

RULE OF LAW

INSTITUTE OF AUSTRALIA

Judge or Jury

Right or Choice?

Trial by Jury in Australian Courts

NSW Law Reform on Jury Trials



The Daily Telegraph published an article on 1 August 2011 raising important questions about the application of the NSW Criminal Procedure Law Reform regarding the way the public may come to view the criminal justice system.

The article reported the development of a ‘mini revolt’ calling for the NSW Law to be ‘scrapped’.

They reported that the legislation had been criticised by members of the Judiciary and Legal Profession as threatening ‘the whole fabric of the system’.

It was claimed that Judges will spend twice as long preparing judgements to ensure they are not appealed and may ‘always...go in favour of the accused purely and simply because of their fear of appeal’.

It was argued that Juries were vital to the Criminal Justice System in ensuring equality and fairness, applying the ‘common sense rule’ indicative of community standards’.

Lisa Davies [‘Jury Out on Judge Trials’](#), 1 August 2011



Do we have a Right to Trial By Jury?

Section 80 of the Australian Constitution provides an express right to trial by jury:

'The Trial on indictment of any offence against any law of the Commonwealth shall be by jury'

- This is a positive right for accused persons on trial for a **federal** offence. The right cannot be removed.
- There is NO choice for the offender to a Judge only trial under the Australian Constitution.
- But this provision does not extend to state and territory criminal trials

History of Jury Trial

The right to Trial by Jury stems from a proposition dating back to the Magna Carta in 1215. Article 39 states;
'no freemen (sic) shall be taken or imprisoned except by the lawful judgement of his peers or by the law of the land'.

1824 NSW Supreme Court Chief Justice Forbes advocated strongly for jury trial stating
'It would not merely be against the express language of the Magna Carta to try free British subjects, without the common right of a jury, but against the whole law and constitution of England'.

Historically, only white, male, landowners were permitted to sit on juries.



Modern Democracies require juries to be a representation of their community.

Jury Act 1977 (NSW)

Section 5 of Jury Act 'Every person who is enrolled as an elector for the Legislative Assembly of NSW is qualified and liable to serve as a juror'.

Persons currently unable to sit on Juries include:

- Judges, Members of Parliament, Lawyers, Public Service employees engaged in law enforcement, criminal investigation, provision of legal services in criminal matters, Police Officers, etc
- Persons unable to read or understand English, a person who is unable because of sickness, infirmity or disability (Schedule 2 *Jury Act 1977*)

Importance of Trial by Jury?

- The Jury Trial represents one of the most important rights that a citizen in a democracy possesses. It has been a long standing Rule of Law Principle for Criminal Trials.
- Reinforces public involvement in the legal process, increasing respect for the justice system.
- Twelve jurors chosen at random are likely to represent community views and values.
- Preserves the liberty of the offender against oppression by the state.
- Seen as fair and just.



Right to Trial by Jury under Commonwealth Criminal Law

- The right to Trial by Jury under s80 of the Constitution only relates to **Commonwealth** Criminal indictable offences
- The Commonwealth *Crimes Act 1914* states that **indictable** offences are those which are punishable by imprisonment for a period exceeding 12 months (s4G).
- Most Commonwealth Criminal Offences relate to the importation of Drugs, Welfare and Tax Fraud, and other types of Commonwealth offences relating to Corporations, People Smuggling and Terrorism.
- The Commonwealth does not have a 'general' power to legislate on the subject of criminal law.
- The Commonwealth can only legislate on aspects referred to in s51 of the Constitution.
- The States are permitted to legislate on all other matters, this includes, Criminal Offences.
- Under the NSW Constitution there is **no** right to Trial by Jury but tradition has dictated the practice of jury trials.

NSW Legal Context

- In November 2010 the NSW Government introduced the *Criminal Procedure (Courts and Crimes Legislation Further Amendment) Act 2010*
- Prior to this amendment the Crown and the Accused had to agree on a Judge only trial.
- The amendment permitted the Judge to overrule the prosecution if it did not agree to the accused's request for a Judge only trial.
- The reform has raised concerns within the community regarding the removal of the jury trial protection and the implications on the way the criminal justice system will operate in NSW



Criminal Procedure

Courts and Crimes Legislation Further Amendment Act 2010

Section 132 (4) If a prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

Section 132(7) The Court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:

- (a) there is a substantial risk that acts that may constitute an offence...are likely to be committed in respect of any jury or juror and
- (b) the risk of those acts occurring may not reasonably be mitigated by other means.

