THE RIGHT TO A FAIR TRIAL - SOME RECENT DEVELOPMENTS

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INTRODUCTION

The High Court of Australia has held that the right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.[1]

The right is clearly established at common law. It also could now be said that a solid basis exists for asserting that the right, at least in relation to offences against the laws of the Commonwealth, is entrenched in the Commonwealth Constitution by Chapter III's implicit requirement that judicial power be exercised in accordance with the judicial process.[2]

In recent cases the Court has considered the concept of the fair trial. Decisions concerning police interrogation, the right to silence, jury

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* A paper presented to the 5th Biennial Conference of the Criminal Lawyers Association of the Northern Territory, Bali Indonesia 26 June 1995.

1 Jago v District Court (NSW) (1989) 168 CLR 23, at 29 per Mason C J; at 56 per Deane J; at 72 per Toohey J; at 75 per Gaudron J.

2 Dietrich v The Queen (1992) 177 CLR 292 at 362 per Gaudron J; and see at 326 per Deane J.

exhortations, the right to counsel, adverse media publicity and abuse of process have redefined the necessary elements of a fair trial. The concept must be fluid, however; it must adapt to different circumstances, changing times and evolution of values, in what has been described as "the onward march to the unattainable end of perfect justice".[3]

It must be continually refined to accord with the community's notions of fairness, with which our courts attempt to conform. In Jago, Brennan J. (as he then was) perhaps admitted some inherent restrictions on the development of the right to a fair trial when he said:

> *"If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it."*[4]

The right to a fair trial does have practical limitations - the courts must be mindful of those who, though not represented, have a legitimate interest in the outcome of the case. The interests of the community and victims of crime in the enforcement of the criminal law are issues that are particularly at the forefront of considerations of the concept of a fair trial. The public interest in securing the conviction of persons who have

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[3] Jago v District Court (NSW) (1989) 168 CLR 23.

[4] Ibid at 49 per Brennan J.

committed criminal acts often competes with the right of an accused to a fair trial, creating a continuing tension that courts are required to resolve. That perfect fairness may be an illusion is exemplified in practice by the phenomena of adverse media publicity to an accused. If absolute fairness is to be the standard, such publicity would result in a trial being permanently stayed. However, the resolution of the problem is to be found in the requirements, imposed upon trial judges by the High Court and State and Territory Courts of Appeal, to direct juries in a way to remove unfairness caused by adverse publicity. Similar resolution occurs in other areas of potential unfairness. The underlying feature, however, is that the trial process is allowed to continue where the accused's position can be protected.

It is only where an acceptable level of fairness can be achieved that a trial is allowed to proceed. If events occur in the course of a trial which give rise to unfairness, and such unfairness leads to a substantial miscarriage of justice through the conviction of an accused, the accused has an immunity against conviction because an Appeal Court will quash that conviction. Therefore the right to a fair trial is more accurately expressed in negative terms as a right not be to tried unfairly or as an immunity against conviction otherwise than after a fair trial.

It is in these contexts that a number of recent High Court decisions have proscribed practices that compromise the fairness of the trial process or have granted relief by a stay or adjournment to ensure a fair trial. The decisions reflect different perceptions of the standard of fairness that prevailed previously or take into account changing circumstances which make a new standard of fairness attainable in the criminal justice system.

A number of these decisions will now be highlighted.

THE RIGHT TO SILENCE

Two recent decisions have dealt with the issue as to how the exercise of the right to silence before and during trial may be treated at trial by the jury.

In Petty and Maiden,[5] the High Court decided that, at trial, it is not permissible to suggest that an accused's exercise of the right to silence before trial can provide a basis for inferring consciousness of guilt or inferring that a defence raised at trial is a new invention or is otherwise suspect.

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[5] (1991) 173 CLR 95.

But what is a jury entitled to make of the exercise of the right to silence during a trial? In Weissensteiner,[6] the question was whether it was permissible for the trial judge to instruct the jury that inferences available to be drawn from facts proved by the Crown can be drawn more safely when the accused elects not to give evidence of relevant facts which the jury may perceive to be within the knowledge of the accused.

It was argued on behalf of the Appellant that there should be no distinction in result between the exercise of the right to silence before trial and the exercise of that right during trial. The High Court disagreed, although accepting that the distinction was a fine one.

Three members of the majority said:

> *"The failure of the accused to give evidence is not of itself evidence. It is not an admission of guilt by conduct ..... when an accused elects to remain silent at trial, the silence cannot amount to an implied admission ..... It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence .....the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right."*[7]

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[6] (1993) 178 CLR 217.

[7] Ibid at 225 per Mason C J; Deane and Dawson J J.

