of records, or, involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury (ss 21(3)(a) and (b)).

17 Relevantly, ss 21 and 22 of the *Defamation Act* (NSW) provide:

> "**21 Election for defamation proceedings to be tried by jury**

(1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.

(2) An election must be:

(a) made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried, and

(b) accompanied by the fee (if any) prescribed by the regulations made under the *Civil Procedure Act 2005* for the requisition of a jury in that court.

(3) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if:

(a) the trial requires a prolonged examination of records, or

(b) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

22 Roles of judicial officers and juries in defamation proceedings

(1) This section applies to defamation proceedings that are tried by jury.

(2) 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.

(3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(4) If the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.

(5) Nothing in this section:

(a) affects any law or practice relating to special verdicts, or

(b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer."

HISTORY OF JURIES IN DEFAMATION TRIALS

18 As I discussed in *Ra v Nationwide News Pty Ltd,*[10] in times less free than those in which we now live, the charge of criminal libel was often employed as a means of censoring freedom of expression and opinion.

19 Prior to the passage of *Fox's Libel Act* in 1792,[11] the judges of England had asserted that it was their province to determine whether or not a matter was defamatory.[12]

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10 [2009] FCA 1308 [18]

Lord Denning traced some of the eighteenth century history in his book *Landmarks in the Law*.[13] A number of prosecutions were brought against newspaper publishers who printed letters attacking King George III. The letters were signed "*Junius*". They suggested that the King:

> "Do justice to yourself, banish from your mind those unworthy opinions, with which some interested persons have laboured to possess you. Distrust the men who tell you the English are naturally light and inconstant, that they complain without a cause. Withdraw your confidence equally form all parties, from ministers, favourites, and relations, and let there be one moment in your life in which you have consulted your own understanding."

20 This was apparently fairly strong criticism in those days. Lord Mansfield CJ considered the letters to be a seditious libel and he directed the jury that the words in the information (i.e. the charge) alleging "*intention, malice, sedition, or any other still harder words*" were "*mere formal words, mere inference of law, with which the jury were not to concern themselves*". One publisher was acquitted, and one was found problematically "*guilty of publishing only*" a verdict which required a new trial, that was never held[14]. Ultimately, that form of direction was reversed by *Fox's Libel Act* that placed the decision of whether or not the matter complained of was libel squarely in the hands of the jury.

21 Lord Camden supported the passage of the Bill that became *Fox's Libel Act* in the House of Lords saying:

> "I ask your Lordships to say, who shall have the care of the liberty of the press? The judges or the people of England? The jury are the people of England."

His speech swayed the House. The new statute provided that the question of libel or no libel was withdrawn from the judges and rested solely in the jury. In those times, most defamation trials were for the crime of seditious libel. And, a good few of his Majesty's judges literally fitted just that description when assessing the defamatory character of the publication. They had denied the jury a role in that assessment by seeking to confine it to finding whether the defendant had simply published the matter.

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11 32 Geo 3 c 60

12 *R v Shipley (The Dean of St Asaph's Case)* (1784) 4 Doug 73 at 164–165 per Lord Mansfield CJ

13 Lord Denning, *Landmarks in the Law*, Butterworths, London 1984 at pp 284-294

14 *Ibid.* at pp 285-288

22 After the passage of *Fox's Libel Act*, the jury's role was increased and solidified in libel cases. Juries were vital to the protection of the freedoms of speech and of the press. They stood between the Government and its critics, allowing the efflorescence of the open society in which we now live.

23 That has remained the position in England to the present time, as it has until recent times in many of the Australian States. If those juries and others had not defied the judicial direction to find the criminal defamatory meaning, think of the tyranny that would have prevailed today. There are many countries in the world where criticism of government leads to jail, or worse, for the critics. Those countries do not have trial by jury or brave juries. England did, and we are among its heirs.

24 Thus, as mentioned above, the jury's statutorily recognised role in libel cases can be seen as central to the protection of the principles of freedom of speech and freedom of the press. Different considerations arise today in civil jury actions for defamation.

