Australian State Is Weakening Jury Protection Of The Innocent

By Serena Nicholls

New South Wales (NSW) is Australia's most populous state, and Sydney is its largest city. In August of 2005 the New South Wales Law Reform Commission issued a report that strongly recommended that the system of unanimous jury verdicts in NSW should be retained. The NSW Government ignored that recommendation when it announced on the 9th of November 2005, that they "…have, on balance, decided to approve in principle the introduction of a system of majority verdicts."[1] The government proposal is to allow conviction by an 11-1 juror vote after six hours of deliberation has failed to result in a verdict. The recent questioning of unanimity has come shortly after the jury was discharged in the Kerry Whelan murder trial because they were unable to reach a verdict.[2] NSW will become one of several Australian states that have introduced majority verdicts.[3] This article considers some of the implications of abandoning the unanimous jury verdict.

Advantages of Non-unanimous Jury Verdicts

The main argument that has been advanced by supporters of majority (non-unanimous) verdicts is that they would reduce the opportunities for juries to hang, thereby reducing the number of retrials. This argument is based on the belief that the administration of justice is frustrated when there is an irrational juror who refuses to consider the evidence in an impartial manner.[4] Therefore, by eliminating the need for unanimity an irrational juror will no longer cause a hung jury.[5] In turn, majority verdicts will reduce the number of undesirable compromises that are made, with dissenting jurors being persuaded to conform to the majority view.[6] If these dissentient jurors are not persuaded then the unanimity rule

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Walsh stated to reporters that Petro had no right to say convicted killer Clarence Elkins is innocent without examining the entire case. Petro fired back stating, "I object so much to that charge," he said. "Where does she get off? We have been engaged for quite some time. Almost a year ago we said we had real concerns in this matter because he was totally excluded as a [DNA] match." [7]

In an editorial appearing in Cleveland's *The Plain Dealer* on November 7, 2005, prosecutor Walsh was accused of trying to "construct a fort of straw," in the Elkins case, after the new DNA evidence was discovered. *The Plain Dealer* wisely observes, "... justice also calls for something that won't show up in the county conviction rate: humility and the wisdom to respect science, the evidence and the law." [8]

Walsh also threw a new twist into Elkins' case by defending against the new DNA evidence by claiming Ohio's DNA statute only allows one year for inmates to apply for DNA testing. Since that statute had expired, she claimed Elkins' new DNA evidence was time barred. An evidentiary hearing concerning Elkins' new DNA evidence was scheduled for February 22, 2006, in the Summit County Common Pleas Court.

During all the prosecution's obstruction, the 42-year-old Elkins sat in prison, a spectator to the comedy of errors, display of misplaced pride and misperceived political one-upmanship.

"Pack Your Bags, You're Coming Home Baby"

Petro scheduled a press conference for the morning of Thursday, December 15, 2005, to announce the DNA test result of previously untested crime scene evidence that both excluded Elkins, and implicated Mann. That test was of a hair found in feces smeared on the girl's nightgown that she was wearing when attacked. Fifteen minutes before that press conference, prosecutor Walsh unexpectedly reversed her position and filed a motion to dismiss all charges against Elkins. Judge Hunter, who just five months earlier had denied Elkins' motion for a new trial, granted the motion and ordered Elkins' immediate release.

> "Melinda Elkins has been tireless in trying to bring justice to her mother, Judith Johnson, to her niece, and to her husband, Clarence Elkins. She has led the fight from Day One. She was able to do something that the police and prosecutors were not able to do – solve this crime."
>
> Carey Hoffman, The Ohio Innocence Project (Sept 2005)

Shortly after that Elkins' wife Melinda told him in a phone call, "Pack your bags, you're coming home baby." [9] While waiting for his release to be processed, Elkins said in a phone interview, "When my wife told me I was coming home today for good, I was just overwhelmed with joy and tears of joy. I was amazed it was so soon. I thought it was going to drag out." [10] Elkins walked out of Mansfield Correctional Institution about 4 p.m that afternoon. After seven years of wrongful imprisonment, Elkins told reporters outside the prison, "I don't think it's really hit me yet. It's strange. It's different. This is a day I will never forget." [11]

Walsh apologized to the Elkins' family during a press conference, while at the same time defending her long-standing opposition to his efforts for a new trial. She explained that she only became convinced of Elkins' innocence after Mann had "miserably" failed five polygraph examinations in the preceding two weeks, and made incriminating statements during his post-examination interviews. Although Mann hadn't confessed, he had admitted to being inside Johnson's home on the day she was murdered. After watching recent videotaped interviews, Walsh described Mann as a "very strange" and "violent" person. She said, "Based on our investigation, I no longer have the doubt that I had in [Elkins] case." [12] Although charges weren't immediately filed against Mann, it is expected that if they are, Walsh will seek the death penalty.

