
New South Wales
Supreme Court

| | |
|---|---|
| **CITATION :** | **Wilson v GIO General Ltd [2007] NSWSC 1445** |
| | |
| **HEARING DATE(S) :** | 3 December 2007 |
| **JUDGMENT DATE :** | 14 December 2007 |
| | |
| **JURISDICTION :** | Common Law |
| | |
| **JUDGMENT OF :** | Associate Justice Harrison |
| | |
| **DECISION :** | (1) The summons filed 20 August is dismissed; (2) The plaintiff is to pay the defendants' costs as agreed or assessed. |
| | |

| | |
|---|---|
| **CATCHWORDS :** | Summary dismissal - appeal - Local Court - jury trials in civil matters |
| | |
| **LEGISLATION CITED :** | Civil Procedure Act 2005<br>Courts Legislation Amendment (Civil Juries) Act 2001<br>Courts Legislation (Civil Procedure) Amendment Bill<br>Juries Act 1927 (SA)<br>Jury Act 1912 Law Reform (Miscellaneous Provisions) Act 1965<br>New South Wales Act 1823 (4 Geo IVC 96)<br>Supreme Court Act 1970<br>Supreme Court (Amendment) Act 1987<br>Uniform Civil Procedure Rules 2005 |
| | |

| | |
|---|---|
| **CASES CITED :** | Apex Pallet Hire Pty Limited v Brambles Holdings Limited (4 April 1988, unreported)<br>Caledonian Collieries Limited v Fenwick (1959) 76 WN (NSW) 482<br>General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125<br>Gerlach v Clifton Bricks Pty Ltd [2002] HCA 22<br>O'Brien v Commissioner for Railways (1959 unreported)<br>Pambula District Hospital v Herriman (1988) 14 NSWLR 387<br>Peck v Email Ltd (1987) 8 NSWLR 430<br>Smoje v Trend Laboratories Pty Limited (Cole J, 27 May 1988, unreported; 125 NSW 3)<br>W Dazenko Structural and General Engineering Pty Limited v Fraser Hrones and Co Limited (unreported, NSWCA 751/88, 5 October 1990) |
| | |
| **PARTIES :** | John Wilson (Plaintiff)<br>GIO General Ltd (First Defendant)<br>Local Court of New South Wales (Second Defendant)<br>Parliament of New South Wales (Third Defendant)<br>Sheriff of New South Wales (Fourth Defendant)<br>State of New South Wales (Fifth Defendant) |
| | |
| **FILE NUMBER(S) :** | **SC** 14247/07 |
| | |
| **COUNSEL :** | Mr M C Koyuncu (First Defendant)<br>Mr R H Weinstein (First to Fifth Defendants) |
| | |
| **SOLICITORS :** | Mason Black Lawyers (First Defendant)<br>Crown Solicitor (First to Fifth Defendants)<br>Mr J Wilson (Plaintiff) |
| | |

| | |
|---|---|
| **LOWER COURT JURISDICTION :** | Local Court |
| | |
| **LOWER COURT FILE NUMBER(S) :** | 90557/06 |
| | |
| **LOWER COURT JUDICIAL OFFICER :** | Culver LCM |
| | |

| | |
|---|---|
| **LOWER COURT DATE OF DECISION :** | 8 August 2007 |

**IN THE SUPREME COURT**
**OF NEW SOUTH WALES**
**COMMON LAW DIVISION**

**ASSOCIATE JUSTICE HARRISON**

**FRIDAY, 14 DECEMBER 2007**

**14247/2007 - JOHN WILSON v GIO GENERAL LTD & 4 ORS**

**JUDGMENT (Summary dismissal, appeal, Local Court – jury trials in civil matters)**

1 **HER HONOUR**: By summons filed 20 August 2007, the plaintiff seeks to appeal the decision of her Honour Magistrate Culver LCM made on 8 August 2007 in matter no 90557/06 in the Small Claims Division of the Local Court, North Sydney.

2 By notices of motion filed 11 September 2007, the first to fifth defendants seek orders firstly, that the proceedings be dismissed generally pursuant to Rule 13.4 of the *Uniform Civil Procedure Rules* 2005. Alternatively, the first defendant seeks security of costs on an indemnity basis. On 18 September 2007, the plaintiff filed a notice of contention.

3 The plaintiff is John Wilson. The first defendant is GIO General Limited. The second defendant is the Local Court of New South Wales. The third defendant is the Parliament of New South Wales. The fourth defendant is the Sheriff of New South Wales and the fifth defendant is the State of New South Wales.

