THE VEHICLES OF JUSTICE: ROLLS ROYCE OR KINGSWOOD?

THE HONOURABLE JUSTICE GORDON J. SAMUELS, A.C.*

I. INTRODUCTION

It is, of course, a great honour for me to have been invited to deliver the second Julius and Reca Stone Oration. This occasion was established in 1985 just before Julius Stone's death, as a tribute to his remarkable career, and in honour of the Golden Wedding which he and Reca had celebrated the year before. The first Oration was delivered in 1985 by the Prime Minister, and dealt primarily with Stone's contribution to international law, his tireless defence of human rights and his constant concern for the peaceful management of relations between members of the world community.

When the Oration was established by the New South Wales Jewish Board of Deputies, to which warm acknowledgment is due for its graceful recognition of the contribution made by Julius and Reca Stone both to legal scholarship and the affairs of the Jewish community, it was not stipulated that the topic should be a legal one. The specification is merely that the speaker, if a Jew, may address any topic of his or her choice; but, if a non-Jew, must select a topic of

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interest to the Australian Jewish community. The ecumenical quality (if that adjective is not inapt) of the prescription overcomes any discriminatory tendency which it might display.

I was therefore left with the widest possible election in the choice of a subject-matter. I decided to select a legal topic and, because my audience would not be wholly or even substantially composed of lawyers, one which was, as near as I could judge, of current and general interest; and one which touched upon concerns to be found in Stone's work. Julius Stone's standing as a scholar depends principally upon his reputation as an international lawyer and legal philosopher. But he was also much involved with the problems of municipal law and, in particular, with the way in which matters of procedural law may influence the character of the decision making process which it is the business of the courts to undertake. Much of his work was designed to reveal how, in truth, judges decide cases and how judicial determinations really proceed. His treatment of the uses and limitations of formal logic in legal reasoning[1] offered the judges a charter which, perhaps, they did not explicitly accept until Lord Reid denounced as a "fairy tale" the belief (or rather the assertion) that judges did not make law but merely found it ready packaged in some Aladdin's cave to which the judicial oath provided access.[2] In his examination of questions of this kind, he sought, amongst other things, to investigate the continued capacity of settled legal ideas to satisfy the additional pressures exerted upon them by the increasing demands of an ever more complex society. He expressed his attitude thus: "Settled ideas of evidence, procedure, and substantive law, are brought increasingly into question by our very faithfulness to them under conditions of massive litigation arising from the mechanisation and urbanisation of social life."[3]

I thought that tonight I might say a little about some of the problems which that statement contemplates. The title of this paper, carefully chosen in the best academic tradition to conceal as much as it reveals, and thus to maintain freedom of manoeuvre as ideas change during the stress of preparation, is intended to oppose two possible systems, one opulent and comparatively expensive, and the other more basic and comparatively cheap.

Our present system of administering justice in New South Wales is at a critical stage. The courts are struggling to maintain control over an increasing

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1 J Stone *The Province and Function of Law* (1946) Chapters VI and VII.

2 Lord Reid *The Judge as a Lawmaker* (1972) 12 *Journal of Public Teachers of Law* 22, at p 22. He said: "There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when the judges muddle their password and the wrong doors open. But we do not believe in fairy tales any more."

3 J Stone *Legal System and Lawyers' Reasonings* (1968) at p 12.

volume of work, and delays in the adjudication of both criminal and civil cases have reached an unacceptable level which understandably generates public and professional concern. The State Government has responded by commissioning the firm of Coopers & Lybrand W.D. Scott to investigate the extent and causes of the problem, and identify possible solutions to it. The Coopers & Lybrand report was delivered to the government in May 1989. In addition, the Supreme Court has established its own delay reduction program, and court administrators are alive to the many problems which undue delay inevitably produces.

