1-2001

Juror Comprehension and Complexity: Strategies to Enhance Understanding

Mark FINDLAY
Singapore Management University, markfindlay@smu.edu.sg

Citation

FINDLAY, Mark. Juror Comprehension and Complexity: Strategies to Enhance Understanding. (2001). *British Journal of Criminology*. 41, (1), 56-76.
Available at: https://ink.library.smu.edu.sg/sol_research/2020

Published in British Journal of Criminology, January 2001, Vol.41 (1), pp.56-76.
http://doi.org/10.1093/bjc/41.1.56

JUROR COMPREHENSION AND COMPLEXITY

Strategies to Enhance Understanding

Mark Findlay*

Recent law reform debate proposes the complexity of trials as generally reducing juror comprehension. This in turn is said to impact on the accuracy of the verdict. The empirical studies of three very different jury systems examined in detail in the paper challenge these assumptions against problematic measures of complexity. Critics of the jury, particularly in commercial fraud trials, often take the issue of trial complexity as a given. The studies demonstrate that features of the trial which trouble jurors in terms of concentration, comprehension and decision making are consistent, while often specific to the trial and interrelated. The paper argues for a more sophisticated analysis of trial complexity to precede further empirical testing of the relationship between complexity, comprehension and verdict delivery. This is crucial as a foundation for any policy reform regarding verdict delivery mechanisms on the basis of trial complexity.

In principle at least, the jury sits in order to ascertain the facts of the case and then to determine on the basis of these whether there exists any reasonable doubt concerning the accused and the offence(s) charged. The decision-making ideology which supports this function is of a representative, randomly selected and impartial group of ordinary people brought together to apply their knowledge of the world and experiences of the community to the unravelling of 'facts' in contest.[1] Jurors are expected to weigh up the evidence, determine who to believe and which witnesses to doubt, and to apply their 'common sense' to settle on which version of the argument best approximates their impression of the truth. Throughout, jurors are supposed to be disinterested, unbiased, and removed from emotion. As with the fundamental artificiality of the fact/law distinction (Devlin 1966: 150), this image of the 'masters of fact' has come under challenge (Harding 1988).

The Roskill Committee, examining complex commercial fraud trials (Roskill 1986), was not the first to voice their concerns for the consequences of juror confusion. Common law judges for centuries have felt free 'in the intermediate area of applying the law to the facts, to decide whether to allow the jury full sail or to keep it close-hauled' (Cornish 1968: 106). Even the rules which restrict what evidence can be put before a

* Mark Findlay, Institute of Criminology, University of Sydney.

[1] From our empirical studies into jury deliberation in Hong Kong (1988), New South Wales (1993) and the Russian Federation (1995–6), it is apparent that jurors are confused about what it is that they are required to decide. For instance, of our sample of New South Wales jurors, over 60 per cent thought they were deciding guilt or innocence, 55 per cent felt that they were to decide whether the prosecution case was proven, and 34 per cent thought they were to determine between truth and falsehood (see Findlay 1994: 78). As for the Russian sample, two-thirds nominated 'guilt or innocence', while just a quarter believed they were deciding what was true or false. Around 10 per cent of respondents nominated 'whether the procurator's case was proved', as their task for determination (see Findlay and Reynolds 1995a).

jury,[2] and the interpretative intentions of some judge's directions, can be viewed as qualifiers on the scope of a jury's decision-making discretion regarding the facts at issue.

This paper recognizes the literature concerning the contradictions inherent in jury ideology, and its translation into trial practice (for such a discussion see Freeman 1981; Findlay and Duff 1982). What follows is an analysis of data from three major studies of juror comprehension (see; Duff *et al.* 1992; Findlay 1994; Duff and Findlay 1997), with particular reference to assumptions about the correlation between trial complexity and comprehension.[3] The paper identifies certain specific challenges to the jury's 'fact finding' function,[4] and tests the critique of juror comprehension, in the context of recent attempts to 'remodel' complex commercial criminal trials. We conclude by offering some tentative measures of complexity, and speculate on the way in which their influence over comprehension may be analysed and perhaps minimized.

Initially it is necessary to examine the representation of complexity.

Complexity

As it is assumed that the more complex a trial, the more difficult it will be for the common man to comprehend, so too the determination of what makes trials complex is regularly proposed in a less than problematic fashion (see Aronson 1993). The debate around comprehension, in criminal fraud trials in particular, tends to avoid the complexity of what is complex.

Much of the discussion concerning appropriate decision making in such trials takes the conceptualization and measure of complexity as either obvious or essential depending on the substance and commercial context of certain trials. Attacks against the jury as a mechanism for rational, informed or efficient decision making on this territory tend not to stray from the realm of truisms. The Roskill Committee, for instance, appears to have avoided confusing its impressions with facts:

> There has been no accurate evidence that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally. Nevertheless we do not find trial by a

[2] Interestingly, when it comes to the removal of jurors from the court during a *voir dire*, our research indicates that jurors are not simply protected from contested evidence, but rather their eventual decisions may be influenced by speculation about what was being concealed from them as the trial progressed in their absence (Findlay 1994: 87–8). Seventy-six per cent of NSW respondents indicated that removal of jurors from the courtroom during the progress of the trial had the potential to affect their concentration. Only 65 per cent said that they understood why they had to leave the courtroom.

[3] It would be fair to assume that jurors from whatever jurisdiction or culture of justice should, on average, possess comparable potentials for understanding. However, equally important for comprehension might be variations in trial procedure. The three studies (see Duff *et al.* 1992; Findlay 1994; Duff and Findlay 1997) which are discussed in what follows, consider the comprehension of jurors from varied and transitional cultural backgrounds, and from distinctly different legal traditions and environments.

[4] Recognizing inevitable confusion over what they are deciding and what they might employ for the process, a juror's lack of familiarity with decision making in its different forms within the adversarial trial might produce added comprehension difficulties. While they individually are to determine what is fact out of conflicting versions of evidence, and appreciate the influence of anything from documents to demeanour, what jurors carry with them into the deliberation room is supposed to inform the substance of further debate. Out of this either a unanimous attitude to guilt or innocence is expected to emerge, or some consensus and compromise towards a majority verdict. In Russian Tsarist (pre-revolution) jury courts, for instance, the decision-making process was largely orchestrated by the judge towards consensus, through a consistent and repetitive round of questioning put to the principal parties. In Soviet trials, decisions emerged from the collegium of judge and people's assessors, after facts were settled through investigation and inquisition. Now Russian jurors are being required to distil the facts out of argument and contradiction, and to arrive at decisions through debate and compromise.

random jury as a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth. (Roskill 1986: para. 8.35)

As Harding suggests (1988), this reads more like an article of faith than the consequence of empirical reasoning. Harding further observes (1988: 74–6) of the Roskill Committee Report, that there appear to be three strands of hostile challenge to the role of the jury in complex commercial cases: the 'law and order' dimension; that which emanates from concern for the juror; and that which is technocratic. Each of these themes of criticism works from an assumption that indices of complexity are universal and self-evident. Our recent research into juror comprehension (see Chan *et al.* 1991; Duff *et al.* 1992; Findlay 1994; Findlay and Reynolds 1995a; Duff and Findlay 1997) confounds this view.

Any attempt to isolate what makes a trial complex is of necessity a somewhat subjective venture. However, it is vital if we are to test the hypothesis that juror comprehension is in some way inversely proportional to the complexity of the trial before them. If criminal fraud trials are presented as the epitome of complex, then perhaps this is an appropriate focus for such analysis.

