Majority jury verdicts

By Nicholas Cowdery

For some people there was yet another 'beginning of the end of civilisation as we know it' on 26 May 2006, when the New South Wales *Jury Amendment (Verdicts) Act 2006* became law. It allows for majority jury verdicts (for conviction or acquittal) in NSW criminal trials of offences against NSW law.

In a general way (subject to some differences of detail), NSW then fell into line with South Australia (where majority verdicts have been available since 1927), Tasmania (1936), Western Australia (1960), the Northern Territory (1963), England and Wales (1967), Victoria (1994), Scotland, Ireland and some of the states of the USA. In none of those jurisdictions has there been any outcry over miscarriages of justice or injustice by reason of the provisions; nor have there been any calls for reform. New Zealand is examining the notion.

Juries have been described as

> 'bring[ing] together a small group of lay persons who are assembled on a temporary basis for the purpose of deciding whether an accused person is guilty of a criminal act... The jurors are conscripted and often initially reluctant to serve. They are untutored in the formal discipline of law and its logic. They hear and see confusing and contested evidence and are provided with instructions, most often only in oral form, about arcane legal concepts and sent into a room alone to decide a verdict without further help from the professional persons who developed the evidence and explained their duties.'[1]

Juries of 12 persons are selected almost daily in many courts around the State of NSW and elsewhere. Most trials end with the same 12 making a decision, but in NSW the number can shrink from illness or other reason to 11 or 10, to eight if the trial has been in progress for at least two months, or to any lower number with written approval from the prosecution and defence. An assumption underlying the jury system is that the jury is representative of the community; but that applies only in a limited sense, given the ineligibilities, disqualifications and exemptions that presently apply to jury service. Unlike in the USA, there is no preliminary examination of potential jurors.

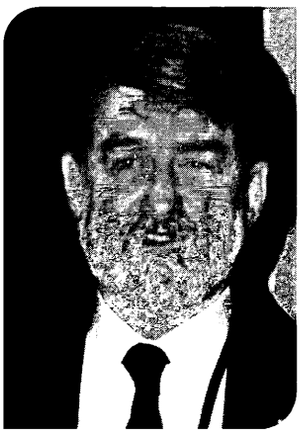
The new legislation

Under the new legislation, where the jury at the end of the trial has at least 11 members, a majority verdict of the whole less one (ie 11 out of 12, or 10 out of 11) may be taken if:

- a unanimous verdict has not been reached after at least eight hours' deliberation (which therefore requires an overnight adjournment);
- the court (ie, the judge) considers it reasonable, having regard to the nature and complexity of the proceedings; and
- the court is satisfied, after questioning one or more of the jurors, that it is unlikely that the jurors will reach a unanimous verdict after further deliberation.

Nevertheless, it is accepted that the jury should still endeavour to reach a unanimous verdict in the first instance.

The provisions do not apply to Commonwealth offences. In *Cheatle v The Queen*[2] the High Court held that unanimous verdicts are an essential feature of trial by jury as required by the Constitution (in s 80). The Court referred to the 'fundamental thesis' of our criminal law that an accused person should be given the benefit of any reasonable doubt and held that



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'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'.

Well, does it?

The NSW Law Reform Commission in its Report 111 tabled in Parliament on 9 November 2005 considered all the arguments for and against majority verdicts (which appeared to be fairly evenly balanced) and recommended against them. Among other reasons, it put forward the proposition that where unanimity is required 'disagreement among jurors can force the evidence to be viewed from different perspectives and leads to a more thorough investigation of the issues'.

But is that not addressed by requiring at least eight hours of deliberation, directed towards a unanimous verdict, before a majority verdict can even be considered?

The arguments on majority verdicts

Critics of majority verdicts raise a number of matters.

1. The magic of the number 12 (Christian apostles, months in the Julian calendar, signs of the Zodiac—omitting Ophiucus—and so on). But is it really appropriate to acknowledge an element of magic in the criminal justice process? In Scotland, juries are of 15 persons and a simple majority is sufficient for a verdict. (True it is that there is also a verdict there of 'not proven' and corroboration of evidence of guilt is required before any conviction; but those features do not alter the process substantially and the fact remains that eight out of 15 can convict.)