The solutions cannot be reserved only for the attention of lawyers. But it is the lawyers who tend to attract the initial criticisms, and it is the lawyers who have a special responsibility for the efficient and compassionate operation of the system in which they play the leading role. This is perhaps of particular importance where, as in Australia, there exists neither a constitutional nor a common law right to a speedy trial, although the common law right to a fair trial may in certain cases be so prejudiced by delay as to require judicial intervention.[4]

The causes of delay are manifold. Broadly speaking they may be distributed between causes external to the court system, and causes inherent in it. The former include increases in population and in the crime rate, the passage of additional regulatory legislation, the availability of legal aid and the general litigious appetite of the community.[5] The latter include inefficient managerial practices on the part of court administrators, lack of resources and facilities, the procedures of the courts and the practices of lawyers and judges.[6] Clearly the scope for reform in the second category is greater than the possibility of influencing the intractable elements which appear in the first. This paper will suggest that the procedures central to our system of administering justice render it peculiarly vulnerable to the twin scourges of undue delay and high cost; and that reformation depends as much upon radical changes to forensic procedures as it does upon improvement in the techniques of case flow management. I want to consider the basic procedure that drives our system of justice, and the assumptions that it encourages or imposes; and the use of juries, still quite extensive in New South Wales, as a forensic instrument.

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4 *Jago v District Court (NSW)* (1989) 168 CLR 23. Cf Article 14(3)(c) of the *International Covenant on Civil and Political Rights* (to which Australia is a party) which provides that an accused is entitled "to be tried without undue delay"; the Sixth Amendment to the *Constitution of the United Sates of America* states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"; and see the similar terms of s11(b) of the *Canadian Charter of Rights and Freedoms*.

5 JRA Dowd "Delays in Criminal Trials" (1989) 21 *The Australian Journal of Forensic Sciences* 91 at p 93.

6 Cranston, Pullen and Scott *Delays and Efficiency in Civil Litigation* The Australian Institute of Judicial Administration Incorporated (1985) at pp 4 and 5.

By 'system of justice' I allude to the means of evaluating and resolving conflicts in society by a method of judgement which the antagonists, in principle, accept.[7] I hasten to add that it may be objected that I also need a definition of 'justice'. Perhaps so; but I hope that I may be absolved from attempting to solve a problem here with which Julius Stone himself wrestled throughout his long professional life. I will continue to use the word without embellishment, protected by Stone's own comment that discussion about the arena and criteria of justice constitutes "an arena within which each of us could in most of the really perplexing situations find justice to be where we wished it."[8]

Perfect justice in our legal system is an unattainable ideal. We can only hope to approximate it. It is not possible to devise a system of criminal justice that will ensure that no innocent person is convicted or guilty person set free. Nor is it possible to design a system of civil justice to ensure that all persons who suffer legal wrongs at the hands of others will obtain the remedy to which they are entitled under the law. Given the inevitability of human fallibility there is simply no way to remove the risk of error. Hence, our system of justice has sought to minimise this risk by means of complex civil and criminal procedures. In our case these procedures are tailored to what are perceived to be the needs of the individual litigants, are replete with 'fail safe' devices, impressive (even dramatic) in operation, somewhat ponderous and extremely expensive; and, above all, particularly where the triers of fact are a jury, regarded as highly reliable. But, as Sophocles wrote, there is a point at which even justice is unjust.[9] If the procedures designed to minimise the risk of error are so cumbersome, expensive and time consuming that access to the courts is denied or grossly delayed, one might well ask whether the 'Rolls Royce' system of justice which I have just briefly described should not be traded in for a more economical and utilitarian model - for a 'Kingswood' system of justice, one might say.

II. THE ADVERSARY SYSTEM

Now, the basis of our procedure, which I want to examine a little more closely, is what is commonly called the adversary system. It entails that the parties, and not the court, determine the issues which they will fight, and themselves select and call the evidence in support of them. The case is conducted by counsel for the parties, and as a general rule the judge's intervention is, and is intended to be, comparatively minor. It is thus the responsibility of the parties to prepare their cases and marshal their witnesses;

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7 E Kamenka "What is Justice?" in *Justice* ed. E Kamenka and AES Tay (1979) at p 14.