Overall:

This section permits:

- The accused will be tried by judge alone where it is in the interests of justice and the accused requests it.
- Where there is a risk of Jury tampering the Judge can order a Judge only trial, without a request of either the Crown or the Accused.

This section removes:

- The ability of the Crown to object to the Judge only trial. The position under this section prior to amendments was that the Crown had to agree with the Accused's request to have a Judge Only Trial.
- The ability for the Court to permit Judge only trial request by the Crown when this is objected to by the Accused.

What was said in Parliament

The Honourable John Hatzistergos, NSW Attorney General commented in his Second Reading Speech, when introducing the amendment to Parliament;

Judge alone trials are appropriate...where there are concerns that cannot be overcome regarding pre-trial publicity, or where the evidence of the trial is likely to be highly technical...

The purpose of the new model is to allow both the prosecution and defence to apply for a judge-alone trial and uses the court to determine the appropriate trial method where there is a dispute. This will bring New South Wales into line with other jurisdictions and represents a fair and transparent way to determine whether a trial should proceed without a jury.

The jury remains the most appropriate fact finder for serious criminal trials ...The accused's right to trial by jury continues to be a central tenet of the New South Wales criminal justice system.

Should the Court of Criminal Appeal determine that a trial by judge order is appealable under the Criminal Appeal Act 1912 the court has the capability to deliver a swift hearing and verdict prior to the trial taking place. Given the relatively limited circumstances where a judge would make an order that might be the subject of appeal, there is unlikely to be a significant impact on the criminal justice system by implementing the provisions in their current form.

NSW Legislative Council 24th November 2010 page 28065



Questions

1. When are judge only trials appropriate?
1. Who can apply for a judge only trial?
1. Do you think this is an appropriate way of dealing with criminal cases?

R v GSR [2011] NSWDC 14

**District Court New South Wales
Decision Date: 15 March 2011
Before: GD Woods QC DCJ**

Facts:

The accused [GSR] had dishonestly presented himself as a gynaecologist in a District Hospital. He was charged with five counts of assault and one charge of indecent assault.

The Court had recently granted a suppression order preventing all publication of his name and the location of the Hospital in order to protect the accused from potential prejudice of jurors.

The Case:

The accused [GSR] sought an order from the District Court for a Judge only Trial on the grounds that material that was being distributed on the internet was likely to prejudice a jury.

The Crown objected to the order.

R v GSR [2011] NSWDC 17

The Judge stated:

There is before me evidence relating to the extent of pre-trial publicity to which the offender has been exposed. Exhibit A is... a Google search of the internet for the accused by name...On 14 March 2011 ...[the] search produced 267,000 results [11]

I have before me as well Exhibit A4, an up to date Media Monitors search of GSR [the accused]. That search reveals...numerous references to the accused in the vilest terms. It refers to him as...a rogue doctor...accused of mutilating and assaulting hundreds of women...numerous references to a police investigation of claims linking him to the deaths of fifteen mothers and babies [12]

The publicity...is extensive and disturbing. It identifies the accused as a rogue doctor and it suggests that he is guilty of serial killings. He has been identified visually on a national television program...in terms similar to the kind of material referred to in [evidence]...pre-trial publicity has been, frankly, poisonous, inflammatory, and includes very nasty epithets which are not easy to forget [21]

What I see here is a significant risk that one or more of the jurors selected might, despite strong directions of the kind which I would give and do regularly give in trials, make enquiries about the connection between the accused and the relevant regional hospitals or that such a juror or jurors might already be aware of and affected by the widespread and seriously prejudicial publicity [29]

The pre-trial publicity here is such that it is in the interests of justice for me to order a judge alone trial. [32]

It is important to bear in mind that most major criminal trials in NSW are conducted by a jury of twelve civilians randomly drawn from the community, and this is a long respected mode of trial...[However] [t]he law has traditionally regarded it as important that the accused have some stake in a process which may lead to him being convicted and put into gaol. [16]

Based on the 'interests of justice test' the Court granted a Judge only trial.

