

REPRESENTATIONS

2 DECEMBER 2014

THE RIGHT TO A CIVIL JURY TRIAL IN NEW SOUTH WALES

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1. The Courts Legislation Amendment (Civil Juries) Bill 2001, which was introduced into the Legislative Assembly by the then Attorney General, Mr R J Debus on 28 November 2001 has had the practical effect of ending the right to civil jury trial in New South Wales even though Mr Debus had assured the Parliament that this would not be the effect of the bill.¹
2. *Attachment 1* is a volume of the Hansard records relating to the 2001 bill. It is my belief that this contains the totality of the Hansard records.
3. The bill was passed on 14 December 2001 after some amendments proposed by the then Independent member of the Upper House Mrs Sham-Ho (referred to in paragraphs 44 and 45 *post*). It was commenced on 18 January 2002.

The 2001 Act amends section 85 of the Supreme Court Act 1970 and inserts a new section 76A into the District Court Act and provides that a court may order trial by jury if "the Court is satisfied that the interests of justice require a trial by jury in the proceedings".

It applies to all actions commenced on or after 18 January 2002.

4. In his second reading speech on 28 November 2001 Mr Debus stated:

"These amendments are not intended to abolish civil juries. The Government recognises that it is appropriate to have some matters determined by a jury. ... The amendments are intended to enable judges to consider the full range of factors when determining whether there is a special need for a jury trial. ...

The bill is not prescriptive about the special need that must be shown because it is intended that each case will be considered on its merits. Once the bill is enacted, I will write to the Chief Justice and the Chief Judge suggesting that they issue an appropriate practice direction about the matters the court would consider when deciding that a special need exists. What constitutes a special need will depend very much on the particular circumstances of each case. ..." (*Hansard records page 4:W-Z, page 5:I-J*)

In the reply on the second reading on 6 December 2001 Mr Debus further stated.

"I thank the honourable member for Gosford and the honourable member for Liverpool for their contributions to the debate. I assure my colleague the honourable member for Liverpool that I certainly do not intend that this legislation should in any way lead to the virtual abolition of civil juries and I assure him that it would always be my intention that the effects of the bill should continue to be monitored. If its effects were in anyway substantially different to those that we now propose, we would revisit the whole measure. As I said in my second reading speech, this bill does not abolish civil juries. Rather, it seeks to strike a balance between the various competing priorities and to simplify the law with respect to civil juries." (*Hansard records page 11:H-K*)

¹ Defamation claims which have a separate regimen as to jury entitlement are not included in these calculations.

5. Our searches and enquiries indicate that since January 2002 (more than 12 years ago) no one in New South Wales has been able to obtain trial by jury of any claim commenced on or after 18 January 2002.

To the best of our knowledge and belief all such applications for trial by jury have been brought by plaintiffs and all such applications have been actively opposed by defendants and their insurers.

Notwithstanding the assurances that were given by Mr Debus to the Parliament that the right to trial by jury was not being abolished by this bill, precisely that has been the practical effect of its enactment.

The 2001 legislation has effected the de facto abolition of civil jury trials in New South Wales. This will continue to be the case as long as that legislation remains in effect.

The case of Mr Yeo Moon Yoon

6. Herewith is the following:

Attachment II – Affidavit of Yeo Moon Yoon sworn 6 February 2014

Attachment III – Affidavit of Timothy Denis Kelly sworn 24 April 2014

Mr Yoon is a high level quadriplegic who was rendered into that condition in a fall down some stairs leading from the exit of a karaoke lounge at Beecroft Road, Epping to the street level below. These affidavits were used to seek orders for trial by jury and for an expedited hearing of his case *Yoon v Kim & ors SC 2012/00147790*. It is we believe the last jury application to be heard in New South Wales up to the present time.

7. Mr Yoon was born on 7 June 1954 in South Korea and he, his wife and son immigrated to Australia in March 1990. They have all since become Australian citizens. As at 2011 he and his wife had a small office cleaning business and Mr Yoon also wrote articles as a newspaper journalist for some South Korean papers. He was also a poet whose works in the Korean language had been published in South Korea.

As at the evening of 26/27 November 2011 he lived with his wife in rented accommodation in an upstairs unit at Epping.

8. On that evening he attended the karaoke lounge at Epping with some Sydney resident South Korean businessmen and the Consul General in Sydney for South Korea and on exiting those premises suffered the fall resulting in his injury.

He was treated at the Royal North Shore Hospital where he was an inpatient until 12 April 2012 and then transferred to the Royal Rehabilitation Centre.

9. He was discharged from the Royal Rehabilitation Centre in or about January 2013 to a Housing Commission cottage in Narraweena² where he has since lived with his wife in the circumstances detailed in his affidavit.

² This transfer was facilitated by the staff of the Rehabilitation Centre which needed his bed for new admissions. Mr Yoon himself did not wish to go on living in an institution.

10. He was assessed by Associate Professor John Yeo AO on 18 April 2013 as follows:

"The clinical examination on the 18.4.13 confirmed that the patient has a complete C4/5 tetraplegia with only limited shoulder movements and no voluntary movements in forearms, wrists, hands, and trunk or lower limbs. He has a paralysed neurogenic bladder and bowel. There is 15° of contracture in his left elbow as a result of the profound paralysis in this limb and also minor contractures involving the tendo-achilles in both right and left paralysed lower limbs. The patient has no significant sensation spared below the shoulders in the upper limbs, trunk and both lower limbs.

Mr Yoon will remain with a permanent high level tetraplegia as a result of the spinal cord damage which occurred when he fell down a flight of stairs on the 26.11.11.

The patient will require twenty-four hour a day assistance for his future safety and well being. This intense level of attendant care has been, in the main, up to now, provided by his wife. He is dependent on assistance for almost all activities of daily living and this level of care should be provided by paid attendants. His wife will be unable to continue her present level and degree of assistance and Mr Yoon is now in urgent need of appropriate levels of attendant care, twenty-four hours each day. He remains prone to some complications which need urgent attention.

Mr Yoon will require two attendants between the hours of 7.30am and 9.30am each day and one of these attendants should be a registered nurse with expertise in the care of the tetraplegic casualty. He will also require an additional two attendants between the hours of 9pm and 10pm with one of those attendants being a registered nurse. In addition to these attendants, he will require on a daily basis, a personal carer (for example a nurse's aide) between the hours of 9.30am and 9.30pm. He also requires each night an active sleep over between 9.30pm and 7.30am.

He also requires four hours of domestic assistance each day for cleaning, laundry, ironing, shopping and meal preparation."

(Report of Professor Yeo annexure C to Mr Yoon's affidavit [*attachment II*])

Professor Yeo assesses his present life expectancy at approximately 18 years, an assessment not disputed by the medical experts who examined Mr Yoon on behalf of the insurer.

11. He receives from the New South Wales Department of Family & Community Services 35 hours per week of attendant care spread over 7 days which is the maximum level of hours per week that can be provided by the Department to any one patient.³ This is substantially less than the assistance that Professor Yeo considers necessary for his safety and wellbeing.

He is, attended around the clock by Mrs Yoon (apart from a brief respite period) and when available, his son Michael. They attend to his toilet needs and the carers have been instructed by the nursing agency not to carry out any of these toilet needs. This toileting involves emptying as necessary his supra pubic catheter bag and emptying his colostomy bag everyday (Mr Yoon's affidavit paragraphs 22-25).

12. This situation is viable only as long as the health and availability of Mrs Yoon to perform these tasks continues.

³ Paragraph 21 of the Yoon affidavit.

13. His then financial circumstances are as detailed in his affidavit. The affidavit sets out the urgency of his need to have the amount, if any, of his entitlements determined.
14. The relevant defendants were all insured by the English based Lloyds of London insurance syndicate XL London Markets Limited to the extent of \$20,000,000.
15. Mr Yoon and his wife were destitute and in debt and dependent on payments from Centrelink for the necessities of life.

