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Reforming the Jury: The Common Ground

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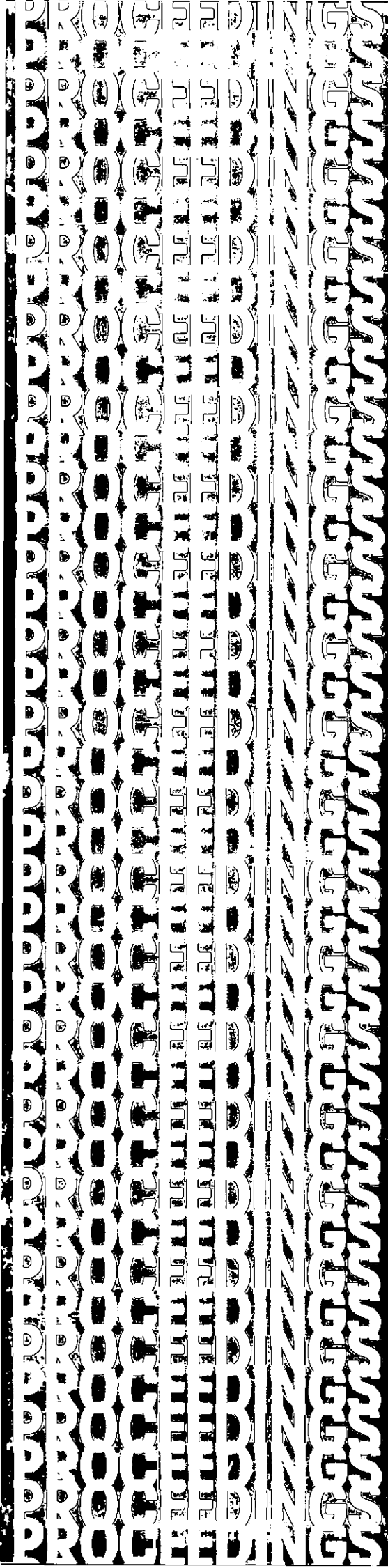

Australian Institute
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The Jury

Edited by
Dennis Challinger

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CONTENTS

OVERVIEW

The jury is an important and vital part of Australia's criminal justice system if the views of participants at this seminar are summarised. Notwithstanding that, it is crucial that known shortcomings, which leave the jury vulnerable to attack, are addressed and that action is taken to ensure that the task of jurors is made as straightforward and non-threatening as possible.

Support for the jury received a real boost from the first speaker at the seminar, the Hon. Mr Justice Lionel Murphy, who stated quite unequivocally 'I have been a life long believer in the value of trial by jury ... [it] should be maintained and extended as far as possible'.

Mr Justice Murphy's paper was directed towards section 80 of the Australian Constitution which allows for trial by jury for any Australian charged with an indictable offence against Commonwealth law. Recent High Court judgments in the cases of Kingswell and Brown have indicated that the High Court does not currently have a settled view on the import of section 80, and Mr Justice Murphy suggested that some further judicial comment might well be expected.

Commenting upon that paper, Professor Tony Blackshield happily embraced the idea that more might be heard on this issue and suggested that all High Court judges would now approach the question sharing a fundamental view of the importance of the jury.

Mr Justice Murphy's paper also referred to the notion of the 'overzealous prosecutor' and this caused considerable discussion. Three types of prosecutors were identified: police officers, tenured and salaried crown prosecutors, and lawyers in private practice who undertook prosecution work from time to time. His Honour saw little difference with respect to the last two, but stated strongly that a police prosecutor was simply not compatible with the administration of justice. People subject to 'orders and discipline' were inappropriate prosecutors and police should be free to do police work.

Notwithstanding that, His Honour believed that peer review of prosecutorial behaviour might be appropriate although legislation (and sanctions) might well be need to be instituted to require prosecutors to conform to certain standards of behaviour. Chief Judge Heenan expressed his view that legislation could not cope adequately with controlling prosecutorial behaviour and he favoured peer group review. But whether any exercise to control prosecutorial overzealousness would considerably assist the jury in its deliberations was not directly canvassed.

