

Speech Given at Australian Law Students' Association (ALSA) Double Jeopardy Forum, 9 July 2003, Brisbane

This afternoon is my opportunity to contribute to the debate on the topical question of possible reform of the double jeopardy rule. This long-standing maxim of criminal law says that no person should be twice troubled for one and the same offence¹. Recently, however, there have been calls to abandon this rule where fresh evidence comes to light². Certainly we have all heard the distressing stories of victims' families disillusioned with a criminal justice system which allows perpetrators to walk free. It seems a compelling argument to abandon the double jeopardy rule if it would mean successfully retrying an acquitted murderer³.

However, as one commentator has said:

“In a highly charged atmosphere which might understandably arise it may be all too easy to discount the reassurance gained by reflecting, in less emotive circumstances, on long-standing traditional bulwarks of individual liberty.”⁴

So, before we can ask whether the rule warrants change, we must understand what it is. To do this, we need to examine its origins.

¹ *Laws of Australia* Chapter 9 (2002) Law Book Co. at [294].

² For example, 'Attorneys to Consider Double Jeopardy' *Qld Department of Attorney-General and Justice Media Release* (9 April 2003); 'Premier Backs Jeopardy Talks' in *Herald Sun* (11 December 2002); Duff E, 'Carr Bid to Scrap Law on Double Jeopardy' in *Sydney Morning Herald* (9 February 2003); and Broadbridge S, *The Criminal Justice Bill: Double Jeopardy and Prosecution Appeals*, Research Paper 02/74 (2 December 2002) House of Commons, United Kingdom.

³ Winn G 'Double Jeopardy' in Law Spot at www.Law4u.com.au (April 2001).

⁴ Roberts P (2002) at 412.

It has been said that the history of double jeopardy is the history of criminal procedure. The rule is thought to have its origins in the controversy between Henry II and Archbishop Thomas a Becket that clerks convicted in the ecclesiastical courts were exempt from further punishment in the King's courts because such further punishment would violate the maxim (*nemo bis in idipsum*) no man ought to be punished twice for the same offence. This maxim stemmed from St Jerome's commentary in AD 391 on the prophet Nahum: "For God judges not twice for the same offence".⁵

The rule later found expression in the common pleas "autrefois convict" and "autrefois acquit".⁶ Based on the concept of merger, autrefois convict was a plea that the prisoner had already been tried for and convicted of the same offence. "[T]he object sought to be achieved ... [was] avoidance of curial imposition of a sentence in punishment of conduct which had previously been the subject of curial imposition of a sentence in punishment"⁷. Based in estoppel, autrefois acquit was a plea that the prisoner had already been tried for and acquitted of the same offence⁸.

The pleas operated in the context of a criminal law with relatively few offences and limited opportunities for a given fact situation to give rise to multiple offences⁹. The last 100 years, however, have seen the

⁵ Friedland M L, *Double Jeopardy* (1969) Clarendon Press, Oxford at 5.

⁶ *Laws of Australia* Chapter 9 at [293].

⁷ *Travers v Wakeham* (1991) 28 FCR 425; 54 A Crim R 205 per Jenkinson J at 211.

⁸ *Laws of Australia* Chapter 9 at [293].

⁹ Friedland M L (1969) at 14.

proliferation of criminal law, the modernisation of criminal procedure, and the development of modern criminal process and institutions¹⁰. The consequence has been the development of a more extensive double jeopardy rule which more properly gives effect to its underlying principle: that no person shall be troubled twice for the same offence.¹¹

The decision in *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254 provided the first judicial statement of coherent general principle on the rule¹²:

“For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that which he is then charged. The word ‘offence’ embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law.”¹³

In Queensland, the concept of double jeopardy is embodied in the *Criminal Code*. Section 16 is the rule against double punishment for the same act or omission¹⁴. Section 17 provides a defence where the person has previously been acquitted or convicted of the offence for which they are charged.

¹⁰ *Laws of Australia* Chapter 9 at [293].

¹¹ *O’Sullivan v Rout* [1950] SASR 4 per Napier CJ at 5-6.

¹² *Laws of Australia* Chapter 9 at [293].

¹³ at 1339-40 per Lord Devlin.

¹⁴ except where the act or omission caused death.

“The underlying idea ... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense [sic], thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty”.¹⁵

This statement captures the essential arguments for maintaining the double jeopardy rule. Foremost among these is that such a rule is necessary to protect against wrongful convictions. Repeated exposure to the (fallible) trial process increases such a risk.¹⁶

The other central argument in favour of the rule is the need for finality. Public interest requires a degree of finality in the criminal justice system “to protect people suffering more than once from the trauma, stigma and expense of prosecution”¹⁷. Any person acquitted of a crime would face the uncertain prospect that they could be retried for the same crime. Interestingly, it is also said that without such finality, the families of victims would “continue to harbour the hope that a defendant might one day be retried for the offence”¹⁸.

