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

her life she lost. She sought financial compensation from the very beginning in an endeavour to regain some of this loss. Third, there is no anti-discrimination legislation in Tasmania: it is the only jurisdiction left in Australia without such laws. The *Sex Discrimination Act* 1984 (Cth) has no application to employees of local government.

In retrospect, making a civil claim had a number of advantages. First, Ms Barker was in control of the conduct of the litigation from the very beginning, deciding who her witnesses would be and what tactics she would adopt in the course of the trial. Second, had she chosen a criminal trial it is unlikely she would have achieved the same result. The majority verdict on the rape (in a civil jury of seven) on the civil standard of the balance of probabilities was unlikely to have translated to a majority verdict of proof beyond reasonable doubt in the criminal court.

The decision has not only condemned the behaviour of these men and vindicated Ms Barker, it will surely act as a catalyst to prevent sexual harassment occurring in the workplace. Insurance companies are likely to compel their clients to stamp out harassment on economic grounds as it is potentially very costly. In this case the Council's insurance company, C.E. Heath (who indemnified Barratt and Gentile for damages and costs) will be paying most of Ms Barker's damages ($105,000), her legal costs (approximately $200,000), the legal costs of Barratt and Gentile (approximately $100,000) and the costs of the Council's solicitors (approximately $150,000). Similarly, men in Tasmania will be on notice that they are accountable for their behaviour, and that their misdeeds can be very costly to them.

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COURTS

Judicial 'habits' and other curious tales

SIMON RICE takes a tongue-in-cheek look at the judiciary.

The perennial and almost populist pursuit of 'access to justice' has concentrated, understandably, on process, structures and costs. All manner of barriers are in the way of ready access to the just resolution of disputes, the just allocation of resources, and the just balancing of power and interests in society. The recent move to introduce some form of training or continuing education of judges should be seen as part of the whole push towards 'access to justice'.

While the issue of the education of judges has arisen principally from the manner in which judges have handled sexual assault matters, questions about the role of judges as interpreters of the law, and therefore as deliverers of justice, are implicit in the proposals for training. No number of structural or procedural reforms will assist a party who, given ready access to the courts, is confronted by a judge whose very perception of the judicial role is itself a barrier to a just resolution of a dispute.

Understanding what 'the law' is, is a challenge for everyone, including lawyers. Judges, according to their office rather than to innate ability, are charged with being the arbiters, for disputing parties, of what the law is. I do not address the extent to which a basic tenet of the democratic process – that judges do not make law, they merely apply it – is a fiction. My curious tale is about the very function judges do indubitably have: to interpret the law.

Justice Meagher of the NSW Court of Appeal recently found himself in agreement with the President of the Court, Justice Kirby. That itself could be a curious tale. In any event, the case of *Monier Ltd v Szabo* (1992) 28 NSWLR 53 involved the interpretation of a section of the *Workers Compensation Act* (NSW), and it was on this interpretation that Justice Meagher agreed with Justice Kirby. He went on, however, to give his view on how ambiguities in an Act might best be, or not be, clarified. He referred to reliance on second reading speeches as a means of resolving legislative ambiguities, and said: 'The habit should cease'. Although he considered it 'needless to say', he nevertheless said that such material does 'not in any way resolve the ambiguity in the Act'.

That may have been so, in that case, but in calling the practice 'a habit' that must cease, His Honour was clearly speaking beyond that case. In fact, he referred to the practice as one that vexes him, and to which he wants to 'draw the profession's attention'.

Justice Meagher would not, of course, be ignorant of the *Interpretation Act* 1987 (NSW). Section 34 of that Act provides that if any material, including a second reading speech, is capable of assisting in interpreting the meaning of an ambiguous provision, consideration may be given to it. In the light of this, Justice Meagher could not really be attacking the 'counsel [who] flood the courts with various Second Reading Speeches'; they are, after all, only offering the court what the *Interpretation Act* invites them to. His Honour must be sending a message, as judges do, to the legislature, saying: 'The licence you give to counsel to perpetuate the habit should cease'.

The 'habit' has been otherwise unremarkable for some time, and the *Interpretation Act* was relied on in this way most recently by the High Court in *Saraswati v R* (5 June 1991) and by Justice Meagher's fellow (I *can* say brother) judges in the Court of Appeal in *Promenade Investment Pty Ltd v NSW* (18 February 1992).

Perhaps what Justice Meagher meant to highlight is not the right of a party to rely on the material (to flood the courts), but the discretion he as a judge has to disregard it – the wording of the Act is that 'consideration *may* be given', and 'if the material is capable of assisting'. That is a decision, and perhaps an appellable one, for a judge; parties ought not be criticised for relying on rights the legislature gives them, let alone for trying to ensure that judges apply the law as the legislature intended it.

The respect due to judges ought not derive from any perceived (or self-perceived) distinction between the role of judges and the legal process. Judges, though independent, are a part of the process of justice – neither at the beginning nor the end of it, nor somehow separate from it in some sort of custodial or consultative fashion.

Respect is due to judges as it is due to all professionals for the responsible and responsive manner in which they discharge their duties and perform their role within a larger system. Judges, as much as a host of other features of the legal system, sit between the community and justice; judges as much of the rest of the legal system must respond to change.

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