His Honour did agree with Mr David Biles that eligibility for jury service should be widened insofar as currently citizens with better education or in high status employment were invariably excluded from jury duty. That in turn meant that juries could be seen as representative of only part of the community and were thus open to attack. Mr Justice Murphy was most firm that such attacks needed to be repelled and the jury constituted 'a most important feature of the justice system' for the retention of which all Australians should fight.

Mr John Willis in his paper identified another way in which the jury was under attack, but this time from the law-makers themselves. He outlined the way in which re-defining certain offences as summary removed the hearing of those offences into Magistrate's Courts and away from jury trial. Mr Tom Kelly indicated that the New South Wales Legal Aid Commission had a working practice of encouraging defendants to accept summary jurisdiction, not least to avoid the risk of a longer sentence if they were found guilty by a jury. Despite that it was generally agreed that accused persons should have the right to elect for trial by jury. In New Zealand, Judge Jaine informed the seminar, the accused has that right only where the maximum penalty for the offence exceeds three months imprisonment.

Mr Willis also drew attention to the difficulties faced by jurors resulting from their unfamiliarity with legal procedure and the 'artificial mental gymnastics' they may need to engage in if they do wish to understand it. He suggested that judges should pay greater heed to the difficulties faced by juries.

Not all participants agreed with this view. Mr Paul Fairall argued that any member of the public could, for instance, make a distinction between 'reasonable doubt' and the 'balance of probabilities'. But there was general agreement that the task of the jury was considerably more difficult in long trials and even allowing something as simple as note taking by jurors could considerably assist them.

However, in practice, judges controlled the activities of the jury, and jurors as a matter of course had no right to take notes, ask for transcripts or documents like the police record of interview, or address questions to witnesses. The variety of attitudes held by judges was evident from the fact that some judges encouraged jurors to take notes while others forbade it. One newly appointed judge was described by a participant as having asked the jury after each witness concluded testifying whether they had understood that evidence. However, after a few trials the judge had ceased that particular practice, a move the participant suggested was not consistent with ensuring the jury performed their task faithfully.

In his paper Mr David Neal argued that it was important for the jury to be seen in its historical and political context. He used specific historical examples to illustrate this point, and indicated how the so-called perverse verdict where a jury refuses to convict should be seen as a legitimate role of the jury rather than a criticism of it.

Mr Mark Findlay, while embracing an historical and political perspective believed that much community support for the jury is based on untested ideological beliefs. The practices followed in selecting, challenging and vetting potential jurors all contribute to illusory community involvement, yet community involvement is the ideological touchstone of many supporters of the jury. Mr Neal agreed there were difficulties with reflecting the community on juries but nevertheless he said, 'some decisions in democracies are to important to trust to anyone but citizens ... two of these decisions come through the ballot box and the jury box'.

This view was effectively rejected by Ms Mariette Read who had practical experience of both the Australian and Dutch legal systems, the latter not using juries but instead panels of judges who have up to eight years education or training. On the basis of that experience Ms Read argued for 'justice without juries' in a provocative paper, given the general feeling amongst participants in favour of the jury.

While Ms Read's paper was given a good hearing, it did not convince the bulk of participants of the folly of continuing the use of the jury. There were three main objections to Ms Read's presentation. The first was the unreliable nature of hard facts advanced in support of her case. These included the unsuitable phrasing of the Age Poll which showed that 40 per cent of respondents had little confidence in the jury (but only after a preamble pointing out how particular verdicts in recent times had been questioned), the second objection related to the skewed nature of letters written to the Victoria Police Commissioner a visible critic of the jury. The third was the inappropriateness of comparing statistics relating to all magistrate's court hearings with only 'not guilty' pleas in the higher courts.

Participants seemed to feel that celebrated cases where re-trials or other action had followed a jury verdict, were not so much failures of the jury, but failures of the judge or counsel to adequately inform the jury. That has two corollaries. First, Ms Read's implicit assumption that somehow judges will always 'get it right' may be inappropriate. And second, juries are capable of handling complicated evidence if it is properly presented to them.

This last proposition was, however, not supported by research reported by Mr Ivan Vodanovich. He found that the majority of members of the public responding to his survey believed special juries should be appointed for trials involving 'difficult scientific, medical or commercial evidence'. Despite that however, the 747 respondents were generally supportive of the jury and its continued use with those who had actually served on a jury being more supportive. Mr Paul Byrne pointed out that the New South Wales Law Reform Commission's study had also found greater support for the jury from those who had served on one, 97 per cent support compared with 70 per cent for a community survey.