Finality is also seen as an essential element in maintaining the integrity of the jury trial. The social conception of criminal justice does

¹⁵ *Green v United States* (1957) 355 US 185 at 187-88.

¹⁶ Roberts P, ‘Double Jeopardy Law Reform: A Criminal Justice Commentary’ in *Modern Law Review* (2002) 65 (3) 393 at 397.

¹⁷ Dingwall G, ‘Prosecutorial Policy, Double Jeopardy and the Public Interest’ in *Modern Law Review* (2000) 63 (2) at 268-269.

¹⁸ Winn G (April 2001).

not allow governments to invalidate jury acquittals. To do so would undermine public confidence in jury verdicts and lend government an “ominously authoritarian jurisdiction”.¹⁹

Other reasons in favour of the rule are that it encourages efficient and thorough investigation²⁰ and conserves judicial resources and court facilities²¹.

The principal argument in favour of abandoning the rule is to guard against guilty persons escaping punishment²². This argument assumes that we are able to distinguish between acquittals where the defendant was innocent and those where the defendant was in fact guilty.

It is also suggested that situations where prosecution by one agency precludes prosecution by another for offences arising out of the same set of circumstances may undermine public confidence in the justice system.²³

It has been argued by a distinguished English legal academic that:
“Abrogation of the rule against double jeopardy is not some first step on a road to loss of individual freedom. The rule is an anachronistic obstacle to justice. The safeguards of the new

¹⁹ Roberts P (2002) at 410 and 411.

²⁰ Roberts P (2002) at 397.

²¹ Dingwall G (2000) at 268-269.

²² Friedland M L (1969) at 4-5.

²³ Friedland M L (1969) at 17.

proposal will make retrial an exceptional remedy in rare cases in which there is new and compelling evidence of guilt.”²⁴

It should be said that most proposals for reform seem not to seek a complete abandonment of the principles of double jeopardy²⁵ but rather seek to define the circumstances in which it is appropriate that a retrial be allowed. This is reflected in the *Criminal Justice Bill* now before the British Parliament.

“[P]erhaps in modern conditions such absolute protection may sometimes lead to injustice. Full and appropriate safeguards would be essential. Fresh trials after acquittal would be exceptional.”²⁶

It has been suggested the basis for such reform would likely be an appropriately narrow “fresh evidence” rule allowing a retrial after acquittal in limited circumstances²⁷. After all, none of us would argue that a person who was found guilty should remain in prison when compelling new evidence shows that the person should not have been convicted. Commentators have suggested a series of tests to be satisfied before a retrial would be allowed.²⁸

First, the charge must attract a minimum specified severity of sentence. Second, the new evidence must make the prosecution case substantially stronger than it was at the first trial. This could be determined either by specifying that certain categories of evidence, such

²⁴ A. Keane “Reform of the “double jeopardy” law has caused unjustified fury” “The Times” 30 June 2003

²⁵ For example, Broadbridge S (2 December 2002).

²⁶ The *Macpherson Report* in Broadbridge S (2 December 2002) at 20.

²⁷ Roberts (2002) at 413.

²⁸ Roberts (2002) at 416-419; Dingwall (2000) at 279-280.

as DNA evidence or a post-trial confession, would automatically be considered to strengthen the case substantially; or by adopting a two-limbed test involving a subjective and objective test of evidential strength. Third, the new evidence must not have been able to be adduced with due diligence at the first trial. Finally, it is suggested the exception would only operate if the court was satisfied that in all the circumstances of the case a retrial would be in the interests of the justice.

If indeed continued public debate determines that reform is necessary, this may appear to represent a sensible approach. It would seem to avoid the risk that any new evidence, however strong and whenever available, would trigger a new trial. It would also ensure that only the most serious of cases were open to the possibility of retrial. However it would appear that in some of the more notorious cases both here and in the United Kingdom which have led to the pressure for abandonment of the rule, any change is unlikely to assist, as much of the relevant evidence was available at the time of the trial.

Perhaps it is this recognition of the risks within the formulation for reform, however, that provides an indication of just how dangerous it may be to abandon this 800-year-old rule at all. The central question which needs to be addressed is, as the Law Commission for England and Wales has said:

“Is it possible to identify a category of cases in respect of which the objective of achieving accurate outcomes clearly outweighs the justifications underlying the rule against double jeopardy?”²⁹

²⁹ in Roberts P (2002) at 412.