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Class One: Accusatorial Justice

- NB: evidence can be oral or real – used to establish primary facts
- Most obvious influence of our justice system's English heritage is the jury of twelve citizens – public face of criminal justice (both literally and metaphorically)
 - Jury: dual role of having the final word and also bearing witness to proceedings – means the lawyers strive to make the process comprehensible to lay people
 - Juries are no longer the decision makers for most offences and even the most serious offences can now be determined by judge-alone trials in most states (able to relax rules of evidence: UEA s 190 – see esp s 190(3))
- NSW 2019: contested trials of just under 18,500 defendants – just over 13,500 found guilty of at least one charge and just over 3,500 found not guilty on all charges
 - Of 140,204, nearly 88,000 pleaded guilty and proceeded directly to sentencing
 - NSW courts: 'temples of justice' (*Nudd* (2006) 225 ALR 161, Kirby J)
- Jury has defined both the need for and shape of our law of evidence (really in terms of admissibility)
- For US criminologist, Kamisar, the trial gave Ds the presence and protection of judge tasked to ensure fairness, and a structured process which embeds rights, including for serious offences at least, legal representation for Ds
- Mentions the inability for justice if cultural considerations are not accounted for (particularly re: Aboriginal rights)
- Trials are criminal justice's 'main event' (Pakes, 2015)
- Indirect impact of jury is profound – defined both the need for and the shape of our law of evidence
 - Particularly material to understanding the resolution of criminal charges *and civil disputes) and evidence law remains central to the choice of criminal charges brought against a defendant and to pre-trial negotiations, charge and plea negotiations
- Kamisar: likened the police station to the 'gatehouse' to the courtroom's 'mansion' of justice
 - Trial gives the presence and protection of a judge tasked to ensure fairness, and a structured process which embeds rights
- Calma: it is 'misconceived to believe that justice can be delivered without due consideration being given to cultural factors'
 - Courts' day-to-day operation must understand and respect Indigenous cultures, heritage, and histories, 'construed in a way that is capable of providing justice for our people and communities'

Right to a Fair Trial

- Not an inquiry into 'the truth' - common law trial is process by which prosecution seeks to prove guilt beyond reasonable doubt – presumption of innocence manifests
 - D: job is to raise reasonable doubt – procedural (not objective) truth – truth is to be pursued with moderation, fairness and by fair means, set by 'prevailing community standards' (Spigelman)

- *Pearse v Pearse* (VC Knight Bruce): [t]he discovery and vindication and establishment of truth are main purposes... of the existence of Courts of Justice'
- Underlying logic of adversarial ideal: best way of getting at the truth is to have each party dig for the facts that help it, will bring all to light between them (Lord Devlin, *The Judge*)
 - Checks and balances created by parties' self-interest to test and challenge opposing evidence works well if power imbalances are appropriately moderated (not just 'win at all costs')
 - Spigelman: right to a fair trial is 'entitled to constitutional significance'
- Rights:
 - Presumption of innocence (ICCPR art 14.2 – focuses on equality before the court) applies unless or until conviction (*Betts v The Queen*)
 - Art 14 illustrates that the right to a fair trial is a bundle of rights and that the right to a fair trial pivots upon the obligation to be fair *to the accused* (what about witnesses or victims?)
 - Rights to silence
 - Rights to privacy (can't march into house to search)
 - Rights to liberty (cannot detain or lock up suspect for convenience)
 - Rights to silence, privacy and liberty are not absolute despite having long-standing in common law, particularly prone to challenge in recent debates
 - ICCPR art 14 illustrates that right to a fair trial is a bundle of rights and that the right to a fair trial pivots upon the obligation to be fair to the accused
- Common law fair trial obligations:
 - Accused:
 - Right to know charged with sufficient particularity to meet them
 - Disclosure rights of prosecution case (often supplemented by statute): *Grey; Brown (Winston)*
 - Right to stay if fair trial is prevented by delay: *Jago v District Court of NSW; Edwards*)
 - Right for trial to be conducted in the presence of a judge who acts impartially, with detachment (*Antoun*) and appropriately (*Cesan* (sleeping; distracting proceedings); Kirby, 2014 (bullying)), and who assists unrepresented litigants not otherwise entitled to legal representation; and who directs the jury appropriately, including with respect to assessing certain evidence, particularly unreliable evidence (*Bromley; McKinney; Domican; Pollitt*)
 - Right to interpreter: *Hakimi; Rostom*
 - Prosecution
 - Must act fairly in court (*Evans*), including putting the prosecution case fully (*Apostillides; Richardson; Whitehorn*)
 - Court:
 - Obligation to ensure a fair trial is not impeded by charging practices of prosecution (eg, inappropriate charges): *Connelly v DPP*
 - If delay prevents fair trial, it will be stayed (no right to a speedy trial): *Jago v District Court of NSW; Edwards*