Although this case concerned Queensland law where there is no statutory prohibition on comment by the trial judge or prosecution on the failure of the accused to give evidence, its impact will be felt in all jurisdictions.[8] This is because the right of the jury to take into account the silence of the accused does not stem from the right of a trial judge or prosecution to comment upon it. Even in those jurisdictions where comment is prohibited, the jury may consider the accused's silence, and there would appear to be little doubt that at least some members of most juries will be aware of the right to give evidence.

The reasoning of the High Court in Weissensteiner clearly reflects the resolution of a particular tension between the right to a fair trial and the competing public interest of securing a conviction for a person who has committed a serious offence.

The High Court was obviously concerned not to put an artificial barrier upon the ability of a jury to reach a logical conclusion based upon its knowledge of human nature and behaviour. This pragmatism is reflective of many recent decisions of the Court.

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[8] In New South Wales, Victoria and the Northern Territory, legislation prohibits comment by the trial judge or prosecution. In Western Australia, Tasmania, South Australia and the Australian Capital Territory, legislation prohibits comment by the prosecution only.

POLICE INTERROGATION

In McKinney and Judge,[9] the High Court established a new prima facie rule of practice of general application, reflecting both a different perception of the standard of fairness that previously prevailed and the necessity to provide an incentive to law enforcement agencies to take advantage of existing technology to avoid unfairness.

The new rule provides that whenever police evidence of a confessional statement allegedly make by an accused involuntarily held in police custody without access to a lawyer or independent person is disputed, and its making not reliably corroborated, a warning should be given to the jury.

The court emphasised that the basis for the requirement of the rule is not the suggestion that police evidence is inherently unreliable, but in the special position of vulnerability of an accused to fabrication when he or she is involuntarily so held, in that the detention will have deprived the accused of the possibility of any corroboration of a denial of the making of all or part of an alleged confessional statement.

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[9] (1991) 171 CLR 468.

The majority of the Court said:

> *"The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law. It is obvious that the content of the requirement of fairness may vary with changed social conditions, including developments in technology and increased access to means of mechanical corroboration..... Where a majority of the Court is firmly persuaded that the absence of a particular warning or direction in defined circumstances will prima facie indicate that the requirement of fairness is unsatisfied.....it is incumbent upon the Court.....to enunciate a prima facie rule of practice....."*[10]

The practical result of this case has been the passing of legislation in a number of jurisdictions - both State and Federal - to ensure that tape or video recording of the interview of suspects in police custody is encouraged by providing for the admission into evidence of admissions or confessions only where a recording has been made (at least in relation to indictable matters). The High Court directed that where there is no independent corroboration a trial Judge should instruct a jury of the comparative greater difficulty of an accused person to challenge police evidence of confessional statements then it is for such police evidence to be fabricated, and therefore that they should give careful consideration to the dangers of convicting where the only (or substantially the only) basis for finding guilt is the uncorroborated confession.

As Sir Anthony Mason has commented recently:

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[10] Ibid at 478 per Mason CJ., Deane, Gaudron and McHugh JJ.

> *"It is difficult to conceive that such a decision would have been taken before the advent of relatively inexpensive, reliable video- and sound-recording equipment. The social cost of implementing the decision would have been too high".*[11]

ADVERSE MEDIA PUBLICITY

In Glennon [12], a well-known media personality, Derryn Hinch, was alleged to have so infected the trial process that a fair trial was impossible. Hinch was convicted of contempt of Court and sentenced to imprisonment. [13] Pre-trial applications for a permanent stay of proceedings on the grounds of delay and incurable prejudice from the publicity were made but refused. Glennon was convicted. The Victorian Court of Criminal Appeal acquitted him, holding that his trial should have been stayed by reason of extremely prejudicial publicity. The Crown successfully appealed to the High Court.

The Court had to consider, once again, the tension between the accused's right to a fair trial and the community's right to expect that a person charged with a criminal offence be brought to trial together with the public interest in securing the conviction of a person who has committed serious criminal offences.

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[11] The Hon. Sir Anthony Mason AC, KBE, "Fair Trial": Keynote Address to the Fifth International Criminal Law Congress, Sydney, 26th September 1994: 19 Criminal Law Journal 7 at 8

[12] The Queen v Glennon (1992) 173 CLR 592

[13] Hinch v Attorney-General (Vic) (1987) 164 CLR 15

Brennan J. (as he then was) encapsulated the opinion of the majority of the Court when he held:

> *"that the risk of a juror's knowing of the respondent's 1978 conviction was outweighed by the interests of the community in ensuring that a prosecution.....was pursued, provided, of course, that the trial Judge took all appropriate steps available to him to secure a fair trial."*[14]

Brennan J. commented on the phenomena of certain media personalities perpetrating an image as informers of the public and becoming moulders of public opinion, and who do not appear to be restrained by the need to allow a fair trial for a person charged with crimes that have attracted public attention. A punishable contempt of Court does not require a trial to be aborted. Were it to be otherwise, the more shocking the crime coupled with attendant publicity, would result in notorious accused going untried and unpunished. Trial by media would supersede trial according to law.

