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Should The Double Jeopardy Rule Be In Jeopardy?

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What is the double jeopardy rule?

The term 'jeopardy' generally means putting yourself in danger, at risk, or facing some kind of peril. In the law the rule of 'double jeopardy' generally means that a person who is acquitted at one trial should not be in danger of being tried again for the same crime. This rule has been a fundamental principle of most criminal justice systems, especially those based on the common law.[1] Of course there does exist in Australia the possibility of being tried twice where a person who has been acquitted in a criminal court could face a civil court over the same criminal event. The most well-known example of this comes from the USA, where famous footballer and movie celebrity OJ Simpson was acquitted of the murder of his wife Nicole Brown Simpson and acquaintance Ron Goldman in the 1990s, but was later found liable for their deaths in a civil suit.[2]

The origins of the double jeopardy rule are in Roman and Greek law but it gained more widespread use under 12th century English law. At that time there were two different court systems – one ecclesiastical or church-run and the other the king's court – and there was concern about whether someone convicted in the church-run court could subsequently be tried in the king's court. By the middle of the following century the principle of double jeopardy had emerged to mean that a defendant could only be prosecuted once, no matter what the verdict.[3]

What are the moves to change the double jeopardy rule?

This notion of double jeopardy is now being challenged in Australia, even though it has not been on the public agenda for change in hundreds of years. The debate has been sparked by some high-profile cases in Queensland where an accused person has been acquitted of a serious crime yet doubts have been voiced about the verdict. The most important of these involves the case of Raymond Carroll who was originally convicted of the murder of toddler, Deidre Kennedy. The 17-month-old child was taken from her bed, sexually assaulted and her body thrown onto the roof of a toilet block in a park in Ipswich in 1973. The original murder conviction was overturned by the Queensland Court of Appeal in 1985 and under the double jeopardy rule, Mr Carroll could not be tried again for Deidre's murder.

However, new forensic evidence prompted the Department of Public Prosecutions to charge Mr Carroll with perjury in 1999, claiming that he had lied to the court in the original murder trial. The conviction for perjury was also overturned by the appeal court noting that Mr Carroll was in essence being tried twice for the same crime. An appeal to the High Court of Australia was unsuccessful and so Mr Carroll cannot be tried again in relation to this murder case.

In Queensland there has been considerable debate about this case and the appropriateness of the double jeopardy rule. The toddler's mother, Mrs Faye Kennedy, has now collected over 25,000 signatures on a petition to the state's Attorney-General to ask for the rule to be set aside because of the exceptional circumstances in this case. The Attorney-General, Mr Rod Welford, has called for a nation-wide approach to the problems caused by the double jeopardy rule.[4]

Other political leaders have spoken out about the problems associated with the case and double jeopardy. In New South Wales, Premier Bob Carr, has called for reform to this centuries-old rule. While his government acknowledges that the double jeopardy rule is fundamental to the criminal justice system and that innocent people should not be subject to continual harassment by the law, they also have stated that 'civilised societies should seek to stop murderers getting off scot-free'. The NSW Attorney-General however has noted that there would be no cases that would be re-opened if changes in the rule were to occur.[5] More recently the Standing Committee of the Attorneys-General – which involves the chief lawmakers from all states and territories – has discussed changes to the double jeopardy rule and is

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expected to report on their review by August this year. Similar debate has occurred in the United Kingdom where a government White Paper *Justice For All* in 2002 proposed to change the double jeopardy rule, but this is yet to be passed by parliament.

In all the above public debate, no-one has yet been recommending a total abandonment of this principle. In general the Australian proposals are similar to those outlined in the UK government white paper. They involve some refinements to the rule rather than its complete abolition, so that special exceptions for another trial would be:

- made only for serious crimes of violence such as murder, manslaughter, gang rape or severe drug trafficking;
- permitted only once and therefore the case would not be left open-ended;
- made by the public prosecutor to the court of criminal appeal and it is the appeal court that would grant permission;
- based on the requirement of having 'fresh' or new evidence that would not normally have been available for the first trial;
- allowed only where the new evidence was very strong or compelling to avoid harassment of those previously acquitted.[7]

Why should the double jeopardy rule be changed?

There appear to be three main factors prompting calls for change to this 800-year old rule.

