

Judge Alone Trials in NSW

Practical Considerations

History¹

In 1990² the *Criminal Procedure Act*, 1986 (NSW) (“the Act”) was amended to allow for a trial by a Judge alone, in state matters³, provided that an accused requested that course and the prosecution consented. There was no mechanism contained in that legislation for a court to intervene if there was disagreement between the parties.

In the years immediately following that amendment the DPP consented as a matter of course, to an accused’s application unless there was any suggestion of Judge shopping. In 1995, the Director implemented a new policy that each case would be determined by Crown Prosecutors and Trial Advocates on a case by case basis. The delegation of this decision to the individual advocate running the matter had the effect that Crowns invariably refused to consent and there was no avenue for an accused to challenge that decision. Many of the matters in which the Crown has agreed to Judge alone trials involved issues of fitness and mental health defences on which the experts agreed.

After convening an enquiry, the NSW Legislative Council Standing Committee on Law and Justice published a report in November 2010 in which they proposed a model where an accused could apply to a court for an order for Judge alone where a Crown opposed the making of such an order. The proposal was adopted and the Act amended with effect from 14 January 2011. Additionally, a court is empowered to make an order for a Judge alone trial in the absence of an accused’s consent in

¹ Much of the historical material is obtained from a paper by Mark Ierace SC “Trials in NSW by Judge Alone: Recent Legislative Changes” which was presented to the AIJA Conference 9/9/11 and which is available on the Public Defenders website.

<http://www.publicdefenders.nsw.gov.au/Documents/Judgealonetrialsrecentlegislativechanges.pdf>

² The amendments commenced on 17/3/1991.

³ Section 80 of the Constitution requires all Commonwealth matters proceeding on Indictment must be held with a jury. *Brown v R* (1986) 160 CLR 171 by 3-2 majority.

certain restricted circumstances, involving jury, witness or judicial officer tampering. These provisions only apply where there is no other way to mitigate the risk⁴.

Other Australian Jurisdictions

South Australia have had provisions for Judge alone trials since 1984. The *Juries Act* 1927 SA provides that a trial will be by a Judge alone provided that an accused so requests and that prior to so doing has sought and obtained legal advice on that issue.⁵ There is no discretion vested in either the prosecution or the court to refuse the election.⁶

The West Australian *Criminal Procedure Act 2004* allows either an accused or a prosecutor to apply for a Judge alone trial, however a court can only grant such an application with the consent of the accused. The application must be made prior to the identity of the Judge being known and will be granted if it is “in the interests of justice”⁷. “Interest of justice” is defined as including the trial length and complexity and whether it is likely that issues such as jury tampering will occur.⁸ The legislation provides that “the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness”.⁹ Once an order is made for a Judge alone trial it is not able to be cancelled after the identity of the trial Judge is known.

The Australian Capital Territory have had provision for Judge alone trials since 1993. A protectionist model was developed which gave priority to the accused’s choice to waive his/her right to a trial by jury. There was no discretion for a prosecutor or court to refuse an application. When the legislation was introduced it was expected that an accused would only elect for a Judge alone trial in limited situations such as complex or lengthy trials or where there was significant pre-trial publicity. A study conducted

⁴ s 132(7) *Criminal Procedure Act*

⁵ s 7(1)(b) and s 7(2)-(3). An accused cannot obtain a Judge alone trial for a “minor indictable offence” in which they have elected to have heard in the District Court or in a joint trial if the co-accused does not consent.

⁶ In 2012 certain amendments were introduced which refer predominately to serious and organised crime. These issues are not dealt with in this paper.

⁷ s 118 *Criminal Procedure Act* WA 2004

⁸ s 118(5).

⁹ s 118(6)

between 2004-2008, revealed that during that period, 56 per cent of matters were proceeding as Judge alone trials.¹⁰ Amendments introduced in 2011 changed the availability of Judge alone trials in the ACT. Whilst still permitting an accused the right to a Judge alone trial if he/she so chooses, certain offences were regarded as “excluded offences” to which an accused had no right to a Judge alone trial. Excluded offences broadly include murder, manslaughter and all sexual offences. The inclusion of these offences as “excluded offences” has attracted criticism as these are precisely the type of offences “likely to give rise to the kinds of issues, which were considered to justify the option of a Judge alone trial such as adverse pre-trial publicity and community prejudice”¹¹

Queensland introduced legislation for Judge alone trials in 2008.¹² This legislation is based on the Western Australian legislation¹³ and largely mirrors those provisions although if “special reasons” exist an application can be brought if the identity of a trial Judge is known.¹⁴

Victoria, Tasmania and Northern Territory have no provisions for a trial by Judge alone and all matters prosecuted on indictment proceed to trial with a jury.