Due to the unique dimensions of each case and each trial process, it is illusory and not a little distracting to search for universal and constant indicators when trying to determine the meaning of complexity. Not every commercial fraud crime, for example, is essentially complex, nor can one simply assume all complex trials involve commercial or fraud crimes. Why should the assumption hold that because a case concerns a commercial fraud that it will result in a complex trial? Perhaps it has been the characteristics of certain recent and notorious complex commercial fraud trials,[5] which have established as irrefutable the connection between commercial fraud and complexity for verdict decision makers.

Critics and law reformers alike, however, seem to have accepted this largely untested correlation between complexity, confusion, and potential injustice as a motivation for policy review. Variables which have been proposed as indicative of complexity are trial length, the nature of the charges, the number of defendants, the intervention of justice professionals, the degree to which jurors participate in the trial, and the form and content of evidence.[6] These direct the consequent discussion of comprehension within the bounds of the trial.

In commercial crimes, while the charges themselves may be simple, the evidence necessary to establish these may involve matters and processes requiring specialist knowledge. Usually large sums of money are involved, documents numerous and witnesses many. Evidence of the essential facts may be concealed in a series of interrelated transactions; transactions often consciously concealed from public view, or disguised. Knowledge of specialized business concepts may be necessary, in order to fully understand the

[5] Later in the paper we touch upon just such a case. At the time we were carrying out some of our research into the Hong Kong jury, the Territory's High Court was hearing the *Carrian* fraud trial. For a discussion of the *Carrian* case and the Attorney General's reference which resulted from it see Litton (1988).

[6] In the empirical studies of Hong Kong, Russian and New South Wales jurors those issues which may impact on juror comprehension were proffered as: trial length; number of accused; number and nature of charges; judge's explanations, prosecution and/or defence opening; prosecution and/or defence evidence; legal terminology; complex facts; scientific evidence; nature and position of evidence; comprehension of fellow jurors; access to exhibits; recall of evidence; maintenance of concentration; questions asked by jurors; jury exclusion; note-taking; judge's summing up; prosecution and/or defence closing; juror deliberations, intervention of the foreman. Any or all of these variables may be seen as having some impact on the complexity of a trial from the perspective of the individual juror. However, it would appear from our research that none of these variables is sine qua non the factor for complexity.

commercial context in which they occur. The offences may be committed by individuals and in settings designed for their concealment.[7] So many of these indices influence an individual's concentration, comprehension and contextualization.

The manner in which questions of understanding are addressed will fundamentally depend on whether one considers the nature of the information to be understood, the context in which it is to be revealed and appreciated, competing explanations, and the parties to whom the responsibility of decision making is directed.

To date, a disproportionate amount of 'reformist' zeal has been directed exclusively against the latter. The appropriateness of the potential decision maker has become the focus of contest.[8]

Problems with Decision Making in Complex Trials

Criticism of trial decisions concerning complex commercial frauds has been levelled on several grounds. As Levi points out:

> In principle these criticisms argue for at least two sets of consequences: (1) the non prosecution of those against whom the prosecutor believes that there is at least prima facie evidence of guilt; and (2) the acquittal of those who 'are' guilty or the conviction of those who 'are' innocent. (1988: 97)

During the period of our research into Hong Kong juries, the Territory faced an additional problem, the relative frequency of these cases. Just prior to the commencement of the notorious *Carrian* trial (1985),[9] investigators were working on no less than 17 major commercial crime cases involving the alleged fraud of billions of dollars.

To some degree the Carrian fiasco epitomises the complex interests and variables at work against the likelihood of satisfactory decision making within the traditional adversary trial setting. The trial took 280 actual sitting days. The jury however, was out of court for 115 of those days, 98 of these being taken up with disputes and legal argument. The judge delivered 53 rulings in the jury's absence. When the defendants were acquitted on 17 September 1987, and the trial having run up a bill of HK$40–50m, the critics were vociferous (see Litton 1988). Their attacks were directed at not only the outcome, but the process, which was perceived as enabling the result.

The *Carrian* case was a marathon event in every sense. Over 100 witnesses, flown into Hong Kong from all parts of the world, gave evidence for the Crown. The Jury (Amendment) Bill was rushed through the Legislative Council to allow the judge to empanel two more jurors than normal for this trial. When the jurors were eventually summonsed, over 400 summonses were sent out and more than 100 potential jurors were whittled down to nine,[10] the result of four hours empanelling.

The number of potential jurors summonsed reflected the probability that the vast majority would successfully seek to be excused. The amendment to the Jury Ordinance

[7] In addition, as a trial tactic, defence lawyers may become involved in obfuscating the transactions and relationships at issue in order to delay process or confuse the jury. Recently, in the Australian federal jurisdiction, prosecution authorities have introduced new technologies into the trial in order to simplify crucial transactions or relationships at issue (see Greenleaf and Mowbray 1993).

[8] This is primarily true concerning criticisms of the jury. However, as Litton (1988: 6) implies about the judge in the *Carrian* trial, a reluctance to address complex judicial duties such as the summing-up of evidence at the conclusion of a long and detailed trial may lead to confusion and misinterpretation.

[9] HC 117 of 1985.

[10] The standard Hong Kong jury is comprised of seven jurors. The reasons for this are discussed in Duff *et al.* (1992: chs. 4 and 5).

(1985) allowed up to four jurors to be dismissed during the course of the trial without affecting the ability of the remainder to bring in a verdict. With the extreme limitations on jury franchise in Hong Kong (see Duff *et al.*1990) these provisions were more than usually prudent. Two jurors were in fact discharged during the trial, one when his application to immigrate to Australia was approved, and the other having established that his prolonged absence from his job was endangering his career.

After such effort to ensure the continuation of a competent jury, and the praise accorded them for performing an 'enormous civic duty', eventually they were not called upon to consider their verdict. At the close of the case the judge made what was later to be criticized as a fundamentally incorrect decision to dismiss the charges for duplicity.[11] It was the judge who prevented what might have been the correct verdict through an error of law, not the jury through any confusion of fact.

Another telling criticism of the *Carrian* determination was that the Crown prosecutors had misjudged the complexity of the charges at the time the indictments were drafted. During the Crown case multiple charges emerged. Instead of a single charge of conspiracy there should have been several counts alleging different offences arising from various transactions in which the defendants had been involved. It became apparent that the accused could have faced separate trials altogether. Thus, as a consequence of the procedural imperfections of the *Carrian* prosecution as well as the complex expert evidence presented during the trial, pre-trial preparation was foreshadowed as an appropriate extension when analysing juror comprehension.

Accepting that trial complexity is an outcome of the interaction of a diverse set of procedural and discretionary characteristics, such characteristics may be modified through pre-trial procedures. Again such characteristics may (not must) impact on the decision making of those who participate in the verdict. Therefore, it would be sensible to examine the views of the principal players in the verdict process.

What follows is a brief examination of empirical research which, in part, explored the issue of juror comprehension, the impact of the judge over this, and confronted certain assumptions about the connection between features of complexity and comprehension.

What the Players Say

Over the decade 1986 to 1996 we have had the carriage of three major research projects which have examined the operation and impact of juries in criminal trials[12] (see Duff *et al.* 1992; Findlay 1994; Findlay and Reynolds 1995a,b; Duff and Findlay 1997).[13] While none of the projects was solely dedicated to the relationship between trial complexity

[11] See *Attorney General's Reference No. 1 of 1987* [1988] HKLR 375.

[12] The jurisdictions and jury systems were initially selected because the researchers had special knowledge, unique access opportunities, and funding support. In two of the jurisdictions the superior courts sponsored the research exercise. The legislation governing each research situation did not prevent the preferred method of interviewing jurors immediately following the delivery of their verdict.