25 One of the great virtues of having a jury try the substantial factual issues in a defamation action is that, particularly in mass media cases, they represent the very audience to which the defamatory publication was addressed. In assessing whether or not a publication, first, is defamatory in the sense complained of and, secondly, has been defended under defences such as truth, honest opinion or fair report, a jury of ordinary reasonable people is able to evaluate the competing factual issues bringing to bear the moral and social standards that they share with the community at large. And, they are better placed than judicial officers to assess how ordinary reasonable people understand mass media publications.

26 The test does not imply that the hypothetical referees will exercise a moral judgment about the plaintiff or applicant because of what is said about him or her. Rather, the test identifies the attributes of persons who share the standards of the general community and will apply them[15]. And, the moral or ethical standards held by the general community may be relevant to imputations which reflect upon a person's business or professional reputation.[16] The standard to be applied must be one common to society rather than one which reflects an attitude of a section of it[17].

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15 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 516 at 352

16 *Ibid* at 533

17 *Ibid* at 536

RA v NATIONWIDE NEWS PTY LTD – WHEN MAY THE FEDERAL COURT ORDER A JURY TRIAL?

27 I examined the circumstances in which the Federal Court might order a trial by jury in *Ra v Nationwide News Pty Ltd*. Like most defamation actions, this one had interesting facts and law.

The Facts

28 Kwang Suk Ra was a brothel owner. She commenced proceedings in the Federal Court against the publisher of *The Daily Telegraph* newspaper, Nationwide News Pty Limited and its associated company, News Digital Media Pty Limited. News Digital published material on the internet including extracts from *The Daily Telegraph*.

29 On 3 December 2008, *The Daily Telegraph* published an article under the headline "*Sex Slave Trade Revealed*". The article had a subheading, "*Brothel Madam Walks Scott Free*". On the same day *The Daily Telegraph* also published an editorial headed "*Sydney's Own Horror House*". The text of the editorial appears to have been republished on the internet by News Digital on either 3 or 4 December.

30 On 4 December 2008, News Digital published an internet article headed "*No Way Out for Women in Debt and Total Despair*". A web blog or section on the News Digital website allowed readers to post comments on this article. On and after 4 December 2008 a number of comments were posted on this part of the website. The flavour of the publications can be gleaned from the following defamatory meanings and representations that Ms Ra alleged were conveyed by the "*Sex Slave Trade Revealed*" article about her namely that she:

- was a brothel owner and madam who kept foreign women as sex slaves;
- was accused of a despicable crime of keeping foreign women as sex slaves in her brothel;
- confiscated the passports of young women who worked at her brothel;
- forced women who worked for her to work for up to 20 hrs per day to pay off excessive debts of between $10,000 and $14,000;
- conducted herself in such a manner that her young women employees were frightened of her;

- charged huge amounts of $14,000 for the cost of young women travelling to Australia;
- forced harsh fines on young women who worked in her brothel;
- required the young women to work under harsh conditions in her brothel;
- failed to explain to the young women the harsh conditions under which they were required to work for her.

31 In addition, Ms Ra relied on two further defamatory imputations that she alleged were conveyed by the publications, namely that:

- she had served a lengthy term in a US jail in 2000 and 2001 for sexual traffic offences and filing a false tax return;
- the Commonwealth DPP should not have dropped the charges against her for keeping foreign women as sex slaves because it is possible that she was guilty.

32 Ms Ra gave particulars of damage for all her causes of action that the employment which she offered was for the purposes of prostitution. she claimed that she had suffered damage, by the publications, to her reputation generally and as an employer.

33 Ms Ra claimed that each of these publications contravened s 53B of the *Trade Practices Act 1974* (Cth) by making representations about the nature of the employment offered in her brothel. She alleged that one or other of the publishers had engaged in conduct that was liable to mislead persons seeking employment as to the nature, terms or conditions of that employment by making a variety of misleading representations in each of the five publications in relation to employment that was or may be offered by her.

34 Similarly, Ms Ra complained that each of the publications complained of defamed her. She sought to recover damages for the alleged contraventions of s 53B and for the alleged defamatory publications. The publishers' defences denied the contraventions and pleaded defences of truth, contextual truth, honest opinion and fair report under the *Defamation Act 2005* (NSW).

