SUBMISSION OF NO CASE TO ANSWER IN CIVIL TRIALS

The submission of "no case to answer" may be made in both criminal and civil trials. The rules are, however, different in these two types of trials. In a criminal trial, at the close of the prosecution's case, counsel for the defence may freely submit that the defence has no case to answer. A defendant in a civil case may do the same, but it must be done with extreme care. In a criminal case, the court would, upon a submission of no case to answer, review the evidence adduced by the prosecution and rule on it. If there is insufficient evidence, the accused would be acquitted and discharged without his defence being called. On the other hand if the evidence was sufficient, the accused would be asked to make his defence. In contrast to the simplicity involved in a criminal trial, a judge in a civil trial may require counsel to "elect" upon a submission of no case to answer. This means that unless counsel says that he will stand by his submission and call no evidence if the judge rules against him, the judge will not entertain his submission. Various reasons have been given by the judiciary in England and Singapore for the operation of such a rule. The rationale for such a rule and the manner in which it operates in England, Australia and Singapore will be considered in this article. The practice in England differs from that in Australia and it will be submitted that the latter is preferable.

ENGLAND

The practice of requiring counsel to elect before making the submission of "no case to answer" originated from the common law. Not all courts in England however seem to have applied it. The King's Bench Division, as opposed to the Chancery Division, did not before 1930 require a party to elect. This was modified eventually and the practice in the Chancery Division followed.[1]

In *Muller* v. *EBBW Vale, Etc. Co. Ltd.*,[2] the plaintiff sued the defendant for breach of contract. The defendant at the end of the plaintiff's case submitted that there was no case to answer. It was contended by the plaintiff that, before the judge ruled on this submission, the defendant must agree not to call any further evidence should the judge rule against his submission. In support of this contention, the plaintiff cited the decision of the Court of Appeal in *Alexander* v. *Rayson*[3] which held that a judge of first instance was not entitled to accede to the defendant's submission "… except upon the terms that the defendants should undertake not to call any further evidence upon any question of fact."[3a] This however was not the true position in law.

1 See Mallal's *Supreme Court Practice,* v. 1, 1961 p. 457.
2 [1936] 2 All E.R. 1363.
3 [1936] 1 K.B. 169.
3a [1936] 2 All E.R. 1363, 1365.

Alexander did not substantiate the plaintiff's contention; in fact it was the opinion of the Court of Appeal that the procedure suggested was only "highly inconvenient."[3b] In *Muller's* case, Brayson J. was of the view that there were no *dicta* whatsoever in *Alexander* that the judge should require the defendant to elect:

> I cannot think, if the Court of Appeal had intended to lay it down as an inflexible rule that the judge of first instance ought not to accede to a submission of no case made at the end of the plaintiff's case except upon the terms that the defendants should be precluded from calling any further evidence, that their lordships would not have laid that down in very different language from that which was adopted in the case of *Alexander* v. *Rayson*.[4]

In fact Brayson J. said that it was left to the judge to decide the nature of the ruling he ought to make upon a submission of "no case to answer". He could either accede to the plaintiff's contention or even say:

> In this case I think it would be desirable that before I rule I should hear the whole of the evidence.[5]

Before deciding what ought to be done, a judge was to consider all the circumstances of the case and in particular, whether it might save the litigants any expense and time. In this case it was the learned judge's opinion that he should rule on the submission of the defendant without requiring an undertaking from counsel that he would not call further evidence.[6] His Lordship then considered the plaintiff's evidence and ruled that the case as pleaded was not established and therefore the action should be dismissed.

It is clear therefore at least from the above case that there was no absolute rule that a judge should always put the party to elect on a submission of no case to answer. Later decisions however do not support Brayson J.'s judgment.

