Reconciling truth and efficiency

In his address to the NSW Chapter's Annual Dinner, Justice Peter McClellan explores the challenges in meeting our aspirations for justice.

In my early days at the Bar I was retained for a plaintiff who alleged that he had injured his knee in a work place accident. It was 1975 and jury trials were still the norm when suing an employer. I had grave doubts about my client's veracity and before rejecting a modest offer from my opponent obtained written instructions. The jury returned a verdict with the foreman saying "we find for the defendant – provided the company pays the plaintiff's medical expenses." The judge entered a verdict for the defendant.

When I was a relatively young barrister I was engaged by a client who had migrated to Australia in the early 1950s. I will call him Mr Smith. He came from modest origins and set up a business growing fruit and vegetables which he marketed to the public from a road side stall. The business grew and became a significant retail shop. Unfortunately, as the city developed the local road authority decided to include part of his land in a major road widening. It meant that his business had to close. Faced with this threat he commenced proceedings for an injunction to restrain the authority from taking his land. He failed at trial but I was able to successfully argue in the Court of Appeal that the matter should be returned to the trial judge for the resolution of further issues. This happened. He again lost and another appeal was filed. These processes occupied more than 2 years during which time he kept trading.

Shortly before the new appeal was to be heard he came with his solicitor for a conference. The position was now hopeless and I advised him that our best course was to negotiate as much time as possible before his business must close. He looked downcast. On the way to the lift with his solicitor I am told that in a distressed voice he exclaimed "I do not understand. I have given you all this money. Have you not been paying the right people?"

In recent years I have participated in a number of conferences with the judiciary of developing countries in the Asia Pacific region. Many of these communities are relatively poor and lack capital to fund the physical facilities which we accept as necessary for an effective judiciary. Some countries lack a legal tradition which ensures the acceptance by their communities of the role of the courts as the arbiters of disputes. In some there may be tensions between the judiciary and the executive. In many places the development of customary laws must be reconciled with a legal system inherited from colonial times.

I recently attended a conference in Tonga where the Chief Justice of Samoa spoke of the development of customary law. As I listened to him speak I was reminded of the early days of equity as the judges struggled to develop principles which would provide a just solution to a problem while ameliorating the perceived harshness of the common law. Every exchange I have with judicial colleagues of the Asia Pacific region reminds me that the law is not static. Society is in constant change. Legal systems must respond to those changes. The

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response may be cautious and changes made only when the demand is expressed by many in the community. In some cases the need for change is only apparent when a retrospective assessment confirms that what may have been first thought to be an irritant or inconsequential has become an entrenched problem. Sometimes it is the courts which respond by changing their procedures, adapting and altering the rules by which litigation is conducted. Other times when the problem develops a "political" dimension the legislature intervenes. When this occurs the changes are likely to be abrupt. Parliaments rarely intervene to merely refine systems, a task which can be accomplished by the courts. They are more likely to intervene to impose radical change. These forces can be seen at work in many aspects of the Australian court system.

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

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

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

"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."

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

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

Menzies supported the use of juries in criminal trials. His support was founded on the proposition that you get the judgment

"of a plain citizen on the plain issue. Did he do it or not?"

Menzies' final contribution to the debate was blunt:

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

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

Efficiency and truth – the demand for change

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

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

If it be the case that the community seeks both efficiency and truth in the justice system it will be necessary to consider change in a number of areas. Some issues require broad community discussion.

The demand for efficiency

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

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It is common to identify cost and delay as the "twin evils". My researcher has found more than 30 occasions on which judges have discussed these problems in just the past two decades. The former Chief Justice of the Australian High Court, Sir Anthony Mason, commented that there has been an "erosion of faith" in the adversarial system. In a 1999 paper titled "The Future of

Adversarial Justice" Sir Anthony commented:

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

There are some judges who speak in terms of reluctant acceptance. For them the resolution of disputes is inevitably a time consuming and costly business. Questions of access to justice and fairness may be mentioned and inadequacies lamented but the identified problems are accepted as incapable of an effective response.

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

Truth

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

The role of juries has been the subject of debate amongst practitioners, academics, judges and many from the general community. A bibliography would include at least several hundred books or collected papers and numerous articles. The controversy may abate for a time but inevitably returns. The issues reveal some constant themes. Applauded by many as providing an opportunity for the general community to be involved in the administration of justice, its inefficiencies and sometimes aberrant verdicts are accepted as a cost which must be borne by individual litigants and the wider community. Although often discussed, and in some jurisdictions changes have been made, the difficulties for jurors required to consider months of evidence in complex criminal trials which may include sophisticated crimes committed by and within corporations and financial market activities have not been resolved. Apart from the complexity of some contemporary legislation and the activities made criminal by them, the length of the trials and the difficulty of finding 12 persons with the time to serve on the jury presents a continuing problem. The availability of potential jurors reduces, probably significantly, the expectation that jurors will be chosen at random across the broad range of age and socio-economic groupings in the general population.