Many members of the community, however, form opinions very much on the basis of what they glean from the media, and Mr Tom Molomby presented a paper dealing with the possible impact on a jury of media coverage. Basically Mr Molomby addressed the issue of a free press versus a fair trial, indicating that in his opinion, much of the media were unconcerned about the consequences of their actions on the prospect of a fair trial. He suggested that the Victorian legislation effectively 'gagging' jurors was an over-reaction to the problem of post-trial speculation, but agreed that self-regulation of the media was somewhat illusory.

During discussion, Mr Frank Gurry, Q.C. pointed out that lawyers were often annoyed that it was only in spectacular cases that the media sought out jurors and Mr Tom Kelly raised the further problem of the media itself being manipulated by, for instance, the police. Mr Molomby responded by indicating that the media comprised individuals with their own targets who received or solicited information from a variety of sources. Mr Keith Mason, Q.C. raised the issue of who should be proceeded against when interference in the legal process followed reporting of, say, a prominent public figure's comments. Mr Molomby believed that action should be taken against both editor and the corporation, on the grounds that if it were the corporation only, they may well be happy to 'pay' for the story.

The actual court proceedings before a jury were the subject of papers by Mr Bill Hosking, Q.C. and Professor Peter Sheehan. Mr Hosking's paper based on his experience as a practising barrister, encompassed the theatrical nature of trial by jury and indicated methods used by counsel to persuade the jury. In response to a question regarding the importance of a barrister being able to behave theatrically, Mr Hosking said that he believed that choice of lawyer was not critical and that the existing legal system and the notion of a charge having to be proved beyond reasonable doubt were the crucial elements of a trial.

Professor Sheehan's paper reviewed existing psychological research that was relevant to the jury's role. In particular he

spoke of memory, witness testimony and confidence all of which affect jurors' processing of the information presented to them in court.

However, having pointed out how jurors' biases and prejudices also affect their judgment Professor Sheehan did say that despite these problems the jury was still 'the best game in town'. This paper prompted many questions from participants who were genuinely concerned about the soundness of the behaviour of juries given the catalogue of difficulties raised by Professor Sheehan. In response to these, Professor Sheehan indicated that there was not necessarily safety in numbers and the larger the number of people on a decision making group the greater was the social pressure within it; jurors were affected by the authority figures in court; police tend to overwork a witness's testimony, the original questioner of a witness who is later to give evidence should be a neutral person with no preconceived ideas; there is more chance of distortion by jurors in long cases as time delay does affect perception and lead to erratic memory; there are real problems selecting an appropriate jury without knowledge of jurors; and counsel deliberately using a therapeutic technique in questioning witnesses is certainly professionally inappropriate if not unethical.

Representatives from three local law reform bodies which had recently released reports involving the jury were next to make presentations to the seminar. They comprised Dr Jocelynne Scutt (from the Law Reform Commission of Victoria), Mr Paul Byrne (from the New South Wales Law Reform Commission) and Professor Michael Chesterman (from the Australian Law Reform Commission). Their papers reflected the activities of their various commissions and identified the major points that resulted from those activities. Mr Mark Findlay then commented on the work of law reformers generally, arguing that the apparent basic enthusiasm by the public for the jury, does not inhibit the institution of real reforms.

The difficulty faced by juries in coming to grips with legal questions were discussed by two speakers. Mr Ivan Potas outlined research he had conducted on the capacity of mock jurors to handle legal matters as presented to them in the format of a judge's summing up. Professor Wayne Westling introduced the seminar to pattern jury instructions as they are used in the United States in order to deal in a uniform way with similar cases. Each speaker urged that jurors should be given more assistance to perform their duty.

'Inside the Jury' was the title of the paper read by Ms Meredith Wilkie of the New South Wales Law Reform Commisson. That paper examined exemption and selection patterns for juries in N.S.W., established that young males were under represented on juries, and following data gathering from 1834 jurors after their service, identified the assistance they had received and how they felt about their task.

While that paper reported a macro study, Mr Dennis Challinger's paper looked at these last areas in a micro context. Each of the papers reflected some jurors' frustrations with the legal process, and identified areas where more could be done to make jury service less trying and more acceptable.