4 The first defendant relied on the affidavit of Ozenc Koyunsu sworn 10 September 2007. At the outset, Mr Wilson informed the court that it had no authority to hear these motions and that his matter could only be heard by a jury.

**Background**

5 On 29 November 2006, the defendant filed a statement of claim seeking payment of workers compensation insurance cover in the sum of $563.93 plus costs.

6 On 22 February 2007, the plaintiff filed a notice of motion seeking the entry of default judgment. On 22 February 2007, judgment was entered in the Local Court, Small Claims Division pursuant to s 135(2) of the *Civil Procedure Act* 2005 in the sum of $1,383.61.

7 On 19 March 2007 a writ for levy of property issued in the sum of

$1,389.60.

8 On 16 May 2007, the Sheriff issued a notice of non levy which advised that a levy had not been made but Mr Wilson refused entry to the officer and videotaped them while they were making enquiries. Mr Wilson did not reside at the premises. The address given was a dental surgery and the officers were asked to leave. The writ was filed pending further instruction.

9 On 27 June 2007, the plaintiff filed a notice of motion seeking pursuant to s 135(2)(a) of the *Civil Procedure Act*, that the Court authorise the Sheriff to enter the premises of Mr Wilson for the purposes of executing the writ of levy of property.

10 On 8 August 2007 the motion came on for hearing at the Local Court North Sydney before Her Honour Magistrate Culver. Mr Koyuncu appeared for the plaintiff and Mr Wilson appeared unrepresented.

11 The Magistrate at t 9.10 stated:

> "I furthermore am of the view that there is a valid appointment of this court to determine a civil claims matter as the legislation makes it quite clear that this is a matter squarely within the jurisdiction of the local court principally by virtue of the amount in dispute. The judgment debt appears to have been properly entered."

12 On 16 August 2007, the Sheriff issued a notice of seizure which notified Mr Wilson that the Sheriff was authorised to seize a Toyota Rav 4 White 4WD.

**The summons**

13 By summons filed 20 August 2007, the plaintiff seeks:

> "(i) RELIEF by a Jury adjudging that the Judgment made in the LOCAL COURT OF NSW at North Sydney on Wednesday the 8th of August, 2007, in the matter of GIO GENERAL LIMITED -v- John Wilson, File No 90557/06 is not to be drawn into consequence or example; that the Judgment is illegal and void; and that any person carrying out the Orders of that illegal Judgment is guilty of Trespass.
> (ii) RELIEF by a Jury adjudging that the Right to Trial by Jury is an inalienable Legal Right.
> (iii) RELIEF by a Jury adjudging that challenging the Jurisdiction of the Court is an essential and indispensable Legal Procedure.
> (iv) RELIEF by a Jury declaring that the LOCAL COURT OF NWS, in regard to doings and proceedings mentioned above in paragraph (i), was a "KANGAROO COURT" in that the Court acted unfairly, dishonestly, disregarded legal rights and disregarded legal procedures.
> (v) RELIEF by a Jury adjudging that the PARLIAMENT OF NSW has wrongly passed legislation which the woman acting as a Magistrate in the LOCAL COURT OF NSW at North Sydney on Wednesday the 8th of August, 2007, has taken away the Right to Trial by Jury and that, as Lord Edward Coke once said, "Common law doth control Act of Parliament and adjudge them when against common right to be void."
> (vi) RELIEF by a Jury adjudging that the Crown, ie: the STATE OF NEW SOUTH WALES, is vicariously liable for Civil Wrong committed by a woman, ie: Mrs Jane Colver who was acting as a Magistrate in the LOCAL COURT OF NSW at North Sydney on the occasion mentioned in paragraph above, under section 8 of the *Law Reform (Vicarious) Liability Act*

1983 which states: “(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance by the person of a function (including an independent function)…”, and that the Crown may be sued under the *Crown Proceedings Act* 1988.
(vii) RELIEF by a Jury awarding me, the Plaintiff, damages of $150AUD million (one hundred and fifty mission dollars) which are indeed “exemplary” because they are “to punish oppressive, arbitrary or unconstitutional acts by government servants” by the denial of my Right (“mon droit”), the injustice caused, time spent in prison, damage to my reputation, and distress caused to my family and to myself.”

