

NEW SOUTH WALES CROWN PROSECUTORS'

ANNUAL CONFERENCE

LAW AND ORDER AND THE JURY SYSTEM

JURIES – COMMON SENSE AND THE TRUTH

**The Hon Justice Peter McClellan
Chief Judge at Common Law
Supreme Court of NSW**

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In my early days at the Bar I was retained for a plaintiff who alleged that he had injured his knee in a work place accident. It was 1975 and jury trials were still the norm when suing an employer. I had grave doubts about my client's veracity and before rejecting a modest offer from my opponent obtained written instructions. The jury returned a verdict with the foreman saying "we find for the defendant - provided the company pays the plaintiff's medical expenses." The judge entered a verdict for the defendant.

The 20th century saw a significant reduction in the use of juries to resolve disputes. Apart from defamation, New South Wales now has few jury trials in civil matters. They remain for persons accused of more significant crimes. For these matters we believe that a person should be judged by a small group of people drawn from the general community rather than a single judicial officer.

Jurors are expected to bring their knowledge and understanding of the world to the task. However, we do not let them at large. The law imposes requirements as to how jurors should approach the task of rational decision making. We provide instructions to jurors designed to ensure that they think in the way the law demands. If a decision to convict is arrived at that cannot be justified having regard to those requirements we set it aside. Although a jury may acquit, it is ultimately the judges who convict.¹

The use of juries is justified on at least two bases. Juries can and do bring community values to their deliberations. The jury's capacity to acquit, even if the verdict is perverse, is the most obvious confirmation of that proposition. Juries are also invited to bring their commonsense and knowledge of the world to the task of assessing the evidence and the truthfulness and reliability of the various witnesses. However, there is reason to doubt whether the ordinary person's "common sense" approach to assessing the truthfulness or reliability of a witnesses evidence accords with the understanding which science has developed of the processes of human observation, recall and behaviour. Before addressing contemporary issues it is useful to briefly reflect upon the origins of and effectiveness of the jury system over time.

The Magna Carta issued by King John in June 1215 guaranteed trial by jury. Idealised as a trial by one's peers it was adopted by many common law countries. It was seen as the ordinary man's protection from oppression by the State. However, a jury system free of influence from the state providing dispassionate judgment on the guilt of an accused did not develop without difficulty.

¹ See *M v The Queen* (1994) 181 CLR 487; *R v MFA* (2002) 193 ALR 184.

Criminal juries existed prior to 1200 but they literally came at a price. It is reported that Randulph de Tottesworth was charged with assault and battery. He gave King John some silver in return for an inquisition by a group of knights. His purchase brought the appropriate return. He was acquitted.²

Notwithstanding the Magna Carta criminal charges were not immediately tried by jury. As with so many changes in society the Church was to play a role. The use of juries increased when the clergy were forbidden by Pope Innocent III to assist in the ordeals of water and fire.³ The physical condition of some accused persons also played a part. In 1226 an old woman was charged with a serious crime. Trial by battle was impossible due to her age and she was tried by a jury.⁴

During the reign of Richard I, although juries were used for criminal trials, it is reported that there were almost always convictions.⁵ There were a number of reasons. It was believed that the fragile foundations of the state required that the King's authority be maintained in the courts. An acquittal was viewed as a contradiction of that authority. Majority verdicts were unnecessary. Jurors were not restricted to a finding of guilty or not guilty. If they were unsure of the verdict, the

² William Forsyth, *History of Trial by Jury*, London, 1852 at 200.

³ L.E. Moore, *The Jury, Tool of Kings, Palladium of Liberty*, Cincinnati :W. H. Anderson Co., 1973.

⁴ *Ibid.*

⁵ Glanville Williams, *The Proof of Guilt*, Stevens and Sons, London, 1963 at 4-5.

decision could be handed over to the judge to determine the verdict having regard to the facts as found by the jury.⁶

Jurors were generally appointed from the county in which the crime allegedly occurred. This was justified as allowing the opinions of the community to be represented in the expectation of avoiding unfair or perverse verdicts. A criminal act was a breach of the peace and a crime against the Crown. It was accepted that the community had an interest in ensuring that the person accused was tried according to the standards and morals of the neighbourhood. Knowledge of the character of the individuals involved was accepted as giving the jury an advantage when evaluating the truth of the situation as related by those individuals.⁷

Jurors were allowed to testify as witnesses in the proceedings well into the Tudor Period. Where there was no evidence the case was nevertheless decided by the jurors based on their private knowledge of the parties.⁸

For a time there was uncertainty as to whether a defendant could be tried by a jury without his consent. One judge solved the dilemma by dispensing with a trial altogether. On the judge's order the accused were hung, even though they had not confessed and had not been caught in the act. For his efforts the judge received a fine.⁹

⁶ Note 3.

⁷ Ibid.

⁸ Ibid at 76.

⁹ Ibid at 53.