¹⁰ Hanlon F “Trying Serious offences by Judge alone: Towards an understanding of its impact on judicial administration in Australia. [2014] 23 JJA 137

¹¹ Hanlon Op Cit

¹² s 614-615 Criminal Code Qld

¹³ Hanlon Ibid

¹⁴ s 614(3) Criminal Code Qld.

The NSW legislation

132 Orders for trial by Judge alone

- (1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a **trial by judge order**).
- (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.
- (3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.
- (4) If the 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.
- (5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.
- (6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.
- (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 under Division 3 of Part 7 of the Crimes Act 1900 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.

132A Applications for trial by judge alone in criminal proceedings

- (1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.
- (2) An application must not be made in a joint trial unless:
 - (a) all other accused person apply to be tried by a Judge alone, and
 - (b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial.

- (3) An accused person or a prosecutor who applies for an order under section 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury.
- (4) Rules of court may be made with respect to applications under section 132 or this section.

The most comprehensive analysis of these provisions was undertaken by McClellan CJ at CL (as he then was) in *R v Belghar*.¹⁵ In *R v Villalon*¹⁶ Bellew J summarised the principles flowing from *Belghar* in the following way:

In *R v Belghar* [2012] NSWCCA 86; (2012) 217 A Crim R 1 McClellan CJ at CL (as his Honour then was), having undertaken an exhaustive review of the authorities, distilled a number of considerations relevant to an application for trial by Judge alone. Those principles may be summarised as follows:

(i) although s 131 provides for trial by jury "except as otherwise provided", the section does not have the effect of creating a presumption that the trial should be with a jury, thereby casting a burden of proof on an accused person (at [96]; 25);

(ii) although the accused person carries an evidentiary onus the court does not determine where the interests of justice lie by requiring the evidence to rise to a level by which a presumption of trial by jury is displaced. Given that each mode of trial has its particular characteristics, and depending on all of the circumstances relating to the particular case, the court may conclude that the interests of justice are best served by a trial before a judge alone rather than a trial by a jury (at [96]; 25);

(iii) subsection 132(5) acknowledges that when considering where the interests of justice lie, it will be relevant that where the trial involves an issue which may be informed by community standards or expectations the interests of justice may be best served by utilising a jury of laypeople (at [96]; 25);

(iv) the legislation does not require weight to be otherwise given to the fact that, absent an application for a judge-alone trial, the trial will be with a jury as opposed to by a judge alone. The question for the court is whether it considers that it is in the interests of justice to make the order (at [96]; 25);

(v) the subjective views of an accused, and his or her belief that a jury trial may not be fair (as reflected in his or her desire to dispense with a jury) is a relevant factor to consider. However, the fact that an accused person desires a trial by judge alone is not as significant as the reasons for that preference, whether those reasons are rationally justified, and whether they bear upon the question of a fair trial (at [99]; 26 and [102]; 26-27);

¹⁵ [2012] NSWCCA 86

¹⁶ [2013] NSWSC 151 at [20]

(vi) Parliament has made plain by the enactment of s. 132(5) that it would be preferable in the interests of justice that there should be a trial by jury where an alleged offence involves the application of objective community standards (at [100]; 26);

(vii) the granting of an application which is based upon the mere apprehension of prejudice in prospective jurors, and which is not based on evidence or a matter of which the court may take judicial notice, is at odds with the assumption which the common law makes that jurors will understand and obey the instructions of trial judges to bring an impartial mind to bear on their verdict (at [102]; 26-27);

(viii) it is to be assumed that the protections afforded an accused person in the ordinary course of a trial will protect him or her from an unjust result (at [107]; 27-28)”

Section 132(1) allows for an application to be made by either the accused or a prosecutor. If the parties agree upon a Judge alone trial the court has no discretion and must make that order. (s 132(2)). An order cannot be made without the consent of the accused except in very limited circumstances relating to jury safety and tampering and then only if those risks cannot be mitigated in any other way. (s 132(3) and (7)).¹⁷

The prosecution no longer have the power of veto over an application for a Judge alone trial. In the absence of prosecutorial consent a court may make a Judge alone order if it considers it “is in the interests of justice” to do so. (s 132(4)).

