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TITLE: The Hon. Justice Gaudron:
Contribution to the Jurisprudence of the Criminal Law*

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INTRODUCTION

Upon the establishment of the 'Mason Court' there was an increase in the number of criminal matters being granted leave to the High Court.[1] On the eve of this period, in 1987, Mary Gaudron was appointed to the High Court, and became one of its most original and progressive thinkers.[2] It will be the thesis of this paper that Her Honour's most notable contribution to the criminal law has been her commitment to ensuring the accused person's right to a fair trial, particularly in relation to procedural fairness and the insistence on strict compliance by trial judges with their obligations in directing juries.

Mary Gaudron was the daughter of a fettler turned train driver. She grew up in Moree, a small country town in New South Wales. She was, it has been noted on many occasions, 'no silvertail',[3] rather, she was raised in a time and place that enabled her to develop a keen awareness of the existence of inequality and injustice. One should not, of course, overstate the significance of this. However, perhaps there is something in Gaudron's own life that supports the claim that her experiences have provided a background to her contribution to the criminal law.

At the heart of Her Honour's work lies the commitment to ensuring that the accused person receives a fair trial. She has described it in the most forceful terms as 'fundamental to our system of criminal justice'.[4] This paper will examine the way in which the principle of a fair trial for the accused has been explored, developed and applied by Gaudron J. in a number of judgments and, in particular, her Honour's adherence to procedural fairness and her insistence on strict compliance by trial judges with their obligations in instructing juries.

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1 Justice Kirby has written extensively on this subject: see, M D Kirby, 'Turbulent Years of Change in Australia's Criminal Law' (2001) 25 *Crim LJ* 181. His Honour notes the emergence of a consistent pattern from the mid to late 1990s relating to applications for special leave to appeal in criminal matters: Of the 100 or so applications being made each year, roughly 15% were granted. See, M D Kirby, 'Why has the High Court become more involved in criminal appeals?' (2002) 23 *Aust Bar Rev* 4 at 7. This is a significant increase from the Barwick and Gibbs eras of the 1970s and 1980s, in which the number of applications made, and granted, was far less. One of the primary reasons given for this growth is attributed to the dramatic advances in the quality of legal scholarship in the field throughout the 1960s and 1970s. This lifted the profile of the criminal law and engaged the interest of appellate courts at all levels. See, Justice Mark Weinberg, 'Moral Blameworthiness – The 'objective test' dilemma', (2003) 24 *Australian Bar Review* 173 at 174.

2 Fegus Shiel, 'A different kind of Justice', *The Age*, 9 December 2002.

3 Justice Margaret McMurdo, Speech proposing a toast to retiring Justice Mary Gaudron, delivered at the Australian Women Judges' Dinner, Sydney, 22 February 2003.

4 *Dietrich v The Queen* [1992] 177 CLR 292 per Gaudron J in a single majority judgment at 362. Her Honour's view can also be extracted from the joint majority judgment in *McKinney v The Queen* (1991) 171 CLR 468 (per Mason CJ, Deane Gaudron and McHugh JJ) where the right to a fair trial was described as 'the central thesis of the administration of criminal justice'.

'Fair Play' in Criminal Proceedings

The notion of a fair trial for the accused entails a court hearing and process that is procedurally fair to the accused party.[5] Chief Justice Spigelman of the Supreme Court of New South Wales has observed that the principle of a fair trial now informs and energises many areas of law and has gained increasing prominence in High Court decisions.[6] His Honour notes, however, that it is not a new principle. He quotes Isaacs J in 1923, with reference to 'the elementary right of every accused person to a fair and impartial trial', when he said that '[e]very conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle'.[7]

Today, this principle is continually adapted to new and changing circumstances and involves ongoing balancing of competing interests.[8] These have been emphasised by the Chief Justice of New Zealand, the Right Honourable Dame Sian Elias:[9]

> The caricature of the criminal trial is that it is a game where notions of fair play require an accused to be given the sporting opportunity. On this view, the rules of criminal justice put roadblocks in the search for the truth. While there is 'more glitter than substance' in such criticism, it has been hardy. It has led to a perception that criminal justice attempts a balance between the interests of society in securing conviction of offenders and the interests of individuals in not being wrongfully convicted.