One issue in particular that was raised and discussed in the seminar was the possible provision of the transcript to the jury. Apart from problems of availability and cost, judicial reservations were expressed about the utility of this suggestion. Judge Jaine suggested it was safer to rely on the collective memory of the twelve jurors, believing that if the transcript were available the jury might latch (unfairly) onto particular questions. Judge Heenan pointed out that in any event the trial judge would read back appropriate sections of the transcript if the jury requested it.

A particularly absorbing session at the seminar was that involving forensic scientists Dr Hilton Kobus, Dr Ben Selinger and Dr Eric Magnusson. Collectively their papers indicated the range of forensic science possibilities available to courts today, the necessity for forensic standards and the importance of the scientist to be seen as providing information for the Court rather than exclusively for either the prosecution or defence.

This last could be achieved by the development of standard prescribed methodologies with step-by-step documentation that could be provided to the court and the jury, along with a pre-trial disclosure or examination of any forensic evidence that was intended to be used in court.

These propositions led to some vigorous discussions during which Dr Selinger made clear that the propositions needed more development and that he was keen to continue to work to that end in conjunction with lawyers or social scientists who were also interested in that endeavour. Setting standards and defining guidelines would plainly be difficult yet that work should be undertaken to ensure that unreliable, unsound or speculative forensic material does not reach the court or the jury's attention. Ultimately, however, setting the standard becomes a social rather than a strict scientific decision and that is why joint research is necessary to clarify just how standards should be defined.

Professor Richard Harding's paper extended the above forensic arguments to commercial and other complicated cases, asserting that juries can certainly handle complex material as long as it is competently presented to them. That would in turn, he suggested, require pre-trial disclosures, prosecutorial guidelines, training of lawyers and development of forensic ethics and standards. Commenting on this paper Mr Ian Temby agreed that all efforts should be made to ensure juries

understood the proceedings and the evidence.

The final session of the seminar allowed for further discussion of some issues that had surfaced during presentation of the papers. Among them was the issue of the representativeness of juries which was illustrated by a Queensland event related by Mr Kevin Martin. He indicated how in 1981 the Queensland Attorney-General had floated the idea of limiting exemptions from jury service for certain occupational groups including medical practitioners. A concerted campaign by the Australian Medical Association followed the Attorney's announcement, with up to a third of the state's medical practitioners objecting to the proposal. In addition, other professional groups became aware of the existence of automatic exemptions from jury service and started further lobbying for their profession. The divergence of these professional views from that of the general community seems quite marked.

But representation itself was a conceptual issue that had not been canvassed, and Mr David Neal pointed out that it could mean representative of community values or representative of community groups. Either way it was suggested that without challenges, accused persons might feel that a jury had been imposed upon them, and their ability to participate in their own trial in this way was an important and sometimes settling down role. Plainly the issue of allowing what number of challenges was an area where concensus was unlikely amongst the seminar participants. And so it was with other points which have not been included in this overview. Concensus was achieved, however, with respect to the general notion that the jury's continued part in Australia's criminal justice system was most important.

WELCOMING ADDRESS

THE JURY SYSTEM

Professor Richard Harding
Director
Australian Institute of Criminology

Your Honours, Ladies and Gentlemen:

Welcome to this conference on the jury system. We, at the Institute, believe that it is one of the most important we have arranged in recent years. The jury is at the fulcrum of the relationship between the citizen and the State as E.P. Thompson put it in Writing By Candlelight, (The Merlin Press, London):

> In my books, the ... common law rests upon a bargain between the Law and the people. The jury box is where the people come into the court: the judge watches them and the jury watches bck. A jury is the place where the bargain is struck.

Recent events in Australia have raised questions about that bargain and how it is to be struck. The program of the Conference ranges across the whole spectrum of issues that have been thrown up - what the public thinks about the jury system; whether it should be retained at all; whether complex cases, particularly those involving abstruse scientific evidence, require a different form of trial; whether legal language and procedures should be simplified and, if so, how; whether the Australian media, apparently insatiable in their quest for half-truths, should be penalised for revealing jurors' memories of their deliberations; whether the jury should be more representative; generally, what paths reform should take.

These issues are now being vigorously debated: in the courts, in the more reputable parts of the media, in legal and criminological journals, in Law Reform Commission discussion papers and reports.