[13] The methodologies employed in these three projects, while being unique in certain respects, were largely reproduced project to project. Jurors were surveyed immediately following the delivery of their verdict, or in a small number of cases, at a later time. Legal professionals were also surveyed. The juror survey instruments in each exercise employed similar and comparable questions about comprehension. Each project surveyed jurors' attitudes to their task, as well as the attitudes of legal professions on the manner in which this task was discharged. The survey responses were regarded as expressions of what jurors said they understood or comprehended. On occasions the researchers were left to speculate on inconsistent, inaccurate, or apparently self-serving or constructed responses.

and juror comprehension, each survey produced unique insights into what might be considered as a feature of complexity, by whom, and how, if at all, that feature influenced comprehension, and the eventual outcome of the trial.

What makes a comparison of these insights more telling is that they are drawn from different jurisdictions, with very different communities which their juries represent, very different histories of jury process, different manners of professional intervention, and different systems of criminal justice.[14] This should allow for a comparative outcome which would emphasize the significance of any common themes of complexity or challenges to comprehension.[15]

The Hong Kong study ran from 1988 through till 1990. Initially surveys were to be administered to jurors immediately after the delivery of their verdict. However, as a result of the withdrawal of essential access conditions[16] the research reverted to a 'grab sampling' method, resulting in 58 completed questionnaires from recently serving jurors. The NSW surveys were administered in 1993 to jurors after verdict delivery, in urban and rural courts. The survey instrument was a refined and expanded version of what had been employed in Hong Kong.[17] The sample in NSW covered 637 jurors[18] in 57 trials, held in four courts over a three-week period. This represented a total jury trial coverage for that period. The NSW questionnaire was used as a model for the Russian instrument, being adapted to recognize the different status and functions of jurors, judges, victims and accused persons, as well as the specific format of the Russian verdict. This survey covered 142 juror respondents who had decided trials run in three of the experimental court districts (Saratov, Krasnodar and Ulyanovsk). For the Saratov district at least the respondents came out of a total jury trial coverage for the summer survey period in 1994.[19] The research projects in Hong Kong and Russia also involved questionnaire surveys of the lawyers and judges in the trials surveyed, or for Hong Kong of the bar and the bench generally.

[14] With Russian jurors serving in a recently revived jury system, for instance, the inexperience of trial professionals within the Russian jury process was expected to compound juror's difficulties with comprehension. Judges and lawyers themselves must first become familiar with 'foreign' concepts such as the presumption of innocence in order to convey to jurors their responsibilities. In addition, so much of the information put before jurors must be distilled and interpreted by the professionals. The plain meaning of facts needs to be elicited from witnesses in an accessible fashion, the status and significance of 'facts' may require comment, and the distinction between fact and 'law' can only be maintained (if at all) by judges and lawyers who are themselves grappling with a new system and foreign concepts.

[15] NSW and Hong Kong have juries of English origin but both have developed their own unique functional and structural features. Russia has introduced a hybrid of Tsarist, American and civil law jury traditions. The Hong Kong jury resembles colonial/professional juries with language and ritual far removed from the general community. NSW retains the unanimous verdict and peremptory challenges. The Russian jury has transposed juries above civil law criminal justice principles and procedures. What makes comparison possible or valuable? Common jury ideologies, broadly similar functions for the jury, similar dichotomies between the professional and lay trial participants, similar concerns about the impact of complexity, and common community expectations. The comparison is enlivened by the transitional period through which each of these juries was progressing when surveyed.

[16] The methodological difficulties confronted and overcome in the Hong Kong study are detailed in Duff *et al.* (1992: ch. 2). This chapter also analyses the politics of jury research in general. Method difficulties in the NSW project were less serious due to judicial sponsorship (see Findlay 1994: chs. 2 and 5). The challenges for the Russian project, besides language and physical access, were also minimized by the support of trial judges and the Supreme Court, as well as the involvement of the principal researchers in advising on the creation of the new Russian jury law (Findlay and Reynolds 1994).

[17] For copies of the surveys see Duff *et al.* (1992: appendix 1); Findlay (1994: appendix 2).

[18] The NSW project also surveyed 881 persons called for jury service but who did not serve.

[19] In a number of these trials the survey return rate may not have reflected the response rate. In addition, following some trials the survey was not administered personally and jurors were allowed to return the questionnaires later. This significantly reduced the response rate. Twenty-four trials were observed and formed sites for the survey.

At the time of the surveys each jury system was in transition. For Hong Kong and Russia in particular, the civic and legal cultures were in great upheaval. The jury was being introduced or retained as a claim for democracy and the rule of law in an atmosphere where previous political, economic and social structures were being torn away. For NSW political culture was stable, but the reputation of criminal justice was in chaos. The jury was the final institution in which the community had confidence but it too was assailed by supporters and critics requiring guarantees of comprehension and competence.

In its symbolic standing the three juries provided a framework against which the essential position of criminal justice within democratic government could be tested. For the operation of criminal justice the juries were being challenged to reconcile the aspirations for lay participation with the demands for a new professionalism. The public was being asked to reaffirm their confidence in jury-based justice within transitional, modernizing and deregulating economies.

Preconceptions of the jury

Each survey examined the potential for the juror's initial contact with the court to influence their confusion or capacity for comprehension.[20] Particularly for the Hong Kong and Russian juries a lack of familiarity with or confidence in the justice process and the law had the potential to undermine a positive disposition to the decision-making process.[21]

Against the initial contact issue, the surveys examined whether potential jurors knew about the jury and had confidence in it.[22] In Hong Kong, interestingly, the vast majority of respondents had no personal knowledge or experience of the jury, had little

[20] A useful measure of whether the information provided to jurors on arriving in court has influence over their knowledge of their duties is to compare the responses to the questions concerning previous knowledge of the jury's role, and knowledge of their function when taken to court, or knowledge of what to do when the judge's associate called their names. In the NSW surveys, from the initial question regarding prior knowledge of the jury, 11 per cent of non jurors and 16 per cent of jurors did not possess such knowledge of the jury's role. Twenty-two per cent of non jurors indicated that when they were taken to the courtroom they did not know what they were expected to do. A far greater proportion of jurors (36 per cent) was negative in their response to this question. Therefore, for these respondents little if anything had happened in the jury assembly room which would supplement their ignorance. Eighteen per cent of non jurors said that they did not realize that they could be excused at this time, and 25 per cent of jurors expressed the same misunderstanding. Of those non jurors who responded, the vast majority (42 per cent as compared with 7 per cent) said they knew what to do when called by the judge's associate. Ninety-two per cent as compared with 6 per cent of jurors made an affirmative response to this question.

[21] It is worth remembering that from their earliest contact with the court, potential Russian jurors were the victims of confusion and misconception, certain aspects of which generates in all jury systems (Findlay 1994). An initial apprehension of jury service verging on fear is hardly conducive to the positive or accurate reception of explanation and direction. For example, court staff in one region reported the regular and constant need to clarify the meaning of original jury notices and disabuse recipients of adverse readings associated with the jury summons. Many jurors took these documents to relate to some violation committed by themselves or members of their family, and tried as a result to distance themselves from the court. This sometimes required court officials to visit potential jurors in their homes and allay such concerns. In other instances potential jurors would only appear for service when threatened with court process. For these potential jurors in particular, the atmosphere of a courtroom which they feared, would not induce a keen and clear reception of initial instruction as to duty. In addition, it would be fair to assume that reticent or fearful jurors such as these might also be reluctant to indicate truthfully the actual extent of their ignorance and confusion about duty at any stage of their service, in anticipation of any adverse repercussion for such admissions. Having said this it would appear from other indicators in the survey that the vast majority of juror respondents when questioned at the completion of their service expressed that they were happy to serve, were not inconvenienced by service, and would do it again if required.