Issues

35 The publishers filed a motion seeking an order under s 40 of the *Federal Court of Australia Act 1976* (Cth) that the issues in the proceedings, other than damages, be

tried by a jury. Ms Ra opposed such an order, and also argued that, should it be summoned, it should be a jury of 12 under s 20(2) of the *Jury Act 1977* (NSW).

Circumstances which make it appropriate for Jury to trial

36 The controversy between the parties in that case raised issues that very much involved giving effect to moral and social values of the community. In these circumstances, I found that a jury would be better able to make such an assessment than a judge and to do so in a way likely to arrive at a reflection of the attitude of society generally. I said:

> "I am of opinion that where the real substance of a matter in this Court's jurisdiction is a claim for damage to reputation, ss 39 and 40 of the *Federal Court Act* permit the Court to have due regard to the appropriate procedural law of the State or Territory that is the *lex loci delicti* and the historical mode of trial of such actions in order to decide how best the controversy between the parties should be resolved at trial. Ordinarily, where any party to a defamation action in New South Wales so elects, there will be a trial of that action by a jury. Of course, there will be cases where it may be more appropriate to try a defamation action without a jury, as s 21 of the *Defamation Act* itself provides. And, in some States and Territories, their laws provide that the trial of a defamation action must be by judge alone." [18]

37 I rejected an application by Ms Ra that the jury trial should be ordered on all issues including damages. This was because the State Parliament had evinced a public policy that such trials in New South Wales should leave damages to be decided by a judge. This was consistent with the general mode of trial for all actions in the Federal Court provided in s 39 of the *Federal Court Act*.

Juries of 4 or 12

38 The ordinary mode of trial by jury in civil actions in New South Wales is by a jury of 4. However, the Court has a discretion to order a trial by a jury of 12 where it is shown that the matter is more appropriately tried by a larger number of jurors. In *Lang v Australian Consolidated Press Limited*[19], Nagle J held that:

> "… a jury of 12 would seem to give a better 'spread' and be more representative of the views of the community as a whole."

39 I considered the principle to determine whether a jury of 12 should be ordered saying[20]:

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18 *Ra* [2009] FCA 1308 [25]
19 [1967] 1 NSWLR 157
20 *Ra* [2009] FCA 1308 [37]

> "Where a person is a contentious figure or one with a prominent public role, his or her position as a party to an action tried before a jury may cause concern about its potential effect on a jury of 4 persons. He or she is more likely to be given a dispassionate and fair trial by a jury of 12. This is because a larger jury is more likely to dilute the influence of any single juror whose passions or antipathies are aroused for or against one of the parties. Balanced against that concern, must be the Court's recognition that jurors obey the directions of trial judges to put aside their own personal prejudices and feelings."

40 Here, Ms Ra had a highly contentious occupation. She ran a brothel. It was more appropriate that a jury of 12 be constituted to dilute the influence of any single juror whose passions or antipathies might have been aroused for or against one of the parties. Thus, by expanding the jury to 12, it was more likely that the range of community values, morality and thought was reflected in the larger panel so as to ensure a fair trial.

IN DEFENCE OF JURIES

41 The desirability of civil jury trials has been debated for a long time. There are fierce critics and equally fierce defenders. The critics of jury trials identify numerous perceived faults; including, inability of jurors to understand the complex legal and factual issues; perverse verdicts; length of the trial, failure to do justice according to law; unreviewability of their findings; and lack of transparency in the jury's deliberative processes.

42 Responding from the floor to a paper entitled "*The Jury System in Australia*"[21] delivered by Justice Evatt to the second legal convention of the Law Council of Australia in Adelaide in September 1936, the then Commonwealth Attorney General, the Hon RG Menzies KC, declaimed:

> "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."

43 Mr. Menzies then referred to a particular defamation action tried twice in the original jurisdiction of the High Court. He suggested that defamation trials raised issues too complex for a jury fully to appreciate, and there was significant potential for error in the jury's verdict, leaving the losing party in the position where, as he said, "*your*

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[21] Justice HV Evatt, *The Jury System in Australia*, (1936) 10 ALJ Supp 49 at 74

prospects of appealing successfully against a jury verdict are fantastically thin indeed"[22].