In *Parry* v. *The Aluminium Corporation, Ltd.*,[7] the Court of Appeal in England was confronted with a similar situation. The plaintiff was employed by the defendant to operate a machine that cut aluminium plates. The plaintiff's three fingers were cut off by the machine due to the negligence of another employee. Accordingly, the plaintiff sued the defendant for damages under the Workshop Act, 1910.[8]

During the trial the plaintiff admitted under cross-examination that it was a foolish thing for him to have put his hand into the machine. The defendant argued that this admission proved that there was no case to answer. The trial judge agreed and gave judgment for the defendant without asking them to adduce any evidence. The plaintiff appealed on the ground that the defendant ought to have been required to elect before the judge ruled on the submission. In allowing the appeal, Goddard L.J. said that a judge ought to refuse to rule unless it was indicated by counsel for the defence that he was

3b *Ibid.*
4 [1936] 2 All E.R. 1363, 1365.
5 *Ibid.*, at 1366.
6 *Ibid.*
7 [1940] W.N. 44.
8 S. 10 sub-s. 1(1): "All dangerous parts of the machinery... must... be securely fixed...."

going to call no evidence. This was especially applicable in negligence cases.[9] The reasons why the rule should particularly apply in negligence cases were not stated clearly in the decision.

This view found further support in *Laurie* v. *Raglan Building Co. Ltd*.[10] The plaintiff sued the defendant for causing the death of her husband by the defendant's negligent driving of a heavily laden lorry. The defendant submitted at the close of the plaintiff's case that there was no case to answer. The trial judge, without putting the defendant to elect, held that the plaintiff's action failed. The Court of Appeal overruled this decision on the ground that the trial judge ought to have refused to rule on the submission unless counsel for the defendant made it clear that he was not going to call any evidence. Lord Greene M.R. stated:

> That must be regarded as the proper practice to follow and it is to be found very lucidly set out if I may say so, in ... *Parry* v. *Aluminium Corporation*. . . .[11]

The cases of *Parry* and *Laurie* were extensively referred to by Devlin J. in *Young* v. *Rank and Others*.[12] In that case the action was for wrongful dismissal of the plaintiff. At the end of the plaintiff's case, defence counsel submitted that there was no case to answer. Unlike the earlier cases considered above, the trial was before a jury and not before a judge alone. Upon the submission of no case by the defendant, Devlin J. did not put the defence counsel to elect whether he would or would not call any evidence. In fact, counsel for the defence submitted that the court had a discretion and was not obliged to put the defendant to his election.[13] The learned judge agreed with this submission but made it clear that this discretion was not applicable in a case tried by a judge without a jury. In cases tried by a judge alone, the judge "was bound to put Counsel who makes the submission to his election."[14] However, as the case before the court was a trial by jury, Devlin J. opined that he had a discretion which he exercised by not requiring the defence counsel to elect.

The compulsory election by the defendant in a non-jury trial was confirmed by the Court of Appeal in *Payne* v. *Harrison*.[15] It was held in that case that a defendant in a non-jury case must elect when he makes a submission that there was no case to answer.[16] This case did not refer to an earlier decision of the Court of Appeal in *Storey* v. *Storey*[17] which involved a matrimonial dispute. There, the wife complained of the husband's cruelty and desertion. The husband submitted that there was no case to answer. The trial court asked him to 'elect' and held that the wife had not established her complaint. The wife's appeal was dismissed by the Court of Appeal. It was opined by the court that the tribunal always has a discretion in putting

9 [1940] W.N. 44, 46.
10 [1942] 1 K.B. 152.
11 *Ibid*., 155.
12 [1950] 2 K.B. 510.
13 *Ibid*., 511.
14 *Ibid.*
15 [1961] 2 Q.B. 403.
16 *Ibid*., 413 *per* Holryd Pearce L.J.
17 [1961] p. 63.

a respondent to his election.[18] Both *Payne* and *Storey* are decisions of the English Court of Appeal.

From a review of all the cases it appears that, in England, a judge has a clear discretion whether to place the appropriate party to elect only in a trial by jury. In the case of a non-jury trial, it is unclear whether the judge has no such discretion and therefore the appropriate party has to elect before a ruling would be given on his submission of no case to answer. The effect of the Court of Appeal's decision in *Storey* is unclear.