[22] In NSW around 85 per cent of both serving jurors and potential jurors surveyed answered in the affirmative that prior to coming to court on this occasion they were aware of what a jury does. A slightly lower percentage (around 75 per cent) confirmed that when they enrolled on the electoral roll (the name source for the jury roll) they were aware of their responsibility to serve as a juror.

secondhand knowledge, did not know what the jury did, but had confidence in it as an institution of justice.[23]

Initial instructions

Beyond the understanding that any juror may bring to the courtroom, there is the potential within most jury selection processes to override misinformation, correct confusion and compensate for ignorance.[24] The surveys of Russian jurors (Findlay and Reynolds 1995a) and those in New South Wales (Findlay 1994), for instance, were interested to examine whether these features of the process were adequately addressing the need to inform jurors of their duties, at least from their point of view.[25]

Further, it was anticipated in the surveys that a juror's capacity to initially comprehend his/her responsibilities might be affected by their understanding of how they came to be selected, and for what purpose. Amongst the Russian jurors, for instance, the adequacy and impact of information provided as part of the selection process, concerning what would be required of jurors, was tested. At the time they were taken into the courtroom for selection, over 20 per cent of respondents did not know what was expected of them. However, some of this confusion may later have been corrected in that almost all respondents eventually were satisfied that they had been told enough by the judge (at the commencement of the selection process) about what to expect. The high approval rating of judicial instruction at the selection stage remained constant when respondents were asked about the information on their duties provided by the judge at the commencement of the trial.[26] Even though such instruction was deemed adequate, a significant number of jurors were not advised about 'examining exhibits', on principles of court procedure, and the role of the judge. The positive response held constant when Russian jurors were asked whether they had been instructed on the duty of the jury to decide the facts; the ultimate responsibility of all jurors. Almost half those surveyed agreed that they would have liked issues such as the rights and duties of parties to the trial, and the duty of jurors more fully explained.

Understanding concepts

It would be fair to assume that for any juror to discharge adequately his/her duties in any trial complex or otherwise, they would need to be clear as to the meaning of concepts such as the presumption of innocence, the facts of the case, and the evidence. It would

[23] In the Russian survey, when asked whether, prior to coming to court on the relevant occasion, respondent jurors were aware of what a jury did, well over half of those surveyed expressed ignorance. It is interesting to put this against the 90 per cent vote of confidence in the jury from responses offered up from the survey. Such confidence, it would appear, was not diminished through the experience of jury service.

[24] Along with our assumption of a prevailing community ignorance in Russia about the details of jury duty, the survey sought to test whether the relative inexperience of legal professionals and judges involved in the early Russian jury trials compounded the problem. In particular, reactions to the explanations provided by judges were inquired into, as was the assimilation of preparatory information made available to jurors by court administrators.

[25] The methodological problems inherent in relying on the assessment of respondents otherwise ignorant of the information on offer were acknowledged and identified through testing what jurors eventually understood as their duties.

[26] This was mirrored in the NSW surveys. A very large proportion (90 per cent) of jurors surveyed felt that at the commencement of the trial they had been told enough by the judge about the duties involved in jury service. With around 5 per cent answering in the negative and 5 per cent non response, one might draw the conclusion that in the vast majority of cases judges are giving introductory remarks to jurors about their duty, and that these remarks are satisfactory.

also seem to follow that where the facts of the case, the legal themes or the fundamental concepts before the jury are complex, then clarity in understanding these key issues might be diminished. In any case clarity of conceptual understanding is crucial to eventual comprehension. On each of these points, in the Russian survey for instance, less than half of those responding were clear, with the remainder either feeling somewhat clear or not clear at all. Around 15 per cent were not at all clear.

Competing evidence

Comprehension, particularly in the face of competing evidence, may depend on the nature and variety of information sources within the trial.[27] This presents a more complex array of choices in the Russian trial than might normally tend to confuse jurors in other jurisdictions. In the new Russian criminal trial procedure, not only will both sides of the case present their evidence, but the accused and the victim also have opportunities to introduce evidence at their own behest. Further, the evidence presented may be tested by questions from the victims as well as those emerging out of both trial teams.[28] Jurors may also question witnesses as well as the judge. Therefore, the complexities of evidence which stand as an indelible feature of all adversarial trial are compounded in the Russian situation by the wide range of interests with power to intervene across the contest over fact.

Prosecution and defence evidence

Juror respondents were asked whether, during the course of the trial, they experienced difficulties in following the evidence presented[29] by the prosecution or the defence. Thirty-eight per cent of the Hong Kong sample responded in the affirmative. In the Russian sample over half were not clear about the meaning of the presumption of innocence, the facts of the case, or the evidence. It would be fair to assume that amongst the remainder there was a need for clarification before any considered comprehension of the case.

In the NSW surveys questions were asked about the clarity and influence of evidence presented by the prosecution and the defence. With respect to prosecution evidence,

[27] In the Hong Kong survey, of those who expressed dissatisfaction with the amount of information presented, two-thirds were members of juries which convicted (compared with the conviction rate for all jurors of 78 per cent).

[28] The adversarial process itself, not known to Russian justice, has a potential to compound difficulties with comprehension. The idea that truth emerges from debate, when in previous processes of justice in Russia truth was distilled through investigation, and emerged at the trial as a by-product of its ultimate stage, could be confusing to many trial participants. In the past, the appropriate truth and its determination were the monopoly of legal professionals or lay assessors significantly influenced by them. In jury trial, at least in part, this is passed over to the jury.

[29] It was anticipated, in the Russian jury project, that with the introduction of new forms of evidence through the procedures supporting Russian jury trial, some confusion m emerge. For instance, the documentary evidence and the dossier on which the procurator's case so heavily relies in Russian non-jury trial theoretically is less significant than oral evidence in systems where the presumption of innocence confers a related right on the accused to test all the evidence against him through cross examination. How such oral evidence would stand in the minds of jurors when compared with the written 'official account' of the procurator's case was thought problematic.

In addition to differences in form, there is the change in the position of evidence within the trial in Russia which merits consideration. In non-jury trial the defence case commences with a statement from the accused. In Russian jury trial the defendant may also take this course but is not required to do so. If he makes such an election he can introduce other forms of evidence to his benefit at later stages of his case. How this difference in the potential ordering of evidence would effect, if at all, the comprehension of jurors was tested.

20 per cent of juror respondents indicated that they had difficulties in understanding. Regarding the prosecutor's closing address, 78 per cent considered it to be helpful, a similar figure felt that it adequately explained and summarized the prosecution case. However, 64 per cent indicated that it helped them reach their verdict. Sixty-six per cent of respondents stated that they had no difficulty understanding the evidence of the defence, with those indicating a difficulty being in equal proportion to those who found the prosecution evidence difficult. Around 5 per cent fewer respondents found the defence closing address helpful than those gaining assistance from the prosecution closing. A similarly reduced proportion of respondents indicated that the defence closing adequately explained and summarized the defence case, with 58 per cent of the view that the closing address of the defence counsel helped them reach their verdict.

Nature and placement of evidence

The Russian survey assumed that both the nature and placement of evidence from the accused and from the victim would influence comprehension, if such evidence was declared to be influential over eventual jury decision making. As for the evidence of the accused, less than one quarter of respondents declared it to be influential, while around 40 per cent saw the victim's evidence as influential. One might project, therefore, that the victim's evidence is an important focus for comprehension.

