

“Looking Inside the Jury Room”

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Trial by Jury

The common law has used juries to decide factual issues for centuries. Although its role and method of functioning has evolved over time, and it is not without its critics, the jury has proved to be an enduring institution. Until recently it has not been possible, at least outside of the United States of America, to evaluate the effective working of juries. Appeal courts sometimes have to try and put the “pieces” of the trial together by examining the transcript particularly jury questions and the decision on various courts where the indictment contains more than one. But this is patchy and may give an incomplete picture of events.

The common law rule of jury secrecy, known as the exclusionary rule, prohibits a juror from discussing the deliberations in the jury room.¹ The origin of the rule is uncertain. Boniface attributes a spiritual dimension to it. He suggests that:

“Its historical justification may lie in a belief of ancient jurists that “when jurors went into the confines of the jury room the presence of God led them to the proper verdict”.

¹ Dorne Boniface, ‘Juror Misconduct, secret jury business and the exclusionary rule’ (2008) 32 *Criminal Law Journal* 18, 24 – 28.

Attempts to investigate jury deliberations would therefore be questioning the judgment of God.”²

The rule is now entrenched. Public policy considerations require that the verdict of the jury should be final. Discussing their deliberations may provoke controversies about the outcome. The rule ensures that “jurors or former jurors are not subjected to pressure [or] harassment”³, and that deliberations and discussions are “full and frank.”⁴ Of particular significance is the perception that silence protects public confidence in the justice system.⁵ The position is otherwise in the United States of America where “jurors may appear on popular talk-shows, give media interviews or indeed publish books.”⁶ And many do.

It is important to understand that in most jurisdictions only a limited number of criminal trials take place with a jury. In New South Wales less than four percent of

² Ibid 24.

³ See: *Shrivastava v The State of Western Australia (No 2)* [2011] WASCA 8 [25] (Pullin JA) citing *R v Rinaldi* (1993) 30 NSWLR 605, 612 – 613 (The Court).

⁴ *R v Skaf* (2004) 60 NSWLR 86, 92 (Mason P, Wood CJ at CL and Sully J).

⁵ See: *Shrivastava v The State of Western Australia (No 2)* [2011] WASCA 8 [25] (Pullin JA) citing *R v Rinaldi* (1993) 30 NSWLR 605, 612 – 613 (The Court).

⁶ See: Robyn Lincoln and Debra Lindner, ‘Judging Juries’ (2004) 10(1) *The National Legal Eagle* 8, 9 <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1072&context=nle>>; William Bagley, ‘Jury Room Secrecy: Has the Time Come to Unlock the Door?’ (1998) 32 *Suffolk University Law Review* 481, 495 – 496. Bagley writes that: “[i]n recent years ... members of the media have challenged court imposed limitations on their First Amendment right to gather information about the factors that led to a jury’s decision. Courts have dealt with these challenges by balancing the media’s First Amendment right with the defendant’s Sixth Amendment right to a fair trial. One of the core issues of this balance revolves around the historical view of the criminal trial as an open process. Although the public’s right of access to criminal trials is not a Constitutional absolute, a court must still provide a compelling reason for prohibiting media access to the proceedings. Accordingly, courts have reluctantly taken steps over the past several decades that have expanded the scope of trial coverage”

The media’s right to access jurors is not absolute. It must be tempered by the defendant’s right to a fair trial as provided by the Sixth Amendment. The courts have favoured a presumption of openness concerning media access to juries. The onus rests on the defendant to demonstrate that a compelling reason to the contrary exists before the presumption can be rebutted. For an interesting discussion of the media’s right to access juror names prior to empanelment see: *United States v Wecht* 537 F.3d 222 (3d Cir. 2008) and Kaitlin Picco, ‘By Any Other Name: The Media’s First Amendment Right of Access to Juror Names *United States v Wecht* 537 F.3d 222 (3d Cir. 2008)’ (2009) 82 *Temple Law Review* 561.

criminal trials are conducted with a jury.⁷ The number is greater in the United Kingdom,⁸ although pressure on Government finances is likely to bring change.

The law assumes that a verdict delivered in the presence of all the jury has been assented to by each member.⁹ It cannot be rebutted by evidence from jurors which would contradict this assumption.¹⁰ The rule has led to some unusual results.