The authors of the "White Book"[19] in the United Kingdom do state that in jury trials the judge has a discretion. In the cases involving non-jury trials the authors opine that:

> The judge should generally refuse to rule on such a submission by the defendant unless he makes it clear that he does not intend to call evidence.... But the judge is not bound so to refuse....[20]

In support of this they refer to *Storey* v. *Storey*. Thus the discretion whether to put a party to elect, according to them, is equally available to a judge in a jury and a non-jury trial. Hence, if a judge in a non-jury trial refuses to put a party to elect, the other party cannot appeal on the ground that the judge erred. It is submitted that this view expressed in the "White Book" should prevail, and the opinion of the court in *Payne* v. *Harrison* that the party "must elect" should be abrogated.

AUSTRALIA

There are numerous decisions in Australia in this matter. Basically the courts hold the same view as the "White Book". The cases discussed below will be mainly from the states of Victoria, South Australia, Tasmania and New South Wales.

The law in Victoria on this issue was explained in *Humphrey* v. *Collier*.[21] The case involved an action for damages brought by a wife for the death of her husband in a road accident. The action was heard before a jury. At the close of the plaintiff's case, the judge upheld the submission of the defendant that there was no case to answer without putting the defendant to his election. The plaintiff appealed. It was contended that before the judge ruled upon the submission of the defendant's counsel he should have put him to his election as to whether he intended to call evidence.[22]

The Supreme Court considered this to be only a general rule. As a general practice, it was held desirable to require counsel to elect.

18 *Ibid*., at 69.
19 1979 Volume 1, p. 571.
20 *Ibid.* See also Odgers' *Principles of Pleading And Practice* (21st Edn. 1925) p. 288. "If he makes a submission at the close of the plaintiff's case he will probably be required to call no evidence. The matter is one of discretion for the judge, whether sitting alone or with a jury." This is followed at the footnotes by a reference to *Muller* v. *EBBW Vale Steel Co.* (1936) 52 T.L.R. 655 and *Young* v. *Rank* [1950] 2 K.B. 510. The first case supports the authors contention, but *Young* v. *Rank* does not do so only in connection with jury trials. *Muller's* case was not referred to by later decisions of the English Court of Appeal.
21 [1946] V.L.R. 391.
22 *Ibid.*

His Honour Gravan Duffy J. however thought that the presiding judge ought to have a discretion in the matter as there could be occasions where a strict adherence to the practice would result in loss of time and money.[23] His Honour further opined that lawyers should generally refrain from taking the risk of calling no evidence even if it was a clear case.[24]

Three years after *Humphrey* the Supreme Court of Victoria was again faced with a similar problem in *The Union Bank of Australia Limited* v. *Puddy*.[25] The plaintiff bank sued the defendant for $3,000/- plus interest under a guarantee written and executed by the defendant. The defendant pleaded a counterclaim. At the close of the defendant's case, the plaintiff's counsel contended that he should not be required to elect not to call evidence in rebuttal of the defence and counterclaim if he submitted that there was no case to answer.[26] The decision of the Supreme Court was delivered by Fullagar J. His Honour referred to *Humphrey* v. *Collier*[27] and confirmed that as a general rule counsel should be required to elect. Although this general rule was well established, it was his Honour's opinion that like all rules of practice it was not an inflexible one.[28] As it was not an inflexible rule he decided not to call upon the plaintiff's counsel to elect. He then proceeded to rule on the submission and held that the plaintiff's submission of no case succeeded. It was also his Honour's opinion that on a "balance of convenience", that was the most favourable course to adopt.