**The history of juries in civil matters**

14 The jury system is frequently held to be one of the most important foundations of our democratic way of life. It has been called the "bulwark of our society". It has also been said that to take away a person's right to a jury would be against the express language of the Magna Carta and that the right to a jury is one of the significant causes of our political stability.

15 As to the latter, Lord Devlin writing extra-judicially, described the importance of the jury as follows:

> "In a democracy law is made by the will of the people and obedience is given to it not primarily out of fear but from goodwill. But just as important as the frame of the law is its application. The jury is the means by which the people play a direct part in the application of the law. It is a contributory part. The interrelation between Judge and jury, slowly and carefully worried out over several hundred years, secures that the verdict will not be demagogic; it will not be the simply uninhibited popular reaction. But is also secures that the law will not be applied in a way that affronts the conscience of the common man. Constitutionally it is an invaluable achievement that popular consent should be at the root not only of the making but also of the application of the law. *It is one of the significant causes of our political stability* ." [Emphasis added.] – McHugh JA “Jurors’ Deliberations, Jury Secrecy and Law of Contempt”, in *The Jury Under Attack* (1988) M Findlay & P D Duff

**Use of civil juries in Australia**

16 With the exception of South Australia, each Australian state, territory and federal jurisdiction has the ability to hear civil matters with a jury. In 2000, South Australia amended s 5 of the *Juries Act* 1927 (SA) to completely abolish civil trials before a jury.

**History of Juries in New South Wales**

17 According to McHugh J we owe trial by jury to the Norman Conquest. Originally, the jury was a body of men, drawn from a particular locality, sworn to give a true answer (*vere dictum*, verdict) to some question of interest to the Crown. By the end of the seventeenth century the role of the juror had moved from witness to that of an adjudicator (Juror Deliberations, Jury Secrecy, Public Policy and the Law of Contempt).

18 A distinction must be drawn between the Supreme Court of New South Wales and the old courts at Westminster. The jury played a traditional part in the trial of actions at law in England, but the jury system was not imported into New South Wales on the first settlement – see *Caledonian*

*Collieries Limited v Fenwick* (1959) 76 WN (NSW) 482 at 491; Windeyer *Lectures of Legal History* (1938) at 60-61. Juries were introduced by statute.

19 In New South Wales, the earliest court for the trial of civil actions, the Civil Court, which first convened in July 1788, did not provide for jury trial. Nor did the Supreme Court established by the Charter of Justice of 1814. The year 1819 marked the beginning of a concerted campaign for civil and political rights for emancipists centred on the jury issue – Neal, *The Rule of Law in a Penal Colony* at 177. It was the *New South Wales Act* 1823 (4 Geo IVC 96), pursuant to which the present Supreme Court was later established by Charter issued by the Crown, which allowed the trial of issues of fact by jury if both parties agreed. By 9 Geo IV 683 (1828) the Court was afforded a discretion to allow trial by jury on the application of either party. There was also reserved to the local Legislative Council "by some general law or ordinance" to decide "the qualification, number and summonses and other rules for the constitution and proceedings" of such juries. In 1832, by Act of the Council 2 WM IV No 3, New South Wales provided for juries of twelve persons. In the words of the Act "every man described in the Jurors Books as an Esquire or person of higher degree, or as a Justice of the Peace, or as a Merchant (such Merchant not keeping a general retail shop) or as a Bank Director shall be qualified to serve on special juries.

20 The special provision reducing the civil jury on the normal case from twelve (which had been the traditional number in England) to four was introduced by the statute 8 Vic No 4 (1844).

21 In 1959, in *O'Brien v Commissioner for Railways* (unreported – see article by P H Henchman “the New South Wales Jury of Four Persons” *Australian Law Journal* at 235), in an application to the Privy Council for leave to appeal, Denning J made reference to a jury of four persons. Counsel informed Lord Denning that it is universal practice for a jury of four persons in New South Wales. The explanation was that it dates from a time when the population was apparently scarce and labour was extremely difficult to obtain, and since all civil actions were tried by juries, it was found quite impracticable to empanel twelve jurors for sufficient number of juries. A jury of four was later provided in the *Jury Act* 1912.

22 By the end of the nineteenth century jury trial was certainly the normal mode of trial for disputed issues of fact in common law proceedings in the Supreme Court. Section 29 of the *Jury Act* 1912 so provided.

23 In 1936, the Chief Justice of New South Wales said "the jury system should never be modified or cut down unless a very strong case is made. (from a paper read to the second legal convention of the Law Council of Australia in 1936 by the Chief Justice of New South Wales, the Rt Hon Dr Evatt “The Jury System in Australia”; 195 10 *Australian Law Journal* 49 at 58).