Legal aid is now not available in New South Wales for personal injury claims and this has been the case since 10 September 2012.⁴

16. Earlier this year research was undertaken in this office in respect of principal judgments given in the Supreme Court in personal injury claims in the general case management list. 32 such judgments were identified in calendar year 2012 and 21 such judgments were identified in calendar year 2013. It is believed that this represents either all or nearly all of such cases determined by the Supreme Court in those years.⁵ The results of this survey are set out in the affidavit of Joshua James Clarke sworn 8 April 2014 and filed in those proceedings and are analysed in the affidavit of Timothy Denis Kelly (*attachment III*) at paragraphs 36-42.
17. In 2012 the average time between the last hearing day and the delivery of judgment was 187 days or 26.7 weeks⁶ and in one case was more than 1½ years.⁷ In 2013 the average period between the last hearing day and the delivery of the judgment averaged 23 weeks and in one case was more than 1½ years.⁸
18. If one confines this data to cases where the trial involved seven hearing days or more in such cases the average delay in 2012 was almost a year and in 2013 the average delay was more than half a year. The gap in some of these cases was significantly more than a year.

Of the 10 such cases identified in 2012 eight were verdicts in favour of the plaintiff and the remaining two were verdicts for the defendant. Of the 12 such cases identified in 2013 nine were verdicts for the plaintiff and the remaining three were verdicts for the defendant.⁹
19. In a catastrophe case such as that of Mr Yoon an appeal to the Court of Appeal is highly likely whichever party is unsuccessful at first instance based on the available evidence.
20. Mr Clarke's affidavit also surveyed the judgments of the Court of Appeal in respect of personal injury claims brought in the common law general list. The average time between the delivery of the judgment at first instance and the decision of the Court of Appeal was one year and 12 weeks in 2012 and one year and 25 weeks in 2013

⁴ Legal aid policy bulletin no 6/12 effective as from 10 September 2002, Kelly affidavit paragraph 28.

⁵ Excluded from this list are cases where the Plaintiff was not legally represented.

⁶ That is a bit over half a year.

⁷ Annexure A to the Clarke affidavit.

⁸ Annexure B to the Clarke affidavit.

⁹ This is simplifying things somewhat and counts as a verdict for the plaintiff any proceedings in which he or she succeeded against at least one defendant.

(Mr Clarke's affidavit paras 9-13, Kelly's affidavit *attachment III paragraph 42*).

* * *

21. On 23 May 2014 the trial judge declined Mr Yoon's application for trial by jury but expedited the hearing of his case and fixed the trial to commence on Monday, 18 August 2014. The hearing then ran over six days to 28 August 2014 when his Honour reserved judgment. On this day the parties agreed that the amount that should be awarded to Mr Yoon in the event that he was completely successful in his claim was the sum of \$9,000,000¹⁰, exclusive of legal costs and exclusive of any fund management costs. This was all under the umbrella of the insurer's total rejection of all liability in the matter.
22. [None of the foregoing is said in any intended personal criticism of the trial judge for whose capacities we have great respect. The failure to obtain trial by jury simply resulted in our view from a systemic failure within the system as the result of the 2001 amendments.]
23. The case was settled on Friday, 12 September 2014 with terms not to be disclosed except as required by law or for the purpose of the plaintiff negotiating with Centrelink, the NSW Department of Family & Community Services, or other authorities.
24. The various features detailed in paragraph 27 *post* had some bearing on the plaintiff's decision to settle his claim on the terms on which it was settled. Mr Yoon and his wife presently continue living in the Housing Commission cottage in Narraweena but will move to a new home in the New Year.
25. The major potential vulnerability in his claim in the view of his legal advisors was the factual issue of causation that is whether the defects in the stairs of which we complained caused him to fall down those stairs.¹¹ This was a factual issue that (had he had a jury trial) would have been determined by that jury and a jury verdict in favour of Mr Yoon on that question would not in our view have been successfully challenged by the Lloyds of London insurer in the Court of Appeal.

* * *

The settlement of claims generally

26. In 2012 there were 251 personal injury claims commenced in the common law general list of the Supreme Court. A total of 248 personal injury claims in that list were disposed of in 2012. The figures for 2013 were 213 personal injury claims commenced in that list and 365 personal injury claims in that list disposed of.¹²
27. The majority of those "disposed of" claims were settled in one fashion or another.

Cases settle for many different reasons. Among those possible reasons are all or

¹⁰ Transcript page 104.

¹¹ Mr Yoon himself has no memory of the accident, his last memory being of leaving the karaoke premises and his next memory being of waking up in Royal North Shore Hospital. There was no other direct witness to the accident and his claim rested on the inferences to be drawn from the CCTV footage which captured the accident.

¹² "Supreme Court of New South Wales provisional statistics (as at 24.1.14)."

any of the following:

- The urgency of the injured claimant to obtain a result
- The prospects of success and the anticipated delays that will be involved in achieving a final court determined result in a juryless trial
- The resources or lack of resources of the plaintiff
- The expense involved in pressing on and consequent ability or lack of ability on the part of the plaintiff or his advisors to fund such expenses
- The identity of the trial judge when this becomes known
- The attitude adopted by the defendant or the defendant's insurer in resisting the claim¹³
- In a jury trial the parties both know that at the conclusion of the hearing a verdict will be given immediately¹⁴ that in all probability will be binding on the parties whatever the verdict. In a juryless trial on the other hand a judgment is far more vulnerable to upset in the Court of Appeal and the parties will be aware that almost inevitably judgment will be reserved for an unknowable and indeterminate period and when judgment is given it may be treated as a tentative or provisional determination on the way to the Court of Appeal a further one year or more away
- The results of other cases litigated to the finish both the substantive result and the time taken to obtain that result

All of these factors and estimates have the capacity to affect whether a case settles and if so the amount or basis upon which it settles. Whether an individual case will settle of course remains unpredictable until such time as it either indeed does settle or judgment is given by a Court.

* * *

The other consequences of his claim proceeding as a juryless trial

28. As the result of Mr Yoon's claim proceeding without a jury the evidence of all the experts was taken jointly and preceded by the experts providing additional reports commenting on the reports of the experts on the other side and then attending a joint conference of the experts and the production of a joint report by the experts. One of the defendants' engineer's report comprised with attachments 486 pages.

¹³ This aspect of litigation was adverted to by Chief Justice Gleeson in his 2000 state of the judicature address as follows:

"One of the problems in measuring the performance of 'the justice system' is that in some respects it is not a system at all. Litigants, lawyers, court administrators, judges, and the executive government all influence the time and expenses involved in the process of litigation. Their interests often conflict. In civil litigation, for example, plaintiff and defendants, and their respective lawyers, do not have common interests. Most defendants are brought before courts unwillingly, and some may see it as in their interests to maximise the expense and delay with which their opponents are confronted. Persons who are accused of criminal offences are not always anxious to have a speedy trial. The process of litigation is not co-operative. This does not mean that it is chaotic, but it is unrealistic to expect that it can be managed with a view to producing an outcome satisfactory to everybody. The most important measure of the performance of the court system is the extent to which the public have confidence in its independence, integrity and impartiality."

Australian Law Journal March 2000 p153.

¹⁴ Unless for some reason the whole trial miscarries and has to commence again.

This produced problems and difficulties for Mr Yoon at both a practical level and a substantive level.