In a similar vein, Gaudron J has often underscored the importance and validity of fairness in criminal trials. Recently her Honour said that '[h]opefully the presumption of innocence, the right to silence and the right of every accused person to a fair trial according to law are now embedded in our criminal jurisprudence.'[10] On the Bench, these ideals were upheld by Gaudron J in a number of her own judgments and also in joint judgments as critical to the just operation of the criminal law.

Procedural Fairness in Practice: Justice Gaudron's Judgments

Dietrich v The Queen

Perhaps most explicitly, the joint majority judgment in *Dietrich v The Queen*[11] explored and set out the parameters of a fair trial. In that case, the question centred on whether an accused person needed representation in order for a criminal trial to be fair, and if so, whether it equated to a common law and/or constitutional right. The majority held that, although there is no right for an accused person to have representation in a criminal proceeding at public expense, the courts possess the power to stay criminal proceedings that will result in an unfair trial. It was held that lack of representation may lead to an unfair trial.[12]

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5 *Jago v District Court of New South Wales* (1989) 168 CLR 23. Procedural fairness, interchangeably termed 'natural justice', is the right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision maker and the right to have that decision based on logically probative evidence. See, *Salemi v Mackeller* (No 2) (1977) 137 CLR 396. Although the principle of procedural fairness has its origins in civil law, it has had increasing application in the criminal law. See, *R v Amad* [1962] VR 545. More recently, *R v Su and Goerlitz* [2003] VSC 305.

6 Hon J J Spigelman AC, 'The truth can cost too much: The principle of a fair trial', (2004) 78 *ALJ* 29 at 30.

7 *R v MacFarlane; Ex Parte O'Flanaghan and O'Kelly* (1923) 32 CLR 518 at 541-42. Cited in Spigelman AC, above no 8 at 30

8 Spigelman AC, ibid.

9 The Right Honourable Dame Sian Elias, 'Criminal Justice in the High Court', Address on the Occasion of the Centenary of the High Court of Australia, 10 October 2003.

10 Gaudron J, 'Foreword', in G. D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900*, Federation press, Sydney, 2002 at 6.

11 *Dietrich v The Queen* [1992] 177 CLR 292.

12 See Frances Gibson, 'A Decade after Dietrich', (2003) 41(4) *Law Society Journal* 52 at 52.

In *Dietrich*, the accused was charged before the Victorian County Court with importing heroin contrary to the provisions of the *Customs Act* 1901 (Cth). At the time the case came to trial, Dietrich had exhausted all possible means of obtaining legal assistance. His application for an adjournment was refused by the trial judge on the grounds that he had no prospect of securing legal representation with or without an adjournment. Following his conviction, Dietrich eventually sought and obtained special leave to appeal to the High Court on the ground that his trial had miscarried due to lack of legal representation.[13]

The majority[14] went further than previously[15] in explaining the relationship between fairness and legality in the conduct of criminal proceedings. In a dissenting judgment by Brennan J a distinction was drawn between fairness according to community values (which courts were not obliged to uphold) and fairness in the sense of the trial having taken place in accordance with the law (which they were).[16] Gaudron J, in her separate majority judgment, specifically rejected this view. In her opinion, a trial could be relevantly unfair even though conducted strictly in accordance with law; the requirement of fairness, she thought, is 'independent from and additional to' the requirement of legality.[17] Her Honour stated:[18]

> It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law.[19] The expression 'fair trial according to law' is not a tautology. … [Rather], the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness!

In considering the source of the right to a fair trial, Gaudron J went further than the rest of the majority[20] in stating that the right exists not only at common law but – at least in relation to federal offences – is 'entrenched in the Commonwealth Constitution by Chapter III's implicit requirement that judicial power be exercised in accordance with the judicial process.'[21]

This interpretation has since come to the fore in a number of criminal cases at Supreme Court level in which the validity of legislation (Commonwealth and State) has been challenged along the lines suggested by Gaudron J in *Dietrich*.[22] While there has been criticism that the decision will cross the boundary into the realm of executive powers, there is strong argument in support of her Honour's assertion that 'whatever the consequences and whatever the cost, it is for the courts to decide what is and what is not fair in a criminal trial.'[23]

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13 See Janet Hope, 'A Constitutional Right to a Fair Trial?', (1996) 24 *Federal Law Review* 173 at 175.

