Majority Jury Verdicts

by

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EXECUTIVE SUMMARY

This Briefing Paper presents an overview of the main arguments and issues relating to majority jury verdicts in criminal trials. Some of its main findings are as follows:

- majority verdicts are permitted in civil but not in criminal proceedings in NSW (page 4);

- majority verdicts in criminal trials have been available in several other comparable jurisdictions for many years: South Australia since 1927; Tasmania since 1936; Western Australia since 1960; the Northern Territory since 1963; England since 1967; and Victoria since 1994 (page 5);

- there does not appear to be any pressure to rescind majority verdicts in the above jurisdictions (page 8);

- arguments in favour of majority verdicts include: to avoid the 'rogue' or perverse juror who is unreasonable or unrepresentative of the community; to avoid the possibility of one juror being 'nobbled'; the avoid the added cost and delays of mistrials; and that majority verdicts have not undermined the jury system in those jurisdictions where they are in force (page 7);

- further, it is argued by the proponents of majority verdicts that the criminal standard of proof beyond reasonable doubt does not entail the requirement of unanimity. Indeed, it is argued that unanimity is not essential to any of the key functions of the jury (page 9);

- against this, the NSW Law Reform Commission argued that the concept of a majority verdict 'strikes at the root of the hallowed principle that the guilt of the accused person must be proved beyond reasonable doubt' (page 10);

- in its 1986 report, *The Jury in a Criminal Trial*, the NSW Law Commission recommended against the introduction of majority verdicts in criminal trials, stating 'The problem of jury disagreement is a minor one which does not merit solution by the destruction of one of the fundamental features of jury trial' (page 11);

- In *Cheatle v R* (1993) 177 CLR 541 the High Court held that a jury verdict in a trial on indictment for an offence against a law of the Commonwealth must be unanimous. Unanimity was seen as going to the core of the deliberative responsibilities of the jury. The Court said that unanimity should not be abandoned for reasons of 'contemporary convenience or practical utility' (page 13);

- in *Black v R* (1993) 179 CLR 44 the High Court introduced a new model direction to juries which has the effect of requiring 'twelve separate verdicts' (page 16);

- in *R v Kolalich* a NSW Supreme Court judge said that the *Black* direction to juries has produced a 'sharp increase' in the number of jury disagreements and seemed to suggest a need for legislative intervention (page 17);

- before *Black* at least it was argued by those opposed to majority verdicts that the incidence of hung juries is low and that any evidence as to jury 'nobbling' is 'extremely sparse' (page 18);

- a recurring theme of the critical literature on this subject is that, where majority verdicts have been introduced, such legislative change has not been made on the basis of sound empirical evidence (page 18); and

- the percentage of hung trials in NSW in 1991-1992 was 3.6%, in 1992-1993 it was 3.2%, in 1993-1994 it was 5.7%, and in 1994-1995 it was 6.2% (page 20).

1 INTRODUCTION

On 23 September 1995 it was reported that the Government was considering the introduction of majority verdicts in criminal trials in NSW. The Attorney General, Hon J Shaw MLC, is reported to have said: 'The incidence of hung juries is getting to the stage where I think we've got to seriously consider the possibility of majority verdicts, with some safeguards'. Mr Shaw, who commented that he did not have a 'closed mind' on the subject, is said to have indicated that he would ask the NSW Law Reform Commission to report to the Government on the possibility of making the change. He said one option would be for a conviction or acquittal to be recorded in criminal trials if 11 out of 12 jurors were in agreement. At the same time it was reported that the shadow Attorney General, Hon JP Hannaford MLC, said that the Opposition would support a move to majority verdicts.[1]

The issue of majority jury verdicts had in fact been the subject of some public debate in this State prior to Mr Shaw's announcement. On 19 August 1995 the NSW Director of Public Prosecutions, Mr Nick Cowdery QC, called for the introduction of majority verdicts 'essentially to cater for the obdurate member of the jury who will not be persuaded by reason'. At that time the Attorney General said he 'would be interested in any evidence Mr Cowdery had to support his call for majority verdicts'.[2]

Subsequently, on 8 September 1995 a retiring Supreme Court judge, Justice Mervyn Finlay, said he would personally favour the introduction of majority verdicts of not less than 10 and preferably 11 out of a jury of 12. He said: 'Out of 12 there is the risk that you will have one or two who just may be out of the range of representing the normal community'. Justice Finlay's comments were said to echo those of District Court Judge William Ducker who is said to have remarked on the need for majority verdicts after discharging a hung jury.[3]

A further interesting development was that on 10 October 1995 it was revealed that a juror in NSW had been offered a $25,000 bribe to ensure a hung jury in a drugs trial. Commenting on the incident, the President of the NSW Law Society, Mr Maurie Stack, said that 'In 25 years of practice this is the first time I have ever heard of a bribe being offered to a juror'.[4]

The purpose of this briefing paper is to review the arguments for and against the introduction of majority jury verdicts and to include a commentary on other comparable jurisdictions. Of the Australian jurisdictions, South Australia, Tasmania, Victoria, Western Australia and the Northern Territory have all opted for majority verdicts. On the other hand, in 1986 the New South Wales Law Reform Commission supported the requirement for unanimous verdicts in criminal cases. Also, the principle of unanimity was upheld by the

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1 'Majority jury verdicts possible: Shaw', *The Sydney Morning Herald*, 23 September 1995.

2 'Prosecutor calls for majority verdicts', *The Australian*, 19 August 1995.