24 In the 1960's, in this State, as earlier in England, a controversy had arisen about the merits of jury trials of civil causes. The controversy was stimulated by a paper delivered by Wallace J "Speedier Justice (and Trial by Ambush)” (1961) 35 *Australian Law Journal* 124. The paper canvassed various ways the right to trial by jury could be modified so that delays and cost could be reduced and a greater consistency in decision making could be promoted. At the conference, most of the commentators defended the civil jury by reference to legal authority, judicial opinion and personal experience. The paper proved influential. In 1965, following a change of government in New South Wales, Parliament enacted the *Law Reform (Miscellaneous Provisions) Act* 1965. Now cases where persons were injured in the course of the use of a motor vehicle (these are known as running down cases) would normally be tried by a Judge without a jury – s 5(1) *Law Reform (Miscellaneous Provisions) Act*.

**The introduction of the Supreme Court Act 1970 (NSW)**

25 Basically, in civil cases upon introduction of the *Supreme Court Act* 1970, either party could request a jury. There were exceptions; most notably, in "running down cases" (*ie* those involving the use of a motor vehicle) where neither party could requisition a jury. Section 85 of the Act, as it then was, relevantly provided:

> "(1) Subject to sections 86, 87 and 88, proceedings in any Division shall be tried without a jury, unless the Court otherwise orders."

26 After this statement of general principle, specific provisions were made in s 86 for common law claims. Relevantly, the section provided:

> "(1) In proceedings on a common law claim, except proceedings to which either of section 87 and 88 applies, issues of fact shall, if any party files a requisition for trial with a jury and pays the fee prescribed by the regulations made under section 130, be tried with a jury."

27 Section 87 contained specific provisions relating to running down cases in the Common Law Division. Relevantly, three should be noticed:

> "(1) In any proceedings to which this section applies, the Court may, on the application of any party, and shall, on the application of all parties, order that the proceedings be tried with a jury.
>
> (2) Subject to subsection (4), this section applies to proceedings on a common law claim in which - [damages or contribution are claimed, putting in broadly, arising out of the use of a motor vehicle].
>
> (3) ...
>
> (4) This section does not apply to proceedings for damages in respect of the death of or bodily injury to any person where the proceedings are based upon an act, neglect or default of the defendant for which, if proved, he would, as the employer of that person and not otherwise, incur liability to the plaintiff."

28 There then followed two special provisions dealing with particular kinds of common law claims:

> "88 Proceedings on a common law claim in which there are issues of fact -
>
> (a) on a charge of fraud against a party; or
>
> (b) on a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage shall be tried with a jury.
>
> 89(1) In any proceedings on a common law claim (except proceedings to which section 88 applies), the Court may order, despite sections 85, 86 and 87, that all or any issues of fact be tried without a jury.
>
> (2) In any proceedings to which section 88 applies, the Court may order, despite that section, that all or any issues of fact be tried without a jury where -
>
> (a) any prolonged examination of documents or

scientific or local investigation is required and cannot conveniently be made with a jury; or

(b) all parties consent to the order.

(3) In any proceedings on a common law claim, issues of fact on a defence arising under -

(a) section 63(5) or section 64(1)(c) of the Workers' Compensation Act, 1926; or

(b) section 150(1)(e) of the Workers' Compensation Act, 1987, shall, despite sections 85, 86, 87 and 88, be tried without a jury."

**The decision in *Peck v Email Ltd* (1987) 8 NSWLR 430**

29 In this case, the plaintiff sued his employer in negligence as he suffered the effects of an asbestos related condition. The defendant had filed a requisition for a jury. The plaintiff sought that the jury be dispensed with on the basis that there would be both a prolonged examination of documents and scientific investigation.

30 Section 89(1) of the Act, as it then was, relevantly provided:

"(1) In any proceedings on a common law claim the Court may order, notwithstanding sections 86 and 88 of this Act, that all or any issues of fact be tried without a jury where -

(a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury;

(b) the proceedings are entered in the commercial list; or

(c) all parties consent to the order."

31 Clarke J (as he then was) reviewed the medical evidence and pointed out that juries are asked, almost on a daily basis in this State, to decide relatively complex medical questions. However, His Honour concluded that there would be a scientific investigation which could not be conveniently made with a jury.