44 Significantly, in preparing his paper Evatt J solicited the views of the Chief Justices of New South Wales[23] and Victoria[24] both of whom were in favour of retaining civil juries. Sir Frederick Jordan said[25]:

> "As regards civil matters, the advantage of the jury system is twofold. In the first place, although the lives of Judges are by no means as cloistered as people are apt to suppose, the Bench being recruited from men who have experienced the rough and tumble of life at the Bar, **the combined experience of four men is likely to be greater than that of any one man**. I have on occasion known a juryman to stand up and clear up some incidental point emerging in the course of the evidence, which neither witnesses nor counsel was able to explain. Also the litigants in the type of case that is ordinarily tried at common law are, I think, much more satisfied with the decision of four men like themselves, (whether successful or unsuccessful) than they would be with the decision of a Judge whom they might feel to be unable to appreciate their point of view. **It is important that decisions should not only be just but should be felt to be just**. Another important advantage of the jury system is that it involves the existence in the community of a large number of citizens who actually take part as Judges in the administration of justice. **I think this is of very considerable importance in helping to foster and maintain a respect for the law, and for the administration of justice, the maintenance of which is of great moment in a modern community. It maintains confidence in the law and in the administration of justice that there should be in the community a large number of people who have an opportunity of seeing that justice is fairly administered and of taking part in securing that it shall be fairly administered**." (emphasis added)

45 Anecdotes of current experience relied on by some critics, including McClellan CJ at CL, claim that the length of defamation trials is likely to be significantly longer than a trial by a judge alone. They say that it is more likely that there will be a just, quick and efficient result from a trial by a judge alone. This is said to justify using the latter mode of trial in order to achieve the overarching purpose of the Court's civil procedure provisions. Recently Pt VB of the *Federal Court Act* has come into force stating this is a now statutory objective of the Court (but it also reflected its earlier approach to case management). The Federal Court had a significant additional statutory armoury of case management tools conferred on it by Pt VB.

46 The cap on general damages provided in s 35 of the *Defamation Act 2005* (NSW) also presents a significant issue deterring plaintiffs from bringing proceedings. The more the length and costs of jury trials in defamation cases increase, then the less accessible will be a means to redress a wrong. It would be undesirable if only the wealthy could

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22 *Ibid* at 75
23 Jordan CJ
24 Mann CJ
25 Evatt op cit at 72

afford to bring an action in defamation because, in the end, any plaintiff would be out of pocket, if the damages and costs recovered were less than the plaintiff had to pay to get his or her case heard and determined.

47 There is, of course, some force in the criticisms. But these same criticisms can be as validly made of trials by judge alone, from time to time, as with jury trials. The law reports and judgment libraries of superior courts are full of cases where the trial, either by jury or judge alone, miscarried. Sometimes, despite their professional training and consciousness of their duties, judges even fail to give reasons, or adequate reasons, for their decisions which must then be set aside. Like all humans, judges make mistakes.

48 Should we thus abolish trial by judge alone because, occasionally, something goes wrong? That argument is as fallacious as those that attack trial by jury because, on occasion, a jury verdict can properly be condemned as wrong or perverse.

49 Jury trial has been a longstanding and successful societal institution in our common law tradition. Usually, institutions survive over time because they evolve and secure the confidence of the society in which they exist.

50 Trial judges, just as juries, must decide between competing, often highly conflicting, versions of fact put forward by both sides. Sometimes, as counsel and later as a judge, I have puzzled over what really happened in a case. Who should be believed or accepted as a witness? But, as a judge, one has to decide the answer to the puzzle, if at all possible. Of course, if the evidence leaves the judge in doubt, then the plaintiff fails to satisfy the onus of proof. Why are the advocates of judge alone trials able to be confident that judges are so much better than jurors in deciding which witness should be accepted or believed? It cannot be because of the judiciary's broader experience of life; for most members of the legal profession have a relatively narrow experience of life or one that has been less informative than those of 4 or 12 ordinary citizens, each of whom can bring to bear a different reality check on what his and her peers are saying in the jury room. This was also part of Sir Frederick Jordan's reasoning for upholding civil trial by jury[26].