3 'The judge's dozen', *Telegraph Mirror*, 8 September 1995.

4 'Juror was offered $25,000 bribe', *The Sydney Morning Herald*, 10 October 1995.

High Court in *Cheatle v R.*[5]

2 THE LAW IN NEW SOUTH WALES

In its 1986 report on *The Jury in a Criminal Trial*, the NSW Law Reform Commission that, 'In accordance with the common law rule, criminal verdicts in New South Wales must be unanimous'.[6] It is explained that the common law rule applies because it has not been abrogated in the *Jury Act 1977*. Section 56 of the Act, which speaks of the jury agreeing on their verdict, recognises the common law position. Before the *Jury (Amendment) Act 1987* the trial judge could discharge a jury that was unable to agree after deliberating for a minimum of at least six hours. That time requirement was removed in 1987. Section 56 provides:

> Where the jury in criminal proceedings have retired, the court in which the proceedings are being tried may discharge them if it finds, after examination on oath of one or more of them, that they are not likely to agree on their verdict.

The Law Reform Commission went on to say that, 'The common law requirement of unanimity means that neither a conviction nor an acquittal can be secured without the concurrence of the whole jury';[7] and, further, that 'Unless the Crown decides that the accused person should not be retried, the accused person will be put on trial again'.[8]

Majority verdicts are permitted in civil proceedings in NSW. Thus, section 57 of the *Jury Act 1977* provides:

> Where the jury in civil proceedings have retired for more than 4 hours and they are unable to agree on their verdict:
>
> (a) in the case of a jury consisting of 4 persons, the decision of 3 jurors; or
>
> (b) in the case of a jury consisting of 12 persons or, pursuant to section 22(b), 9, 10 or 11 persons, the decision of 8 jurors,
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> shall be taken as the verdict of all.

Section 58 of the Act then provides for the discharging of a jury in civil proceedings which cannot agree on either a unanimous verdict or a verdict under section 57 after a minimum of 4 hours of deliberation.

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5 (1993) 177 CLR 541

6 NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48, 1986, p 139.

7 Ibid, p 140.

8 Ibid, p 142.

3 MAJORITY VERDICTS IN OTHER SELECTED JURISDICTIONS

Majority verdicts in criminal trials (except for capital cases) have been available in several Australian jurisdictions for many years. The first jurisdiction to alter the requirement of unanimity was South Australia in 1927,[9] followed by Tasmania in 1936.[10] Western Australia adopted majority verdicts in 1960[11] and the Northern Territory in 1963.[12] An example from these provisions is that the South Australian Act allows for majority verdicts where a jury is unable to reach agreement after deliberating for a minimum of 4 hours. Where there are 12 jurors, a majority verdict of 10 or 11 jurors will suffice. At least 10 jurors must concur where there is an 11 member jury.

In England majority verdicts were introduced in 1967 under section 13 of the *Criminal Justice Act*. The legislation allows a 10:2 or 11:1 majority verdict to be returned if the jury has been unable to agree after 2 hours deliberation, or such longer period as the court thinks reasonable having regard to the nature and complexity of the case. Where there are 10 jurors at least 9 must agree.[13]

In the United States, there is a requirement of unanimity for federal jury trials.[14] However, in 1972 in two five-to-four decisions, the Supreme Court upheld the constitutionality of majority jury verdicts in State criminal trials.[15]

Of the Australian jurisdictions the latest to adopt majority verdicts in most criminal trials is Victoria under the *Juries (Amendment) Act 1993*, which came into operation in 1994. Following that amendment, section 47 of the Victorian *Juries Act 1967*, which is headed 'majority verdicts in criminal inquests', provides:

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9 Section 57, *Juries Act 1927* (SA).

10 Section 48, *Jury Act 1899* (Tas). In 1943 the Act was amended to provide that, in the case of a capital offence, a majority of ten jurors could bring in a verdict of either not guilty or guilty of manslaughter.

11 Section 41, *Juries Act 1957* (WA).

12 Section 48, *Juries Act 1962* (NT); originally under the *Juries Ordinance 1962* (No 30 of 1963) - 9:3 verdict in criminal cases, except capital cases, is acceptable after 12 hours of deliberation.

13 Matters relating to juries were consolidated under the *Juries Act 1974* (UK) (section 17).

14 *Cheatle v R* (1993) 177 CLR 541 at 557. The High Court did acknowledge that some recent judgments 'have arguably cast doubt on that proposition'.

15 *Apodaca v Oregon* (1973) 406 US 404; *Johnson v Louisiana* (1972) 406 US 356. At issue was the interpretation of Amendment 6 of the US Constitution.

(1) In this section "majority verdict" means -

(a) if the jury, at the time of returning its verdict, consists of 12 jurors - a verdict on which 11 of them agree;

(b) if the jury, at the time of returning its verdict, consists of 11 jurors - a verdict on which 10 of them agree;

(c) if the jury, at the time of returning its verdict, consists of 10 jurors - a verdict on which 9 of them agree.

(2) Subject to sub-sections (3) and (4), in any criminal inquest if all the jurors after at least 6 hours deliberation are unable to agree on their verdict, a majority verdict may be taken as the verdict of all.

(3) A court must refuse to take a majority verdict if it appears to it that the jury have not had a period of time for deliberation that the court thinks reasonable having regard to the nature and complexity of the inquest.

(4) A verdict that the accused is guilty of murder or treason or of an offence against the law of the Commonwealth must be unanimous.