Reflection

1. Does the legislation create a rights based competition? Is there a contest between the rights of the accused to a fair trial vs. the rights society to have the accused tried before the community? Or the rights of the victim vs. the rights of the accused?
2. In this case the Court had already made an order suppressing the accused's name to protect any pre-trial prejudice. Why did the court think that this was not enough?
3. Does our 'internet age' pose a particular problem for Courts in ensuring the accused's right to a fair trial and an impartial jury?
4. Are juries 'completely fallible' and hopeless in criminal trials?
5. What is it about a Judge that is different from a Jury in making decisions?
6. Do you agree with the Court's decision in *R v GSR* to order a Judge only trial?
7. What are the problems with Judge only trials? Do Judges have a grasp on 'community values'?
8. Do you think that the Judge considered the 'interests of justice' adequately in this case?

Statistics

The NSW Bureau of Crime Statistics and Research report of September 2008 provides some insight into the understandings of jurors in criminal trials.

The report provided some interesting contrasts.

A total of 1225 jurors were surveyed after hearing District and Supreme Court trials between July 2007 and February 2008. 55.4% understood the phrase 'beyond reasonable doubt' to mean 'sure' that the person is guilty. 22.9% thought it meant 'almost sure' that the person is guilty (4). This was raised as a concern for the use of Jury trials in highly technical criminal cases and may lead to hung juries or acquittals because they were unable to understand basic Criminal law.

However, 94% of jurors stated they understood the Judges instructions completely, 97.1% reported that the Judges summing up of evidence was easy to understand (10). Therefore, if Judges are able to ensure that they explain various complex issues, on this study, Jurors were able to understand the legal process.

Lily Trimboli, 'Contemporary Issues in Crime and Justice', *Crime and Justice Bulletin* No 119, September 2008.

Interesting Activity:

- Conduct a survey of your family and friends and see what they know about juries and their role in our society.

Opinions

In response to the media reporting of the NSW Amendments The Daily Telegraph published opinions of readers on 1st and 2nd August 2011.

Readers posted the following comments:

1. 'When a jury gives a verdict, they say it in public and walk away. When a judge has a finding, they have to produce written reasons. Lawyers then claw through that report, looking for grounds to appeal. An appeal gives lawyers more money. The whole system is broken....With courts there is no search for the truth, and the rich get better results because they can afford better lawyers'.
2. 'Juries are a hangover from days gone by, can be swayed by court theatrics of clever solicitors and practiced witnesses...counterproductive to achieving true justice'.
3. The revelation that in close decisions many NSW Judges will always favour a not guilty verdict for fear of criticism from the appeal courts is almost beyond belief...An let's not even talk about light sentencing, even if a guilty verdict is finally given by a Judge. The chances of having 12 rational people selected on a jury panel without at least a couple of rebellious smarties is also remote, which again favours the odds of a not guilty verdict. No wonder the criminals are laughing'.
4. Trails before a judge alones sound like a good idea. After all, it is the judge who decides what evidence the jury is allowed to hear, and who instructs the jurors in how to interpret the information. Jurors aren't even allowed to use their own knowledge. Also, a Judge is more likely to be able to sift out the tricks of oratory used by barristers to confuse jurors: This is, after all, what barristers do'.

What are the various opinions being expressed? What your thoughts on the issues raised by the readers in the above article? What opinion do you prefer? Why

Class Debate

- You are the Barrister for the Accused. What arguments do you put before the Court to seek a Judge only trial?
- You are the Crown Prosecutor. What arguments do you put before the Court opposing the Judge only trial?

You can refer to any material provided in this presentation to support your arguments.

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Other Rule of Law Resources:

1. The Rule of Law and the Courts; *Wainohu v NSW* Slides
2. Henry VIII Clauses and The Rule of Law Slides
3. The Rule of Law; Case Studies and Their Relevance to Legal Studies, *Legal Studies State Conference 2011*
4. *Judicial Reflections on the Rule of Law* Jim Spigelman AC QC

Available at our website

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