At a practical level

29. Mr Yoon and his wife were destitute and dependent on Centrelink payments for the necessities of life. They were not in a position to provide any money to pay the experts¹⁵ and the prospects of recouping those disbursements in the event that Mr Yoon was successful in his claim was potentially years away. No expert witness in the present atmosphere in which civil litigation is conducted is prepared to wait potentially years to get paid for days or weeks of work at some indeterminate time potentially years away.¹⁶
30. This situation is particularly oppressive to the point of potentially simply derailing a plaintiff such as Mr Yoon, who had neither financial resources nor a grant of legal aid, from presenting his claim to a court (see paragraph 15 ante).¹⁷
31. Thus on the one hand Mr Yoon was destitute and in debt and incapable of borrowing money or receiving assistance from the Legal Aid Commission of New South Wales and on the other hand the defendants were insured for \$20,000,000 by the Lloyds of London insurance syndicate XL London Markets Ltd. Presumably the English insurers were able to deploy virtually unlimited funds in fighting Mr Yoon's claim through the courts.

On the substantive level

32. The taking of the expert evidence jointly and the prior procedures that this involves (of joint conferences and reports upon reports etc) can slew and distort the

¹⁵ These expenses can be quite substantial.

in the cases of *Simon & McKenna v Hunter & New England Local Health District* (2013) NSWCA 476 the Plaintiffs were refused a jury trial. These were the claims of the mother and sisters of a Mr Rose.

A Mr Pettigrove had been discharged from the psychiatric ward of the Manning Base Hospital into the care of Mr Rose for the purpose of being driven to Pettigrove's home in Victoria. Pettigrove had a history of paranoid illness that was known to the hospital but notwithstanding this was inadequately medicated prior to discharge and no warning of the resulting danger was given to Mr Rose. In the course of that journey Pettigrove had a psychotic flare up and strangled Mr Rose to death. The result of this was that Mr Rose's mother and sisters developed psychiatric illnesses.

In the juryless trial that followed the experts (comprising three psychiatrists on behalf of the Plaintiff and three psychiatrists on behalf of the Defendant) reported on each other's reports and conferred and produced a joint report. This all occurred in 2011.

The Plaintiffs' expenses in respect of the experts' fees for this exercise amounted to \$19,115.80. Had the Plaintiffs been granted a jury trial none of these expenses would have been incurred.

The expenses of all six psychiatrists in the case giving evidence together for both sides were in excess of a further \$19,000. Had this been a jury trial in all probability only some of these doctors would have given evidence and those that did would have spent a far shorter time in attending court to give their evidence. Had this occurred the total cost would have been significantly less.

Fortunately the Plaintiffs in those proceedings had a grant of legal aid and the Legal Aid Commission met the Plaintiffs' expenses of these two exercises.

¹⁶ This of course does not say much for the present system.

¹⁷ Legal aid policy bulletin no 6/12.

plaintiff's expert evidence.¹⁸ The potential effect of this has been outlined in letters from the English surgeons Dr Michael Saleh by letter dated 16 March 2009 and Dr Robert Simonis dated 18 March 2009 copies of which are attached.

These communications were furnished in the course of proceedings in the Supreme Court in the medical negligence claim of *Harris v Bellemore* CA 2010/092491.

These communications are *attachment IV* hereto.

In a trial before a jury the evidence of the experts would have been taken separately and individually without interruption or distraction.

* * *

The history leading up to the 2001 amendments

33. Civil juries have existed in New South Wales going back to 1844 in early colonial times.
34. As at the beginning of 2001 either party to common law litigation was prima facie entitled to trial by jury if he or she lodged a requisition for jury and paid the Court jury fee.
35. [The present Court jury fee is a non-refundable \$1,061¹⁹ (even though the odds of being granted a jury are presently about zero) payable upfront with the lodgment of the jury requisition and notice of motion seeking trial by jury. The jury requisition and the notice of motion is to be lodged within 56 days of the service of the Statement of Claim.²⁰]
36. On 14 February 2001 a jury in the case of *Hogan v The Trustees of the Roman Catholic Church* awarded the Plaintiff damages of \$2,529,093.70. (This was set aside by the Court of Appeal on 31.10.01.)²¹
37. On 16 February 2001 a story in the Sydney Morning Herald reported as follows:
"...
A spokesman for the trustees of the Catholic Church Archdiocese said legal advice was being sought, but an appeal was likely.

The shadow attorney-general, Mr Chris Hartcher, said damages should be set by a judge to stop excessive payments and to ensure consistency. Caps should also be set, similar to the Motor Accidents Act.

'There needs to be some level of control,' Mr Hartcher said. 'If a church gets a bill for \$2.5 million, that's the cost of a new school.'

The president of the NSW Law Society, Mr Nick Meagher, disagreed. 'I would be sad to see juries go because I think they can often be a reflection of what the community thinks the

¹⁸ Often depending simply on the personalities of the individual witnesses.

¹⁹ In the mid-1980s it was \$12 refundable if the case settled before a jury was empanelled.

²⁰ Which will generally be one or two years before any trial takes place.

²¹ This was a school strapping case. In my view matters occurred in the presentation of the Defendants' case in the first trial that were received very poorly by the first jury and were unlikely to be replicated in any retrial. On 27 March at the retrial a second jury brought in a verdict of \$ 1,200,000 in favour of Hogan and this verdict was paid by the Church's insurers without any appeal.

damages should be."

Mr Debus said any proposals to change the role of juries in civil matters would need to be discussed "widely and thoroughly with the community" (emphasis added)

"There are some broad issues worth examining," he said."

38. Thereafter there was no discussion with the community in relation to juries "widely and thoroughly" or at all.
39. On 6 November 2001 Mr Debus wrote to the Law Society and the Bar Council seeking "confidential comments" on a bill that became the Courts Legislation Amendment (Civil Juries) Bill 2001. On 12 November 2001 the then Law Society Chief Executive Officer wrote to Mr Debus indicating the Law Society's opposition to the proposed bill.
40. A similar letter was sent by the Bar Council which also wrote opposing the measure.²²
41. On 27 November 2001 Mr Debus issued a background paper to the members of the Labor Caucus comprising one page. It is believed that this was the first knowledge that the Labor Caucus had had of the matter and was the first public unveiling of the bill.
42. On 28 November 2001 the bill was introduced into Parliament by Mr Debus and given its second reading and the debate was then adjourned (see paragraph 4 ante).
43. On 6 December 2001 the debate resumed in the Assembly:

Mr Hartcher, the Shadow Attorney-General in not opposing the bill said as follows:

"... In the history of development of the common law the role of the jury is one of enormous significance and dates back even earlier than the Norman Conquest, which revolutionized England and the English legal system. It is not incumbent on us today to detail the history of juries. This bill does not abolish juries in civil jurisdictions. It simply requires that there be a special need before a jury can be empanelled in a civil matter
...

A jury acts as the community panel, taken at random, to ensure that the community participates in the justice system. A jury ensures that the justice system reflects as far as possible the prevailing views of the community as to what is reasonable and what is unreasonable. The Coalition's position is not endorsed by the New South Wales Law Society; nor is it endorsed by members of the New South Wales bar who have been in

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Mr Debus in his speech to the Assembly on 6.12.01 said:

"I should mention that earlier this year I wrote to the Chief Justice, the Chief Judge of the District Court, the Law Society and the Bar Association about these proposed amendments. Indeed, I provided each those heads of jurisdiction and the professional organisations with a copy of the bill once it had been prepared, in order that they might comment upon it. The Law Society and the Bar Association have raised concerns about reducing the role of civil juries. The Bar Association has argued that the attainment of quicker and cheaper adjudication of disputes could be enhanced by more, not less, frequent use of juries. It has argued that sensible advocates will not risk trying a jury's patience by needlessly wasting time. It has argued that case management techniques should make use of this capacity to combine an advocate's brevity and the jury's rapid, and virtually inscrutable, decisions."