8 J Stone *Human Law & Human Justice* (1968) at p 323.

9 Sophocles *Electra* L 1042.

although the court provides the formal means, backed by sanctions, by which the witnesses may, if necessary, be summoned to the trial and documents procured for inspection and tender. It is an essential consequence of the adversary system that the parties are not obliged to call all the relevant evidence which they may have in their possession. They are entitled to call only that which favours their own case and, generally, need not offer that which does not. The court makes the rules by which the parties regulate their contest, and the judge acts as referee. But within this regulatory framework the parties are accorded a considerable degree of flexibility and decisive choice.[10]

Traditionally, the adversary trial has been regarded as a gladiatorial combat; and sporting metaphors abound. They are not always accurate; but, as Lord Devlin has observed,[11] our system is a trial of strength, rather than an inquiry on the European model produced by the traditions of the Roman Law. Since it does not involve a painstaking and wide ranging investigation conducted by an impartial inquisitor it is not designed to ferret out the truth in any absolute sense. The judge, for example, is limited to the material which the parties choose to offer. To quote Lord Devlin again, the objects of the adversary system and the Romanesque inquisitorial system are different. The one is to decide whether the prosecutor or plaintiff has discharged the burden of proof; but the other is to ascertain the truth.[12] Hence the adversary contest is intended above all to produce a winner.

The suggestion that neither the criminal nor the civil aspects of our system of justice is essentially designed to ascertain the truth often comes to lay persons unfamiliar with the details of legal procedure as profoundly shocking, almost to the degree of blasphemy. But let me offer two statements of high authority in Australia, the first made by Sir Garfield Barwick when Chief Justice of the High Court:

> It is a trial, not an inquisition: a trial in which the protagonists [sic] are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he [or she] will contest the issue, the evidence which it or he [or she] will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that context, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not.[13]

That statement was quoted by Sir Daryl Dawson in a later judgment of the High Court, in which he put the matter in his own words thus:

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It

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10 "The Judge in the Adversary System" *The Judge* (1981), at p 54 and following.

11 *Ibid* at p 54.

12 *Id.*

> is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel. He is not equipped to do so, particularly in making a decision whether a witness should be called.[14]

Dawson J there says that the adversary system is the means which the Anglo-Australian legal tradition adopts to pursue the truth, so that the discovery of the truth is, no doubt, on that view, the objective at which the procedure aims. Indeed, it has been said that the adversary system does find the truth because powerful statements on both sides of the record provide the best available means of discovering it.[15] A European lawyer brought up in the traditions of what we call the inquisitorial system, where the judge is essentially an interrogator with extensive powers of examination, would regard that statement with considerable scepticism. However, the principles to which both Barwick CJ and Dawson J subscribed were affirmed in a joint judgment of the High Court which set out certain general propositions applicable to the conduct of criminal trials in Australia including the rule that "save in the most exceptional circumstances, the trial judge should not himself [or herself] call a person to give evidence."[16]

There are, of course, dissenters from the views of those, including myself, who find it impossible to regard the object of an adversary trial as the pursuit of truth; notably Lord Denning.[17] I will not set out the whole of Lord Denning's remarks in the celebrated case of *Jones v. National Coal Board* in which he, together with Romer and Parker LJJ, who joined in the judgment, expressed their belief that the judge in England "was not a mere umpire to answer the question 'How's that?'". Their Lordships went on to say: "His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role." I would entirely agree in the existence of the second of these objectives; but with all respect, I cannot wholly accept the first. It seems to me that what I would regard merely as a dogmatic statement - what one might call part of the judicial doctrine of immaculate assumption - adopted in preference to the less romantic reality, is exposed as jejune by what is said in *Jones* a little after the passage I have quoted. Their Lordships point out that it may be all very well to paint justice blind, although "she does better without a bandage around her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies

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13 *Ratten v The Queen* (1974) 131 CLR 510 at 517.

14 *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

15 *Ex parte Lloyd* (1822) Mont. 70 at 712 per Eldon LC, extolling "the most powerful opposite statements of experienced men".

16 *The Queen v Apostilides* (1984) 154 CLR 563 at 575.

17 *Jones v National Coal Board* (1957) 2 QB 55 at 64-5.

the truth: and the less dust there is about the better." The judge's eyes are, of course, the eyes of justice. But so firmly is it established that the judge must stay clear of the dispute "that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts". Hence the judge, whose task it is to see that the truth is vindicated and justice done, is prevented from taking a step which might powerfully conduce to the achievement of that object and which, presumably, is suggested by the apprehension that unless it is pursued the purpose of the exercise will be defeated.