1. Recent advancements in the forensic sciences may provide the kind of new evidence that would warrant a case to be re-tried. For example, DNA testing is now quite sophisticated and relatively inexpensive. It can be used on very small or even degraded samples and such retesting of old evidence may shed new light on an investigation. As these new forensic methods continue to improve they may offer evidence that would not have been available at an original trial.
2. Improvements in police investigation techniques, such as the use of criminal profiling methodologies, have prompted the re-examination of what are called 'cold cases'. Many police forces around the country now have special units that are re-examining past serious crimes that have never been solved. It may be that the examination of these old cases might reveal the need to try an individual again for the same crime.
3. There has also been significant attitudinal shifts in the criminal justice system to take more account of the role and needs of victims of crime. Trials can fail and an accused can be acquitted for many reasons, and it is thought that such an outcome may not afford protection to victims of crime (as in sexual assault cases) and does not provide comfort to the secondary victims of crime. Victims of crime, through voluntary and government-funded organisations, now have a greater voice in justice processes.

Why should the rule not be changed?

There are many reasons for maintaining the double jeopardy rule, but here we have isolated three that we believe are important.

1. The criminal justice system operates on a principle of finality – that once acquitted of a crime or once a person has done their time, then the agencies of the law cannot continue to harass that person. This is particularly important in an adversarial system where trials are expensive both to the state and to the defendant.
2. It is possible that the scrapping of the protection that the double jeopardy rule offers may encourage poor police investigation methods. All avenues of investigation and all evidence gathering may not be as thorough if the rule is changed because it provides at least one more opportunity to send a person to trial. This may discourage investigative and prosecutorial efficiency.
3. The other principles of justice – fairness and impartiality – may suffer if the double jeopardy rule is changed. For example, if the revised rule applies to relatively high profile serious crimes then it is likely that there will be significant media and public attention focused on the accused. This may make it difficult to secure impartial juries and to ensure fairness in the process when there has already been a 'dress rehearsal' for the trial.

In Britain the law reform commission has raised similar arguments against changes to the rule. Their opposition is that there may be 'the risk of wrongful conviction; the distress of the trial process; the need for finality; and the need to encourage efficient investigation'.[8]

Recommendations

It is our view that there is currently no great need to make changes to this ancient rule. However, we do concede that the law, the criminal justice system and its processes should be flexible and responsive to social and cultural changes and therefore need to be continually updated and modernised. So, we are not opposed to law reform per se, but rather that there seems to be no compelling argument for change to the double jeopardy rule at this time for a number of reasons.

First there is a lack of empirical evidence to show how many cases might be affected by the possible changes and what the impact might be. Indeed, as noted above the NSW Attorney-General claims that there are no such cases in his state, and perhaps only three that have been discussed in Queensland. The argument therefore that there are only a handful of cases that would be affected is not a strong one for it implies that there is no real need for reform.

Secondly, while it is admirable that the current proposals are only meant to be applied to serious crimes that would usually attract 'natural life sentences' this leaves out many offence categories where serious harm may be done to the victims where a conviction is not secured. Such crimes involve sexual assault (where currently only gang rapes might be included in the changed rule) and armed robberies which are serious crimes of violence. This kind of approach engenders bias by creating a two-tier system.[9] And, as we don't yet have the details it is not clear exactly which crimes the revised rule would apply to.

A more pressing problem is that this legal change is likely to be retrospective. This means that it has the potential to contravene human rights conventions. For if the finality principle 'is to be revoked by a ìnew evidenceî exception to the double jeopardy prohibition, every person still alive who has ever been acquitted of a serious offence, or is tried and acquitted in the future, will lose a freedom hitherto enjoyed by right'.[10]

A further problem is that it is very difficult to define exactly what new and compelling evidence might be. What

would happen if some alleged fresh and certain evidence was permitted to be placed before a jury at a second trial and that jury still acquits. Would justice have been seen to be served by either side – those who believe the person to be guilty and those on the defendant's side who have had to endure two trials with acquittals in both cases?

Instead of reform only to the double jeopardy rule, we would recommend a system that addresses both wrongful acquittals and wrongful convictions. It is suggested that in Australia we should establish a Criminal Cases Review Commission like that set up in the UK. However, it would differ in that it could deal with cases where an alleged wrongful acquittal has been granted and thereby seek a second trial because of exceptional circumstances. This could be done without massive and complex changes to the rule of double jeopardy. In this way the human and legal rights of all defendants would be granted protection.

Questions for Debate:

In what circumstances do you think the double jeopardy rule should be ignored?

Do you think the double jeopardy rule is fundamentally a good rule?

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1 Roberts 2002; Hunter 1984
2 Findlay Odgers & Yeo 1999; Ross 2002
3 Hunter 1984; Ackland 2003; Lopez 2000; Pentony & Rice 2003
4 R v Carroll 2001; Watt 2003
5 Hatzistergos 2002; Jones 2003
6 Dennis 2000; Fitzpatrick 2003
7 Hatzistergos 2002
8 Roberts 2002
9 Farrar 2003
10 Roberts 2002: 216

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