32 Clarke J [at 435] reasoned:

"The *particular factor* which, in my opinion, takes *this case* out of the ordinary and separates it from most cases concerning asbestos related injuries is the issue concerning which of the employers was responsible for his ingestion of the critical fibres or dust." [Emphasis added.]

33 Clarke J then made the observation that at that time there were a large number of cases awaiting trial where the plaintiffs were very ill or dying. From the Court's viewpoint it being very difficult for the Court to provide expeditious trials for these parties. It is far easier to order urgent hearings for trial by Judge alone, given the greater flexibility of this mode of trial and the Judge's ability to adjourn the trial from time to time. He concluded that, in urgent cases like these, Judges should be given an unfettered discretion to order trial by Judge alone, except in respect of proceedings to which s 88 applies.

**Amendment to section 89 Supreme Court Act in 1987**

34 These comments caught the eye of the government and of the legislature. In 1987, the *Supreme Court (Amendment) Act* 1987 was

introduced to amend the *Supreme Court Act* 1970 to enlarge the discretion provided by s 89.

35 The Attorney General (Mr Sheahan), in his second Reading Speech, referred to Clarke J's judgment and made the following comments:

> "...In practice, the right of a party to a common law action to elect pursuant to section 89(1) to have a matter tried by a jury will continue, but subject to this new discretion which will allow a court to decide otherwise. In exercising this discretion, the court will be able to have regard to all relevant circumstances and be able to make a decision consistent with the needs of justice *in each particular case* ." [Emphasis added.]

36 Responding to the opposition spokesman on legal matters, Mr Dowd *inter alia*, Mr Sheahan indicated what was in his mind in proposing the amendment:

> "...This legislation provides, *not for the abolition of juries* , but for an increased discretion for judges to dispense with juries." (Emphasis added.) (Ibid at 14100.)

37 Interestingly, shortly after this amendment was passed, asbestos cases and the like were transferred to the then newly created Dust Diseases Tribunal 1989.

**The decisions in *Pambula District Hospital v Herriman* and the appeal; (1988) 14 NSWLR 387**

38 The undisputed facts in *Pambula District Hospital v Herriman* are as follows. Rebecca Herriman, who at the time this case was decided was 15 years of age, by her tutor, sued Pambula District Hospital alleging negligence. She claimed that as a result of the failure of the hospital to carry out a standard test on her shortly after birth at the hospital, a disability which would have otherwise been detected and treated led to her suffering severe brain damage. It was claimed that, although she appeared normal, she had the mental age of a child of some eighteen months. Unlike *Peck v Email Ltd*, it was not suggested that there would be significant dispute about the facts or complex medical questions would be raised which would involve any prolonged examination of documents or consideration of scientific investigations.

39 Originally, a jury was requisitioned by the plaintiff who subsequently changed her mind and applied for an order that all issues of fact be tried without a jury. The hospital had not requisitioned a jury but it was agreed that had the plaintiff not done so, the hospital would have done so. Cole J decided in the plaintiff's favour but this decision was reversed in the Court of Appeal.

40 Cole J referred to some earlier decisions, and particularly one of his own, namely *Smoje v Trend Laboratories Pty Limited* (Cole J, 27 May 1988, unreported; 125 NSW 3).

41 His Honour expressed the view that the discretion conferred by section 89 was "at large":

> "In my view section 89 does not proceed from a presumption that if a party has exercised its right to requisition a jury pursuant to and in accordance with section 86, that thereafter that right prevails so that a significant reason must be shown why it should be deprived of that right in the exercise of discretion under section 89."

42 The Court of Appeal disagreed with this approach and said:

"Cole J posed for himself a test which was wrong in principle. He appears to have made retention of the jury, not dispensation, the subject matter of the discretion; and regarded that element as dependent upon whether the case before him was 'of such singularity that it would be more efficiently, more shortly, or in a less costly manner litigated before a jury'."

43 In *Smoje v Trend Laboratories*, Cole J dispensed with the jury and said:

"Following reference to numerous decisions in England concerning the discretion involved in that jurisdiction in considering whether personal injury actions should be heard with or without a jury and some general remarks about the respective merits and demerits of jury trials of civil actions, His Honour proceeded to list a number of considerations to which, he concluded: 'the authorities suggest that consideration may be had, in comparing trial with a jury with a trial by a judge alone'".