(5) If on the trial of a person for an offence it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of another offence with which he or she has not been charged and the jury reaches a verdict (either unanimously or by majority in accordance with this section) that the accused is not guilty of the offence charged, a majority verdict of guilty of that alternative offence may be taken as the verdict of all if the jury are unable to agree on their verdict on that alternative offence after a cumulative total of at least 6 hours deliberation on both offences.'

Thus, under the Victorian legislation jurors must deliberate for at least 6 hours before a majority verdict can be given. Also, under section 47(3) the Court can refuse to take a majority verdict where it does not consider that the period of deliberation is 'reasonable having regard to the nature and complexity of the inquest'. Verdicts in cases dealing with murder, treason and offences against the Commonwealth continue to be unanimous.

4 ARGUMENTS FOR MAJORITY VERDICTS IN CRIMINAL TRIALS

In the Second Reading Speech for the Bill abolishing the requirement of unanimity in Victoria, the Minister said:

> The government believes the requirement of a unanimous verdict is a potential source of expense and unfairness where a single, determined juror holds out doggedly and for peculiar or improper reasons against the common view of the remaining 11. A hung jury will lead either to a retrial or, on rare occasions, to a decision by the Director of Public Prosecutions to discontinue the prosecution. The first outcome is an unjustifiable waste of public money, especially when the trial has been long and expensive. Many may see a decision to discontinue a prosecution in these circumstances as unjust. Majority verdicts, which have been introduced in the United

> Kingdom and several other Australian States do not eliminate the chances of this happening, but they significantly reduce them. They strike an appropriate balance between the principle that guilt should be determined beyond reasonable doubt and the need to manage courts efficiently and fairly.[16]

Expanding on these themes, a recent article in *The Bulletin* set out the basic arguments for majority jury verdicts in criminal trials in these terms:

- to avoid the 'rogue' or perverse juror, that is, the person who is unreasonable, or unrepresentative of the community, or the person who for whatever reason sets out to make jury deliberation difficult. The article mentions in this context the controversy surrounding the trial of former Queensland Premier, Sir Joh Bjelke-Peterson on perjury charges in October 1991. In that case, where the jury remained hung and there has been no retrial, the jury foreman, Luke Shaw, was a member of the Young Nationals with links to the Friends of Joh group;

- to avoid the possibility of one juror being 'nobbled'; that is, to avoid the possibility of the corruption of a juror, through bribery or intimidation;

- to avoid the added cost and delays of mistrials, which involve an unwarranted burden on the state and the accused person; and

- to overcome the fact that the traditional basis of jury membership - a group of the defendant's peers or equals - is increasingly at odds with reality. 'In a pluralistic, multicultural society, the chances of being judged by 12 of your actual "peers" are remote'.[17]

The last argument did not figure in the NSW Law Reform Commission's review of the case for and against majority verdicts. The Commission did, however, make note of the following additional arguments which are often cited against the unanimity rule:

- that it forces juries which are unable to agree to reach verdicts which are compromises;

- that the rule is undemocratic because it allows a small minority to frustrate the decision of the majority; and

- that the rate of acquittals is too high, and that the unanimity rule is the cause of

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16 *Victorian Parliamentary Debates* (LA), 20 October 1993, p 1157.

17 'Eleven concurring voices', *The Bulletin*, 3 October 1995.

this.[18]

In its 1980 report on *The Jury in Criminal Trials*, which ultimately recommended that the unanimity requirement should be retained, the Canadian Law Reform Commission added two further arguments in favour of majority verdicts:

- the unanimity rule is a sham. While receiving the apparent concurrence of all jurors, many verdicts in fact represent either a compromise among the jurors, or a verdict in which a minority acquiesced because of coalition or verbal pressure; and

- the requirement of unanimity is inconsistent with, or at last anomalous when compared with decision making rules for other democratic institutions. Legislative bodies, appellate courts, administrative tribunals and practically every other body in which group decisions must be made, decide on the basis of some form of majority vote. Why not jury verdicts?[19]

It is said in addition that majority jury verdicts in criminal trials have operated for many years in other comparable jurisdictions without any apparent detriment to the jury system as such.[20] Further to this, and perhaps most persuasively of all, it can be argued that there is no evidence that majority verdicts have had any adverse effect in practice in these jurisdictions; there is apparently no pressure to rescind majority verdicts; nor is there any suggestion that majority verdicts have resulted in unfair convictions. That is not to say that dissatisfaction with aspects of the jury system and the administration of criminal justice generally has not been expressed in these jurisdictions, as elsewhere. It is only to suggest that it would seem that such dissatisfaction has not focused on the operation of majority jury verdicts.

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18 NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48, 1986.

19 Law Reform Commission of Canada, *The Jury in Criminal Trials*, 1980, p 27.

20 *Cheatle v R* (1993) 177 CLR 541 at 543-544. These and other arguments were submitted to the Court by M Rozens QC.