From early times the prosecution procedure was comprised of an “accusing jury” followed by trial before the “trial jury.” The United States maintains the Grand Jury today and we, of course, in one form or another have a committal process. However, the King was careful to ensure that at least some members of the accusing jury found their way onto the jury for the trial itself. It would not do to have accusations brought by one jury contradicted by the verdict of another jury.¹⁰

Apart from their use in criminal trials a civil jury system developed. A feature of that system was that a civil jury was subject to attain or punishment for a false verdict.¹¹ The process of attain gave rise to interesting problems. On occasions the attain jury could not agree as to whether the original jury had got it right. In many cases jurors were simply added until the right number could agree on the outcome. Jurors who were found to have got it wrong were punished often, severely, with their land and personal property destroyed or taken by the King. In criminal trials juries also risked being fined or imprisoned if they found a verdict in favour of the accused.¹²

It was during the 1400’s, in the reign of Henry IV, that juries began to be confined to consider the evidence placed before them.¹³ With the exception of the personal knowledge that jurors had by being members of their local county, the jury were encouraged to consider only the evidence tendered in the court and not to conduct

¹⁰ Ibid.

¹¹ Sir William Holdsworth, A History of English Law, 1st ed, at I-339-40.

¹² Ibid at 57.

¹³ Year Book, 2 Hen. IV. as cited by William Forsyth. See Note 2.

their own investigations. This signalled the commencement of the impartial jury system that we have in place today. However, many difficulties remained.

It must not be forgotten that during the fifteenth century the Star Chamber existed as a criminal court with extraordinary powers. It did not use a jury. Its method was more direct. It used torture to extract confessions. It was also responsible for punishing those who brought in verdicts which it considered to be against the weight of the evidence. The penalties could be heavy. New trials could be ordered even when an accused had been acquitted.

Any discussion of the development of the modern jury would not be complete without mention of the trial of William Penn and William Mead before a jury at the Old Bailey in 1670. The case had a sequel being the habeas corpus action on behalf of a juror, Edward Bushell. Penn and Mead were charged with unlawful assembly which resulted in a disturbance to the peace. There were a number of irregularities in the trial including the fact that Penn and Mead were both fined by the judge for not having their hats on, although one of the court attaches had told them to uncover their heads. Bushell was re-sworn when it was claimed he had not kissed the Bible.

The jury's deliberations were marked by their inability to agree on the verdict. The initial verdict was confined to a finding that the accused were guilty of speaking but made no mention of "unlawful assembly." The judge refused to accept the verdict and confined the jury without meat, drink, fire and tobacco saying "we shall have a verdict, by the help of God, or you shall starve for it." Although the jury were without food and drink for in excess of 2 days they declined to return a verdict of guilty. In

return each of the jurors was fined (a little over 26 pounds) and sent to jail until the fine was paid. Bushel who did not take kindly to the fine obtained a writ of habeas corpus. His action brought an end to the punishment of jurors for not finding in accordance with the court's instructions.¹⁴ Thereafter the influence of the state was left to the persuasive capacity of the judge and jurors became free to exercise their own judgment in resolving the case.

In the late 17th century the system of special panels of jurors developed. One early illustration was a jury of merchants who were empanelled to try an issue relating to the business affairs of fellow merchants. By the beginning of the 18th century rudimentary rules of evidence emerged. It is believed that the rule excluding hearsay evidence first came into being in about 1700.¹⁵ Juries were prohibited from separating until their verdict had been given.

As the population increased and society became more complex, the jurors trying a case had little, if any, personal knowledge of the accused and any witnesses. Of necessity jurors were required to rely upon their assessment of the evidence of the witnesses, rather than their own opinions.¹⁶ Critical to this process is the ability of jurors to assess both the credibility and reliability of the witnesses who give evidence before them. It is to these issues that I wish to direct attention today. Some of you may be aware of my thoughts on the matter – they were published in the Australian

¹⁴ Ibid at 89.

¹⁵ Note 5 at 206.

¹⁶ Note 3 at 11.

Law Journal (“ALJ”).¹⁷ However, I have been asked to share them with you at the risk of boring those who have heard of or read them previously.

In a speech delivered to the Local Courts Annual Conference in 2006 I raised questions about the ability of adjudicators to identify whether a witness was telling the truth.¹⁸ Of necessity any enquiry into past events, although a search for the real truth, will be confined to the truth as perceived by the decision-maker. This is as true of a jury trial as it is in a trial by judge alone. Although free to make the decision which they believe correctly reflects the truth, a contemporary jury is given instruction by the trial judge in the relevant law. In addition the judge will instruct the jurors in the reasoning techniques which they should use to assess the facts. The assumption is that the collective wisdom of the judges will provide useful guidance for “lay” jurors.

In my earlier paper I said:

“the problem of reconciling real and perceived truth in our ordinary lives can be significant and may give rise to other problems. Sorting out the information we are receiving about our family problems, career, investment and personal choices requires us to consciously or subconsciously analyse information, some of which we understand directly and some of which we receive from other people is a complex task and we, of course, do not always come up with the correct answers.