(Hansard volume p11)

contact with us ..." (*Hansard records page 6:I-M*)

He was followed by Mr Lynch the member for Liverpool who said as follows:

"... this bill does not propose removing jury trials for criminal matters. That would obviously be intolerable and would have unmitigated opposition. Many of the principles, however, that are relevant to that debate are also relevant to civil juries. What this legislation does in relation to civil juries is to attempt to walk a middle path. The present position allows anyone in a civil trial who wants a jury to have one. This bill says you can have a jury trial if you can establish a need for one. It does not, as I understand it, abolish jury trials for civil actions. If it did, I would be expressing considerable opposition to the bill. The weakness of the bill as it is drafted is that it provides no indication of the bases upon which a special need for a jury can be established. I understand from the Attorney that he will suggest to the relevant judicial officers that practice notes be issued setting out the criteria that are relevant.

My fear is that if those criteria are not set out, with the pressure that is currently on lists and on senior judicial officers to get through lists, it will be only too easy for applications for a civil jury to be rejected by list judges just to speed things up. If that were to happen, I believe justice would not be done. If I have been too optimistic about what I think this bill does, and the end result is indeed that civil jury trials are abolished by this legislation, I will obviously be happy to have it revisited. That is not, as I understand what the Attorney says, the aim of the bill. I would have considerable concerns if that were the aim. As I say, that is not what I think is intended and I assume that the Attorney and his department will monitor the situation.

... I do not think this legislation is about abolishing civil juries. If it was about doing that completely across the board, there would be a lot more opposition to it than there currently is."

(*Hansard records page 10:V to page 11:C*)

Mr Debus' response to these remarks is set out in paragraph 4 ante.

44. On 13 December 2002 the bill was given a second reading speech in the Legislative Council the then Independent Mrs Sham Ho proposed amendments replacing the term "special need" with the formulation "the interests of justice require a trial by jury in the proceedings".²³

45. Mrs Sham Ho said as follows (*Hansard records page 16:L-T*)

"I am pleased that this bill does not abolish the use of juries in all civil actions. If it did, I can assure honourable members that I would not support it. I firmly believe that there will always be certain cases or circumstances in which a jury trial is necessary and appropriate. The bill recognises that fact by allowing a court to order a jury trial if the court is satisfied that there is a special need for one. I am alarmed that the bill provides no indication of the sorts of cases that might constitute a special need. While I appreciate that it is reasonable to assume that whether a special need exists will depend on the individual circumstances of the case, the fact remains that the term "special need" is not a judicially recognised term.

To my mind a much broader, fairer and more certain test for determining whether a jury trial in a civil action should be ordered is when a court is satisfied that a jury is required "in the interests of justice". The phrase "in the interests of justice" is a judicially recognised term with which all courts would be familiar. It was referred to by Chief Justice Nicholson in 1989 in the Family Court case of *Chapman v Jansen* and more recently by His Honour Justice O'Keefe in *O'Hare v Director of Public Prosecutions*, which was handed down in the Supreme Court last year.

For those reasons I foreshadow that I will move an amendment in Committee to provide that a court may order a jury trial in a civil action if the court is satisfied that a jury is required in

²³ To many lay people this change of words may seem to be a matter of semantics.

the interests of justice. I will further explain in Committee that that amendment is supported by both the Law Society and the Bar Association – and I believe also by the Government. It will provide greater clarity and certainty as to when a jury trial will be granted by a court without interfering with the exercise of judicial discretion.” (*emphasis added*)²⁴

In moving these amendments Mrs Sham-Ho stated (*Hansard records page 25:C-D*):

“These amendments will provide with greater clarity and certainty as to when a jury trial may be granted by the court, while not interfering with the exercise of judicial discretion. I wanted to place on the record the reason for these amendments, because people will read *Hansard* for that reason.”

Mrs Sham-Ho went on to move those proposed amendments (at 4:12am) and those amendments were not opposed by the Government or the Opposition (*Hansard records p25*).

46. In relation to the measures foreshadowed by Mr Debus as set out in paragraph 4 ante:

- (a) it is not at this time known to us whether Mr Debus as foreshadowed ever wrote to Chief Justice Spigelman or Chief Judge Blanch;
- (b) it would appear that practice notes were never issued by the Supreme Court or the District Court as foreshadowed;²⁵
- (c) there do not appear to be any court records of any monitoring of the effect of the change in legislation;²⁶
- (d) there are no records that we have been able to discover of any revisiting of the whole measure as referred to by Mr Debus on 6 December 2001.

47. Mr Debus continued to be Attorney General until March 2007.

* * *

48. It would seem probable that no one in the Parliament in 2001 anticipated the interpretation that would be placed on the words “the interests of justice require a trial by jury in the proceedings” by Justice Mason in the Court of Appeal in *Maroubra Rugby League Football Club Inc v Malo & anor* 2007 69 NSWLR 496.

In his judgment Mason P stated as follows (69 NSWLR 496 at pp501, 502):

“There is, in my view, a subtle but significant distinction between circumstances “warranting” a course of action and circumstances “requiring” it. I am not suggesting that the application for jury trial must show ineluctable necessity, but the statutory language of “require” connotes that which is obligatory, not that which is authorised. To speak of something being “warranted” smacks of the latter without the added stricture of the former.

...

²⁴ We suspect that some confusion has crept into the question of what was or was not supported by the Bar Council and the Law Society and it is our understanding that the Bar Council and most probably also the Law Society indeed opposed the bill both in the original form proposed by Mr Debus and as changed by the amendments moved in the Legislative Council by Mrs Sham-Ho.

²⁵ This has been confirmed to us in relation to the District Court but we do not yet have confirmation of this from the Supreme Court.

²⁶ This also has been confirmed to us in relation to the District Court but again we do not yet have confirmation of this from the Supreme Court.

The standard required by s85(2)(b) is high and absolute, namely that the judge must be satisfied that the interests of justice require trial by jury in the instant proceedings."

49. The reason or justification offered on behalf of the Carr Government by Mr Debus for the 2001 bill was the assertion that "jury trials can be more costly and time consuming than trials before a judge alone"²⁷. That proposition did not take into account the far higher likelihood of settlement in a case listed to be tried before a jury than in a juryless case.²⁸

The proposition advanced by Mr Debus was publicly doubted (at the time that the bill was before the Parliament in 2001) by Mr Justice Priestley on the occasion of the judge's retirement from the New South Wales Supreme Court. Justice Priestley's remarks were as follows:

"The reason always given in support of this trend is that it is cheaper and more efficient to do away with juries. Even if this be so, of which I am not convinced, the reason misses the main point of juries: the spreading of power within the community.

The more widely spread the exercise of legal power is, the healthier it seems to me to be. However, I simply watch the trend go the wrong way without being able to do anything about it."²⁹

²⁷ *Hansard records p4:S-T*, background paper to the Labor Caucus 27.11.01 (para 41 ante).

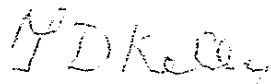
²⁸ Kelly affidavit *attachment III para 43* referred to in *Hansard records p8:M-R*, paper by Associate Judge Harrison referred to by Mr M Semmler SC at *Hansard records p7:T-W*, position of the Bar Council as outlined to the Parliament by Mr Debus (*footnote 22 ante*).

²⁹ Cited by Dr Chesterfield-Evans MLC at *Hansard records p23:D-F*.

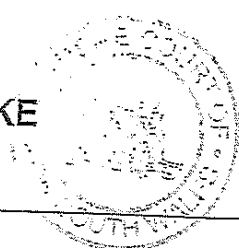
Summary

50. The 2001 amendments (as interpreted in the courts) have led to the de facto end of civil jury trials in New South Wales. No one has since been able to obtain a civil jury trial in respect of an action commenced on or after 18 January 2002.
51. The 2001 legislation was enacted by a Parliament that misapprehended what the effect of the legislation would be. The legislation has totally removed any community input into the civil justice system.
52. The 2001 amendments have deprived an accident victim of access to the direct, quick and relatively final procedure of a jury trial.