44 Cole J referred to:

"Each of factors, the length of the trial, the predictability of verdicts and the settlement of other action, are likely to result in litigants *other than the parties to the action* in which the application is brought receiving a more prompt hearing; in the list of cases awaiting trial being reduced, and thus in justice being more efficiently and promptly administered. In my view that also is a factor to which regard may be had in exercising this discretion. If it be acknowledged, as in my view it must, that the purpose, scope and object of amending section 89 was to confer upon the Court a discretion to dispense with juries except in a limited class of cases, in order that justice may be more efficiently, promptly and cheaply dispensed, *not just to the particular parties but to litigants generally* , then regard may be had in exercising that discretion to the state of the lists, and the effect of dispensing with juries upon such lists and upon litigants other than the immediate parties.'" [Emphasis added.]

45 In the appeal, Kirby P (as he then was) examined Cole's J decision in the light of the proper exercise of judicial discretion. Kirby P agreed:

"with the appellant that all of these matters referred to in *Smoje* are, as stated, observations of a general character relating to the nature of jury trials as such. They *are not particular* to the question of whether a jury which has been summoned should be dispensed with in this particular case."

46 Kirby P concluded that:

"The basic flaw in Cole J's reasoning was in considering to be relevant as such, universal characteristics of jury trials. This was impermissible because the scheme of the legislation assumes that jury trials will continue to be available for proceedings on a common law claim such as this. Indeed, whether or not section 86 of the Act confers a "right", strictly so called, it does envisage that a party to proceedings on a common law claim will continue to have an entitlement to requisition a jury. Having done so (as the appellant is to be taken to have done here) the exercise of the discretion called for by section 89 requires the party seeking the alternative mode of trial to discharge the onus to satisfy the Court that it should exercise its discretion upon the *particular* application made, to order that the trial be had, despite that fact,

without a jury. It is therefore not to the point to consider universal characteristics on jury trials.

Also impermissible is consideration of the consequences of the conduct of the trial with a jury for other cases standing in the list. A judge hearing an application under section 89(1) of the Act would have to shoulder an intolerable burden to decide between the competing claims of all cases awaiting hearing in the Court, or even in a particular sitting of the Court. He or she does not typically have the material to work out the budget allocation that will best achieve justice as between all parties in the list. Nor does he or she have the data to determine justly the competing claims to aggregate judicial time. This is not the purpose for which the discretion in s 89 was provided. To refer to such considerations is therefore, however well intentioned, to refer to matters which were not within the contemplation of the discretion conferred upon the judge by Parliament. It is also to question the premise upon which the discretion was conferred to discharge a jury, although lawfully requisitioned."

47 Similarly to Kirby P, Samuels JA also examined the intention of the legislation concluding that:

"It follows, to my mind, that the legislature, by expressing the 1987 amendment to section 89 in the way in which it did, and by leaving the group of sections in their present pattern, has plainly confirmed the individual litigant's right (in the class of case which section 86 contemplates) to have a trial with a jury and has affirmed that this right may be divested only if there are grounds for the proper exercise of the discretion to order that a jury should be dispensed with. This approach to the matter is quite different from that adopted in England."

48 Samuels JA agreed in general with what Kirby P had written about the necessity to exclude matters which are wholly general and universal, and which raise only the inherent and inevitable consequences of employing juries in civil trials, from examination in the exercise of discretion.

49 Mahoney JA dissented. He interpreted that the judge at first instance had a wider judicial discretion than Kirby P and Samuels JA. His reasoning was:

"It was submitted that it is not open to the court to order trial by judge because of matters which do no directly, in this way, affect the particular case. I do not think that such a general proposition should be accepted. In the exercise of other general powers, the court can and does have regard to matters outside the consideration which directly affect the particular case. It is, in my opinion, now generally recognised that it is part of the function of a judge to ensure that, subject to the requirements of justice and the interests of the parties, proceedings progress through the courts with due speed. As I shall indicate, each case, and the decision of it, must be determined according to the circumstances relevant to it. But it does not follow that the circumstances of other cases or of cases generally must be seen as irrelevant in determining what happens in a particular case."

50 The Court of Appeal urged a review of legislation to provide the Supreme Court with a wider discretion to dispense with juries than it believed was permitted on its interpretation of the Act.

51 It is interesting to note that in 1990, two years after *Herriman*, the Court

of Appeal (Mahoney, Meagher and Handley JJJA) in *W Dazenko Structural and General Engineering Pty Limited v Fraser Hrones and Co Limited* (unreported, 751/88, 5 October 1990) took into account *general* considerations when upholding an appeal from Cole J who refused to grant an adjournment because the solicitors had failed to adequately prepare a case for hearing.