¹⁷ McClellan, P. Who is Telling the Truth? Psychology, Common Sense and the Law (2006) 80 *ALJ* 657.

¹⁸ *Ibid*, at 656.

Throughout history individuals have developed methods by which they have been able to make sense of the complex of information which they receive. Conventional approaches for the resolution of uncertainties or conflicts are adopted. Thought patterns which we describe as rational or normal are identified and problems are solved in accordance with those patterns. ...

What we are talking about are the fundamentals of human behaviour, which, of course, are the domain of the psychologists”¹⁹

I went on to consider the contemporary research of psychologists in which many of our assumptions about human behaviour and our capacity to identify the truthful witness have been challenged. Although we are all familiar with the concept that a jury should use its common sense there are serious questions as to whether “common sense” correctly reflects what science tells us about our memories and reasoning processes.

As I have observed, the jury system has evolved from the days when the verdict which the State wanted was demanded of the jury. A failure to return an “appropriate” verdict would be visited with significant sanctions. The fact that the jury was chosen from persons, comprised at least in theory of the peers of the accused, gave legitimacy to a decision by the State which could lead to death, often by cruel means, or incarceration. The modern jury, for which there is a significant cost to the resources of the state, is maintained because of the legitimacy which it brings to the decision making process. However, as the contemporary availability of DNA

¹⁹ Ibid, at 656.

evidence reminds us, that decision will only reflect their perception of the truth. It may not reflect the real truth. In the USA more than 200 prisoners have been exonerated since 1989 by DNA evidence — almost all of whom had been incarcerated for murder or rape.²⁰ The objective evidence available from the biological marker allows the real truth, “the accused did not do it”, to be established. Of course, video and other recorded evidence may allow of the same degree of certainty but this is rare.

In the earlier paper I identified the fact that the law has traditionally devised its own rules of human behaviour and created its own norms for interpreting that behaviour. Judges are required to direct jurors on a whole range of subjects, with varying degrees of impact on the outcome of the trial. Accordingly, over the decades familiar passages have emerged from judge’s directions to juries. It is usual for the judge in his or her opening remarks to tell the jury that they are the judges of the facts and must apply their common sense and experience of the world when considering the evidence which they are about to hear. Similar directions are given at the end of a trial.

A form of direction commonly given by trial judges is as follows:

“As ordinary citizens, you are not expected or required to leave your common sense at home. You are expected to apply your ordinary common sense to the evidence you have heard and to your assessment of the witnesses and

²⁰ Roberts, J. and Stanton, E. “A Long Road Back After Exoneration and Justice is Slow to make Amends” The New York Times, 25 November 2007

just as you do in your ordinary, everyday lives. It is open and proper for you to draw inferences from the direct evidence which you find established.”²¹

It is not quite the injunction given by a parent which often takes the form “Oh Anne” use your common sense”. Of course what the parent is actually saying is “Oh Anne – why don’t you think about the matter as I do.”

Quite what a juror understands by “ordinary common sense” is unknown. In my previous paper I illustrated the problem by reminding the audience that in earlier times the idea that the world was flat with the distant traveller likely to fall off the edge was a matter of common sense.²² The proposition that a liar will shift in their seat, turn red in the face and fail to look the questioner in the eye would, I venture to suggest, still be accepted by many as a matter of common sense. Judges invite jurors to make careful observations of the witness. However, there is continuing controversy about the role of demeanour in assessing the matters of credibility.²³

Another common form of direction given to juries to help them in assessing the evidence of witnesses takes the following form:

“There is no rule that you must place any particular witness into a compartment which is entirely reliable or entirely unreliable. You have the right to say in respect of any witness that you accept part and reject part of

²¹ Criminal Trial Courts Bench Book, *Judicial Commission of New South Wales*.

²² Note 17, 657.

²³ *Fox v Percy* (2003) 214 CLR 118; *CSR Ltd v Delamadalana* (2006) 224 ALR 1.

what he or she says; or that you reject the whole of that persons' evidence; or on the contrary, that you accept the whole of it.

If you were to think in relation to a particular witness that there was significant part of his or her evidence that you could not accept, then obviously you may well be less willing to accept the remainder. But that, again, is something which is for you and you to assess, applying your experience of life, your commonsense and your ability to judge your fellow citizens.

Secondly, when you deal with this question of assessing reliability or credibility of a witness, you are obviously entitled to take into account the impression which he or she made upon you when giving evidence. That impression is sometimes referred to under the tag of demeanour. It means, or relates to the appearance of a witness in the witness box and particularly as to whether they appear to be comfortable, honest, convincing and doing their best to tell you the truth, or the opposite of any one of those features.

It is often very helpful when you come to assess evidence, to bear in mind that question of demeanour or appearance or impression upon you. However, there is a need to be cautious in this regard. Because for a witness, the witness box is not necessarily a place where every person who comes to a court is equally comfortable or equally experienced or perhaps, and relevant in this case, speaking in their own native tongue. Where a person is speaking through an interpreter, you may well get an impression of that person which really does not truly reflect their true reliability, credibility or otherwise.