Date: 2 December 2014


.....
T D Kelly

AFFIDAVIT OF JOSHUA JAMES CLARKE
DATED 8 APRIL 2014



COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Common Law General List
Registry	Sydney
Case number	2012/00147790

TITLE OF PROCEEDINGS

Plaintiff	YEO MOON YOON
First defendant	YOUNG PIL KIM
Number of defendants	5

FILING DETAILS

Filed for	Yeo Moon Yoon, plaintiff
Legal representative	Timothy Denis Kelly TD Kelly & Co
Legal representative reference	PCN: 3243 NSW Ref: TDK:eg:107794
Contact name and telephone	Grant Scott Watson Tel. 02 9267 7003
Contact email	grant@tdkellyanco.com

A handwritten signature, likely of Timothy Denis Kelly, is located in the bottom left corner of the page.

177941061496

A handwritten signature, likely of Joshua James Clarke, is located in the bottom right corner of the page.

AFFIDAVIT

Name: Joshua James Clarke
 Address: Lv 13, 99 Bathurst Street, Sydney NSW 2000
 Occupation: Solicitor
 Date: 8 April 2014

I say on oath:

1. I am a solicitor in the employ of T.D. Kelly & Co (the solicitors for the Plaintiff) and am working on this matter jointly with Timothy Denis Kelly and Grant Scott Watson.
2. I have made searches of Caselaw.nsw.gov.au and Austlii to obtain details of available personal injury principal judgments delivered in the Common Law Division of the Court in juryless trials in the years 2012 and 2013¹.
3. I have excluded cases which were run by unrepresented litigants (litigants in person).
4. I have located 32 principal judgments in respect of 2012 and 21 principal judgments in respect of 2013. Annexed hereto and marked with the letter "A" is spreadsheet in respect of the 2012 cases and annexed hereto and marked with the letter "B" is spreadsheet in respect of the 2013 cases.

These spreadsheets detail in respect of each of these cases the citation and case name of such case and the hearing dates on which such case was heard by the court. The schedules then go on to calculate the time between the last hearing date in the case and the delivery of the decision by the trial judge.

It is my belief that these schedules contain either all or nearly all of the total number of such judgments delivered in that category in those years².

5. In respect of the year of 2012 the average period between the last hearing date and the delivery of the reserved judgment was 187 days or 26.7 weeks. This ranged from 731 days (104 weeks) (case number 9) and 595 days (85 weeks) (case number 6) to 6 days (1 week) (case number 9).

¹ Searches undertaken on Caselaw.nsw.gov.au involved searches for principal judgments of tort cases commenced in the Supreme Court of NSW. This included using the advanced search function on the Caselaw website and also browsing by subject. The advanced search of Caselaw involved narrowing the search parameters to year, principal judgments and the Supreme Court jurisdiction. I have then reviewed each case that has appeared in the results at the time of my searches to isolate personal injury matters.

Deponent

Witness

1077941061496

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In respect of the year 2013 the average period between the last hearing date and the delivery of judgment was 159 days or 23 weeks. This ranges from a high of 573 days (82 weeks) (*case number 19*) to a low of 1 day (*case number 2*).

6. Annexed hereto and marked respectively "C" and "D" are tables that list all cases in Annexures "A" and "B" that had hearing days of or in excess of 7 days.

As will be seen in 2012 there were 10 such cases and the average time between the last hearing day and delivery of the reserved judgment was 46.4 weeks. Of these cases eight ultimately resulted in a verdict for the Plaintiff and two resulted in a verdict for the Defendant.³

7. If one excludes case number 32 from this calculation the average number of days between the last hearing day and the date of the reserved judgment of the remaining 9 cases is just short of one year (359.9 days or 51.4 weeks).

8. In respect of the year 2013 (Annexure "D") there were 12 such cases with hearings of 7 days or more and the average time between the last hearing day and the delivery date of the reserved judgment was 31.2 weeks. Of these cases 9 resulted in a verdict for the Plaintiff and 3 resulted in a verdict for the Defendant.

9. I have also prepared schedules for 2012 and 2013 in respect of judgments delivered by the Court of Appeal in years 2012 and 2013 in matters litigated in the Common Law Division in respect of personal injury damages, calculating the period between the decision of the court below and the decision of the Court of Appeal. Annexed hereto and marked "E" is a copy of the 2012 schedule and annexed hereto and marked "F" is copy of the 2013 schedule.

10. I have also excluded from these lists all cases involving unrepresented litigants.

11. The 2012 schedule comprises 13 cases. Of these 13 cases the appeal was dismissed in 8 cases and the original judgment was overturned or altered in part, in the remaining 5 cases. The average period between the judgment in the Common Law Division and the Court of Appeal judgment was 447 days (64 weeks). This ranges from a high of 644 days (92 weeks) (*case number 3*) to a low of 271 days (39 weeks) (*case number 5*).

12. The 2013 schedule comprises 13 cases. Of these cases the appeal was dismissed in 6 cases and the original judgment was overturned or altered in part in the remaining 7 cases. The average period between the judgment in the court below and the judgment

³ A case is listed in this and succeeding paragraphs in this Affidavit as a verdict for the Plaintiff where the Plaintiff has succeeded against at least one of the named Defendants.

Deponent

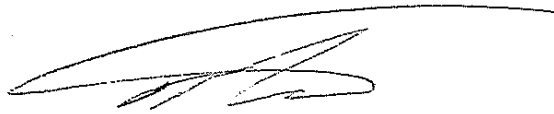
Witness

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of the Court of Appeal was 537 days (77 weeks). This ranges from a high of 839 days (120 weeks) (case number 3) to a low of 118 days (17 weeks) (case number 2).

SWORN at

Signature of deponent



Joshua James Clarke

Name of witness

Aunt Watson

Address of witness

99 Bathurst St, Sydney

Capacity of witness

Solicitor

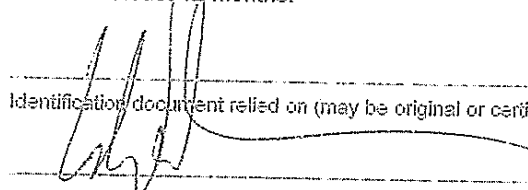
~~Justice of the peace / Solicitor / Barrister / Commissioner for affidavits / Notary public~~

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 # I saw the face of the deponent.
- 2 # I have known the deponent for at least 12 months.

Identification document relied on (may be original or certified copy) ⁴

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

⁴ "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011 or JP Ruling 003 - Confirming identity for NSW statutory declarations and affidavits, footnote 3.

Ms H Sham Ho
102 Prahran Avenue
DAVIDSON NSW 2085

13 January, 2015

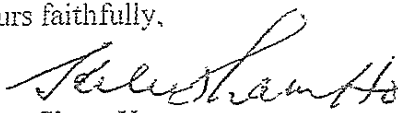
T D Kelly & Co
Level 13
99 Bathurst Street
SYDNEY NSW 2000

Dear Mr Kelly,

Further to our telephone conversation of this morning I write to advise as follows:

1. My proposed amendments replacing the words "there is a special need for a trial by jury in the proceedings" with the words "the interests of justice require a trial by jury in the proceedings" was intended to expand the category of eligible or potentially eligible claimants seeking a jury trial and not to contract it. I intended "the interests of justice require a trial by jury" to mean simply that the interests of justice warranted or justified a jury trial.
2. It is my belief that this was the interpretation placed on these words by the Legislative Council when the amendments were passed.
3. Had I foreseen the interpretation that Mason P later placed upon these words (which was certainly not my intention) I would never have proposed the amendments.
4. Had I known that this legislation would effect the de facto abolition of civil jury trials in New South Wales I would have voted against the Bill both in its original form as introduced and as amended by the amendments proposed by me in the Legislative Council.
5. I am of the view that the Courts Legislation Amendment (Civil Juries) Act as interpreted by Mason P does not reflect the intention of the Parliament that enacted that legislation.
6. I am now of the view that the Courts Legislation Amendment (Civil Jury) Act No.124 of 2001 should be repealed.