It cannot go without saying that Elkins had support from his wife Melinda, numerous friends, and first class investigative and legal aid in his fight for freedom. The tireless campaigning on Elkin's behalf resulted in national publicity for his case, including a segment titled Star Witness on CBS' *48 Hours* television program broadcast on September 13, 2003. That broadcast revealed additional exculpatory information in the form of a lab report obtained by *48 Hours* that showed two hairs found on Johnson's buttocks definitely did not originate from Elkins. Detailed information about Elkins' case is on his website, http://www.freeclarence.com.

Endnotes:

1 Noted Forensic Scientist Doubts Murderer- Rapist's Guilt, Donna J. Robb, *Cleveland Plain Dealer*, July 5, 2002.
2 New Trial Denied Despite DNA Find," Phil Trexler, *Akron Beacon Journal*, July 15, 2005.
3 New Twist in DNA Killing, Phil Trexler, *Akron Beacon Journal*, September 22, 2005.
4 Inmate Helps Student's Case, by Sharon Coolidge, *Cincinnati Enquirer*, September 23, 2005.
5 DNA Should Free Inmate, Attorney General Says, Karen Farkas, *Cleveland Plain Dealer*, October 29, 2005.
6 '98 Case Divides Offices, Phil Trexler, *Akron Beacon Journal*, November 1, 2005.
7 Summit Prosecutor Rips Petro for Saying Prisoner is Innocent, Karen Farkas, *Cleveland Plain Dealer*, November 1, 2005.
8 Editorial, *Cleveland Plain Dealer*, November 7, 2005.
9 Man Cleared By DNA Leaves Ohio Prison, John McCarthy, *Washington Post*, December 15, 2005.
10 *Id.*
11 Elkins Wins His Freedom, Phil Trexler, *Akron Beacon Journal*, December 16, 2005.
12 *Id.*

Majority cont. from p. 19

would be undemocratic because it allows the minority to frustrate the decision of the majority.[7] Those who favor majority verdicts further argue that unanimity places an unwarranted financial burden on the State and the accused person.[8] By implementing the majority system there will be less hung juries, which will relieve the State of the financial burden of retrying cases.[9] This notion is supported by the many studies that have shown that juries operating under a majority system will deliberate and deliver the verdict faster.[10] An additional argument that has been advanced in favor of majority verdicts is that it reduces the possibility of juror corruption because more than one juror would need to be approached.[11]

Advantages of Unanimous Jury Verdicts

Although some of the arguments for majority verdicts appear strong at first sight, they must be considered in the wider context of the criminal justice system. Firstly, the arguments in favour of a majority system would carry a greater degree of weight if hung juries were a common occurrence.[12] Research suggests that the Australian States that have implemented majority verdicts have only marginally lower rates of hung juries than Queensland (where unanimous verdicts are still required).[13] Thus, implementing a majority system would only slightly decrease the incidence of hung juries.[14] It can also be argued that a larger number of hung juries is beneficial to the criminal justice system because it serves to affirm the integrity of the jury and ensures that the judgment of each juror is valued. Therefore, it would be a mistake to assume that hung juries are indicative of a failing system.[15] It is acknowledged that the implementation of the majority rule would represent some administrative and economic savings that accompany jury disagreements. However, these savings are, at best, very modest.[16] They also come at a cost to the quality of our judicial system, with the loss of an important protection.[17] The economic savings that may be bought about by the majority system should not be prioritised over the interests of justice.[18]

Another drawback of majority jury verdicts is the view of a dissenting juror is negated.[19] If reasonable doubt exists in the mind of one juror then arguably a shadow is cast over the validity of the conviction.[20] As was noted in *Cheatle v The Queen* "…assuming that all jurors are acting reasonably, a verdict returned by the 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."[21] In a majority system the prosecution's burden of persuasion is lighter than in a unanimous system, where all twelve jurors need to be convinced of the defendant's guilt.[22] Therefore, the practice of a majority verdict beyond a reasonable doubt is a contradiction in terms.[23]