The NSW data revealed that the positioning of evidence within either the prosecution or defence cases could influence juror decision making (Findlay 1994: ch. 5). Add to this the traditional expectation in Russian trial justice that the accused should be required to speak and speak first to further emphasize the significance of the presence and position of the accused's evidence in jury trials.[30] Against this background Russian jurors would have impressions about a silent accused, where he elects in jury trial not to give evidence or to give it first. Also judges familiar with the non-jury practice and ideology in Russia on this point might wish to draw adverse inferences from any failure by the accused to follow the traditional pattern.[31] This might still prevail, at least in the mind of jurors, despite the presumption of innocence.

It was suspected by some Russian judges and legal professionals that any shift from the reliance on documentary evidence as the basis of the state case would lead to difficulties for the prosecution and as a result, to juror confusion and injustice. This assumes that jurors would give far more weight to oral evidence, as in fact the 'presumption of innocence' might seem to require. Interestingly, this does not seem necessarily to be so for Russian jurors. Respondents were asked whether they were influenced by oral as opposed to the documentary presentation of evidence. Around 49 per cent of those who responded nominated oral evidence as being more influential, while a similar number saw no difference in the significance of either form of evidence.

[30] Just over 20 per cent of Russian respondents indicated that in their trials the accused was the first witness to give evidence in the trial. This clearly suggests that the election on evidence now vested in the accused in jury trials is attractive to the defence side. It is not clear from the survey whether this election by the accused went on to a decision not to give evidence on his own behalf at any stage. The non-response rate to later questions regarding the impact of the accused's evidence might suggest that in up to 20 per cent of the trials this was the case.

[31] Due to the presumption of innocence, and the protections against self incrimination in common law jurisdictions, the ability to draw such inferences is strictly limited.

Complexity of evidence

Consistent with the arguments of juror critics focusing on complexity and comprehension, the complexity of certain elements of the evidence was identified as possibly impeding comprehension. In Hong Kong, five of those jurors who admitted to having difficulties with the evidence stated that they understood half or less of the legal terms presented in the case. In the NSW and Russian surveys a series of specific questions were asked regarding juror comprehension of 'legal terms', 'complex facts', and 'scientific evidence'.[32] In NSW, only 20 per cent of respondents indicated that they understood the legal terms in the case thoroughly. The majority (56 per cent) understood these terms 'most of the time', whereas around 15 per cent had an understanding 'some of the time' or 'not at all'. As for complex facts, a smaller proportion (16 per cent) understood these thoroughly, with again a smaller proportion (50 per cent) understanding complex facts most of the time, and 18 per cent only understanding these some of the time or not at all.[33]

For Hong Kong jurors medical terms, legal procedures, problems as to what evidence to discard, imprecise cross examination, the process of translation and tiredness were also identified as problems which confronted the jurors in their attempt fully to appreciate the evidence put before them.

A somewhat disturbing correlation in the NSW survey is for those jurors who only understood legal terms some of the time, 43 per cent were involved in juries which convicted, when compared with 7 per cent of that group which acquitted. Of the Hong Kong sample, 80 per cent of those who admitted to having problems in following the evidence were on juries which convicted (compared with 78 per cent of all jurors). Further cross tabulations with the more general indicators of English comprehension[34] produced similar results.[35]

Defendants and demeanour

Russian jurors were also asked whether the behaviour and demeanour of the accused influenced their decision making. Largely it did not. Neither did the judge's attitude to the accused where it was discernible.

It would seem from the data that challenges to comprehension did not increase along with the number of defendants on trial. This appears to be confirmed by the particular

[32] In the NSW surveys the question concerning the understanding of scientific evidence was responded to in a rather unclear fashion. This may have indicated either that jurors are not certain what classifies as scientific evidence, or that such evidence may not have been raised in the trials with which they were associated. Again 20 per cent indicated they understood such evidence thoroughly, 33 per cent most of the time, and 10 per cent some of the time or not at all.

[33] Whereas the overall figures of comprehension here may not be conclusive, the particular analysis of specific trials seems to indicate that in fraud, sexual assault, and to a lesser extent murder trials, complex facts and scientific evidence are each a focus for confusion.

[34] The language of the criminal trial in jury courts in Hong Kong is English, while the majority of jurors nominate Cantonese as their preferred language.

[35] Of those respondents who had difficulty with English language newspapers, two were in juries which acquitted while 11 deliberated with juries which convicted; almost 90 per cent of those who could not fully understand an English language television news broadcast were members of juries which convicted. It would seem, therefore, that many juries in Hong Kong which convict include members whose English comprehension may be suspect. We were unable to test whether, or to what extent, the confused juror actually influenced the verdict of his/her jury. It would not be unreasonable to assume that most of those jurors who did not fully understand the evidence simply went along with the majority.

analysis of selected juries which was carried out as part of the NSW project (see Findlay 1994: 102–14).

Understanding and trial duration

There is a popular wisdom that the more complex the trial, the longer will be its duration. Attached to this is the assumed correlation between longer trial and lower levels of juror comprehension. We were interested to determine whether the percentage measure of understanding was in any way dependent on the length of the trial. Trials in NSW lasting longer than a week produced a significantly lower proportion of jurors who understood 100 per cent of the trial, and larger proportions understanding between 75 and 100 per cent, and between 50 and 75 per cent.

Understanding and age of jurors

Another interesting correlation is the age of jurors in comparison with percentage of trial understood. It is assumed that the older juror with the greater life experience will be better able to appreciate complex trial scenarios, than would be the younger juror. Although the differences were not great it would appear that the older the NSW juror, the more likely were they to indicate 100 per cent understanding of the trial, except that jurors over the age of 65 were also more likely to indicate an understanding of 75 per cent to 50 per cent of the trial. Otherwise, the 75–100 per cent range was more likely to include younger jurors.

Sites of confusion

In addition to the focus on forms of evidence and comprehension, the surveys sought to identify 'sites' of confusion within the trial. In NSW jurors were asked whether they found the evidence confusing during cross examination, during counsel's closing remarks, or during the judge's 'summing up'. The cross examination was far more likely to be confusing than the other two situations in the trial (30 per cent compared with 11 per cent as against 10 per cent). What is additionally interesting about these figures is they demonstrate that jurors, while generally expressing confidence in their understanding of the evidence, had specific problems of understanding on particular occasions during the trial.

In the Russian survey, it would seem that for some jurors confusion prevailed as the trial progressed. Again around one-third of our respondents had some difficulty understanding the questions asked and the answers given during the trial. This, however, should be balanced against the measure that almost all these jurors had such an understanding either 'always' or 'most of the time'. This response is consistent with the answer to the question about how much of the trial respondents understood. Almost half those surveyed indicated that they understood 100 per cent of the trial and then most of the remainder understood between 75 and 100 per cent of the trial. It may be of some concern that in addition to the non-response rate for this question of 8 per cent, around 15 per cent of those who responded said that they understood between 25 and 50 per cent of the trial.

The closing remarks of the lawyers and the judge are often thought to have a lasting effect on juror deliberations. If so it might be assumed that this goes beyond the simple fact that these may be the last voices in the trial a juror hears prior to retiring. As such these closings would, if influential, present an opportunity for clarifying complexity and diminishing resultant confusion.