5 MAJORITY VERDICTS AND PROOF BEYOND REASONABLE DOUBT

Another argument which has been raised is that the rule of unanimity is not part of the essential nature of the institution of jury trial. Indeed, in years gone by juries were compelled, by the practice of starvation, to arrive at a unanimous verdict, which suggests that the common law's insistence was on apparent, not substantial unanimity. Of particular significance in this context is the question of whether the criminal standard of proof beyond reasonable doubt is in some way inconsistent with majority jury verdicts in criminal trials. The advocates of such verdicts say that it is not. In *Cheatle's* case the Solicitor General for South Australia, JJ Doyle QC, submitted:

> Various functions of the jury have been asserted. They are the protection of the accused against oppression by the State; ensuring fairness or fair play in criminal cases; an educative function; keeping the criminal law and system in touch with and understandable by the community; legitimising the criminal system; providing a collective, deliberative mechanism for making the decision on guilt; and providing a representative body in which minority views can be effectively expressed. *Unanimity is not essential to any of these functions. Proof beyond reasonable doubt does not entail unanimity. What is a reasonable doubt and whether it exists is decided by each juror. The number who must be satisfied is distinct from the existence of a reasonable doubt* (emphasis added).[21]

In 1988 Gerry Maher, then Lecturer in Jurisprudence at Glasgow University, presented a detailed account of the issue of the relationship between majority verdicts and proof of guilt beyond reasonable doubt. His view was that unanimity is not a *necessary* pre-condition of establishing proof beyond reasonable doubt. Maher commented that, for legal purposes, proof beyond reasonable doubt can be can be characterised as 'probability at a level of practical certainty, that is the situation where the prosecution case shows that by appeal to these generalisations [about human acts and the human environment] the only consistent and coherent story which can be made of all the (credible) evidence of a case is that the accused is guilty'. Operating with this definition of proof beyond reasonable doubt, Maher argued that it is not clear why unanimity by itself should be vital to the jury process. His point was that, even where a person is found guilty by all 12 jurors, the defendant could always argue that if the jury had been 15 or 20 in size there would not have been unanimity within the larger group and thus proof beyond reasonable doubt would not have been reached. Maher continued to say:

> But such an argument about the *necessity* of unanimity to establish proof beyond reasonable doubt can be repeated for any size of jury. Thus even if we were to require unanimity for juries 120 members in size, a jury of 121 might still give rise to one dissentient and the fact of such disagreement would negate proof of guilt beyond reasonable doubt. Unanimity by itself

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21 *Cheatle v R* (1993) 177 Clr 541 at 545.

> does not appear to be a requirement of proof beyond reasonable doubt. Rather, the need for unanimity becomes greater the smaller the size of the jury but has less force the greater the size of the jury.[22]

Maher's argument was based on the assumption that the larger the jury the more representative it is of the community as a whole. He concluded:

> if a jury is large in size and is also representative of the community or society in general, then some relaxation of the [unanimity] rule may not frustrate the purpose of the principle which is to give the accused a right not to be convicted of a charge unless the case against him has been made out at a level of practical certainty.[23]

In *Apodaca v Oregon*,[24] a case which upheld the constitutionality of majority verdicts in State criminal trials, the US Supreme Court reasoned that 'a requirement of unanimity does not materially contribute' to the exercise of the jury's 'commonsense judgment'. Furthermore:

> a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross-section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where non-unanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.[25]

On the other side, the NSW Law Reform Commission argued that the concept of a majority verdict 'strikes at the root of the hallowed principle that the guilt of the accused person must be proved beyond reasonable doubt'. After quoting at length from Sir James Fitzjames Stephen the Commission observed:

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22 Maher G, 'The verdict of the jury' from Findlay M and Duff P (eds), *The Jury Under Attack*, Butterworths 1988, pp 47-48.

23 Ibid, p 49. It should be noted that Maher continued to argue for unanimity, or near unanimity, in the absence of other safeguards protecting the right not to be convicted unless the case has been made out at a level of practical certainty. An example of the kind of safeguard he had in mind was a rule of corroboration of prosecution evidence.

24 (1972) 406 US 404.

25 Ibid at 410.

> Where there is a majority verdict of guilty, it can clearly be said that, in the absence of corruption, there exists in the mind of at least one member of the jury a reasonable doubt about the guilt of the accused person. It is simply not valid to say that if a doubt is entertained by only one among 12, then it cannot be a reasonable doubt. We think it inescapable that the existence of a dissenting voice casts a shadow over the validity of the verdict.[26]

As discussed later in the paper, in *Cheatle's* case the High Court offered a similar account of the relationship between the requirement of unanimity and proof beyond reasonable doubt. However, the Court did concede 'that there is no logical inconsistency involved in the co-existence in the law of the criminal onus of proof and majority verdicts of guilt'.[27]

6 THE NSW LAW REFORM COMMISSION'S 1986 REPORT ON *THE JURY IN A CRIMINAL TRIAL*

Most of the Commission members were not convinced by the arguments on behalf of majority jury verdicts in criminal proceedings. Four members (Mr Byrne, Mr James QC, Mr Mason QC and Her Honour Justice Mathews) thought unanimity to be the only appropriate basis for the determination of guilt by a jury and said they did not believe that the need to change the existing rule had been demonstrated. They added: 'Even if such a need did exist, we would not be satisfied that allowing a "majority verdict" of 11 of the 12 jurors would overcome the supposed defects of the present system'. Having considered the case for reform in some detail, the majority of the Commission set out its reasons for retaining the unanimity rule in these terms:

> The problem of jury disagreement is a minor one which does not merit solution by the destruction of one of the fundamental features of jury trial. Majority verdicts will not eliminate the already quite small number of retrials which are caused by jury disagreement. The incidence of jury corruption has not been adequately demonstrated. If this is a serious potential problem it can best be met by other measures which do not involve interference with traditional and fundamental principles of the jury system.[28]

Another important consideration for the majority of the Commission was that the purity (and seeming impracticality) of the unanimity rule, which means that neither a conviction nor an acquittal can be secured without the concurrence of the whole jury, is mitigated in practice by a number of factors.

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26 *The Jury in a Criminal Trial*, op cit, p 151.

