CONSTITUTIONAL LAW

Trial by jury

The High Court holds majority verdicts unconstitutional. GRAHAM JEFFERSON reports.

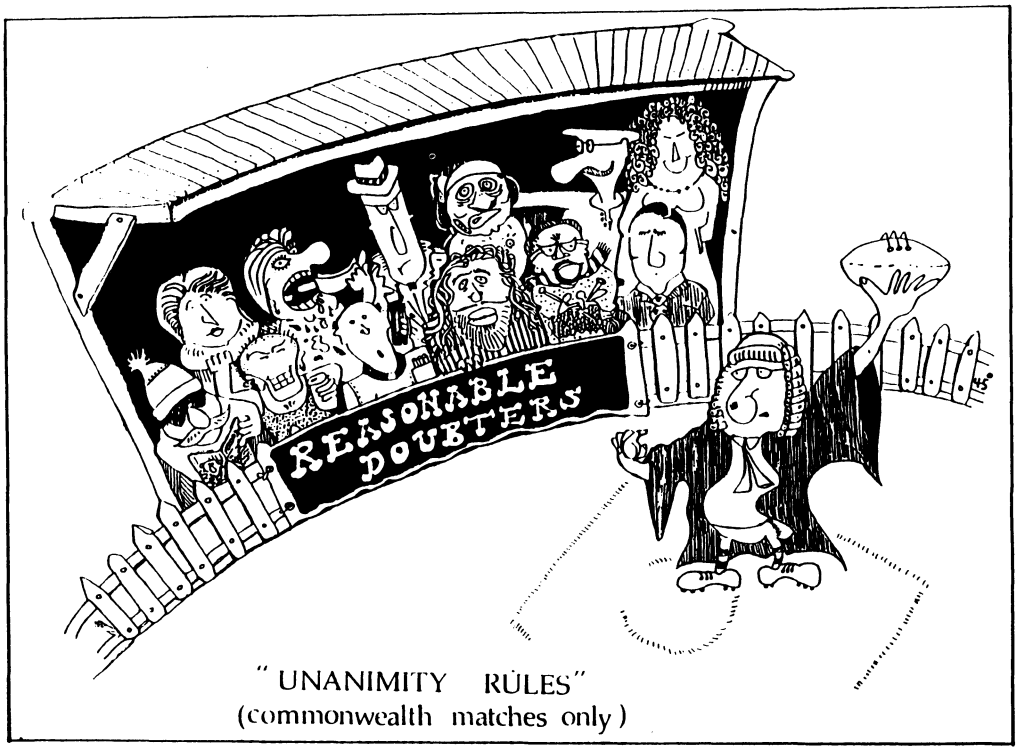
Following quickly on the *Dietrich* case,[1] the High Court has brought down another important decision governing criminal procedure: *Cheatle v R* (26 August 1993). The effect of the judgment is that jury verdicts in trials for serious Commonwealth offences must be unanimous.

The Cheatles were found guilty of conspiracy to defraud the Commonwealth by a 12-person jury in South Australia. The verdict was not unanimous.[2] The Cheatles appealed their conviction to the High Court on the ground that s.80 of the *Constitution* requires unanimity in a jury's verdict. The High Court agreed and allowed the appeal.

Section 80 provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

In a joint judgment all judges of the court held that ' . . . history, principle and authority combine to compel the conclusion that s.80's guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by the agreement or consensus of all the jurors' (at pp.17-18 of the unreported judgment).



"UNANIMITY RULES"
(commonwealth matches only)

The court examined the history of trial by jury and found that as far back as 1367 the common law had required unanimity in criminal trials. This accorded with the fundamental principle in criminal law that an accused person be given the benefit of any reasonable doubt a jury might entertain. At the time of Federation it was an essential of the criminal justice systems in the colonies that trial by jury involve unanimity of jurors. The court also looked at the position in the United States. The last clause of s.2 of Art.III of the US Constitution is in terms almost identical to s.80. Indeed, that clause served as a model for s.80. At the time of federation it was clear that the American law required unanimity in verdicts. It was understood that the architects of our Constitution intended the position in the new federation to be the same as that in the US.

Despite the fact that *Cheatle* is the first time this question has been directly addressed there was compelling authority to support the view that trial by jury required unanimity. In 1936 Evatt J expressed the view that unanimity was more than a procedural requirement. He said ' . . . trial by jury has been universally regarded as a fundamental right of the subject, and unanimity in criminal issues has been regarded as an essential and inseparable part of that right . . . ' (*Newell v The King* (1936) 55 CLR at 713).

The guarantee afforded by s.80 is, however, not as comprehensive as might be expected. It is settled law that the section only operates in relation to laws of the Commonwealth. Trials for State or Territory offences are not covered. As a result, the vast majority of criminal trials are not affected by s.80 (heroin importation cases under the *Customs Act* being a notable exception). It has also been decided that s.80 only applies to trials on indictment. If the Commonwealth introduced laws to prosecute serious crimes other than by way of indictment, the guarantee in s.80 would not apply (*R v Bernasconi* (1915) 19 CLR 629). Such a narrow interpretation of the section mocks its existence and has been criticised.[3] Indeed, the court in *Cheatle* talks of trial by jury in terms of a fundamental right. It seems absurd that such a fundamental right could be abrogated by legislation affecting simple procedural changes to the way a person is charged.

