

What Can the English Legal System Learn From Jury Research Published up to 2001?

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Introduction

By Penny Darbyshire

In 1992-3, while teaching at the University of California at Berkeley, I spent many months studying the American jury. I became aware of the many thousands of pieces of jury research in the common law world and it occurred to me that the English legal system could learn lessons from many of them. Lord Justice Auld asked, at the commencement of his Criminal Courts Review¹, in 2000, whether section 8 of the Contempt Act 1981 should be abolished to permit research using real jurors and asked what we would find if we were able to conduct such research. There has been a clamour for repeal of the section since its controversial enactment and a demand for research. There is a widespread ignorance among commentators on our jury system of the rich, worldwide resource of existing research, by lawyers, psychologists, social scientists and other. The editor of the *New Law Journal* has repeatedly asserted that there is *no* jury research.² When research hits the English press, like the large New Zealand Law Commission project, published over the last two years, or the small-scale Glasgow research on human communication, heavily publicised in 2001, which said nothing about juries, it is greeted as a revelation, as if such work had never been done before. Worse, some of the researchers themselves fail to set their work in its previous research context. For instance, Australian work on juror comprehension in New South Wales, Hong Kong and the Russian Federation, reported in *the British Journal of Criminology*, in 2001, makes no mention of the mass of sophisticated work on juror comprehension and jury instructions that has been produced in the United States and elsewhere.

To those who clamour for research before we can understand English and Welsh juries, then, I respond that before we spend yet more public money on re-inventing the wheel, we should take the trouble to find out what we can learn from existing research from England and Wales, the rest of the common law world and elsewhere.

We have endeavoured here to examine some of the major pieces of research in the twentieth century. The task almost overwhelmed us, as a search in just one of the law or criminal justice English language databases will retrieve 3-5000 items and our research had to be completed within two months, in 2000, working part-time, so is necessarily selective. We concentrated on items that have been frequently cited and are recognised as valuable by the academic research community. We apologise for any omissions but have deliberately excluded irrelevant items, such as those relating exclusively to civil trials, such as juries assessment of damages. We have also ignored most of the items produced for and by the

¹ www.criminal-courts-review.org.uk

² (2000) 150 N.L.J. 1439.

unregulated, multi-million dollar trial consulting industry,³ used by American trial attorneys as a matter of routine in major trials, to assist their selection and manipulation of the jury. For this reason, we have not used, for instance, Abbott and Batt's 674 page *Handbook of Jury Research* (1999).⁴

Our work was funded by the Criminal Courts Review and we warmly thank the Review team and Auld L.J. accordingly. An earlier version was submitted to Lord Justice Auld in November 2000. We have updated it to September 2001, by the addition of some new publications, such as Vidmar's *World Jury Systems*, published in December 2000 and the New Zealand Law Commission's 2001 final report, discussed below. We have not attempted to add all of the jury research published in 2001.⁵

In part A below, we examine work on jury composition and construction and the effect of composition on deliberation and the verdict. In part B, we summarise research on the mechanics and dynamics of deliberation and verdict and related issues such as the experience of being a juror. In the third section we examine English and Welsh stories of jury service. This enabled us to measure the work conducted by experimental psychologists, for example, against the dynamics of the real jury room. It also allowed us to test the credibility and applicability of foreign research findings to the English or Welsh courtroom. Throughout the paper and in our conclusion, we make many suggestions for some immediate restructuring of the English and Welsh jury system and for some more changes to be contemplated.

Part A: Constructing Representative Juries and Assessing How Composition Affects the Verdict

In 1936, US Supreme Court Justice Charles Evans Hughes stated 'Impartiality is not a characteristic of who or what a person is but rather a state of mind'.⁶ This statement expresses how we currently expect our jurors in England and Wales to think and act. With the abolition of the defence's right to peremptory challenge⁷ and a blind faith in random selection of jurors solely from the electoral roll, it is difficult to draw another conclusion. It follows that jurors' characteristics such as race, sex, age, occupation, and attitudes must be considered unimportant. We expect members of the public to dutifully put aside any biases they may have, step into the jury box, swear an oath, be totally fair and deliver an impartial, just verdict. Is this blind trust *na ve*?

Do juries represent the population at large?

The abolition of the property requirement and age reduction from 21 years to 18 years in 1972 changed jury composition⁸ and it was assumed, thenceforth, that juries became representative

³ For an excellent analysis of this industry, see F. Strier and D. Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, its Impact on Trial Justice and What, if Anything, to Do About It*, 1999 *Wisconsin Law Review* 441.

⁴ Reviewed by C. Faruki in *The Federal Lawyer*, January 2001, at p. 43.

⁵ I would like to thank the University of Notre Dame, Indiana, where I am an Associate Adjunct Professor. Without their research facilities, we could not have done this project. I would also like to extend my warm thanks to my two research assistants and co-authors, who worked extremely hard for twice as long as their contractual period, despite their both suffering debilitating illnesses during the research period.

⁶ *United States v. Wade* (1936) United States Law Reports, 299, 123-151 as cited in V.P.Hans and N. Vidmar, *Judging the Jury* (1986) p.63.

⁷ S.118 Criminal Justice Act 1988.

⁸ See further Baldwin and McConville., *infra*, pp.94-5.

of the population. Baldwin and McConville found, however, in the 1970s, that there was a significant under-representation of women and ethnic minorities on Birmingham juries. Only 0.7 per cent of the 3,912 jurors surveyed were of West Indian/Asian origin but a representative proportion would have been 12 or even 15 times that number for a city like Birmingham.⁹ Zander and Henderson's 1993 *Crown Court Study* for the Royal Commission on Criminal Justice surveyed over 8,300 jurors from all over England and Wales and found males to be over-represented (53 per cent as opposed to 48 per cent in the population) but non-whites to be only slightly underrepresented (5 per cent, as opposed to 5.9 per cent of the population).¹⁰ Nevertheless, Lloyd-Bostock and Thomas comment, in 2000, that there still appears to be an under-representation of women and ethnic minorities.¹¹

The *Crown Court Study* found that the social classes of the jurors surveyed reflected the wider population in terms of unskilled manual workers and professionals/managers but skilled manual workers were underrepresented on juries. Research in 1993 by the New Zealand Department of Justice, however, made a more detailed analysis of occupational groups on jury panels and found many to be underrepresented.¹² We think if a more thorough analysis were conducted here, the same pattern would be found, because the same underlying causes exist here as in New Zealand: a long list of statutory excusals, a large proportion of discretionary excusals and of non-appearances, as we describe below. We come back to this issue in Part C and in the conclusions.

Concern has already been expressed to the Criminal Courts Review over the statutory exclusion of large elements of the population by virtue of ineligibility, disqualification or excusability as of right, under the Juries Act 1974 and the same concern has been expressed over very similar sweeping statutory exclusions in some Australian jurisdictions.¹³ Another reason for unrepresentativeness may be the summoning and excusal system. Research¹⁴ in England and Wales found that of those summoned for jury service in June and July 1999, 38 per cent were excused¹⁵ and only 34 per cent were available for jury service. Nearly half of these were deferred to later dates. Of the deferrals, 39 per cent were for work commitments and 35 per cent for holidays. It has been pointed out that since excuses and exemptions are not randomly distributed across different populations, a random sampling of potential jurors does not lead to a representative cross-section of community populations.¹⁶ Clearly the loss to jury duty of segments of the population is disturbing, not only in terms of representativeness but also in legitimating the jury process itself.

⁹ *Jury Trials* (1978) p.98.

¹⁰ See useful summary and discussion in Zander, *Cases and Materials on the English Legal System* (8th edition, 1999) at pp. 415-417.

¹¹ S. Lloyd-Bostock and C. Thomas, *Decline of the Little Parliament: Juries and Jury Reform in England and Wales* (1999) 62 *Law & Contemp.Probs.* 7 at 21. See now the same authors *The Continuing Decline of the English Jury* in N. Vidmar (ed.), *World Jury Systems* (2000) at p. 69. Vidmar's book is an invaluable contemporary comparative survey of jury systems, which is highly relevant to our task. Unfortunately, it was published after the submission of this report to Auld L.J. so all references to it were added in January 2001.

¹² Discussed by N. Cameron, S. Potter and W. Young, *The New Zealand Jury: Towards Reform*, in Vidmar, *ibid.*, at p. 187-8.

¹³ M. Chesterman, *Criminal Trial Juries in Australia*, in Vidmar, 2000, *ibid.*, at p. 138.

¹⁴ J. Aird and A. Shaw *Jury Excusal and Deferral*, Home Office RDS Report No.102, 1999.

¹⁵ 20 per cent for care of young children and the elderly; 40 per cent for medical reasons and 10 per cent who were accepted as essential workers. Other reasons included pregnancy, large numbers of animals to care for and having relatives on probation or in prison.

¹⁶ H. Fukurai, *The Representative Cross Section Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to End of the Jury Selection Process* (1999) 23 *International Journal of Comparative and Applied Criminal Justice*, No1, p.56.

Further, our expectation of a representative jury from random selection in England and Wales is flawed because jurors are drawn from a single list - the electoral roll. Research in the United States, as long ago as the 1960s-80s¹⁷ demonstrated that electoral lists were not representative of a community.¹⁸

The problem of under-representation of elements of the population on juries is not unique to England and Wales. A study¹⁹ conducted in Washington DC found that only 18 per cent of potential jurors actually served. The jury system served two courts²⁰ and had a multi—source list of jurors names (a jury wheel) constructed by merging names of registered voters, licensed drivers and those holding non-driver identification cards. Over a two week period, the courts sent out approximately 17,900 questionnaires and summonses. Fewer than 20 per cent of recipients were qualified. Compared with the demographic composition of residents over 18, the qualified jury pool was found to be broadly representative of the DC population in terms of gender and race..[but].. under-representative of citizens under the age of 29 years and over representative of jurors with college education .

The researchers attempted to contact 300 jurors from the Superior Court of the District of Columbia who had not returned qualification questionnaires and interviewed 62. They found that 158 had moved, 11 would have been disqualified and 69 could not be contacted. The study estimated that approximately 20 per cent of jurors [were] simply ignoring the summons and questionnaire .²¹ Interestingly, those who did not return the questionnaires were representative in terms of education and race but not age; 42 per cent of those in the sample were under the age of 29 years, compared with 30 per cent in the district.

Further studies in other districts have revealed a similar problem.²² King points out, however, that high rates of jury avoidance seem to be a localized phenomenon, not a nationwide epidemic. Statistical studies of various jurisdictions reveal extremely low response rates to questionnaires or to summonses in some jurisdictions, and near-perfect compliance in others .²³

In New Zealand, the 1993 Department of Justice survey found that 18 per cent of summoned jurors do not respond, either because of out-of date addresses or because they ignored the summons. Coupled with statutory ineligibility and discretionary excusal, this meant that only

¹⁷ Piven and Cloward (1988) found racial minorities consistently under-represented on the Registrar of Voters largely because these groups neither register or vote , as cited by Fukurai *ibid.*, p56.

¹⁸ Van Dyke states that some groups continue to be substantially underrepresented on juries, and one of the causes of underrepresentation of certain groups is the exclusive use of voter lists , *Jury Selection Procedures* (1977) p. 89.

¹⁹ Richard Seltzer *The Vanishing Juror: Why Are There Not Enough Available Jurors?* (1999) 20 *The Justice System Journal*, No. 3, 203.

²⁰ The Superior Court of the District of Columbia and the US District Court for the District of Columbia.

²¹ Seltzer *op.cit.*, p.212.

²²J. Clark Kelso *Final Report of the Blue Ribbon Commission On Jury System Improvement* (1996) 47 *Hastings Law Journal* 1433. In Los Angeles, in 1994, almost four million juror affidavits were mailed. Accounting for non-response, returned undelivered, unqualified or excused for undue hardship or returned for updating, only 10 percent were left of which only half of these, a total of 172,154 persons actually served on juries.

²³ N. J. King *Juror Delinquency in Criminal Trials In America, 1796-1996* (1996) 94 *Mich.L.R.* 2673. See now her recent discussion of the concern over underrepresentaton of minorities on American jury panels in N. King *The American Criminal Jury* , in Vidmar, 2000, *op. cit.* , 108-114.

26 per cent of persons summoned appeared in court for jury service. This resulted in a serious under-representation of Maori, women and young people on jury panels, as well as certain occupational groups. The official response was to use special enrolment campaigns.²⁴

Why Are Jury Panels Unrepresentative?

What is important for our purposes is why jury pools may be unrepresentative and what research there is that could assist in obtaining a more representative jury pool.

A number of causes have been identified as the reasons for under-representation and avoidance or reluctance to serve. Lack of childcare, family commitments, difficulties with employment and potential lost income. Interestingly, Seltzer's study indicated that with non-responding jurors, increasing jurors pay from \$30 to \$40 per day would have little effect²⁵ on their willingness to serve. Additionally, increased enforcement by way of fines or sanctions may produce angry and unwilling jurors.

Employment

The Californian Blue Ribbon Commission Report recognised employment difficulties in terms of uncertainty of time, lost wages to employees and workforce to employers. It pointed out that for employers the most critical issue is uncertainty over the length of time an employee would be off work. It recommended that private sector employees contribute to funding jury service and suggested that the existing Disability Insurance Programme²⁶ be used for this purpose. Amendment would permit workers to receive benefits for being unable to work due to, *inter alia*, non-occupational illness or injury *and jury service*. It was suggested that employers should also meet the burden of supporting the jury system. The relevant Labour Code could be amended to make payments to employees for jury service compulsory for a period of three days. It further suggested offering reasonable tax credits for those employers²⁷ who voluntarily continue paying usual compensation and benefits to employees who are absent from work for more than three days on account of jury service.²⁸

To reduce waiting time for trials and uncertainty, the one trial one-day service requirement has been adopted in many states.²⁹ Munsterman points out that already over one third of the population of the United States lives in jurisdictions that have adopted this method of jury use.³⁰

Comment: it may be worth experimenting with shortening jury service to, say, a week but this might increase the acquittal rate. See discussion below. In the conclusion, we comment on the burden of jury service on employers.

²⁴ For discussion see Cameron et al, 2000, *op. cit.*

²⁵ Seltzer *op.cit.*, p.213.

²⁶ The report argues that it would be fair to apportion some of the burden for ensuring a smoothly running system onto employees as the recommendations would also create burdens on employers and the state.

²⁷ The report notes that many (but not all) employers including federal, state and many local government units have a policy of compensating jurors for part if not all of an employee's jury service (part III (6)).

²⁸ As of 1996, just seven states required an employer to pay the salary of persons on jury duty, as described by Munsterman, A Brief History of State Jury Reform Efforts *Judicature* Volume 79 Number 5 March-April 1996, p.217.

²⁹ Recommended by the American Bar Association, whereby a juror will serve for either one day or one trial, whichever is longer. A number of states, including Connecticut, Massachusetts, Florida, and Colorado have adopted this method.

³⁰ Munsterman *op.cit.*, p.217.

Childcare

In England and Wales, Airs and Shaw's research³¹ shows that 20 per cent of all excusals were for childcare. This is not a new finding. Baldwin and McConville reported in 1979³² that almost 75 per cent of jurors in their study were male suggesting that more women apply for, and are granted excusals from jury service, particularly on the grounds of pressing family commitments. Nor is it confined to our jurisdiction. Family commitments are a ground of excusal in New Zealand and the 1993 survey, cited above, found women to be underrepresented on jury panels. The California Blue Ribbon Report³³ pointed out that in some counties, 60 per cent of hardship excuses involve lack of childcare. In addition to recommending that jurors should be reimbursed for the actual, reasonable expenses of licensed day-care, it also suggested a system to pay for child care given by a spouse who stays home from work while the other does jury service.

Comment: one very simple solution to the large number of excusals for childcare would be to offer a loss of earnings allowance to the other parent or another suitable carer, where professional child care is unsuitable or unobtainable. The same applies to carers for the elderly or disabled.

Non-appearances

Here, the new Central Summoning Bureau³⁴ is to be welcomed, in particular the centralisation of decision making on excusals and deferrals, reducing inconsistencies. In addition, the new jury summoning system and national call centre may go some way towards addressing the difficulties of jury participation. Our research team has, however, discovered that the Bureau's efforts may still not provide more inclusive jury panels. We observed a new panel being greeted at the Crown Court in a London location in October 2000. Of the 100 the jury manager was expecting to appear, fifteen were missing. When we asked if they would be pursued, she explained that there were not the resources to do this. A circuit judge confirmed to us that he was well aware of this and if a friend of his were called for jury service, he would simply advise them not to turn up, knowing that there would be no ramifications. We asked the Central Summoning Bureau to explain this, in November 2000. They told us that, although they send out one follow-up letter to non-respondents, they then simply supply the court with the list of respondents and non-respondents. They said they rely on the illusion that severe consequences will flow from non-response. It is up to the court to take any further action. Many courts, if they feel they have sufficient jurors among the respondents, will do nothing. Astonishingly, the Bureau staff find they need to call four times as many persons as a court needs for jury service, in England and Wales generally and up to six times as many in London because of the combination of no-shows, statutory exclusion and excusals.

Comment: quite apart from the effect this behaviour (ignoring the summons) has on the representativeness of juries, if the lack of follow up became public knowledge it might become a scandal, bringing the legal system into disrepute. If the rule of law is to be upheld, then those jurors who simply do not respond or attend on the appointed day must be pursued. We make more extensive comments on this in our conclusions.

³¹ *op.cit.*

³² *op.cit.*, p.97.

³³ *op.cit.*

³⁴ Reducing the Trials of Jury Service 31 August 2000, Lord Chancellor's Department Press Release.

Mobility and residential status

Nevertheless, research in the United States, Australia and New Zealand indicates that non-representation runs deeper than merely excusals, deferrals and summoning systems. It may also be caused by other factors such as mobility and residential status which are, in turn, linked to class and income earned.

A survey³⁵ in 1986 funded by the Superior Court of Orange County, California, looked at more than 1,000 eligible potential jurors selected randomly from the Orange County master list. The purpose of the survey was to obtain accurate estimates of the ethnic and racial compositions of eligible prospective jurors in Orange County, and to understand the pattern of jury participation by various racial/ethnic and class segments of the community³⁶ throughout the jury selection procedure. Subjects were asked amongst other things about their social class, ethnic background, views on the criminal justice and court process and about their eligibility to serve.

The report made a number of interesting findings. Analysis of the results,³⁷ allowing for exemptions, excuses and qualification showed that women, African Americans and Hispanics were under-represented on the jury panel. It is pointed out, however, that this was not as statistically significant as the under-representation of those with lower occupational status and lower annual incomes. The paper argued that social class (as defined by work related authority, occupational standing, annual income) should be afforded cognisable status along with being African American, Hispanic and female. In other words, race is an unacceptable ground of challenge in the United States, just as it is in England and Wales and the paper argued that so should social class be. What is interesting to note however, was that those who requested to be excused because of economic hardship were under-represented. Further, racial minorities with low incomes³⁸ and less prestigious occupations were the most under-represented groups.³⁹

Two important factors that affect the representativeness of juries are occupation and residential mobility. Highly residentially mobile persons are less likely to be included in the jury pool list.⁴⁰ There are a number of principal factors that explain high residential mobility. Firstly, home ownership is clearly connected to mobility and transience. Research indicates that minorities are more likely to rent accommodation than whites. In England and Wales,⁴¹ in a 1991 electoral registration/census comparison, non-registration was highest for ethnic minorities, those who had moved address, people between 20-24 years and those living in rented accommodation. Registration was highest for owner-occupiers, whites and the over

³⁵ Conducted jointly by social scientists at the University of California, Riverside and University of California, Los Angeles.

³⁶ As cited in H.Fukurai, *Race, Social Class and Jury Participation: New Dimensions for Evaluating Discrimination In Jury Service and Jury Selection* (1996) 24 *Journal of Criminal Justice* p.77. See also Fukurai, 1999. *op. cit.*

³⁷ For explanation of method see and measurement, see Fukurai, 1996, *ibid.* p.77.

³⁸ The study also identified a significant overrepresentation of minority jurors who had greater annual incomes and jobs of higher prestige.

³⁹ This is supported by findings in SJC's Final Report on Racial and Ethnic Bias. The State Commission found underrepresentation on State juries was primarily due to outdated address lists and low response rate of minority residents summoned for jury duty *Massachusetts Lawyers Weekly* 3.19.94, cited by N. King and G T. Munsterman *Stratified Juror Selection: cross section by design* *Judicature* March-April 1996 Vol. 79 No.5.

⁴⁰ Fukurai, Butler and Krooth. *Race and the Jury: Racial Disenfranchisement and the Search for Justice* (1993) p.23.

⁴¹ *Jury Excusal and Deferral* *op.cit.*

thirties. In the California survey⁴² it was found that only approximately 22 per cent of whites rented accommodation as opposed to 56 per cent of blacks. Further, the percentage of whites owning property was 68 per cent compared with 44.4 per cent of blacks and 60.7 per cent of Asians. The average length of time spent at a current address was nearly ten years for whites compared with two and a half years for blacks. Occupational instability and increased mobility were other factors identified as leading to undeliverable jury questionnaires. In the survey, age was found to be the single most important indicator of residential mobility for all groups.⁴³

How Can Panels Be Made More Representative?

The evidence is difficult to refute. Electoral lists are not representative of a community. Despite a lack of Governmental response, it has been argued for some time that the electoral roll in England and Wales is unrepresentative and inaccurate, to the extent that the reasons, such as mobility or death are usually discussed in student ELS textbooks.⁴⁴ It has been estimated that up to 20 per cent of black and Asian people never register to vote in England and Wales.⁴⁵ Further, when the annual registration form is completed by the householder, she or he may have reasons for omitting some members. For instance, if a landlady is claiming a reduction in council tax for single adult occupancy, she will not disclose the presence of a lodger. The unrepresentative nature of electoral lists has been recognised since the 1970s in the United States. In Australia, it is acknowledged that the electoral roll excludes many rural Aborigines⁴⁶ and in New Zealand, Maori.⁴⁷ It is not surprising that the roll is not representative of the English and Welsh population, as described above. The revised *Practice Note*⁴⁸ of 1988 omits a segment of text present in its 1973 predecessor — that a jury must be chosen from an appropriate panel. What constitutes an appropriate panel?

In 1968, the United States Congress passed the Jury Selection and Service Act (JSSA). The Act ensures, *inter alia*, that in Federal Courts any substantial deviations in jury lists from a fair cross section (of the community) are to be corrected by supplementation with names from other readily available source lists, such as driver's license or public utility lists.⁴⁹ Nevertheless, at state level, for example in *People v. Harris*,⁵⁰ the California Supreme Court found that voters' lists were not sufficiently representative of the jurisdiction. Subsequently, the California Legislature required all state courts to merge lists of voters and drivers. Many other states require courts to merge various lists, recognising the need to improve cross-sectional representation.

⁴² Fukurai, Butler and Krooth *op.cit.*, p.22.

⁴³ *ibid.* p.24.

⁴⁴ For instance, Zander, 1999, *op.cit.*

⁴⁵ P. Wynn Davis 'Colour Blindness in the Jury Room', *The Independent*, 29 June 1990.

⁴⁶ M. Chesterman, 'Criminal Trial Juries in Australia' in N. Vidmar (ed.), 2000, *op. cit.*, at 136.

⁴⁷ Cameron et al in Vidmar, *ibid.*

⁴⁸ Practice Note [1988] 3 All ER 240. It states 'jury service is an important public duty which individual members of the public are chosen at random to undertake' revoking the practice note of [1973] 1 All ER 240 which stated 'A jury consists of 12 individuals chosen at random from the appropriate panel.'

⁴⁹ Cited by C. Williams 'Jury Source Representativeness And The Use Of Voter Registration Lists' *New York University Law Review*, June 1990. The interpretation of 'substantial deviation' has remained with the courts. Munsterman and Munsterman pointed out that (as of 1986) five federal courts had merged voters' and drivers' lists but of numerous challenges to jury selection in federal courts, none had invalidated the source lists (i.e. the voters' list) used. The disparities presented were not found to be substantial, cited in 'The Search for Jury Representativeness' (1986) 11 *Justice System Journal* 61.