27 (1993) 177 CLR 541 at 553.

28 *The Jury in a Criminal Trial*, op cit, p 150.

For example, a judge may direct a jury that is having difficulty in reaching agreement that it is their duty to agree if they can honestly and conscientiously do so. It is said in this regard that 'The law allows considerable pressure to be placed on juries to encourage them to reach a unanimous verdict'.[29] As discussed later in this paper, it has been suggested that the High Court's decision in *Black v R*[30] has altered this situation, thus effectively lessening the pressure that can be brought on juries to reach unanimous verdicts.

Another factor assisting the practical operation of the unanimity rule for the majority of the Commission was that 'reasonable lay people may be expected to exert strong moral pressure on fellow jurors who alone are holding against a result which a large majority clearly favours'.[31]

Looking to other jurisdictions, the majority of the Commission added that in 1985 the Victorian Shorter Trials Committee was 'strongly opposed' to the concept of majority verdicts in criminal trials and that the Canadian Law Reform Commission had arrived at the same conclusion in 1982.[32]

Of the other members of the Commission, Mr Sackville, who did not object to majority verdicts in principle, said that their introduction was not needed because of the low incidence of jury disagreements. Justice Roden, on the other hand, supported the introduction of majority verdicts. The report stated:

> In his opinion the criminal law should have a more acceptable means of remedying the injustice done by a single perverse juror who does not agree with the overwhelming majority. Where there is only one juror amongst a group of 12 who does not agree in the verdict, he feels it can be said with some confidence that the view held by that juror is wrong. The current options of either starting the trial again or abandoning the prosecution are inadequate to deal effectively with the problem of jury disagreements, particularly in long trials where the expense and the strain of the proceedings is substantial.[33]

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29 Ibid, p 140.

30 (1993) 179 CLR 44.

31 *The Jury in a Criminal Trial*, op cit, p 141.

32 Ibid, p 150.

33 Ibid, p 156.

7 *CHEATLE'S* CASE - ARGUMENTS IN SUPPORT OF UNANIMOUS JURY VERDICTS

In *Cheatle's* case[34] the High Court held that, under section 80 of the Commonwealth Constitution, a jury verdict in a trial on indictment for an offence against a law of the Commonwealth must be unanimous whether it is a verdict of guilty or not guilty.

In a unanimous judgment the High Court decided that that conclusion was supported both by arguments of history and principle. The principle of unanimity was traced back at least to the fourteenth century. Certain dubious practices in earlier times were noted but the Court found that more recently the requirement of unanimity 'has commonly been seen as constituting "an essential and inseparable part" of the right to trial by jury and an important "protection" of the citizen against wrongful conviction'.[35]

Unanimity was seen as going to the core of the deliberative responsibilities of the jury. The Court said that the jury process was special in this respect, quite different, for example, to the electoral process where a majority verdict can be understood in terms of the aggregation of individual views. The High Court said that the requirement of unanimity:

> constitutes one of the hallmarks of the common law institution of criminal trial by jury in that there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors and a process in which a specified number of jurors can override any dissent and return a majority verdict. The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions. The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of 'hasty and unjust verdicts'. In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority.[36]

The Court went on to say that majority verdicts tend to undermine the common law safeguard that a person should not be convicted of a criminal offence without proof beyond a reasonable doubt. The Court stated the case in these terms:

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34 (1993) 177 CLR 541

35 Ibid at 551.

36 Ibid, pp 552-553.

> Moreover, the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt. It is true that there is no logical inconsistency involved in the co-existence in the law of the criminal onus of proof and majority verdicts of guilt. Nonetheless, assuming that all the jurors are acting reasonably, a verdict returned by a majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict.[37]

Responding to the various arguments in support of majority verdicts, the High Court said that the rule of unanimity should not be abandoned for reasons of 'contemporary convenience or practical utility'. The Court said it was not, in any event, apparent that such considerations do in fact favour such an abandonment:

> To the contrary, one can point to strong support for the view that the requirement of unanimity of a criminal jury is, on balance, in the public interest in this country. In particular, it is far from evident that the reduction in the number of cases in which a criminal jury is unable to return a verdict, which could be expected to result from an abandonment of the requirement of unanimity, would be of sufficient significance to outweigh the disadvantages which would result from such a course.[38]

8 *BLACK'S* CASE[39] - A FURTHER STATEMENT OF PRINCIPLE AND A NEW MODEL DIRECTION TO JURIES

This is an important case in the present context both for theoretical and practical reasons. The case involved an appeal to the High Court from the NSW Court of Criminal Appeal. One of the grounds of appeal related to the direction given by the trial judge to the jury. At issue was whether a reference by the judge to 'considerable public inconvenience and expense if a jury cannot agree' involved inappropriate pressure or coercion. In fact the direction used after the jury had been deliberating for about three hours was a standard direction in NSW. Among other things the judge reminded jury members:

> you have a duty, *not only as individuals but also collectively*. No one of you should be false to the oath you took but in order to return a collective verdict, a verdict of you all, there must necessarily be discussion and argument and a *certain amount of give and take and adjustment* within the scope of that oath.

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37 Ibid, p 553.

38 Ibid, p 562.

39 *Black v R* (1993) 179 CLR 44.