- Where trial is for serious offence, a court will stay proceedings unless there is legal representation: *Dietrich*
 - In exceptional circumstances, a court will quash a conviction if defence counsel is flagrantly incompetent: *Nudd; TKWJ; Birks*
- Since 1980s there has been a growing movement recognising that community standards require greater respect be afforded to witnesses' treatment in court, especially if vulnerable: see, eg, UEA ss 41 and 92(2)(b)
 - Psychological research has revealed that some people:
 - Will admit to crimes they have not committed (especially if emotionally or mentally vulnerable): *Kassin & Gudjonsson, 2004*
 - Will become overwhelmed under cross-examination in court such that this questioning impedes a witness giving full and accurate testimony (especially children and others vulnerable)
 - Consciously / subconsciously form a negative view of a criminal defendant who has a criminal past such that it influences their verdict irrationally
 - Will wrongly (but honestly and confidently) identify a person they saw, or heard, as the thief, murderer or fraudster

The Public Face of Justice (and its Non-Public Dimensions)

- Akin to a parade of justice (arguable, an idealised version of administration)
- Realisation that witnesses have interests that should be protected and the impact of rise of pervasive and unfettered media on accused's rights has created a new dynamic for courts
- Access to the day to day court rulings, taking of evidence, delivery of verdicts and to sentencing of offenders is an important aspect of transparency and accountability
- Incremental increase of suppression orders relating to national security, removing the risk of prejudicial publicity, protecting the dignity of witnesses during trials relating to sexual assault offences: Bosland, 2017
- For COVID, the removal of crowding, obligation to maintain social distance and the threat to people's well-being created by this highly contagious coronavirus led to the lengthy postponement of trial by jury: see, eg, *COVID Emergency Response Act 2020 (ACT)* – amended ss 68B and 68BA of the *Supreme Court Act 1933 (ACT)*
 - In NSW, all arraignments, judge-along trials, sentencing hearings and appeals from Local Court suspended
 - Audio-visual links replaced parties, lawyers and witnesses: see *R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 11)*
 - Email replaced mentions
 - Impact on people awaiting trial, particularly while on remand was immense
 - Have shown the need for high quality technology, and potential to use that technology for efficiency gains (balancing the risk of lost transparency)
- Nicola Gobbo (aka EF, Informer 3838 or Lawyer X) – criminal defence lawyer and registered police informer in Melbourne, also double agent feeding information back to Melbourne underworld
 - Admitted to prioritising her information role as an agent for police over acting in the best interest of clients

- McMurdo Royal Commission into Ms Gobbo (completed in early 2020); impact on just under 1300 matters in the Victorian criminal justice system with a steady trail of appeal cases in the pipeline
- “the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system”
- *Dietrich* (Gaudron J): highlighted the criminal trial’s potential as “the stage for a retrospective check on evidence-gathering, investigation and prosecution decision-making”
 - Trial has capacity to “retrospectively, within boundaries, make good lost rights... [and] investigative illegality and impropriety... through the judicial discretion to exclude evidence so obtained”
 - Ordinarily, scope of trial to review police behaviour tends to be incidental