Do these closing remarks provide important understandings for the juror, as commentary on the evidence and explanations of the issues? For around three-quarters of the Russian respondents their understanding of the case was improved as a result of the closing remarks of the procurator. This proportion was reduced to just under 70 per cent being those with improved understanding as a result of the defence advocate's closing. The judge's summing up did not produce difficulties for almost all of the respondents in terms of understanding directions on law. In addition, the judge's observations on the evidence were largely helpful to juror understanding, although this should be balanced against some disagreement with the proposition (10 per cent) and a relatively large non-response figure (42 per cent). Over 90 per cent of respondents, recognizing a significant non response (52 per cent), measured the judge's closing as fairly summarizing the evidence.

Juror questioning

Comprehension might further be questioned in light of those respondents who despite expressions of confidence in the presentation of the evidence, also identified a desire for greater clarity in nominated situations within the trial. In the Russian survey, when the judge or the procurator read from documents, around one-third of those surveyed would have liked greater clarity. The proportion of jurors seeking greater clarity remained constant where lawyers questioned witnesses, the judge questioned witnesses, when expert evidence was presented, the accused made his address, lawyers made their closing addresses, and the judge gave his summation and instructions. Therefore, it can be concluded that while jurors largely understood the presentation of evidence by parties in the trial, the quality and scope of such understanding could be enhanced and improved through greater clarity at important stages in the presentation or review of the evidence.

If a significant number of jurors were concerned to increase their understanding, and they appreciated their right to ask questions[36] in order to achieve this, one would assume that such questioning by jurors would be a feature of Russian jury trial in particular. In fact, two-thirds of our Russian respondents noted such questions in their trials. Individual jurors alone more often than not formulated the questions, although questions arising out of some discussion amongst jurors were not uncommon. Around 25 per cent of respondent jurors also asked the judge to explain the evidence or the law. This usually occurred either during the presentation of evidence or during deliberations. In almost every situation where such questions were asked of a judge, there was satisfaction with the answer.

Hong Kong respondents were asked whether the jury sought assistance from anyone in court where jurors felt that they did not understand the evidence presented. Around a quarter of the respondents were in juries which sought such clarification, usually

[36] It should be noted that jurors in the Russian trial process need not only ask questions of or through the judge, but are able to direct their questions to the accused and witnesses.

concerning the nature of the evidence or the exhibits. Most inquiries were put during the course of the trial, with a few arising after the jury's deliberations had commenced. The questions were almost always directed to the judge and resulted in either a clear response or an explanation as to why a satisfactory answer could not be provided. Of the NSW sample 36 per cent of respondents sought explanation of the evidence. In almost all cases, questions were directed to the judge, or through the sheriff's officer to the judge. Such inquiries were made at various stages during the trial, but in most situations the trial was well underway before such explanations were sought. Ten per cent of jurors indicated that they felt unable to seek explanation of the facts.

The next step in this line of questioning was to inquire of those who did not seek any assistance, why this was so, and in particular whether anything prevented them. Most of this section of the Hong Kong sample replied that they did not need assistance because either the evidence was clear, or its presentation helpful, or jurors conferred in order to overcome their confusion.

It is interesting to note that Hong Kong jurors who were members of juries which sought assistance, were amongst those respondents claiming the highest degree of understanding of the trial in percentage terms. All claimed to have understood more than 80 per cent of the trial, most respondents more than 95 per cent. Of those who were on juries that refrained from seeking clarification because they felt discouraged from asking questions, the comprehension rate averaged out at 80 per cent, dropping as low as 50 per cent. It seemed that the more jurors understood, the more confident they were about taking an active role in the trial process.

Juror concentration

Concentration is the temporal sequence dimension of comprehension. Obviously a lack of comprehension is a first and foremost challenge to concentration. Russian jurors were asked whether it was difficult for them to remember the evidence when they retired to deliberate. A remarkable 93 per cent of Russian respondents indicated no difficulty in recall. Therefore, it is not surprising that 82 per cent had no difficulty in maintaining concentration during the trial. Three per cent of the NSW respondents found such recall of the evidence when they retired to consider their verdict very difficult, while 18 per cent indicated it to be difficult. 'Not difficult' was nominated by 70 per cent of the respondents. NSW jurors were invited to comment on methods employed to help recall the evidence. These included note taking, conversations with fellow jurors, reliance on transcript of evidence in the deliberation room, the use of a whiteboard to focus the jury's discussions, and a close examination of statements.

Concentration goes beyond the issue of recall. Jurors were asked whether they found it difficult to maintain concentration during the trial, and 30 per cent of NSW jurors indicated it was (with 59 per cent of respondents denying any such difficulty). For the 30 per cent who had difficulty concentrating, the questionnaire suggested reasons: the length of the trial, tiredness, boredom, the physical conditions of the court, or some other reason. Thirteen per cent of the survey (almost half of those with concentration problems) nominated a difficulty due to the length of the trial—10 per cent due to tiredness, 12 per cent boredom and 8 per cent the physical conditions of the court. Of Hong Kong jurors surveyed, 32 respondents indicated that they had no difficulty in maintaining their concentration throughout the proceedings. When this group was

asked how they had managed this, their responses addressed taking notes, reminding themselves to pay attention (e.g. 'Kept saying to myself that to be just is very important'), the novelty of jury service and their interest in the proceedings, and their sense of duty and responsibility. Nineteen jurors indicated that they were unable to maintain their concentration. Many of those identified boredom as a reason for this. Other factors mentioned were lengthy and repetitive cross examination, delays and repetition due to interpreting evidence, the similarity of witnesses' evidence, and tiredness.

No clear trend emerges from a comparison of these responses in the Hong Kong survey with the length of the trial. It did seem, however, that respondents under the age of 30 were more likely to admit to having difficulties with their concentration. Of those who had problems with concentration, all but one were on juries that convicted.

Retiring to deliberate

Most jurors surveyed stated that they were clear about what they had to do when they retired to reach a decision about the guilt or innocence of the accused. In answer to a question as to whether they should have been allowed to take material into the jury room to aid their memories, over half of the Hong Kong sample, for instance, responded positively. Suggestions included: personal notes taken during the trial; exhibits; transcripts of witnesses' evidence; notes of the judge's clerk; and even the stolen property in question. Respondents were also asked what other additional assistance might have been provided. This produced a broad range of answers which range from improved physical comforts, to independent expert advice.[37]

Our surveys of juror behaviour indicated that jurors often make decisions on guilt or innocence well prior to retiring. In the Russian survey, for instance, jurors were asked to indicate the time at which they first formed a strong opinion about the guilt or innocence of the accused. The options suggested followed the progress of the trial. Just less than 10 per cent of respondents settled such an opinion after the charges had been read out. Another 13 per cent came to such an opinion after the accused made his statement. Consistent with the significance accorded the victim in other situations 18 per cent made up their minds after the evidence of the victim. At the conclusion of the procurator's case 13 per cent had formed strong opinions and a similar number after the judge's summing up. This left around 30 per cent of respondents to come to strong opinions in the jury deliberation room. Therefore only these jurors and perhaps some of the 20 per cent who did not respond to the question approached the verdict questions with an open mind. The NSW questionnaire sought to establish whether jurors made their decision about the guilt or innocence of the accused at similar sites in the trial.[38] As one would assume, almost none of the jurors (1 per cent) came to a decision about guilt or innocence prior to the trial, with only 2 per cent indicating that they made their decision at the trial's commencement. Twelve per cent, however, nominated that their decision on guilt and innocence came at the closure of the Crown case. Twenty-two per cent of respondents

[37] In Russia, the vast majority of those who sought explanations from the judge were satisfied with its helpfulness. Ninety per cent of Russian respondents had no difficulty understanding the judge's direction about the law as part of his summing up. However almost half of those surveyed would have preferred greater clarity in the way the judge gave his summation and instructions.

