

Double jeopardy

Latest Update

25 June 2013

Author(s)

Michelle Heeley - No 5 Chambers

This article seeks to examine the doctrines of autrefois acquit and convict, often referred to as the principle of double jeopardy. It examines the development of the case law and the effect of recent legislation upon the area.

Overview of Topic

1. This article will examine the principles of autrefois acquit and autrefois convict which are designed to prevent a person from being tried for the same offence twice.
2. The article will also examine recent legislation that allows for a retrial after an acquittal in serious cases where certain criteria are met.

Key Acts

[Criminal Justice Act 2003](#)

Criminal Procedure Act 1851 s.28

Key Subordinate Legislation

[Law Commission Report no 267](#)

Key Quasi-legislation

None.

Key European Union Legislation

European Convention on Human Rights

Key Cases

Connelly v DPP [1964] A.C. 1254

DPP v Humphrys (Bruce Edward) [1977] A.C. 1

DPP v Alexander [2010] EWHC 2266 (Admin); [2011] 1 W.L.R. 653

R. v Beedie (Thomas Sim) [1998] Q.B. 356

R. v JFJ [2013] EWCA Crim 569

R. v Secretary of State for the Home Department Ex p. A (A Juvenile) [2000] 2 A.C. 276

R. v D [2006] EWCA Crim 1354; [2007] 1 W.L.R. 1657

Key Texts

None.

Discussion of Detail

The Doctrine

1. It is an established doctrine that no man should be punished twice for an offence arising out of the same or substantially the same set of facts whether convicted or acquitted in the first set of proceedings. The doctrine forms two special pleas in bar to an indictment, autrefois acquit and autrefois convict. Any defendant wishing to rely on either doctrine must state that one of the following apply and lodge a written document with the court setting out either: "A B says that the Queen ought not further to prosecute the indictment against him, because he has been lawfully acquitted of the offence charged therein". s.28 Criminal Procedure Act 1851.
2. The leading case in the field is Connelly v DPP [1964] A.C. 1254 Lord Morris gave a lengthy judgement that established nine principles, the most pertinent principles being

"(1) that a man cannot be tried for a crime in respect of which he has previously been

acquitted or convicted.

(2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted.

....

(7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

(8) that, apart from circumstances under which there may be a plea of *autrefois acquit*, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of *res judicata* applies;

"

He continued:

" It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction."

3. It is the words "the same or substantially" the same that have led to a great deal of litigation over the years. Following Lord Morris's approach it was the facts that appeared to be most the important issue in deciding whether one could plead *autrefois*, it mattered not whether the offence charged was precisely the same or not.

4. It is Lord Morris's test that has been followed through the years and developed with further case law, but it should be noted that Lord Devlin gave a further judgment with Connelly where he sought to narrowly confine the issue of *autrefois* stating:

"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 with 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."

Lord Devlin advocated that where a wider approach was taken and offences that were not the same in both facts and law were to be tried twice the defendant ought to rely on the principles of abuse of process, which give the court a far wider discretion, rather than the plea in bar that *autrefois* constitutes. Initially the court appeared to favour Lord Morris's definition and allow a wider interpretation however more recent case law has emphasised the importance of Lord Devlin's speech and the use of *autrefois* where an abuse of process argument ought to be run.

5. Further cases have weakened the effect of Lord Morris's nine principles, for example principle 8 concerning *res judicata* appears to suggest the power of the court to stop a

prosecution under the civil doctrine of estoppel. [DPP v Humphrys \(Bruce Edward\) \[1977\] A.C. 1](#) confirmed that there was no doctrine of estoppel in criminal law. In that case a defendant had been charged with a specific offence of driving whilst disqualified, the main evidence coming from a police officer who purported to identify the defendant driving on a specific day. The defendant stated that this was a case of mistaken identity and that he had not driven for a year. He was acquitted however he was later prosecuted for perjury after the Crown called witnesses who stated they had seen the defendant driving on a number of occasions during the year he claimed not to have driven. He was convicted and appealed citing [Connelly](#) and the doctrine of estoppel however the conviction was upheld, evidence from the police officer who identified the defendant as driving on a specific day was admissible at a subsequent prosecution for perjury, the offence was not the same in law nor founded on the same facts, the overlap was the evidence of the police officer which was not sufficient to found a plea of autrefois acquit nor could estoppel be relied upon in the criminal courts.

6. Autrefois convict can only be pleaded successfully if the defendant has been convicted before the courts of an offence, thus if an offender has received a caution for an offence it is still open to the Crown to prosecute them. The [Home Office Circular 016/2008](#) states that a caution is a non statutory disposal for adult offenders, specifically at para.34:

"A simple caution is not a form of sentence (which only a court can impose) nor is it a criminal conviction."

This principle, first laid in [Connelly v DPP \[1964\] A.C. 1254](#) was confirmed in [DPP v Alexander \[2010\] EWHC 2266 \(Admin\); \[2011\] 1 W.L.R. 653](#) at para.6

"The principle of autrefois convict and acquit are applicable only where there has been a finding by a court of guilt or innocence."

Although one cannot therefore rely on the principle of autrefois convict it is still open to a defendant to plead an abuse of process. In deciding whether a plea of autrefois is available the courts have affirmed the position that the offence must be the same in facts and law, in the case of [R. v Beedie \(Thomas Sim\) \[1998\] Q.B. 356](#) a defendant had been charged with offences under Health and Safety legislation after the death of a tenant from carbon monoxide poisoning. He pleaded guilty and was sentenced. At a later inquest the defendant gave evidence, believing that he was immune from prosecution, the jury returned a verdict of unlawful killing and the defendant was subsequently charged with manslaughter. He was convicted and appealed, Rose L.J. confirmed that he was not entitled to rely on the doctrine of autrefois convict however the conviction was quashed as the court ruled that the indictment ought to have been stayed as an abuse of process and there were no exceptional circumstances to justify the second prosecution.