As can be seen by s 132A an application for a Judge alone trial cannot be made within 28 days of the trial date without the leave of the court. The mischief said to be behind this section is to prevent the issue of “judge shopping” as was made clear by the Attorney General in the Second Reading Speech of the proposed legislation:

“The new section 132A sets out procedural matters regarding trial by judge orders, including that applications are to be made no less than 28 days before the trial date, except by leave of the court. This is designed to minimise the risk of a party applying for a judge-alone trial on the basis of knowing the identity of the trial judge.”¹⁸

¹⁷ Similar provisions exist in other jurisdictions. See also **R v Richards** and **Bijkerk** [1999] NSWCCA 114 where the CCA upheld a trial Judges’ implied power to make orders relating to the safety of jury members in the face of threats.

¹⁸ *Courts and Crimes Legislation Further Amendment Bill 2010*, which introduced s.132A, the then Attorney General, Mr Hatzistergos, said (Hansard, Legislative Council, 24 November 2010):

There are a number of decisions dealing with the issue of judge shopping¹⁹ and the DPP Guidelines on this issue directs their officers to withhold consent to Judge alone applications if the “principle motivation appears to be judge shopping”.²⁰ Despite this concern s 132A(3) is a curious provision. It would appear that an accused or a prosecutor who successfully argues for a Judge alone trial prior to the identity of the presiding Judge being known can “apply for “ a jury trial after the identity of the trial Judge is announced. The relevant section in the **Criminal Procedure Act** (prior to its amendment) allowed for an accused person to withdraw his/her election at any time prior to the date fixed for trial.²¹ The different wording of the sub section would suggest that an accused no longer has the right to simply withdraw the election and the terms and nature of any hearing of this further application are unclear. It would, however, appear unlikely that a court would force an accused to a trial without a jury against his/her expressed wishes.

Perhaps the most contentious provision of this amendment is ss (5) which provides a non-exhaustive list of matters a court may take into account in determining whether or not to make an order. The provision is not mandatory, however it refers to the fact that “the court may refuse to make an order if it considers that a trial will involve a factual issue that requires the application of objective community standards, including but not limited to an issue of reasonableness, negligence, indecency obscenity or dangerousness”.

In a trial where self-defence is raised it is apparent that the trial will involve a factual issue as to the reasonableness of an accused’s actions which will require an application of community standards. Similarly, in a matter where indecency or obscenity was challenged on behalf of an accused, a court would likely hold that this was a matter better suited for a jury as they better represent objective community standards. The situation is less clear when questions of credibility or of intent of an accused are involved. At first blush it would appear that an accused’s intention would be an entirely subjective consideration which would not require the application of any

¹⁹ See **R v Perry** (1993) 29 NSWLR 589 at 594; **R v Coles** (1993) 31 NSWLR 550 at 552-553; **R v Simmons**; **R v Moore (No. 4)** [2015] NSWSC 259 at [20]-[29].

²⁰ <http://www.odpp.nsw.gov.au/docs/default-source/default-document-library/prosecution-guidelines.pdf?sfvrsn=2>

²¹ s 132(5) An accused person who elects to be tried by the Judge alone may, at any time before the date fixed for the person’s trial, subsequently elect to be tried by a jury.

community standards. As will be discussed below, there is a significant divergence of opinion amongst the authorities as to whether the resolution of these issues involves the application of objective community standards.

The origins of the controversy appear to lay in obiter comments from Heydon J in **AK v State of Western Australia**.²² In discussing this exact phrase in Western Australian legislation His Honour stated:

“Other examples of factual issues requiring the application of “objective community standards” include whether behaviour was “threatening, abusive or insulting”; whether conduct was “dishonest”, a matter to be decided by the jury “according to the ordinary standards of reasonable and honest people”; whether an assault is “indecent”; and whether an accused person had a particular intention. (References omitted).”

The only citation provided by Heydon J for the proposition that “whether an accused person had a particular intention” was an example of a factual issue requiring the application of objective community standards was at note [86] which states:

“[86] Buxton, ‘Some Simple Thoughts on Intention’, [1988] Criminal Law Review 484 at 495: ‘[R]ecourse to shared values and assumptions about the implications of actions and the circumstances in which those actions occur may be a safer guide to culpability than analytical deductions from a generalised verbal definition’.”

Belghar²³ was a case in which the accused was facing a trial on charges of attempted murder and in the alternative, attempt to inflict GBH with intent. Clearly, intent was to be an issue at trial. Mclelland CJ at CL stated:

“100 Where an alleged offence involves objective community standards, the Parliament has made plain that it may be preferable, “in the interests of justice”, that there should be trial by jury. However, where, as in the present case, the trial will not require the application of community standards to resolve any issue, the factors favouring a jury trial are diminished at least by the absence of that factor.”