In *Vaise v Delaval*¹¹ the Court refused to admit evidence from two jurors that the jury had made their decision by tossing a coin. In *Nanan v The State*¹² the accused was convicted and sentenced to death. As it happened after the trial the foreman swore an affidavit in which he said that when he delivered the verdict he had mistakenly agreed that the verdict was unanimous when in fact the jury were split 8:4.¹³ The Privy Council ruled that the affidavit was not admissible.¹⁴ Although their Lordships acknowledged that the “misapprehension in the present case ... may [be said to be] ... of a fundamental kind” they emphasised that other “misapprehensions” by the jury as to the law or the facts may also lead to an erroneous verdict.¹⁵ Whatever the

⁷ See: New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2009* (2010 New South Wales Bureau of Crime Statistics and Research) 3, 11 <[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/ccs09.pdf/\\$file/ccs09.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/ccs09.pdf/$file/ccs09.pdf)>.

⁸ Roger Matthews, Lynn Hancock and Daniel Briggs, *Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts* (Home Office Online Report 05/04, 2004) 10 <<http://rds.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf>>.

⁹ *Ellis v Deheer* (1922) 2 KB 113, 121 (Aitkin LJ).

¹⁰ *Burrell v R* (2007) 190 A Crim R 148, 216 (McClellan CJ at CL).

¹¹ *Vaise v Delaval* (1785) EngR 12; (1785) 99 ER 944. Similar actions have occurred more recently in the United Kingdom when a concerned juror provided a letter to the trial judge after the verdict was given but before sentence was passed. In *R v Mirza; R v Connor and Rollock* (2004) 1 A.C. 1118 it was argued that the jury secrecy rule was incompatible with article 6(1) of the *European Convention on Human Rights*. The Court dismissed the appeal confirming the sanctity of juror secrecy in the common law world. Evidence of juror misconduct that was raised after a conviction was inadmissible (per Slynn LJ of Hadley at 1146). The juror's letter had indicated that: “There was talk of trying to reach a verdict by the tossing of a coin, this was quickly given short shrift” (per Slynn LJ of Hadley at 1141).

¹² *Nanan v The State* (1986) AC 860.

¹³ *Nanan v The State* (1986) AC 860, 867 (Goff LJ).

¹⁴ *Ibid* 872 (Goff LJ).

¹⁵ *Ibid*.

misapprehension may be evidence of it is not admissible.¹⁶ I wonder if Nanan's death sentence was commuted.

The law has confined the obligation of secrecy to what actually happens in the jury room. In *R v Young*¹⁷ the Court of Appeal set aside a verdict that had been arrived at after three members of the jury had come together in an hotel room to seek assistance of a ouija board.¹⁸ The Court accepted evidence of the invocation of the supernatural to assist some jurors, but only because it took place in a hotel room.¹⁹ If it had happened in the jury room, the evidence would not have been accepted.²⁰ The supernatural forces would have been allowed to operate.

Notwithstanding the strictures of the secrecy rule, contemporary curiosity about the working of juries, which is similar to our curiosity about the effectiveness of many of society's institutions, has led to a number of studies of the deliberative processes in the jury room. The findings do not permit conclusions of universal relevance but a body of interesting material has begun to emerge. Studies have been undertaken in New Zealand, the United Kingdom, New South Wales, Western Australia and Tasmania. The findings are of interest to both supporters and critics of trial by jury.

New Zealand

The New Zealand Law Commission carried out a study which was completed in 1999. Published under the title "Juries in Criminal Trials" the stated purpose of the study was to address an identified gap in the research literature that examined how

¹⁶ Ibid.

¹⁷ *R v Young (Stephen)* [1995] QB 324.

¹⁸ *R v Young (Stephen)* [1995] QB 324, 334 (Taylor LCJ).

¹⁹ Ibid 311-332.

²⁰ Ibid 330.

juries actually work.²¹ The study looked at 48 jury trials from numerous urban and provincial courts throughout New Zealand.²² 312 jurors were interviewed.²³ The offences tried ranged from murder to attempted burglary.²⁴ The data was collected through questionnaires and semi structured interviews, both before and after the trials.²⁵

The study concluded that overall the jury decision process was “characterised by a very high level of conscientiousness when attempting to understand the law and apply it to the facts.”²⁶ The authors found that there was “little evidence that juries were tempering the rigidities of the law by applying their own “common sense” or by bringing to bear their own brand of justice.”²⁷ However, the study did find that jurors displayed “widespread misunderstandings about aspects of the law which persisted through to and significantly influenced jury deliberations.”²⁸ The authors stated that only 27% of the total trials did not reveal “fairly fundamental misunderstandings of the law at the deliberation stage.”²⁹ In addition to this, jurors had reported problems in disentangling evidence.³⁰ This was said to be due to the complexity of the evidence or the poor way in which it was presented.³¹ Jurors described the evidence as “vague, muddled, confusing and contradictory.”³² Questioning by counsel was often

²¹ New Zealand Law Commission, *Juries in Criminal Trials, Part Two, A Summary of Research Findings*, Preliminary Paper, Paper No. 37, Vol 2, (November 1999).