There are some perceptive comments in a paper delivered by Dr W Zeidler at the Twenty First Australian Legal Convention in 1981.[18] The learned author establishes a comparison between the two systems by using, as a model, the analogy of a railway journey by two routes. The conclusion is that whereas the final destination of the English law train would be "the due and equitable process of law" that of the German law train would be "the uncovering of the truth".[19] I think that this is true, although it would be wrong to conclude that the inquisitorial process, on that account alone, is wholly superior to the adversarial trial. The point I am seeking to make is concerned less with the actual incidents of the adversary system than with its consequences.

First of all, it effectively leaves the parties in the case to determine the speed at which the whole matter moves ahead, even though there are standard time limits as a framework; and reserves to them the primary responsibility for preparation for trial, casting the court in its familiar and frustrating role of muleteer with goad in one hand and carrot in the other. Secondly, by depriving the judge of any real evidentiary initiative, it permits the parties (which means in practical terms the advocates) to determine not only what evidence they will offer but also how they will present it, and in what order and profusion and, most importantly perhaps, how long they will take to do it. Thirdly, the adversary system was the necessary procedural corollary of trial by jury. It must be remembered that it was really not until about 1883 in England that common law judges came to decide the facts themselves. For nearly seven centuries all they had done was to preside at a trial by jury and order that judgment be entered in accordance with the jury's verdict. And for trial by jury no other system is possible. "It was not selected for its superior quality; the only alternative was not practicable".[20] Accordingly, it is as well to remember that the adversary trial is the only procedural framework in which a jury (in our sense) can be summoned to try the facts. The retention of juries maintains the adversary system. But if juries are abandoned other possibilities appear.

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18 "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure", (1981) 55 *ALJ* 390.

19 *Ibid* at p 392.

20 Per Lord Devlin, note 11 *supra*.

III. TRIAL BY JURY

Although the adversary system can and does exist when the trier of fact is a judge sitting alone, its quality as a forensic conveyance may fairly be considered in the light of the reliability of the fact finding tribunal which it was designed to carry, that is, the jury. In a paper delivered some years ago I endeavoured to marshal the differing views about the quality of jury trial and I will not repeat all that I said then.[21] But I will summarise what seem to me to be the leading arguments.

The jury has been the object of almost superstitious veneration by English judges; and Australian judges have lavished more encomia than criticisms. The great jurist, Blackstone, was of the view that trial by jury "ever has been, and I trust ever will be, looked upon as the glory of English law ... The liberties of England cannot subsist so long as this palladium remains sacred and inviolate".[22] Lord Devlin regarded trial by judge as "the lamp that shows that freedom lives",[23] and Sir Travers Humphreys saw it as an essential check on unpopular laws.[24] Lord du Parcq said: "When questions of fact have to be decided, there is no tribunal to equal a jury, directed by the cold impartial judge";[25] Lord Birkett echoed the words of early supporters when he observed: "A jury can do justice where a judge, who has to follow the law, sometimes may not".[26]

On the other hand, juries have been denounced with equal passion. In 1937 an American academic[27] launched this diatribe: "We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyse or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their number coerce the others into submission or drive them into open revolt". It seems to me that despite the guarantee of jury trial in the Sixth and Seventh Amendments to the Constitution of the United States of America, or perhaps because of it, American criticisms of the jury system tend to achieve a striking level of vehemence. For example, "Our own boasted trial by jury, which affirms that all grades of capacity above drivelling idiocy are alike fitted for the exalted office

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21 GJ Samuels, "Forensic Tribunals" (1984) 17 *Australian Journal of Forensic Sciences* 11 at p 17.

22 *Commentaries*, Book III, p 379, Book IV at p 350.

23 *Trial by Jury* (1956) at p 164.

24 *Criminal Days* (1964) at p 159.

25 *Aspects of Law* at p 10.

26 *Letter to the Times*, June 14, 1958.