Sean Lee King²⁴ sought a Judge alone trial for a count of murder. He was alleged to have beaten, kicked and stomped on the deceased. Intent and his ability to form the requisite intent were the issues at trial. In refusing the application Bellew J stated:

²² [2008] HCA 8 at [95]

²³ Op Cit

²⁴ [2013] NSWSC 448

“In the present case, the Crown will submit that the jury would be satisfied beyond reasonable doubt that the accused formed one of the two specific intentions applicable to a charge of murder. In doing so, the Crown will submit to the jury that they should reject the proposition that the accused's level of intoxication was such as to impair his ability to form the requisite intention. The evidence upon which those submissions will be based will not be confined to expert evidence. Leaving aside the content of the telephone conversations (which the Crown will submit exhibit an intention of the part of the accused to kill the deceased) the Crown will also invite the jury to draw inferences from aspects of the accused's behaviour, both before and after the deceased's death, which it will submit are inconsistent with an inability to form the necessary intention.”

52 In determining whether there is an issue which requires the application of an objective community standard, the circumstances of the particular trial must be taken into account. The various matters to which I have referred all combine to form part of the circumstances in which the Crown will submit that the accused killed the deceased, intending to kill her, or intending to inflict grievous bodily harm upon her. Viewed in that way, the circumstances of the case put by the Crown, and the issue of intention in particular, will attract the application of objective community standards in the sense contemplated by Heydon J. In particular, the jury will be asked to have recourse to their shared values about the circumstances in which the accused's actions occurred, as well as the implications of those actions. In my view, the fact that in Belghar the issue was one of intention, and the fact that McClellan CJ at CL observed (at [100]) that such issue did not, in the circumstances of that case, require the application of community standards, does not lead to the conclusion that this will always be the case when an issue of intention is raised.”

Latham J was confronted with the divergence of opinion regarding this issue in **R v Dean**.²⁵ Mr Dean was charged with 11 counts of murder and 8 counts of recklessly inflicting GBH arising from a nursing home fire lit by himself at his place of employment. The issue at trial was whether he foresaw or realised that lighting the fires would probably cause the deaths of the deceased and that he did so regardless of this foresight or realisation. The accused intended to call pharmacological evidence that his abuse of medication precluded him from obtaining the requisite foresight. In refusing the application Latham J stated:

“58 The Crown in King relied upon this aspect of Heydon J's judgment and the Crown relies upon it here. It is right to acknowledge that Justice Heydon's observation in this respect was not endorsed by any other member of that bench and that McClellan CJ at CL accepted that the issue of intention did not involve the application of community standards in the circumstances applying in Belghar. Like Bellew J, I am not persuaded that the issue of intention can never involve the application of objective

²⁵ [2013] NSWSC 661

community standards. I also note that the basis of the decision in *Belghar* was that the trial judge determined the application in the absence of appropriate evidence and without considering whether such prejudice as was found to exist could be neutralised by directions.”

R v Stanley²⁶ was a Crown appeal from a decision to grant a Judge alone order. The trial Judge made the order based on a ground that was not put forward by either party and of which there was no evidence. In relation to the issue of intent and whether that was a fact which required the application of community standards Barr AJ (with the agreement of MacFarlan JA and Campbell J stated:

“55 The relevant question is whether the Crown has proved beyond reasonable doubt that the respondent formed the intent to penetrate in the manner contended for. In answering the question the tribunal of fact will consider evidence of what the respondent said and did at the hospital, including his demeanour, what he told police he had consumed, what the pharmacological experts assumed as fact and their opinions of the capacity of the relevant substances to affect the formation of intent and, if it is available, their opinion whether the respondent did form the necessary intent.

56 The question is a simple one, of a kind of routinely answered by juries....

....

59 I accept that the fact alone that community standards must be applied in the resolution of factual issues does not mandate trial by jury but, as subs (5) makes clear, it is a circumstance in which the jury may be considered to be the superior tribunal of fact.”

Harrison J expressed his concerns about this issue in ***R v Abrahams***.²⁷ In that matter a mother was charged with the murder of her young child. The matter attracted enormous negative publicity and the evidence was said to be graphic concerning the disposal of the body. The accused pleaded guilty to manslaughter but not guilty to murder and the issue at trial was her intention. In dismissing the application on other grounds Harrison J stated:

“75 For my part I find it difficult immediately to accept that cases concerned with the assessment of whether or not a particular individual had formed or retained a particular intent allegedly relating to the commission of some charged act necessarily or even arguably "involve a factual issue that

²⁶ [2013] NSWCCA 124

²⁷ [2013] NSWSC 729

requires the application of objective community standards". The question, for example, of whether or not an act was committed with such force that it bespeaks or evinces a particular intention is undoubtedly a question of fact. The force of the suggestion that there is a corresponding and simultaneous requirement to apply some objective community standard in undertaking the assessment of that factual issue is not obvious to me.....