Yours faithfully,


Helen Sham Ho

Gerroa Chambers
11 Park Road
GERROA NSW 2534
Tel: (02) 4464 3463
Fax: (02) 4464 3462
P.O. Box 4061
GERROA NSW 2534

also

ianbarkerqc@bigpond.com

please reply to: Gerroa

7
Frederick Jordan Chambers
Grd Floor, 53 Martin Place
SYDNEY NSW 2000
Tel : (02) 9229 7301
Fax : (02) 9410 2673
DX: 450 SYDNEY

8 December 2014

Ms Jane Needham SC
President
NSW Bar Association
174 Phillip Street
SYDNEY NSW 2000

c.c. Philip Selth

Dear Jane

I am writing to request the Bar Council to sponsor or support legislation to reinstate the right to trial by jury in civil cases in the Supreme Court and District Court. My proposal is that the provisions of the *Courts Legislation Amendment (Civil Juries) Act* No. 124 of 2001 restricting civil jury trials in the Supreme Court and the District Court be repealed, and the law in force before those amendments be reinstated.

Criminal trials and defamation proceedings aside, what remains of civil jury trials is found in s.85 of the above *Act*. It reads as follows:

‘Trial without jury unless jury required in interests of justice

- (1) Proceedings in any Division are to be tried without a jury, unless the Court orders otherwise.
- (2) The Court may make an order under subsection (1) that proceedings are to be tried with a jury if:

liability limited by a scheme approved under Professional Standards legislation

- (a) any party to the proceedings:
 - (i) files a requisition for trial with a jury, and
 - (ii) pays the fee prescribed by the regulations made under section 130, and
- (b) *the Court is satisfied that the interests of justice require a trial by jury in the proceedings.*

(And see *District Court Act* s.76A.)

It is a matter of legislative curiosity that Parliament saw fit to retain jury trials in defamation cases by enacting s.21 of the *Defamation Act*.

As to other civil cases s.85 purports on its face to preserve trial by jury. In practice however subsection 85(2)(b), as interpreted by the Court of Appeal in *Maroubra Rugby League Football Club Inc v Malco & Anor* (2007) NSWCA 39, BC200701510, creates a barrier more or less impenetrable. In the decision appealed against, Simpson J adopted the reasoning of Hall J in *Muir v The Council of Trinity Grammar School* (2005) NSWSC 55 at [19] that “The application of s.85(2)(b) does involve an evaluation as to whether the proceedings raise questions that ought to be resolved by a jury employing the common sense and values of the average jury person.”

Her Honour went on to say at [20]:

“The legislature did not intend entirely to preclude jury trials in civil cases. If that had been its intention there would have been no call for the enactment of subs(2). The power conferred by subs(2) is a real one, with real content, intended to be used in appropriate cases. The availability of jury trial in appropriate circumstances is not illusory, and the power conferred upon the court is not to be interpreted as illusory. It would be erroneous to treat the section as though (whether by reason of the use of the word “require” or otherwise) there are no, or virtually no, circumstances in which an order would be appropriate. In other words, the section must be approached and construed on the basis that it was genuinely intended that there would arise some cases in which the presumption otherwise enacted by s.85(1), for trial of civil proceedings without a jury, is to be overridden.”

The Court of Appeal rejected the reasoning of Hall J and Simpson J, applying a much stricter test to the meaning of “the interests of justice require” holding in effect that the concept refers to consideration going beyond the private interests of the parties.

The High Court refused special leave to the plaintiff. Whether or not the decision in *Maroubra Rugby Club* was correct, the right to trial by jury in civil cases has been virtually extinguished.

The issue does not invite a comparison between the respective abilities of juries and judges to determine questions of fact. Clearly, the Parliament has confidence in both, or it would not have retained juries in defamation trials. The issues are why the community was deprived of an ancient right which enured to the public good, and whether restoration of jury trials would be consistent with the ends of justice. I acknowledge the impracticability of including motor accident cases in this submission, because of the complex legal and administrative structure which now surrounds them.

The abolition of civil jury trials has happened incrementally and, it would seem, largely because of misconceptions on the part of our legislators.

The erosion of civil jury trials began in 1965 as a consequence of a paper by the late Justice Gordon Wallace which contended that jury trials were an impediment to a speedy system of trying and disposing of cases. The paper was published in the *ALJ* (1961) 35 *ALJ* 124. Between 1965 and 2001 the right to civil trial by jury survived various legislative attacks, largely founded on the notion that jury trials were productive of undue delay. Parties wanting a jury had to apply and the calling of jurors became discretionary, but the right largely remained until 2001.

The chronology is examined in my book, *Sorely Tried, Democracy and Trial by Jury in New South Wales* (Francis Forbes lecture 2002). The proposed changes in 1965 and subsequently were opposed by the Bar Association. See, for example, a 50 page article “Your right to a jury trial” compiled largely by the late Harold Glass QC (later a judge of appeal) for the Bar Association.

After the *Maroubra Football League* case lawyers more or less gave up on applications for civil juries. I have not seen any considered rational statement supporting the 2001 Act and I have no reason to suppose that the views of the majority of present barristers would differ significantly from views held in previous years.

Leaving aside principles of interpretation, it seems clear from Hansard that in passing the 2001 bill Parliament did not intend the legislation to have the far reaching consequence that jury trials would be virtually abolished.

The following are some extracts from the second reading speech of the Attorney General Mr Debus in support of a bill which proposed the introduction of a “special needs” test:

These amendments are not intended to abolish civil juries. The Government recognises that it is appropriate to have some matters determined by a jury. However, it is intended that these amendments will restrict the use of civil juries to those cases where a special need is demonstrated. Jury trials can raise particular issues for the court system and the public. Parties should not be able to requisition a jury trial simply for tactical advantage. Rather they should only be able to requisition a jury if there is a special need for a jury in their particular case.

....

The bill is not prescriptive about the special need that must be shown because it is intended that each case will be considered on its merits. Once the bill is enacted, I will write to the Chief Justice and the Chief Judge suggesting that they issue an appropriate practice direction about the matters the court would consider when deciding that a special need exists. What constitutes a special need will depend very much on the particular circumstances of each case. It is likely that juries will be employed in, for example, civil actions where there may be questions of fraud or even major issues of credibility involving either the plaintiff or the defendant. (Hansard 28/11/2001.)

In later debate Mr Debus said:

I assure my colleague the honourable member for Liverpool that I certainly do not intend that this legislation should in any way lead to the virtual abolition of civil juries and I assure him that it would always be my intention that the effects of the bill should continue to be monitored. If its effects were in anyway substantially different to those that we now propose, we would revisit the whole measure. As I said in my second reading speech, this bill does not abolish civil juries. Rather, it seeks to strike a balance between the various competing priorities and to simplify the law with respect to civil juries. (Hansard 6/12/2001.)

In the Legislative Council the Bill was amended on the motion of the Hon Helen Sham-Ho to substitute “in the interests of justice” for “special need”. Amongst other things she said:

I am pleased this bill does not abolish the use of juries in all civil actions. If it did I can assure honourable members I would not support it. (Hansard 13/12/2001.)

The above are brief extracts from relatively lengthy debates.

Would the restoration of jury trials be consistent with the ends of justice? Experience has shown that the notion that jury trials cause unnecessary delays is a fallacy. In fact it is apparent from many judgments by judges alone in the Supreme Court that jury trials would have been dealt with and disposed of far more quickly. The following are statistics compiled for the purposes of a recent unsuccessful application for a jury trial in the Supreme Court:

YEAR	AVERAGE DAYS TO RESERVED JUDGMENT
2012	187 days
2013	159 days

The average for 2012 included a delay in a personal injury case of 595 days. The average for 2013 included a delay in one case of 573 days.

The 2001 Act was originally intended to restrict the right of jury trials, but not with the impediment that now exists.

As we have seen, the Act as passed makes no reference to “special need” and the Court of Appeal judgment in *Maroubra Football Club Inc* makes it virtually impossible to secure an order requiring trial by jury.