⁵⁰ Munsterman and Munsterman *op.cit.* p.60.

In the drive to improve the quality of the jury pool, these lists include numerous sources, including telephone books, city directories, local censuses, lists of property and income taxpayers, welfare recipients, high school graduates, natural citizens, utility customers, hunting licenses and even dog licenses.⁵¹ In California, due to low juror yields, the Blue Ribbon Commission⁵² recommended considering, in addition to the mandatory Register of Voters (ROV) and Department of Motor Vehicles list (DMV), the use of private group medical plan insurance lists and State Disability Insurance Program lists.⁵³ As early as 1977, courts in many districts of States such as Colorado, Columbia, California, Alaska, Idaho, New York, Kansas and Kentucky utilised multiple source lists of persons on the ROV and DMV.⁵⁴ As of 1986, nine states had merged ROV and DMV lists statewide.⁵⁵

But how much more representative do additional lists make the jury? In the California research project⁵⁶ the sole use of the ROV did not produce a representative cross section of the community. The research showed that the ROV list [tended] to skew jury representativeness towards whites, males, higher incomes, those over 40 years of age, the married and the widowed but the supplemental use of DMV lists and jury exemptions and excuses [tended] to correct the representative imbalances caused by ROV and jury qualification requirements. Fukurai also points out that the use of DMV [led] to greater inclusiveness of racial minorities such as African Americans and Hispanics, those less than 39 years of age, and never married groups, and those with less than high-school education and [earning] less than \$30,000 annually.⁵⁷

In a 1983 study in Connecticut of 500 people over 18 years of age, only 1.8 per cent were on neither the ROV nor DMV list. Further, the study found that whilst the individual lists were unrepresentative in various respects in terms of age, sex, race and occupation and length of occupation, when the lists were merged they closely mirrored the demographic profile of the population.⁵⁸

Other results comparing single lists and merged lists are varied. In Los Angeles County in 1980 when only the ROV list was used, and 1982 when a merged list had been introduced, exit questionnaires were used on jurors to determine the disparity.⁵⁹ There was a demographic improvement towards the representative population. In another study in New Castle County, Delaware,⁶⁰ when voters and drivers lists were used, the sex of jurors closely mirrored the population but the disparity for non-whites moved from under-representation to a significant over-representation. A further study in Ventura County, California, showed that the young and non-white population [was] increased with the use of the drivers list.⁶¹

⁵¹ As cited *ibid.* p.65.

⁵² *op.cit.*

⁵³ Also recommended in the report was the possible use of utility lists and state income tax lists.

⁵⁴ Kairys, Kadane, Lehoczky *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) *California Law Review*, Vol. 65. Information was compiled by Bird Engineering Research Associates. At the time of the research, Alaska used Fish and Game and Income Tax Lists instead of the DMV list. In Kansas, State Census and ROV were used and in Kentucky the ROV and Property Tax Lists were used.

⁵⁵ These are Arizona, California, Connecticut, Delaware, Hawaii, Nebraska, New Jersey, North Carolina and the District of Columbia. Munsterman and Munsterman *op.cit.* p.66.

⁵⁶ Fukurai *The Representative Jury Requirement: Jury Representativeness...* *op.cit.*

⁵⁷ *Ibid.* p.74.

⁵⁸ Logan and Cole, 1983, as cited by Munsterman and Munsterman p.69.

⁵⁹ Each survey had over a 90 per cent return rate. The sample size in 1980 was 12,249 and that in 1982 was 18,059 persons, Munsterman and Munsterman, *op.cit.* p.71.

⁶⁰ *ibid.* p.71.

⁶¹ *ibid.* p.71.

The United States has also used clustered sampling to address issues of representation. Obviously, selection procedures differ from that in England and Wales. In the United States, questionnaires are sent to potential jurors. One technique used is to identify an area with a high population of an under-represented type of juror and send more questionnaires to that district.⁶² Another system is to identify a county with lower voter registration which does not mirror the adult population and adjust the number of questionnaires sent to it, thus ensuring that that county receives as proportionate a number of questionnaires relative to its population as other counties.

In New Zealand, where there has long been concern over the under-representation of the Maori population, on jury panels, the official response has been to attempt to increase the inclusion of Maori on the electoral roll, rather than to merge the roll with other lists.⁶³

Comment: we have long been aware of research which demonstrates a potential shortfall of representative jurors in relying solely on the electoral roll. The Central Summoning Bureau should be instructed to merge it with other lists, such as the DVLC list and telephone directories, mobile phone subscribers and/or mailing lists. This would necessitate an amendment to the Juries Act.

Do Jurors Characteristics Affect Their Vote in the Verdict? The Shortcomings of Research Methods

As research in England and Wales is limited, it has been necessary to examine studies in the United States. Due to the sanctity of the jury room, researchers have been prevented from assessing deliberations of real trials.⁶⁴ Thus research has taken a number of forms: mock and shadow juries,⁶⁵ interviews with other participants in the trials (e.g. professionals such as judges and lawyers) to gain a comprehensive view of each verdict, ⁶⁶ comparative statistical analysis of jury verdicts and, of course, interviews with actual jurors. Before considering the results of the research, it is worth looking at the limitations and benefits of the research methods used.

Mock juries have been used in a number of studies and consist of either recordings of a trial being played to the jury, actors re-enacting a trial or subjects reading a case. A potential drawback to this method of research and that of shadow juries, who copy a real jury throughout a trial, is that the defendant's future is not at risk. The gravity and implications of

⁶² In New York, for example, one jury commissioner would send more questionnaires to minority neighbourhoods to compensate for the relatively low numbers of minority jurors she sees *The Jury Project*, Report to the Chief Judge of the State of New York Mar 31 1994, p.18, as cited by King and Munsterman, 1996, *op. cit.*, p.275.

⁶³ Cameron, et al, *op. cit.*, p. 193.

⁶⁴ In the United States, due to extensive publicity of tape recording actual trial deliberations in Wichita (1955) and the resulting public outcry, jury-tapping legislation was enacted to prohibit this method of research. Actual jury deliberations were undertaken with the consent of the trial judge and counsel, but without the knowledge of the jurors, in five civil cases in the federal district court in Wichita, Kansas. Although extensive security measures were taken to insure the integrity of the effort, when the fact became public in the summer of 1955, there followed public censure by the Attorney General of the United States, a special hearing before the Senate Judiciary Committee, the enactment of statutes in some thirty-odd jurisdictions prohibiting jury-tapping, Kalven and Zeisel, *The American Jury* (1966) p.vii (preface).

⁶⁵ E.g. McCabe and Purves, *The Jury at Work* and *The Shadow Jury* Oxford University Penal Research Unit, 1974.

⁶⁶ Baldwin and Mc Conville *op.cit.*, p. 23

jurors' decisions may not be fully accounted for. Further, Baldwin and McConville point out that jury equity in simulated trials may not be practised or accurately reproduced in mock jury experiments where the fate of the defendant in question is not at issue.⁶⁷ The presentation of simulated evidence may differ from that of a real trial. Researchers have, however, reported that mock jurors take their tasks seriously.⁶⁸

Despite the limitations, a laboratory setting has some value, notably in disentangling complex variables (such as the types of crime committed, the appearance, attractiveness, age, race and sex of the defendant or victim and the performance, race and age of counsel) from juror characteristics.⁶⁹

Interviews with other professionals as a method of evaluating verdicts include studies such as *The American Jury*⁷⁰ and *Jury Trials*⁷¹ but this research also has limitations. Baldwin and McConville point out that the assumption that jurors ought to be deciding cases in ways lawyers would decide them is questionable.⁷² Further, caution should be exercised in relation to possible inferences drawn by researchers from questionnaires and any biases those responding to questionnaires may hold.

Thanks to the elaborate American system of jury selection, called *voir dire*, a trial support industry has grown up which profits from advising attorneys on jury selection and, in some trials, providing shadow juries whose deliberations are observed, to found advice to attorneys on the conduct of the trial. A great deal of money has been expended on scientific jury selection (SJS)⁷³ but it is generally received with cynicism in the academic community. This method of determining how potential jurors may vote is often limited to the jurisdiction and the particular facts of a trial. Saks and Hastie point out that key attitudes change not only with geography but with the passage of time or the rise of a new case to activate new issues.⁷⁴ Further, as Hans and Vidmar state a good juror in one jurisdiction might well be a bad juror in a different jurisdiction, even for very similar trials.⁷⁵ Additionally, there are a number of trial manuals written to advise attorneys that are contradictory and described as often based on plain old fashioned stereotypes and conflicting or outdated ones at that.⁷⁶ For completeness, these methods have been mentioned but this paper will not focus on these aspects of selection.

⁶⁷ *Ibid.*, p.13

⁶⁸ Simon, *The Jury and the Defence of Insanity* 175-9 as cited by Zeisel and Diamond in *The effect of peremptory challenges on Jury and Verdict: An Experiment in a Federal District Court*. See also McCabe and Purves *The Shadow Jury at Work* p 4-5, 60 and Hastie, Penrod and Pennington, *Inside the Jury* p 27.

⁶⁹ See Saks and Hastie, *Social Psychology in Court*, 1978 ch. 1, for detailed discussion. Also C. Stephan, *Selective Characteristics of Jurors and Litigants: Their Influence on Jury's Verdicts*, in R.J. Simon, *The Jury System in America*, 1975, Vol 4.

⁷⁰ Kalven & Zeisel, *op.cit.*

⁷¹ Baldwin and McConville *op.cit.*

⁷² *Ibid.*, pp. 11,12.

⁷³ See cases such as *Berrigan Brothers* or *Joan Little*.

⁷⁴ *Op.cit.* p.56.

⁷⁵ Hans and Vidmar *op.cit.*, p.83.

⁷⁶ *Ibid.*, p73. They give the example that trial manuals suggest that lawyers should challenge cabinet makers because they want everything to fit together neatly or in another to look for jurors whose minds can be moulded, who will not resist your arguments.

The Effect of Jurors Characteristics: the Research Findings

The most important finding agreed on by many researchers is that the main factor that influences a jury verdict is the evidence.⁷⁷ Bridgeman and Marlow in their study⁷⁸ of 65 actual jurors in 10 felony cases indicate that with 59 per cent of jurors the opportunity to engage in and review of the evidence was the most influential post trial factor .⁷⁹

Beyond that, there would appear to be a lack of consensus among commentators as to whether demographic characteristics of jurors affect verdict. Visher states that research suggests that jurors personal characteristics are substantially insignificant in affecting trial outcomes .⁸⁰ Ellsworth points out, however, that different jurors draw different conclusions about the right verdict on the basis of exactly the same evidence .⁸¹ This being the case, it would appear that individual differences among jurors make a difference . She points out that individual differences need not be differences in character or philosophy of life. Other influences such as length of trial, juror inattentiveness or unpredictable external events may affect the juror s decision-making process.

Nevertheless, some research does substantiate the proposition that certain characteristics are significant in affecting a juror s verdict.

Sex of the Juror

In their study of 276 trials in Birmingham, Baldwin and McConville concluded that in cases where four or more women were sitting, although their conviction rate was lower than that of all male juries, their acquittal rate corresponded to the city average. Additionally, there were no significant variations regarding questionable verdicts that could be attributed to the numbers of women sitting on juries. Sealy and Cornish⁸² found in a mock rape trial that women were significantly more likely to convict on circumstantial evidence.⁸³ Accounting for this finding, however, they state that in the other three situations there appeared no probability that the sex of the juror explains his or her verdict. ⁸⁴

Some studies do indicate that a juror s sex may be a factor in their decision making. For example, Mills and Bohannon⁸⁵ analysed data from returned questionnaires received from 117

⁷⁷ *Op. cit.*, p.92. It is pointed out that in cases where evidence is strong either way, neither the composition of the jury nor insights derived from mock juries are likely to make much difference . Kalven and Zeisel state that the evidence itself is a major determinant of the decision of both judge and jury . *op.cit.*, p. 162.

⁷⁸ Jury Decision Making: An Empirical Study Based on Actual Felony Trials (1979) 64 *Journal of Applied Psychology*, No 2, p. 94. 10 trials were studied. There were 11 defendants (one trial with two defendants). The average age of the defendants was 23 years. Two defendants were charged with possession of heroin, one with assault, two with rape, two with homicide and four with burglary.

⁷⁹ Saks also found trial evidence [was] more than three times as powerful as juror attitudes in influencing decisions . Scientific Jury Selection. Social Scientists can t rig juries *Psychology Today* 1976, 48-57, as cited by Bridgeman and Marlowe, p.94.

⁸⁰ C.A. Visher, Juror Decision Making: The importance of Evidence (1987) *Law and Human Behaviour*.

⁸¹ P. C. Ellsworth, Some Steps Between Attitudes and Verdicts , in R. Hastie (ed.), *Inside The Juror*.

Ellsworth points to research that evidence is often insufficient to produce first ballot unanimity.

⁸² Sealy and Cornish, Jurors and their verdicts (1973) 36 *Modern Law Review* 496.

⁸³ They point out that that between the victim and defendant it was simply his word against hers , *ibid.*, p.503.

⁸⁴ *Op. cit.*, p.502.

⁸⁵ C. J. Mills and W. E. Bohannon, Juror Characteristics: to what extent are they related to jury verdicts? (1980) 64 *Judicature*, Number 1, 23. The study finds the group, when compared with demographic information from census records and court records on jurors demographic characteristics .to be highly representative of both the general population and the Baltimore Jury population .

females and 80 males randomly selected from the Baltimore jury panels .⁸⁶ They tested for statistical significance between two variables and used multivariate analysis to examine the multiple contributions of four variables: race, sex, age and education.⁸⁷ Multiple regression analysis indicated that from 10 per cent to 16 per cent of variance in verdict could be accounted for by a combination of the four demographic variables .⁸⁸

They found that females gave more initial guilty verdicts for rape (78 per cent) and murder cases (71 per cent) as opposed to males (53 per cent rape; 50 per cent murder). After further analysing the data by race, they found the largest sex difference was found for blacks, with black females reporting a significantly higher percentage of initial guilty verdicts (73 per cent) than black males (50 per cent) .⁸⁹ No significant differences were found between white males and females.

The report notes that although the majority of jurors personal decisions originally agreed with the final group decision, a significant sex difference was found for the amount of agreement between personal and group decisions. The personal decision of 67.5 per cent of the males and 81 per cent of females agreed with the final group decision .⁹⁰ The report points out that only 5 per cent of the female jurors reported changing their initial decisions from not guilty to guilty, whereas 10 per cent of male jurors did so . Further, a higher proportion of females initial guilty decisions matched with the final group guilty verdicts.⁹¹ Only 26 per cent of female jurors felt responsible for changing other jurors decisions as opposed to 43 per cent of males.

The researchers also examined the relationship between gender and three personality variables: empathy, autonomy and socialisation.⁹² They found that for males, guilty verdicts were associated with high socialisation,⁹³ low empathy and low autonomy scores . For females, guilty verdicts were associated with low socialisation and low autonomy scores .⁹⁴

In another study in Florida,⁹⁵ Moran and Comfort compared their findings to those of Mills and Bohannon.⁹⁶ They found there were no sex effects for verdict or pre-deliberation

⁸⁶Jurors had an average age of 43 years. The majority of jurors (41per cent) had a high school education. 30 per cent had less and 29 per cent had attended college.

⁸⁷ A linear regression equation was then computed for each of the three types of cases, murder, rape and robbery *Ibid.* p.26 (and footnotes 25 and 26 of report).

⁸⁸ Mills and Bohannon *op.cit.*, p.30.

⁸⁹ *Ibid.* p.27.

⁹⁰ *Ibid.* p.27.

⁹¹ The report suggested that women were either more persuasive or more accurate at assessing how the group verdict would eventually turn out, particularly in the case of a guilty verdict . They state that the first hypothesis seems untenable since the present study, as well as other studies, found women less influential and assertive (at least in the present study they reported themselves to be less influential) than males on a jury . *ibid.* p.27.

⁹² M. J. Bonazzoli Jury Selection And Bias: Debunking Invidious Stereotypes Through Science (1998) 18 QLR 252.

⁹³ Bonazzoli points out that the three personality variables comprise Hogan s character structure . Socialisation was measured by Gough s Socialisation Scale of the California Psychological Inventory, analysing the individual s interpretation of societal rules and values as personally compulsory. Empathy was measured by Hogan s Empathy Scale, analysing the individual s capacity to understand the perspectives of others and ramifications of one s actions on others. Autonomy was measured by Kurtine s Autonomy Scale, analysing perceptions of personal responsibility for one s actions [at FN18].

⁹⁴ As cited by Bonazzoli..

⁹⁵ Moran and Comfort , Scientific Juror Selection: Sex As A Moderator of Demographic and Personality Predictors of Empanelled Felony Juror Behaviour (1982) 43 *Journal of Personality and Social Psychology* ,

verdict .⁹⁷ Additionally, they doubted that either sex is more likely to convict in felony trials in general, although such finding is conceivable for specific felonies such as rape or robbery .⁹⁸

In their study, however, there was an interactive effect between the sex of the juror and other variables. Their analysis showed that male jurors who convicted had more children and a lower income . Further, male jurors who were predeliberationally inclined to convict , not only had more children (or a higher interest in having a family) but also higher Gough socialisation scores. They also found female jurors who convicted had a stronger belief in retributive justice.

Penrod and Hastie state that the safest generalisation that can be made from all research on gender differences is that female students⁹⁹ are more likely than male students to regard the defendant in a rape case as guilty and that males participate at higher rates of deliberation than females .

Research would appear to substantiate the hypothesis that males do participate in the deliberation process more than females but the indications are that gender may also have an interactive effect with other factors.¹⁰⁰ Additionally, there is evidence that jurors may find it easier to empathise with a same sex defendant.¹⁰¹ The effect of gender on jury decision making is complex one, not necessarily confined to the juror s sex but potentially linked to many factors in the trial process.

Age

As with other characteristics, studies as to whether the age of a juror is linked to verdict have produced inconsistent results. Sealy and Cornish noted that in their London research that a significant relationship between age and verdict emerged, the most consistent feature being that higher proportions of not guilty verdicts occur amongst the youngest groups .¹⁰² Mills and Bohannon¹⁰³ found jurors guilty verdicts generally increased with age, particularly for rape cases where the strongest relationship between age and the number of guilty verdicts

No.5, 1052-1063. 319 returns to 1,500 anonymous questionnaires sent were analysed. Respondents consisted of persons who had served on felony juries that reached verdicts during 1975-6 in the state courts of Miami. The report notes that it was unable to estimate the representativeness of the sample due to lack of existing demographic data profiles on felony jurors. Further, it must be remembered that in Florida, juries of six decide all felonies except capital cases that are heard by 12 jurors.

⁹⁶ They point out that their sample only contained 4 per cent of black jurors, as opposed to 42 per cent in that of Mills and Bohannon. There were a number of other important differences such as the Florida research had a higher percentage of jurors over 60 and are better educated.

⁹⁷ It is pointed out that the Florida research cases represent undifferentiated felony verdicts (unlike the Baltimore research which included only murder, rape and robbery).

⁹⁸ Moran and Comfort *op.cit.*, p1059.

⁹⁹ Penrod and Hastie refer here to a number of mock jury trials with students, such as those conducted by Scroggs (1976) where male students gave more lenient sentences in rape and robbery cases when the victim did not resist, while females gave harsher sentences under the same conditions, *Inside the Jury, op. cit.* p.141.

¹⁰⁰ Penrod and Hastie further add that not only are male jurors more talkative but they generated more total facts, key facts, different facts and different issues during their speaking time *but* these differences could not be necessarily ascribed to gender per se . Other differences between males and females such as occupation and education may have had a bearing on the findings. *Ibid.* p.142 .

¹⁰¹ See S. S. Nagel and L.J. Weitzman Women as Litigants (1971) 23 *Hastings Law Journal*. 171, cited by Bonazzoli.

¹⁰² Sealy and Cornish, Jurors and their verdicts (1973) 36 *Modern Law Review* 503. It is pointed out, however, that this finding did not occur in the small Theft Group 2.

¹⁰³ Mills and Bohannon, *op.cit.*p.27.

were found . They reported that guilty verdicts amongst females remained fairly high and constant. Male guilty verdicts were lowest, however, in the 18 to 25 age group. Moran and Comfort found age un-correlated with verdict in undifferentiated felony trials . Likewise, Baldwin and McConville, in England, found the age structure of juries had no effect whatsoever on the outcome of cases .¹⁰⁴ In Reed s study¹⁰⁵ of approximately 240 jurors in Louisiana, he found no associations of significance between age and verdict. It would appear that the hypothesis that a younger juror is more likely to acquit because he/she may identify with a younger defendant may be unsupported.

Nevertheless, Penrod and Hastie point out that there seem to be certain differences regarding age during deliberations. In their study, there was a clear relationship between age and recall of the judge s instructions and recall of case facts the oldest group of jurors displayed markedly poorer performance than younger jurors .¹⁰⁶ Age, however, did not appear to have affected jurors assessment of deliberation thoroughness. Likewise, belief in their own correct decisions or persuasive pressure from other jurors seemed unaffected.

Socio-economic status

The relationship between socio-economic status and verdict preferences appears to be uncertain and contradictory. Sealy and Cornish, in London, indicated that manual workers were the most ready to convict when the evidence against the accused is very substantial .¹⁰⁷ Reed reported,¹⁰⁸ however, that the higher the status of the individual, measured by education and occupation, the more likely they were to convict.

Other studies of actual jurors such as that conducted by Moran and Comfort¹⁰⁹ suggested that males who were on lower incomes were more prone to convict. In Mills and Bohannon s study, they found that as male education level increased so did acquittals.¹¹⁰ Bridgeman and Marlowe,¹¹¹ however, found in their study that demographic characteristics were largely unrelated to both procedural and outcome variables .¹¹²

There is evidence that occupation and education do affect performance during deliberation. Penrod and Hastie¹¹³ found occupation-recall results closely paralleled the results obtained for education . Jurors with lowest educational levels had only a 48 per cent recall for facts from testimony, compared with 70 per cent by those with the highest level of education. Additionally, in a sub-sample of 269¹¹⁴ jurors, a number of factors such as residence in a wealthy suburb, attitude towards someone who causes another s death, newspaper read and marital status accounted for 11 per cent of variance in verdict preference. Thus, like age and

¹⁰⁴ Baldwin and McConville, *op.cit.* p.102.

¹⁰⁵ J.P. Reed Jury Deliberations, Voting and Verdict Trends (1965) 45 *Social Science Quarterly* 361-370. The study was conducted between September 1959 and July 1961.

¹⁰⁶ Penrod , Hastie and Pennington, *op.cit.*, p.142.

¹⁰⁷ Sealy and Cornish, *op.cit.*, p.505.

¹⁰⁸ *Op. cit.*, at p366.

¹⁰⁹ Moran and Comfort, *op.cit.*, p.1057.

¹¹⁰ Female guilty verdicts remained high across all levels of education.

¹¹¹ Bridgeman and Marlowe, *op.cit.* The report does point out that their sample of jurors interviewed was not necessarily fully representative of Santa Cruz County, being relatively younger, better educated and more middle class than poorer, more conservative jurors one may expect to see in small California counties.

¹¹² *Ibid.*, p.91.

¹¹³ Penrod, Hastie and Pennington, *op.cit.*, pp.135, 137-8.

¹¹⁴ *Ibid.*, p 129. The initial sample was 828 jurors.

gender, the effect of socio-economic juror characteristics on verdict seems uncertain. With all three, however, an impact on the deliberation process is evident.

Race

Does the race of a juror affect verdict? The OJ Simpson trials¹¹⁵ and that of the four white police officers acquitted by a state jury with no black members in the first Rodney King police brutality trial would indicate that race is a factor influencing a juror's decisions. These and other notorious trials have, at the very least, focused attention on this sensitive issue. England and Wales were re-alerted to potential racism among jurors in 2000, when the European Court of Human Rights determined that a Crown Court judge had not acted sufficiently robustly where racist remarks had been made in the jury room.¹¹⁶ In a recent case, a judge dismissed a jury after allegations of racism were made. The racial structure of English and Welsh juries may become a political issue which will prove impossible to ignore.