Again, where people are experienced in coming to courts such as police, they may well give an appearance of being far more comfortable than a person who is an infrequent or, indeed a first time only visitor to the witness box. Again, those are matters of commonsense. It is important to bear in mind that demeanour is some guide but it has to be kept in balance and approached in a way I suggest.”²⁴

The power of the human mind is significant. The many filters which affect our perceptions of the truth can cloud our sense of reality. Some witnesses may become so defensive of a fact which is not true that they come to believe it. An untruthful witness can appear entirely credible, even to themselves. Gaudron, Gummow and Kirby JJ said in *MacKenzie v R* :

“The mind recognising perhaps the seriousness of the consequences of the error, may seek unconsciously to reinforce conviction of the truth and accuracy of the recall, the subject of the testimony. This can lead to just such risks of dogmatism and certainty that have occasioned the requirements for court warnings in the case of identification evidence so as to prevent the risks of miscarriages of justice which can otherwise, quite innocently, occur in that context.”²⁵

²⁴ Criminal Trial Courts Bench Book, *Judicial Commission of New South Wales*.

²⁵ (1996) 190 CLR 348 at 373.

In my earlier paper I discussed the question of demeanour and its usefulness as a tool in assuming the credit of a witness. I said that:²⁶

“In *Rama Furniture v QBE Insurance* (unreported, NSWCA, 20 June 1986), the trial judge confessed that he was “deeply suspicious of my ability to determine the truthfulness of a witness from his demeanour in the witness box.” This suspicion may be well founded. Ekman has concluded that “most liars can fool most people most of the time.”²⁷ Demeanour will only reveal incompetent liars.²⁸ Alarming he also concluded that “although most people cannot do better than chance in detecting falsehoods, most people confidently believe they can do so.”²⁹ This might even be exacerbated in a courtroom, which often has a “sterilising” effect on witnesses.³⁰ Notwithstanding that it has been shown that there is no universal cue that enables us to tell when a person is lying (i.e. a “Pinocchio response”),³¹ the confidence of a witness is often treated as though it is a conclusive measure of the witness’s honesty. That this may be fallacious has been recognised since Charles Dickens’ time. He once observed:

²⁶ Note 17, 657-658.

²⁷ P. Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage*, Norton, New York, 1985. Also quoted in: Giles, “The Assessment of Reliability and Credibility” (1996) 2 *TJR* 281 at 285.

²⁸ J. Ellard, “A Note on Lying and its Detection” (1996) 2 *TJR* 303 at 307.

²⁹ Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage*, Norton, New York, 1985, cited in: O. G. Wellborn, “Demeanor” (1991) 76 *Cornell Law Review* 1075 at 1081.

³⁰ M. Stone, “Instant Lie Detection? Demeanour and Credibility in Criminal Trials” (1991) *Crim LR* 821 at 825.

³¹ M. G. Frank, “Assessing Deception: Implications for the Courtroom” (1996) 2 *TJR* 315 at 321.

“I have known a vast quantity of nonsense talked about bad men not looking you in the face. Don’t trust the conventional idea. Dishonesty will stare honesty out of countenance, any day of the week, if there is anything to be got by it.”³²

Modern research indicates, as you would expect, that confident or powerful patterns of speech are more readily employed by the most powerful group within society – professional white men – regardless of the accuracy of their testimony. By contrast, “it is said that Aboriginal speech habits involve silences, indirect answers and negative answers which might wrongly be understood as evasion, confusion or guilt, and that Aboriginal culture promotes gratuitous concurrence.”³³ Moreover, even when others (such as women) are able to emulate a confident and powerful style of communication, they are regarded as less credible because they are not conforming to their stereotypes.³⁴ Furthermore, even though “confidence can account for up to 50% of the variance in jurors’ decisions to believe eyewitnesses,”³⁵ studies indicate that – far from there being a strong correlation between confidence and accuracy – “over 90% of the variance in eyewitness confidence is

³² C. Dickens, *Hunted Down*, Peter Owen Publishers, 1996, p. 176, quoted in: J. P. Timony, “Demeanor Credibility” (2000) 49 *Catholic University Law Review* 903 at 904.

³³ Giles, “The Assessment of Reliability and Credibility” (1996) 2 *TJR* 281 at 292.

³⁴ See generally: P. Conley, W. M. O’Barr and E. A. Lind, “The Power of Language: Presentational Style in the Courtroom” (1978) *Duke Law Journal* 1375.