²² Ibid 2.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid 53.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid 24.

³¹ Ibid.

³² Ibid.

described as being “confusing” or “difficult to follow.”³³ The implication was that jurors were required to reconstruct a fragmented “story” or “narrative” based on a “partial recollection of earlier evidence.”³⁴ The lack of clarity in the evidentiary narrative impeded the jurors understanding of facts and the evidence before them.

The study also looked at jurors’ response to legal terminology. Common problems were identified with jurors having trouble with the ingredients of the offence, the meaning of intent, understanding the concept of “beyond reasonable doubt”, “the balance of probabilities” and the wording of the indictment, particularly where there were multiple and alternative charges.³⁵ Many of the jurors stated that they were uncertain of the meaning of beyond reasonable doubt.³⁶ They “variously interpreted it as meaning 100%, 95%, 75% and even 50%.”³⁷

The study revealed that the judge’s summing-up has “rather less significance than is often imagined.”³⁸ Jurors were also found to have based their decisions on irrelevant considerations such as the impact on the community or the accused’s family.³⁹ The authors said: “it is ... quite likely that (the jurors) interpreted the law incorrectly so as to fit with the verdict they wished to reach, and then persuaded the majority to that view.”⁴⁰

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid 54.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid 56.

³⁹ Ibid 52.

⁴⁰ Ibid 70.

The authors made suggestions for reform. To increase juror comprehension they suggested three areas for change. They included: “summaries of the law in writing”; “instructions on the law in the form of a flowchart or sequential list of questions”; and “providing an opportunity for the jury to seek clarification before deliberations.”⁴¹

As part of the study, an experiment was conducted using summaries of the law broken down into constituent parts.⁴² A majority of jurors (62.2%) responded positively to this approach.⁴³ They reported that summaries alleviated problems in absorbing oral directions.⁴⁴ Jurors had similar responses to flowcharts that listed a series of questions which they were required to answer which identified elements of an offence.⁴⁵

The United Kingdom

In 2004 the United Kingdom Home Office published a study entitled “Jurors perception, understanding, confidence and satisfaction in the jury system: a study in six courts.”⁴⁶ This study involved 361 jurors who were both interviewed and asked to answer written questionnaires.⁴⁷ The study produced many positive findings in relation to jurors’ confidence in the jury system particularly the deliberation process. The study found that confidence of jurors in the system after service on a jury went up in 43% of the jurors, it remained the same in 38% and went down in 20% of jurors.⁴⁸ The authors commented that in relation to those who lost confidence in the

⁴¹ Ibid 62.

⁴² Ibid.

⁴³ Ibid 62.

⁴⁴ Ibid.

⁴⁵ Ibid 62 – 63.

⁴⁶ Matthews, Hancock and Briggs above n 8.

⁴⁷ Ibid 18.

⁴⁸ Ibid 45.

system this did not mean that their confidence was low.⁴⁹ Their confidence may have been very high to begin with.⁵⁰ The inverse may be true for those whose confidence increased.⁵¹ Examination of the factors that promoted confidence revealed some interesting findings. 131 jurors cited justice through diversity; 79 jurors referred to fairness and 75 jurors listed juror commitment as the reason why their confidence rose.⁵²

Justice through diversity reflects the democratic aspiration that many jurors associated with jury trials.⁵³ Trial by one's peers and the "randomness of jury selection" was seen as "important in establishing impartiality while giving the decision-making process a sense of balance."⁵⁴ A decision made by a group comprised of a cross section of the community was viewed as necessary to ameliorate individual prejudices and biases, which were particularly apparent in the deliberation process.⁵⁵ With respect to fairness, the diversity of opinions between jurors was emphasised.⁵⁶ Jurors viewed this diversity "as being linked to honesty and the openness of those involved in the trial process."⁵⁷ One juror reported "that the jury trial system is one of the most difficult systems to corrupt and that is one of the real strengths and it is important that it is the everyday person who judges his peers."⁵⁸ Experiencing the dedication and conscientiousness of jurors increased confidence in the jury system.⁵⁹ One juror said:

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid 46.