In an early study,¹¹⁷ Broeder reported findings of the University of Chicago Jury Project¹¹⁸ that Negroes and persons of Slavic and Italian descent were more likely to vote for acquittal. Interestingly, as Van Dyke¹¹⁹ pointed out, in Baltimore in 1969 when jury commissioners switched from selecting jurors from property lists to randomly selecting them from the voter registration list, the composition of juries changed from 70 per cent white to 43.7 per cent black by 1973. The conviction rate also dropped from 83.6 per cent in 1969 to an average of 70 per cent in the next few years.

Laboratory findings would appear to support the theory that racial bias affects the determination of guilt. The problems regarding mock juries have been discussed but Johnson¹²⁰ adds that there is always a risk for example, [that] the condition of being observed might cause the subjects to conceal their racial bias. Her article eloquently argues that none of the ordinary sources of concern about external validity seriously threatens the significance of the laboratory findings on race and guilt attribution.

Ugwuegbu's¹²¹ two studies of 256 white undergraduates and 196 black undergraduates systematically varied the defendant's and victim's race and the strength of evidence pointing towards guilt. Results revealed that white subjects rated a black defendant more culpable than a white defendant.¹²² It was found, however, that when the evidence is not strong enough for conviction a white juror gives the benefit of the doubt to a white defendant but not a black defendant. The second study revealed that black subjects rated the black defendant as significantly less culpable than the white defendant but interestingly tended to grant the black defendant the benefit of the doubt not only when the evidence was doubtful but even when there was strong evidence against him.¹²³

¹¹⁵ Both the criminal acquittal for OJ Simpson by a predominantly black jury and subsequent civil verdict against him for wrongful death by a largely white jury.

¹¹⁶ *Sander v. U.K.* Case 34129/96 judgment 09/05/2000, European Court of Human Rights: www.echr.coe.int

¹¹⁷ D. Broeder The University of Chicago Jury Project (1959) *Nebraska Law Review* 744. (The report does not detail how this finding was reached).

¹¹⁸ 1,500 jurors who had served on criminal trials were interviewed in the study.

¹¹⁹ Van Dyke, *op.cit.*, p.33.

¹²⁰ S. L. Johnson, Black Innocence and the White Jury (1985) 83 *Michigan Law Review*, 1611, 1625.

¹²¹ Ugwuegbu, Racial And Evidential Factors in Juror Attribution of Legal Responsibility (1979) 15 *J. Experimental Soc. Psychology* 133, as cited by Johnson.

¹²² Johnson, *op.cit.*, at 1627.

¹²³ Ugwuegbu, as cited by Johnson. Johnson does point out that it is possible that the jurors who actually decide cases are less biased than are the student mock jurors due to the selection process of *voir dire* at 1708.

King points out that attempts to measure the relationship between verdicts and juror race demonstrate that, whenever a connection exists, it is likely to be the specific kind of connection often predicted by judges: white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors.¹²⁴ Further studies using mock juries¹²⁵ reveal definite racial bias. One study¹²⁶ of 896 Alabama citizens in 1979¹²⁷ found the black defendant to be judged much more culpable than the white defendant.

In order to substantiate findings of mock jury research, it is useful to consider data from real trials to ascertain if there are particular racial trends that emerge. One comprehensive study¹²⁸ in New York State took place over a 10 year period between 1986 and 1995. It examined a total of 35,595 criminal verdicts in 27 counties analysing the relationship between racial makeup and jury acquittal rates.

The study found a close relationship between racial demography and jury behaviour. Bronx County had the highest jury acquittal rate but also the highest black and Hispanic population. Conversely, Ontario County had the lowest acquittal rate and second to lowest population of blacks and Hispanics. The researchers questioned whether strong and weak prosecutions were similar across jurisdictions but with an independent control of trial rate i.e. those cases actually going to trial, the data strongly suggests it is, indeed, the presence of black and Hispanic jurors that spells the difference in jury conviction rates from county to county.¹²⁹

It is widely assumed in the United States that the ethnic diversity of modern juries has caused the acknowledged increase in hung juries. Klein and Klastorin use statistical analysis to argue that diversity is an insignificant cause of hung juries and eliminating it would only reduce the rate by three per cent.¹³⁰

In England and Wales in 1995, 382,000¹³¹ crimes were considered by the victim to be racially motivated. The evidence that racism exists is irrefutable. Peter Herbert makes the point that the reliability of the common man must seriously be in question if one considers the extent of racism in Britain.¹³² As has been discussed, randomness is not the same as representativeness. Further, representatives of the local community may not be the peers of a defendant. An employed, predominantly white jury may not be viewed as peers of an unemployed black defendant. Van Dyke¹³³ points out that a jury that includes a cross section

¹²⁴ N.J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions (1993) 92 *Michigan Law Review* 63, at 85.

¹²⁵ See Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial (1976) 93 *J. Psychology* 93; Lipton, Racism in the Jury Box: The Hispanic Defendant (1983) 5 *Hispanic J. Behavioural Sci.* 275; Bernard, Interaction Between the Race of the Defendant and that of Jurors Determining Verdicts, (1979) 5 *Law and Psychology Rev.* 103. See Johnson for summaries of these experiments at 1626-8.

¹²⁶ Field, Rape Trials and Jurors: A Psychological Analysis of the Effects of Victim, Defendant and Case Characteristics (1979) 3 *Law and Human Behavior* 261, as cited by Johnson.

¹²⁷ 19 per cent of those in the study had served as jurors.

¹²⁸ J. P. Levine, The Impact of Racial Demography On Jury Verdicts, in Markowitz and Jones-Brown (eds.) *The System in Black and White: Exploring The Connections Between Race, Crime And Justice*, 2000.

¹²⁹ *Ibid.* p.162.

¹³⁰ S. Klein and D. Klastorin, Do Diverse Juries Aid or Impede Justice? (1999) *Wisconsin L.R.* 553.

¹³¹ From the 1995 British Crime Survey: Percy, Statistics on Race and the Criminal Justice System Home Office Publications, 1998. 143,000 against ethnic minorities and 238,000 against whites.

¹³² P. Herbert, Racism, Impartiality and Juries (1995) 145 *N.L.J.* 1138.

¹³³ Van Dyke, *op.cit.*, p.12.

of the community provides a modern definition of peer . All people are represented on a jury panel ensuring their impartiality and independence . He points out that people have different perspectives resulting from different life experiences that need to be balanced to achieve impartiality. It is often, however, the way hidden biased attitudes might affect impartiality that is in issue, a situation less likely to prevail if a portion of the jury is of a similar ethnic background or gender to the defendant.

In 1989, the Court of Appeal in *Royston Ford*¹³⁴ held that a trial judge had no power to construct a multi-racial jury; a judge s power was limited to jurors competency to serve. Prior to this there were a number cases¹³⁵ where the judiciary exercised discretion to ensure a representation of minorities on a jury trying a minority defendant. For over five centuries, until 1870, members of minorities such as Jews, Germans and Italians had the right to be tried by a jury comprised half of foreigners. It was called the jury *de mediate linguae* .¹³⁶ This right was abolished on the ground that no foreigner need fear for a fair trial in England .¹³⁷ Given the trial data, reported cases and research findings, can we in England and Wales believe this to be true now?

It has been argued that one serious consequence of the abolition of the peremptory challenge is the loss of a potential means to ensure a racially mixed jury .¹³⁸ In England and Wales there is virtually no mechanism to ensure that juror bias may be removed. Certainly there remains challenge for cause but the defence are given no facts about jurors upon which to base a challenge. Thus, short of juror having a swastika tattoo in full view of the court, challenge for cause is practically redundant.

Lawyers and defendants have little access to information about jurors. The point is well made that in certain cases, such as mercy killings members of pro-life, euthanasia societies and certain religious groups should be excluded from the jury.¹³⁹ The court, however, would probably be unaware of such associations and beliefs. As Richard May points out, in the United States, being able to question jurors about their past experience has the advantage of dispensing with those who may be thought unlikely to come to a fair and impartial verdict .¹⁴⁰ Certainly there are many difficulties with their system. The process can be lengthy¹⁴¹ and expensive, with more potential jurors needing to be summoned to take the places of those challenged and dismissed. Nevertheless, the argument that peremptory challenge causes the rigging of juries has yet to be substantiated.¹⁴²

¹³⁴ (1989) 89 Cr. App. R. 278. Enright points out that in following *Mansell* (1857) 8 E & B, *Royston Ford* was decided when a defendant did not have the luxury of 35 peremptory challenges. Additionally, *Mansell* was decided 13 years before *de mediate linguae* was abolished: Enright, *Multi-Racial Juries* (1991) 141 NLJ. 992.

¹³⁵ For example, *R. v Binns & Others* [1982] Crim. L. R. 522 and *R v Bansal* [1985] Crim. L.R. 151, as cited by Enright.

¹³⁶ Meaning of half tongue , M. Constable *The Law of the Other* (1994).

¹³⁷ Enright , *op.cit.* p.992.

¹³⁸ Lloyd-Bostock and Thomas, *op.cit.*, at 25.

¹³⁹ Hard Cases Make Bad Law Editorial (1992) 142 NLJ. 1293.

¹⁴⁰ R. May, *Jury Selection In The United States: Are There Lessons to be Learned?* [1998] Crim.L.R. 272.

¹⁴¹ E.g., in the De Lorean case, selection took seven weeks and the juror questionnaire was 42 pages long: Hans and Vidmar, *op.cit.*, p.14. In the first Rodney King beatings trial and in the O.J. Simpson trial, jury selection took months.

¹⁴² See Herbert, *op.cit.*, also J. Vennard and D. Riley *The Use Of Peremptory Challenge and Stand by of Jurors And Their Relationship With Trial Outcome* [1988] Crim.L.R. 723. See also Baldwin and McConville *op.cit.*, p. 93.

There are arguments against racially structuring juries. If one type of defendant, for example, an Afro-Caribbean, is entitled to stipulate the kind of jury that will try him then this would open the floodgates to other minorities.¹⁴³ Homosexuals, alcoholics and militant feminists could argue they also should be afforded the same treatment. Further, structuring a jury would interfere with randomness that appears to be important in the English concept of a fairly structured jury. The Runciman Commission¹⁴⁴ suggested that in exceptional cases, three ethnically similar jurors to the victim or defendant could be included, on the judge's order, following a request by the prosecution or defence. Research¹⁴⁵ indicates that unless there is a minimum of three minority jurors, they may not withstand group pressure. Commenting on this recommendation, the New Zealand writers¹⁴⁶ consider such judicial tinkering would be undesirable, as compromising the integrity of the jury. They argue that juries should be selected so as to achieve representativeness in all cases, not just where the accused is a minority (in that case, a Maori). Bootham criticizes the Royal Commission's recommendation that the mixed jury should only be ordered in exceptional cases, as unlikely to inspire much confidence among ethnic minority defendants.¹⁴⁷ Sanders and Young expand on this criticism as the RCCJ's recommendation ignores the evidence that race plays a much broader role within the operation of the criminal process than this.¹⁴⁸ Nevertheless, if potential bias towards a defendant or victim has been identified, is there not a duty to reduce or eliminate it so that he or she may receive a fair and impartial trial? With the abolition of the peremptory challenge and the decision in *Ford*, there is now virtually no mechanism to achieve this.

Johnson points out that in structuring a jury, the aim should be to prevent a wrong rather than make a victim whole.¹⁴⁹ Further, potential hostility towards an ethnic minority would not increase for unlike some affirmative action plans, those in question are not being given, rather than earning a benefit that is not afforded to white persons.¹⁵⁰ Research in Santa Cruz¹⁵¹ indicated that only 28.3 per cent of those with postgraduate education and 36 per cent of men as opposed to 51.8 per cent of women and 60 per cent of blacks are likely to favour mandated racial quotas to create racially mixed juries. This is an interesting finding if one considers that decision makers within societies are predominantly educated and male. The report does state however, that 70.7 per cent of all those questioned agreed that in criminal trials, African American jurors should be included when the defendant was African American.

Comment: it appears that the racial composition of the jury can affect its verdict. We might consider permitting the trial judge to draw three or more black or Asian jurors (whichever is

¹⁴³ See *R v McCalla* [1986] Crim.L.R. 335.

¹⁴⁴ Royal Commission on Criminal Justice Report 1993 Cmnd. 2263 at 133-4, also cited by Lloyd-Bostock and Thomas.

¹⁴⁵ Saks *Jury Verdicts: The Role of Group Size and Social Decision Rule* (1977), cited by Fukurai in *Social De-Construction of Race and Affirmative Action in Jury Selection*, cited below.

¹⁴⁶ Cameron et al, *op.cit.*, p. 195 but they do acknowledge that other writers have called for the reinstatement of all-Maori juries in certain cases. These were abolished in 1962, when Maori voters were given equal eligibility for jury service with whites.

¹⁴⁷ C. Bootham, *Race and Racism — the Missing Dimension in the RCCJ* in M.McConville and L.Bridges (eds.) *Criminal Justice in Crisis* (1994).

¹⁴⁸ A. Sanders and R. Young, *Criminal Justice* (2nd edn., 2000), at p. 565-6.

¹⁴⁹ S. L. Johnson, *op.cit.*, at 1696.

¹⁵⁰ *Ibid.* at 1703.

¹⁵¹ In spring 1997, 327 adults were sampled in Santa Cruz County, California, after the O.J. Simpson Trial. Over 50 questions were asked, including on subjects attitudes towards affirmative action in jury selection. H. Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection* (1999) 11 *La Raza L.J.* 17, at 55.

appropriate) from the pool to place them on a jury in a racially sensitive case, or where a defendant or victim requests this. Such a facility must apply to victims as well as defendants, since we must remember that the first Rodney King beatings trial, in 1992, was seen as unfair because the all-white jury acquitted in the face of overwhelming evidence of a vicious assault by white police officers on a black victim. The jury were undoubtedly the peers of the four defendants and representative of their community. We would add a word of caution. The allegation is sometimes made that Irish defendants accused of terrorist crimes do not have the benefit of an impartial jury when tried in England and Wales and some of the most notorious miscarriages of justice in English legal history have involved Irish defendants. We have strong unpublished evidence of discrimination against Irish defendants at every level of the English criminal process. Our suggestion will not solve this problem but we are alarmed to read Helena Kennedy's comment, when interviewed by Grove (cited in Part C below) that in IRA trials in England, it is routine to *excuse* Irish jurors. We come back to examples of racism related by real jurors in Part C.

Part B: Jury Decision Making and Deliberation

Research Methods in the Projects Surveyed

The main methods used by the various research studies and discussed above were summed up by W. R. Cornish¹⁵² in 1970 and with one exception remain unchanged today, they are:

1. Recording actual deliberations.
2. Interviewing jurors before or after deliberations.
3. Comparing verdicts with the views of participants in the trial.
4. Using shadow or mock juries to view re-enactments or videos and then observing their deliberations.

The modern roots of empirical jury research can be traced to the late 1950s and early 1960s and the Chicago Jury Project which resulted in over 70 publications. The most famous and most quoted of these was *The American Jury*¹⁵³ by Kalven & Zeisel, whose main methodology was to study questionnaires completed by trial judges who indicated their satisfaction with the jury's verdict. Baldwin & McConville later followed this model in their study of jury trials in Birmingham and London.¹⁵⁴ This type of study is primarily outcome orientated and many were undertaken at a time when there was a body of opinion, championed by Sir Robert Mark,¹⁵⁵ that suggested that the rate of acquittals was too high.

More recent research has tended to focus on the internal workings of the jury, in areas such as information processing, instruction comprehension and small group decision making. Although early studies in Kansas were able to use recordings of actual deliberations, this was very quickly outlawed in most states,¹⁵⁶ as it was in England and Wales by Sec.8 of the Contempt of Court Act 1981 which prevents any questioning of jury members. The result of this prohibition is that researchers have had to resort to other methods, the most common being the use of shadow juries. When studying the results of such research it should be

¹⁵² W. R. Cornish, *The Jury* (1970).

¹⁵³ H. Kalven & H. Zeisel, *The American Jury* (1966).

¹⁵⁴ Baldwin and McConville, *Jury Trials* (1979).

¹⁵⁵ S. McCabe, *Jury Research in England and the United States* (1974) 14 *British Journal of Criminology* at p. 277. See also, M. Zander, *Cases and Materials on the English Legal System* (8th ed., 1999) at p. 456.

¹⁵⁶ V. P. Hans & N. Vidmar, *Judging the Jury* (1986) at p.99 et. seq.

recognised that the quality of these panels varies enormously, the most reliable being those such as those used by the Oxford Jury Project¹⁵⁷ which selected jurors from the electoral register who sat in on real trials and were then observed in deliberation. More recently, a study for the New Zealand Law Commission¹⁵⁸ in 1998 used a sample of 48 jury trials. 575 anonymous jurors completed a pre-trial questionnaire, of which 312 jurors were interviewed after the trial, an average of 54.3 per cent of the total jurors. In each case, the judge was also interviewed and researchers observed parts of the trial, obtained copies of notes and tape-recorded the summing-up. This project is a good example of the type of research whose value is heightened by the similarity of our legal systems and, perhaps, an objective view of the jury system sometimes found lacking in American writings. On the other hand, research which simply asks real jurors, for instance, whether they understood instructions or evidence, is of questionable value. Three pieces of such work by Findlay and Duff, in the 1990s, carried out in Hong Kong, New South Wales and Russia are summarised in 2001.¹⁵⁹ Similar questions were asked of English and Welsh jurors in Zander and Henderson's *Crown Court Study* in 1992. The authors of the latter work acknowledge (o)bvviously, the fact that jurors think they could understand the evidence does not prove that they actually *did* understand it.¹⁶⁰ Of even more doubtful value is the technique of asking lawyers and judges whether jurors, largely passive and silent, understood the trial, another technique used by Findlay and Duff.¹⁶¹

Many experimental studies rely on students who view either reconstructions or, more recently, videos. The advantage of such methods is that it is easy to alter selected facts and therefore isolate and identify the behaviour patterns being studied. This is termed internal validity.¹⁶² The disadvantage is that such refinement is only possible by removing as many external factors as possible and, as such, tends to reduce the general applicability of the results, known as the external validity.¹⁶³ It should also be borne in mind that students, often studying law, lack the wide life experience which is often quoted in defence of the jury and also, by definition, tend to be better educated than the average juror.¹⁶⁴ Perhaps the biggest barrier to achieving high levels of external validity is that it is impossible to recreate the responsibility of deciding on the fate of one's fellow man.¹⁶⁵

From the perspective of the jury, the trial process can most readily be divided into distinct categories by asking what is expected of them. As an individual, we ask each member to listen and accurately remember each piece of evidence, where necessary to draw inferences of fact from that evidence, using their experience of everyday life and at the same time evaluate the credibility of witnesses and the relative importance of evidence. Prior to deliberation, we expect each juror to understand and apply directions individually and, when they retire as a jury, to collectively compare the facts with the contents of the judge's instruction on the law

¹⁵⁷ S. McCabe and R. Purves, *The Shadow Jury at Work* (1974).

¹⁵⁸ W. Young, N. Cameron and Y. Tinsley, *Juries in Criminal Trials* New Zealand Law Commission Preliminary Paper no. 37 (1999) at <http://www.lawcom.govt.nz>

¹⁵⁹ M. Findlay, *Juror Comprehension and Complexity* (2001) 41 *Brit. J. Criminol.* 56.

¹⁶⁰ At p. 205, para 8.2.1.

¹⁶¹ See Findlay (2001) at p.72.

¹⁶² M. J. Saks, *What do jury experiments tell us about how juries (should) make decisions?* (1997) 6 *S. Cal. Interdisciplinary L. J.* 1 at 4.

¹⁶³ Hastie, Penrod and Pennington, *Inside the Jury* (1983), pp.38-39.

¹⁶⁴ Saks, *op. cit.* See also M. O. Miller & T. A. Mauet, *The Psychology of Jury Persuasion* (1999) 22 *Am. J. Trial Advoc.* 549 at 550.

¹⁶⁵ Saks, *op. cit.*

and arrive at a verdict with the required majority.¹⁶⁶ In the eyes of the law, the perfect jury member would be an intelligent but passive sponge who waits until the deliberation stage before reaching a verdict, diligently following the judge's instruction without the burden of prejudice or sympathy and mindless to the consequences of their decision. Unfortunately, there is ample empirical evidence to suggest that such a person would be a rare find.¹⁶⁷

The Individual Juror

Behavioural scientists have long searched for a model which could reflect the thought processing and decision making undertaken by a juror. In *Inside the Juror*,¹⁶⁸ Reid Hastie compared four major models: Bayesian Probability, Algebraic Weighted Average, Stochastic Poisson Process Model and finally the Cognitive Story Model. Hastie is of the opinion that although the first three of these may have individual merit, none adequately represents the complexity of a jury trial. The cognitive story model, however, as developed by Hastie, Penrod and Pennington,¹⁶⁹ appears to offer a more complete solution in real life. In plain language, this model suggests that the juror organises the information into a narrative story by using the trial evidence, personal knowledge of similar events and personal knowledge of what makes a complete story. Having constructed the story, the juror then takes the judge's instructions on the law, combined with their prior ideas of crime and forms verdict categories. A decision is reached by classifying the story into the best fitting verdict category. In a further work on the story model,¹⁷⁰ Pennington and Hastie carried out research using interviews with members of an actual jury pool followed by laboratory experiments with college students and found clear evidence to support the story model. They also found considerable variations, however, between accuracy and completeness of their representations of the verdict category, although they concluded that this had no bearing on the jurors' eventual verdict choice. The New Zealand project also found evidence to support the story model in real trials,¹⁷¹ agreeing with Richard Lempert,¹⁷² who observed that trial lawyers often regard their clients' case as 'our story'. Indeed, it is often said that the best advocates tend to be the best natural storytellers.¹⁷³ Unfortunately for them, evidence is usually produced at trial in witness order. Often, for instance, the arresting officer will speak first.¹⁷⁴ Lempert suggests, however, that there are ample other opportunities during the trial to formulate the telling of the story,¹⁷⁵ not least in the opening statements. Indeed, it is likely that these have a large bearing on the outcome. Pennington and Hastie found that their subjects were more likely to recognise information that was consistent with their own story¹⁷⁶ and it would be tempting to adopt the ready-made story contained in an opening statement. It would appear that for best effect, the evidence should be presented in a fashion which most easily enables its formation into a structured story. Lempert does, however, suggest that presenting the jury with a large bundle of unorganised facts might force them to examine the

¹⁶⁶ In general see P. W. English & B. D. Sales, 'A ceiling or consistency effect for the comprehension of jury instructions' (1997) 3 *Psychol. Pub. Pol'y & L.* 381.

¹⁶⁷ The Honourable B. Michael Dann, 'learning lessons and speaking rights' (1993) 68 *Ind. L. J.* 1229 at p. 4 et. seq.

¹⁶⁸ R. Hastie (ed.), *Inside the Juror* (1993).

¹⁶⁹ Hastie, Penrod and Pennington, *op. cit.* pp. 22-23.

¹⁷⁰ N. Pennington & R. Hastie, 'A cognitive theory of juror decision making: the story model' (1991) 13 *Cardoza L. R.* 497.

¹⁷¹ Young, Cameron and Tinsley, *op. cit.* para. 2.57.

¹⁷² R. Lempert, 'Telling tales in court: trial procedure and the story model' 13 (1991) *Cardoza L. R.* 559.

¹⁷³ Miller & Mauet, *op. cit.* 569.

¹⁷⁴ Young, Cameron and Tinsley, *op. cit.* para. 2.56.

¹⁷⁵ Lempert, *op. cit.* p. 564.

¹⁷⁶ Hastie, Penrod and Pennington, *op. cit.*

truth of the evidence with more care.¹⁷⁷ We come back to see whether the story model describes the deliberations of English and Welsh jurors in Part C.