All this activity is welcome, but is perhaps a sign of previous neglect. I am reminded of the comment of the jazz musician, Hubie Blake who, interviewed on his ninetieth birthday, said that if he'd realised he was going to live that long he'd have taken better care of himself. As a society, we have not really taken good care of one of our oldest members, the jury system, so that we now have so much more to do to keep it alive and healthy. This conference should enable the necessary diagnoses to be made.

Ironically - and I want to put this unequivocally on the record - the decision to hold this conference pre-dated all the frantic activity and attention to which I have referred. Its origins were a letter written to me early in 1985 by a Chief Justice indicating his concern at the particular problem of jury competence in cases involving forensic evidence. I wrote back saying that the Institute would be happy to arrange a conference fitting this issue within the broader one of the jury system as a whole. I suggested that it might be promoted jointly with the Institute of Judicial Administration. That possibility was in fact explored, but not implemented. In a way that is a pity, for the judiciary is centrally concerned with this issue. I would like more judges to have been exposed to the deliberations of a conference such as this. Having said that, I particularly welcome those who have chosen to come.

Anyhow, the decision to hold this conference was finalised in June 1985, before the brouhaha about juries really started. We have not, Ladies and Gentlemen, been merely opportunistic, but the conference is, of course, no less opportune.

A threshold issue about jury trial is the extent of its availability. It would be fatuous to say that the jury system is at the fulcrum of the relationship between the citizen and the state if the latter can readily circumvent it or even abolish it altogether. As you know, in the United States there are constitutional guarantees applicable not only to the federal government but also the individual states. In Australia, section 80 of the Constitution is the primary source of law and it states:

> The trial on indictment of any offence against the law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Though, it is, in terms, limited to federal law, nevertheless it is not unrealistic to expect that the tone of Australian law and practice, even at the State level, will be affected by this provision. So what should be its scope? Logically, some attempt to delineate it should be the starting point for a conference on the jury system.

Mr Justice Lionel Murphy, of the High Court of Australia, has always been concerned about this question. For example, as long ago as 1967, as an Opposition Senator he successfully moved amendments to the Narcotic Drugs Bill which secured trial by jury for a whole range of offences and had a spillover effect in other areas of Commonwealth law. In the fifteen years or so I have known him, I myself have had several discussions about the scope of section 80 with him, and I do not doubt that many others have heard his views and developed their own in response to his prodding and probing.

During the period in which the Institute was planning this conference, it came to my notice that two cases raising profound section 80 issues would be decided by the High Court. Because of the timing, His Honour would not be able to participate in the decisions. Accordingly, some months ago I invited him to speak at this conference thereby setting our deliberations off on this right foot and also putting his views on the public record, albeit extra-judicially. I am glad to say that he agreed in principle to do so. Now he is here to honour that undertaking.

Ladies and Gentlemen, it is my privilege now to invite Mr Justice Murphy - a man whom history will surely assess to have been a great Australian and a great judge - to speak to us on 'Trial by Jury: The Scope of Section 80 of the Constitution'.

TRIAL BY JURY: THE SCOPE OF SECTION 80 OF THE CONSTITUTION

Mr Justice L. K. Murphy
High Court of Australia
Canberra

I have been a life long believer in the value of trial by jury. Recent events have confirmed my belief. Trial by jury should be maintained and extended as far as possible.

Trial by jury is our legal heritage. At state level, we derived it directly from Britain. At federal level we adopted it from the United States. In modern times the people's will is exerted upon the legislative and executive branches of government through the ballot box. The jury is the means by which the people participate directly in the administration of justice.

In 17th century England, after the experience of the Star Chamber and other methods of inquisition and trial, the ancient jury system was recognised as a safeguard against arbitrary power. Blackstone in his Commentaries warned against open attacks upon the jury system, and also against sapping and undermining it, by new and arbitrary methods of trial by commissioners and similar bodies. He said:

> ... and however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient,) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.(1)

As de Tocqueville said 'The institution of the jury places the real direction of society in the hands of the governed, and not in the hands of the government ... all the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its direction have destroyed or enfeebled the institution of the jury ...'.(2)

In the American colonies trial by jury was guaranteed in the Constitutions of the original thirteen states. The Constitution of the United States, in article III, itself provides 'the trial of all crimes, except in Cases of Impeachment, shall be by jury ...'.