⁵³ Ibid.

⁵⁴ Ibid 47.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid 51.

⁵⁸ Ibid 48.

⁵⁹ Ibid 50.

“The jury system was new to me and it clarified quite a lot. I was impressed with the independence of the court from the police and the way that individual juries functioned. I appreciated the process more and felt that the rights given to the defence were very well worked through.”⁶⁰

It was not all good however. The study concluded that 39% of jurors found legal terminology difficult to understand, 15% struggled with legal or factual information and 14% found technical evidence complicated.⁶¹ Many jurors found the term “beyond reasonable doubt” confusing and unclear.⁶² One juror described his experience in these terms:

“It is much more difficult than I would have thought to prove someone guilty and what I didn’t realise is that ‘beyond reasonable doubt’ and being ‘absolutely sure’ were two different things ... and there are things such (as) ‘inadmissible evidence’ which I did not understand and this made me realise how complex the law is.”⁶³

Another view expressed by a juror was that “some jurors are arriving at a view without understanding the information.”⁶⁴ This study, as with others, was dependent upon the responses of jurors after the trial in which they were involved had been completed. The accuracy of the responses and in particular the preparedness of a juror to admit they did not understand the evidence or legal directions is a difficulty

⁶⁰ Ibid 51.

⁶¹ Ibid 37.

⁶² Ibid 38.

⁶³ Ibid.

⁶⁴ Ibid 43.

recognised by researchers.⁶⁵ There is also the problem of a juror who believes they understood the facts or the law when the reality may be otherwise.⁶⁶

The Lord Chief Justice of England, Lord Judge has expressed concerns about a contemporary juror's capacity to absorb information. Writing extrajudicially he observed that:

“Most [of our young] are technologically proficient. Many get much information from the internet. They consult and refer to it. They are not listening. They are reading. One potential problem is whether, learning as they do in this way, they will be accustomed, as we were, to listening for prolonged periods. ... [O]rality ... is at the heart of the [adversarial] system.”⁶⁷

Another study was conducted in the United Kingdom in 2010. It was carried out by Cheryl Thomas. The results are interesting. She reported under the title “Are Juries Fair?” she carried out her research using a mock trial.⁶⁸ She used a simulated assault which was filmed.⁶⁹ Two questions were put to the group of theoretical jurors: “did the defendant believe it was necessary to defend himself and did he use reasonable force?”⁷⁰ Of the 797 jurors only 31% correctly answered both questions, 48% correctly answered one question and 20% failed to correctly answer both questions.⁷¹ The jurors came from three different locations in England.⁷² Significant

⁶⁵ Ibid 12.

⁶⁶ Ibid.

⁶⁷ Lord Chief Justice Lord Judge, ‘Jury Trials’, (Speech delivered to the Northern Ireland Judicial Studies Board Lecture, Belfast, 16 November 2010), 3 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-lcj-jury-trials-jsb-lecture-belfast.pdf>>.

⁶⁸ Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, Ministry of Justice, 2010) i <<http://www.justice.gov.uk/about/docs/are-juries-fair-research.pdf>>.

⁶⁹ Ibid.

⁷⁰ Ibid 7.

⁷¹ Ibid 36.

⁷² Ibid.

differences were revealed. I make no comment but merely report the information. Jurors from Blackfriars and Winchester demonstrated relatively high levels of understanding of the judge's directions with 69%: 68% respectively.⁷³ However, "most jurors at Nottingham (51%) felt the directions were difficult to understand".⁷⁴

New South Wales

The NSW Bureau of Crime Statistics and Research (BOSCAR) conducted a study of jurors across 112 criminal trials in NSW.⁷⁵ The study was undertaken between July 2007 and February 2008. Of a prospective pool of 1,344 jurors, 1,225 participated in the survey.⁷⁶ The jurors were required to respond to a short structured questionnaire.⁷⁷ The authors cautioned the reader to be careful when considering the responses acknowledging that the jurors "may not have been entirely candid in their responses about their levels of comprehension or they may believe that they understood the instructions when perhaps they did not."⁷⁸

57.5% of jurors said they understood everything with 27.9% responding that they understood nearly everything, and 14.4% said they understood most things the judge said.⁷⁹ What is of particular interest is the reported response to the phrase "beyond reasonable doubt." 55.4% of the jurors surveyed believed that the term meant "sure

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Lily Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials*, *Crime and Justice Bulletin* No 119 (NSW Bureau of Crime Statistics Research, 2008)

<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb119.pdf/\\$file/cjb119.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb119.pdf/$file/cjb119.pdf)>.