.....

77 Having regard to the view I have otherwise formed, it is strictly unnecessary to decide the point. I accept cautiously that it could not be said that the issue of intention could never involve the application of objective community standards. It does not, however, appear to me that this is such a case."

Further consideration of this issue occurred in ***R v Simmons, R v Moore (No 4)***.²⁸ In that matter Hamill J noted the controversy concerning whether the question of intent was one which required an application of objective community standards. His Honour specifically referred to the decision of Harrison J in *Abrahams*²⁹ and stated:

"I agree with those observations, particularly those in paragraph [75]. There is a qualitative difference between the application of community standards to questions such as whether an act is obscene, indecent, reasonable or negligent and a factual inquiry as to whether a particular accused formed the necessary intention to constitute a specified criminal offence. Further, if the Parliament was of the view that the issue of intention was one that involved the application of community standards, it would have been very easy to include that issue within the non-exhaustive list of matters identified in sub-s 132(5)."

This issue was further agitated in ***R v McNeil***.³⁰ In that case the accused was charged with the murder of a young man in Kings Cross on New Year's Eve 2014. The matter attracted enormous negative publicity which formed the basis of the Judge alone application. It was not in issue that the accused had hit the deceased and the accused's intention was a major issue at trial. In dealing with the issue of intention in respect to the Judge alone application Johnson J stated:

"90 In my view, the intention issue in this case may be characterised as one involving application of objective community standards: AK v Western Australia at 473 [95]; R v Stanley at [55]-[59]; R v King at 415-416 [48]-[53]; R v Dean at [58]."

²⁸ [2015] NSWSC 259

²⁹ As extracted in FN 28.

³⁰ [2015] NSWSC 357

91 In the present case, the question which arises is whether, if the Crown establishes that the Applicant struck Daniel Christie, whether he did so with an intention to inflict grievous bodily harm. An assessment of this issue will involve an examination of all the evidence bearing upon that question and the drawing of inferences, if the evidence permits to the criminal standard. Directions concerning the drawing of inferences, for the purpose of determining an issue of intention are common directions in criminal trials, including a murder trial.

92 I have no difficulty in characterising an assessment as to intention in a criminal trial such as the present as being a matter falling within s.132(5). I have observed earlier that the absence of the word "intention" in s.132(5) provides limited assistance to the Applicant's argument. The provision is non-exhaustive and, in a context such as this, may readily accommodate an issue of intention.

93 The fact that this issue would fall for consideration by 12 persons as opposed to one person, a Judge, is a factor which operates in favour of the jury being the tribunal of fact in this case."

Given the divergence of opinion amongst Judges of the Supreme Court it appears that there will need to be resolution of the matter in the High Court of Australia.

Practical considerations and tips

Making the Application

As outlined above an application for Judge alone trial should be made more than **28 days prior to the date fixed for trial**. It is desirable that such an application be made prior to the identity of the trial Judge being known.³¹ The application should be made using the appropriate form provided by the Court. (see annexure “A”) and be supported by evidence on affidavit. It is important to consider that an order for Judge alone trial (or a refusal of such an order) is an interlocutory decision which is susceptible to review pursuant to s 5 F of the **Criminal Appeal Act** 1912. As such the evidence before the primary Judge will need to be in the correct form so as to become part of the record.

By way of example, an accused may perceive that he/she is disadvantaged in participating in a jury trial because of extensive facial tattoos. Before the primary Judge the accused will be present and reliance placed upon his/her physical appearance. Unless some efforts are made to record the visual observations of the physical appearance there may be a real difficulty if the matter progresses on appeal on that issue.

Many of the applications for Judge alone trials are as a result of pre-trial publicity. Unfortunately, in the present era this publicity is not restricted to mainstream news organisations but includes material contained on internet sites such as Facebook, Twitter, and Youtube as well as various blog sites to which anyone can contribute. Harrison J in **R v Abrahams**³² stated:

“The uncontested evidence in this case shows that the events giving rise to the charges against the accused and Robert Smith have attracted considerable publicity. That has not been limited to the traditional news media outlets but has also extended to electronic publicity in the form of Internet posts and on-line exchanges. These questionable sources of (so-called) information thrive in circumstances and at a time in our development in which everybody must be taken to have unlimited access to them. They survive beyond the range of any appropriate regulation or monitoring capable of ensuring either their accuracy or their reliability. Their authors remain anonymous and unaccountable: their motives are unknown and

³¹ **R v McNeil** Op Cit at [10]
³² [2013] NSWSC 729 at [52]

often manifestly mischievous or malevolent. Regrettably in very many instances the ability of the authors of these questionable publications to express rational views about anything at all cannot be known or assessed and certainly cannot ever be assumed. The material referred to already in this case only serves to confirm and reinforce these concerns.”