This decision was applied by the Supreme Court of Tasmania in *Douglas* v. *Douglas*.[29] That case concerned a matrimonial suit (brought by a husband for divorce against his wife). At the end of the petitioner's case, the respondent's counsel submitted that there was no case to answer. Burbury C.J. said that as a general rule of practice a judge trying an action or matrimonial cause was not to rule unless a defendant or respondent announced that he would not call any evidence. But, "in the interests of the parties themselves I would think it entirely proper for the judge in his discretion to depart from the rule of practice and rule without putting the respondent to his election."[30]

In South Australia the law was recently expounded by the Supreme Court in *Copper Industries Pty. Ltd. (In Liquidation)* v. *Hill And Hill*.[31] The action involved a breach of contract and a claim for specific performance. The defendant made a submission of no case at the end of the plaintiff's case. Walters J. said:

> It would be impudent of one to lay down any general rule as to the circumstances in which counsel should, or should not, be put to an election.... Nevertheless, it is my opinion that in an action which is being tried by judge alone, it is ordinarily proper for a defendant, who feels that in point of law a prima facie case has not been made out

23 *Ibid*., at 402.
24 *Ibid.*
25 [1949] V.L.R. 242.
26 *Ibid*., at 244.
27 See n. 21 above.
28 [1949] V.L.R. 242, 245.
29 [1965] F.L.R. 1.
30 *Ibid*., at 3.
31 [1975] S.A.S.R. 292.

> against him, to put forward a submission of no case to answer, and that he should be allowed to do so without being required to elect to give no evidence.[32]

It was however his Honour's opinion that this right was overriden by the judge's discretionary power. In 1978 the Federal Court of Australia applied the above decision of Walters J. in *Trade Practices Commission* v. *Nicholas Enterprises Pty. Ltd.*[33] The action involved a suit by the Trade Practices Commission against eight hotels alleged to have contravened section 42(2)(a)(ii) of the Trade Practices Act 1974. The defendants submitted "no case to answer" at the close of the plaintiff's case. The court in exercising its discretion in favour of the defendants said:

> "After hearing arguments from all counsel, I exercised my discretion and did not require them to elect. It thus remains open to those defendants who wish, to call evidence."[34]

The exercise of discretion has not always been in the defendant's favour. The Federal Court of Australia exercised it in favour of the plaintiff in *Trade Practices Commission* v. *George Weston Foods Ltd. and Others (No. 2)*.[35] It was held that the defendants should be required to elect whether or not to call evidence in that trial. In the latest case of *TPC* v. *Allied Mills (No. 3)*[36] Sheppard J. refused to put the respondents to their election and was of the opinion that the matter was now governed by Order 32, r. 4(1) of the Rules of Court, "which provides that the court may give directions as to the order of evidence and address and generally as to conduct of the trial. The matter is thus discretionary."[37]

It is axiomatic that Australian courts generally tend to refrain from requiring counsel to elect on a submission of no case. Although there is agreement that it is acceptable as a general rule, judges have shown no hesitation to depart from it and exercise their discretion as and when necessary. In fact the courts have reiterated more than once that the rule of practice was not an inflexible one. It is submitted that the practice in Australia is welcome.

SINGAPORE

The position in Singapore is unclear. There are two reported decisions of the High Court and both have expressed differing views on this matter. The most recent case was *Goh Ya Tian* v. *Tan Song Gou & Ors.*[38] The plaintiff claimed the sum of $1,132.20 as damages caused to his taxi in a road accident. The defendants submitted that there was no case to answer at the end of the plaintiff's case. At the court of first instance, the magistrate said that he was not going to

32 *Ibid*., at 294.
33 [1978] 40 F.L.R. 74.
34 *Ibid*., at 77 *per* Fisher J.
35 [1980] 43 F.L.R. 56.
36 [1981] 37 A.L.R. 225. As in *Trade Practices Commission* v. *Nicholas Enterprises Pty. Ltd.* (above n. 33), the action was brought by the Trade Practices Commission for the contravention of s. 45 of the Trade Practices Act 1974 by the defendants. The facts again were similar to the facts in *Trade Practices Commission* v. *George Weston Foods* (above n. 35). The plaintiff sued the defendant for contravention of s. 45 of the Trade Practices Act 1974.
37 *Ibid*., at 230.
38 [1981] 2 M.L.J. 317.