[38] For instance; before the trial began; at the commencement of the trial; by the end of the prosecution case; after the lawyers had addressed at the end of the trial; after the judge's summing up; or in the jury deliberation room.

indicated that they reached their decision after the lawyers' addresses. Another 24 per cent reached a verdict after the judge's summing up. The jurors who stated that they reached their verdict in the deliberation room comprised 47 per cent of respondents. It would be wrong to read these percentages as exclusive.[39]

The deliberation room is clearly an important decision-making environment for jurors.[40] Fundamental to the decision-making process is a clear mind about what the deliberations are directed towards. NSW jurors were asked whether, once in the deliberation room, they were clear as to what they were meant to do. Eighty per cent indicated in the affirmative, with only 1 per cent unclear.

In order to pursue an understanding of whether jurors were confused during their deliberation and yet felt unable to seek clarification from a judge, the NSW questionnaire asked whether jurors wanted at the same time to seek direction or explanations. Thirty per cent answered in the affirmative. Only a quarter of the survey, and half of those who responded to this question, sought further explanation or direction.[41] Regarding whether these further explanations or directions were helpful, 30 per cent of the survey (which surprisingly was slightly more than those who said they sought explanation) agreed that they were.[42] It is interesting to note that the question concerning the helpfulness of explanations and directions specifically referred to their utility for jurors in reaching a verdict.

Twenty-six per cent of NSW respondents indicated that they or other jurors changed their opinion about the guilt or innocence of the accused during the deliberation process. This contrasts with the 55 per cent who indicated that they did not change their opinion during the deliberations. A question was asked to test common assumptions about intransigent jurors; i.e. 'Did any juror(s) refuse to change their opinion so as to bring in an unanimous verdict?' Seven per cent answered yes to this question while 72 per cent no (21 per cent was the non-response rate).

Time taken to reach a verdict

A correlation between complexity and delay in reaching a verdict may be assumed. On this measure it would seem that few, if any, jury trials are complex. For instance, the NSW survey inquired about the length of time taken for a jury to reach its verdict.[43]

[39] Bearing in mind that the non-response rate for these questions ranged from 40–55 per cent, it would appear that some jurors may have nominated at least two occasions as influential over their decision on guilt or innocence, because it was perhaps difficult for them to state precisely when their mind was finally made up. This may indicate also that jurors changed their mind along the way, and at crucial points of interaction in the trial. The non-response rate for questions regarding details of deliberation might be explained by a reluctance on the part of jurors to indicate details of when and how they decided their verdict.

[40] In order to ascertain material factors which assisted in this process, NSW respondents were asked whether they were allowed to take their notes with them to the jury room, whether they had access to the transcripts of the trial therein, and whether they had access to exhibits. Seventy-one per cent took their notes into the deliberation room, 50 per cent said they had access to transcripts therein, and 80 per cent had access to exhibits in the jury room.

[41] This figure to some extent might underestimate the difference between those jurors needing clarification and those requesting it, because of the significant increase in the non-response rate to the latter question.

[42] The difference between the 25 per cent seeking explanation and the 30 per cent agreeing that it was helpful might be explained by some confusion regarding the usefulness of judicial explanations and directions in general, even those which were not specifically sought by the jury.

[43] There was a surprisingly high non-response rate to this question (21 per cent). Again, when it came to recounting details of verdict deliberation jurors were reluctant to respond. This may have arisen from a construction of the judge's admonition not to talk about the details of their decision making.

Of those who responded, most jurors nominated somewhere between 30 minutes and two hours.[44] Eleven per cent of respondents took 15 minutes or less to decide. Deliberations of between 15 and 30 minutes were taken for 13 per cent of respondents. Thirty per cent of respondents took between 30 minutes and two hours to decide. A deliberation period of between two hours and half a day applied to 13 per cent of respondents. Six per cent deliberated between four and eight hours. Two per cent took up to two days to reach a verdict. Three per cent took three days, with less than 1 per cent requiring up to a week to decide. Only 0.3 per cent of respondents required more than a week to reach their verdict.[45]

Only 3 per cent of respondents felt rushed or pressured to come to a quick decision. A surprising 81 per cent indicated that they felt no pressure such as this.

Lawyers' and judges' attitudes

The questions of sentencers and legal counsel, which endeavoured to elicit their perceptions of juror comprehension, were less detailed, but no less revealing. The lawyers' survey results revealed a broad confidence in jurors' abilities to comprehend the workings of the trial. The following were identified as possible impediments to comprehension: legal terminology; the length of the trial; the complexity of the case; boredom; problems with being impartial; reluctance to ask questions; and inadequacy of explanations, instructions or directions.

On what assistance might be offered jurors in order to minimize these problems the following were suggested: explanations of the law; explanations about court procedure; explanations about the burden of proof; written directions and explanations; written summing up; technical support; access to transcripts and exhibits; opportunity to directly question the judge, counsel and witnesses; and better standards of judge and counsel.

The vast majority of sentencers surveyed also expressed confidence in juror comprehension. Interestingly, from the survey of professionals carried out in Hong Kong, almost all of the judges sampled held the view that jurors could evaluate and understand the evidence in complex commercial trials. The bar was more noncommittal on this point, with over half the sample, and a considerable majority of those who responded shared this confidence.

Strategies to Enhance Understanding

Arising out of these observations, and the earlier comments on complexity, the following may be proposed as issues around which a debate about strategy formulation might be generated:

[44] As with the responses to how long the trial ran, jurors were surprisingly varied in their recall of the actual deliberation time. For some trials these variations could amount to days or weeks. And the regularity with which discrepancies arose over estimates of deliberation time within juries would go against coding error as an explanation.

[45] To some extent the duration of deliberation periods will be affected by the time limits on the survey period.

(1) The role of the jury as 'master of fact' requires specification, and the expectations for its attainment need be declared.

It is clear that jurors, while generally appreciating the tenor of evidence before them in the trial, have difficulties with the nature, presentation and specifics of factual issues in contest. Certain difficulties may arise over what version of the facts are to be preferred, as the two-sided story is a necessary context of the adversarial system. It may also be argued that the ability of a juror to comprehend evidence is essentially connected to the skill levels of the advocates in the trial. Even so, the empirical data suggest some structural impediments for jurors in achieving their function as fact finders. The language of presentation is an obvious site of difficulty. Legal and technical language is a barrier for some. The nature of the evidence (in particular technical and scientific) is problematic for others. More amenable to variation and improvement is the form of presentation. Opening and closing addresses by counsel, for example, might be constructed with a mind for their clarity, before their cogency of argument or impact.

A particular issue for some jurors was the juxtaposition of competing stories or opinions. Again, this is what adversarial trial is all about. Yet when it relates to the views of experts there may be a need to seek as much common ground before opinions are put before a jury.

(2) The assumed inverse relationship between trial complexity and juror comprehension should be tested further, and in more contextual detail.

Returning to indices of complexity, if this assumption is to be established then one might confirm along the way that the longer the trial the less likely are jurors to retain concentration or continue to comprehend significant volumes of evidence. Our research indicates that, while trial duration may have a particular impact on juror comprehension, there is no essential or universal correlation between the length of a trial and jury comprehension. Trial length may influence concentration, but so might the sound of counsel's voice, or the intervention of a heavy lunch. Therefore, a sophisticated analysis of the proposed correlation between complexity and comprehension requires a detailed examination of the way in which the things that make a trial complex, impose on or distract the juror's consciousness. Such an analysis might only be convincing where complexity is carefully deconstructed, and the comprehension of the juror is tested within the broadest social context of his or her trial experience.