³⁵ G. L. Wells and M. R. Leippe, “How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail can be Misleading” (1981) 66 *Journal of Applied Psychology* 682 at 682.

determined by factors other than eyewitness accuracy.”³⁶ A well-known influence on the apparent confidence of witnesses is the “Othello effect.” That is, “like Shakespeare’s tragic hero, lie detectors who disbelieve truthful witnesses may make them appear anxious and fearful – and hence appear as if they are being deceptive.”³⁷ Similarly, age can affect witness confidence. It has been shown that young children are significantly more likely to be overconfident about the accuracy of their positive identifications than older people.³⁸ On the other side of the coin, “people who are being deceptive know which behaviours result in judgments of deception,”³⁹ and hence make a conscious effort not to give off those signals. Research has shown that in the act of deception, supposed deception cues such as fidgeting and postural shifts actually *decrease* rather than increase.⁴⁰

Some of the things that the psychologists tell us *do not* indicate dishonesty can be surprising. These include shifting posture, head movements, smiling, gesturing or making foot and leg movements.⁴¹ Nor does grooming, massaging, rubbing, holding, pinching, or scratching indicate dishonesty.⁴² Blumenthal says that the face is the

³⁶ G. L. Wells, T. J. Ferguson and R. C. L. Lindsay, “The Tractability of Eyewitness Confidence and its Implications for Triers of Fact” (1981) 66 *Journal of Applied Psychology* 688 at 689.

³⁷ M. G. Frank, “Assessing Deception: Implications for the Courtroom” (1996) 2 *TJR* 315 at 321.

³⁸ N. Brewer and K. Day, “The Confidence-Accuracy and Decision Latency-Accuracy Relationships in Children’s Eyewitness Identification” (2005) 12 *Psychiatry, Psychology and the Law* 119 at 123-124.

³⁹ J. A. Blumenthal, “A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility” (1993) 72 *Nebraska Law Review* 1157 at 1194-1195.

⁴⁰ *Ibid*, at 1194.

⁴¹ *Ibid*, at 10.

⁴² J. P. Timony, “Demeanor Credibility” (2000) 49 *Catholic University Law Review* 903 at 939, footnote 188.

easiest “channel” for a liar to control, while voice is the hardest.⁴³ This is unfortunate because the face is the major channel that observers use to assess credibility.⁴⁴ Consequently, “there is some evidence that the observation of demeanor *diminishes* rather than enhances the accuracy of credibility judgments” (emphasis added).⁴⁵ Studies indicate that facial and body cues can distract fact-finders from more reliable vocal cues.⁴⁶ Body movements are a better indicator of credibility than the face, but only when the observer has some familiarity with the witness which allows them to assess whether the witness’s non-verbal behaviour is normal.⁴⁷ Since voice is the hardest channel to control, things like a high tone of voice and speech hesitations are more reliable indicators of deception than most other cues.⁴⁸ Even so, it should be pointed out that “people who apply the same decision rule to all potential liars tend to be poor detectors of deceit.”⁴⁹

“There is evidence from the psychologists that people are more likely to believe the testimony of an attractive or likeable witness than an unattractive or unsavoury witness.⁵⁰ This occurs when people engage in what is referred

⁴³ J. A. Blumenthal, “A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility” (1993) 72 *Nebraska Law Review* 1157 at 1190.

⁴⁴ J. W. Rand, “The Demeanor Gap: Race, Lie Detection, and the Jury” (2000) 33 *Connecticut Law Review* 1 at 10.

⁴⁵ O. G. Wellborn, “Demeanor” (1991) 76 *Cornell Law Review* 1075 at 1075.

⁴⁶ L. Re, “Oral v Written Evidence: The Myth of the ‘Impressive Witness’” (1983) 57 *ALJ* 679 at 682.

⁴⁷ *Ibid*, at 681.

⁴⁸ J. P. Timony, “Demeanor Credibility” (2000) 49 *Catholic University Law Review* 903 at 937, footnote 169.

⁴⁹ M. G. Frank, “Assessing Deception: Implications for the Courtroom” (1996) 2 *TJR* 315 at 324.

⁵⁰ C. Fife-Schaw, “The Influence of Witness Appearance and Demeanour on Witness Credibility: a theoretical framework” (1995) 35 *Med. Sci. Law* 107.

to as “peripheral route processing” rather than “central route processing.” Central route processing is a way of reasoning that involves the cognitive engagement of the person doing the reasoning. When a person reasons in this way, they tend to make decisions based on the *content* of the evidence rather than on who delivers it. People are more likely to engage in central route processing when they have a secure grasp of the issues in the case. Peripheral route processing is a way of reasoning that relies on *non-content* cues. People tend to engage in this type of reasoning when they do not understand the issues. Since they find it hard to evaluate the evidence on its merits, they may reason using heuristics – for example, they might think “that person is an expert, therefore whatever they say on this topic must be correct.” Similarly, since “there is a generalised bias in favour of believing that more attractive people are honest,”⁵¹ people can and often do reason accordingly. To my mind this is a particular danger with expert evidence. The articulate expert with less content may be more readily accepted than the expert who proves less “attractive” in the combative environment of the adversarial trial.”⁵²

It is commonplace for a witness who is cross-examined about an event which they claim to have observed to be asked about peripheral matters. Their recollection of the time an event happened may not be accurate. The furniture in a room where an assault takes place may be inaccurately recalled or the colour of clothing, make of car and many other matters may not be recalled at all or if it is the recollection may

⁵¹ Ibid, at 107.

