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Hung Juries and Majority Verdicts

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BACKGROUND

In recent times there have been calls in New South Wales (NSW) for the introduction of majority verdicts (see, for example, *Sydney Morning Herald* 24 June 1996, p. 4). The NSW Director of Public Prosecutions, among others, has suggested that this change would reduce the amount of court time wasted when juries are hung. This is an important point because there are presently long delays for matters proceeding to trial in the NSW District and Supreme Courts (NSW Bureau of Crime Statistics and Research, in preparation). It could also be argued that it would reduce the trauma experienced by witnesses in sexual assault prosecutions when, because of a hung jury, defendants facing serious sexual assault charges must be re-tried and witnesses once again put through the process of cross-examination.

Provision for majority verdicts exists in some Australian jurisdictions but does not exist in NSW, Queensland, the Australian Capital Territory or in trials involving Commonwealth offences. Nonetheless, some senior members of the legal profession in NSW have opposed their introduction here, arguing that they significantly increase the risk of wrongful conviction and, moreover, that they conflict with the principle that the prosecution must establish its case beyond reasonable doubt. Given these considerations, it has been suggested, 'there is no reason why NSW should copy the worst aspects of other systems' (Barker 1997, p. 17).

Although there is dispute about the merits of majority verdicts, all informed observers appear to agree that if majority verdicts were to be introduced, they should be restricted to circumstances where the jury vote is strongly in favour of acquittal or conviction. In the case of 12 person juries the term 'strongly in favour' in this context is generally taken to mean a vote of either 11-1 or 10-2. Provision for majority verdicts when the vote is more evenly divided than this is considered, by both critics and supporters of majority verdicts alike, to conflict with the principle that the prosecution must establish their case in relation to a criminal offence beyond reasonable doubt.

The argument in favour of introducing majority verdicts would clearly be stronger if (a) hung juries in which there is a clear majority in favour of acquittal or conviction were very common, or (b) hung juries were more likely to occur after a long trial or after a trial involving a sexual assault charge. The argument against introducing majority verdicts would be stronger if either or both of conditions (a) or (b) were not met. Up until the present, however, there have been no objective and reliable data on the basis of which one might assess whether (a) and/or (b) is true. To provide a more informed basis for considering the merits of introducing majority verdicts, the Bureau was asked by the NSW Attorney General to conduct a study to address four basic questions pertinent to an assessment of whether majority verdicts should be introduced. These questions were:

1. What proportion of jury trials end in a hung verdict?
2. Are juries more likely to be hung after a long trial?
3. Are juries more likely to be hung after a sexual assault trial?
4. In what proportion of trials overall and hung trials is the jury vote split either 11-1 or 10-2?

METHOD

To address these issues, Sheriff's Officers attending each Supreme and District Criminal Court trial finalised between mid-October 1996 and 30 June 1997 were asked to complete a questionnaire which sought information concerning, inter alia, each of the charges laid against a defendant, the jury vote (whether for acquittal or conviction) in respect of each of those charges and the duration of the trial (from the date on which the jury was empanelled to the date on which it was discharged). Information on the charges and trial duration was supplied by the Sheriff's Officer from court records. To obtain information on the jury vote, the Sheriff's Officer attending each trial was asked to interview the jury spokesperson upon discharge of the jury whenever the jury was discharged after failing to reach a verdict. Approval for such interviews (which are normally prohibited) was granted by the Attorney General under section 68A(3) of the *Jury Act 1977*.

The Bureau did not receive a complete set of returns from Sheriff's Officers for jury trials held during the period covered by the study. On the basis of independent checks with the Supreme and District Court Registries and with the Office of the Director of Public Prosecutions (DPP), it is estimated that between 1 November 1996 and 31 May 1997 the Bureau received returns for approximately 72 per cent of trials which would have fallen within the scope of the study. The analysis below, therefore, is limited to the 343 trials involving 853 charges on which data were collected by the Bureau during this period. Although there is no strong reason to believe the data received by the Bureau provide a biased picture of the relative frequency of hung juries,

wherever possible estimates of the percentage of hung juries have been cross-checked with data obtained from the Supreme and District Court Registries and the DPP.