14 In a joint judgment from Mason CJ and McHugh J, and separate judgments from Deane, Toohey and Gaudron JJ respectively.

15 *Jago v District Court of New South Wales*, (1989) 168 CLR 23.

16 *Dietrich v The Queen* per Brennan J at 325.

17 *Dietrich v The Queen* per Gaudron J at 362-3.

18 at 362.

19 *Wilde v The Queen* (1988) 164 CLR 365 at 375 per Deane J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 per Deane J; *The Queen v Glennon* (1992) 173 CLR 592 at 623 per Deane, Gaudron, McHugh JJ. Cited in *Dietrich v The Queen* per Gaudron J at 362.

20 Excluding Deane J who took a similar position in his separate judgment at 326.

21 *Dietrich v The Queen* per Gaudron J at 362.

22 See, for example, *"S" (a child) v R* (SCWA, 3 February 1995, unreported); *Commonwealth Director of Public Prosecutions v Phillip Andrew Bayly* (SCSA, 4 November 1994, unreported); *Ngoc Tri Chau v DPP (Cth)* (1995) 132 ALR 430. Cited in Janet Hope, 'A Constitutional Right to a Fair Trial?', above no 15 at 197.

23 *Dietrich v The Queen* per Gaudron J at 362.

The decision in *Dietrich* has met with particular resonance amongst judges of the Court of Appeal of the Supreme Court of Victoria. In the case of *The Queen v White*,[24] the issue of fairness to the accused was considered in the context of directions to the jury on mental illness.[25] Considering *Dietrich*, Chernov JA said[26] that:

> …in the absence of rules that prescribe what a trial judge must do to ensure that the accused receives a fair trial according to law, elements of reason and commonsense must play a role in determining the steps that should be taken in a particular case to prevent the possibility that the trial will be unfair. Thus, as Gaudron J said in *Dietrich*,[27] '[s]peaking generally, the notion of 'fairness' is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice and unfairness might result'.

Osland v The Queen

In a different vein, *Osland v The Queen*[28] raised the question whether the conviction for murder of one co-accused was inconsistent with the jury's failure to convict the second co-accused, therefore constituting an abuse of process.[29] The majority (McHugh, Kirby and Callinan JJ; Gaudron and Gummow JJ dissenting) found no inconsistency and the appeal was dismissed.[30]

Gaudron J, however, in her dissenting joint judgment with Gummow J, held there was inconsistency. Their Honours reasoned that a person (in this case the first co-accused, Mrs Osland) who did not actively participate in the act causing death would be guilty as a principal only if the person who caused the death (the second co-accused, her son) acted pursuant to an understanding or arrangement with the first person that, together, they would kill the deceased. Given that the jury had acquitted the second co-accused, and therefore had not negated his defences, there could be no such understanding or arrangement.[31]

The reasoning of the dissenting judgment in *Osland* reflects an overriding commitment to the notion of procedural fairness for the accused. Indeed, the approach has since been adopted in the Court of Appeal of the Supreme Court of Victoria in *R v Carter*.[32] In that case, considering the question whether there was sufficient evidence at the appellant's trial to prove that the co-offender had the necessary intent for murder, it was held that there was not and the appeal was dismissed. Citing Gaudron and Gummow JJ, Charles JA said:[33]

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[24] *The Queen v White* [2003] VSCA 174 per Charles, Chernov and Eames JJA.

[25] Specifically, whether the conviction at the first trial was unsafe and unsatisfactory given directions on mental illness; and whether the conviction at the second trial was unsafe and unsatisfactory given disclosure of prior criminal conduct.

[26] At [32].

[27] at 363.

[28] *Osland v The Queen* (1998) 197 CLR 316 .

[29] Mrs Osland and her son Mr Albion stood trial in the SCV on a single count of murder. It was alleged that they planned to and did murder Frank Osland (Mrs Osland's husband and Mr Albion's step-father), and then buried him in a pre-dug grave.