The fact that this information exists in electronic form raises a real difficulty in having that evidence before the court during the application. Previously an affidavit annexing the various newspaper reports was sufficient. Presently however, much of the material is in video form on the internet. It may not be possible to reduce that material to DVD which can be tendered on an application. The ever changing electronic landscape will require the playing in court of many of the examples of this offending material. Depending upon the amount of publicity this may be a very time consuming process. Courts previously have delayed a trial in an effort to allow the publicity to lose its focus. That was a suitable remedy in the pre internet world. The issue is well summarised by Burd and Horan.³³

“The challenges caused by pre trial publicity are not new but they have been exacerbated by the rise and the immediacy of the internet.”

In the electronic age articles, blogs and comments are able to be replicated with ease. A simple Google search upon a topic may reveal thousands (or even hundreds of thousands) of related articles. A Google search of the words “Daniel Christie murder” conducted on 1/7/15 returned 858,000 hits in 0.27 of a second. It is noted that this was conducted more than eighteen months after the arrest of the accused. In the present environment material no longer fades away. It can remain dormant for a period and then continue to further expand as the matter progresses through the criminal justice system.

There is a real issue in how a practitioner deals with matters of extreme publicity in the present environment. The publicity concerning a particular matter is likely to be at its highest around the time of the arrest of an accused and when they are in the early stages of the Local Court. As referred to above in this electronic age entries on the internet are able to be replicated many many times. In appropriate cases consideration should be given to an application for a suppression order pursuant to the **Court Suppression and Non-publication Orders Act 2010 NSW**. (**The**

³³ Burd and Horan Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world wide web? (2012)36 Crim LJ 103 at 105

Suppression Act.) That Act provides that a suppression order can be made if it is necessary to prevent prejudice to the proper administration of justice.³⁴ The Act applies to Local, Children’s and District Courts.³⁵ A suppression order at an early stage will prevent the obvious disadvantage and prejudice occasioned to an accused by endless publicity and comment in a high profile matter.

Although not at an early stage and not in the Local Court a recent example of these powers being utilised can be found the decision **R v McNeil**.³⁶ In that Judgement Johnson J stated:

105 As foreshadowed earlier in this judgment, I am satisfied, for the purpose of s.8(1)(a) Court Suppression and Non-Publication Orders Act 2010, that an order is necessary to prevent prejudice to the proper administration of justice with that order being to the effect that there be no publication of the listing of the Applicant’s trial, nor any publication of the name of the Applicant, with those orders to remain in place until such time as a different order is made by the trial Judge.

106 Accordingly, I make the following orders:

- 1. the Applicant’s Notice of Motion filed 30 January 2015 is dismissed;*
- 2. I order that there be no publication of the listing of the Applicant’s trial;*
- 3. I order that there be no publication of the name of the Applicant, with the trial of the Applicant to be described in any court list as “R v AA”;*
- 4. Orders (b) and (c) above are to remain in force until such time as a different order is made by the trial Judge;*
- 5. I order that there be no publication of this judgment or of the evidence and submissions made on the application for Judge-alone trial, until such further order of the Court as may be made after completion of the trial.*

Although the powers under the **Suppression Act** appear wide it is anticipated that suppression orders will not be easily obtained in the matters in which they are needed. High profile or notorious crimes sell newspapers and provide television ratings. Profits are affected by media outlets being able to publish and republish matters in which they consider the public is interested. In high profile matters it can be expected that

³⁴ s 8 **Court Suppression and Non-publication Orders Act** 2010 NSW

³⁵ In addition to other Courts and Tribunals

³⁶ Op Cit.

media outlets will be strident in their defence of “open justice”. Heavy reliance can be expected to be placed upon s 6 of the **Suppression Act** which is in the following terms;

“Section 6. In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.”

The Differing Nature of Trials

A trial heard by a Judge alone has a very real prospect of being a different creature to that heard by a jury. Contained in the **Evidence Act** 1995 are several examples of instances where the court has the ability to refuse to admit evidence based on the possibility of unfair prejudice. Section 137 is in the following terms:

“In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.”