52 Handley JA, with whom Meagher JA agreed, said that it was important to bear in mind, at a time when the courts of this State are under considerable pressure to reduce delays in the hearing of cases and volume of litigation, that adjournments of cases which have been specially fixed for hearing involve prejudice to persons *other than litigants in question*. These considerations have also been expressed by the Full Court of Victoria in *Apex Pallet Hire Pty Limited v Brambles Holdings Limited* (4 April 1988, unreported).

**The 1991 proposed legislative amendments to abolish juries in the light of *Herriman***

53 In the light of *Herriman*, it was proposed that courts would retain discretion to order jury trials in cases where it was considered that the interests of justice required a jury. Jury trials would also be retained for cases where basic civil liberties might be at issue, such as those involving defamation, fraud, false imprisonment or malicious prosecution. These proposals correlate to legislation in force in Western Australia and England.

54 The proposed amendments were to:

> "Require that all civil actions be tried without a jury, provided that the court may order a jury -
>
> (a) to hear issues of liability where a cause of action based on a charge of fraud or a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promises of marriage is involved; or
>
> (b) where the court considers it in the interests of justice to order a jury."

55 On 14 March 1991 in the Second Reading of the Courts Legislation (Civil Procedure) Amendments Bill, Mr Dowd, the Attorney General, emphasised that the Government's primary concern in reforming the law is to remove the potential of unfairness which results from inconsistencies generated by two modes of trial, jury and non-jury, co-existing in the same jurisdiction. One of the inconsistencies, he said, was the different delay periods which apply to jury and non-jury lists. According to Mr Dowd, despite the fact that jury lists are substantially smaller in terms of case numbers than non-jury lists, substantially longer delay periods apply.

56 In relation to cost, Mr Dowd reasoned:

> "The resolution of civil disputes is consuming large and increasing amounts of society's resources. The jury list components of the civil justice system requires a disproportionately higher application of resources, not simply to support the jury system administratively but to cover also the costs of additional hearing time required for jury trials. The use of juries to hear a relatively small but time consuming and costly number of civil claims must now be considered a luxury, the continuation of which must have deleterious effect on other components of the civil justice system. The logical response of the executive to this realisation in recent years has been to increase the jury requisition fee quite substantially. However, this has had the

> unfortunate effect of further exacerbating the general inequality between litigants in personal injury cases, because it makes the right to a jury trial dependent on the ability of the party to pay for the right. The inconvenience and monetary loss to jurors who are not compelled to adjudicate private disputes is also relevant. Jury fees are not, for the most part, sufficient to compensate jurors for lost working time and inconvenience. This financial loss and inconvenience is imposed on individual members of the public by the insistence of certain litigants on exercising a right to have a private controversy resolved by a jury with any demonstration that the public thereby benefits in terms of enhanced administration and delivery of justice."

57 On 1 May 1991 after the Second Reading, Mr Dyer of the opposition opposed the abolition of juries in civil trials on three grounds. They were:

> (1) Where a factual matter of duty of care is in dispute, eg. surgeon to a patient, a school authority to a student, a judge is not as well suited to apply mainstream community standards as is a civil jury of ordinary people.
>
> (2) Assumptions that on average a jury trial takes longer to dispose of and involves greater resources of the Court than does a non-jury trial hearing a similar claim are not well founded.

58 Mr Dyer said that no records have ever been kept nor surveys conducted of the average length of jury trials as opposed to the length of non-jury trials, nor of the average settlement rate in jury actions as opposed to non-jury actions. It seems that the assumption that jury trials take longer to dispose of than non-jury trials rests on the understanding that in a non-jury matter there is no summing up and the opening addresses are much shorter. The average length of time for jury and non-jury matters does not however take account of the differing settlement rates between the two types of trials, or any other factors that might exist.

59 The third reason was:

> (3) Due to changes in legislation, after 1 July 1987, only the most resolute and seriously disabled workers are likely to press on with common law claims against their employers. Thus, the delay in common law matters, whether the trial be by jury or not, will decrease markedly over the next few years.

60 Mr Dyer proposed five amendments to the Bill, the purpose of which were to continue to have jury trials in civil matters.