Presuming innocence, the right to silence and accusatorial trials

- Case law describing accusatorial justice:
 - Two broad lines of cases – HCA has demanded that the accusatorial features of the criminal trial not be undermined in both cases
 - Articulated *the fundamental principle* of the common law: ‘the accusatorial nature of a criminal trial means that, under the common law, *the onus of proof is upon the prosecution to prove its case*’: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (the CFMEU case), [36]
 - Companion rule: an accused person cannot be required to testify: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (the CFMEU case), [3], [37] (French CJ, Kiefel, Bell, Gageler and Keane JJ) citing *Caltex*, 528 and *Lee v NSW Crime Commission*, [313], [318]; *Evidence Act* s 17
 - These are defined by the individual’s relationship to the state or by virtue of the ‘balance struck between the power of the State to prosecute and the position of an individual who stands accused’: *Lee v The Queen*, [32]
- FIRST BROAD LINE OF CASES: A major domain where accusatorial justice principles have been analysed involve criminal trials where the jury hear from a presiding judge or a prosecutor that an accused has an obligation that is in fact in breach of accusatorial principles – includes comments about:
 - Accused acting on legal advice in police station and refused to answer police questions: *Hogg* – held no adverse inference can be drawn from refusal as Crown did not cross-examine for explanation
 - Accused person not testifying: *Azzopardi* – an *Azzopardi* direction acknowledges that accused’s silence in court is not evidence against them, does not constitute an admission and may not be used to fill gaps in evidence tendered by prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt
 - Suggests to jury to scrutinise the accused’s testimony closely: *Robinson*
 - Suggesting the accused would do anything to avoid conviction: *Wise v The Queen*

- Suggesting the accused failed to offer an explanation for the prosecution allegations: *Palmer* (shifts BoP from prosecution to accused)
- Suggesting the accused failed to call a witness: *Dyers v The Queen* (accused isn't bound to give evidence, it is for the prosecution to prove its case)
- SECOND BROAD LINE OF CASES: arises because the ideology of a commission of inquiry, an inquisitorial-style process, is an investigative fact-finding body which may clash with the accusatorial ideology because a criminal defendant is forced to answer questions that traverse criminal charges awaiting trial
 - *X7 v ACC*: X7 had been charged and was awaiting trial on drug-related conspiracy offences, sought a declaration and injunctive relief claiming that the exercise of the Commission's compulsory examination powers created an impermissible interference with constitutional right to a fair trial – accepted by the HCA since accused had no power over the course of the trial
 - *Lee (No 1)*; *Lee (No 2)*: Jason and Seong Wong Lee were facing firearm and drug-related criminal conspiracy charges – resisted orders under *Criminal Assets Recovery Act 1990* requiring Lees to be compulsorily examined on their financial affairs – unsuccessfully relief on X7 with Supreme Court narrowing X7's application putting weight on the Supreme Court's ability to control proceedings to prevent the prosecution from obtaining an unfair forensic advantage (Crennan J) – impact of compulsory examination should be assessed as a matter of "practical reality" (Gageler and Keane JJ) – in *Lee (No 2)* it was discovered that the prosecution had been given the transcript from the examination which breached privilege against self-incrimination and affected the trial in a "fundamental respect"
 - *Strickland (a pseudonym) et al v CPDD and ors*: proceedings stayed for abuse of process – special investigation of appellants had been driven for purposes of AFP's own criminal investigations so ACC had acted unlawfully

The Right to Silence in Court

- Derives from privilege against discrimination
- Abolition of dock statements means that the accused must now choose between silence or giving sworn evidence (along with being cross-examined)
- Even accused who remain silent are not immune from discrediting evidence where their own prior representation is admitted into evidence where their own prior representation is admitted into evidence: *UEA* ss 108A and 108B
 - *Libke*: accused fearful of meeting Crown adversaries so didn't want to come under cross
- Suggested that loss of dock statement has meant a reversion to the imbalance seen in 19th century trials where accused was not permitted to give sworn evidence: *Dyers* (Kirby J)
- *UEA* s 89: preserves right to silence during investigation period by ensuring juries do not draw unfavourable inferences from a failure to answer or respond to police questions
 - *Weissensteiner*: accused went on sailing trip – companions disappeared – adopted principle from *Jones* about a fatal car accident where issue was side of the road where accident happened and knowledgeable witness wasn't called – if you are only person in the world that can rebut the prosecution