RESULTS

WHAT PROPORTION OF JURY TRIALS END IN A HUNG VERDICT?

From the data supplied to the Bureau by Sheriff's Officers, the number of jury trials that were hung was determined. A trial was defined as hung if the jury was hung on at least one of the charges dealt with. Excluding trials in which all charges were dealt with by way of directed verdicts,[1] it was estimated that of the jury trials that go to verdict, the percentage that are hung is approximately 10 per cent.[2] The true figure would be lower than this if, during the study, Sheriff's Officers were more inclined to forward a return to the Bureau when a jury trial was hung than when it was not hung, and higher than this if the reverse bias prevailed.

In order to assess the potential bias, an alternative estimate of the percentage of hung juries was obtained by estimating the total number of jury trials which occurred over the study period from data maintained by Registries and by counting an additional 11 cases of hung juries recorded as having occurred by the DPP but for which the Bureau had no record. Using this approach, the estimate of the percentage of hung jury trials falls slightly, to 9.6 per cent. This figure is slightly higher than the proportion of trials estimated to be hung by the DPP (7 per cent; Cowdery 1997, p.17).

ARE JURIES MORE LIKELY TO BE HUNG AFTER A LONG TRIAL?

To answer this question, the mean trial duration for juries which are hung on one or more charges (D_h) can be compared with the mean duration of trials which are not hung (D_n).[3] If there is a greater tendency for juries to be hung after a long trial, one might expect the mean trial duration to be longer for trials which are hung than for trials which are not hung. In fact, the mean duration of trials where juries are hung was found to be about 33 per cent higher than the mean duration where trials are not hung (D_h = 7.3 days, D_n = 5.5 days). This difference is statistically significant (Wilcoxon 2-Sample Test, $Z = 3.3$, $p < 0.01$).

ARE JURIES MORE LIKELY TO BE HUNG AFTER A SEXUAL ASSAULT TRIAL?

To answer this question, a trial was defined as a sexual assault trial if it involved one or more sexual assault charges. Once again, a hung trial was defined as a trial in which the jury was hung on at least one of the charges dealt with. On this basis, the percentage of sexual assault trials which were hung was 9.2 per cent. The percentage of trials not involving any sexual assault charge which were hung was 10.7 per cent. The data therefore provide no basis for believing that juries are more likely to be hung in sexual assault trials than in trials not involving sexual assault. In fact, if anything, the reverse is the case.

IN WHAT PROPORTION OF TRIALS OVERALL AND HUNG TRIALS IS THE JURY VOTE SPLIT EITHER 11-1 OR 10-2?

The interest in the 11-1 or 10-2 split arises because most jury trials involve 12 persons. However, under section 22(a) of the Jury Act, a jury remains properly constituted as long as (a) its number does not fall below 10, or (b) it falls below 10 but approval in writing for the jury to proceed with this number has been given by both the defence and prosecution, or (c) it falls below 10 but not below eight and, when this occurs, the trial has been in progress for at least two months. In what follows, therefore, the jury voting pattern is shown as *n*-*x*, where *n* is the number of persons on the jury and *x* is the number of persons voting either for or against acquittal. In each case, *x* is less than or equal to *n*-*x*. It should be noted that all of the hung trials in the present study involved juries comprising at least 11 persons.

In the tables which follow, the voting pattern for each hung charge is shown. Some hung trials had more than one charge, and, furthermore, in some of these hung trials, the jury vote was different for different charges.