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[26] Evatt op cit at 72

51 In his Hamlyn Trust lectures in 1956 "*Trial by Jury*" Sir Patrick Devlin, then a puisne judge, addressed the question of fact finding in relation to credibility and reliability of witnesses. Lord Devlin said that he was convinced that the jury was best equipped to decide those matters. He continued[27]:

> "Whether a person is telling the truth, when it has to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, as a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; the impression made upon a mind of twelve is more reliable. Moreover, the judge, who naturally by his training regards so much as simple that to the ordinary man may be difficult, may fail to make enough allowance for the behaviour of the stupid. The jury hear the witness as one who is as ignorant as they are of lawyers' ways of thought; that is the great advantage to a man of judgment by his peers."

52 Anyone who has had experience of committees knows how hard it is to get unanimity, how valuable the contributions, insights and questions of others can be and how more committee members make it likely that a unanimous result is the best outcome. That represents the genius of the common laws selection of a mode of trial that required that 12 jurors have a unanimous view as the deciding factor.

Complexity and the Jury's ability to comprehend legal arguments

53 In my opinion the issues which go to the heart of a defamation trial are best determined by a cross section of ordinary citizens bringing to bear their experience of life. The same characteristics apply to the ordinary reasonable reader[28] or the hypothetical referees of whom Brennan J once spoke[29].

54 The purpose of retaining these people to decide not merely the issue of defamatory meaning but all the merits of the controversy including the existence of the defence was also addressed by Lord Devlin. He elaborated an important and fundamental reason for a jury trial saying[30]:

> "That is why the just decision fluctuates… in most systems the just decision is tied pretty closely to the law; the law may be made as flexible as possible, but the justice of the case cannot go beyond the furthest point to which the law can be stretched. Trial by jury is a unique institution, devised deliberately or accidentally… to enable justice to go beyond that point."

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27 Sir Patrick Devlin, *Trial by Jury*, University Paperbacks, Methuen & Co, 1966 p 140

28 e.g. *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164A-167G

29 *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506; *Chesterton* 238 CLR at 468 [7]-[8]

30 Devlin op cit at 154

55 He continued[31]:

> "The essential virtue then of trial by jury is that it is a mode of trial whereby the law, while remaining generally in control of the decision, loosens its grip on it so as to allow it to move nearer than it could otherwise do towards the *aequum et bonum* [real merits of the case] …
>
> If you want certainty or predictability, you must keep the judgment running close to the law. If you want the best judgment in light of all the facts when they have emerged, then it will be one that has moved closer to the *aequum et bonum*. The unique merit of the jury system is that it allows a decision near to the *aequum et bonum* to be given without injuring the fabric of the law, for the verdict of the jury can make no impact on the law."

56 Judges, indeed most lawyers, are not often considered as "*ordinary*" persons although they may be reasonable. And, I do not suppose any of us would really want to socialise with the reasonable man or woman who is the touchstone of the law of negligence. Such a being would not be very exciting company. The legal mind is, and perhaps necessarily so, analytical. Nor is it easily persuaded or attuned to how the "*average*" person sees things.

57 It is necessary to be mindful that complex technical issues and the jury's ability to comprehend legal arguments, may affect the quality of their verdicts. A recent research paper in England[32] entitled "*Are juries fair?*", indicated that, there "*is not a consistent view among jurors at all courts about their ability to understand judicial directions*". The study involved 797 jurors at three courts. The paper stated that most discrepancies in a jury's ability to comprehend information put to them is *not* due to an inherent lack of mental capacity to understand legal issues, but rather, to the absence of clear directions and of written instructions as to how to approach their task and to refresh their memories.

58 I have previously written that defamation is an area of the law that is complex in nature[33], and so it still is. However, the solution is not the abolition of civil juries, but rather lucidity, succinctness of advocates and judges and appropriate case management by the trial judge.

Length and Cost – are judge only trials quicker and cheaper?