61 Ms Elizabeth Kirkby referred to representations made by the Bar Council, the Bar Association and Mr Kelly.

62 The Bar Council opposed the abolition of civil juries because it constituted a significant, but unjustifiable erosion of the rights of citizens to a trial before a jury; and there were far more efficient ways of improving the legal system that existed; the Bill was illogical in that it would have eliminated juries for civil trials yet retained them for complex trials such as defamation, fraud, malicious prosecution and false imprisonment. The Bar Council also contended that there was no hard evidence that jury trials actually took longer than non-jury trials, and that in any event, the Government’s imposition of significantly higher fees for jury trials might recoup any additional costs involved.

63 Ms Kirkby also referred to four points raised by the Bar Association. They were that:

(1) Judges, by virtue of their position and education, tend to be remote from the view of the ordinary citizen regarding the quantum of damages;

(2) If there are problems with the length of jury trials, then reforms enabling the tender of material not seriously in issue could be introduced.

(3) plaintiffs cannot afford to pay the jury surcharge of $500 per day; and

(4) the continued presence of civil juries will provide a moderating and standard-setting effect on the awards of damages made by judges and considered by courts on appeal.

64 Ms Kirkby then placed on record that the Australian Democrats would not support the Courts Legislation (Civil Procedure) Amendment Bill but would support the amendments to be moved in Committee by the opposition.

65 The amendments were put to the Committee who voted 21 in support and 18 against. The amendments were agreed to with the effect that jury trials were to continue in civil matters.

**The 2001 amendments**

66 The *Courts Legislation Amendment (Civil Juries) Act* 2001 (The *Civil Juries Act),* which was assented to on 19 December 2001 commenced on 18 January 2002. By that Act, the then ss 85-89 of the *Supreme Court Act* were repealed and different provisions were substituted for them. The substituted s 85 provides:

> "(1) Proceedings in any Division are to be tried without a jury, unless the Court otherwise orders.
>
> (2) The Court may make an order under subsection (1) that proceedings are to be tried with a jury if:
>
> (a) any party to the proceedings:
>
> (i) files a requisition for trial with a jury, and
>
> (ii) pays the fee prescribed by the regulations made under s 130, and
>
> (b) the Court is satisfied that the interests of justice require a trial by jury in the proceedings."

67 Under s 85 as it now stands there is a presumption against a jury trial and an additional requirement is imposed on a party who seeks a trial by jury. That requirement establishes quite a high threshold for the making of an order. It is not merely that the making of an order would be "consistent with the interests of justice", or that it would be "in the interests of justice", rather, the interests of justice "require" trial by jury.

**Summary judgment**

68 Rule 13.4(1) of the Uniform Civil Procedure Rules provides that the court may dismiss proceedings generally, or in relation to any claim for relief, in three circumstances. These are if the proceedings are frivolous or vexatious, or no reasonable cause of action is disclosed, or the proceedings are an abuse of the process of the court.

69 Rule 14.28(1) of the Uniform Civil Procedure Rules provides that the court may at any stage of the proceedings order that the whole or any part

of a pleading be struck out if the pleading firstly, discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, secondly, has a tendency to cause prejudice, embarrassment or delay in the proceedings, or thirdly, is otherwise an abuse of the process of the court.

70 Rule 14.28(2) provides that the court may receive evidence on the hearing of an application for an order under sub-rule (1).

71 In the well known passage in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, Barwick CJ at 129 stated:

> "It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the Court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense.'"

72 As stated earlier in this judgment, juries were introduced into New South Wales by statute. As the High Court noted at [64] in *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22, any state parliament could abolish completely any entitlement to a civil jury trial.

73 The short point is that these proceedings, the subject of this appeal, were commenced in the Local Court pursuant to the *Local Courts Act*. There is no statutory provision for trial by jury contained in the *Local Courts Act*. So far as the plaintiff seeks a jury in this Court requisition for a trial with a jury as required by s 85(2)(a)(i) of the *Supreme Court Act* has not been filed. In any event, it is difficult to envisage that this Court would consider that the interests of justice require a trial by jury when the subject matter concerns the execution of a writ of levy of property for the sum of $1,389.60.

74 The plaintiff's summons is untenable, it is an abuse of process of the court. The pleading cannot be cured by amendment. The summons filed 20 August 2007 is dismissed.

75 Costs are discretionary. Costs normally follow the event. The plaintiff is to pay the defendants' costs as agreed or assessed.

**The court orders:**

(1) The summons filed 20 August 2007 is dismissed.

(2) The plaintiff is to pay the defendants' costs as agreed or assessed.

**********