One of the fundamental tasks of the individual juror is to decide on the truthfulness of a witness. Appeal courts regularly refer to the lower court having had the advantage of hearing the witness in person. It is questionable how effective the average person is at judging truthfulness based on the witness's demeanour. Michael Saks, after quoting some research findings, follows with the conclusion that jurors would be better advised to disregard witnesses' faces if they want to maximise their ability to detect deception, or just wear a blindfold and listen closely. Appellate judges listening to an audiotape would do at least as well as jurors (or, presumably, trial judges) who had access to both face and body cues.¹⁷⁸ If the appearance and demeanour of the witness are not good guides to credibility, this raises the question as to how the juror assesses the credibility of a witness and what effect the cross-examination has on that credibility. Miller and Mauet¹⁷⁹ suggest that the juror evaluates the credibility by judging the status of the source combined with a subjective judgement of their knowledge and an assessment of their presentation.¹⁸⁰ Michael Saks suggests that where the relevance was low, the audience's resulting attitudes were greatly affected by the status of the source as an expert or not and were not much affected by the strength or weakness of the arguments. Where the relevance of the message was high, the audience's resulting attitudes were little affected by the status of the source but were greatly affected by the strength or weakness of the arguments.¹⁸¹ In addition to the danger that lengthy cross-examination of experts may interrupt the formation of the story,¹⁸² a further problem is the possibility that when cross-examining expert witnesses, any questioning of that witness's reputation instantly damages their credibility, even where the accusations are without foundation.¹⁸³ It would appear that jurors either believe that there is no smoke without fire or a so-called sleeper effect occurs where the jury remember the contents of the message but forget the source.¹⁸⁴ The New Zealand researchers questioned whether judges should intervene more readily to prevent this type of questioning.¹⁸⁵

In the case of eyewitness testimony, it is often the case that counsel will grill the witness on peripheral detail in order to lower their credibility¹⁸⁶ but research suggests that the amount of surrounding information absorbed by the witness will be in inverse proportion to the accuracy of the identification. Even very good eyewitnesses cannot be expected to have detailed knowledge of the surrounding scene.¹⁸⁷ Unlike some other jurisdictions, the English juror is left very much alone when deciding on the credibility of evidence. The effect of *R v Turner*¹⁸⁸ is that expert evidence is not allowed on matters which are within the normal competence and experience of the jury. Although *R v Turnbull*¹⁸⁹ established that juries

¹⁷⁷ Lempert, *op. cit.* p. 573.

¹⁷⁸ Saks, *op. cit.* at 22.

¹⁷⁹ Miller & Mauet, *op. cit.* at 557.

¹⁸⁰ See also, Young, Cameron and Tinsley, *op. cit.* paras. 3.20-3.25.

¹⁸¹ Saks, *op. cit.* See also Miller & Mauet, *op. cit.* 557-559.

¹⁸² Findlay and colleagues also found cross-examination to be a major site of confusion for jurors in New South Wales (summarised 2001, *op. cit.*).

¹⁸³ S.M. Kassir et al., *Dirty Tricks of cross-examinations* (1990) 14 *Law & Hum. Behav.* 373 at 380.

¹⁸⁴ Miller & Mauet, *op. cit.* at 560.

¹⁸⁵ Young, Cameron and Tinsley, *op. cit.* para. 5.28.

¹⁸⁶ *Ibid.* at 559.

¹⁸⁷ Hans & Vidmar, *op. cit.* p.128.

¹⁸⁸ *R v Turner* [1975] 1 All E.R. 70.

¹⁸⁹ *R v Turnbull* [1977] QB 224 (CA).

should be warned that even truthful and impressive eyewitnesses can be in error, other jurisdictions allow a much greater input from experts on the reliability of eyewitness evidence.

On eyewitness testimony, Bull and Clifford, in 1999, make a similar point. Providing a review of the research, they conclude that eyewitness evidence is so error-prone that the courts should be warned of this and could similarly benefit from expert evidence regarding its reliability.¹⁹⁰

It would appear that jurors are persuaded by simple, direct language.¹⁹¹ Complex language appears not to decrease memory but makes it harder to interpret complex information. In addition, vivid testimony is more highly persuasive. Compare for example, the child's decapitated body was found with the victim's body was found.¹⁹²

During the course of the trial, the juror can, on some occasions, be exposed to evidence that they are told to either ignore completely or treat in a certain way. For example, they may be told that the evidence goes to the issue of credibility and not propensity. A number of commentators believe that not only do such instructions not work but there is a possibility that they have the opposite effect.¹⁹³ On a basic level, by removing a piece of the story that the juror may be expecting, one is inviting them to fill in the gaps.¹⁹⁴ Vidmar & Hans quote a juror as saying 'You can't really disregard what the judge tells you to when the trial lasts so long, because you can't remember what thing you were supposed to forget.'¹⁹⁵ Evidence considered to be particularly dangerous is that of prior convictions, particularly those involving indecent offences against children. Sally-Lloyd Bostock reports on work for the Home Office, which found in a simulation study that a recent conviction for a similar offence had a marked effect on the perceived likelihood that the defendant committed the offence currently charged.¹⁹⁶ Surprisingly, the research also found that a conviction for a dissimilar offence might be more favourable to the defendant than being of good character. This reflects the previous findings of an earlier project by the London School of Economics.¹⁹⁷

A further problem which may face a juror is the confusion caused by the joinder of defendants or the holding of a single trial for multiple charges. Geoffrey M. Stevenson refers to a number of studies and comes to the conclusion that the evidence tends to cumulate in the mind of jurors and possibly spill over from one issue to another, with the effect that the likelihood of conviction is greater than if the counts had been heard separately. In the case of defendants in joined trials, they are seen in a more negative way and there is a greater

¹⁹⁰ R. Bull and B. Clifford, *Eyewitness Testimony* (1999) 149 N.L.J. 216.

¹⁹¹ Young, Cameron and Tinsley, *op.cit.* para. 5.19.

¹⁹² Miller & Mauet, *op. cit.* at 560.

¹⁹³ See V. Hans & A. N. Doob, sec. 12 of the Canada Evidence Act and the deliberation of simulated juries (1976) 18 *Crim. law q.* 235.

See also R. Wissler & M. Saks, *On the inefficacy of limiting instructions* (1986) 9 *Law & Hum. Behav.* 37.

See also Lieberman & Sales, *What social science teaches us about the jury instruction process* (1997) 3 *psychol. pub. pol y & L.* 604.

See also Hans & Vidmar, *op. cit.* pp.124-126.

¹⁹⁴ Young, Cameron and Tinsley, *op.cit.* para. 5.30.

¹⁹⁵ Hans & Vidmar, *op. cit.* at p. 114.

¹⁹⁶ Lloyd-Bostock & Thomas, (1999) *op. cit.* and, more recently, S. Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study* [2000] *Crim. L.R.* 734.

¹⁹⁷ McCabe, *op. cit.* at p. 277, also *Juries and the Rules of Evidence* L.S.E. Jury Project [1973] *Crim. L.R.* 208. Also, Young, Cameron and Tinsley, *op.cit.* paras. 6.12-6.16.

confusion of evidence and, as mentioned above, judicial instructions to treat the charges and defendants separately have little impact.¹⁹⁸ We come back to all of the points above in Part C.

On a strategic level, many trial advocates have wondered whether the order of presentation matters and whether it is preferable to present the best evidence first or last. Research by Thibaut & Walker¹⁹⁹ found that there were strong recency effects, both in terms of the internal order of each side's case and in the overall order of the trial itself but they believe that the effects are largely cancelled out by the traditional trial format.²⁰⁰

Instruction

At the end of the presentation of evidence, the judge in an English or Welsh trial sums up the case and then gives the jury a number of instructions on the law to consider during their deliberations. Indeed, the judge is legally obliged to sum up the facts and cannot rely on closing speeches by counsel: *R.v. Bowerman* (2000)²⁰¹ and the Court of Appeal considers judicial instructions to be part of the fair trial requirements of Article 6.1 of the European Convention on Human Rights: *R.v. Francom and Others* (2000).²⁰² The need for these instructions stems from the fact that what we are asking the jury to do is not to decide on the truth of the evidence in everyday terms, but to decide whether the defendant is guilty within the definition of the law.²⁰³ In essence, the judge is providing a framework with which the jury can construct verdict outcomes to compare with the story previously created using the evidence.

If there is one point upon which nearly every commentator agrees it is that juries have a great deal of difficulty understanding and applying judicial instructions.²⁰⁴ Although Vidmar & Hans acknowledge that instructions are a problem and support efforts to rewrite them, they suggest that the negative impact is reduced by the collective nature of the deliberations. They further suggest that even if they still do not fully comprehend the instruction, the jury's decision is based upon common sense, and usually ends up at the same place as the law intends it to be.²⁰⁵ The basis of most English judicial instruction can be found in the specimen directions provided by the Judicial Studies Board and published on their website,²⁰⁶ although more experienced judges tend to favour writing their own. The major problem with either type is that they are written with an eye only on the letter of the law and with little consideration of their comprehensibility. Steele and Thornburg²⁰⁷ observe that although juries conscientiously try to follow instructions (a similar finding to the Oxford jury project), in many cases they cannot understand them.

Lieberman and Sales²⁰⁸ suggest, as did Vidmar & Hans, that in the event of the jury's not being able to follow the instruction, they are likely to use some form of common sense

¹⁹⁸ G. M. Stephenson, *The Psychology of Criminal Justice* (1992) at p. 201. See also Cornish, *op. cit.* at p. 178. See also, Young, Cameron and Tinsley, *op. cit.* para. 3.5, and also 3.13 (4).

¹⁹⁹ J. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis* (1975) chpt. 7.

²⁰⁰ In general see Saks, *op. cit.* at 25.

²⁰¹ [2000] 2 Cr. App. Rep. 189 (CA).

²⁰² [2000] Crim.L.R. 1018, [2001] 1 Cr. App. Rep. 237.

²⁰³ Z. Bankowski, 'The jury and reality' in Findlay and Duff (eds.), *The jury under attack* (1988).

²⁰⁴ Hans & Vidmar, *op. cit.* p. 120; Saks, *op. cit.* at 35; Arce, *op. cit.* p. 576.

²⁰⁵ Hans & Vidmar, *op. cit.* p. 123.

²⁰⁶ Judicial Studies Board, <http://www.cix.co.uk/~jsb>

²⁰⁷ W. W. Steele & E.G. Thornburg, 'Jury instructions: a persistent failure to communicate' (1988) 67 N.C.L.Rev. 77.

²⁰⁸ Lieberman & Sales, *op. cit.* 589.

justice, defined by Finkel²⁰⁹ as what ordinary people think the law ought to be. The linguistic and psychological research on jury instructions has concentrated on three topics: (1) syntactic and semantic comprehensibility; (2) timing of delivery and (3) the medium of presentation of instructions.²¹⁰ Steele and Thornburg provide a very comprehensive history of the research undertaken in this area. Particularly remarkable is some early work by Forsten, which found that 86 per cent of subjects were unable to respond properly to what constituted proof of guilt and, further, that 25 per cent of jury discussions contained reference to the instructions, indicating a lack of clarity. Much of the more recent work has centred on the use of psycholinguists to reword the instructions. Elwork, Alfini, and Sales²¹¹ used volunteers from community groups to watch a video of a personal injury case and they were then given no instructions, standard instructions or rewritten instructions. Unsurprisingly, the rewritten ones gave the best results but the standard instructed group fared no better than the ones with no instructions at all. Later experiments proved that rewritten instructions could improve the proportion of correct answers from 40 per cent to 78 per cent. These improvements were made by reorganising the instructions, minimising sentence length and complexity, using the active voice, avoiding jargon and uncommon words and using concrete rather than abstract words. Although this was a civil case, Severance & Loftus,²¹² using similar methodology obtained similar findings using criminal instructions. Robert and Vida Charrow's research in Maryland achieved an overall improvement of 38 per cent even in the case of instructions which were conceptually quite difficult.²¹³ A recent and useful article summarising research findings on jury instructions and comprehension emanates from Tennessee, in 2000.²¹⁴ Dumas laments the fact that despite legal and social scientific research exposing jurors difficulty in understanding instructions, since the 1970s and the documentation of linguistic and syntactic bars to juror comprehension, by linguists and psycholinguists, the U.S. legal system has been slow to respond. Standard instructions, she says, tend to be written in dense, complex, lawyers' language and modelled on the language of appellate opinions. They are delivered orally, often monotone, to the jurors under instruction, who, as average Americans, have an average reading level of sixth to eighth grade. Given the state of adult literacy in England and Wales, the same comment is pertinent here. A browse through the English instructions shows that although they are written mainly in plain language, unlike many American instructions, the syntax is far too complex. Some instructions contain three or more paragraphs, with sentences of five or more lengthy clauses. Dumas gives very helpful examples of how to create simple sentences.

Steele and Thornburg's²¹⁵ own study consisted of members of a real jury pool listening to a judge giving directions, which they were then asked to paraphrase. In the case of the original version, 12.85 per cent answered correctly but after being rewritten, 25.59 per cent were correct. In a further experiment, former jurors completed questionnaires regarding deliberations and, of these, two thirds said that an instruction had been read aloud in the jury room and one third said there had been disagreement over what it meant. There appears to be almost universal agreement that rewriting instructions improves comprehension but a number of commentators have suggested that there is a point above which no further improvements

²⁰⁹ N. J. Finkel, *Commonsense justice: jurors' notions of the law* (1995) at p. 2.

²¹⁰ Dumas.

²¹¹ Elwork, Sales and Alfini, *Making jury instructions understandable* (1982) Charlottesville, VA: Michie.

²¹² L. J. Severance & E.F. Loftus, *Improving the ability of jurors to comprehend and apply criminal jury instructions* (1982) 17 *Law & Society Review*, pp. 153-198.

²¹³ Charrow & Charrow, *Making legal language understandable* (1979) 79 *Colum.L.Rev.* 1306.

²¹⁴ B.K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues* (2000)

Tennessee Law Review 701.

²¹⁵ Steele & Thornburg, *op. cit.*

can be made. Smith²¹⁶ is of the opinion that this is due to the jurors reverting to prior, perhaps incorrect, knowledge of the law. Through a number of experiments, he had some success in persuading the subjects to abandon or revise their prior knowledge. English and Sales²¹⁷ carried out a detailed examination of this so-called 'ceiling effect' and suggested that it was not fully proven. As a matter of common sense, it seems obvious that, when faced with a largely incomprehensible direction, the jury will tend to fall back on their prior knowledge of the law, which we know is largely incorrect. Here, once again, the New Zealand research confirms in actual trials what most writers previously believed. Indeed, there were only 13 of the 48 trials in which fairly fundamental misunderstandings of the law at the deliberation stage did not emerge.²¹⁸ Elwork²¹⁹ is of the opinion that instructions should be rewritten, probably a number of times, until two thirds to three quarters of a 12 person jury could understand any given point of law. A useful guide to rewriting instructions in Michigan was provided by Joseph Kimble and these, with suitable modifications, could be used as a basis for reform in England.²²⁰

Comment

Our Judicial Studies Board delegates the drafting of jury instructions to a committee of two senior circuit judges, who may send them out to consultation with other circuit judges and members of the superior judiciary. The expertise of psychologists or linguistics experts is not employed, nor are the instructions 'road tested' on experimental jurors or members of the public.²²¹ We consider this such a serious shortcoming, with such far-reaching potential consequences that we are sending our findings direct to the Judicial Studies Board. We come back to the issue of jurors' comprehension of instructions in Part C.

Beyond Reasonable Doubt

One particular direction which is almost universally seen as a problem is that regarding the standard of proof required by the Crown to prove their case, that is 'beyond reasonable doubt' (BRD).²²² The perennial problem is in quantifying the size of a 'reasonable doubt' required to avoid conviction.

In terms of a BRD direction, most judges, particularly the inexperienced ones, with an eye on the appellate courts,²²³ tend to favour something similar to that approved by Lord Scarman in

²¹⁶ V. L. Smith, reported in English & Sales *op. cit.* at p. 390 et. seq.

²¹⁷ English & Sales *op. cit.*

²¹⁸ Young, Cameron and Tinsley, *op.cit.* para. 7.13 et. seq.

²¹⁹ Elwork, Sales and Alfini, *op. cit.*

²²⁰ J. Kimble, 'The route to clear jury instructions' (1999) 78 *Michigan Bar Journal* 1406. Work has been done by experimental psychologists on whether personality influences a juror's reactions to instructions. In 2000, Shaffer and Wheatman found dogmatics were more likely than others to properly apply the instructions they received. See D. Shaffer and S. Wheatman, 'Does Personality Influence Reactions to Judicial Instructions?' (2000) 6 *Psychology, Public Policy and Law* 655 and citations therein.

²²¹ We are grateful to the Director of Studies, His Honour Judge David Pearl for this explanation, on 6 November 2000.

²²² For the fascinating history of BRD see Barbara J. Shapiro, *Reasonable Doubt and Probable Cause* (1991) University of California Press, Berkeley. The BRD direction was being used by judges instructing juries in England, Boston, Mass., Canada and Ireland by 1800. Shapiro argues that it was equated with its predecessors 'moral certainty' and 'satisfied conscience', which were based on rational assessment. Judges started instructing jurors to reach a rational decision, based on the evidence, from the sixteenth century or earlier.

²²³ Standard directions are provided by the Judicial Studies Board. <http://www.cix.co.uk/~jsb>. See also P.J. Richardson and D.A. Thomas (eds.) *Archbold* (2001) 4-380. See also, Young, Cameron and Tinsley, *op.cit.* paras. 7.15-7.17.

Ferguson v The Queen.²²⁴ which was they must be satisfied beyond reasonable doubt so that they feel sure of the defendant's guilt. But how sure must they be? There is an increasing body of opinion that juries tend to place this level too high and refuse to convict where there are any doubts, however small. Research by Montgomery,²²⁵ comparing English and American directions, found that English research subjects were not aware that the quantum of proof does not vary with the seriousness of the crime and so would wrongly acquit those charged with serious offences and wrongly convict in the case of petty offences. Very importantly, the research found that 73.5 per cent of the subjects who received the common English direction including 'sure' equated BRD with an impossible 100 per cent proof (!) but, of those receiving the strongest of the American directions on BRD, only 18.4 per cent thought BRD required 100 per cent proof. (The subjects were adults from Luton and the Chester electoral rolls). This confirms a hypothesis, raised by Darbyshire in 1997,²²⁶ that jurors fix an unrealistically high standard of proof when asked to be 'sure'. The results of this research surprised Zander and prompted him to conduct research for the Criminal Courts Review. He tested versions of the commonest English direction, including 'sure' on samples of 1,763 members of the public, 1,364 magistrates and 128 criminal justice professionals, in 2000. He found that 51 per cent of the public and 31 per cent of the magistrates and professionals interpreted variations of the standard direction as requiring 100 per cent proof of guilt.²²⁷

Earlier, in the United States, Hastie²²⁸ surveyed a number of studies and found the evidential percentage at which the subjects would convict to be between 51 per cent and 92 per cent, almost identical to the level which they estimated for the balance of probabilities (48-92 per cent). Robert C. Power²²⁹ carried out a thorough review of the American research regarding BRD, much of it relevant to the English jury. He suggests that many judges believe that jurors do not follow the reasonable doubt standard at all, quoting Judge Frank who said 'were the full truth declared [as to what goes on in the jury room] it is doubtful whether more than one per cent of verdicts could stand.'

In America, as here, judges have struggled to quantify the level of doubt required using tools such as 'moral certainty' or drawing analogies with the affairs of everyday life, although, in many cases, these have drawn the standard too low and been found wanting on appeal. Further confusion is caused by an unhelpful practice, which is the tendency of judges to 'clarify' reasonable doubt a number of times during the summing up, in the knowledge that as long as one of them represents the correct standard, the Court of Appeal will not question it.²³⁰

Michael Saks²³¹ is of the opinion that numerically quantifying the level of the certainty required to convict would improve perception and understanding. The modern lay person is accustomed to using percentages in everyday life and can easily judge the difference between 50 per cent and 90 per cent. Research by Dorothy Kagehiro,²³² reported in Power's article found this to be the case but widespread use faces an insurmountable hurdle. Not only have

²²⁴ *Ferguson v The Queen* [1979] All E.R. 877.

²²⁵ J. W. Montgomery, 'The criminal standard of proof' (1998) 148 N.L.J. 582.

²²⁶ For the New Lord Chancellor — Some Causes of Concern About Magistrates [1997] Crim.L.R. 861 at 871.

²²⁷ Michael Zander, 'The Criminal Standard of Proof — how sure is sure?' (2000) 150 N.L.J. 1517.

²²⁸ Hastie (ed.), *op. cit.* pp. 100-105.

²²⁹ R. C. Power, 'Reasonable and other doubts: The problem of jury instructions' (1999) 67 Tenn. L.Rev. 45.

²³⁰ For example *Coddington v R.*, 23rd March 1996, Privy Council Unrep.

²³¹ Saks, *op. cit.* at 51.

²³² D.K. Kagehiro, 'Defining the standard of proof in jury instructions' (1990) *Psychological Science* 1 at 194.

the judiciary traditionally been wary of the science of mathematical probability,²³³ it would appear that judges themselves are unable, when asked, to accurately identify a percentage of certainty which would satisfy BRD. Of 171 federal judges questioned by Professor McCauliff, just over half placed the level at 80-90 per cent; 12 per cent chose an impossible 100 per cent certainty and the rest 95 per cent.²³⁴ Reid Hastie is of the opinion that communication of a precise, unambiguous meaning of the standard of proof is a notoriously impossible task.²³⁵ A further issue to consider is the effect of the introduction of the majority verdict which weakens the principle of proof beyond reasonable doubt as the jury collectively must be said to doubt the guilt of the accused.²³⁶ We will return to the issue of BRD in Part C, below.

Jury Deliberation

After having heard the evidence and received their directions, the jury retire as a group to deliberate, although in many ways evaluating evidence and deciding on guilt is a singularly unsuitable task for 12 random individuals. Stephenson²³⁷ points out that the task cannot be subdivided amongst them. It is not quantifiable, in that they can increase speed or production and neither is it an additive task requiring the totalling of every piece of evidence.

Once a clear majority appears, then through a process of discussion and negotiation, other members are persuaded to adopt that verdict until the required majority for conviction is reached or the jury is hung.²³⁸ Also, it appears that the larger the number of verdict options available to a jury, the more deliberations will centre on negotiation rather than examining the evidence.²³⁹ This point is supported by the accounts of real jurors in Part C.

Although in the eyes of the law the jurors should not yet have decided on a verdict, most writers recognise that many will have a pre-deliberation preference. According to Kalven & Zeisel,²⁴⁰ the eventual verdict will mirror these preferences in 90 per cent of cases. This is the so-called majority effect. The larger the majority, the more likely that it will be the eventual outcome.²⁴¹ This is the main reason why complete jury reversals in favour of a tiny minority, whether as portrayed by Henry Fonda or Tony Hancock, are extremely rare.²⁴² Deliberation could in many ways be considered more of a group negotiation based on the need to reach agreement than to thoroughly examine the evidence. One of the problems is the lack of guidance given to the jury on how to conduct the deliberation.²⁴³

In a typical trial, the jury, at the start of deliberation, will be fragmented into opposing groups. In view of the fact that the jurors should not yet have discussed the case, this seems curious. Vidmar & Hans highlight the uncanny human ability to detect and form alliances with others

²³³ Saks, *op. cit.* at 43.

²³⁴ C. M. A. McCauliff, Burdens of proof, degrees of belief, Quanta of evidence, or constitutional guarantees? (1982) 35 Vand.L.Rev. 1293 pp. 1325-27.

²³⁵ Hastie (ed.), *op. cit.* pp. 89-101.

²³⁶ G. Maher, The verdict of the jury in *The jury under attack*, *op. cit.* at p.40 et seq.

²³⁷ Stephenson, *op. cit.* pp. 186-7.

²³⁸ Hastie, Penrod and Pennington, *op. cit.* at p. 205.

²³⁹ R. Arce, Evidence Evaluation in Jury Decision-Making in Bull and Carson (eds.), *Handbook of Psychology in Legal Contexts* (1995) p. 570.

²⁴⁰ Kalven and Zeisel, *op. cit.* also Hans & Vidmar, *op. cit.* at p. 110.

²⁴¹ Saks, *op. cit.* at 37.

²⁴² Saks, *op. cit.* at 36.