[30] The jury found Mrs Osland guilty of murder but failed to reach a verdict with respect to Mr Albion. Mr Albion was later retried and acquitted. Mrs Osland's appeal against conviction and sentence to the Court of Appeal was dismissed. By majority her appeal against conviction to the High Court was also dismissed.

[31] At [35].

[32] (2000) 1 VR 175, per Charles, Chernov JJA and Hedigan AJA. Notably, the alleged inconsistency in this case was not one which arose by way of inconsistent verdict. Rather, it was argued that a verdict of murder was inconsistent with a plea of guilty to manslaughter.

[33] At [14].

> The conviction of a person charged as accessory is not necessarily inconsistent with the acquittal or failure to convict a person charged as the principal offender. That is because the evidence admissible against them concerning the commission of the offence may be different. Even so, an accessory cannot be convicted unless the jury is satisfied that the principal offence was committed. Thus, if two people are tried together as principal and accessory and the evidence as to the commission of the crime is the same against both, acquittal of the person charged as principal is inconsistent with the conviction of the other.

Palmer v The Queen

Palmer v The Queen[34] considered whether the accused could be asked to prove a ground for imputing that the complainant had a motive to lie.[35] The High Court held, in favour of the accused, that the question 'why would the complainant lie?' could not be raised either in cross-examination or in jury directions to strengthen the case of the complainant or to undermine the case of the accused.

In the joint majority judgment of Brennan CJ, Gaudron and Gummow JJ it was said:[36]

> … the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.

Some commentators have highlighted the difficulties arising from placing 'blanket prohibitions' on the ability to question the accused about his or her knowledge of the complainant's possible motives.[37] However, to date, the approach developed in the majority judgment in *Palmer* has continued as the best means of preventing irrelevant and damaging inferences from being drawn against the accused, thereby avoiding a miscarriage of justice.[38]

Weissensteiner v The Queen

In the important case of *Weissensteiner v The Queen*,[39] the High Court dealt with the accused's right to silence in criminal trials. The accused sought to exercise the right of silence at his trial for the murder of two travelling companions. The trial judge told the jury that an inference of guilt 'may be

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[34] (1998) 151 ALR 16 .

[35] The accused was charged with 11 counts of sexual offences. The complainant was female and 14 years of age, at home alone after recovering from an operation. The accused offered to take her out during the day on his work rounds. After a number of days in the company of the accused, the alleged offences took place, both in the accused's car and at the home of the accused. During cross-examination of the accused at trial, it was put to the accused: 'At this stage, as you sit here today, you can't think of any reason, or anything you have done to her … As to why she would make this up?'

[36] at 6.

[37] See Jeremy Gans, 'Directions on the Accused's Interest in the Outcome of the Trial' (1997) 21 *Criminal Law Journal* 273 at 290. Certainly, it has been acknowledged that in some instances a 'firm and clear direction from the trial judge may prevent the impropriety of asking the question from causing justice to miscarry', in *Palmer v The Queen*, per Brennan CJ, Gaudron and Gummow JJ at 9.

[38] *R v PLK* [1999] 3 VR 567, per Tadgell, Charles and Buchanan JJA, and *R v Hilsley* [1998] VSCA 143 per Ormiston JA (at 24): 'it is ordinarily irrelevant that the accused has no knowledge of any reason why a complainant should make up the allegations. Especially when the case is 'oath against oath'.

[39] (1993) 178 CLR 217.

more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which can be easily perceived must be within his knowledge'.[40]

The High Court by a majority of five to two upheld this direction, deeming it lawful within the context in which it was delivered. In a strong dissenting joint judgment, Gaudron and McHugh JJ observed that, whilst the majority upheld the accused's right to silence in theory, they also inadvertently narrowed the right:[41]

> The right to silence is, of course, concerned with more than the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. However, it is the presumption of innocence and the prosecution's burden of proof which preclude an adverse inference being drawn from silence which does not amount to evidence or, as we have called it, 'mere silence'. Because of the presumption and because of the burden of proof, silence of that kind proves nothing and provides no basis for any inference adverse to the accused.