27 BS Oppenheimer "Trial by Jury" (1937) *11 Univ. of Cincinnati LR* 141 at p 142.

of sifting truth from error, may excite the derision of future times".[28] And the author of those remarks was comparing trial by jury to the mediaeval practice of trial by ordeal. One of the strongest and most articulate critics has been Judge Jerome Frank whose primary argument is that a jury by exercising its right to bring in an inscrutable general verdict constitutes the best instrument that could be imagined "for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions - utter unpredictability".[29] However, condemnation of juries is by no means confined to American lawyers. The eminent English academic, Dr Glanville Williams, has contributed trenchantly to the subject and has observed that the real reason for keeping the jury's deliberation secret must be the desire to preserve public confidence in a system which more intimate knowledge might destroy.[30]

There are a great many other statements both for and against the institution but, as has been observed, one of the most striking features of the debate has been the fundamental lack of evidence adduced to support either side.[31] Attempts have been made to assess the competence of juries by reference to the views of other participants in the trial, for example, the judge[32] or the barristers involved;[33] otherwise reliance must generally reside in anecdotal material and the folklore of the bar. As to the last of these elements I think that some weight must be placed upon the undoubted fact that successful jury advocates are supposed by their colleagues to possess the virtues of eloquence, quick wit and effrontery, which are not the weapons to be deployed before the High Court of Australia. And the secrecy of the jury room forbids the methodology which researchers would ordinarily employ.

For my own part I believe that the suggested near infallibility of juries is exaggerated, and that their capacity to deal with problems of complexity, whether commercial or scientific, or even factual, is limited. Both their fact-finding competence and the reliability of their judgment are questioned (indeed rejected) by the careful controls which the judges have traditionally exercised over their findings. There are factual questions which lawyers have decided that judges can answer better than juries; and, indeed, there are matters of fact which judges have decided it simply is not safe to leave to a jury. For example, in proceedings for malicious prosecution it is for the judge to determine whether the plaintiff has established the absence of reasonable and probable cause for the prosecution, an indispensable element in the cause of action.[34] Of this

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28 J Frank *Courts on Trial* (1973 ed.) at pp 138-9 quoting Carter.

29 *Law and The Modern Mind* (1949 ed.) at p 172.

30 *The Proof of Guilt* (2nd ed. 1958) at p 233.

31 J Baldwin and M McConville *Jury Trials* (1979) at p 3.

32 H Kalven and H Zeisel *The American Jury* (1966).

33 M Zander "Are Too Many Professional Criminals Avoiding Conviction? - A Study of Britain's Two Busiest Courts" (1974) 37 *MLR* 28.

34 *Lister v Perryman* (1870) LR 4 HL 521.

anomalous rule - anomalous because of the paradoxical importance attached to jury participation in actions for malicious prosecution[35] - Professor Fleming says:[36] "Experience over many centuries has taught the lesson that in this action juries must be kept on a tight rein, and as early as 1599 it was regarded as unsafe to send the general issue to the 'lay gents' (see *Pain v Rochester & Whitfield* (1602) Cro Eliz 871; 78 ER 1096), who are too easily swayed by the feeling that, merely because an innocent man has been subjected to prosecution, he deserves recompense." And in actions for defamation the judge decides whether there is a defence of qualified privilege and determines the question of public interest.[37]

Apart from these controls judges have power to set aside juries' verdicts if they are perverse or unreasonable; and, needless to say, it is the judge who determines what is reasonable. The relationship therefore between judge and jury is a little like that between Beatrice and Sidney Webb. Beatrice said that she and Sidney had decided that he would make their decisions in all important matters and she only in minor ones, but that she would decide which matters were important. A tribunal which is so hedged about as a jury is by restrictions imposed as matters of policy cannot seriously be regarded, in my opinion, as a competent judicial instrument. Let me quote Lord Devlin once again: "I think it must be agreed that there are some determinations in which twelve minds are better than one, however skilled, and most people would accept that the determination whether a witness is telling the truth is one of them. But apart from this I cannot believe that there is any mystical quality distilled from twelve men selected at random which enables them in all cases to find the facts better than a judge alone could do. I do not see how those lawyers who hold that view reconcile with it the interference that judges exercise over the jury's fact finding powers - not merely with the fact of that interference but still more with the theory on which it is based, which is that a jury cannot always be trusted to behave as reasonable men. Nor can it be reconciled with the decline in the popularity of trial by jury."[38]

Indeed, it has been suggested that juries come to their decisions via a sort of psychological Gestalt process. That is to say their conclusion cannot be regarded as a response correlated to particular aspects of the evidence. It is a general overview rather than an analysis of detail. It therefore denies the validity of the methodology adopted in all academic disciplines, which insist upon close scrutiny of the available material in as much detail as the case may require. It is thus, as one critic has observed, a method "accepted only by crystal gazers and teacup readers".[39]

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35 *Supreme Court Act* 1970 (NSW), s 88.