Other points of reference for any such causal analysis which are introduced in our research include:

- the number of accused in a trial (which seems to have little impact on comprehension)
- the type of trial, such as fraud (where no consistent pattern as to complexity and comprehension seems to emerge)
- the presentation of expert evidence (which did seem to effect levels of comprehension)
- the interposition of *voir dires* (which did seem to influence the juror's interpretation of what was going on in the trial)
- the intervention of lawyers (no consistent view emerged on this)
- the intervention of the judge (generally viewed as supporting comprehension).

To test the correlation (if any) between facets of complexity and comprehension the research would need to develop more convincing measures of comprehension, relate these where possible to concentration, and then attempt to establish the connection with complexity.

(3) The examination of comprehension must not be limited to the progress of the trial or to jurors within it.

As the *Carrian* case study indicates, pre-trial decisions by prosecutors and judges may be potentially as vital for the eventual verdict as is the confused juror. If one is to discover how complexity impacts on trial outcomes then our research convincingly suggests the fundamental error in concentrating alone on juror comprehension within the trial. The vast majority of jurors declare that they do comprehend most things in the trial most of the time, and that they are comfortable with the way in which this understanding informs their verdict.

Recent law reform initiatives such as those in Hong Kong and Victoria have attempted to promote pre-trial disclosure and agreement, as methods designed to assist in simplifying the matters before decision makers (judge or jury). Such reforms should be incorporated into a wider and more convincing analysis of complexity and verdicts. To achieve this, researchers and legal professionals need to recognize that the eventual verdict is influenced as far back in the process as the point of charging the accused.

(4) The examination of pre-trial procedures aimed at reducing the likelihood of juries being excluded during the trial from argument on admissibility.

One of the most convincing responses from our surveys in each jurisdiction was the negative impact on the jury of *voir dires*. Whether the instance of exclusion produced suspicion, speculation or confusion is not so much the issue. What is more salient in any consideration of complexity and trial outcome is the capacity which the *voir dire* presents for jurors to introduce extraneous considerations into the decision-making process. This is all the more interesting when the purpose for the *voir dire* is to protect the jury from confronting what the judge anticipates might be extraneous or misleading evidence. The *voir dire* is meant to avoid complexity through confusion and yet this may result as its unintended consequence.

(5) Each group of 'players' within the criminal trials surveyed in our research suggested the provision of simple material support to assist in the task of comprehension.

Obviously such suggestions would need consideration against the conventions of evidence and procedure within the trial. Examples of such support might include:

– a computerized index of exhibits
– a computerized presentation of transcripts with cross referencing, and where possible 'hyper-text' enhancement. If such technology is not available, then at least an audio recording of court proceedings (with play-back function) could be made available
– secretarial support in the jury room
– video-taped reconstructions
– accountants or financial experts to advise the jury

– a liaison officer to pass on requests for information and assistance, from the jury to the judge
– a procedural mechanism to facilitate jurors asking questions through the judge during the progress of the trial
– improved 'creature comforts' in the jury box and the jury room so that the physical environment for the jury does not militate against concentration.

Before investing in any of these support mechanisms (particularly those designed for the deliberation room) policy makers need to recall that a significant proportion of the jurors we surveyed had made up their minds about the guilt or innocence of the accused prior to retiring to consider their verdict. More study needs to be carried out regarding the characteristics of the collaborative deliberation process which promote consensus, and what might be added to overcome division where already decided jurors are unwilling or unable to modify preconceived views.

(6) An examination of ways in which, for the purposes of understanding, jurors might become more involved within the process which they are charged to comprehend, and on which they are to deliberate.

Each of the jurisdictions hosting the juries in our studies operates different levels of juror involvement in the criminal trial. In Russia, jurors can ask questions directly within the progress of the trial, as well as individually and collectively inquiring of the judge. In NSW the jury foreman seeks instruction from the judge on behalf of the jury. In addition, the judge may anticipate juror confusion and direct or instruct without inquiry. The Hong Kong jurors may individually and collectively seek explanation from the judge. It was not clear from our research whether, for instance, in the more interventionist process, jurors were better able to dispel confusion. This seems likely, although some might argue that without the judicial filter, juror intervention might raise as many questions as it answers.

Any such analysis of juror involvement and its impact on comprehension should extend beyond the trial itself. It encompasses the process of empanelling where some detailed instruction is given on what the jury should expect from the trial, the responsibilities of counsel and the judge to assist their functions, and what are the juror's powers and duties.

References

Aronson, M. (1993), *Managing Complex Criminal Trials—Reform of Rules of Evidence and Procedure.* Melbourne: Australian Institute of Judicial Administration.

Chan, J. and Barnes, L. (1995), *The Price of Justice: Lengthy Criminal Trials in Australia.* Sydney: Federation Press.

Chan, T. F., Duff, P., Findlay, M. and Howarth, C. (1991), *Juries in Hong Kong.* Hong Kong: City Polytechnic of Hong Kong.

Cornish, W. R. (1968), *The Jury.* London: Allen and Lane.

Devlin, P. (1966), *Trial by Jury.* London: Stevens.

Duff, P. and Findlay, M. (1982), 'The Jury in England: Practice and Ideology', *International Journal of the Sociology of Law,* 10: 253–65.

——(1997), 'Jury Reform: Of Myths and Moral Panics', *International Journal of the Sociology of Law,* 25: 363–84.

Duff, P., Findlay, M. and Howarth, C. (1990), 'The Hong Kong Jury: A Microcosm of Society', *International and Comparative Law Quarterly*, 39: 881–92.
Duff, P., Findlay, M., Howarth, C. and Chan, T. F. (1992), *Juries: A Hong Kong Perspective*. Hong Kong: Hong Kong University Press.
Freeman, M. (1981), 'The Jury on Trial', *Current Legal Problems*, 65–111.
Findlay, M. (1994), *Jury Management in New South Wales*. Melbourne: Australian Institute of Judicial Administration.
Findlay, M. and Duff, P. (1988), *The Jury Under Attack*. London and Sydney: Butterworths.
Findlay, M. and Reynolds, S. (1994), 'Jury Trial in Russia: Overview of Evaluation', unpublished research paper.
——(1995a), 'Jury Trial in Russia; Evaluation of Juror Responses: Preliminary Findings', unpublished research paper.
———(1995b), 'Attitudes of Legal Professionals to Jury Trial in Russia: Preliminary Findings', unpublished research paper.
Greenleaf, G. and Mowbray, A. (1993), *Information Technology in Complex Criminal Trials*. Melbourne: Australian Institute of Judicial Administration.
Harding, R. (1988), 'Jury Performance in Complex Cases', in M. Findlay and P. Duff, eds., *The Jury Under Attack*. London and Sydney: Butterworths.
Heuer, L. and Penrod, S. (1994), 'Trial Complexity: A Field Investigation of Its Meaning and Effects', *Law and Human Behaviour*, 18: 29–51.
Honess, T., Levi, M. and Charmen, E. (1998), 'Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial', *Criminal Law Review*, 763–73.
Kuhn, D., Weinstock, M. and Flaton, R. (1994), 'How Well Do Jurors Reason?' *Psychological Science*, 5: 289–96.
Levi, M. (1988), 'The Role of the Jury in Complex Cases', in M. Findlay and P. Duff, eds., *The Jury Under Attack*. London and Sydney: Butterworths.
Litton, H. (1988), 'Editorial', *Hong Kong Law Journal*, 18: 462–6.
Roskill Committee (1986), *Fraud Trials Committee Report*. London: HMSO.
Severance, L. and Loftus, E. (1982), 'Improving the Juries' Ability to Comprehend and Apply Jury Instructions', *Law and Society Review*, 17: 153–98.