Some may argue that juries might be prone to award excessive damages. This is a myth, well known to defendant’s counsel, who before 2011 often sought trial by jury. In 1993 the NSW Law Reform Commission noted that “available empirical evidence suggests that awards of damages by juries are not generally excessive”¹ and the record for huge damages in a personal injury case was established, and continues to be held, by judge alone: (*Norris v Blake (No.2)* 1977 41 NSWLR 49.

One obstacle to this application might be that some barristers in 2014 have never seen a civil trial by jury and are strangers to the process but the retention of jury trials in defamation cases and constant criminal trials serve to keep the issue alive.

In the paper prepared by the Bar Association in 1965 it was said:

“The question is whether our legal system should be ‘reformed’ by the substantial abolition of trial by jury in the Supreme Court of NSW. It is our belief that none of the profound social changes of our times has in any way undermined the importance and value of trial by jury to the community and the litigant. If anything, its value as a civic right and democratic safeguard has increased as the structure of modern society has grown more complex. It and the franchise provide the best insurance the citizen can have against the undue encroachment of power.”

¹ NSW Law Reform Commission Discussion Paper 32, Defamation August 1993 p.69

On 21/10/2011 Tom Molomby SC wrote a paper about the respective delays in trials by judges and jurors in defamation cases, dealing with the complexities of defamation trials. His view was jury trials are longer but he does not take account of the present lengthy delays in NSW in judge alone trials. It is of limited significance in the present context.

As I said in the Francis Forbes lecture:

The legal profession strongly opposed the legislation. See, for example, the remark by the Law Society of New South Wales and Peter Semmler QC quoted by Mr Hatcher during the debate (LA *Hansard*, 6 Dec. 2001, pp.19796 – 19797) and the attorney general's advice to the house that the Bar Association has argued that the attainment of quicker and cheaper adjudication of disputes could be enhanced by more, not less, frequent use of juries. It has argued that sensible advocates will not risk trying a jury's patience by needlessly wasting time. It has argued that case management techniques should make use of this capacity to combine an advocate's brevity and the jury's rapid, and virtually inscrutable decisions: LA *Hansard*, 6 Dec. 2001, p.19800.

Jury trials served the critically important function of enabling people outside the legal system and other arms of government to take a direct part in the functioning of government. I suggest this factor is becoming increasingly important as we become engulfed by the secret workings of secret tribunals secretly run by faceless people holding high office.

As the Bar Association said in 1965, of the jury system, "It and the franchise provide the best insurance the citizen can have against the undue encroachment of power". Those words are more significant today than in 1965.

Yours sincerely

Ian Barker QC

From: Ian Barker QC [<mailto:ianbarkerqc@bigpond.com>]
Sent: Monday, 5 January 2015 12:58 PM
To: Philip Selth
Cc: Alastair McConnachie
Subject: CIVIL JURIES

Philip Selth
c.c. Alastair McConnachie

Dear Philip

CIVIL JURIES

I refer to my submission of 8 December to the President. In considering my submission could the Council please take account of the paper by the Hon A M Gleeson AC QC published in Bar News Winter 2013 33, particularly at 34 and 35. See attached from page 34:

This rule of appellate practice had its origin in the Privy Council more than a century ago, but it is worth noting that the opportunity for attempted reversals of findings of fact has been magnified in recent times by the virtual disappearance of trial by jury in civil cases. The finality that attended jury verdicts is an aspect of civil litigation that is probably unknown to many modern practitioners but it was a very important feature of the legal landscape in the past. If a civil jury were properly instructed, and there had been no other irregularity in the conduct of the trial, then the jury's verdict being inscrutable, was for practical purposes immune from appellate interference unless it could be shown to be perverse. The bar for appellate review was set high.

The abolition of most forms of civil jury trial has diminished the practical finality of the trial process. The trial has now become a hearing at first instance with an implied promise of more to come until one part or the other has exhausted its available resources or its avenues of appeal.

When trial is by jury, it is important to win at first instance. The abolition of most forms of civil jury trial has diminished the practical finality of the trial process. The trial has now become a hearing at first instance, with an implied

promise of more to come until one party or the other has exhausted its available resources or its avenues of appeal.

It is clear that parliament did not contemplate the virtual disappearance of trial by jury in civil cases, and s.85 of the Supreme Court Act has had a profound effect on the length and finality of litigation.

Yours sincerely

Ian Barker

Alastair McConnachie

Deputy Executive Director

T (02) 9232 4055

W www.nswbar.asn.au



NEW SOUTH WALES
BAR ASSOCIATION

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Fifth Floor · St. James' Hall
169 Phillip Street · Sydney · New South Wales

Jane Needham SC
President
The New South Wales Bar Association

23rd February 2015

Dear President

I agree with Ian Barker QC that the Bar Council should agitate for legislation to expand the use of civil juries. A long time ago, another one of our predecessors (Michael Slattery QC) and I tried in vain to interest various politicians in the same idea. I would not wish to embarrass Justice Slattery by enquiring whether he still holds those views – but I venture to guess that he does. Certainly, the years since the discussions Michael and I had, have done nothing to reduce my regret that New South Wales wrongly decided to treat civil juries as outdated and inefficient.

In my opinion, they are neither. Their likely influence on advocacy, courtroom paperwork and restrictions on appellate challenge combine to cast great doubt on the misguided modernism that has virtually eliminated civil juries in this State.

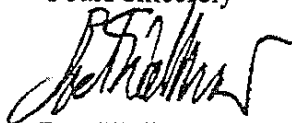
Another one of our predecessors, the Hon A M Gleeson AC as he now is, delivered characteristically pointed remarks concerning the diminution of the practical finality of the trial process by the abolition of most forms of civil jury trial, in his Byers Lecture.

Notwithstanding my appellate practice, or perhaps because of it, I see great merit in the Bar Council considering this project. It is a more promising direction for genuine improvement in civil litigation than any other I know. I would regard apprehended resistance from some quarters of the judiciary as more a reason for the Bar to pursue such reform, than to let this error of history to continue.

More than a dozen years ago, one of your predecessors supplied a preface to Ian Barker's splendid book *Sorely Tried: Democracy and Trial by Jury in New South Wales*. I find myself quite unable to improve the way he put it. For your convenience, I attach a copy.

But seriously, I do hope that Ian's request to you and your colleagues on Bar Council will be carefully considered, and that this reform proposal may be part of your programme to improve the administration of justice.

Regards
Yours sincerely



Bret Walker

Copy: Ian Barker QC

Jeremy Gormly SC

Denman Chambers
Level 7
185 Elizabeth Street
SYDNEY NSW 2000
DX 185
gormly@denmanchambers.com.au
Tel: (02) 9264-6899
Fax: (02) 9264-5541

19 February 2015.

The President
NSW Bar Council

Dear President and Council Members

Access to Civil Juries

I write to urge Bar Council support for the proposal that Ian Barker QC and others are raising for the removal of the clogs on access to civil juries.

Civil juries need to be re-introduced. The reasons I offer are as follows;

1. The use of a jury is and was always correctly seen as a fundamental component of our system of justice. It keeps the justice system in touch with the community and its values. It kept the community actively involved in the justice system.
2. The criminal justice system is adequate proof of the viability of a system of justice that does not require for its operation, the provision of judicial reasons for its acceptance. In the sound focus on the development of administrative law we have accidentally but wrongly come to believe that the provision of reasons is the essence of justice.
3. Time is not saved by the removal of juries from the civil justice system. The length of civil jury trials which were routinely between a few days and 4 weeks were seen at the time as "too long". The modern methods of non-jury trial with the close emphasis on the giving of reasons and providing evidence and material to support them, are now just as long. Jury trials are likely to be both quicker and shorter.
4. Jury trials provide a result that is more or less immediate. The development of the obligation on judges to give demanding reasoned judgments, especially in routine cases, has over-ridden other equally important qualities of a good justice system such as finality, clear determination and the avoidance of encroaching "legalism". The latter factor in particular so burdens the judiciary, creates a culture of legal flux or uncertainty and separates the community from the judicial system.