⁵² Note 17, at 661.

be inaccurate. Although the witness's recall of the critical event "I saw X hit Y" may be clear the witness may be less confident about peripheral detail.

How often have you seen counsel say to the jury – "you cannot believe Z – remember how they could not recall various matters - all of which are peripheral to the primary recollection of seeing X hit Y."

In the earlier paper I considered in detail the problem which the research has revealed when assessing the reliability of a witness's memory. I said:

"It is plain that our so-called "common sense" understandings about the way people behave are not always correct. Psychologists suggest that a lot of the things that we should be looking for when assessing credit are counter-intuitive, and that often the things we *do* look for do not mean what we think they do. This is also true of our understanding of the way people remember events. Some of our "common sense" assumptions about a witness's memory may not be accurate. This has been exposed in studies that deal with repressed memories. The research indicates that the difference between the real truth and a person's understanding of the truth may be greater than we would expect."⁵³

For five extra credit points in Dr Elizabeth Loftus' Cognitive Psychology class at the University of Washington, an undergraduate named James Coan devised an experiment. James successfully implanted a false memory in the

⁵³ Note 17, at 662.

mind of his 14 year old brother Chris. The memory was a mildly traumatic one. James had implanted the memory by providing Chris with a book that contained 4 stories that purported to have been events that had happened to Chris in the past (3 of them were true and one of them was false). James asked Chris to write something about each story every day for six days. In the false story, the five year old Chris gets lost in a shopping mall.⁵⁴ Over the six days, Chris remembered quite a lot about the fictional story, even “remembering” details that had not been suggested. Subsequently James interviewed his brother on tape. Chris confidently described the false event at some length. James then told his brother that he had never in fact been lost in a shopping mall. Chris’ reaction has been widely reproduced in the psychological literature:

“What came out of him was this: ‘REALLY? I thought I remembered being lost and looking for you guys. I do remember that. And then crying. And Mom coming up and saying, “Where were you? Don’t you...don’t you ever do that again”’...He [Chris] told me that the study didn’t bother him and when I asked him what he thought of it, he said, ‘I just think it’s kinda trippy, ‘cause, y’know, I remember it happening.’⁵⁵

Five years later, when Chris was 19, James asked him if the memory still seemed real. He said that it did.⁵⁶

⁵⁴ J. Coan, “Lost in a Shopping Mall: An Experience With Controversial Research” (1997) 7 *Ethics and Behaviour* 271 at 273-274.

⁵⁵ *Ibid*, at 274-275.

⁵⁶ *Ibid*, at 275.

At the time of the experiment James had no idea of the minefield that he had just stepped into. He had shown that false memories of a mildly traumatic event – not just the neutral or positive memories that could be ethically implanted in a laboratory – could be induced, and that the person affected could not tell the difference between their false recollection and their true memories. This did not mean that all repressed memories of trauma were false, but it did show that at least some of them *could* be.

From the time of James' experiment, and to this very day, a debate has been taking place as to whether repressed memories are reliable, or whether they are falsely induced by therapists and/or other environmental factors, such as books, TV, victims' groups and so on. Those who believe in the accuracy of repressed memories refer to the phenomena as repressed memory syndrome (RMS), while their opponents refer to it as false memory syndrome (FMS). James' study did not create this divide, nor did it say anything that directly proved or disproved the views of either side. It merely showed that false memories of trauma were possible. (A more light-hearted but no less illuminating example of false traumatic memories is the 3.7 million United States citizens who in 1996 believed that they had been "abducted by aliens in flying saucers, examined, and then returned to earth."⁵⁷) Harvard Professor Dr Richard McNally has said that "How victims remember trauma is the most divisive issue facing psychology today."⁵⁸ If the psychologists find difficulty in

⁵⁷ J. Ellard, "A Note on Lying and its Detection" (1996) 2 *TJR* 303 at 312.

⁵⁸ R. J. McNally, *Remembering Trauma*, Belknap Press, Massachusetts, 2005, at 2.

this area, it is little wonder that courts have struggled to come to terms with evidence of repressed memories.⁵⁹

Writing in 2005 McNally discussed human memory of trauma in the following terms:

“What has clinical research taught us about memory for trauma? Events that trigger overwhelming terror are memorable, unless they occur in the first year or two of life or the victim suffers brain damage. The notion that the mind protects itself by repressing or dissociating memories of trauma, rendering them inaccessible to awareness, is a piece of psychiatric folklore devoid of convincing empirical support. To be sure, people may deliberately try not to think about disturbing experiences, and sometimes they succeed, especially if the experiences were unpleasant but not catastrophic. They may get on with their lives, concentrating on other matters and not dwelling on their early adverse experiences. When later reminded of these experiences, they may say they had ‘forgotten’ them, meaning that they had not thought about them for many years. But failing to think about something is not the same as being unable to remember it. Not having something come to mind for a period of time is not the same as having amnesia for the experience...