⁷⁶ Ibid 1.

⁷⁷ Ibid 2.

⁷⁸ Ibid 11.

⁷⁹ Ibid 14.

... the person is guilty” and 22.9% believed that it meant “almost sure ... the person is guilty.”⁸⁰ According to the authors:

“There was a significant relationship between the type of offences before the court and jurors’ self-reported understanding of the concept [of] beyond reasonable doubt. Jurors who heard trials dealing with adult or child sexual assault offences were 1.4 times more likely than jurors hearing trials dealing with offences other than sexual assault offences to understand the concept to mean ‘pretty likely’ or ‘very likely’ the person is guilty.”⁸¹

In relation to the judge’s directions as to the law, jurors were asked two questions: “to what extent did you understand the judge’s instructions on the law?” and when “would you have preferred to receive the judge’s instructions on the law?” 47.2% of jurors reported that they “understood completely” the judge’s directions while 47.7% of the jurors said that they “mostly understood”.⁸² There were significant differences depending on the age of the jurors.⁸³ Jurors aged between 18 and 34 years were “at least twice as likely as jurors aged 35 years or more to say that they understood only ‘a little’ or nothing of the judge’s instructions on the law.”⁸⁴ Jurors aged 35 years and above were 1.2 times than younger jurors to say that “they understood ‘completely’ the judge’s instructions.”⁸⁵

⁸⁰ Ibid 4.

⁸¹ Ibid 4.

⁸² Ibid 9.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

Tasmania

There has been a recent study in Tasmania. Although the juror comprehension component of the report has not been published, the authors Professor Kate Warner and his Excellency Peter Underwood, the former Chief Justice of Tasmania, have publicly discussed some of its conclusions.⁸⁶ The study confirmed that jurors have difficulty understanding common legal terms.⁸⁷ One observation reported in *The Australian* is troubling. The authors apparently observed that:

“several jurors placed no weight on oral evidence in the belief that oral evidence alone could not determine guilt. One juror believed it was improper for counsel to continually put to witnesses that they were not telling the truth. Another juror had believed the fact the case had been mentioned in a lower court meant that the defendant had already been found not guilty.”⁸⁸

The ultimate report may prove to be interesting reading.

Western Australia

The final report to which I will refer this morning comes from Western Australia. It was concerned with juror intimidation.⁸⁹ The study reviewed questionnaires from 913 jurors who had cumulatively sat in 218 metropolitan and country trials.⁹⁰ The authors also interviewed 130 jurors.⁹¹ The authors did not define juror intimidation, but

⁸⁶ See: Chris Merritt, ‘Jurors get it wrong without a guiding hand’, *The Australian* (online), 26 November 2010 <<http://www.theaustralian.com.au/business/legal-affairs/jurors-get-it-wrong-without-a-guiding-hand/story-e6frg97x-1225961141747>>.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Judith Fordham, *Juror Intimidation: an investigation into the prevalence and nature of juror intimidation in Western Australia*, (Department of the Attorney General, 1 April 2010 as edited on 7 April 2010) <http://www.department.dotag.wa.gov.au/_files/juror_intimidation.pdf>.

⁹⁰ *Ibid.* 37.

⁹¹ *Ibid.* 43.

instead asked jurors whether, during the course of the trial in which they participated, they experienced pressure which they believed was either appropriate or inappropriate.⁹² The jurors were asked whether they had changed their vote before a verdict was given, and if they regretted that, and the “effects of jury duty on their emotional and physical wellbeing.”⁹³

The authors concluded that the incidence of juror intimidation “were disturbingly high and had the potential to prevent a “true verdict.””⁹⁴ However I should emphasise that the instances of juror intimidation from external sources outside the jury room were very low.⁹⁵ The concern was with events taking place in the jury room. The report concluded that around 13.4% of metropolitan district court jurors felt uneasy, threatened or unsafe during the trial.⁹⁶ A similar response came from Supreme Court jurors.⁹⁷

The authors concluded that pressure and intimidation had led to jurors changing their original decision which they regretted after the jury’s decision had been announced: “23.6% of jurors [said that] they changed their votes during deliberations. ... Of those who changed their votes, 19.2% regretted it.”⁹⁸ Of those who changed their vote, 20.1% cited pressure from various sources, both appropriate and inappropriate, which included other jurors: “73.8% of those who felt pressured felt pressured by the

⁹² Ibid 32.