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31 Devlin op cit at 155, 156-157

32 Cheryl Thomas, *Are juries fair?*, (United Kingdom) Ministry of Justice Research Series 1/10, February 2010

33 Steven Rares, *Can I Say that?*, (2004) 25 Aust Bar Rev 45 at 45

59 The critics of jury trials claim that they are longer and more costly. All I can say from my experience of having been counsel in many all issue jury trials in the 1980s and 1990s, is that they were generally shorter and more efficient than judge alone trials. One essential reason was that counsel were, and should be, conscious of "*losing the jury*" by introducing irrelevance or unnecessary complexity.

60 One problem with judge alone trials, including for defamation actions, is that the parties are more likely to raise every issue they can in the hope that somewhere in the morass the judge will find their salvation. Such an exercise almost always results in delay, a lengthier trial and increases the risk of error by the judge.

61 Moreover, a jury decides the case *then* and *there*. Its verdict is immediate. Because of the usual factual and legal complexity of defamation actions, if a judge tries it, a reserved judgment is unlikely to be delivered quickly and, where the plaintiff succeeds, his or her vindication is commensurately delayed. The interests of justice are not better served by such delays.

Unreviewable Decisions of Juries

62 A further criticism is that a jury's verdict lacks transparency and is more difficult to review on appeal, as Sir Robert Menzies lamented[34]. That is not a self-evidently bad outcome. There is an important public interest in the finality of litigation.

63 Fact finding is sometimes easy, sometimes hard. How does one know or decide who is telling the truth? Even though contemporaneous documents are frequently seen as a reliable indicator of what occurred. This reasoning, however, is over simplistic. It ignores that the characteristics of the person who created the document – sometimes these characteristics are decisive in counsel's decision not to call the person but to rely on the inhuman piece of paper, i.e. it is better the judge does not see how unreliable the author appears to counsel to be. Documents are really only as reliable as their author, being a recorder of the facts she or she sets down in them.

64 The focus of a trial involves the judge or jury finding the facts and applying the law to those facts to arrive at a result. This is in marked contrast to the focus of an appeal. There the issue is how the trial went, allegedly, wrong. Appeals deal in allegations of error; these are usually within a narrow compass. In deciding whether a witness

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[34] Evatt op cit at 75

should be accepted in preference to another witness who appears equally honest and reliable, trial judges often will have a variety of good reasons for accepting or rejecting both witnesses. Ultimately you may "*know*" or believe that one witness simply is more likely to be right – is that a matter of, perhaps, impression or, common sense? How does one explain satisfactorily demeanour evidence in a judgment? And, why is a judge, in these circumstances, a better assessor of reliability than a jury?

65 In many cases of fact finding, there will be a choice between two respectable and plausible alternatives. This openness of choice is not always apparent to either the contestants in the trial or their lawyers. But, a judge or jury will come to the controversy with an open mind. Life experience, commonsense, and demeanour are often tools with which they must, or do use, consciously or unconsciously, in selecting the version of the facts that they prefer. It is here that a jury has a distinct advantage over a judge. They are collectively able to assess the human side of the differing witnesses and their evidence.

66 How often in life do we make an individual assessment of the interaction we have had with someone else and then turn to our spouse, partner or friend who not only gives us a different insight into the same event, but causes us to change how we see it? Although a judge, just as a jury, has the benefit of argument from the parties, he or she assesses witnesses alone. Overall, a jury can better gauge these matters.

67 While it is true that the jury's verdict is as inscrutable as the Sphinx, even a judge's demeanour based findings are difficult to challenge on appeal. Where appropriate, the Court can, and often does, ask juries to answer particular questions. Those answers can assist appellate courts although it is true that the jury's findings will be hard to challenge on appeal. By the same token, a rehearing on an appeal is a valuable right to litigants. And, as Gleeson CJ, Gummow and Kirby JJ observed in *Fox v Percy*[35] there is a real need for judges to be cautious in too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses.

The Right Kind of Justice

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35 (2003) 214 CLR 118 at 128-129 [30]-[31]

68 Lord Devlin in *Trial by Jury*[36] contrasted judgments according to the law and judgments according to the merits. As John Cooke surmised, "*in answer to the question of which mode of trial is best he poses the question of what sort of justice do you want? In some areas of law judgment according to the law is essential*"[37].