The dissentients went on to explain that the trial judge's directions to the jury were defective because '[t]hey were couched in terms of the failure to give evidence, rather than in terms of the unexplained facts.' That is, they suggested that the appellant's failure to give evidence in relation to some matters entitled the jury to more readily draw an inference of guilt from the whole of the Crown case.[42] In light of such a misdirection, Gaudron J together with McHugh J would have allowed the appeal by the accused for a retrial.

Glennon v The Queen

In *The Queen v Glennon* [43] the relevant issue turned on whether a permanent stay of proceedings could be granted on the basis that the accused was prejudiced by pre-trial publicity. The application was refused in the County Court and by a trial judge of the Supreme Court of Victoria. The Victorian Court of Criminal Appeal allowed the application, by majority, on the ground that adverse pre-trial publicity created the substantial risk of a tainted jury, and thereby constituted an unsafe and unsatisfactory verdict.

On an appeal by the Director of Public Prosecutions to the High Court, the majority, Mason CJ, Brennan, Dawson and Toohey JJ, held that the appellate court had erred: The mere possibility that a juror may have acquired knowledge during the trial of the accused's prior conviction was not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice.[44]

However, in their joint dissenting judgement, Gaudron, Deane and McHugh JJ considered that the broadcasts aired on a popular Melbourne radio station by a presenter, Mr Derryn Hinch, 'constituted one of the most serious cases of contempt of court'.[45] While conceding that only 'extreme' or 'singular' circumstances would justify a permanent stay, it was necessary where a 'campaign of vilification and prejudgment is such that, notwithstanding lapse of time and careful and thorough directions of a trial judge, any conviction would be unsafe and unsatisfactory'.[46]

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[40] Mason CJ, Deane and Dawson JJ at 223-24.

[41] at 245.

[42] at 247.

[43] [1992] 173 CLR at 592.

[44] Mason CJ, Brennan and Toohey JJ at 593.

[45] Per Deane, Gaudron and McHugh JJ at 620.

[46] Ibid. at 624.

The underlying reasoning of the dissenting judgment returns to the basic notion considered by Gaudron J in her single and joint judgments, that 'the central prescript of our criminal law is that no person shall be convicted of a crime otherwise than after a fair trial according to law'.[47] This 'dictates that an accused is entitled to be protected from an unacceptable and significant risk that the effect of prejudicial pre-trial publicity will preclude a fair trial.'[48]

Conclusion

The right to a fair trial, ingrained in which is the presumption of innocence and privilege against self-incrimination, has been emphasised in the criminal courts time and again.[49] It is the central point of reference, and has been treated as such, reflecting the proud record in this area of the common law that has protected the liberty and security of individuals against the excessive use of power by the State. Not all areas of human rights, it has been noted, have been so heartening.[50]

In an era of recognition of the needs for the courts to protect equality, justice and human rights, Gaudron J developed a powerful voice to articulate and the legal tools to protect the principles she viewed as fundamental to the proper administration of criminal justice. At the heart of these principles was her belief in the right to a fair trial for the accused person and the protection of that right. This essay has touched on but a few High Court judgments by Gaudron J that reflect her firm practical adherence to achieving this ideal. It has not been exhaustive; at best indicative.

In 2003, Mary Gaudron retired from the Bench of the High Court. In more recent times, her Honour has expanded her legal horizons further again and pushed the frontiers of human rights law, in particular, international law.[51] Of course, the protection of the rights of the accused reflects a fundamental human right, that is, the entitlement of an individual to not just a fair trial in the routine sense but an actual fair trial in the full procedural sense.[52] So the question might be postulated: in her contribution to the criminal law was Gaudron J pointing to something else, another field of learning, perhaps the human rights of the accused individual?

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47 Ibid. at 623.

48 Ibid. at 623.

49 The Hon. Justice Toohey, 'A Matter of Justice: Human Rights in Australian Law' (1998) 27 *University of Western Australia Law Review* 129 at 134.

50 Ibid.

51 See, Justice Gaudron, 'Liberty, Justice and Sorority', the Victorian Women Lawyers' Dame Roma Mitchell Memorial Lecture, Melbourne, 4 March 2004.

52 See, The Hon. Justice Vincent, 'Human Rights and the Criminal Law', speech presented at the 14th Sir Leo Cussen Memorial Lecture, Sir Leo Cussen Institute, Melbourne, 16 October 2003.

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