⁹³ Ibid.

⁹⁴ Ibid 118.

⁹⁵ Ibid 58 – 62.

⁹⁶ Ibid 74.

⁹⁷ Ibid 74.

⁹⁸ Ibid 56 – 57.

other jurors.⁹⁹ Of those, 27% felt very pressured and 49.2% thought the pressure was inappropriate.”¹⁰⁰

Experienced trial judges will tell you that juries mostly get it right. For critics of the system the concern is with the cases where they get it wrong. There has been a change in attitude to the jury’s verdict since the Chamberlain case.¹⁰¹ Courts are more ready to accept that juries may get it wrong reflected in the High Court’s affirmation of the role of the appellate court when considering whether a conviction can be supported having regard to the evidence.¹⁰² I have said previously that the reality is that juries acquit but judges convict.¹⁰³ A reasonable doubt which the appellant judge has is one which the jury should have had.¹⁰⁴

Despite the importance of maintaining the sanctity of the jury’s deliberations we can be certain that research into the functioning and effectiveness of juries will continue. The research increasingly reveals the human dynamic which operates within the jury room. The process is of course similar to our everyday experience of group activities and decision-making by committees. The Western Australia study confirms as our everyday experience suggests it should that in any group of people there will be some who have greater influence over the decision of the group than others.

⁹⁹ Ibid 58, 62.

¹⁰⁰ Ibid 62.

¹⁰¹ See: *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 537-8 (Gibbs CJ and Mason J) and David Hamer, ‘The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof’ (1997) 23(1) *Monash University Law Review* 43.

¹⁰² *Weiss v R* (2005) 224 CLR 300, 314 – 315 (The Court).

¹⁰³ Justice Peter McClellan, ‘The Australian Justice System in 2020’, (Speech delivered to the National Judicial College of Australia, Canberra, 25 October 2008).

¹⁰⁴ *Weiss v R* (2005) 224 CLR 300, 317 (The Court).

It is not difficult to predict that the task for juries will become more difficult in the future. Evidentiary issues will increase in complexity. This will be a product of both increasing scientific knowledge and an increase in the prosecution of complex corporate and finance related crimes. The demand from appellate judges for accuracy of language in explaining the law and the requirement to give an increasing number of warnings to the jury to take care will make the task of absorbing the judge's directions more difficult for the average juror.

A common conclusion from the studies is that the language of the law and the means by which it is communicated to jurors involve complexities which the average person may not be able to deal with in the course of an individual trial. We can all think of examples.¹⁰⁵ Over 20% of jurors in the Home Office study felt that a more fulsome explanation of the law was necessary in addition to a plain English summary of the charges.¹⁰⁶ In Thomas' study a random selection of jurors were provided with a one-page *aide memoire* that summarised the judge's verbal directions on the law.¹⁰⁷ Those who received the written summary were more successful in answering the judge's original two questions relating to the guilt of the accused than those who only received oral instructions.¹⁰⁸

The research has not looked at the cost of jury trials. In many trials time is taken with lengthy examination of witnesses, the playing of extensive electronic intercept and other surveillance material or the presentation of scientific and statistical information

¹⁰⁵ A good example is the phrase "hypothesis consistent with innocence" which Hunt AJA in *EI Hassan v R* [2007] NSWCCA 148 [33] (Hunt AJA) criticised as being "decidedly non-jury friendly language."

¹⁰⁶ Matthews, Hancock and Briggs above n 8, 41.

¹⁰⁷ Thomas above n 68, 38.

¹⁰⁸ *Ibid.*

by forensic experts. It comes as no surprise that jurors become bored or confused, inevitably leading them to defer mechanistically to the opinion of an expert or even relinquish their decision-making power.¹⁰⁹ This is particularly so in cases involving expert and DNA evidence.