2. *Unanimity as a virtue in itself, because of its authority and the processes required to reach it.* When juries began in England they were more like groups of witnesses who brought with them their own knowledge of the events being litigated. Later they became impartial and objective contributors, representing the community in which the alleged offence had occurred. Unanimity of their verdicts was required from the 14th century and sometimes they would even be deprived of food and heating to encourage them to reach a decision, or transported from town to town with the court until they decided. One can only speculate about the compromise decisions that must have been reached in such conditions.

As with every other aspect of the criminal justice system and its processes, there is a need for balance. Unanimity is probably at least desirable because it can encourage greater deliberation, it can give effect to a dissenting view that may be soundly based, it ensures consistency with the trial of Commonwealth offences and hung juries are said not to be so common as to require change. On the other hand, even if only 10% of juries are hung, that means up to 200 trials in NSW in a year (and often the more lengthy, difficult, expensive and taxing trials) need to be run again. The dissent may not be a reasoned one but the conduct of a 'rogue juror' who is unreasonable, perverse or misinformed and obstinate. Compromise verdicts may be reduced where a majority is sufficient; the possibility of corruption or intimidation of a juror is lessened; verdicts are more efficient; and the process is more consistent with general democratic practices.

Enough instances are known of the one juror who cannot be said to be truly representative of the community who, for reasons entirely unconnected with the proper reasoning processes leading to verdicts, refuses to conscientiously participate in the task required and is determined to frustrate it. This tends to happen in trials that are especially difficult for the participants (including victims of crime, witnesses and other jurors) and the trouble and cost of retrials are very significant (with a Supreme Court trial costing about $40,000 per day to run).

Trial by jury is not perfect; but our form of it is the product of principle, experience and necessary compromise, balancing inevitably competing considerations. Appeal courts may correct its failings, as required. Majority verdicts are now a well established feature of trial by jury in similar jurisdictions.

3. Dilution of the presumption of innocence and/or the requirement of proof beyond reasonable doubt. How these leaps of logic persist is a mystery. An accused person, unless and until convicted, retains the presumption of innocence. It can only be displaced by ultimate proof beyond reasonable doubt. Whether 12, 11 or 10 jurors (or any lesser number) ultimately convict, the presumption of innocence remains in place and must continue to operate on their individual minds until conviction.

When decision time comes, those voting for conviction individually must be satisfied beyond reasonable doubt that guilt of the crime charged has been proved. If one juror does not have that satisfaction, it does not mean that the rest do not—and there is no magic in any particular number making the final decision. It means only that a smaller number than the total has that degree of satisfaction. The same standard is applied—it does not change.

The High Court in *Cheatle* thought that majority verdicts objectively suggest the existence of reasonable doubt and carry a greater risk of conviction of the innocent. Those propositions should be examined further. The disagreement of one person out of 11 or 12 temporarily selected from the community may be based on a range of factors not necessarily including a satisfaction or lack of satisfaction of proof beyond reasonable doubt. Indeed, a 'rogue juror' may not even have addressed that issue in any proper fashion. It is suggested that it is not the unanimity of decision *per se* that assures proof beyond reasonable doubt, but the decision to convict being made by an acceptably large and representative absolute (and not comparative) number of decision makers.

Conclusion

Is there a greater risk of conviction of the innocent? Risk is relative; and there are many mechanisms and rules in place throughout the criminal justice process to minimise the risk of conviction of the innocent, from processes that operate throughout investigations and restraints upon investigators, to rules about the admission of evidence, right through to the appeal courts reviewing the soundness of the processes that have occurred. Any increase in risk of conviction of the innocent from majority verdicts must necessarily be infinitesimal. The five-year review of the NSW legislation will no doubt examine that proposition, among others.

So far in NSW it would seem that the floodgates have not opened, nor has the apocalypse drawn nearer. At the time of writing (after 11 months of operation of the legislation), there have been three trials in which majority verdicts of guilty on some charge(s) have been returned and two trials in which majority acquittals have been decided.

A little under 2,000 trials proceed to verdict in a year, being well under 1% of all criminal cases heard by all NSW courts (the rest being decided by magistrates and judges alone or being determined by pleas of guilty). There are no signs that the measure has threatened or diminished public confidence in the criminal justice process and it now exists as a safeguard of the general public interest.

Endnotes

1. N Vidmar, 'A historical and comparative perspective on the common law jury' in N Vidmar (ed) *World Jury Systems* (2000), 1.
2. *Cheatle v The Queen* (1993) 177 CLR 541.