36 *The Law of Torts* (7th ed. 1987) at p 588.

37 *Defamation Act* 1974 (NSW), ss 12 and 23.

38 *Trial by Jury*, at pp 149-50.

39 JF Kerr *A Presumption of Wisdom* (1987), at pp 50-1.

Add to all this that trial by jury is much slower and more inflexible than trial by judge alone and you have a singularly inefficient forensic instrument; and one which has already been very largely restricted in Australia. In New South Wales there is still a right to a jury in common law claims other than those arising out of motor vehicle accidents.[40] But the Government, I understand, now at last proposes to eliminate juries in most non-criminal cases.

The considerations I have discussed apply in principle to the use of juries in criminal trials. The supervision which judges exercise over civil juries is to be seen in this area as well. The verdict (other than a verdict of acquittal) of a jury in a criminal trial may be set aside as perverse or unreasonable and, in particular, where an accused person convicted by a jury complains that the verdict is unsafe or unsatisfactory it is the duty of the appellate court to undertake an independent examination of the relevant evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused.[41] This involves the decision of a question of fact,[42] and thus a trespass upon the turf held sacred to the jury.

I see nothing in the functions of juries in criminal trials which suggests that they are more dependable fact finders than their colleagues in civil cases. I note Lord Devin's view that the jury is better able than a judge to determine matters of credibility and, with all respect, I am not convinced. Recent events, for example, the Chamberlain trial and the first trial of Justice Murphy, suggested to many that prime characteristics of juries in criminal cases were an inability to judge demeanour and credibility correctly, and incapacity to analyse and understand, and by understanding to reject, evidence of any scientific complexity. In England in recent times persons convicted by juries of complicity in IRA terrorism have been released, and the convictions of others are under investigation, it being conceded in one or more cases and contended in others that the juries were hoodwinked by the fraudulent evidence of police officers.[43] Indeed, there is no really persuasive reason to assume that the members of an average jury have more experience and understanding of 'life' than the average judge. On the contrary there is much to recommend the conclusion that the judge will be far more astute to look for and perceive any manufactured evidence. Naturally, current criticisms of the competence of juries puts those whose ideological inclination would be to argue for their retention in a somewhat difficult position from which some chosen escape routes are hardly plausible.[44]

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40 *Supreme Court Act* (NSW), s 86(1).

41 *Morris v The Queen* (1987) 163 CLR 454.

42 *Chamberlain v The Queen (No.2)* (1984) 153 CLR 521 at 530-534.

43 *The Times*, 30 August 1990 at p 11.

44 D Brown & D Neal "Show Trials: The Media and the Gang of Twelve in The Jury Under Attack" in *Understanding Crime and Criminal Justice* ed. M Findlay and P Duff (1988) at p 126.

For reasons which I hope will by now have become apparent I favour the abolition of civil juries. Their continued existence is not justified by technical efficiency or compelled by social or political imperatives. Civil trial by jury has already been abandoned in South Australia and the Territories, and has been generally much restricted elsewhere.[45] As I have said a proposal to abolish civil juries in all but cases of fraud, malicious prosecution and defamation is likely to be made in New South Wales. I would myself abolish them across the board. Juries have, I think, been preserved by the rational self interest of insurers who, legitimately of course, benefit from the gross delays in the jury lists,[46] combined with an irrational amalgam of myth and dogma. Contrary to the view expressed by the late Dorothy Parker it is possible to teach an old dogma new tricks, and it is time to do so.

Juries in criminal trials, however, stand upon a different footing. They are not, of course, any more efficient as fact finding than civil juries. Their employment renders trials long, expensive and complicated. They do not any longer command the respect their verdicts once enjoyed. On the contrary, in any case which has attracted significant public interest a conviction may attract immediate denunciation; and trial by jury seems likely to become trial by jury and a subsequently appointed Royal Commissioner, with two appeals unsuccessfully intervening.