...Finally, some experiences are reclassified as traumatic many years after they occur. Some molested children are too young to understand sexual abuse for what it is, and only years later realise what they experienced. But

⁵⁹ See eg *Lackovic v Insurance Commission of Western Australia* [2006] WASCA 38; *R v Bartlett* [1996] 2 VR 687; *E* (1997) 96 A Crim R 489 (NSWCCA).

their failure to think about it and classify it as abuse cannot be attributed to repression or dissociation of their memories if the emotional realisation that they were abused occurs in adulthood.”⁶⁰

There is another situation (unrelated to repressed memories) where it might be said that “what you don’t know can hurt you.” Research has shown that when a person witnesses a traumatic event, they focus on the central features of the event rather than peripheral details.⁶¹ For instance, “when a weapon is used to commit a crime, eyewitness identification is less accurate because the witness tends to focus on the weapon.”⁶² Similarly, “the literature on information processing suggests that attention to a criminal’s face during an event may preclude processing of other less central details and that good memory for trivial or peripheral factors may imply less, rather than more, encoding of the criminal’s facial features.”⁶³ The failure to understand this phenomenon may have unfortunate results in a trial where judges or jurors may mistakenly associate memory for peripheral detail with greater witness accuracy.⁶⁴ One study showed that

“Subject-jurors behaved as though the correlation between memory for the thief’s characteristics and memory for peripheral trivia is positive. Subject-

⁶⁰ R. McNally, *Remembering Trauma*, Belknap Press, Massachusetts, 2005, pp. 275-276.

⁶¹ Easterbrook, cited in: R. McNally, *Remembering Trauma*, Belknap Press, Massachusetts, 2005, pp. 49-50.

⁶² W. D. Wolfson, “‘That’s the Man!’ Well, Maybe Not: The Case for Eyewitness Identification Expert Testimony” (2000) 56 *Litigation* 5 at 6.

⁶³ G. L. Wells and M. R. Leippe, “How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail can be Misleading” (1981) 66 *Journal of Applied Psychology* 682 at 683.

⁶⁴ *Ibid.*

jurors were less willing to believe that an eyewitness had correctly identified the thief if the eyewitness had poor memory for peripheral trivia. This effect was not mediated by the confidence of the witness...[I]t appears that the effects herein obtained are not due to the mediating role of eyewitness confidence but, instead, occur in spite of the eyewitness' unshakeable confidence."⁶⁵

There is also a problem with colour. Apparently, colour is not remembered as readily as form – for instance, dreams are seldom remembered in colour⁶⁶ - and there is research that indicates that eyewitness memory for colour is often very poor.⁶⁷ A witness to a traumatic event may process what they see in black and white rather than in colour, the theory being that at times of great stress colour vision is dispensed with so that the mind can devote more of its resources to dealing with the actual trauma. Our perception of colour is controlled more by our brains than by the hardware of our eyes.⁶⁸

The jury system faces other contemporary problems. Today, for most people the news comes from radio or television with the computer screen increasing in use. Access to newspapers is diminishing. When a serious crime occurs it is common for it to be widely reported in the electronic media. The investigation will be

⁶⁵ Ibid, at 686.

⁶⁶ P. Gouras, Professor of Ophthalmology at Columbia University, Personal Communication, 1/6/2006.

⁶⁷ R. Kemp, Senior Lecturer in Psychology at UNSW, Personal Communication, 6/6/2006.

⁶⁸ Anon., "Color Perception Is Not In The Eye Of The Beholder: It's In The Brain," available from: <http://www.sciencedaily.com/releases/2005/10/051026082313.htm> (viewed 22/6/06).

accompanied by police press conferences telling us of progress. Persons of interest and the details of the crime are discussed. When the investigation is apparently successful and an arrest effected appropriate announcements are made. The headlines tell us that the murder has been solved, the drug ring busted, or the gang war brought to an end.

The consequence of modern technology is that even if the previous publicity was not sufficiently striking to be permanently remembered prospective jurors will have access to it through the internet. Knowledge which a juror of the Middle Ages acquired from living in the locality where the crime was committed is now acquired from the published media.

In New South Wales it is now an offence for jurors to conduct their own investigations on the internet.⁶⁹ It is universal for judges to direct the jurors that they are not to conduct such an inquiry and to consider the matter having regard only to the evidence tendered. Justice Bell in her paper "How to Preserve the Integrity of Jury Trials in the Mass Media Age"⁷⁰ referred to a New Zealand study where it was established that juries did not appreciate the importance or understand the logic of restricting themselves to the information presented by the parties and the judge. This is not surprising. Our common sense method of decision-making is informed by all of the information available to us. When invited to use their common sense there may be difficulties for a juror in accepting the constraints of the court room. If, as will be the case with some trials the accused and/or the circumstances of the crime are

⁶⁹ s68C of the *Jury Act 1977* (NSW).