Table 1 shows the voting pattern for each charge where the vote was hung,

Table 1: The overall voting pattern for charges where the jury was hung (*N*=52 charges)

Vote	*No. of charges*	*% of charges*	*Cumulative % of charges*
n - 1	17	32.7	32.7
n - 2	5	9.6	42.3
n - 3	16	30.8	73.1
n - 4	8	15.4	88.5
n - 5	2	3.8	92.3
n - 6	4	7.7	100

n = number of jurors

Table 2: The voting pattern for charges where the jury was hung and the majority vote was for acquittal (*N*=16 charges)

Vote	*No. of charges*	*% of charges*	*Cumulative % of charges*
n - 1	5	31.3	31.3
n - 2	3	18.8	50.0
n - 3	5	31.3	81.3
n - 4	2	12.5	93.8
n - 5	0	0.0	93.8
n - 6(a)	1	6.3	100

n = number of jurors
(a) The vote in respect of this charge was 6 - acquit, 5 - convict, 1 - undecided

Table 3: The voting pattern for charges where the jury was hung and the majority vote was for conviction (*N*=33 charges)

Vote	*No. of charges*	*% of charges*	*Cumulative % of charges*
n - 1	12	36.4	36.4
n - 2	2	6.1	42.4
n - 3(a)	11	33.3	75.8
n - 4(b)	6	18.2	93.9
n - 5	2	6.1	100

n = number of jurors
(a) On one charge the vote was 9 - convict, 2 - acquit, 1 - undecided
(b) On one charge the vote was 8 - convict, 2 - acquit, 2 - undecided

regardless of whether the majority of the vote was for or against acquittal. Table 2 shows the voting pattern for charges where the vote was hung but where the majority vote was to acquit. Table 3 shows the voting pattern for charges where the vote was hung but where the majority vote was to convict. Note that there were two charges where the jury vote was unknown. These charges are excluded from all of the tables. There were a further three charges where the jury vote was split 6-6. These charges are excluded from Tables 2 and 3.

It is evident from Table 1 that juries are hung *n*-1 in respect of about one-third of the charges on which they cannot reach agreement, while in a further 10 per cent of such cases they are hung *n*-2. The results differ somewhat where the voting pattern involves a majority favouring acquittal as against conviction. A comparison of Tables 2 and 3 indicates that the principal difference lies in the fact that where the majority favour acquittal, a larger proportion are divided *n*-2 than where the majority favour conviction. However, where the jury was hung, there were about twice as many charges where the majority vote was for conviction than where it was for acquittal. If verdicts of *n*-1 and *n*-2 had been permissible, then in our sample there would have been 14 additional charges with a conviction and eight additional charges with an acquittal.

In terms of the total number of charges, these voting patterns indicate that juries are hung *n*-1 on 2.1 per cent of charges on which they deliberate, while in a further 0.6 per cent of charges they are hung *n*-2. Thus, if majority verdicts were allowed where juries are hung *n*-1 or *n*-2, a further 2.7 per cent of all charges on which juries deliberate would be resolved.

Although the relevant data are not shown in the above tables, the situation does not change substantially if, instead of counting the number of charges in which a jury is hung *n*-1 or *n*-2, the number of trials involving one or more hung charges in which the jury is hung *n*-1 or *n*-2 *on any charge* are counted. In this case the relevant figures are 3.0 per cent (hung *n*-1), 1.5 per cent (hung *n*-2) and 4.6 per cent (hung *n*-1 or *n*-2).[4]

DISCUSSION

The above results indicate that, while the introduction of majority verdicts would probably produce some administrative benefits, in general they are only modest. Sexual assault charges do not appear disproportionately likely to produce hung verdicts. The benefits which would flow to witnesses in sexual assault cases from the introduction of majority verdicts are therefore no more or less than those which would be obtained from an overall reduction in the number of cases which have to be re-tried.

The potential reduction in re-trials which would flow from the introduction of majority verdicts cannot be regarded as substantial. While about 1 in 10 juries find themselves unable to reach a verdict on one or more of the charges, in the majority of such circumstances the jury vote is split in ways which would not produce a verdict even if votes of *n*-1 and *n*-2 formed a legitimate basis for a jury verdict. If all re-trials were avoided in all cases in which hung juries are currently split *n*-1 or *n*-2, the overall reduction in trials would be less than five per cent. If majority verdicts of only *n*-1 were allowed the reduction would be only about three per cent.

