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Bad Press: Does the Jury deserve it?
Communicating with Jurors

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Introduction

The debate about the desirability of retaining the use of the jury as a system of deciding questions of guilt and innocence in criminal courts is a debate which, without reference to constitutional questions, is at least involving the community in growing deliberation about the principle behind this mode of the decision of criminal cases and the effectiveness of the application of the principle in the context of our current criminal procedures.

Juries have always tended to attract bad press whenever they return what may be regarded as perverse verdicts, but they are relatively rare in my experience, both as a practising lawyer and a judge over a period of nearly 45 years. Juries by and large take the job, which is a considerable imposition upon the citizens who are empanelled to serve on juries, particularly seriously. They struggle to arrive at the right decision. They generally try to understand and apply the directions about the law given to them by the judge. They generally respect the fact that the judge has made decisions about what evidence may come before them and what may not and that this has been done for good reason.

Overwhelmingly they make good decisions about the facts. Of course they do not give reasons but there is no impediment to testing the basis upon which they make their decisions having regard to the directions they are given,

the admissibility of the evidence which is placed before them, and the fairness of the trial process. I think juries do bring their common sense to their deliberations.

The composition of juries

They are, I think, generally representative of the community from which they are drawn. Recent research conducted in the Faculty of Law at Monash University in Victoria, in cooperation with the Victorian Juries Commissioner, Mr Rudy Monteleone, showed that juries in that State in the Melbourne metropolitan area were substantially comprised of professional people and people following white collar occupations, followed by trades people and in rather smaller proportions, retired people, students, and the unemployed. In country Victoria the proportion of white collar occupations was rather smaller and there was a preponderance of trades people and those following rural occupations, but the elderly, the students and the unemployed were still present in smaller numbers.

There is not a disproportionate representation of men as compared to women. That research is consistent with my impression over the years. So by all means widen the pool and limit the categories of persons who are subject to disqualification from jury service or entitled to automatic excusal or deferral of jury service, but I think that will not change the composition of juries.

What it will do however is give some direct recognition to the principle that jury service is both an important civic obligation and a privilege accorded to members of the community to give them the opportunity to participate directly in the administration of the system of criminal justice.

Do we do enough to help juries?

The debate we are having now does in my view have the important benefit that it causes us to examine afresh the assistance the court and the

lawyers who practice in it provide to the jury to enable them to come to grips with the issues in a case and to decide the facts upon which the verdict will depend. When I started in practice the process of trial and instruction of the jury was almost entirely oral. It was regarded as sufficient to give the foreperson a copy of the indictment upon the jury's retirement. The oral tradition of criminal trials may still in some cases - short, simple matters which do not involve a multiplicity of issues or witnesses - be the most efficient and easy to control trial process.

I am not advocating abandonment of the oral tradition or the adversarial process of trial, which, within reasonable limits, allows counsel the capacity to use persuasive skills and to draw upon the theatre of the court room, but it has become increasingly clear that as lawyers and judges we must be prepared to aid the jury to better understand and to better perform their task. We are coming to a recognition that to listen to the spoken word and observe the demeanour of a witness does not provide all jurors with information in a form which they may readily assimilate. Most people process information both orally and visually and the use of records as aids to the information process is, I am sure, on the way to becoming a routine feature of the jury trial process.

Some recommendations

The Victorian Law Reform Commission in its final report No 17, 'Jury Directions' (2009), makes recommendations in this regard which seem to me, with respect, to be sensible and manageable. They are concerned particularly with the use of such things as an outline of the charges and the issues arising in respect of them and a jury guide or decision tree which will provide the jury with a map that it may use during the course of its deliberations to decide the questions of fact upon which their verdict will depend.

The New South Wales Law Reform Commission has a reference before it, as I understand it, which will lead to recommendations upon similar issues,

and upon the jury system generally in that State. Indeed work goes on around the country. In this state for example I Chair a Jury Advisory Working Party which will shortly make recommendations to the judges of our trial courts and, where legislative support is required, to government.

Such aids are now often used. Najdovski-Terziovski, Clough and Ogloff have reported that, broadly speaking, of surveyed judges, those who used such aids were in Vic 13%, NSW 22%, Qld 26%, SA 30%, WA 50%, Tas 75% and in that progressive part of the world where there has been much reform of criminal procedure, NZ 41%: 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 Journal of Judicial Administration 65.

The relevant legislation

It may be that in most, if not all, of the Australasian jurisdictions there is already sufficient legislative support for judges to provide such aids to juries. One form of such enactments is that contained in s 19 of the *Crimes (Criminal Trials) Act 1999* (Vic), which, if the trial judge thinks it will assist the jury to understand the issues in the trial, allows the judge to provide to the jury copies of documents, including summaries of or the addresses of counsel, statements of facts, the trial judge's summing up, transcripts of evidence, transcripts of video records of interviews or audio recordings, schedules, chronologies, charts, diagrams, or other aides memoire.