Some researchers have suggested that jurors place a disproportionate emphasis on DNA evidence by “falsely ‘exalt[ing] the infallibility of forensic evidence.’”¹¹⁰ In a study undertaken by Rhonda Wheate last year, she interviewed jurors involved in two criminal trials in the Australian Capital Territory, specifically addressing the importance those jurors placed on expert evidence.¹¹¹ Wheate found that the majority of jurors felt that DNA evidence was “very important” when reaching a verdict with many jurors viewing such evidence as “more important than other evidence in the trials.”¹¹² Wheate, suggests that this imbalance in the rational worth of DNA evidence may be related to the impact of the television program *Crime Scene Investigation*.¹¹³ Wheate and others authors have colloquially termed this impact the “CSI effect”.¹¹⁴ The suggestion is that the popularisation of forensic

¹⁰⁹ Fordham above n 89, 28.

¹¹⁰ Rhonda Wheate, ‘The Importance of DNA evidence to juries in criminal trials’ (2010) 14 *The International Journal of Evidence and Proof* 129, 130 citing Kimberlianne Podlas, “‘The CSI Effect’: Exposing the Media Myth’, (2005) 16 *Fordham Intellectual Property Media and Entertainment Law Journal* 429, 430.

¹¹¹ Rhonda Wheate, ‘The Importance of DNA evidence to juries in criminal trials’ (2010) 14 *The International Journal of Evidence and Proof* 129.

¹¹² *Ibid* 141.

¹¹³ *Ibid* 142; For a summary of ‘Crime Scene Investigation’ see Podlas above n 110, 430. Podlas writes that Crime Scene Investigation “rests on “the notion that blood, hair, saliva, skin, et cetera are forensically designed to tell an investigator what has happened without having any witness to a crime.” [Crime Scene Investigation uses] this intrinsic narrative to design a program where forensic evidence “speak[s] for those who cannot speak for themselves.”” Commenting on the coverage of Crime Scene Investigation, Jane Goodman-Delahunty and Lindsay Hewson in *Improving jury understanding and use of expert DNA evidence* (Technical and Background Paper, No 37, Australian Government, Australian Institute of Criminology, 2010), 5 <http://www.aic.gov.au/documents/C/2/6/%7BC26C0965-E841-49E4-B7F9-98C925564F9A%7Dtp037_002.pdf > noted that “[in 2007 Crime Scene Investigation] was the most popular television program with 84 million viewers worldwide.”

¹¹⁴ See: Wheate above n 111; Goodman-Delahunty and Hewson above n 113.

science by the media and television has created the impression that when forensic evidence is used it is “irrefutable and always leads to convictions.”¹¹⁵ In a study undertaken by Findlay, he observed that jurors “constantly rated [DNA evidence] above the actual forensic impact it had in the construction of the prosecution case.”¹¹⁶ “Popular wisdom [would seem] ... to override probative value.”¹¹⁷ This pre-trial forensic knowledge has the benefit of mediating the “objective complexity of the evidence and of the nature of its presentation within specific trial contexts.”¹¹⁸ Studies have shown that jurors are more likely to find an accused guilty than not guilty when DNA evidence is tendered.¹¹⁹ This is particularly so in homicide and sexual assault cases.¹²⁰

It must be acknowledged that there is a sense of unreality in what we ask jurors to do. Lord Justice Moses described the problems in his recent paper entitled “Summing Down the Summing Up.”¹²¹ He described summing up as “a lecture in a foreign language about foreign subjects.”¹²²

He said:

“The concepts are alien, far removed from the problems they have to confront in every day life...people in their daily drift are not called on to distinguish direct from

¹¹⁵ Goodman-Delahunty and Hewson above n 113, 6.

¹¹⁶ Mark Findlay, ‘Juror Comprehension and the Hard Case-Making Forensic Evidence Simpler’ (2008) 36 *International Journal of Law, Crime and Justice* 15, 22.

¹¹⁷ Ibid.

¹¹⁸ Ibid 24.

¹¹⁹ Goodman-Delahunty and Hewson above n 113, 6.

¹²⁰ Ibid 2.

¹²¹ Lord Justice Alan Moses, ‘Summing Down the Summing-up’ (Speech delivered at the Annual Law Reform Lecture, The Hall, Inner Temple, London, 23 November 2010).

<<http://www.judiciary.gov.uk/NR/rdonlyres/FF4F1CA7-2DDD-437B-96D0-0CA0014933AB/0/speechmosesljsummingdownsummingup.pdf>>.