⁷⁰ *Supreme and Federal Courts Judges' Conference* - January 2005.

such that the jury will inevitably know “the story”, will that trial be compromised? If the law accepts that an accused in those circumstances will have a fair trial should we be troubled by jurors in other trials having access to information stored on the internet.

In recent years there have been notorious cases in which jurors have conducted their own research. This may extend to visiting the scene of the crime⁷¹, conducting internet searches⁷² or making enquiries as to the likely temperature of the corpse of a young child.⁷³ Although these transgressions were identified it is conceivable that many more do occur without the court’s knowledge. When clearing your emails after a day in court as a juror the temptation to “Google” would be significant.

The juror’s knowledge of an accused and the alleged crime faces another issue. It is common place for the media to comment after a trial that the jury were not told of the previous crimes committed by that person. It happened recently in relation to the culpable drive charges in Victoria. Of course, the ordinary person makes decisions every day with knowledge of the “track record of others”. It is the inquiry you make before hiring a builder, architect or plumber. If the local dentist did a bad job for your brother you go to another one. It is just common sense. But except in limited circumstances it is a method of reasoning denied to the jury. There are good reasons why the rule was created. There may be questions on whether it can be successfully defended.

⁷¹ *Skaf v R* [2004] NSWCCA 74.

⁷² *R v K* [2003] NSWCCA 406.

⁷³ *Folbigg v R* [2007] NSWCCA 128.

The issue has not escaped the critical comment of journalists. Commenting in the Sydney Morning Herald Richard Ackland questioned whether the purity required by the courts can be sustained in the face of developing technology and the availability of information. Mr Ackland commented “if the institution is to survive, the law will have to accept a more middle ages view of jurors – they know stuff”.⁷⁴

The problem which Australian courts face is minimised in the United States where juries are sequestered for the entire trial. It may be that before long a policy decision must be made as to whether we accept that juries will “know stuff” or be confined without access to the internet or the media for the course of the trial. Justice Phillip Cummins of the Victorian Supreme Court has said:

“long experience in the law... confirms that juries are robust and responsible. Of course, one must not ask psychological impossibilities of juries, and one must always be astute to prevent prejudice creeping into the jury trial from extraneous sources. But juries time and time again, come to court in cases of great notoriety and publicity and demonstrate by their evident application of mind that they act according to their oath or affirmation to give a true verdict to the evidence led before them in court.”⁷⁵

⁷⁴ Richard Ackland “Blindfolding Jurors, and Idea Whose Time has Gone” *Sydney Morning Herald*, 15 February 2008.

⁷⁵ Mark Day, “Law’s Sensitive Underbelly a Poke in the Eye for Jurors” *The Australian*, February 2008.

In *R v Burrell*⁷⁶ Barr J was faced with a retrial in circumstances where there had previously been an aborted trial followed by a completed trial from which the verdict was quashed. There had been sensational publicity about the matter. In that case the judge gave “a firm warning” reminded the jury of the need to put out of their minds anything they had read in the press. His Honour told them that they had to judge the case on all the evidence. Although there was an appeal there was no suggestion that the jury had not been faithful to that task.

The criminal law is far more sophisticated today than in earlier centuries. Over time rules have been developed to ensure, so far as the law is able, that the trial process is fair and the jury’s verdict appropriate. However, the process faces constant challenge. I have identified some of those challenges. We must accept that jurors, like judges, are not psychologists and their approach to the task of assessing the evidence, will bring with it the limitations of their individual backgrounds and understanding of human nature. It is unlikely that the public’s understanding of the work of psychology researchers will keep pace with the researcher’s findings.

You may remember the inquest into the death of the aboriginal lad, David Gundy, who was shot by police at point blank range when they forcefully entered the house in which he was sleeping. The police kicked in the front door and in numbers ran through the house. Gundy who had been asleep stirred from his bed and in the dark allegedly lunged at a policeman carrying a shotgun. The gun was discharged and he was killed.

⁷⁶ (2002) NSWSC 101.

The events surrounding the inquest attracted enormous publicity. The police were not looking for Gundy but for a man who they believed to be his friend who had shot and killed a policeman. That person was not in the house but hundreds of kilometres away on the north coast of New South Wales.

The jury, which considered the matter comprised three men and three women, all white and all apparently aged more than sixty years. A lack of concentration was obvious in some throughout the many afternoons of the hearing. They returned a verdict exonerating the police from any misconduct. Would the verdict have been the same if the jury had been comprised in part or entirely of aboriginal people?

I began by telling you of one of my real experiences of the common sense of a jury. Can I close by reminding you of the story once told by the late Jim Killen - the Federal Minister for Defence - who was a barrister. I am sure you will have heard it before. The accused had been charged with stealing some sheep. When returning the jury's verdict the foreman said in response to the question: "How do you find the defendant" was "Not guilty your Honour - provided he gives back the sheep."