What should a trial Judge do when an accused is faced with adverse media publicity? The trial Judge, in conformity with the High Court's directions, has powers to adjourn the trial until the influence of prejudicial publicity subsides, is required to direct the jury that their verdict must be based on the evidence given before them and that they must disregard knowledge otherwise acquired.

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[14] Ibid at 617

In this way, the tension between the rights of the accused and public are to be resolved to ensure as fair a trial as is possible.

THE RIGHT TO COUNSEL

In Dietrich[15] , the High Court held that in the absence of exceptional circumstances, a Judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault of his or her own, is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available. If the application is refused and, by reason of the lack of representation, the trial is not fair, a conviction must be quashed by an appellate Court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial. This case has resulted in much judicial, academic and media comment.

All members of the Court were united in their view that competent legal representation in serious criminal cases was highly desirable. It was also acknowledged that the assistance which trial Judges give to unrepresented accused provides no substitute for representation by competent Counsel. All members of the Court concluded that there was no absolute right to Counsel in the common law of Australia. However,

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[15] Dietrich v The Queen (1992) 177 CLR 292

the advantages of representation by Counsel were recognised with all members of the Court acknowledging that it is in the best interests not only of the accused but also of the administration of justice that an accused be represented by competent Counsel:

> *"An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as Counsel for the Crown. The hallowed response that, in cases where the accused is unrepresented, the Judge becomes Counsel for him or her, extending a "helping hand" to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial Judge and a defence Counsel have such different functions that any attempt by the Judge to fulfil the role of the latter is bound to cause problems."*[16]

It is those disadvantages which form the basis of the unfairness and therefore the rationale behind the High Court's decision. The development of legal aid schemes of assistance through the establishment of Legal Aid Commissions in every State and Territory of Australia over the past two decades has established the environment where the community has an expectation that indigency should not cause unfairness in the criminal justice system.

The majority finding that the desirability of an accused charged with a serious offence being represented is so great that a trial should proceed

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[16] Ibid at 302 per Mason C.J. and McHugh J.

without representation in exceptional cases only, is a reflection of the Court's appreciation of current community perceptions or standards. While the common law insists that there be no conviction without a fair trial according to law, the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances. This was recognised in the judgments of the majority of the Court. [17]

The formulation by the High Court of the approach to be adopted by a trial Judge contains a number of aspects which remain to be clarified by subsequent decisions of Courts of Appeal or the High Court. These aspects include: What is the meaning of "*serious offence*"?; Does legal representation have to be competent?; What are the parameters of *"exceptional circumstances"* in which legal representation is not necessary"?; What is the definition of *"indigent"*?; Is legal representation necessary in committal proceedings, sentencing proceedings and appeals?

Some of these questions have already been answered, although perhaps tentatively. In Cannellis[18], the High Court unanimously upheld an appeal from a decision by the Court of Appeal of New South Wales

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[17] Ibid at 328 per Deane J., particularly.
[18] New South Wales v Cannellis (1994) 124 ALR 513

that representation should be provided to important witnesses to a Royal Commission inquiring into the guilt of a prisoner convicted of murder. It was recognised that there were reasons for thinking that the prisoner would seek to attribute responsibility for the murder to those witnesses. The New South Wales Court of Appeal considered that without proper legal representation of each witness a breach of the legal requirements of procedural fairness would occur. The High Court held that the principle in Dietrich has nothing at all to say about the protection of the interests of a witness at an inquiry and neither the decision nor the reasoning in Dietrich supported the view that the grant of a stay so as to ensure the securing of legal representation for a witness at an inquiry forms part of the requirements of procedural fairness applicable to an inquiry. The suggested extension of the Dietrich principle was rejected on the basis that the content of the rules of procedural fairness should not extend to the provision of legal representation or the grant of a stay to ensure the provision of such representation at an inquiry.

In Fuller [19] the High Court refused to grant special leave to appeal from a decision of the Supreme Court of South Australia which held that Dietrich had no application in committal proceedings.

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[19] Unreported, High Court of Australia Special Leave Application, Adelaide, 26th August 1994

JURY EXHORTATIONS

In Black [20], the High Court considered the appropriate direction to be given to a jury by a trial Judge if it appears that the jury is encountering difficulty in reaching a verdict.

The Appellant claimed that the trial Judge's exhortation to the jury to reach a verdict was erroneous in that it infringed the fundamental rule that the jury must be free to deliberate without any form of pressure. The High Court upheld the complaint and took the unusual step of formulating a model direction. The Court held that it was quite proper to remind the jurors that they should listen to each other's views, weigh them objectively and that minds can be changed if honestly persuaded. However, it was held to be improper to refer to the inconvenience and expense that would be incurred if a verdict could not be reached, to say that there should be a *"give and take"* adjustment or refer to collective duty or responsibility.