Nevertheless, there are important socio-political reasons for retention.

> [T]he social value of the institution is not to be assessed solely on the basis of its efficiency as an instrument for arriving at the truth. The involvement of ordinary citizens in the administration of justice has important implications, which are political in a wide but exact sense, placing the onus firmly on those who would limit or abolish the system to produce affirmative proof of its deleterious effects.[47]

I cannot discharge that burden of proof. The evidence in most criminal trials is straightforward. And most juries, I think, get it right.

However, considerations of the kind mentioned may be given more or less importance in different categories of proceedings. There is much to be said for engaging ordinary citizens "at a point of special stress in the relationship between government and governed, where the collective forces representing the ultimate guarantee of the social order stands revealed."[48] But that requirement does not apply to prosecutions for corporate crime, which do not directly involve ordinary citizens and deal with transactions foreign, in character and extent, to their experience.

At the moment the Supreme Court has power to deal summarily with certain indictable offences, including those involving fraud or dishonesty by directors

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45 *Juries Act* 1927 (SA) s 5: *Supreme Court Act* 1933 (ACT) s 14(1): *Juries Ordinance* 1963 (NT) s 71: *Supreme Court Act* 1935 (WA) s 42.

46 *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 414.

47 A Dashwood "The Jury and the Angry Brigade" (1973-74) 11 *UWAL Rev* 245 at p 246.

48 *Id.*

and other company officers, conspiracy and other offences under Companies legislation, provided the accused elects, after pre-trial procedures are completed, to be tried by judge alone.[49] I would recommend that the desirability of withdrawing the right to choose in such cases be carefully examined, with a view to providing for mandatory summary trial on the certificate of a Supreme Court judge. In expressing this view I take account not only of the general nature of this class of proceeding, and the length of jury trials, but of the complications which will often affect the trial, the complexity of the evidence and the high risk of the jury going wrong; together with the chance of legal error, which will, if the case is for trial by jury, almost certainly mean a new trial. Further, juries give no reasons and are as inscrutable as the Sphinx.[50] There is no opportunity to ascertain what the jury thought of particular items of conduct said to be dishonest, and, in the absence of a judge's reasons, there will be no comprehensive statement of the relevant legal principles, the summing-up being usually inadequate for that purpose.[51]

Any proposal to restrict jury trials in criminal cases usually stimulates a predictably hostile response. I agree with Justice McGarvie's observation that "judges ... have an inescapable responsibility to the community to ensure that their courts operate with such economy, efficiency and effectiveness as is consistent with the maintenance of an independent judiciary and high standards of justice.[52] But, he adds, it is the practical objective of doing practical justice that is vital; and these ends cannot be achieved unless the case load is disposed of with reasonable speed and with a degree of efficiency which fosters confidence in the system. This will require some balance in the commitment of judicial and other resources sufficient to satisfy the reasonable expectations of litigants.

If I may make a final glancing allusion to my title I would, without overstraining the metaphor, lighten the load of my forensic conveyance by discharging the civil jury permanently. But the criminal jury will remain aboard, and the vehicle will still require plenty of room and a massive fuel allowance.

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49 *Crimes Act* 1900 (Cth) ss 475A and 475B: *Supreme Court (Summary Jurisdiction) Act* 1967 (NSW).

50 *Ward v James* (1966) 1 QB 273 at 301: and see *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 per Samuels JA at 521-2.

51 *R v Kylsant & Morland* (unreported, Central Criminal Court, Mr Justice Wright, 30 July 1931) is something of an exception. The summing-up is reproduced in Dickerson, *Accountants and the Law of Negligence* (1966) at pp 456 and following. The conviction of Lord Kylsant was affirmed, (1932) 1 KB 442.

52 "Judicial Responsibility for the Operation of the Court System" (1989) 63 *ALJ* 79 at p 79.

IV. THE PROCEDURAL CONSEQUENCES

Apart from nurturing the jury trial the adversary system has had a number of important procedural consequences inimical to the reforms required to diminish the excessive delays which now affect the courts. It is, after all, driven by the profession, rewards delay rather than expedition and concentrates on the contest between the parties to the particular proceedings to the exclusion of the wider context in which they are set.