5. Jury trials have the effect of preserving the principle of open justice by preserving orality. Jury trials focus on the facts. The modern case managed trial emphasises the law. Both are necessary components but the community accepts the law as stated by the judge. It is the facts that a jury decides and it is those issues that the community follows in a trial. They cannot do so in a case managed trial. The reduction of orality in the legal system has led to the anomaly of the so called "written" hearing. Written advocacy has its role but not at trial level in routine cases. The concept of an open hearing or a public court only works if those in the public gallery can understand what is happening in the court room. The loss through case management of public narrative and the use of written advocacy has helped to empty the public galleries of common law courtrooms except in the most unusual of cases. The use of the jury resolves that problem.
6. An associated benefit of the civil jury trial is the lower cost to the parties of a jury hearing by avoidance of written advocacy. Putting argument in writing changes the argument. Written argument requires a level of presentation, precision and justification that exceeds the oral approach to a significant degree. It can take hours of work by a number of people out of court to produce a document that answers a judge's question. The oral, on the spot answer, in accordance with the oral process may be less detailed, less polished but usually just as effective and far quicker and cheaper. An oral address to a jury occurs on the spot with at most a day or a night or perhaps a weekend to prepare. It does not allow for book-length, written submissions produced at great cost and designed to assist a judge to give reasons that will withstand the uncertainties of appeal. Orality works in criminal trials where deprivation of liberty is at issue and the stakes could not be higher.
7. The finality of the jury trial will reduce the immense burden on the appellate courts. Appellate courts are reluctant to interfere with jury decisions.
8. The essentially oral nature of the jury trial is consistent with the nature, history and skills of the Bar. The advent of the "written hearing" has brought into the advocacy field approaches inconsistent with the disciplined reasoning of the courts and the oral Bar. Written submissions have been intruding into the oral work of the Bar. They are producing scholarly or detailed or historical or arcane approaches to legal argument that have massively increased cost, caused delay and above all have imposed a burden on judgment writing. Those approaches are becoming inconsistent with fundamental requirements of a good justice system; namely, quick and final. Often these written submissions are not coming from the Bar.
9. For well over a decade judges in Australian superior courts have been complaining, as an adjunct to the development of case management, about the prolix oral address to which they are obliged to listen, as well as ineffective and prolonged cross examination, and a failure by the profession to decide upon

and pursue the best point and abandon the others. But anyone could understand why these tendencies have developed, as the judges suggest, in more recent times. The ability to persuade a jury on the one hand, compared with the ability to provide a judge with the material to give reasons in favour of one's clients, are profoundly different in nature. The complaints made by the judiciary are really that the modern written advocate is not doing what the prior oral advocate did. Of course they are not. They are carrying out completely different functions. Alternative pleading and alternative argument are the only prophylactics available to appellate review, to increasing technicality in pleading (that were so carefully rejected in reforms here over 40 years ago), and to the effects of the uncertainty caused by increased appellate review or very detailed judicial reasoning. That increased review may "develop the law" but it harms the legal system. I suggest that this "cost" is not justified by the alleged development of the law, especially in routine cases. Juries are an antidote to inevitable legalism.

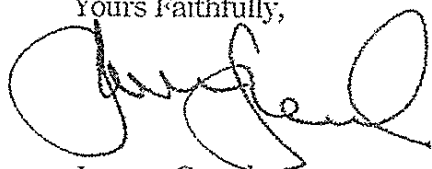
10. Juries keep knowledge of the legal system alive in the community. Compared with the civil justice system, the criminal justice system, for all its faults, works better, faster, cheaper in the great bulk of cases, and with greater community acceptance. More importantly it is keeping alive the knowledge and culture of the criminal jury trial. The loss of the civil jury is the loss of four lay people per matter discussing their experience later, at home, in the work place or in the pub. Even those not selected had their stories to tell. The connection of the legal system with the community through the jury could not be over-emphasised.
11. Decisions about credit, based upon the acceptance of one version over another, have always provided the judiciary with one of the most disturbing parts of their work. They endeavour to find other ways to decide cases than on credit, which in turn causes other problems and fails to address what is, in the eyes of the community, a genuine credit problem. Such questions were always best left to juries. A jury decision on a credit point does not seem to do the damage to the justice system that the judges legitimately fear. The provision of reasons for a credit decision is and always has been a deeply artificial act.
12. We must accept too, that civil juries gave the Bar proper scope for representation of a client just as they do in the criminal courts. The modern case managed hearing is such a trussed up, judicially controlled exercise that the scope and role of counsel has come to be more confined than is healthy even if for good administrative reasons. The judge has come to hold the stage in the modern common law court in a way that the advocate for a party used to do. That is an unhealthy development for the judiciary (and probably not one it sought), unhealthy for the Bar, and I suggest, for the standing of the civil justice system. I do not seek to argue the problems of case management for the Bar in this submission (though I suggest they need to be examined). Rather, I argue that among other things, juries act as a protection for everyone against systemic and administrative reforms aimed at justifiable goals (such as

list control) but which have unintended consequences, including for the Bar. Juries are a fundamental component of the justice system and keep everyone involved within their proper role.

13. There is no point in arguing that courts of equity work successfully without juries. The history of equity is as different from the use of a civil jury as the jury is from the modern, disconnected "trial" of a hybrid, case managed publicly incomprehensible, written hearing. Equity is a different world. There are numerous other such "worlds" in the law. The contention is not that all non-criminal work should go to civil juries. Rather it is that there is and always will be a body of easily identifiable routine cases that are best heard by juries and that in doing so we preserve an important internal check and stabilizing element of the justice system.

14. The common law, the justice system and the community, need juries. I urge the Council to support their re-introduction. I suggest that the common law Bench at least, is likely to provide substantial support for the proposal.

Yours Faithfully,



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3 June 2015

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Dear President

I support an application by the Bar Council to sponsor or support legislation to reinstate the right to trial by jury in civil actions in the Supreme and District Courts.

I endorse the statements of Barker QC, Walker SC and Gormly SC in support of the application and would emphasise that juries are a major community resource for the justice system.

Jury trials ensure that the community is involved in the justice administration. In my experience as a District Court Judge, juries in criminal trials listen carefully to the directions of law by the trial judge and have no hesitation in requesting clarification of any direction. It is also very common for juries to request copies of the transcript of evidence in determining questions of fact.

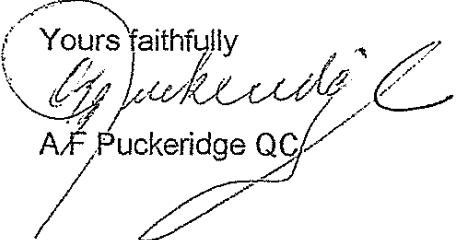
The determination of facts by a jury is the basis of the sentence by the judge. There are a number of appeals in criminal trials particularly relating to sentencing but the binding nature of findings of fact by the jury enable appeals to be dealt with expeditiously.

It is patronising to suggest that juries are unable to determine complex questions of fact. In a defamation action in which I sat as the judge the jury determined that imputations numbering over 20 were defamatory or non-defamatory. The findings of the jury brought about the subsequent finalisation of the action. The additional benefit was that there was no need for any written reasons.

In individual cases and particularly in country sittings there may be good reasons to dispense with a jury, but the suggestion that a judge alone hearing in civil actions automatically results in the more efficient disposal of an action is, I consider untenable.

My experience with jury trials extends over a period of time since being admitted to the Bar and from my appointment to the District Court Bench in 1997 and as an acting judge until retirement in August 2013.

Yours faithfully


A.F. Puckeridge QC