It is noted that the section is in mandatory terms. “[Unfair prejudice] may arise in a variety of ways, a typical example being where it may lead a jury to adopt an illegitimate form of reasoning, or to give the evidence undue weight. However, insofar as any prejudice flows from the legitimate use of evidence it provides no ground for the exercise of the duty or discretion arising under sections 135-137.”³⁷

In 1999, the Law Reform Commission WA released a Consultation Paper in which one point of discussion was the development of differing rules of admissibility for jury trials and Judge alone trials. Ultimately the final report rejected the proposal stating that the rules developed for jury trials “embody significant guarantees for an accused. Thus wholesale abolition may have detrimental effect on the rights of an accused...”³⁸ In practice however it is suggested that these provisions have less applicability once a trial is conducted by a Judge alone.

“The principle that a judge should exclude evidence, the prejudicial effect of which outweighs its probative force, can have very little part to play in a trial by Judge alone. The rule is designed to protect juries from exposure to prejudicial material which has but little probative force. The learned judge in this case was quite able to discard any prejudicial effect of evidence of this

³⁷ **R v Yates** [2002]NSWCCA 520 at [252]

³⁸ Hanlon Op Cit.

kind and to focus on such probative weight as he considered that it properly bore. In my opinion, therefore, the evidence was properly admitted.”³⁹

A Judge will rely on his/her training and experience and is less likely to “misuse” the evidence. However, it is argued that there may be circumstances where a Judge reacts, quite likely in an unconscious manner, to overtly prejudicial material. Because of the likely unconscious nature of the action it is unlikely to figure in the Judge’s written reasons and consequently unlikely to be able to be remedied on appeal. It is stressed that this concern is not that a judicial officer will deliberately behave in this manner but rather that there is a potential for an unconscious use of this information in the functions of a busy Supreme or District Court Judge.

It should not be thought that this difficulty will be restricted to a small number of evidentiary matters. Occurrences of separate trials and severance of counts will also be significantly reduced, thereby significantly adding to the burden of the judicial officer. In ***Arthurs v Western Australia***⁴⁰ Martin CJ expressed the view:

“89. Despite their training and experience, it would, I think, be unwise to assume that Judges are any less vulnerable to human emotions and frailty than any other member of the community. However, it is in this context that an obligation to provide reasons appears to me to be of particular significance.”

His Honour went on to indicate that the requirement to provide reasons was an appropriate safeguard in this regard. It is accepted that this safeguard exists however only if the issue makes its way into the final judgement. A judicial officer sitting alone will bear the total responsibility and pressure of the entire trial. If more traditionally inadmissible evidence continues to be placed before that Judge, the burden will become even greater.

³⁹ ***R v Abrahamson*** (1994)63 SASR 139

⁴⁰ [2007] WASC 182 at [89]

Acquittal Rates

In a paper given in 2011 to the University of NSW Faculty Of Law, McClellan CJ at CL⁴¹ expressed surprise about defence lawyers opposing removal of the jury system as “the statistics show that Judge alone trials result in significantly higher rates of acquittals than jury trials.” Some commentators similarly conclude that Judges sitting alone are more liable to acquit than juries⁴². Perhaps one possible reason for Judges returning a higher acquittal rate is the significant number of “mental health” matters in which the medical practitioners agree. These are matters in which there is likely to be agreement between the parties and which have proceeded, even prior to the 2011 amendments, as Judge alone trials.

Annexure B to this paper is a summary of statistics obtained from NSW Bureau of Crime Statistics and Research in relation to acquittal rates of jury trials and Judge alone trials for the period 1993-2014. These figures appear to casts some doubts on the assertions that Judge alone trials produce a higher acquittal rate than jury trials in recent years particularly after 2009.

In 1993, 85 trials were heard in NSW District and Supreme Courts by a Judge alone and 1,213 were heard with a jury. In these Judge alone trials the acquittal rate was 62.4 per cent as opposed to 52.3 per cent with a jury. In 1999, there were 841 trials with 67.3 per cent of Judge alone trials resulting in acquittals on all charges whilst with a jury that figure was 48.2 per cent. In 2005, of 629 trials there were 29 Judge alone trials. The acquittal rates in that year were 58.6 per cent for a Judge and 40.7 per cent for a jury. This trend continued until 2007 when the figures were of 497 trials (35 by Judge alone) with a Judge alone acquittal rate of 57.1 per cent as compared with the jury acquittal rate of only 41.4 per cent.

Since 2009, there appears to have been a change in these outcomes. In 2009, there were 575 trials in the higher jurisdictions, 52 of which were by a Judge alone. The acquittal rate for a jury was 43.8 per cent compared to Judge alone rate of 17.3 per cent. These raw figures provide no answer for such a dramatic change. Since that

⁴¹ McClellan CJ at CL. “The Future Role of the Judge – Umpire, Manager, Mediator or Service Provider. 1 December 2011

⁴² Hanlon Op Cit.

time the statistics reflect that jury trials show a higher acquittal rate than a trial by a Judge, albeit by a very small percentage.