It is not difficult to see that as the means by which we identify and receive information changes, jurors will be less inclined to confine their deliberations to the evidence produced by the parties. The internet provides everyone with information on a scale which could never have been anticipated. Everyone can do

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research. The difficulties experienced in NSW with some jurors accessing the internet and others making their own enquiries at the scene of the crime reflects a desire by jurors to "get it right". The New Zealand jury studies reveal jurors' frustration with seemingly incompetent counsel and trials where one or other party is believed to have been inadequately represented. The community expectation that a trial will reveal the truth is reflected in a changed attitude to double jeopardy. New South Wales, Queensland and South Australia have legislated to allow, in certain circumstances, for the prosecution of persons who have previously been acquitted of an offence.

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

The decision in *Weiss,* with its emphasis on the view of the appellate court of the relevant facts, reflects the community's concern that a conviction following a trial by jury may not always be the correct conclusion. Apparently motivated by the problems in *Chamberlain* and *Mallard* the reality is that juries acquit but judges convict. If a jury convicts there is an appeal as of right. If the appeal court has a reasonable doubt it must acquit. Only if the Crown case withstands scrutiny by the appellate court of the facts will the conviction remain.

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

Civil trials and the adversary system

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

Much of the recent intrusion into the adversary system has as its object control of "trial by ambush." Seen as inefficient if not unfair, courts have required the exchange of experts reports and the evidence going

to damages before trial. In the common law division of the Supreme Court we now require disclosure of all relevant material, including the likely factual evidence, before trial. All parties are required to provide a statement of the relevant events which will become the primary source of that person's evidence at the trial. It has the objective of allowing the experts to proffer an opinion before trial having regard to the likely evidence. Guesswork is eliminated. It also ensures that a party cannot be ambushed by an unexpected account of the relevant events. Coupled with a change in our rules, which allows the trial judge to direct when expert evidence will be called, which may require the defendant's witness to be called in the plaintiff's case, these changes have brought not only efficiency gains but a significant increase in the settlement rate of complex cases.

Expert Evidence

In recent years I have written on a number of occasions about the problems with expert evidence. Both because of frequent perceptions of bias in experts who give evidence but, more significantly, the reluctance of the best experts to become involved in an adversarial trial our accepted methods have been challenged by some and much criticised by others. There have been at least two responses: the single expert and concurrent evidence.

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

Private adjudication

There is a persuasive argument that if, as must be anticipated, the proportion of public resources available for dispute resolution continues to diminish, the courts will have to more carefully identify the priority for their allocation. There is no question that the criminal process which involves the enforcement of the law requires adequate funding. In some respects this is also true of administrative and revenue law disputes where the conflict requiring resolution involves the interests of an individual and the State. However, beyond these matters, as the changes in workers compensation, motor accident liability, the development of various grievance bodies in the form of ombudsmen and alternative dispute resolvers and counsellors makes plain, the community already accepts that a court need not be the primary decision maker. It is not difficult to predict that an increasing

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number of disputes will be resolved outside of the conventional court system with a judge or judges being available to review the process and intervene if the outcome is not faithful to the law and the interests of justice.

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

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

A more significant issue is that organised “private justice” may carry a risk of bias in the decision maker or mediator who depends upon a continuing flow of business from one of the parties or their representative in a particular dispute. Peter Murray discussed these problems in his article “*Viewpoint”* published in *Judicature* this year. Although the concern is legitimate, where a number of qualified and competent decision makers are available and both the litigators and litigants come from a cross-section of the legal and business communities, I doubt that the problems will materialise. It would be a problem if, for example, cases involving primarily one insurer were being resolved in this manner. It is another matter when the litigants are all well resourced and well represented.

It is not difficult to discern in the issues I have raised this evening a growing reluctance to accept an adversarial culture as appropriate for the resolution of disputes within the community. The demands for efficiency and truth will inevitably encourage the use of mediation. Recent changes which we have made in the common law procedures have resulted in both an increased use of mediation and a significant increase in the rate of settlement of complex disputes. Only two complex professional negligence trials have not been resolved before trial this year. I believe it likely that before long there will be a universal obligation to attempt mediation before proceedings can be commenced. It is incumbent on all of us in the legal profession, although I am sure this gathering will have little difficulty in responding to ensure that we mould our legal process to the contemporary needs of the community.

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About The Hon Justice Peter McClellan

Justice Peter McClellan has been a judge of the Supreme Court, Chief Judge of the Land and Environment Court of NSW and was sworn in as Chief Judge at Common Law in the Supreme Court of NSW in September 2005.

His Honour has also been Counsel Assisting the Maralinga Royal Commission into British Nuclear Testing in Australia (1984-85), President of the NSW Division of the National Environmental Law Association (1988-1991), and over the same period, Chairman of the State Government Inquiry into Swimming Pool safety.

His Honour has also been Acting and Assistant Commissioner of the Independent Commission Against Corruption (1992-93) and Chairman of the Sydney Water Inquiry in 1998. He has also supervised the statutory review of the Sydney Casino License (in 1997 and 2000).

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