²⁴³ Hans and Vidmar, *op. cit.* p. 102.

of a similar outlook, even without discussing the case.²⁴⁴ In *Inside the Jury*,²⁴⁵ Penrod & Hastie undertake a thorough examination of the process by which these opposing factions negotiate their way to an agreement by the requisite majority. Indeed, much of this work concentrates on the effect of requiring a majority decision rather than a unanimous one. Their main findings suggest that if unanimity is required, the deliberations involve a more thorough investigation of the evidence and law (evidence-driven), probably because dissenting or minority factions have the ability to hang the jury. Another feature of the unanimous verdict is the distribution of the discussions. Surprisingly, a large amount of discussion takes place after the largest faction reaches eight. More surprisingly, the discussion after the faction size reaches ten often includes error correction and references to the standard of proof, quite often resulting in questions to the judge.²⁴⁶ Even where the dominant faction has reached a substantial majority, as high as eight, there is still the possibility of reversal or a hung jury.

In the case of these evidence-driven deliberations, the jury follows a three-stage sequence of story construction, verdict categorisation and classification following the story model.²⁴⁷ Unlike that of the individual juror, the jury's story can draw on the collective experience of them all²⁴⁸ and this serves to counter any prejudice or bias. Indeed, some jurors are surprised to learn that an alternative plausible story may exist, based on the same evidence.²⁴⁹ The jury also has the added advantage when constructing the story that their collective ability to remember evidence (90 per cent accuracy) and understand complex instructions (80 per cent accuracy) is far better than that achieved by individual jurors.²⁵⁰

In the event of a majority decision's being sufficient, there tends to be less consideration of the evidence and more emphasis on the mechanics of reaching an agreement. This does, however, result in shorter deliberations. In addition, rather than following the story model, these verdict-driven deliberations tend to start with the verdict category and construct a story to fit. Saks²⁵¹ adds that after a majority verdict, the existence of dissenters left the majority with lingering doubts that they had delivered the correct verdict. Obviously the more thorough evidence-driven approach is preferable to the latter verdict-driven one and the authors suggest that, where a majority is sufficient, the jury should be directed to examine the evidence in depth before polling the members on their verdict.²⁵² Although, in reality, initial English deliberations require unanimity, (a majority verdict is only allowed after the jury has deliberated for more than two hours),²⁵³ such a direction would also deal with the problem of homogenous juries. These groups tend not to consider fully any evidence that conflicts with their own view. Heterogeneous groups, by contrast, tend to be more evidence-led.²⁵⁴ The New Zealand project found both evidence-driven and verdict-driven deliberations but also reported that some juries who took an early poll still went on to carry out a full examination of the facts and that some groups who failed to take an initial poll were in fact

²⁴⁴ Hans and Vidmar, *op. cit.* p. 100.

²⁴⁵ Hastie, Penrod and Pennington, *op. cit.* p. 228.

²⁴⁶ *ibid.* p. 229.

²⁴⁷ *ibid.* p. 232. Also Hans & Vidmar, *op. cit.* p. 104.

²⁴⁸ Hans & Vidmar, *op. cit.* p. 112.

²⁴⁹ Stephenson, *op. cit.* pp. 196-7. See also Lempert, *op. cit.* p. 570.

²⁵⁰ Hastie, Penrod and Pennington, *op. cit.* See also Hans and Vidmar, *op. cit.* p. 120.

²⁵¹ Saks, *op. cit.* at 41.

²⁵² Hastie, Penrod and Pennington, *op. cit.* at p. 230.

²⁵³ Juries Act 1974, s.17. See also Lloyd-Bostock and Thomas, *op. cit.* sec. xii

²⁵⁴ Arce, *op. cit.* 575.

disorganised, inefficient and essentially lacking in focus or direction.²⁵⁵ We come back to accounts of verdict-driven juries in Part C.

Most commentators on jury deliberations have considered the balance of power within the group, quite often by studying relative spoken contributions.²⁵⁶ It appears that approximately three jurors in the average jury are responsible for 50 per cent of the discussion, although this is balanced by the two to four jurors who barely speak at all.²⁵⁷ It would be a mistake, however, to believe that this silent minority play no part in deliberations. Often, silence can be explained by the fact that they are part of a faction whose views have been adequately expressed.²⁵⁸ This silent minority hold a disproportionate level of power. The reason for this is the need for some of the players to change sides during deliberations and this proves much harder for someone who has nailed his flag to the mast by speaking in support of a particular verdict.²⁵⁹ This point seems not to have been taken account of by those who have interpreted the findings of Garrod and others, widely publicised in 2001 (discussed below) to imply that we could reduce jury size because the silent jurors are non-participants. Arce also found that when the qualitative value of utterances was examined, the foreperson dominated the deliberation and the majority of deliberations conformed to the foreperson's initial decision.²⁶⁰

Other, possibly linked, factors which have been noted include the seating positions at the table, (those at the head or end of the table are responsible for up to a third of discussions during deliberation²⁶¹) and the status and gender of the speaker. Penrod & Hastie listed those with higher status occupations, more education, male gender and foreman status as contributing more.²⁶²

In order to progress from the pre-deliberation stalemate to an agreed verdict, it is obviously necessary for some of the jurors either to convince everyone else they are wrong or, more probably, alter their own stance.²⁶³ One viewpoint is that after a full discussion with the other members, the juror realises that she has missed some of the evidence or misunderstood an instruction on the law and therefore has a change of conviction.²⁶⁴ Arce has measured post-deliberation decisions and suggests that over 10 per cent of jurors, where a unanimous decision was required, voted with the group verdict although they still maintained their opposing, pre-deliberation, view. This effect is known as conformity and is most prevalent where the individual is in favour of a guilty verdict but the majority vote not guilty. This could also explain why juries are more lenient than individual jurors are. Arce is of the opinion that an instruction should be given to counteract this.

In the event of the jury's being evenly divided at the start of deliberations, the likely verdict will be acquittal. Saks gives a number of reasons for this so-called asymmetry, perhaps the

²⁵⁵ Young, Cameron and Tinsley, *op.cit.* para. 6.6.

²⁵⁶ Hans & Vidmar, *op.cit.* p. 108.

²⁵⁷ Arce, *op.cit.*

²⁵⁸ Arce, *op.cit.* 567.

²⁵⁹ *Ibid.* 568.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.* 567.

²⁶² Hastie, Penrod and Pennington, *op. cit.* p. 233.

²⁶³ Hans & Vidmar, *op. cit.* p. 110.

²⁶⁴ See Young, Cameron and Tinsley, *op.cit.* para. 6.47.

strongest being the high standard of proof required.²⁶⁵ We come back to examples of the dynamics of participation given and discussed by real jurors in Part C.

Competence

Although there is much evidence that suggests that jurors set about their task in a conscientious manner,²⁶⁶ the overriding question is whether a jury of 12 random citizens is competent to decide on guilt or innocence under the law. Vidmar and Hans are of the opinion that critics of jury trials are making a comparative judgement and should therefore provide an alternative, whether it be a single judge, panel of judges or mixed panels of judges and laymen.

Some valid arguments against the use of juries include the fact that it is impossible to tell exactly what they have based the decision on, owing to secrecy and their apparent difficulty understanding and applying instructions. Other critics point to the fact that judges are skilled in fact finding and understand the law and are therefore more suited to the task. Factors in support of the jury include their ability to apply a collective wisdom and sense of fair play which a judge, focused only on issues of fact and law, may overlook.

Most assertions of jury competence are founded in the results of the Chicago Law School project undertaken by Kalven and Zeisel.²⁶⁷ Although this conclusion was almost universally accepted at the time, later analysis proved more critical.²⁶⁸ In a study of 3,576 criminal trials, the judges were asked to complete a questionnaire to express their satisfaction with the jury's decision. The fact that the judges and jury agreed in 78 per cent of cases has been constantly quoted in support of the jury system but a further examination of the figures reveals some more worrying statistics. Of the 64.2 per cent of cases in which the jury convicted, judges agreed with 96 per cent (62 per cent of the sample). Although this difference of 2.2 per cent appears small, it represents approximately 79 defendants in the study who were possibly wrongly convicted. Equally worrying is the discrepancy between the 1,083 people acquitted by the juries of which 604 would have been convicted by the judges. If these figures were a true representation and were transposed to the 1999 English Court Service figures, something like 225 convictions and over 4000 acquittals per year could be in error.²⁶⁹ Finding an explanation for the overall 22 per cent discrepancy is not straightforward. The obvious inference, that the jury just failed to understand the evidence, was rebutted by the fact that the questionnaire asked the judges to indicate more complicated cases and these proved not to be the disputed ones. The judges themselves thought the following factors were responsible for the disagreements over decisions:

Jury Equity	29 per cent
Sentiments about the defendant	11 per cent
Issues of evidence	54 per cent
Facts only the judge knew	2 per cent
Disparity of counsels' abilities	4 per cent

Stephenson points out that even if one ignores jury equity, the judges' unique knowledge and the effect of poor counsel, over 14 per cent of jury trials are incorrectly decided in the eyes of

²⁶⁵ Saks, *op. cit.* at 38.

²⁶⁶ McCabe & Purves, *op. cit.* p.60. Also Young, Cameron and Tinsley, *op. cit.* para. 7.11.

²⁶⁷ Kalven and Ziesel, *op. cit.*

²⁶⁸ Baldwin and McConville, *op. cit.* Chapter One.

²⁶⁹ Court Service Website www.courtservice.gov.uk

the judge because of misinterpretation of the evidence or extra-legal sentimental reasons regarding the defendant. Indeed, Kalven and Zeisel themselves recognised that juries tended to be more lenient than the judge in cases where the defendant had no previous convictions and they thought that the jury tended to misapply the standard of proof.

Baldwin and McConville²⁷⁰ carried out research on cases in Birmingham and London using a similar methodology but here the trial lawyers, police and judges completed questionnaires. They found that judges had serious doubts over an acquittal in 32 per cent of cases and that in 36 per cent of the sample the judge plus one other professional expressed doubts regarding an acquittal. Only a third of acquittals in Birmingham were seen as clearly justified by all respondents.²⁷¹ In general, the disagreements were more with acquittals than convictions but although in 88.4 per cent of cases the conviction was not doubted by any respondent, in a worrying 1.2 per cent of cases, all four respondents, including the police and prosecuting counsel doubted the decision.²⁷² Further, Baldwin and McConville failed to find evidence of a clear-cut pattern to the perverse verdicts, such as the application of jury equity or consideration of legitimate extra legal factors.

A further point raised by Stephenson²⁷³ is that in order to declare the jury as being competent there should at least be some element of consistency in their decisions, and so he examines the results of the Oxford Jury Project carried out by McCabe and Purves.²⁷⁴ This is perhaps the best shadow jury experiment to date, despite its relatively small scale, involving only 30 cases in Oxford Crown Court. The subjects were selected from the electoral register in the same way as the real jury. They watched the real trial and were then observed in deliberation and delivered the verdict to the researchers. Unfortunately, the shadow jury would have acquitted or hung on 23 per cent of those found guilty and would have convicted 38 per cent of those acquitted by the real jury.²⁷⁵ In view of these findings, it could be concluded that the widespread view of the jury's competence may be misplaced and a significant number of decisions are based on nothing more than guesswork and intuition.

Further issues of concern in relation to disputed verdicts relate to the use of jury equity or, as it is termed in America, jury nullification²⁷⁶ and the effect of extra-legal factors such as sympathy and prejudice.

Jury equity could be summed up as the refusal of juries to apply the law when they believe that to follow it would lead to an unjust verdict.²⁷⁷ There are a number of reasons why the use of equity could be justified, such as where the law has become unjust or oppressive by failing to keep up with current mores. Others believe that a certain amount of flexibility is required in order to deal with situations which lawmakers would not have been able to foresee. The opposing view is that the law should reflect the majority view and is created by elected individuals, accountable to their constituents and as such should not be overridden by

²⁷⁰ Baldwin and McConville, *op.cit.*

²⁷¹ *Ibid.* at p. 46.

²⁷² *Ibid.* See table 9 at p. 51.

²⁷³ Stephenson, *op.cit.* p. 183.

²⁷⁴ McCabe & Purves, *op. cit.*

²⁷⁵ Stephenson, *op.cit.* p. 184.

²⁷⁶ See generally, H. S. Erlanger, Jury Research in America (1970) 4 *Law & Society Review* 345.

²⁷⁷ Hans and Vidmar, *op.cit.* p. 149 et. seq. see also N. J. King, The American Criminal Jury (1999) 62 *Law & Contemporary Problems* pp. 50-54 and see now the same work by King in Vidmar (ed.), *World Jury Systems* (2000), *op.cit.*

anonymous, unelected, individuals.²⁷⁸ Some authors such as Finkel²⁷⁹ argue that nullification is really the jury's attempt to perfect the law, but he almost completely overlooks the cases of wrongful conviction, which can also result. Bedau and Radelet²⁸⁰ identified convictions demanded by community outrage as a major source of miscarriages of justice. There has been a long tradition of nullification in England. The removal of the death penalty for many minor offences followed the refusal of juries to convict. Perhaps the most notorious modern day example of jury equity was the acquittal of Clive Ponting for breaches of the Official Secrets Act, despite the judge's almost directing conviction. There have been several examples in England and Wales, in 2000-01 of jury acquittals of persons charged with possessing cannabis when they have defended themselves by arguing that it relieved the symptoms from multiple sclerosis. The situation is different in some American states, which instruct the jury that they can decide on the law and the facts. The law differs between states. In some states jurors are told they may nullify, in others they may not and in some the instruction is ambiguous. Horowitz²⁸¹ conducted research in Ohio using ex-jurors who, after hearing a taped trial were given one of three instructions, the standard Ohio, the Maryland nullification or a radical nullification. The last of these said that they had final authority to apply law to the facts, and they could express community sentiment and their own feelings of conscience. Although the results found little difference between the Maryland and Ohio instructions, those faced with the radical option were more likely to acquit in the case of euthanasia, convict in the case of drink driving and make no distinction in a murder case. In addition, those given the radical direction spent less time examining the evidence and more time discussing other things such as the nullification power. It seems, then, that where juries are told that they have a right to ignore the law, the verdict outcome may be altered.

Sally Lloyd-Bostock and Cheryl Thomas²⁸² make the valid point that it is not always easy to distinguish clearly between verdicts where the jury is using power in defiance of the law and government and verdicts where the jury has been confused, incompetent or prejudiced. To this, Saks²⁸³ would add that although much attention is paid to juries nullifying the law, in his view, when judges issue instructions that cannot be understood, they are, themselves, nullifying the law.

The manifestation of sympathy and prejudice have long been recognised as possible dangers in jury trials. Clarence Darrow, a famous American trial lawyer, said jury members seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least to feel sympathy for him; facts regarding the crime are relatively unimportant.²⁸⁴ The jury, being a random collection of citizens, obviously arrives at the trial carrying the baggage of their individual previous experiences²⁸⁵ and biases

²⁷⁸ Lieberman & Sales, *op. cit.* 620. Darbyshire, *The Lamp That Shows That Freedom Lives — is it worth the candle?* [1991] *Crim.L.R.* 740 at 750.

²⁷⁹ N. J. Finkel, *op. cit.*

²⁸⁰ H. A. Bedau & M. Radelet, *Miscarriages of justice in potentially capital cases* (1987) 40 *Stan. L. Rev.* 21 pp. 56-57.

²⁸¹ I. A. Horowitz, *The effect of jury nullification instruction on verdicts and jury functioning in criminal trials* (1985) 9 *Law and Human Behavior* 25-36 at p. 29.

²⁸² Lloyd-Bostock and Thomas, *op. cit.* p. 163.

²⁸³ Saks, *op. cit.* at 35.

²⁸⁴ Hans and Vidmar, *op. cit.* p. 131.

²⁸⁵ N. Vidmar, *The Canadian Criminal Jury* (1999) 62 *Law & Contemp. Probs.* 141, pp.155-156 and see now the same item in Vidmar (ed.), *World Jury Systems* (2000), *op. cit.* Young, Cameron and Tinsley, *op. cit.* para. 7.9.

based on factors such as race, gender, speech²⁸⁶ and appearance.²⁸⁷ It is therefore strange that most of the previously mentioned research has indicated that the jury as a group tends to be more lenient than a judge would be. Although there are ample tales of the attractive blonde or a disabled defendant swaying the jury (and there are examples of jurors favouring certain witnesses in Part C), to what extent will this sympathy be represented in the final verdict?²⁸⁸ Kaplan and Miller²⁸⁹ carried out experiments on reducing the effect of jury bias and found that the bias component decreased as the weight of the evidence increased and concluded that a possible effect of deliberation is to expose the juror to additional evidence, missed originally. Another feature of deliberation is to air the juror's opinions with the risk that they will expose their prejudice. Myers²⁹⁰ investigated where such extralegal considerations may come into play. Kalven and Zeisel had suggested that the jury felt free to act when the evidence was inconclusive, the so-called liberation hypothesis. Contrary to this, Myers found that jurors attributed different weight to differing types of evidence and exercised their liberty to depart from instructions only in a limited class of cases. Typical examples were cases involving a serious offence, a young victim and an employed defendant.²⁹¹ One type of juror who has been the recipient of extra scrutiny is the so-called authoritarian juror, characterised as conservative, rigid and punitive. Many trial lawyers believe that this type of juror reaches a verdict early in the trial, is more resistant to change and convicts more frequently. Bray and Noble carried out research using 280 psychology students and found that high authoritarian subjects did tend to convict more but, when properly directed, considered the evidence fully and were more prone to change their view than low authoritarians.²⁹²

Suggested Improvements

Although the area with the most potential for improvement has already been mentioned above, namely rewriting jury instructions, research has identified a number of others.

Written Instructions

It is a well-documented fact that audible information is lost soon after receipt, and that people are better able to recall printed material.²⁹³ Lieberman and Sales²⁹⁴ are of the opinion that information processing is better when using written instructions resulting in better comprehension, retention and application. They cite Heuer and Penrod²⁹⁵ who found that although written instructions did not reduce deliberation times, the jurors were more satisfied and efficient and participated in higher quality deliberations. Although there is an additional administrative burden on the court, both lawyers and judges were generally favourable and found that the benefits increased with the complexity of case. With the above in mind, Dann²⁹⁶ has suggested the use of a juror notebook which would contain, among other things, a

²⁸⁶ Conley, O Barr and Lind, reported in Hans and Vidmar, *op.cit.* p. 140.

²⁸⁷ D. L. Wiley, Beauty and the Beast 27 St. Mary's L.J. 193. See also Saks, *op.cit.* at 27.

²⁸⁸ Saks, *op.cit.* at 20.

²⁸⁹ M. F. Kaplan and L.E. Miller, Reducing the effects of juror bias in Wrightsman, Kassin and Willis (eds.) *In The Jury Box.* (1987) at p. 114 et. seq. Also, Arce, *op.cit.* at p. 575.

²⁹⁰ M. A. Myers, Rule Departures and Making Law in *In The Jury Box.*, *op.cit.* at p. 95.

²⁹¹ *Ibid.* at p. 108.

²⁹² R. M. Bray and A. M. Noble, Authoritarianism and Decisions of Mock Juries in *In the Jury Box*, *op.cit.* at p. 83 et. seq.

²⁹³ Miller & Mauet, *op.cit.* at 563.

²⁹⁴ Lieberman & Sales, *op.cit.* 626.

²⁹⁵ L. Heuer & S.D. Penrod, Instructing Jurors: A Field Experiment with Written and Preliminary Instructions (1989) *Law and Human Behavior* 13 at 409.

²⁹⁶ Dann, *op.cit.* at p. 9.

list of witnesses (with photos.), copies of key documents and a final written instruction. Backed by the American Bar Association and the New York Bar Association, he asserts that this would prevent confusion, aid deliberation, require fewer questions during deliberation and increase confidence in the verdict. Similar conclusions were reached by the New Zealand²⁹⁷ researchers who found that 62.2 per cent of jurors said they would have found a written summary of the law useful.²⁹⁸ They also suggested increased use of visual aids²⁹⁹ and reducing juror passivity by encouraging them to ask questions.³⁰⁰ We come back to written instructions in Part C and the conclusion.

Timing of instructions

At present it would appear that most judges restrict opening instructions to a number of basic house keeping matters usually leaving a fuller outline of the issues for the Crown opening.³⁰¹ There has been a great deal of discussion regarding the timing and content of judicial instructions. Lempert³⁰² is of the opinion that pre-instruction may help the jurors focus on the most relevant evidence and prevent them placing undue weight on legally irrelevant factors. This could be more important in complex trials to prevent the jury being overwhelmed, although he also argues that it might be better for the jurors to base the story on their naive understanding and apply a form of popular justice. Dumas suggests that jurors are like students taking several new and arcane courses simultaneously in their time in the jury box and need all the help they can get. She suggests a roadmap, a list or diagram telling jurors where they are going.³⁰³ Lieberman and Sales³⁰⁴ studied some of the research in the area and listed some potential benefits which are:

1. Improved juror recall of evidence and instructions.
2. Reduction of bias and reliance on stereotypes.
3. Reduced confusion about procedure.
4. Discouragement of opinion and verdict formation prior to deliberation.

Against these, however, they also listed a number of potential drawbacks:

1. Instruction may be redundant when combined with the general introduction.
2. The judge may not be able to decide, in advance, on the appropriate direction.
3. Progress may be slowed down.
4. The jurors may seek out evidence which favours the prosecution version, (hypothesis seeking).
5. It may impose a single perspective on the jury.
6. The jury may arrive at a verdict before all the evidence is given.

²⁹⁷ Young, Cameron and Tinsley, *op.cit.* para. 2.58 & 3.7 to 3.9.

²⁹⁸ *Ibid.* paras. 7.59-7.62. See now the discussion by Cameron et al in N. Vidmar (ed.), *World Jury Systems* (2000), *op.cit.*, at p. 205-206.

²⁹⁹ In this context, it is to be welcomed that the Lord Chancellor proposes to increase the use of technology in the Crown Court, by the presentation of evidence on screens and by using digital audio recording equipment. See his speech to the Warwickshire Law Society on 17 November 2000, *Speeding up Justice in the Crown Court*, press release 407/00, LCD website, www.open.gov.uk and the Court Service Document, *Courtroom of the Future*, 26 October 2000, www.courtservice.gov.uk. This technology has been used for some years on serious fraud trials but not routinely.

³⁰⁰ Cameron, et al, in Vidmar (ed.), 2000, *op.cit.*, at p. 205-206.

³⁰¹ *Ibid.* Chapter 2.

³⁰² Lempert, *op. cit.* p. 570 see also Saks, *op.cit.* at 51.

³⁰³ 2000, *op. cit.*

³⁰⁴ Lieberman and Sales, *op.cit.* p.629.

There is also the issue of the jury's hearing all the evidence with knowledge of both the presumption of innocence and beyond reasonable doubt standards. Commentators appear divided as to whether this is a benefit or a burden. After considering the research, Lieberman and Sales found that there was plenty of evidence in support of pre-instruction, typified by that of Heuer and Penrod³⁰⁵ who found that judges were less surprised and more satisfied with verdicts of pre-instructed juries. The judges also said that there was no additional burden put upon them and that they had no difficulty deciding on the pre-instruction. In short, they thought there were very few negative effects weighed against a number of useful improvements such as an evident reduction in jury bias.³⁰⁶ Dumas, in 2000, concludes that the weight of evidence is that while the impact of pre-instruction alone is questionable, the use of both pre- and post-testimony instruction improves both juror comprehension and juror satisfaction with the trial process.³⁰⁷

Pre-deliberation discussion

Jurors are admonished not to discuss the case until after all the evidence has been presented, in order to prevent contaminating the deliberation and to avoid premature judgement.³⁰⁸ These fears are a product of the legal system's belief in the passive juror model in which the jurors suspend judgement until the end of the case. Nearly every writer believes, however, that the vast majority have reached a decision before deliberation³⁰⁹ and a good proportion have also discussed the evidence.³¹⁰ Dann is of the opinion that as the jurors are already engaging in discussion, it would be better to turn this into a structured, judicially controlled discussion with clear guidelines and a warning not to make their minds up until after hearing all the evidence.³¹¹ The main weight of opinion amongst American commentators is that trials can best be improved by involving the jury more and the advantages of pre-deliberation discussions can be:

1. Interactive communication, leading to better understanding of the evidence.
2. Thoughts and questions can be addressed before they are forgotten.
3. Tentative premature verdicts can surface and be addressed.
4. Illegitimate, factional, discussions may be eliminated.
5. A more efficient use of jurors' time.³¹²

As part of the move toward a more active jury, the Arizona Supreme Court, in 1995, introduced a number of measures in civil cases which they hoped would result in more active and attentive jurors and thereby increase credibility and satisfaction.³¹³ The moves included using preliminary written instruction, pre-deliberation discussion and encouraging both note-taking and written questions to the judge. In general, the changes have been felt to be beneficial³¹⁴ although in some cases juror questions have been found to add up to 20 per cent to the length of the trial.³¹⁵ In 1999, Hans, Hannaford and Munsterman³¹⁶ studied the Arizona

³⁰⁵ Heuer & Penrod (1989) *op. cit.*

³⁰⁶ See also, Young, Cameron and Tinsley, *op. cit.* paras. 2.25, 2.26 and 3.13.