7. One of the justifications for the principle of autrefois is to protect a person in peril of conviction for the same offence with which he is then charged. "In peril" has been examined in numerous cases, often where the Crown has chosen to reorganise its case, for example in the case of [R. v JFJ \[2013\] EWCA Crim 569](#) the defendant was initially charged with common assault, he pleaded not guilty in the Magistrates court and a trial date was set. Upon review of the medical evidence the Crown notified the defence of an intent to add s.47 ABH in place of the common assault. The defendant indicated a not guilty plea to ABH, mode of trial took place and the matter was committed to the Crown court for trial. The prosecution offered no evidence on the common assault and it was thus dismissed. A subsequent plea of autrefois was allowed, the Crown appealed and the court allowed the appeal stating that:

"When all that is being done is that the Crown is re-organising its case and no objection is taken, the decisions to which we have referred make it clear that it cannot be said that the defendant is in peril in such circumstances ... The reality [is] that the defendant is not in such circumstances at risk of conviction of the offence which is not to be pursued."

8. In [R. v Secretary of State for the Home Department Ex p. A \(A Juvenile\) \[2000\] 2 A.C. 276](#) a defendant was charged with rape, his defence was that of consent. He had previously been charged on four separate indictments with rape, acquitted on three and convicted on one, the issue in each case being consent. The Crown sought to call the complainants in respect of each previous allegation on the basis of similar fact evidence, the defence objected on the grounds of autrefois in respect of the allegations that the defendant had been acquitted of. The House of Lords allowed the evidence to be adduced stating that there was a distinction to be drawn between the prosecution adducing evidence on a second trial to prove the defendant was guilty of an offence of which he had earlier been acquitted and the prosecution adducing evidence on a second trial to seek to prove that the defendant is guilty of the second offence charged. The evidence was admitted as it was not adduced to prosecute the defendant on the same facts as which he had earlier been acquitted but was intended to demonstrate guilt of the offence which he now faced. The defendant was not in peril of being convicted of the earlier rapes and thus the principle of autrefois was not offended.
9. Autrefois has never applied in cases where a defendant attacks someone and is charged with [s.18 Offences Against the Person Act 1861](#), convicted, and the victim subsequently dies. A defendant can properly be tried for murder as the offence subsequently charged is neither the same in law, nor on the same facts, the main difference of fact being that a person has now died.
10. The principles of autrefois have thus been far more clearly defined. A major change in the law came about on 4 April 2005 following a report by the Law Commission ([Law Comm no.267](#)) [Pt 10 of the Criminal Justice Act 2003](#) now allows for the quashing of an acquittal and the retrial of a defendant. [Sections 75 - 79](#) set out the criteria with the qualifying offences defined in [Pt 1 of Sch.5](#). There must be new and compelling evidence before a retrial is permitted and it must be in the interests of justice to make such an order. The interests of justice test is further defined with [s.79](#).
11. There have been limited prosecutions under the new legislation, the most high profile case being that of the killers of Stephen Lawrence. The courts have examined some of the cases and in particular the Law Commission's reasons for introducing the new law. In the case of [R. v D \[2006\] EWCA Crim 1354; \[2007\] 1 W.L.R. 1657](#) the defendant had previously stood trial twice for the murder of a young woman, the jury were hung twice and the Crown subsequently offered no evidence and a not guilty plea was entered. The defendant was later convicted of two offences under [s.18 OAPA](#) and whilst in custody confessed to several people that he had murdered the young lady as alleged. He was subsequently charged with perjury and convicted and once the CJA came into force the Crown sought a retrial of the original murder. He was convicted and appealed, the main ground of his appeal being that the defendant had only confessed to the murder in the belief that he was immune from prosecution, thus the defendant was now being prejudiced by his own confession, further the publicity surrounding the previous trials and the subsequent delay meant it was impossible for him to have a fair trial. The court upheld the conviction, citing the Law Commission's comments that there would public disquiet and revulsion if a person who had been acquitted of a crime was subsequently confessed could not then be retried, it would undermine confidence in the criminal justice system. Thus whilst this case offended the principle of double jeopardy the unique features of the crime provided justification for subsequent prosecution. The approach has been confirmed as compatible with European law and does not offend the European Convention on Human Rights.

Analysis

KEY AREAS OF COMPLEXITY OR UNCERTAINTY

It is therefore clear that over the years not only has there been a limitation in what constitutes autrefois but also exceptions to the rule that have been specifically drafted to recognise advances in forensic science, thus allowing fresh trials where modern analysis of DNA for example has provided new and compelling evidence. It is important to note that any acquittal for a qualifying offence can now be retried, it does not have to be an offence committed after the implementation of the new law, 4 April 2005.

LATEST DEVELOPMENTS

1. The cases of [R. v JFJ \[2013\] EWCA Crim 569](#) and R v Bayode are both 2013 judgments, they have between them provided a detailed analysis of the existing law and guidance as to how to approach the issue today.

POSSIBLE FUTURE DEVELOPMENTS

1. It is not yet known whether either [R. v JFJ \[2013\] EWCA Crim 569](#) or Bayode will be taken to Supreme Court, no Human Rights points have yet been taken but as more cases are retried under [s.75](#) of the CJA one can expect further developments.

HUMAN RIGHTS

See above.

EUROPEAN UNION ASPECTS

None.

Further Reading

None.