Perhaps the strongest argument which can be made in favour of the claim that the introduction of majority verdicts would save court time rests with the fact that trials where the jury ends up hung on one or more charges are significantly longer on average than trials where this does not occur. Some indication of the maximum potential saving in court time which would flow from this fact can be gained if we assume that re-trials are currently ordered in all trials where a jury is hung *n*-1 or *n*-2 but that none of these cases would generate a re-trial if majority verdicts were introduced.

Last year the NSW Supreme and District Courts, between them, conducted approximately 850 trials (NSW Bureau of Crime Statistics and Research, in preparation). Since, on our estimates, 4.6 per cent of jury trials end in a verdict hung *n*-1 or *n*-2 on at least one charge, the introduction of majority verdicts would save approximately 39 trials. Since, moreover, the average duration of hung trials is 7.3 days, this would produce a potential saving of some 285 court days. In terms of trial disposals, in other words, it would theoretically create the scope to dispose of approximately 50 additional trials of average duration (i.e. 5.7 days).

At first sight these results might seem impressive but there are three reasons why they should be treated with some caution. Firstly, the NSW District Court alone last year allocated 7,790 days of judge-time to hearing criminal matters (District Court of New South Wales 1997, p. 44). In terms of the total time allocated to hearing criminal matters in the NSW District Court, therefore, the potential saving amounts to just 3.7 per cent. If majority verdicts were restricted to juries dividing *n*-1, the savings would amount to just 2.4 per cent of the judge time allocated to criminal matters by the NSW District Court.

Secondly, it is unrealistic to suppose that re-trials are ordered even if just one of the charges listed on the indictment results in a hung verdict. The percentage of hung juries in the present study which resulted in a re-trial is unknown. However, information provided by the DPP for juries hung in the financial years 1994-95 and 1995-96 indicates that 57 per cent of hung juries resulted in a re-trial.[5] If this figure is typical of the percentage of hung juries which result in a re-trial when a jury is hung *n*-1 or *n*-2, the savings in criminal court time are only 2.1 per cent for

majority verdicts allowing for voting patterns of *n*-1 or *n*-2, or 1.4 per cent for majority jury verdicts only allowing for a pattern of *n*-1.

Finally, discussion of the potential savings which might accrue from the introduction of majority verdicts has been based on the assumption that they would potentially affect all matters which proceed to trial in the NSW Supreme and District Courts. In fact, six out of the 33 hung trials (i.e. 18.2 per cent) examined in the present study involved Commonwealth offences. The Australian Constitution has been interpreted by the High Court of Australia to require unanimous verdicts in criminal trials. If the estimated savings in court time shown immediately above are discounted by 18 per cent, the potential net savings in criminal court time which could be obtained from the introduction of majority verdicts are 1.7 per cent for majority verdicts of *n*-1 or *n*-2, and 1.1 per cent for majority verdicts of *n*-1 only.

NOTES

1 In 14 trials, a directed verdict of acquittal was issued for each of the charges dealt with. These trials are excluded from all subsequent calculations.

2 If charges are counted rather than jury trials, the percentage of charges in respect of which juries are hung is 6.6 per cent. This figure excludes 39 charges in which a directed verdict of acquittal was issued.

3 For the purposes of the present study, the duration of a jury trial was the time (calculated in court days) from the time and date the jury was empanelled to the time and date the jury was discharged. It should be noted that a 'court day' was considered to be a six-hour day (commencing at 10:00 a.m. and finishing at 4:00 p.m., unless specified otherwise on the questionnaire completed by Sheriff's Officers).

4 The percentage of trials which are hung *n*-1 or *n*-2 is 4.6 per cent (rather than 4.5 per cent, i.e. 3.0 per cent + 1.5 per cent) because of rounding.

5 It should be noted that this calculation excludes a number of hung trials where the outcome was unknown. If these trials are included and counted as not having resulted in a re-trial, the percentage of hung trials resulting in a re-trial is 50.7 per cent.

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