³⁰⁷ At p. 737.

³⁰⁸ Dann, *op. cit.* p.10.

³⁰⁹ Lieberman and Sales, *op. cit.* 635.

³¹⁰ Dann, *op. cit.* p.11.

³¹¹ *Ibid.* p. 11.

³¹² Lieberman and Sales, *op. cit.* 635.

³¹³ J. E. Shtabsky, A More Active Jury: Has Arizona Set The Standard For Reform With Its New Jury Rules? (1996) Arizona State L.J. Fall edition.

³¹⁴ Shtabsky, *op. cit.* p.1018.

³¹⁵ *Ibid.* 1022.

discussion provisions by means of questionnaires to participants in 200 trials, in half of which the jurors were instructed not to discuss the evidence until final deliberations. The results showed that the majority of judges and juries supported the rule allowing discussion, whilst attorneys and litigants were divided. Three quarters of judges believed that discussion helped juries understand the evidence and 30 per cent believed that they prejudged the evidence. 70 per cent of jurors who were given the right discussed evidence during the trial and said, on the whole, that evidence was remembered more accurately and the discussion helped them understand the case. The jurors also said that all points of view were put forward. The feared dominance by assertive individuals failed to materialise.

A similar project undertaken by Lakamp³¹⁷ one year after introduction also found that over 90 per cent of judges supported the use of controlled pre-deliberation discussions and reported that they had experienced no particular problems. In her article, she also addressed a number of possible drawbacks cited by the Californian Blue Ribbon Commission when they recommended implementing all of Arizona's reforms, except for pre-deliberation discussions, and found that the benefits outweighed the theoretical risks.³¹⁸ In the New Zealand criminal trial project, at least six of the juries (12.5 per cent of the total) systematically engaged in pre-deliberation discussions. The report concludes (d) discussions involving just the identification and summation of key pieces of evidence and an initial assessment of the credibility of that evidence did not in themselves lead to prejudgement, and they made the subsequent deliberations much more efficient and more focused.³¹⁹

Reasoned Decision

One aspect of the jury trial system which could, following the recent introduction of the Human Rights Act 1998,³²⁰ be open to added scrutiny is the absence of a reasoned opinion. The Court of Appeal has traditionally refused to examine any aspect of the jury's deliberation. The traditional reasons are to ensure the finality of decisions and prevent the jurors from unwarranted pressure.³²¹ This prohibition was confirmed as recently as September 2001.³²² Although these may be valid reasons, there are a number of cases where the appellate courts have refused to overturn decisions despite evidence of fundamental problems within the jury room.³²³ One disturbing example is *Nanan v The State*³²⁴ where the Privy Council heard evidence during an appeal against a death sentence in Trinidad and Tobago. The jury foreman had misunderstood unanimous to mean majority and the defendant was convicted. The jury was split eight to four in favour of conviction. Despite there being four affidavits from the jurors, the Board refused to consider them on the grounds that they should have spoken up at the time and also that there was no material difference between this misapprehension and any other, whether on the facts or on the law. Such unbelievable decisions, often dutifully aided by s.8 of the Contempt of Court Act 1981, are certainly examples of Homer nodding, perhaps even sleeping soundly. It is unlikely, however, that this

³¹⁶ Hans, Hannaford and Munsterman, The Arizona jury reform permitting civil jury trial discussions: The views of trial participants, judges, and jurors (1999) 32 U. Mich. J.L. Ref. 349.

³¹⁷ N. K. Lakamp, Deliberating juror pre-deliberation discussions: should California follow the Arizona Model? (1998) 48 UCLA Law Review 845 at p. 876.

³¹⁸ *Ibid.* at p. 858.

³¹⁹ Young, Cameron and Tinsley, *op.cit.* para. 6.8.

³²⁰ Human Rights Act 1998 in force October 2nd 2000.

³²¹ See for example, *Thompson* (1961) 46 Cr. App R 72.

³²² *R.v. Qureshi* *The Times*, 11 September 2001.

³²³ See, J. Gibbons, Explaining the Verdict (1997) 147 N.L.J. 1454.

³²⁴ *Nanan v The State* (1986) AC 860, quoted by Gibbons *Ibid.*

state of affairs can continue. The ECHR³²⁵ enshrines the right to a fair trial, and insists that all parts of the trial should be reviewable by a higher court. More specifically, in *Murray v United Kingdom*³²⁶ the European Court of Human Rights, in a case dealing with the Northern Ireland equivalent of s.34-35 of the CJPO³²⁷ held that the court could draw inferences as a result of the defendant's silence. Nevertheless, in a carefully worded decision, the court emphasised the need for a reasoned opinion, given in this case by a single Diplock judge. It is hard to see, in an era when every tribunal and magistrates' court provides a reasoned decision, how the secrecy of jury trials can survive. One suggestion would be to modify the special verdict mechanism and thus get an amount of feedback but some, such as Cornish thought that to do so would prove to be the death of the jury trial.³²⁸

Should the judge sum up on the facts?

I was told by a recorder, who was a strong supporter of the jury system, that when first appointed he used to sum up to the jury with complete impartiality, and the result was that the jury, being left to do its own thinking acquitted most of the defendants. To avoid these failures of justice the recorder changed his method and summed up in the direction he thought proper. The result was the expected number of convictions.³²⁹ Although the above may smack of cynicism, there is ample evidence of judges overstepping the line between summing up the facts and actively trying to influence the jury.³³⁰ Having originated from the fact that the judge was likely to be the only person at the trial with a complete record of the evidence, judges started to pre-digest the evidence in order to save the jury considering irrelevant information. By contrast, in America, most states prohibit the judge from expressing an opinion on the weight or credibility of the testimony,³³¹ as anyone who followed the Louise Woodward trial witnessed.³³² The danger for the English judge is that even where they limit themselves to marshalling the facts in order to provide an agenda for the jury to follow, there is still the danger that subtle and unrecorded body language can influence the jury. Wolchover is of the opinion that modern juries no longer require this protection from being misled by clever counsel. Further, he points out that the comprehension of the accused, and probably members of his family, that the summing up leaned towards the prosecution leads to dissatisfaction with the fairness of trial, warranted or not. He also points out that having to pay such close attention to proceedings keeps the judge alert, a quality apparently lacking in American judges.³³³ The New Zealand findings suggest jurors tend to focus on the directions concerning the law, but also that 30 per cent of the jurors interviewed believed that the judge communicated their view of an appropriate verdict.³³⁴ One method of reducing the impact of accidental non-verbal communication would be the use of written jury instruction as outlined above.

³²⁵ European Convention on Human Rights.

³²⁶ 41/1994/488/570 Feb 1996.

³²⁷ Criminal Justice and Public Order Act 1994.

³²⁸ W. R. Cornish, *op.cit.* at p. 258. See now modern discussion of the pros and cons of the jury's giving reasons by A.M. Pritchard, 'A reform for jury trial?' (1998) 148 N.L.J. 475.

³²⁹ Glanville Williams, quoted *ibid.* 112.

³³⁰ See D. Wolchover, 'Should Judges Sum up on the Facts?' [1989] Crim. L.R. 784.

³³¹ *Ibid.* p. 785.

³³² Lloyd-Bostock and Thomas, *op. cit.* p. 34.

³³³ D. Wolchover, 'Criminal Trials: Curtailing the Judge's summing-up function' (5th Feb. 1986) *The Law Society's Gazette* at p. 365.

³³⁴ Young, Cameron and Tinsley, *op.cit.* paras. 7.26-7.29.

Alternate or reserve jurors

In her interview with Grove, cited in Part C below, Baroness Helena Kennedy Q.C. suggested that alternate jurors be sworn in for long trials. We would strongly endorse this. Given the expense of some long trials, even swearing in two alternates would be worthwhile. It is common practice to use alternates in the United States. It is well known that in the O.J. Simpson trial, alternates replaced some of the jurors who were dismissed part way through the trial, for attracting too much media attention. In four Australian jurisdictions, up to six reserve jurors may be sworn in. This is not yet permissible in Canada, Scotland or New Zealand, nor in English law.³³⁵

Structural Changes

One of the major problems facing the criminal justice system is the issue of costs, as it is one of the few remaining demand led services within government. It comes as no surprise that many mooted reforms seem to be motivated by cost reduction. One of the main areas of concern is the amount of cracked trials, i.e. those scheduled for a full jury trial which collapse at the last minute. Last year there were 16,502³³⁶ such trials, amounting to 22.4 per cent of all Crown Court trials. In these, 60.4 per cent of defendants pleaded guilty on the day, 15.7 per cent pleaded guilty to an alternative charge and in 20.2 per cent of cases the prosecution offered no evidence. Whilst the perceived wisdom is that defendants choose jury trial because of the increased chance of acquittal and through a distrust of the magistrates court,³³⁷ 9,962 defendants last year chose jury trial and then pleaded guilty, foregoing any potential benefits and probably getting a more severe sentence. One reason for this could be the use of what Americans call the *slow plea* where the defendant admits guilt but disputes parts of the prosecution evidence. Another is the fact that time spent on remand, often locally and in better conditions, awaiting trial, counts as time served and is deducted from any eventual jail sentence.

It seems, therefore, that in order to cut down costs one must either restrict the right to elect trial by jury or reduce the cost of a Crown Court hearing. A number of alternative approaches are used in other jurisdictions and these are summarised below.

Six person juries.

Traditionally, and for no apparent reason, English and American juries have consisted of 12 people but some U.S. states have moved to six member juries in certain cases, not always to universal acclaim. As the purpose of the jury is to be representative of the population, including any minorities, reducing the size of the panel, as a matter of simple mathematics, reduces the incidence of minority representation.³³⁸ Another aspect of smaller panels is the variability of decisions. The larger the sample, the lower the margin of error so a six person panel results in a wider variety of outcomes. Saks is of the opinion that more errors of wrongful acquittal will result than of erroneous conviction.³³⁹ Kalven and Zeisel also found

³³⁵ M. Chesterman, *Criminal Trial Juries in Australia*, N. Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, P. Duff, *The Scottish Criminal Jury* and Cameron et al, *op. cit.*, all in Vidmar (ed.), *World Jury Systems*, 2000.

³³⁶ 1999 Court Service figures, *op.cit.*

³³⁷ Hedderman & Moxon, *Magistrates Court or Crown Court? Mode of Trial Decisions and Sentencing* (1992) Home Office Research Study no. 125.

³³⁸ Kalven & Zeisel, quoted in Hans and Vidmar, *op.cit.* p. 167. See also Arce, *op.cit.* 569. See also H. Zeisel and S. S. Diamond, *Convincing empirical evidence on the six-member jury* (1974) 41 *University of Chicago Law Review* 381.

³³⁹ Saks, *op.cit.* at 14 et. seq.

that six person juries hang less than half as often as 12 person juries.³⁴⁰ In a 2001 study by Fay, Garrod and Carletta (Glasgow and Edinburgh), using student subjects, they found that in groups of 10 or more, the majority of speech in discussions was produced by only 4 or 5 contributors, like a series of monologues and the members are influenced most by the dominant speaker. In 5-person groups, communication is like dialogue and members are influenced by those with whom they interact. While this research was received by the 2001 legal press as having implications for jury size,³⁴¹ we have read the research reports³⁴² and would be very wary of drawing any such implications. The experimental groups were students and the tasks they were given, to discuss a case of student plagiarism and formulate policy bears little comparison with the task of the jury. Even silent jurors have equal voting power with vocal ones. This was not a piece of research on jury size and should not be interpreted as such.

Trial by a single judge.

A number of other jurisdictions including parts of Canada, four Australian jurisdictions, New Zealand and America allow the defendant in certain types of case to waive the right to a trial by jury and be heard instead by a single judge. It is estimated in America that 14 per cent of federal cases are settled in this way.³⁴³ In 1991, Darbyshire argued that it is inaccurate to talk in terms of a right to jury trial in the context of indictable offences, as the defendant cannot opt for trial by judge alone.³⁴⁴ The question is, why would a defendant put themselves in the hands of a single judge? Research into Diplock trials in Northern Ireland³⁴⁵ suggests that judges may be better equipped to deal with certain types of cases. Defence counsel would prefer a single judge in cases involving forensic evidence. Being less impressed by expert evidence, judges were also thought to be more aware of the danger of identity evidence and more impartial when hearing sexual cases. Nevertheless, most counsel would still choose a jury as it is easier to raise a reasonable doubt of guilt. One further advantage of trial by a single judge would be their ability to give a reasoned opinion.

The Mixed Jury.

The use of juries consisting of both laypeople and experts is perhaps more common in some of the continental inquisitorial systems. Typically, laypeople are in the majority, to reduce the expert's influence. The advantage of a mixed panel is that it overcomes any difficulty which jurors may have in understanding the law. A major drawback is a tendency for the laypeople to agree with the expert, a process termed obedience. In a study using panels of eight laypeople and a judge, the subjects watched a video of a trial and the jurors were asked for a pre-deliberation verdict. The judge was then instructed to maintain the minority verdict regardless of its correctness. In nearly every case, the jurors changed their verdict to correspond with the judge.³⁴⁶

³⁴⁰ *Ibid.* at p. 168.

³⁴¹ Paper presented at the British Association for the Advancement of Science Festival, September 2001, as reported in *The Times*, 4 September 2001 and (2001) 151 N.L.J. 1269.

³⁴² N. Fay, S. Garrod and J. Carletta, Group Discussion as Interactive Dialogue or as Serial Monologue: The influence of group size (2000) 11 *Psychological Science* No. 6, p. 481 and summarised in the annual report of the ESRC Human Communication Research Centre (Edinburgh and Glasgow).

³⁴³ S. Doran & J. Jackson, The Case for Jury Waiver [1997] Crim. L.R. 155.

³⁴⁴ The Lamp That Shows That Freedom Lives — is it worth the candle? [1991] 740 at 743.

³⁴⁵ J. Jackson & S. Doran, *Judge Without Jury: Diplock trials in the adversarial system*. (1995). See also J. Jackson, The Value of Jury Trial in Attwood and Goldberg (eds.), *Criminal Justice* (1995) pp.87-93. See also S. Doran and J. Jackson, The Case for Jury Waiver [1997] Crim.L.R. 155.

³⁴⁶ Arce, *op.cit.* 573.

Although some of the above, suitably modified, could possibly be utilised here, a major obstacle is the lack of English empirical research against which to measure any changes. Any process of change would require pilot projects etc. which would only be successful if supported at the highest level and approached with an open-mindedness noticeably lacking in the past.

Effects on the juror

One aspect of the jury system which has come in for very little scrutiny is the physical and emotional impact of the trial on the juror. Although in some gruesome (and usually high profile) cases such as the 1985 Rosemary West trial, jurors are offered counselling and support, very little useful information into the average juror's psyche exists. Sally Lloyd-Bostock observed that Jurors who had served on murder cases spoke of long-term psychological problems resulting from the experience. Stressful experiences include exposure to horrific evidence and in some cases, intimidation. Some had lingering doubts about the wisdom of the final outcome.³⁴⁷ Here, the rules protecting the sanctity of the jury prevent the questioning of real jurors and it is just not possible to replicate the stress and responsibility using shadow jurors. For these reasons the inclusion in the New Zealand project of a number of questions concerning the welfare of actual jurors was most welcome.

The findings reveal that, in general, jurors are unprepared for the experience and tend to become marginalised and feel like outsiders.³⁴⁸ Typically, they become resentful of the number and length of delays, which many see as disrespectful and a waste of their valuable time. When asked about how they felt about their experience, however, 82 per cent made positive comments believing it to be worthwhile, despite some finding it harrowing and imposing a heavy responsibility. Some jurors were annoyed where the case involved trivial matters where the cost of prosecution outweighed the harm done.³⁴⁹ 23 per cent reported feeling tired or exhausted, often attributed to concentrating on oral evidence, and made worse by long, monotonous presentation and a lack of sleep. Jurors also reported stress or the symptoms of stress³⁵⁰ either during or after the trial. The sources of stress were identified as the responsibility of being a juror, feeling intimidated by the accused or their family, evidence in the case bringing back personal memories and the difficulty of deliberating under pressure to reach a verdict. Although there was provision for counselling, this was not widely taken up and one of the suggestions is that there should be some form of debriefing for all the jurors to allow them to talk about the case. A further suggestion was the provision of better segregation in order to prevent intimidation. In relation to the inconvenience, a number of the jurors had experienced high degrees of difficulty in relation to employment. Some were even forced to attend work after court hours³⁵¹ and others had major difficulty with childcare arrangements. Perhaps the worst affected are the self employed who are concerned at the long term damage caused to their business and lose money because of the poor payment rates.

³⁴⁷ Lloyd-Bostock and Thomas, *op. cit.* p. 28.

³⁴⁸ Young, Cameron and Tinsley, *op.cit.* para. 4.1.

³⁴⁹ *Ibid.* para. 10.1 et.seq.

³⁵⁰ *Ibid.* paras. 10.14-10.21.

³⁵¹ *Ibid* para. 10.41 et. seq.

Part C: What Can We Learn From English and Welsh Jurors' Accounts?

Few of those who demand the abolition of section 8 of the Contempt Act so that we can research real jurors seem to be aware that we already have quite a collection of published accounts of jury service, from which we could learn a great deal. They should not be written off as anecdotal. Given the expertise of some and the carefulness of most of the writers, they can be seen as highly informative and evocative participant observation studies. They allow us to check the applicability of the research findings in Part B and they provide unparalleled insights into jury dynamics and the pains and pleasures of jury service that cannot be experienced by experimental jurors. Some repeating themes emerge. Many make recommendations for reforms to jury trial or these can be implied from repeated comments.

The Subjects

Prior to the Contempt Act 1981, the legality of jurors publishing their experiences was unsettled at common law. This collection includes full accounts published prior to the Act, some truncated and some full (illegal) accounts made since 1981. One of the best known is LSE economics Professor Ely Devons' 1964 lecture on two periods of service a few years earlier. Fourteen, mainly by professional writers, were published in 1976, in Barber and Gordon's *Members of the Jury*.³⁵² They included a crime writer who had also served as an experimental shadow juror called Wallace, C.H. Rolph, a writer and ex-police officer and a social scientist, Barker. Socio-legalists Bankowski and Mungham used a social science graduate as a participant observer and the results appear in Carlens's *The Sociology of Law*, in 1976. An invaluable analysis was provided by an anonymous research psychologist, specialising in studies of the legal system, in the 1979 Legal Action Group *Bulletin*. Items by journalists Robin Lustig and David Leigh (on Patrick Ensor's³⁵³ service) appeared in *The Observer*, on the eve of the activation of section 8, in 1981. Eldin produced a truncated version of John Wright's service in the 1988 *New Law Journal*.

The *Journal's* editor took a bold decision to publish five uncensored accounts in 1990, calculating a low risk of prosecution under section 8 by the Attorney General. This group includes articles by Penny Darbyshire, co-author of this work, a senior law lecturer with a first degree in law, a master's degree in criminology and a doctorate in socio-legal studies, whose research area is criminal justice, Julian Harris, a former editor of the *Solicitors Journal*, Anna Hodgetts, a systems analyst, Ann Carlton and law graduate Jane Robbins. These were swiftly followed by comments from a woman juror in *The Daily Mail*, in the same month. Leila Spence complained of the disruptive impact of serving on a long trial in *The Times*, in 1991. A lengthy, valuable, analytical account by Stephen Lofthouse appeared in the *New Law Journal*, in 1992. He compared his observations with published research findings. John Harlow, *Sunday Times* journalist, complained, in that newspaper, in 1996, of the ease of avoiding service. In 1997, the *New Law Journal* carried a disgruntled account by Bell. Trevor Grove, ex-editor of the *Sunday Telegraph*, wrote a book, *The Jurymans Tale* in 1998, on his service on a four month Old Bailey kidnapping trial and added a 72 page commentary on the jury system. In 2000, interviews with recent jurors appeared on BBC

³⁵² Cited here as B and G. All items are fully referenced in the bibliography. Page numbers of quotations are not generally given, as each item is short. The jurors in B and G were: Barker, Brooks, Cohen, Hamilton, Male, Mellors, Morris, Potter, C.H. Rolph, Solesbury, Wallace, Wykes, Barber and Gordon.

³⁵³ Where the juror's occupation is not mentioned, the fact was not disclosed in the original article.

One *s Heart of the Matter* and BBC Radio Four *s The Commission*. Thus we have thirty-three accounts of varying lengths, spanning about four decades. Most jurors sat on at least two juries and some had sat on four or more. Experience in over sixty juries is included.

Commonly Mentioned Items

Popular topics are attempts to avoid service; the boredom, discomforts or inconvenience of service; the attitudes of court personnel and the judge toward the jury; inhibition over asking questions; selection of foremen; confusion over the evidence; note taking; evaluation of lawyers' performances; prejudice and characteristics of other jurors; voting and deliberation behaviour; interpretation of the quantum of proof; the method of reaching a verdict and the judge's summing up.

Avoiding Jury Service/Inconvenience

Most subjects had not attempted to avoid service and many, like the social scientist, Barker, (in Barber and Gordon) and Darbyshire relished the opportunity to conduct a participant observation study in a piece of applied social science research. Hamilton, (in B and G) was, however, fined by a judge for failure to answer his first summons and re-summoned and several subjects had deferred service. Wykes failed to argue his way out of service. Spence found she was too inhibited to make public excuses to the judge as to why she could not serve on a five week trial, which lasted for nine. Her delicate lattice-work of part-time jobs collapsed as a result. Harlow spent weeks writing begging letters, which failed to excuse him, then complained of middle class ingenuity in inventing acceptable excuses which, according to him, distorted jury composition and led to an unacceptably high rate of acquittals. His perception that the eventual pool did not represent a cross-section of society is supported by Harris, Spence, the term random is a lie when applied to jury service and Wright, (w)e were ..predominantly working class with lowish educational standards. Spence resented the long list of statutory excusals and thought those who fail to answer their summons are self-exempted and seldom followed up. Bell excused himself five times then appeared before a judge in chambers, who refused to excuse him further because there were insufficient professional intelligent people standing for jury service. The resultant pool he described as a motley crew, unrepresentative of the general public. Darbyshire noted the 40-50 per cent statutory and informal excusal rate at her Crown Court, with a generous interpretation by the summoning officer of the statutory right. This distorted randomness and was exacerbated by offering time off for pressing work commitments to those who had reported for service.

Comment: not surprisingly, since the sample contained a disproportionate group of persons so enthusiastic about doing jury service that they were persuaded to write about it, it does not reflect the general population of those summoned, the majority of whom attempt to avoid service, according to Home Office research, discussed in section A. Those jurors who commented on the high excusal/avoidance rate are correct, as we demonstrate in Part A and many of them were under the impression that it was the middle class jurors who avoided service, one way or another. Grove introduces another suggestion to pre-empt the widespread requests for excusal. He adopts the suggestion of one of his interviewees, that potential jurors should be told that they would have to do jury service any time within the next twelve months but could choose when to do it.