An alternative form of such legislation is exemplified by the provisions of the *Criminal Procedure Act 2004* (WA), s 110, which provides that on the application of a party or on the judge's own initiative the trial judge may order that the jury be given, on any conditions and subject to any appropriate instruction, any 'record (including any document in the court's record), or thing that may assist the jury to understand the issues or the law, or to understand and assess the evidence'.

Section 110(2) makes it clear that this can be done at any time before the jury gives its verdict and there is already a jurisprudence developing around the country as to when, if at all, such material should be provided and in what form, how complete the written material needs to be, and with what directions the trial judge should accompany the provision of such information.

There is no doubt in this State, and I think in the legislative provisions in other jurisdictions, that decisions about what should be done in that regard may be made by the judge as part of a case management process before trial: *Criminal Procedure Act 2004*, s 98 and s 137. Importantly the case management process allows the judge to require the parties to confer on a 'without prejudice' basis, or otherwise to identify the facts and issues in the case that are not in dispute and those that will be in issue at the trial. Quite apart from the disclosure process the nature of the prosecution case and the defence may be required to be revealed.

I think it inevitable that courts will increasingly involve trial judges in case management processes in the criminal jurisdiction. They will be designed to identify the issues and to make decisions about the admissibility of evidence, as well as the provision of aids of the kind under discussion. More active case management involvement by a judge will be directed to ensuring that when the trial starts before the jury their time will not be wasted while the lawyers sort out at trial matters which should have been resolved before trial.

The common law

There is of course some authority in relation to such matters in the context of the application of the common law. ***Butera v DPP (Vic)*** (1987) 164 CLR 180 remains a useful authority, although I have to say that the decision of the High Court in ***Gately v R*** [2007] HCA 55; (2007) 232 CLR 208 causes some concern in its reference to the question whether the trial judge needs to give the jury directions designed to prevent them placing undue emphasis upon written

material. Nonetheless, that is a relatively minor matter and there is some indication developing around the country that appellate courts, particularly intermediate appellate courts, will not need to be dragged unwillingly into a recognition of the need to provide juries with suitable written adjuncts to the oral trial process.

We have of course seen on the civil side of the court's business that the High Court has moved away from the concern about the extent to which civil trial proceedings may be modified, without harm to the administration of justice, by case management processes. In ***Aon Risk Services Aust Ltd v ANU*** [2009] HCA 27; (2009) 83 ALJR 951 the court disapproved its earlier decision in ***Queensland v JL Holdings Pty Ltd*** (1997) 189 CLR 146. The court made encouraging references to an expansive view of a just trial process on the civil side and the need to maintain public confidence in the judicial system generally.

What should be the focus

In my view we should move towards a system which provides assistance to jurors as a matter of course in the following ways:

- Jurors summonsed should have the capacity to find out generally what jury service entails.
- Their privacy must be preserved, including during the process of seeking an order from the judge, to be excused.
- The process of challenge should be sensitively handled. Peremptory challenges should be retained, but without the provision of private information about jurors to the parties, particularly the accused.
- The WA reserve juror process is good and effective.
- The concept of the foreperson should be abandoned, but the judge should ensure that there is instruction about the process of deliberation.

- The judge's opening remarks should deal with housekeeping matters, an explanation of the trial process, and should refer to the issues if they are sufficiently known.
- The instruction about jurors not undertaking their own investigation should be sensitively expressed, but the court should not be too 'precious' about the impact of potential jury contamination on the trial process.
- Note taking should be uniformly facilitated and jurors should be provided with transcript during the trial, if it is of any length.
- Jurors should routinely be provided with transcript of video records of interview, and audio recordings admitted in evidence although made out of court.
- Exhibits should be provided to jurors as the trial proceeds.
- Not only should the jury be provided at an early stage with a copy of the indictment but they should be provided with an issues chart, a separate flowchart or decision tree if thought to be useful, and a verdict chart, unless the verdict is guilty or not guilty on a single charge. I do not favour PowerPoint presentations by the trial judge.
- The judge should not engage in a lengthy summary of the evidence.
- After retiring to deliberate, juries should generally not be sequestered overnight.
- Their stress should be recognised and debriefing by a senior officer of the Sheriff or the Jury Commissioner, and, if thought desirable, psychological counselling should be available on a voluntary basis.
- Debriefing by the judge should not occur.
- After returning a verdict the jury should be able to leave quickly and separately from others or stay to observe proceedings as they wish.