rule on the submission unless the defendant's counsel indicated to him that, "if I should rule against you on your submission you will offer no evidence on your behalf."[39] This action taken by the magistrate was upheld by the High Court, in the exercise of its appellate jurisdiction. Lai J. held that the expeditious disposal of a trial and saving of costs would not be possible if the defendant was permitted to submit "without putting the defendant to his election whether to call evidence or not, if his submission fails."[40] It was further held that a defendant would not be under any disincentive if he was not put to an election. Such a defendant would not hesitate to make this submission and require the court to go through all the evidence and the law. If this happened in every civil case, "the logical conclusion must be that the trials are prolonged."[41] It was therefore Lai J.'s opinion that a judge ought to put counsel to his election and if he does not elect the judge should refuse to rule on his submission.[41a]

We saw earlier that the courts in England and Australia have treated the matter on the basis of a general rule of practice. On several occasions, the courts in Australia have approached a case as an exception to the general rule and applied the judge's discretion, in favour of not requiring counsel to elect. It must be noted that no such discretion was said to be applicable in non-jury trials in England. Jury trials have been abolished in Singapore and therefore the rules governing them are irrelevant.

It is nevertheless unclear from *Goh Ya Tian* whether Lai J. considered that it was a discretionary matter for a judge to require or not to require counsel's election. All the learned judge said was that "it is most desirable...."[42] What do the words "most desirable" mean? Did his Lordship mean that it was mandatory that counsel should always be required to elect? He probably meant that, but this is unclear. How should a trial judge view the matter now? Should a trial judge approach it as a matter of discretion or should he as a matter of law require counsel to elect? On the other hand his Lordship may have meant it to be a matter of discretion for the trial judge. If this was Lai J.'s opinion it is submitted to be a fair and equitable one.

In the other case, *U.N. Pandey* v. *Hotel Marco Polo Pte. Ltd.*,[43] the High Court took a different view. Sinnathuray J. upheld the submission of no case to answer by the defendant without first requiring counsel for the defence to elect. Having referred to the English decision in *Storey* v. *Storey*[44] the learned judge said:

> In my judgment, it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election, whether to call evidence or not, if his submission fails.[45]

39 *Ibid.*, at 319.
40 *Ibid.*
41 *Ibid.*
41a Since the writing of this article, the Singapore Court of Appeal has upheld Lai J.'s judgment. See *Tan Song Gou* v. *Goh Ya Tian* (unreported), Civil Appeal No. 83 of 1981.
42 *Ibid.*, at 320.
43 [1980] 1 M.L.J. 4.
44 [1961] P. 63 C.A.
45 [1980] 1 M.L.J. 4, 5.

With due respect his Lordship approached the matter unsatisfactorily. Having referred to *Storey,* it should have been indicated how that case supported his Lordship's opinion. The English Court of Appeal in *Storey's* case did say that if a judge "did not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission."[46] It also stated that the tribunal had a discretion. Was Sinnathuray J. influenced by this to conclude that he had a discretion and therefore he was entitled not to require defence counsel to elect? This was not clear in his judgment. The Court of Appeal's opinion in *Storey* that a trial judge has a discretion in the matter, should have been referred to his judgment. An appraisal of the law in England should have been made and the various cases (at least *Payne* v, *Harrison* as well as *Storey* v. *Storey)* considered. Had his Lordship done that and concluded that he had a discretion and that he exercised it by not requiring counsel to elect, it would have been clearer. With respect the same may be said of Lai J.'s judgment in *Goh Ya Tian.*

While Sinnathuray J.'s appraisal of the law in *U.N. Pandey* was incomplete, the writer agrees that as a desirable practice a party should not always be required to elect. To illustrate, *A* files an action for personal injuries sustained in a road accident. He is unable at the trial to recall the exact events of the accident. He is also unable to identify the defendant as the tortfeasor. There are no other witnesses to do the same. The plaintiff however produces witnesses to establish his hardship and the pain and suffering he is undergoing. The defendant submits no case to answer. Should the judge automatically require the defendant to elect or should he approach the matter on the basis that he has a discretion? The tortfeasor's identity is of utmost importance. Should not the judge in such a case be entitled to rule on the submission without putting the defendant to elect? The answer surely must be in the affirmative.