> It makes for *considerable public inconvenience and expense* if a jury cannot agree and it is most unfortunate indeed if such a failure to agree is due to some unwillingness on the part of one or more members of the jury to listen to and consider the arguments of the rest of the jury (emphasis added).[40]

In the principal judgment, Mason CJ with Brennan, Dawson and McHugh JJ, commented that the NSW Court of Criminal Appeal had 'disposed of the challenge to the direction quite briefly'. The High Court could not agree. The principal judgment stated:

> the reference to 'considerable public inconvenience' is apt to impose pressure upon individual jurors to join in the view taken by a majority, thereby violating the fundamental principle that the jury must be free to deliberate without any pressure being brought to bear upon them. The statement that 'there must necessarily be...a certain amount of give and take and adjustment' might be taken to suggest, wrongly in our view, that a juror is to compromise with other jurors in reaching a verdict.[41]

Their Honours continued:

> Moreover, the earlier reference to the jury having a 'duty, not only as individuals but also collectively' may well have had the effect of reinforcing the impression that the jury were under some obligation to reach a result to which all the members of the jury subscribed. Jurors do have a responsibility to act collectively but only in the sense that individual jurors should participate in the collective consideration and discussion of issues in the jury room. There is a risk that references to collective responsibility or duty may be understood more broadly by the jury as an invitation to an individual juror to subordinate his or her views to those of those of a majority of jurors. Consequently references to 'give and take and adjustment' and collective duty or responsibility should be avoided.[42]

These are important statements of the principles which underlie the jury process. While that process may be collective in nature the verdict itself, despite the requirement of unanimity, is not. Stated in this way the distinction is between process and outcome. On this point, Deane J commented that a direction to the jury must carefully avoid 'anything at all that might be misunderstood as encouraging a minority juror to join in returning a 'collective verdict' which does not completely accord with his or her own genuine views'.[43] Further to the decision in *Black's* case, Allen J in the NSW Court of Criminal Appeal said: 'In effect

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40 Ibid, p 47.

41 Ibid, p 50.

42 Ibid, p 51.

43 Ibid, p 56.

what the law requires is twelve separate verdicts...There is no element of any collegiate function of the jury in returning a verdict as distinct from there being a duty of discussion among themselves before each juror finds, in effect, his own verdict'.[44]

To these statements of principle the High Court added a new model direction which a trial judge should give to a jury. That direction includes reference to the need for 'calm and objective discussion'. However, it adds the warning:

> That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.[45]

9 THE PRACTICAL IMPLICATIONS OF *BLACK'S* CASE

Comment was made in the February 1996 number of the *Criminal Law Journal* that in the *Kolalich* case a NSW Supreme Court judge recently pointed out that 'the High Court's introduction of a model direction to juries where they are unable to agree has produced a sharp increase in the number of trials where no verdict is reached'.[46] In that case Allen J observed:

> The duty of this Court is to apply Black not only in the letter but also in the spirit. It is notorious that since Black the incidence of disagreements by juries who have been exhorted in terms of the model exhortation they are given has risen markedly. That may be considered as justifying the High Court in its understanding of the likely impact upon jurors of the pre-Black exhortations. Whether it is in the public interest that there be this sharp increase in the incidence of disagreements is another matter.[47]

Allen J went on to say that the practical impact of the *Black* case is of 'considerable significance' to the debate concerning majority verdicts in criminal trials. He said that the case had 'moved the goal posts'. Past experience had shown that disagreement tended to occur only where there was true 'strength of conviction' on the part of the juror or jurors who disagreed with the majority. In the opinion of Allen J, that is no longer the case. What the law requires now is 'twelve separate verdicts'. His Honour added, 'If they are all the same, that becomes the verdict of the jury to be returned in court. If they are not all the same, the jury cannot return any verdict'. Allen J elaborated:

> It is not surprising that the Black exhortation has produced a sharp increase

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44 *R v Kolalich* (NSWCCA, unreported 9 October 1995 - 60641/93)

45 (1993) 179 CLR 44 at 52.

46 'Trial by jury' (1996) 20 *Criminal Law Journal* 5-6.

47 *R v Kolalich* (NSWCCA, unreported 9 October 1995 - 60641/93)

> in the incidence of juries being unable to return a verdict. Consider, for example, a case where eleven of the jurors are satisfied beyond reasonable doubt of the guilt of the accused but the twelfth is not. The jurors debate their differences. The twelfth juror is almost convinced, but not quite, that the others are right. He gets even to the point where he accepts that the accused probably committed the crime - even though he is not persuaded that the accused's guilt has been demonstrated beyond reasonable doubt. Black makes it clear that he cannot say to the others: 'I really don't have much doubt about his guilt. You are probably right even though personally I am not wholly persuaded. I certainly don't feel strong enough about the correctness of my doubt to dissent. I'll go along with you'. Black forbids it. It says to the juror: 'If you do that you are being false to your oath'.[48]

Appearing to foreshadow the need for legislative intervention, his Honour continued:

> The practical effects of Black must be recognised if there is to be a rational approach in debate to the continuance of the requirement that the jury's verdict be unanimous. Any change to that requirement is one which will require legislative intervention.[49]

In relation to Allen J's remarks, the editorial comment in the *Criminal Law Journal* said that the judge had 'expressly called for the introduction of majority verdicts'. The editorial went on to say:

> We are reluctantly forced to agree. While the High Court has held that such verdicts are prohibited by the Constitution in respect of Commonwealth offences, we are not persuaded by the assertion of members of the High Court that majority verdicts are inconsistent with the principle of proof beyond reasonable doubt.[50]

The editorial then continued in a somewhat different vein:

> If the introduction of majority verdicts is a way of preventing or deflecting more direct assaults on the institution of trial by jury, there may be little alternative to their introduction.[51]

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48 Ibid.