The *Cheatle* decision also resurrects an interesting question so far as residents of the Territories are concerned. *Bernasconi's* case is authority for the proposition that s.80 does not apply to the Territories. The rationale for that result came from the peculiar position of the Territories under the Constitution. In recent times the High Court has been moving towards an interpretation of the Constitution that places citizens in the Territories on an equal footing with citizens in the States. This is particularly so in relation to the fundamental guarantees such as s.80 (*Capital Duplicators Pty Ltd & Anor v*

ACT & Anor (1992) 109 ALR 1). The decision in *Bernasconi* may no longer be correct. A judge of the Northern Territory Supreme Court took this view in a recent heroin importation trial (*R v Druett*, unreported, NT Supreme Court, 9 June 1993, Gallop J. The judge directed the jury that they must return a unanimous verdict notwithstanding the fact that s.368 of the NT *Criminal Code* provides for majority verdicts).

The Cheatles' convictions were set aside and a new trial was ordered. One can expect that there will be a number of people currently serving gaol terms as a result of majority verdicts in trials for Commonwealth offences. Those convictions must be unconstitutional and should be set aside. Although the consequences of *Cheatle* are unlikely to be as dramatic as the consequences of *Dietrich*[4] both decisions suggest a vigilance on the part of the High Court to ensure that people are not unfairly convicted.

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References

1. *Dietrich v R* (1992) 109 ALR 385. See generally: Fletcher, K., 'Legal Aid: Right or Privilege?' (1993) 18(1) *Alt.LJ* 21.
2. *The Juries Act* 1927 (SA) permits a majority verdict of ten or more jurors for crimes other than murder or treason. It is similar to legislation in other States and Territories permitting majority verdicts.
3. See generally Hanks, P.J., *Constitutional Law in Australia*, Butterworths 1991, pp.409-10.
4. See also Giddings, J., 'Legal Aid in Victoria: Cash Crisis' (1993) 18(3) *Alt.LJ* 130.

SEX DISCRIMINATION

Common law victory

ROLAND BROWNE reports on a recent case in Tasmania, the only Australian State that does not have anti-discrimination legislation.

On 10 July 1993 a Hobart jury gave its verdict in a long-running sexual harassment case against the Hobart City Council. In doing so, it gave work-place sexual assault and sexual harassment in this country the same status as any other industrial injury.

The plaintiff, Karina Barker, was employed in 1989 by the Hobart City Council as an apprentice horticulturalist. She was 17 years old. As she lived on the outskirts of Hobart, her supervisor arranged for another worker, James Stacey, to transport her to and from work. Ms Barker's first four months were spent with a gang of male workers, the majority of whom were over 30 years old, and were largely unsupervised. This job, which she had longed for — having had a childhood interest in gardening — soon turned into a nightmare. She was subjected to male behaviour at its worst, being teased, touched, propositioned, ridiculed and humiliated. One member of the gang, Paul Barratt, also placed his arms around her, cuddled her, touched her continually on her breasts, and occasionally on her genital area. A second member, Bruno Gentile, touched her on her body and breasts. On one occasion Gentile pinched her buttocks with a pair of pliers as a 'practical joke'. Further indignity came from Stacey who touched Ms Barker on the legs and breasts while she rode in his car to and from work. The plaintiff did not disclose these assaults. Subsequently, Stacey's conduct escalated: he raped Ms Barker one afternoon on the way home from work.

The harassment took its toll, and Ms Barker suffered an adjustment disorder and agoraphobia. She stayed home, too scared to go out with others, and was unable to lead the lifestyle she led just six months before. Ms Barker became increasingly distressed and traumatised, eventually requiring psychiatric and other counselling.

After nine months with the Council Ms Barker summoned the courage to see the head of the relevant department at the council, Mr Crossen, to complain. Unfortunately, following his promised investigation, he told Ms Barker: 'You've got quite a reputation for yourself, young lady', after which he asked whether she had something to do at night, 'like Red Cross'. She was devastated, but resolved to try to continue her apprenticeship. However, fearing a repetition of the harassment from Barratt and Gentile when she returned to the original gang, Ms Barker left the Council in May 1990.

Ms Barker commenced proceedings against the employer, Hobart City Council, and Barratt, Gentile and Stacey. She sued the Council for negligence, alleging a failure to supervise her workplace and a failure to provide a safe place for her to work. She also sued the Council for the defamation by Mr Crossen. Barratt and Gentile were sued for assault and battery. Barratt was also sued for false imprisonment (for locking Ms Barker in an underground tunnel and demanding sexual intercourse). Stacey was sued for assault, battery and false imprisonment, the latter arising from his refusal to take Ms Barker home the day he raped her. Ms Barker originally sued (in the alternative) in the tort of *Wilkinson v Downton* but abandoned this during the trial owing to the added complexity this would cause in directions to the jury. The council's defence was a denial of a breach of duty. Stacey simply denied any contact between himself and Ms Barker. Barratt and Gentile chose a novel defence, which was that they never touched Ms Barker, but if they did, she impliedly consented to it.

The verdict of the jury was unanimously in Ms Barker's favour in respect of the major allegations against the Council, Barratt and Gentile. The verdict for rape was by majority, as was her claim that Stacey had touched her on the breasts in his car. The total damages awarded were $120,529, comprising $90,870 against the Council, $11,863 against Barratt, $2311 against Gentile and $15,485 against Stacey. Of these awards, the jury included a component for exemplary (punishment) damages of $27,500 against the Council, $1000 against both Barratt and Stacey and $250 against Gentile.

Why did Ms Barker choose civil rather than criminal proceedings or one of the other legal options? First, she never went to the police about the rape or the sexual assaults and complained to her employer very late in the course of things. Mr Crossen had given her a choice of calling in the police or investigating the matters himself. As a result of the fact that Mr Crossen blamed Ms Barker for the incidents Ms Barker lost all faith in authority figures, and her subsequent approach for legal advice was initially to make an application for criminal injuries compensation. Second, putting the defendants in prison would not have compensated her for the three years of