	Total trials	Judge Alone	Acquittal Rate-Judge	Acquittal Rate Jury
2009	575	53	17.3%	43.8%
2010	545	55	41.8%	43.5%
2011	500	83	43.4%	44.6%
2012	502	95	33.7%	41%
2013	546	112	25%	35.3%
2014	378	93	33.3%	35.2%
Jan-Sept				

Confidence and the Finality of the Jury System

A trial before a jury necessarily involves community members. The community is therefore vested in the result and to that degree has some ownership of it. It is argued that there is a greater acceptance in the community of a verdict delivered by a jury as opposed to a Judge sitting alone. Regardless of the truth of the allegation, a Judge's verdict is always susceptible to sensationalist media (mis)reporting about the legal system being out of touch with the "average person". Deliberations of a jury are private and not able to be explored. To that extent there is a degree of finality in the verdict of a jury. There is no appeal against an acquittal, however perverse it may be, in a jury trial.

A Judge sitting alone in a trial is required to provide reasons which must include the principles of law applied by the Judge and the findings of fact upon which the Judge relied. In setting out these reasons, the Judge is required to expose the reasoning process behind the decision, linking the law and the facts which justifies the verdict

reached.⁴³ An appeal court is therefore able to evaluate the reasoning behind a Judge's verdict in a way which is prohibited in respect of a jury. Arguably this process will have the effect of increasing the number of appeals against the verdict of a Judge. A poorly phrased summary of a particular area or the unintentional failure to mention an issue may well lead to a decision being set aside and the matter returned to trial. Given the increase in trials by Judge alone it is suggested that this may be an area appropriate for further research.

The Future

In 2011, Mark Lerace SC expressed concern that the amendments made at that time, although appropriate and borne of common sense, "...may materialise into a path leading, in whole or part, to the loss of an accused's *right* to a jury trial."⁴⁴ Those concerns remain. Shortly after those comments McClellan CJ at CL gave an address to the University of New South Wales on changes in the judicial landscape in the next 40 years. His Honour raised an issue which he believed needed resolution in that time of whether "we shall continue to use lay juries in criminal trials".⁴⁵ The view expressed in that discussion was that our community may be better served to depart from the jury system and replace the jury with "a Judge together with two or more assessors or a sit a panel of Judges"⁴⁶

It is accepted that the jury system has some difficulty in dealing with certain issues that arise in the modern day and specific circumstances will dictate that at times an accused's interests may be better served by having the matter determined by a Judge alone. Those cases however are in the minority and should never be allowed to be the pathway to a future in which the jury trial is anything other than the norm.

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25/8/15

⁴³ *Fleming v The Queen* (1998) 197 CLR 250

⁴⁴ *Ibid* at Fn 1

⁴⁵ *Op Cit*

⁴⁶ *Ibid*

Appendix A

Appendix B

Year	Supreme Court- Judge alone Trial	Supreme Court- Jury Trial	District Court- Judge alone	District Court- Jury Trial	Total- Judge alone Trial	Total- Jury Trial	Percentage of Acquittals- Judge alone Trial	Percentage of Acquittals- Jury Trial
1993	2	59	83	1,154	85	1,213	62.4%	52.3%
1994	5	48	81	978	86	1,026	62.8%	47.1%
1995	1	42	33	848	34	890	50.0%	52.8%
1996	0	37	28	857	28	894	67.9%	52.5%
1997	0	48	16	858	16	906	50.0%	47.9%
1998	3	60	37	874	40	934	67.5%	52.5%
1999	1	49	48	792	49	841	67.3%	48.2%
2000	12	58	27	729	39	787	59.0%	50.2%
2001	5	60	34	694	39	754	79.5%	48.3%
2002	9	48	33	581	42	629	71.4%	41.0%
2003	3	55	23	586	26	641	57.7%	39.9%
2004	5	63	30	536	35	599	60.0%	43.7%
2005	5	53	24	576	29	629	58.6%	40.7%
2006	10	50	27	497	37	547	59.5%	37.8%
2007	1	38	34	459	35	497	57.1%	41.4%
2009	10	32	42	543	52	575	17.3%	43.8%
2010	8	45	47	500	55	545	41.8%	43.5%
2011	12	27	71	473	83	500	43.4%	44.6%
2012	6	67	89	435	95	502	33.7%	41.0%
2013	5	50	107	496	112	546	25.0%	35.3%
Jan-Sep 2014	9	22	84	356	93	378	33.3%	35.2%
Total	112	1,011	998	13,822	1,110	14,833	49.5%	46.1%