49 Ibid.

50 'Trial by jury' (1996) 20 *Criminal Law Journal* 5-6.

51 Ibid.

10 INCIDENCE OF HUNG JURIES

The question of the empirical basis for reform: The *Criminal Law Journal* had in fact published an editorial comment on the same subject of 'trial by jury' in 1992. At that time it was again of the view that majority verdicts may not necessarily be inconsistent with the principle of proof beyond reasonable doubt. However, it made the point that 'there is little hard evidence in Australia' as to the practical impact made by the requirement of unanimity.[52] In other words the actual incidence of hung trials occurring as a result of that requirement was not known.

Those opposing majority verdicts in criminal trials often argue that 'Hard evidence of jury nobbling is extremely sparse' and that, what evidence there is, suggests that 'Juries disagree in only a small proportion of cases, usually less than 4%'. Tom Molomby, writing in the *Criminal Law Journal* in 1989, added: 'This seems to be a standard proportion in various jurisdictions in Australia, England and the United States, and as such must be taken to represent the real proportion of cases which present genuine scope for differences of opinion'.[53] Another comment which is sometimes made is that where there is a requirement of unanimity, research overseas indicates that 'it usually requires a large number of dissenting jurors early in the deliberations to prevent an ultimately unanimous verdict'.[54]

A recurring theme of the critical literature on this subject is that, where majority verdicts have been introduced, such legislative change has not been made on the basis of sound empirical evidence. A good account was offered by Professor Alex Castles in the *Australian Law Journal* in 1992. For example, he said that in relation to both South Australia and Tasmania 'the Parliamentary Debates which introduced majority verdicts show virtually no more than anecdotal knowledge being used...'. Also, he noted that the change in England in 1967 'came about with a remarkable lack of empirical knowledge to support it'. Castles states: 'as Cornish has pointed out in his seminal book *The Jury* (1968) the change was implemented hastily without detailed consideration of the overall desirability of the change. Pragmatically, the government of the day basically sought to minimise the risk of jurors being "nobbled"'.[55] Another commentator has observed in this context that, at the time of the adoption of majority verdicts, 'the general perception of English judges was that the incidence of perverse verdicts was negligible. This evaluation would now appear to be supported by the general figure of 4% of trials resulting in hung juries'.[56] Referring again to the changes in England in 1967 Nicholas Blake has said:

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52 'Trial by jury' (1992) 16 *Criminal Law Journal* 367-368.

53 Molomby T, 'Letter to the editor' (1989) 13 *Criminal Law Journal* 158-159.

54 'Trial by jury' (1992) 16 *Criminal Law Journal* 367-368.

55 Castles AC, '"Boot-eaters" and majority verdicts in criminal trials' (1992) 66 *The Australian Law Journal* 290-293.

56 Brookbanks WJ, 'Hung juries or majority verdicts: the jury on trial' (June 1991) *New Zealand Law Journal* 188-190.

> The change was made as a result of police concern at possible bribery and intimidation in a series of trials involving London gangsters, but the evidence of these malpractices was virtually non-existent. The Home Secretary of the day could produce none when questioned about it; the best that he could come up with was that in 1966 there were three allegations of intimidation reported to the police, none of which even resulted in a prosecution let alone a conviction.[57]

The same issue of the actual incidence of hung juries arose in Victoria in the context of the Parliamentary Debate concerning the *Juries (Amendment) Act 1993*. During the course of the Debate reference was made to a submission by the Law Institute of Victoria which stated:

> Presumably this proposal is put forward to overcome or reduce the instances of a hung jury. However, the instances of hung juries are surprisingly few in Victoria. For the four-year period from 1989 to 1992, 853 trials went to verdict in the County Court in Melbourne. Of those, only 40 or 4.7 per cent were the subject of a hung jury. Because of the confidentiality that is supposed to be preserved within the jury room, we do not know, and cannot know, whether the voting was 11-1 or 6-6. The proposal may have little or no effect on any of those 40 hung juries.[58]

In response, the Minister, Mrs Wade, did not question these figures or present statistical evidence of her own supporting the case for majority verdicts, Instead, she said that the changes were prompted by two reasons. First by a concern for victims, particularly the trauma suffered by victims in rape and other serious sexual offences if required to give evidence and be cross-examined a second time in the event of a retrial resulting from a hung jury. Secondly, by the opinion of judges who 'believe if one dissenting voice is allowed out of 12, it makes it harder to nobble a jury'.[59]

The point can be made again at this stage that, notwithstanding the apparent lack of empirical research supporting the original need for change in these various jurisdictions, majority verdicts do seem to have operated more or less successfully therein, without apparently causing any concerted pressure for the re-introduction of the requirement of unanimity.

Hung juries in NSW: With regard to NSW, in its 1986 report the Law Reform Commission set out the results of various surveys into the incidence of hung juries in the State.

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57 Blake N, 'The case for the jury' from Findlay M and Duff P (ed), *The Jury Under Attack*, Butterworths 1988, p 143.

58 *Victorian Parliamentary Debates*, 18 November 1993, p 1905.

59 *Victorian Parliamentary Debates*, 18 November 1993, p 1931.