Research suggests that juries operating under a majority system deliberate quicker and reach a verdict in less time.[24] This is largely because juries can stop deliberating if a majority is obtainable immediately.[25] It is at this time that errors occur and the jury often asks the judge questions regarding the required standard of proof.[26] The majority system may not promote a full and passionate discussion of the issues. As a result the jury may start with the verdict category and then construct a story to fit.[27] In turn, if a majority system was implemented it is likely to increase the incidence of the accidental conviction of innocent people.[28] A unanimous system operates as one of the 'checks and balances', which aims to protect the innocent from wrongful conviction.[29] Therefore, we should be concerned about abandoning it in favour of the majority rule, which diminishes one of the procedures that has been established to protect the accused person.[30]

Conclusion

Unanimous jury verdicts should not be abandoned in New South Wales. The supposed defects of unanimous verdicts will not be overcome by a majority system, and it is likely to bring with it another set of problems. Full and passionate jury deliberation is essential to the operation of the reasonable doubt standard. Majority jury verdicts undercut the prosecution's requirement to prove a defendant's guilt beyond a reasonable doubt. Unanimity is an essential safeguard to protect the interests of all accused persons. By negating the view of a dissenting juror the danger of convicting the innocent will increase. There are sound reasons to believe that implementing majority verdicts in NSW will derogate the quality of justice in our judicial system. That is unacceptable in a society that professes to be just.

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Endnotes:

1 NSW Legislative Assembly, 'Majority Verdicts' (9/11/05) http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20051109019.
2 In 1997 Kerry Whelan disappeared. Although her body was never found, Bruce Burrell (a former co-worker), was charged with her murder. When this case went to trial the jury was dismissed because a verdict could not be reached.
3 Majority have been implemented since: 1927 in South Australia; 1936 in Tasmania; 1960 in Western Australia; 1963 in Northern Territory; and 1994 in Victoria. NSW Legislative Assembly, 'Majority Verdicts' (Report 111, 2005) (9/11/05) http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20051109019.
4 *Id.*
5 *Id.*
6 *Id.*
7 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial' (Report 48, 1986).
8 *Id.*
9 Tucker WL, '*Johnson v. Louisiana*: and *Apodaca v. Oregon*: Unanimity in the Criminal Jury Verdict' (1972-1973) 7 *Georgia Law Review* 339.
10 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
11 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
12 Salmelainen P, Bonney R, and Weatherburn D, 'Hung juries and majority verdicts' (1997) 36 Crime and Justice Bulletin 1.
13 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
14 Tucker WL, *supra*.
15 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
16 Salmelainen P, Bonney R, and Weatherburn D, *supra*.
17 Tucker WL, *supra*.
18 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
19 *Id.*
20 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
21 *Cheatle v The Queen* (1993) 177 CLR 541.
22 Dolinko PB, 'Constitutional Law – *Johnson v. Louisiana*: State Criminal Juries Need Not Reach Unanimous Verdicts' (1972-1973) 22 *De Paul Law Review* 635.
23 Tucker WL, *supra*.
24 Davis JH, Kerr NL, Atkin RS, Holt R, and Meek D, 'The decision processes of 6 and 12 person mock juries assigned unanimous and two-thirds majority rules' (1975) 57 *Journal of Personality and Social Psychology* 1-14.
25 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
26 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
27 Darbyshire P, Maughan A, and Stewart A, 'What Can the English Legal System Learn From Jury Research Published up to 2001?' (2001) http://www.kingston.ac.uk/~ku00596/elsres01.pdf.
28 Tucker WL, *supra*.
29 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
30 Willis J, 'Jury Disagreements in Criminal Trials: Some Victorian Evidence' (1983) 16 *Australian and New Zealand Journal of Criminology* 20.

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to assess that his alibi defense was consistent with Gibson's lack of involvement.

Yet Judge Carr didn't think the prosecution's conduct was fraudulent. Spirko appealed to the federal Sixth Circuit Court of Appeals. During oral arguments on December 6, Spirko's lawyer Thomas Hill argued, "The star witness for the state did not believe the very theory that he was a proponent of." On December 22, 2005, the Sixth Circuit affirmed Carr's ruling.

Although Spirko's post-conviction investigations have accumulated substantive evidence that doesn't just undermine the evidentiary basis relied on by Ohio to obtain his conviction, but supports his actual innocence, he has not been granted an evidentiary hearing by any state or federal court.

As of late-December, the DNA test results have not been publicly released.

Barring the revelation of evidence of Spirko's guilt prior to January 19, 2006, that the State has not produced in the 23 years since Mottinger's murder, *Justice:Denied* will be submitting a letter to Governor Taft requesting that he grant Spirko executive clemency and a full pardon.