Professor Michael Zander, interviewed by Grove, drew attention to the crackdowns on jury draft-dodgers in Arizona and New York State, where almost no-one now escapes jury service, including the presiding judge of the New York Court of Appeals (1997) and Zander's

94 year old father-in-law, an attorney. In the United States, lawyers are not excluded from jury eligibility. In 1993, Berkeley administrative law professor Ed Rubin recounted how his attempts to feign insanity had not convinced the judge to release him from jury service.

Boredom/Frustration

By mid-Tuesday Devons was bored, angry and frustrated. As Grove remarks,³⁵⁴ everyone who has done jury service moans about the tedium and the time wasting. Brooks, having been forewarned by friends that the most notable feature of jury service is the amount of time one spends hanging around doing nothing, took half a page to describe bad temper wrought by boredom among his fellow waiting jurors. Morris remarked on annoyance caused by endless waiting, when he was kept waiting for each of four days then sent home, I still fail to understand why a panel of jurors cannot be called in advance and so avoid the terrible waste of time. Solesbury spoke of an obstacle course actually to get on a jury to avoid the exhausting and uncomfortable time spent waiting. Eldin's enduring memory of service was hanging about and after a week of this, some jurors were very pissed off. Bell was bored rigid in the jurors waiting room.

In Spence's nine week trial, she complained the jury were retired more time than in court. We waited around until the whole day was wasted. I could have achieved so much more at home. I felt impotent and frustrated. Don't lawyers know that jurors are people too? Grove, who interviewed a number of ex-jurors for his book, quoted a fraud trial juror who said a sort of hostage mentality held the jury together through six months of nerve jangling boredom. Grove thought a version of the Stockholm Syndrome came into play on long fraud trials. The jury began to sympathise with the only other person banged up there day after day against his will, i.e. the defendant.³⁵⁵ The LAG psychologist, like Darbyshire and Grove, remarked on how few people brought books. Darbyshire was surrounded by people who were livid that their work had to be rearranged just for days of waiting and remarked that jurors should be told to bring something to do. Two years later, in 1992, the introductory video did just this, as did the booklet introduced in 1994 but Grove, in 1998, still found it extraordinary how few jurors seem inclined to take this advice and that staring into space was easily the most popular occupation. At least four of the subjects were sent into courtrooms to observe proceedings while waiting to be called in. They all welcomed this relief from boredom.

The LAG psychologist remarked that, apart from waste of money, these prolonged periods of waiting had three disadvantages. First, they led to increased feeling of frustration and irritation. Secondly, they provided an opportunity for the exchange of information about court experiences and for (inaccurate) rumours to develop, confirmed by Darbyshire and Grove. Thirdly, it allowed for small social groups to form around articulate and dynamic individuals, which became of some significance in later deliberations. This last effect was also mentioned by Wright and Brooks. Darbyshire confirmed the alliances although she found that new friends emphasised their differences in deliberations. Lofthouse criticised the waste of public money and cost to the jurors of hanging around and criticised the absurdly large number of potential jurors summoned.

Comment: jury managers should beware of requesting that the Central Summoning Bureau call too many potential jurors. Although the press release announcing the creation of the

³⁵⁴ At p. 236.

³⁵⁵ At p. 232.

Bureau is entitled Reducing the Trials of Jury Service , by preventing jurors time being wasted, we fail to see how this is possible. Jurors are still summoned in pools of 100 or more, on a Monday morning. The nature of the unpredictability of trial scheduling and the collapsing of contested cases into guilty pleas will inevitably result in jurors having to wait around. Centralising the summoning process can make not one jot of difference.

In long trials, we suggest legal argument could take place, as much as possible, pre-trial and each afternoon, calling the jury in only in the mornings (when they are more alert — see below). This was done in the Maxwell trial.

Discomfort/Inconvenience

There are innumerable accounts of the irritation at having to rearrange work or do a day s work after jury service, or losing self-employment (Wykes, Spence) or paid employment (Rolph) but also a list of other irritations and physical discomforts. Devons jury were miserably cramped and had to sit bolt upright for long periods. Lofthouse complained of inadequate access to the canteen and lack of drinks machines. Potter, Cohen and Darbyshire found being locked in a jury room with barred windows reminiscent of being incarcerated in a cell and one of Darbyshire s fellow jurors was a tearful claustrophobic. Several of Grove s interviewees mentioned the effects of incarceration. Wykes complained that the lengthiest deliberation in all his trials was conducted in the most uncomfortable of circumstances. Potter commented We were perpetually inconvenienced, kept short of the elementary necessities such as a sufficiency of chairs ..Under threat of dire consequences we were always punctual. Darbyshire found frosty air conditioning in the courtroom made her lose concentration on the evidence and some subjects in B and G were at pains to fend off an afternoon nap: The greatest enemy of justice in the courts is drowsiness; or, not to put too fine a point on it downright slumber. (Rolph).

Spence found a long trial strained the jurors. One juror was violently sick. Others suffered backache and sore throats. Grove devoted two pages to the stress caused to jurors by the nauseating exhibits in murder trials and the effects of such stress, such as panic attacks, vomiting and severe depression. Others were haunted by the abiding feeling that their jury has wrongfully convicted. Solesbury added that some jurors found the jury room experience distressing. Some lost sleep over the burden of responsibility. Cohen described people who felt inadequate and resented the fact that they were forced to decide on freedom or incarceration. He thought such resentment produced a lack of concentration.

Comment: a group of us visiting a London Crown Court in October 2000 found the air conditioning to be unnecessarily cold. Since cold depresses arousal levels, this must make it difficult for jurors to concentrate. The judge, clerk and barristers were probably not affected, as they were all gowned and bewigged. Jurors should have adequate access to refreshment and be given breaks and court managers should keep a close check on room temperatures.

The jurors accounts here, on the stress which may be induced by service, are supported by the New Zealand research, cited in Part B.

Rudeness By Court Officials

Devons complained the clerks and officials treated us so to speak as jury fodder, conscripted by legal process: therefore without rights or deserving of consideration. We were herded into rooms, kept waiting without any indication as to when we would be called, or how long our service was likely to run. The LAG psychologist remarked on an inevitable

feeling of being treated like children, mustered by roll call and herded ..there remained a prevailing atmosphere of ignorance. Spence found jury service a humiliating business . Brooks reported the anger of his jury at being treated as mindless ciphers as did Morris, the annoyance we all felt at being kept waiting around in the cold for so long and told to hurry up, to which one juror retorted we re not in the bloody army now . On the contrary, those who mention judges attitudes all remarked on their politeness, as did some in respect of the officials.

Comment: one of the research team was astonished by the impatience of a jury manager in a London Crown Court, in autumn 2000. New jurors were dispatched in groups of fifteen to the courts. Some of the excess jurors returned to the waiting area, where the video had been played and the jurors had received their introductory speech. Look at you! bawled the jury manager at the errant four. Haven t you listened to a word I said? What did I say? You ve got special rooms to wait in. I told you *not* to wait outside the courtrooms. It seems that some officials could benefit from courtesy training and being reminded that most people consider jury service an annoying and disruptive chore. Ironically, since 2001, in Kingston Crown Court, jurors can access *The Courts Charter* via a touch-screen kiosk. The charter promises that they will be dealt with courteously. If this is to have any meaning, maybe some of the resources of the *Modernising the Crown Court* programme should be redirected from technology development to staff development.

Note Taking

As can be confirmed by any Crown Court observer, most jurors do not take notes and this was the case in all juries in this cohort. Devons complained of lack of pencil and paper but these are now provided. Grove recommended that the judge encourage each juror to take notes, even occasionally, if only to keep them alert. One of his fellow jurors on their long trial regretted afterwards that she had not kept notes. The research psychologist found no other juror in three trials took notes. Darbyshire found only one other juror took notes in two trials. She commented, however, that most people do not use this skill in everyday life and, crucially, the fact that she could not observe witnesses facial reactions made her give up. Hodgetts, the systems analyst, supported this, as any student knows, whenever you are busy writing notes of any length you miss the next bit of the lecture. That jurors are not skilled in note-taking was recognised as long ago as 1965 by the Departmental Committee on Jury Service.³⁵⁶

Comment: this problem is recognised in the United States. In some States, jurors are banned from taking notes. As every lecturer knows, even law undergraduates may not develop efficient note-taking skills in three years of attending lectures so jurors cannot be expected to take a useful note of evidence. The only purpose in adopting Grove s suggestion that the judge should encourage it is to make jurors more active and alert.

Asking Questions

Almost all who mentioned this item expressed inhibition over asking. Wallace did not find out until after serving that the jury could have interrupted the trial to ask the judge to put a question to the witness. Lofthouse, who devotes three columns to the inhibition against asking questions and the problems it causes, complains that the explanatory leaflet informs

³⁵⁶ Cmnd. 2627. Known as the Morris Committee Report.

jurors of this right but is discouraging in its language. Systems analyst Hodgetts remarks that the procedure [for asking questions] is cumbersome and obviously designed as a deterrent. The LAG psychologist found that no questions were asked by the three juries in which she participated and remarked that it is very difficult for a juror to ask. Rolph, an ex-police officer, recounted how his jury did not interrupt for an hour a witness whose evidence they could not hear. All of this confirms the 1993 finding of Zander and Hendersons s *Crown Court Study*, discussed above, that there is an overwhelming inhibition against asking questions. Of those jurors surveyed who said they had wanted to ask questions, only 17 per cent had dared to do so. Grove remarked that in his long Old Bailey trial, it took a long time for the jury to pluck up courage to ask questions but once they did, individual questions kept grinding proceedings to a halt. Eventually, the judge said he would only take questions put by the jury as a whole.

Comment: the jurors video now informs them of their right to ask questions but the procedure remains cumbersome. Grove, whose jury did see the video, recommended that judges should make it quite clear that jurors may ask questions. Hodgetts suggests giving the jury an opportunity to ask questions before each witness leaves the stand. This overwhelming inhibition on asking questions renders the juror a passive recipient. Lofthouse thought some American jurisdictions much more enlightened in encouraging jurors to be more active.

In October 2000, the Colorado Supreme Court sanctioned a statewide experiment in both felony and misdemeanor courts, permitting jurors to submit written questions via the judge, after the prosecution and defence have finished questioning each witness. The judge then confers with prosecution and defence attorneys and decides whether the question can legally be asked. After the trials, jurors judges and attorneys reactions are being monitored and measured against those of a control group of jurors from trials where questions were not permitted. The results will inform the Colorado Supreme Court in deciding whether to expand the scheme.³⁵⁷

The Judge s Summing Up on the Evidence

Most did not mention this. Of those who did, Grove found it very fair and four in Barber and Gordon commented on its skilful delivery, clarity or usefulness. Three others, such as Potter, remarked on the tedium and redundancy of the summing up. Solesbury remarks, it is ..the terrible performances by judges which stick in the mind a really bad summing-up does a great disservice to the cause of justice The jurors were not only confused but bored. The LAG psychologist concludes: If the judge recaps the evidence, unless he does so by highlighting the contradictions, the jury are bored stiff by the repetition. Wright, who took part in four juries said All the judges summed up repeating the evidence. That was one of the most boring bits.

Comment: if the summing up is to be retained, for it to perform any useful function, judges must be carefully trained to highlight the important points and relate them to the legal issues and not risk switching off the jurors brains and wasting time by simply reciting their notes.

³⁵⁷ The Gazette, Questioning by Jurors Gets its Day in Court, 30 October 2000, YellowBrix Inc., Blackboard Resources, www.blackboard.com.

Remembering the Evidence

Devons remarked that, in one of his trials, since they had no notes, the jury concentrated on the plausibility of the defendant's story and his criminal record. Even in the 1970s, jurors were remarking on how primitive it was that they were expected to trawl their collective memories for the evidence or rely on the judge's summing up, without the benefit of technology or access to the transcript. (See Male). Darbyshire found that, in her two one and a half day trials I didn't detect any shortfall in our collective memory in the jury room but the stories are full of tales about jury room arguments over misremembered witness evidence (Cohen) and misinterpreted judicial instructions.

Comment: this question is all the more pressing, given advances in technology and the European Convention's (Article Six, fair trial) demands that decisions should be reasoned and based on the evidence. The oral conduct of trials, the judge's summing up and the reliance on collective memory in the jury room are all anachronistic relics of the days when trials were extremely short affairs. Lord Justice Auld may consider that, if jurors are to be required to give reasons, they should have access to the transcript, on demand. Technology currently (2001) being installed in nine courtrooms and a projected possible 50, under the *Modernising the Crown Court* programme, allows for audiotaping the trial and provides an easy playback facility. At the moment, however, jurors have to return to the courtroom and request a playback via the judge, because permitting them access to playback facilities in the jury room requires the same decision on principle as allowing them access to a hard copy transcript so the technology has made the task easier in a limited number of courtrooms but has not changed the principle that a recap of the evidence must be done via the judge.

Directions on Law

Hodgetts, the systems analyst remarked, it seems very strange that the judge's directions as to the law concerning the case (or at least a summary of the significant points) are not given to the jury on paper as well as explained in court. The jurors' accounts give a disturbing number of instances of arguments over the judge's instructions or of forgetting instructions: Barber, Brooks, Cohen. Cohen's exasperation over his fellow's misinterpretation of the instructions made him want to bang his head on the wall. The other two insisted on asking the judge questions so the judge could reiterate the point over which they had failed to convince their fellows.

Comment: again, this is a relic of the oral trial. We have encountered an experienced circuit judge, His Honour Judge O'Rourke, who, of his own initiative, produces a word processed copy of his directions for the jury to take into their deliberations, using the laptop with which he has taken his note of evidence. We discussed this habit with him in November 2000. He explained that he started doing it on his own initiative, copying a judge in front of whom he had appeared as counsel, many years ago. He said that, in cases where the instructions had to be fairly complex, he produced for the jury a sort of step-by-step set of questions, in the nature of a flow chart. For instance, he gave a 10 page booklet of instructions to the jury at the end of a trial under the Financial Services Act and a three page instruction in a case of pornographic videos. His practice was to show counsel the written instructions in advance but no counsel had ever objected to the content of the instructions. He would read them out and explain them to the jury before sending them into retirement with the written instructions. He said he did not do this in routine cases but there was no reason why this could not be done in every case.

According to the Director of Studies at the Judicial Studies Board, His Honour Judge Pearl, Judge O Rorke is not the only circuit judge to do this. Judge Pearl said that, as over 900 judges now have laptops (as of November 2000), there is no reason why this practice should not be routine. In view of the fact that research findings above strongly suggest that jurors perform better with written instructions, we would urge Lord Justice Auld to recommend that these be required but this may mean that all recorders will have to be supplied with laptops.

Reasoned Decisions

Our comment here raises an issue already put to Lord Justice Auld. As we discuss in Section B, we share the commonly held view that Article Six of the European Convention may require that juries give some form of reasoned decision. This could be copied from civil trials in which counsel and the judge formulate a series of questions for the jury. Attention should also be paid to the method of setting questions for and requiring reasoned decisions from Spanish juries, described in detail by Stephen Thaman, although attention should be paid to the fact that the role of the Spanish jury differs, in law, from ours.³⁵⁸ If his Lordship makes a recommendation that some such procedure be adopted, then it is difficult to see how a series of questions and a requirement for reasons cannot be given in writing.

The Order of Directions

Both Darbyshire and Hodgetts remark on the illogicality of receiving the directions as to what is relevant after hearing the evidence. Darbyshire cites Clyde Choong's research in which he found that experimental juries were markedly superior in their grasp and application of the law when given a modified version of the judge's directions before trial. She is later supported by Grove, who quotes an American judge who commented that it was like telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game. Grove suggests that judges give preliminary instructions on the law at the beginning of the case as well as a fuller version at the end.

Comment: historically, it was impossible to direct jurors pre-trial because of the defendant's right to see the whole of the prosecution case first. Nowadays, where the defence have provided a statement of defence, to satisfy the requirements of the Criminal Procedure and Investigations Act 1996, it must be possible to give the jury at least an outline direction on law before the trial. This was done in 1999-2000 in the Shipman murder trial. Hodgetts suggests standard directions could be given by the judge at the outset, on the burden and quantum of proof, excluding irrelevancies and the precise legal definition of the charges. We would add that these could be given verbally and in writing to every juror and, indeed, pinned, in simple language, on the jury's retiring room wall. We would link our recommendation with that of Sir Stephen Tumim, interviewed by Grove, that judges in criminal trials should be required to pre-read the papers as they are in civil trials. As we discuss in Part B, it seems that the benefits of pre-instruction of juries outweigh the disadvantages. Pre-instruction need not be elaborate in short trials. As outlined above, certain standard instructions could be given in writing in advance of service and then verbally by the judge and then posted on the jury room walls. In long trials, a pre-trial review should permit the judge and counsel to agree on a brief set of pre-directions, including an outline of the defence.

³⁵⁸ Thaman gives an invaluable description of Spanish law and practice in this context in *Spain Returns to Trial By Jury* (1998) 21 *Hastings International and Comparative Law Review*, Number 2, 241, at 320-381. See now S. Thaman, *Europe's New Jury Systems: the Cases of Spain and Russia* in Vidmar (ed.) *World Jury Systems* (2000), *op. cit.*

Incidentally, when we observed the jurors video being shown to a new panel of jurors at a London Crown Court, in autumn 2000, we noted that at least a third of them did not watch it, because they arrived late, or at the wrong Crown Court (!) or were occupied elsewhere in the court building. Many had not brought with them their jury pamphlet. Both of these items contain basic explanations of the trial and the role of the jury, as well as housekeeping information. It seems that effective pre-instruction must take place in the courtroom.

Selecting a Foreman

Where mentioned, they were overwhelmingly male, which supports all research findings. Only three females were selected. There was no common pattern to the reasons for selection. Some were selected because they had served before, or because they had taken notes, one because they were last through the door and in each of Potter's trials, it was the person who happened to sit at the head of the table. Some regretted the choice of foreman when they proved to be poor at conducting a discussion. Lustig commented that the way the foreman proceeds dictates the speed of the discussion. Lofthouse thought juries should be given a better idea of what the foreman's job is. The LAG psychologist found that because of the furniture in the jury room (long thin tables) and the weakness of the foreman, several discussions broke out simultaneously.

Comment: all that is said in the juror's pamphlet is that the foreman is in charge of the discussions in the jury room.

Voting and Verdict Driven Juries

One remarkable consistency is that in almost all the trials where it is mentioned, a vote was taken as soon as the jury retired. As we have discussed in Part B above, this may lead to verdict driven decisions, or individual jurors feeling they have to justify their initial stance. Grove, acting as foreman after a long trial, and Lofthouse, in the trial where he was foreman, were aware of this and deliberately asked for just a preliminary view, not a vote, prior to discussion of the evidence. Many accounts are given of verdict driven juries, by, for instance, six of the writers in B and G. All accounts match, to a remarkable degree, the research findings on the dynamics of experimental jurors, and the LAG psychologist. Her general conclusion in three trials was:

In all three cases the overall dynamic involved an early emergence of a majority view, a small minority and a group of don't knows. The don't knows, usually non-participants in the discussion, all went with the majority view after a period of discussion (20 minutes at most). Members of the majority took on in turn the minority, establishing their argument then trying to demolish it. Only in the case of one person on one jury did anyone change from an early stated view to the opposite. However, in the case where the minority was in favour of guilty they were prepared to accept the majority view to obtain a unanimous decision (and escape the situation). In the case where the minority view was not guilty they were not prepared to change. It seemed to me that the practical pressure to change from guilty to not guilty were the same as from not guilty to guilty the latter shift was felt to be more difficult because it involved jurors accepting a decision which was potentially more harmful to the defendant.

We have quoted her at length because her account accords exactly with the research findings cited in Part B and it articulates neatly what is described by so many other jurors. Several tell of jurors switching to an acquittal to satisfy the majority. Brooks said in one trial the fury of the other jurors at being condemned for another hour and a half in the airless, comfortless

jury room made the last guilty voter acquit and similarly in Mellors, Sulkily ..he agreed to voting not guilty . Often, the pressure to switch sides is wrought by incarceration.

Very importantly, other jurors accounts also accord with that of the LAG psychologist and the research findings that it is easier to switch from guilty to not guilty than vice versa. They also support the research finding that it is almost impossible for one or a few persons to persuade the majority of guilt. Devons, for instance, argued for twenty minutes but failed to stop his fellows acquitting just because they had taken a dislike to a pipsqueak prosecution witness and thought such civil servants deserved to be taught a lesson. Leigh s account of Ensor s service tells the story of the one guilty voter failing to convince the other 11, in a case where this voter and the defendant were the only blacks.

Comment: the jurors stories accord exactly with research findings on verdict driven juries.

The Friday Afternoon Effect

Darbyshire described the dynamics of a hung jury on a Friday afternoon, when one of the guilty minority three was a tearful, red faced claustrophobic. They did not discuss the case for more than the first half an hour but were kept in the jury room for three hours and ten minutes. Wright, quoted by Eldin, in the same position, said people would have voted either way in order to get home . Later (1997) and somewhat alarmingly, Bell described the same effect. When one juror wanted to go home to see her children before they went to bed, the vote swung from 9-3 in favour of guilt to 11-1 to convict. Even more alarming was the account given to Darbyshire and cited in her 1990 article, of the deputy head of an independent school, who served on a six week armed robbery trial in the Old Bailey. He recalled that the threat of being sent to a hotel for the weekend had had a dramatic effect on his Friday afternoon hung jury. Suddenly people were prepared to say anything, even the most adamant ones. I m not being sexist but it was the women. They were all panicking about missing weddings and dinner parties and hairdressing appointments .

Participation in Discussion

Confirming the research findings, many jurors described a few fellow jurors who produced most of the discussion, some who participated a little and a few who were passive. The LAG psychologist gives the figures for each of her trials. Barker, a social science teacher, found it interesting that so many jurors were unwilling to venture a personal opinion until they had heard a discussion. In several trials, the number of effective discussants was as low as four or five.

Comment: again, the section above lends strong support to the findings with experimental juries, summarised in Part B.

Method of Discussion

The accounts give ample evidence of the story model and Brooks gives an evocative description of the difficulty in piecing together the story because of its method of delivery, as discussed in Section B:

Because of the indirect, piece-by-piece method of bringing forward these events it was some time before I could start to form any coherent and believable pattern, and I was quite sure that my rather dour, mostly elderly, largely under-educated fellow jurors were going to have a tough time making head or tail of it. Sure enough .. their heads, like mine, were whirling.

Also confirmed is the finding that a juror will endeavour to persuade a fellow by providing her with an acceptable story:

As in the previous case, it was necessary to take them one at a time, concentrating on a single juror's worries, getting through to him or her a scenario which was acceptable in that individual's terms ..I was able to deliver a story, well supported by my notes, which sounded convincing because I was convinced .

Comment: the accounts lend strong support to the story model and to Hastie's finding that, once a clear majority emerges, much of the discussion is a matter of negotiation, until the requisite majority for a decision is reached, or the jury is hung. Hodgetts, the systems analyst, comments that the adversarial nature of the process leads to a sequence which doesn't help the juror to consider both sides of an argument coherently .

What Influences the Jury?

It is very difficult to generalise on this. In accordance with research findings, where jurors give reasons for an acquittal, they mostly mention the weakness of the evidence. For instance, like Lofthouse, the LAG psychologist says that, in all three of her cases there was little prosecution evidence. Mellors' jury had all suspected one defendant guilty but acquitted because the prosecution had been put together in a slipshod way. Wykes complained that in one trial, which turned on evidence of forged handwriting, the jury had expected to see a graphologist. None was called so they acquitted.

In at least half of the trials described, the jury appeared to perform as legally required to do. Hamilton was struck by the intense seriousness with which we had all taken our responsibility, the scrupulous care with which even the least educated among us had weighed the evidence, the readiness with which we had all ..set aside our preconceptions.

Many of the writers were clearly alarmed and exasperated, however, about what influenced other individual jurors. Brooks faced a juror who had thought that a witness in a previous case they had been sent in to observe was also somehow connected with the present case. He cynically concludes 'The people who make and administer the laws seem not to have allowed for the fact that many people simply don't know what's going on around them outside the limited compass of their private lives ..They rely on Authority to tell them what to think. Devons was appalled that juries seemed to be influenced by whether they thought the defendant deserved punishment, not by legal guilt. He was alarmed that a jury rejected very secure fingerprint evidence because a housewife had not identified an intruder and that jurors rejected a police surgeon's evidence because he was paid to give evidence.