¹²² Ibid 4.

circumstantial evidence. Everyday routine, in everyday life, does not require people to distinguish between inference and suspicion and few if any in their everyday lives ask themselves whether they are *driven* to a conclusion.”¹²³

Lord Justice Moses recognised that at least in England the complete abolition of jury trials was out of the question.¹²⁴ Nevertheless he suggested several reforms to move the jury from what he described as the “anachronistic” days.¹²⁵ He drew upon an earlier report of Sir Robin Auld who recommended that at an early stage of the trial the jurors should be given written summaries of the issues in the trial which have been prepared by counsel and overseen by the judge.¹²⁶ As the trial unfolds Lord Justice Moses suggested that “the judge should summarise in writing, with the help of the advocates, what has occurred thus far, a list of witnesses, a word or two as to what issue the evidence went to and any direction which has been given in relation to those witnesses.”¹²⁷ Sir Robin also encouraged the use of written directions when summing-up. He believed that the factual issues in dispute and elements of the offence should be reduced to a written form with a series of questions that would “lead logically to a verdict of guilty or not guilty.”¹²⁸

The Auld report was published in 2001 but it seems, at least in England, to remain controversial. Lord Justice Moses reinforced his argument by reference to a coronial inquest where the coroner is required to report, when a jury has been empanelled, “[the] jury’s conclusion on the central issues as to *by what means and in what*

¹²³ Ibid.

¹²⁴ Ibid 1.

¹²⁵ Ibid 12.

¹²⁶ Robin Auld, *Review of the Criminal Courts of England and Wales* (Lord Chancellor's Department, London, September 2001) Chapter 11 [22] and [50] <<http://www.criminal-courts-review.org.uk/ccr-00.htm>>.

¹²⁷ Moses above n 121, 8.

¹²⁸ Auld above n 126, Chapter 11 [50].

circumstances, a deceased met his death. The coroner does so by framing questions.”¹²⁹ Lord Justice Moses states that this could “be done in criminal cases.”¹³⁰ He suggested that this may “alte[r] the tedious rhythm of passive observation” and reduce the issues for the jury to consider to questions that are crucial to their deliberation process.¹³¹

Some of this is old news in Australia. Justice Eames from Victoria undertook the task of finding better ways of communicating with jurors.¹³² Many judges at least in New South Wales use written directions.¹³³ But there is little doubt that as we learn more about the workings of the jury room, both judges and advocates will be required to respond to ensure that the process remains both efficient and effective.

Last year the Director of Public Prosecutions, Mr Nicholas Cowdery QC gave evidence to a parliamentary enquiry into judge alone trials. He was asked this question:

“In one submission reference is made to Richard Dawkins and his experience serving on a trial. He is of the view that if he were innocent he would prefer a judge-alone trial, but were he guilty he would prefer a jury trial. Do you have any observations in that regard?”¹³⁴

¹²⁹ Moses above n 121, 9.

¹³⁰ Ibid.

¹³¹ Ibid 8.

¹³² See: Geoffrey Eames, ‘Towards a better direction – Better communication with jurors’ (2003) 24 *Australian Bar Review* 35.

¹³³ Ibid 55.

¹³⁴ Report of Proceedings Before Standing Committee on Law and Justice, ‘Inquiry into Judge-Along Trials under Section 132 of the Criminal Procedure Act 1986’, Sydney, 11 August 2010, 17 (Ms Sylvia Hale).

His response was telling:

“... I agree. It is a bit of a flippant remark, really, but juries are known to bring in merciful verdicts of not guilty in circumstances where the offence has in fact been proven. Our system is flexible enough to cope with that—it has for centuries—whereas a judge would not operate that way. A judge would be much more constrained, I suspect, to apply the law strictly and not to import that human quality of compassion or whatever it might be. If I were facing a trial and I was not guilty and I believed that the case could not be proved against me, yes, I would probably favour a judge-alone trial rather than take the risk that the jury might get it wrong.”¹³⁵

It was a significant step to allow researchers into the jury room. We must all ensure that the information gained is wisely used. Although no human decision-making process will get it right all the time, we must do what we can to minimise the errors.

¹³⁵ Report of Proceedings Before Standing Committee on Law and Justice, ‘Inquiry into Judge-Along Trials under Section 132 of the Criminal Procedure Act 1986’, Sydney, 11 August 2010, 17 (Nicholas Cowdery QC).