69 One justification advanced for trial by judge alone is that the result is supposedly more predictable. I do not know why this is so. Historically, the law has passed through periods where at common law and in equity the judges were obviously in periods of sometimes developing the law or, at other times, being less than adventurous in their decisions. But in the recent past and now, statute law has become evermore intrusive into litigious disputes. Parliaments are not content merely to introduce significant and sizable new enactments; they constantly amend them. There are some innovations that have been introduced by the *Uniform Defamation Acts*, that at least for the immediate future, mean that either trial judges' summings up or charges to juries or their reasons for judgment will formulate interpretations of how the new Acts work.

70 Because the facts of defamation cases, and the legal issues they raise, are almost always interesting and complex, they are not particularly predictable. Most litigation with live witnesses on hotly disputed issues is characterised by uncertainty. In any event, there does not seem to me, at least, to be any benefit in terms of predictably for the parties, in having defamation cases tried one way or the other.

71 And, I agree with Lord Devlin's view that, when a man is on trial for his liberty, "*predictability is quite unimportant. What then is wanted is a decision on the merits that will after the event satisfy the public that justice as the ordinary man understands it has been done.* ***Likewise, when a man's honour or reputation is at stake, he is more concerned to have a judgment that fits his merits***"[38]. (emphasis added)

Common Sense vs Legal Analysis

72 The commonsense of a jury deciding the real merits can result in a satisfactory and just outcome as much as, and sometimes more than, legal analysis. Merit and analysis may also go hand in hand. But it is well to remember how in the *Merchant of Venice*,

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36 Devlin op cit 151 - 155

37 John Cooke, *Twilight of the libel jury?*, (2006) 14 Tort L Rev 64 at 65

38 Devlin op cit at 156-157

Portia parried Shylock's insistence on his right to the forfeiture of a pound of Antonio's flesh when his bond was not paid on time:

> "**PORTIA**
> And you must cut this flesh from off his breast:
> The law allows it, and the court awards it.
>
> **SHYLOCK**
> Most learned judge! A sentence! Come, prepare!
>
> **PORTIA**
> Tarry a little; there is something else.
> This bond doth give thee here no jot of blood;
> The words expressly are 'a pound of flesh:'
> Take then thy bond, take thou thy pound of flesh;
> But, in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are, by the laws of Venice, confiscate
> Unto the state of Venice."

73 In the middle of the twentieth century, some reasons justifying the abolition, of jury trials in running down and other personal injuries actions included the suggestion that juries found too readily for plaintiffs and were too generous with damages and that judges were better placed to give reasoned judgments. By 2002, when the *Review of the Law of Negligence Report*[39] prepared by Justice Ipp's committee was presented, judges had developed the law of negligence markedly. That development required significant legislation, the *Civil Liabilities Acts* 2002 and 2003 of most State and Territory jurisdictions, to reverse the judge-made trend by raising thresholds to be met before plaintiffs could recover. However, these were policy choices for Parliament that did not strike a fundamental safeguard in society

74 Judge only trials can result in more verdicts for plaintiffs and larger damages than trial by jury. Indeed, anecdotally at least, until the 1990s there had not been a verdict for the defendant, or a jury trial, in any defamation action in the Australian Capital Territory for perhaps 60 years. Plaintiffs who feared a jury were always advised to sue there. Perhaps jury trials there may have achieved a different balance between the right to reputation and the freedom of speech.

CONCLUSION

75 In general, the community accepts jury verdicts; but the willingness of the community to accept the outcome on guilt or innocence in criminal cases undergoes a radical

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[39] Hon D A Ipp et al, *Review of the Law of Negligence*, Commonwealth of Australia, September 2002

change when the convicted person is sentenced. Sentences are often criticised. The judge's reasons for sentence do not often receive the media attention they deserve. Rather, the result – the sentence imposed, not by the jury but by the judge – is the focus. This throws some light on the place juries occupy today in our society, even though the judiciary is generally held in high esteem. The jury is an institution that can be criticised but it has worked very well for centuries and ought to be preserved in hearing defamation trials.

76 No-one can claim, with certainty, that civil defamation cases are best tried by a judge alone trial as opposed to a jury. The answer is a value judgment. My view is that history has shown that the better and more satisfactory mode of trial in such cases is by a jury.