The first of these elements is the product of the principal features of the system to which I have already referred. The lawyers, and not the judges, are primarily responsible for the conduct of their cases and for running them through the preparatory phase to trial. It may be said that the judges make the rules, including the time requirements which, theoretically at least, regulate each step in the proceedings. But, despite recently increased perceptions of the importance of case flow management, and the adoption by judges and court administrators of improved practices and techniques, it remains the obligation of the parties and their legal advisers to bring the case to trial. Failure to comply with a time requirement does not bring an automatic penalty. It is the parties' obligation to keep each other up to the mark. The court generally intervenes only upon application by a party. As a result, in the absence of more sophisticated techniques now in contemplation, it is possible for cases run by inefficient lawyers to slip into limbo until recovered by a periodic audit.

I do not wish to spend time discussing the methods of court management designed to avoid lapses of that kind.[53] My point is that the traditional disinclination of judges to engage in court administration (now, I am glad to think, on the wane) was influenced by the notion that they were concerned only with judging - that is, determining the cases which the parties in their own time brought before them. They were not supposed to act as managers as well.

Now, however, it is becoming plainer that the responsibility of which Justice McGarvie has spoken in the comment I have quoted, can be discharged only if the judges intervene to take a stouter stand against the profession than they have generally adopted. I do not imply that the majority of lawyers is either venal or inefficient. But practitioners have grown used to a system which depends upon accommodation between the parties (which means, in practice, live and let live among the lawyers), and which, naturally enough no doubt, pays little or no heed to the requirements of the whole system in which the specific forensic contest is contained.

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53 This topic is well covered in papers by Justice McGarvie, note 52 *supra*, and by Professor PA Sallmann "Musings on the Judicial Role in Court and Caseflow Management" (1989) 63 *ALJ* 98, and *Tilting at Windmills and Sacred Cows: a Commentary on the Coopers & Lybrand W.D. Scott Review of the New South Wales Court System*, published in June 1990 among papers presented at the Eighth Annual Seminar of the Australian Institute of Judicial Administration.

The judges, however, are bound to have regard to a wider picture. I believe that only a small minority of the profession deliberately extends a case in order to earn more fees. But it is the fact that there are no financial bonuses for early settlement. The longer a case takes the more costs it accrues. The rewards lie in delay - not in promptness. And it is difficult to construct a model which reverses that inducement.

It is true, I think, that most practising lawyers and judges tend to be conservative. Contrary to some popular perceptions their resistance to change is more often stimulated by what is seen as adherence to principle, the defence of procedural fairness and the legitimate expectations of litigants than frank devotion to their own interests. But nevertheless rejection of change does serve their own interests, and principle and pragmatism are often difficult to separate. What is clear is that no serious reforms of any kind in the procedure of the courts and its capacity to cope with an ever increasing load of cases, can be achieved without the cooperation of the judges, the profession and the professional court administrators.

I spoke a moment ago of requiring balance in the deployment of resources for the administration of justice. It may be that a degree of compromise is necessary between the unnecessary luxury of the Rolls Royce and the more basic qualities of the Kingswood. How is the compromise to be measured? As I said at the beginning, by reference to an acceptable method of resolving societal conflicts; by procedures which at least fulfil and which certainly do not defeat legitimate expectations. This aim cannot be achieved by patching up existing practices, or by endeavouring to employ procedures useful in their own right (such as alternative dispute resolution) primarily as a means of relieving pressures on the existing system. As Professor Sallmann has said[54] no lasting or fundamental improvement in our system of administering justice can be achieved without analysis of the place and future direction of courts as key organisations in our community. We need also to be bolder in procedural reform than we have been so far. It may be that what I have said this evening has been based upon a false premise. Perhaps it is our current system which is the Kingswood and the one to which we should aspire is the Rolls Royce.

May I thank the Board of Deputies for this opportunity to grind an axe or two, and, more importantly, by speaking tonight, to acknowledge anew my affection and respect for Julius and for Reca.

I acknowledge the assistance of Mr John Ledda, BA LLB, the research assistant to the Court of Appeal, in the preparation of this paper.

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54 *Tilting at Windmills*, Note 53 *supra* at p 96.