Lofthouse was disturbed at the jurors' being impressed by the confidence of an eyewitness, in the face of research findings, discussed in Part B. He thought that jurors should be given empirical based advice on troublesome issues such as eyewitness evidence. As we pointed out in Part B, this is permitted in other common law jurisdictions. Similarly, The LAG psychologist commented that, in one of her trials, the case involved some very technical psychological points which were clearly beyond the 'average man' and not a matter of common sense , for instance, the question of whether a person who is an experienced observer, such as a store detective, is better than other witnesses at a recognition task.

A few juries contained one or more obdurate members who were determined to acquit, whatever the evidence, sometimes because of a distrust of the police or general distaste for authority, (Potter, Rolph, Cohen). For instance, in Mellors' jury pool, there were a number of

East Enders who announced they were not going to shop anyone who had merely stolen, entered premises with intent to steal, or received stolen goods .

At least four juries contained a group, sometimes a majority, who were sidetracked by sentencing considerations. Some individuals thought they could pass a verdict conditional on sentence. The law graduate, Robbins expressed her jury's frustration:

The discussion thereafter turned to sentencing: how long would he get sent down for — was it fair? I felt happy in the knowledge that this decision was outside our function ..But later, when the sentence was announced, I wasn't so sure of my ground. After all, if your decision leads to inevitable consequences, haven't you a right to know what those consequences are?

Four jurors were concerned that racism seems to motivate the jury in some instances. Cohen was disgusted that one of his juries refused to convict white racist defendants in a racist attack on black victims. Despite acknowledging strong evidence against the defendants, they empathised with the fathers of the defendants who they considered had provided false alibis for their sons.

There are many instances of jurors being strongly influenced by their assessments of and approval or disapproval of witnesses. Barker was frustrated that the opposing guilty group on one of his juries kept referring to the untrustworthiness of one of the defendants, rather than addressing his concerns on the evidence. Solesbury remarked much turns on their general attitudes towards the participants in court proceedings — towards judges, barristers defendants, the police and witnesses. Some of these attitudes were surprising — in particular the widespread distrust of the police and the degree of sympathy for the defendants .

Many juries, in whole or part, seem to be influenced as much by reading between the lines as by the evidence, as Potter described.

Four of the juries expressed irritation at being expected to try cases long after the alleged offence had been committed and the consequent unrealistic demands this placed on witnesses memory.

Devons found most of one of his juries were influenced by the record of the defendant and his friends. Other jurors, who had heard the defendant's record after their finding of guilt, commented that they would have been unavoidably influenced by the knowledge of the defendant's record, had they known it. This accords directly with Sally Lloyd-Bostock's finding, discussed in Part B.

Being Kept in the Dark

Jurors frequently seemed to express frustration at a prevailing uncertainty (Solesbury) caused by missing a piece of the story, as they saw it (presumably because evidence had been ruled inadmissible or irrelevant). As Male complained, so many arrangements seemed to have been arrived at behind the scenes. Jury service is a confusing experience , said Solesbury. Several, like Wallace, referred to jury service as a game: I think we should stop treating the detection of crime as some sort of a game — If the jury is to render a true verdict then it must be allowed to hear all the evidence . These comments should be linked to the frustration jurors felt over their lack of confidence to ask questions, discussed above. The LAG psychologist described how jurors will substitute what they see as the missing pieces of

the jigsaw with (possibly incorrect) assumptions from their own knowledge. These assumptions, she thought, probably determined the verdict in one trial.

Gordon, too, refers to playing a game: If a jury can find out what its rights are it will employ those rights to its utmost and Gordon thought if the courts were to treat the jury as being more intelligent ..I believe juries would be less resentful . Brooks, Potter, Barber and Lofthouse all resented the fact that juries are told of their duties but not their rights.

Beyond Reasonable Doubt (BRD)

Most jurors did not mention quantum, or how the BRD rule was interpreted by their fellows. Those who did remarked that quantum was pitched at the balance of probabilities or the impossible 100 per cent proof. Devons said, I think that expressions such as reasonable doubt, reasonable man, reasonable case, terminology beloved of the legal theorist, have little meaning for the juror when he meets them for the first time . Barker recalls

I had urged, but not much expected, my fellow jurors to require proof beyond a reasonable doubt because that is the rule ..but they seemed to see the making of a decision as their paramount job. If it had to be made on a balance of probability, so be it ..The vast majority of jurors, I would guess, believe that they are being asked to decide whether he did or didn't do it .

Lustig also found that the majority on his jury decided guilt on the balance of probabilities. Darbyshire found that three jurors in her two juries clearly ignored or misunderstood the standard, despite clear articulation by the judge, although they were swiftly corrected by their fellow jurors.

At the other extreme, jurors may be looking for absolute proof. Mellors found that, in two of his trials, several jurors had difficulty in comprehending what was meant by beyond reasonable doubt . One juror interpreted it as meaning that there must be reasonable doubt if you could construct another theory, for instance, that stolen goods had been planted on the defendant, even though that had not been argued by the defence. As a consequence, the jury failed to agree and a retrial was ordered. He thought an explanation of BRD could be given to all jurors in printed form, at the outset of their service, then read out in court by the judge. The LAG psychologist found that, in one trial the definition one hundred per cent certain entered into the discussion, as the decision rule, then the conclusion became inevitable: The judge had talked of certain and sure rather than beyond reasonable doubt which may have led to this definition . Her story is similar to one in a letter to *The Independent*, in 1996,³⁵⁹ all my fellow jurymen and jury women took this to mean that if any of the defendants could offer any explanation — however ludicrous — we should accept it .

³⁵⁹ October 4th, as cited by Darbyshire, 1997, at p. 871.

Comment: the last paragraph accords with Montgomery's finding that the use of the word sure in the English direction is interpreted by most people to require 100 per cent proof. We find this unsurprising and strongly recommend that the use of the word sure be abandoned. No-one can be sure of guilt. Even the defendant cannot be sure if he had the requisite mens rea in cases where he was intoxicated at the time of the offence. Since the research discussed in Part B found that most people are used to evaluating things in terms of percentages, consideration might be given to explaining BRD, which seems to need explanation, in terms of 95 per cent sure, or something closely similar. Apparently, jurors also seem to need to be instructed not to speculate about alternative explanations not argued by the defence.

Jury Equity

Needless to say, there are a few examples (such as one of Darbyshire's cases) of jurors dismissing a case because they thought it too trivial and the prosecution should not have been brought. To Cohen's distress, one of these was the white racist attack on black victims. Lofthouse discussed jury equity at length. He resented not being told of the jury's power to deliver a verdict according to conscience. He drew attention to those states in the United States where the jury is told of its nullification power.

Lawyers/ Police /Prosecution

Jurors could not resist criticising counsel. Brooks 'I could have done better myself'; Rolph 'hideous embarrassment of listening for hours to the platitudinous rhetoric of people in horsehair; or, Lofthouse, 'ridiculous fancy dress'. The worst attacks were reserved for the prosecutors: Bell's prosecutor had 'swallowed a dictionary' and resembled Timmy Mallett. The LAG psychologist spoke for many: 'Prosecution counsel was generally thought to be muddled and incompetent', confirming Wright, 'I was impressed by the defence counsel. Prosecuting counsel were more varied'. Barber added 'The thought occurred to me that perhaps the police have to make do with any old counsel the cream of the barristers having been reserved for the defendant at risk'. Wallace asked 'Why is counsel for the prosecution often so hopeless?' and Solesbury added 'examples of professional incompetence help to reinforce this impression of lack of commitment'.

Examples of prosecutions being lost through casualness, incompetence, over-zealousness, or smugness of police witnesses are given by Solesbury, Rolph (an ex-policeman), Barber, Gordon and Lofthouse. If one adds to this the astonishing number of subjects who reported that jurors have a general distrust of the police, this explains a number of acquittals. Carlton concluded 'More people might be found guilty if the police were held in higher public esteem, something which they have to earn'.

Curiously, three jurors said something like Wright, 'I think if the police want a conviction they should stick to one count'. This confirms both the research findings, discussed in Part B, that jurors have difficulty with multiple charges and Sir Stephen Tumim's opinion, in his interview with Grove, 'Photostats are the real disaster of the jury room'. Having to write in longhand had meant '(y)ou didn't chuck in a dozen extra counts in order just to catch the defendant out'.

Comment: it seems curious that it has taken until 2000 to alert a Lord Chancellor to the imbalance of lawyering between prosecution and defence, brought about by their different

rates of remuneration.³⁶⁰ In this context, it should be noted that a Channel 4 documentary, *Still Getting Away With Rape*, in 2000³⁶¹, found a 70 per cent acquittal rate in a sample of all acquaintance and intimates rape trials throughout England and Wales in a two week period in 2000. One of the main conclusions of the programme was that a major cause was the imbalance between defence and prosecution lawyers, brought about by differences in remuneration. The programme contrasted this with a 70 per cent conviction rate in the United States, in such trials.

Juror Naivety

In 1997, Darbyshire put this forward as a hypothesis to explain the high acquittal rate.³⁶² This is confirmed by Wright, Potter, Rolph and Grove. As Rolph said it is the experience of everyone who has served on a criminal jury that it gets tougher as it gains experience. Towards the end of every session at the Old Bailey (I can say from experience) the proportion of convictions goes up .

Comment: if jury service were to be shortened, as we suggested it might in Part A, the acquittal rate would increase.

Conclusion

We hope we have demonstrated that a great deal can be learned from the existing treasury of jury research published throughout the common law world and from English and Welsh jurors accounts of their service. The latter so closely match the findings of the former that neither can be written off as inapplicable to the English legal system or anecdotal.

D. Conclusions and Recommendations

By Penny Darbyshire

Our search showed that there is already a wealth of research on juries from England and Wales and other common law countries, as well as Russia and Spain, from which we could learn a great deal to form the basis of some simple but, hopefully, effective changes in constructing juries and restructuring jury trial. Published accounts by real English and Welsh jurors endorse the research findings to a remarkable degree, as one of those jurors remarked and demonstrate that foreign experiments and reforms may be equally useful to us, despite cultural differences. Our recommendations below were formed and delivered to Auld L.J. for the Criminal Courts Review in November 2000 but we have included in the text above references to *World Jury Systems*, published in December 2000. Since delivery, we have also had the benefit of reading the New Zealand Law Commission's final report, Report 69, *Juries in Criminal Trials*, which they kindly sent us prior to its publication in February 2001.³⁶³ Below, we bracket the recommendations of the NZLC, for two reasons. Firstly, their legal system is a daughter of ours and jury trial has remained very similar. Secondly, we were struck by the similarity of their recommendations to our own. We consider their work lends endorsement to ours, especially as they have been considering the same issues since 1995 and

³⁶⁰ Lord Chancellor Announces Proposals For Advocates Fees For Criminal and Family Cases , LCD Press release 273/00, 4 July 2000.

³⁶¹ Dispatches , 16 March 2000, www.channel4.com . The programme was made by First Frame T.V. The sample included 29 trials. There were no stranger rape trials in England and Wales during the research period.

³⁶² P. Darbyshire, For the New Lord Chancellor — Some Causes of Concern About Magistrates [1997] Crim.L.R. 861 at 870.

³⁶³ Available in hard copy and at www.lawcom.govt.nz.

have based their conclusions on widespread consultation and empirical research on NZ juries, with occasional reference to English, Australian and American material, whereas our work was completed in two months, part-time.

1. It appears that juries in England and Wales are unrepresentative of certain groups, notably women and minorities and, possibly, some occupational groups.
2. We endorse the call to eliminate most of the lengthy list of the statutorily disqualified and ineligible. The category of excusable as of right should be abolished.
3. Selecting jury panels from the electoral roll excludes certain groups, notably those who choose not to register or whose residential status is more transient. This excluded group includes a disproportionate number of non-whites. The Juries Act 1974 should be amended to require that the roll be merged with other lists, such as those compiled by the DVLC, the DSS and Inland Revenue and/or telephone directories, mobile 'phone subscriber lists and mailing lists.
4. Most people try to avoid jury service. The astonishingly poor ratio of jurors to the number summoned is a cause for concern because:
 - Although adults in England and Wales only have a one in six chance of doing jury service during their eligible lifetimes,³⁶⁴ if most people avoid or evade service, this places an undue burden on those who fail to be excused or are too honest to evade a summons. They may find themselves serving for more than one period.
 - Honest jurors deeply resent the high avoidance/excusal rate, as the accounts of real jurors show.
 - In London, it appears that five sixths of those summoned are avoiding or evading service. This must distort jury representativeness.
 - Both the high excusal rate and, worse, the high rate of non-response and consequent lack of enforcement may bring the law and the jury system into disrepute.
 - The more widely it becomes known that jury service is easy to evade, the more people will evade it. Further, once an individual has learned that no repercussions will follow from ignoring a summons, the more likely that individual is to discard a future summons.
5. The Central Summoning Bureau team is currently developing a database of why people seek to be excused. This is likely to confirm existing Home Office research findings that common reasons are child care and work commitments.
6. Employees already enjoy protection, although the loss of earnings allowance is insufficient to compensate some and jury service may be especially disruptive to the self-employed. If jury service is spread fairly, however, most people will only need to serve for two weeks in their adult lifetimes. This is not an unfair burden on a citizenry who appear to believe in the jury system.
7. The burden would, if it were fairly spread, be no more on an employer or a self-employed juror than taking an extra fortnight's holiday, once in a lifetime, provided enough notice is given and flexibility as to attendance dates is offered. The deferral system partly offers

³⁶⁴ Calculation appears in P. Darbyshire, *Strengthening the Argument in Favour of the Defendant's Right to Elect* [1997] Crim.L.R. 911, at p.913.

this flexibility but Lord Justice Auld might consider offering the juror a choice of dates within a certain period of, say, a year or six months.

8. Reducing jury service to a week would be likely to increase the acquittal rate. Accordingly, we do not recommend it.
9. Where childcare or care for the elderly or infirm are a problem, a loss of earnings allowance could be offered to another person to take over the role of carer for the period of service. Those people would obviously need to enjoy the same employment protection as a juror.
10. Lack of representativeness is a cause for concern because some personal characteristics, such as those listed below, appear to be related to verdict preferences and contribution to deliberation. Making the jury pool more representative cannot guarantee that any individual jury is representative because these are selected at random from the pool and may, therefore, be all white or all female. Nevertheless, juries as a whole will tend to be more representative. The following findings should be taken into account:
 - Men participate more in jury room discussion, are more likely to be foremen and may be more likely to acquit than women, in certain circumstances. Jurors are more likely to empathise with defendants of their own sex. Incidentally, in this context, it should be borne in mind that defendants are overwhelmingly male and men are more likely than women to have criminal record.³⁶⁵
 - Age may affect the deliberation process, since younger people can recall more instructions and more of the evidence.
 - Occupation and education have an effect on the juror's ability to recall the case, in the jury room.
 - There is a relationship between race and verdict and this is strongly perceived to be the case by the public. The racial structure of juries is and will continue to be a provocative issue. Lord Justice Auld may wish to reiterate the RCCJ's recommendation that the trial judge should be able to order that the jury should include at least three black or Asian jurors, as appropriate, in a racially sensitive case. This does not, however, solve the problem of potential bias against Irish defendants by an all-English jury. In this context, we are concerned to read, in Helena Kennedy's evidence to Trevor Grove, that Irish jurors are normally excused service in cases involving Irish alleged terrorists.
11. The most popular theory on how jurors individually consider the trial and verdict is the cognitive story model. The juror reorganises information into a narrative story by using the trial evidence, prior knowledge (which, as real jurors' accounts show, may be wrong) and what makes a complete story. Accounts of real English and Welsh jurors strongly support the story model and the research finding that the adversarial trial process presents evidence in a way which hampers the juror's construction of a story.

³⁶⁵ A 1993 Home Office Janus study (The Offender's Tale: Janus Studies Home Office Research and Statistics Department, 1993) showed that one third of men aged thirty five had at least one conviction for a listed offence. The peak age of offending is 17-18 so such a record would not exclude them from jury service. Some of the male jurors mentioned having committed offences and some of them but not the women, expressed a sentiment of 'there but for the Grace of God ..

12. It is questionable how effective the average juror is at judging the truthfulness of a witness based on demeanour but real jurors' accounts show that many of them are influenced by whether they approve or disapprove of witnesses.
13. Although *Turnbull* allows a warning that even truthful and impressive witnesses can be in error, some American jurisdictions allow a much greater input from experts on the reliability of eyewitness evidence and other expert evaluation of different types of evidence. Since we are already concerned at the increased length of trial times in the Crown Court, we would be reluctant to suggest a new opportunity for a bonanza for expert witnesses. There is another solution to this. The LCD or Judicial Studies Board or a small committee of circuit judges could assess the state of expert knowledge on the reliability of certain types of evidence, with help from research sponsored by the LCD, and juries could be informed accordingly. Again, there is no reason why a simple list of such findings should not be added to the juror's introductory pamphlet and the relevant warning explained again, orally, in the appropriate context. The same points apply to eyewitness evidence.
14. The accounts of real jurors show they are frustrated by the fact that pieces of evidence have been excluded from the story and they speculate on what this evidence might be. They sometimes refer to jury trial as a game.
15. Jurors may be disproportionately influenced by evidence they are told to ignore and are influenced by previous convictions.
16. Joining defendants and multiple charges can confuse juries.
17. Juries are much better at remembering evidence than individual jurors but real juries sometimes argue in the jury room over the contents of the evidence.
18. Jurors seldom take notes but cannot be expected to take a useful note of the evidence and note-taking could distract them from witness evidence. If jurors are to be required to give reasoned decisions in the future, it may be necessary for them to have access to the transcript. (The NZLC found there was widespread support for allowing jurors access to the transcript, but in hard copy form, not computer searchable. They recommended jurors be given a copy of the judge's typed notes of evidence.) The *Modernising The Crown Court* project, introducing new technology for some trials in England and Wales has not made a difference to this problem. Only 50 courtrooms are projected to have such recording equipment installed and jurors are still required to request a playback of the tape, which is played back to them in open court.
19. If English judges are to continue to sum up the evidence, they should be told not to recite their notes but to draw attention to the main points, to areas of conflict and to how the law applies to the issues of evidence.
20. Juries have a great deal of difficulty in understanding and applying judicial instructions. The Judicial Studies Board's model instructions should be subjected to rewriting by English and Welsh psycholinguists, possibly in accordance with guidelines developed in the United States.

21. Juries should be given written as well as verbal instructions on the law after the trial. These should be drafted by the judge and agreed by counsel and explained verbally by the judge. While this has been recommended before, in the context of fraud trials, by the Roskill Committee and the Royal Commission on Criminal Justice and the Fraud Advisory Panel³⁶⁶ and may be done in complex frauds, the practice does not seem to have penetrated normal trials. (Also recommended by the NZLC, chapter 10). Where possible, juries should be given a pre-trial summary of the issues, as they were in the Harold Shipman murder trial, in October 1999, and pre-trial instructions, which could be agreed by counsel and the judge pre-trial. (The NZLC said counsel should co-operate pre-trial so that issues can be identified and juries instructed pre-trial accordingly). Certain basic instructions, such as on burden and quantum of proof could be written into the juror's introductory pamphlet and pinned, as reminders, onto the walls of the jury room.
22. Juries have immense difficulty in understanding beyond reasonable doubt. Depending on how it is interpreted by the judge, they may equate it with 51-100 per cent proof. Modern lay persons are used to evaluating probability in terms of percentages. English research findings confirm real jurors' accounts that when judges use the word sure, some or even the majority of jurors will equate BRD with absolute proof. On the other hand, with different instructions, jurors may equate BRD with the balance of probabilities. It may be thought desirable to describe BRD in percentage proof terms. In any event, the word sure should be eliminated from the BRD direction.
23. Real jurors in England and Wales experience a great inhibition against asking questions, often to the detriment of their deliberation. Encouraging jurors to ask questions, take notes occasionally and discuss the evidence at an interim stage may all help to keep them awake and alert and to make sense of the trial, to help them remember the evidence more accurately, to understand the case and make their deliberation more focussed. (The NZLC recommended juries be actively encouraged to ask questions during deliberations, chapter 11).
24. Since juries consider the evidence more thoroughly when they are not verdict driven, it may be thought desirable to encourage them to discuss the evidence thoroughly before taking a vote on verdict. (Same point made by NZLC, para. 391)
25. We agree with the suggestion being made by many that the ECHR may require jurors to give reasoned decisions. They could be given a series of questions, agreed between counsel and judge, as they are in civil trials. Lord Justice Auld might find it helpful to study Thaman's account of how the procedure works in Spain. (The NZLC recommended a series of sequential questions or a flow chart in complex trials, para. 318). If jurors are to be asked for reasons, then they must surely be told of their power to acquit in the face of condemnatory evidence, as an exercise of jury equity.
26. We would recommend against reducing jury size because juries will be less representative of the population and their verdicts may be more erratic.
27. Many jurors resent giving up their time for jury service. The universally abiding memory of almost all jurors is boredom, waiting to be used at a trial, or waiting while legal argument takes place in a trial, or in court. The activities of the Central Summoning

³⁶⁶ (2000) 150 N.L.J. 435 at 436.

Bureau will not prevent jurors waiting around, only to be sent home, because no-one can pre-empt a trial collapsing into a guilty plea. Jurors have to be called for scheduled trials, however likely it is that the trial will collapse at the court door. In long trials, where boredom and resentment may warp the jurors' sense of judgement, it would be wise to use the afternoons for legal argument and conduct the jury trial in the mornings when the jurors are more alert, as was done in the Maxwell trial.

28. Real jurors' accounts from England and Wales show jurors suffer a lot of discomforts, in addition to boredom and inconvenience, which may affect their performance. Heat and cold, boredom and their passive role may reduce their arousal levels and ability to concentrate on the evidence. Court managers should regularly check courtroom temperatures and it may be wise to give jurors frequent breaks and encourage them to be more active, as described above.
29. Small discomforts all irritate jurors. Jury managers should encourage feedback on these minor irritations and try to respond. (The NZLC recommend a questionnaire to jurors on the adequacy of facilities, para. 479). All court personnel should be taught to be polite to jurors and respect the fact that jurors are making a personal sacrifice for the public good.
30. Jury service can be very stressful, emotionally and physically. In extreme cases, jurors may become depressed after a particularly harrowing trial. In this context, it is encouraging to find that, since the West trial, court appointed welfare officers have been available to speak to jurors on request, as Lloyd-Bostock and Thomas explain. (The NZLC recommend counselling should be offered in appropriate trials, para. 508).
31. In long trials, one or two alternate jurors should observe alongside the jury, in case of illness or other indisposition.
32. We have made no attempt to examine research into complex and lengthy serious fraud trials, or to suggest how they could be improved. This is partly because the subject has had substantial separate attention in the Roskill Report, the Home Office consultation paper, and papers by the Bar Council and the Fraud Advisory Panel but more because we think that juries should be abolished in such cases. We have no proof but share Trevor Grove's impression that the general public would not care a jot if they were abolished. On the contrary, they probably remember newspaper accounts over the last two decades of very lengthy trials, collapsed trials, outrageous plea bargains, surprising acquittals and phenomenal expense of prosecution costs and legal aid for wealthy defendants. We would expect that only the Bar would wish to preserve the use of the jury in such trials. The little information we have on juries in such trials in England and Wales indicates that they are unrepresentative, are deeply bored and resentful of their sentence and may succumb to the tactic of confusing them by bombardment with information. In the unlikely event that a public opinion survey were to indicate support for the continued use of such juries, we would expect that almost no-one surveyed would want to serve on one. (The NZLC pointed out that the right to jury trial is not an absolute right. A few trials, usually involving fraud or complex evidence are too long and arguably too complex to be tried by jury. In this context, they noted that Lord Phillips M.R., who presided over the Maxwell trial, thinks that juries are not satisfactory in serious fraud, para. 98). In this context we would, however, endorse the point made by Findlay, in the 2001 article discussed above, that fraud trials are not necessarily all lengthy and complex and that there are a variety of criteria for measuring complexity, whatever the trial.

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