This case reflects the resolution of a tension that arises at a particularly sensitive time of the trial between the public interests in securing finality of the trial process and the conviction of an accused who has committed a criminal offence and the right of an accused to a fair trial which must

[20] Black v The Queen (1993) 179 CLR 44

include the expectation that a jury of peers will consider its verdict free of any perceived pressure.

ABUSE OF PROCESS

Arguably the most significant development in the concept of the fair trial is the confirmation of the jurisdiction to grant a permanent stay of a prosecution on the basis of abuse of process, where as a result of delay or some other cause, the accused will not have a fair trial.

Barton[21] and Jago[22] are authorities for the proposition that Australian superior Courts have inherent jurisdiction to stay proceedings which are an abuse of process. An abuse of process occurs when the process of the Court is used for a purpose which it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve.[23]

If a permanent stay is sought to prevent the accused from being subjected to an unfair trial, a Court will only grant a stay if it is satisfied that an unfair trial will result unless the prosecution is stayed. Therefore, the Court must be satisfied that there are no other available means of achieving a fair trial. An example of such means would be directions to a

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[21] Barton v The Queen (1980) 147 CLR 75
[22] Jago v District Court (NSW) (1989) 168 CLR 23
[23] Ibid at 47

jury by a trial Judge. These means generally would apply in cases of adverse pre-trial media publicity, for example.

A permanent stay, however, may be sought to stop a prosecution which has been instituted and maintained for an improper purpose. In such a case, the necessity to satisfy a Court that an unfair trial will result if a stay is not granted, may not be required.[24]

Whatever be the grounds for the application, the burden upon the accused of satisfying the Court of the potentiality of abuse is substantial. Successful applications are few, although there is no doubt that in appropriate cases the exercise of this jurisdiction has had a beneficial inpact upon the administration of the criminal justice system.

In the context of criminal trials, the jurisdiction to grant a permanent stay is consistent with the resolution of the tension between the public's interest in bringing an accused to trial and the right of an accused to a fair trial. The public interest requires that the dignity of the judicial system and the integrity of the administration of criminal justice be maintained. This is highlighted when the focus is on any alleged misuse of the Court process by those responsible for law enforcement. If the

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[24] Williams v Spautz (1992) 174 CLR 509 at 519 per Mason C.J., Dawson, Toohey and McHugh JJ

continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice, with resultant erosion of public confidence, an abuse of process will be constituted.[25]

As Mason C.J. (as he then was) said in Jago:

> *".....the power to prevent an abuse of process.....is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that, so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a Court decides whether a criminal trial should proceed."*[26]

CONCLUSION

Obviously important questions still remain to be resolved in relation to the concept of the fair trial. We have been very fortunate that the High Court has acknowledged judicial creativity as a legitimate technique for the development of the common law. The acknowledgment by the High Court that the content of the requirement of fairness may vary or change with changing social conditions, and that what may have been said by the Court in the past cannot conclusively determine the content of that requirement for the present or the future, is a refreshing development in

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[25] Moevao v Department of Labour [1980] 1 NZLR 464 at 482 per Richardson J.
[26] Jago v District Court (NSW) (1989) 168 CLR 23 at 30

jurisprudence. Indeed the approach of the majority of the Court in Dietrich illustrates the application of this principle.

The scope of the concept of the fair trial is broad. In Dietrich, Gaudron J. gave a number of examples of situations which could lead to a conviction being overturned: lack of provision of an interpreter; failure by a trial Judge to counteract adverse pre-trial media publicity; and failure to change a trial venue. [27]

It is perhaps impossible to list exhaustively the circumstances which might generate unfairness. In Dietrich, the Court recognised that it would need to accommodate new situations as they arose. Deane J. indicated that this would be done in two ways, firstly by having regard to the touchstone of fairness, by *"the staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices",*[28] *and secondly,* where those processes are inadequate an element of subjectivity will be required:

> *"It is in such a case that direct reference will necessarily be made to the underlying notion of fairness and that subjective values and perceptions may intrude into the judicial process".*[29]

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[27] (1992) 177 CLR 292 at 363
[28] Ibid at 329
[29] Ibid

We have witnessed an interesting, if not exciting, period in Australia in the development of the concept of the fair trial. It is likely that the High Court will have much more to say on this subject in the foreseeable future and that our substantial interest, as criminal lawyers, will be maintained. [30]

[30] The foundation (if not inspiration) for a number of the propositions upon which this paper is based is contained in the reproduction of the keynote address given by Sir Anthony Mason to the Fifth International Criminal Law Congress, Sydney, on 26th September 1994: "Fair Trial": (1995) 19 Criminal Law Journal 7. Further source material was obtained from the article by George Zdenkowski: "Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel?": (1994) 18 Criminal Law Journal 135