PERIOD	NUMBER OF TRIALS CHECKED	NUMBER OF DISAGREEMENTS	PERCENTAGE OF TRIALS WHICH RESULTED IN DISAGREEMENT
1932-1935	1751	45	2.57
30 July 1971 to 5 November 1971	87	5	5.75
1 January 1975 to 30 June 1975	157	4	2.55
30 September 1985 to 13 December 1985	197	7	3.55

The Commission commented that the figures showed there had not been a 'significant increase' in the incidence of jury disagreements since 1977, the previous occasion when idea of majority verdicts was last considered and rejected. The Commission continued: 'In fact, with the exception of the 1971 survey, which was based on a relatively small sample, the figures are remarkably consistent. This accords with the impression of the members of the Commission and with those of experienced practitioners who have assisted the Commission on this issue'.[60]

More recent figures have been made available by the Director of Public Prosecutions, covering the financial years 1991/1992 to 1994/1995. These are as follows:

1991 - 1992	
Verdict Guilty	595
Verdict Not Guilty	554
VNG by Direction	126
Aborted	66
Hung	50
Percentage of hung trials was 3.6%	
TOTAL	1391

1992 - 1993	
Verdict Guilty	499
Verdict Not Guilty	489
VNG by Direction	100
Aborted	65
Hung	38
Percentage of hung trials was 3.2%	
TOTAL	1191

60 The Jury in a Criminal Trial, op cit, p 146.

1993 - 1994	
Verdict Guilty	460
Verdict Not Guilty	463
VNG by Direction	94
Aborted	84
Hung	67
Percentage of hung trials was 5.7%	
TOTAL	**1168**

1994 - 1995	
Verdict Guilty	360
Verdict Not Guilty	400
VNG by Direction	73
Aborted	69
Hung	60
Percentage of hung trials was 6.2%	
TOTAL	**962**

One comment to make is that it is not possible to say how the jury voting in hung trials was split in any case. In other words the number (if any) of juries which were 'nobbled' or otherwise frustrated by a lone dissenting juror is not known. A second point to make is that some increase in the number of hung juries was evident in the last two financial years surveyed here. In particular, the figures for 1994-1995 were a full 3 percentage points higher than those for 1992-1993. Whether this is the start of a consistently upward trend remains to be seen. Further, having regard to the comments made by Allen J in *Kolalich*, the question can be posed wether this increase represents the full impact of the model direction in *Black's* case, or is that full impact still to be felt? Clearly, the figures for the present financial year will be of considerable interest in that respect.

11 CONCLUSIONS

From this review of the arguments and issues at stake in the case for and against majority verdicts it might be concluded that, on balance, the case for unanimity is based mainly on considerations of principle, whereas the case for majority verdicts tends to be more pragmatic in nature. However, as with most generalisations, there may be a sense in which this is something of a caricature.

Certainly, for those opposed to the introduction of majority verdicts in criminal trials there is a deep practical concern that this might result in the conviction of innocent people. The argument is that from time to time a dissenting minority of one or two will be right. Thus, Tom Molomby states: 'Recent history in this State [NSW] provides a well documented example: the lone juror who refused to convict at the first trial of the Ananda Marga conspiracy case in 1979 was clearly right. A lone juror similarly dissented at the first trial for murder of Arthur Peden in 1921, a dissent similarly vindicated by a later enquiry'.[61] To put it another way, it is clear from cases such as those of Lindy Chamberlain, the Birmingham Six and the Guildford Four that juries do make mistakes

[61] Molomby T, 'Letter to the editor' (1989) 13 *Criminal Law Journal* 158-159.

and the introduction of majority verdicts can only increase the possibility of error.

On the other side, proponents of majority verdicts can point, for example, to the argument that such verdicts are not an essential requirement of jury trial, nor are they inconsistent with the principle of proof beyond reasonable doubt. It is said that majority verdicts 'strike an appropriate balance between the principle that guilt should be determined beyond reasonable doubt and the need to manage courts efficiently and fairly'.[62] On a different note, the further point can be made that the jury verdict in the Lindy Chamberlain case was in fact unanimous.[63] More generally, studies of notorious miscarriages of justice tend not to refer to majority verdicts as significant causal factors. Instead, note is made of such factors as: suspect police procedures; the nature of the evidence presented at trial; unreliable police or prison informers; and media pressure for quick action.[64]

At the same time it may be argued that majority verdicts have operated, apparently without any significant difficulties, in several comparable jurisdictions over many years. In South Australia they were introduced as early as 1927. It is not as if, therefore, the merits and demerits of majority verdicts have not been put to the hard test of practice.

For all that in *Cheatle's* case the High Court was adamant that the requirement of unanimity should not be abandoned for reasons of 'contemporary convenience or practical utility'. It added that, in any event, it did not think that the introduction of majority verdicts would 'be of sufficient significance to outweigh the disadvantages which would result from such a course'.[65] The debate in this context concerning the incidence of hung juries has been noted. So, too, have the concerns regarding the likely impact of the new model direction in *Black's* case on the number of hung juries.

Either way, what the debate seems to point towards is the need for sound empirical evidence on this issue. However, raw data on the number of hung juries will not tell us how the voting was split in any case and, therefore, the likely limitations of empirical evidence will also need to be considered. In this way, the debate may come around again to matters of principle, perhaps based in particular on considerations relating to the principle of proof beyond reasonable doubt.

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62 *Victorian Parliamentary Debates* (LA), 20 October 1993, p 1157.

63 Crispin K, *The Crown versus Chamberlain, 1980-1987*, Albatross Books 1987, p 182.

64 Wilson P, 'Miscarriages of justice in serious criminal cases in Australia' from Carrington K et al (ed), *Travesty! Miscarriages of Justice*, Pluto Press Australia 1991, pp 1-17.

65 (1993) 177 CLR 541 at 553.