Take the example of a submission made by a very young lawyer *B* who is ignorant of the rule.[47] He elects not to call evidence. As a result his client loses the case. If it was a small claim *B* would probably pay something to his client for a mistake done by him. What if it is a large amount and *B* refuses to pay? It is debatable whether the act of 'election' by *B* amounts to negligence in law. Assuming it is, action against *B* would be futile for he is protected from any liability.[48] As such, clients in such situations would be left without a remedy.

The saving of cost, time and convenience are the main reasons given by courts to justify requiring of counsel's election. These factors show that the general interest of all parties is maintained when the judge puts counsel to elect. Should not the inability to sue counsel

[46] [1961] P. 63, 68 C.A.

[47] The legal profession in Singapore and Malaysia is predominantly composed of young practitioners with hardly a few years of practice. It would not be an understatement to say that the consequences of "electing" in a trial may not be apparent to many. It is possible that very young inexperienced practitioners are usually under the impression that the rules applicable in a submission of "no case to answer" in a civil case are not different from the rules applicable in a criminal case.

[48] *Rondel* v. *Worsley* [1969] 1 A.C. 191 and *Safi Ali* [1973] 3 All E.R. 1033 confirm the law that protects counsel from actions for negligence by their clients for certain acts carried out by counsel.

be an important factor that ought to be borne in mind as well? It is submitted that this should be so; otherwise a party whose counsel is inexperienced would be unduly prejudiced. It would be more equitable to rule on counsel's submission without requiring him to elect. This might certainly take more time, but an injustice should not be permitted at the expense of time-saving. Creation of more courts and increasing personnel may be more proper methods of saving time than to require counsel to elect. If the saving of time is held in such prominence in civil matters, it is difficult to see why the rule should not apply to criminal cases as well.

It is true that English decisions are treated with respect and are generally followed by the judiciary in Singapore. Nevertheless it would be indeed welcome to see the growth of a practice in Singapore where counsel are generally not required to elect, as practised in Australia.

CONCLUSION

In England it is an established practice, in civil trials by jury, for a judge to have a discretion whether to require a party to elect when the same party had made a submission of no case to answer. It is unclear whether such a discretion is equally available to a judge in a non-jury trial. Case law[49] indicates that a judge in non-jury trials has no such discretion, but the "White Book" and Odgers on "Principles of Pleading And Practice" opine that the judges do have such discretion. A clearer indication by the English judiciary as to the correct law would be appreciated.

The Australian courts have, unlike their English counterparts, taken a clear stance on this matter. As a general rule the practice in Australia would require counsel to elect. This practice was stated emphatically not to be an inflexible one. Recent trends indicate that the whole matter has been treated by the Australian judiciary on the basis of a judge's discretion irrespective of whether it is a jury or non-jury trial. As it is a matter of discretion, the Australian courts are generally reluctant to require counsel to elect.

In Singapore, case law indicates that the judiciary is not clear on its views. In one case Sinnathuray J. did not require election because he thought that it was "desirable practice"; in the other Lai Kew Chai J. said it was "more desirable" that counsel should be required to elect. A clear decision from the Singapore Court of Appeal would be welcome.[50]

Finally, it is submitted that, as a general rule, compulsory requirement of election should be discouraged. The matter ought to be treated on the basis of "discretion", as in Australia.

J. VELUPILLAI *

[49] The majority of English cases support the view that there is no discretion. *Huller* v. *EBBW Vale* (see n. 2) and *Storey* v. *Storey* (see n. 17) do not support that view.

[50] With respect it is submitted that recent judgment of the Singapore Court of Appeal on this matter (see n. 41a above), is unclear as the court had not sufficiently considered the relevant law. It is possible that the appellant did not raise it as a ground of appeal.

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