In Duncan v. Louisiana(3) the United States Supreme Court said the guarantees of trial by jury 'reflect a profound judgement about the way in which the law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government'. They said it gave an accused

> an inestimable safeguard against the corrupt over-zealous prosecutor and against the compliant, biased, or eccentric judge ... The jury trial provisions ... reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Section 80 of the Australian Constitution states:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

IS S.80 A MERE PROCEDURAL PROVISION?

The question is whether trial by jury even for serious crimes can be avoided simply by not using the procedure of indictment. In 1928, in Archdall's case, Mr Justice Higgin's answer was yes. He bluntly stated that 'if there be an indictment, there must be a jury but there is nothing to compel procedure by indictment.(4) In the same case, Chief Justice Knox and three other justices said 'The suggestion that the Parliament, by reason of s.80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition'.(5)

In Lowenstein's case Chief Justice Latham said 'The Commonwealth Parliament can, at its discretion, provide that offences shall be triable summarily or on indictment. It is only when the trial takes place on indictment that s.80 applies'.(6)

The effect of these decisions was summed up by Chief Justice Barwick in Spratt's case, 'Whereas s.80 might have been thought to be a great constitutional guarantee, it has been discovered to be a mere procedural provision(7)'.

In Zarb v. Kennedy Chief Justice Barwick went further and stated that 'the question of the scope of s.80 has ... not only been long settled but ought not now to be re-opened(8)'. In Li Chia Hsing's case, he once again referred to the court's 'settled interpretation' of the meaning and scope of s.80, (9) but Justice Gibbs, Stephen and Jacobs all expressly refrained from examining further the scope of s.80 since the offence there was clearly one which could be prosecuted summarily. (10)

My view was that the meaning and scope of s.80 was far from settled but it certainly guaranteed trial by jury, at least in serious criminal cases. (11)

Two recent cases in the High Court suggest that this aspect of s.80 is not settled. In Kingswell v. The Queen, (12) the four justices in the majority took the view that the so-called 'settled' interpretation. Should be accepted although recognised that the result of such a narrow interpretation has been criticised. In two dissenting judgments, Justices Brennan and Deane both interpreted s.80 as being far more than a procedural provision. Justice Brennan stated:

> I construe s.80 as prohibiting the Parliament from withdrawing issues of fact on which liability to a criminal penalty or to a particular maximum penalty depends from the jury's determination when any offence against a law of the Commonwealth is tried on indictment.' (13) This approach would give s.80 'teeth' while still accepting the so-called 'settled' interpretation.

Justice Deane, however, rejected the 'settled' interpretation in stating that 'the section is not a "mere procedural provision". It embodies a constitutional guarantee of trial by jury in any case where a person is charged by the Commonwealth or an agency of the Commonwealth with a serious offence against a law of the Commonwealth'.(14)

Justice Dawson, in the later case of Brown (15), recognised the forceful criticism of the settled interpretation and said 'it is overstating the position to say that s.80 has been reduced to a procedural provision'. He observed that section 80 has not yet been really tested: the Commonwealth has not since Federation passed any laws designed to avoid trial by jury for serious criminal offences.

I can recall at least one occasion during my time in the Parliament when such proposed laws were passed by the House of Representatives and were only stopped by Senate amendments. In 1967, the Narcotic Drugs Bill and the Customs Bill both contained provisions under which an accused could be deprived of trial by jury for serious drug offences. It was only after vigorous debate in the Senate that both Bills were amended so that the consent of the accused was necessary before the proceedings could be determined summarily.(16)

Examples such as this together with legislative schemes such as that contained in the present Customs Act where only part of the offence is tried by the jury and the rest is left to the judge ostensibly as part of a sentencing discretion, illustrate the ramifications of treating s.80 as merely a procedural provision. The increasing tendency of legislatures to bypass trial by jury due to its supposed expense and inconvenience may make judges and lawyers question whether s.80 is, indeed, nothing more than a mere procedural provision.

Most members of the Australian Parliament are unaware that they have a special personal interest in these questions. The trial of serious offences without a jury is especially dangerous for them. Section 44 of the Constitution provides 'that any person who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer shall be incapable of being chosen or of sitting as a Senator or a member of the House of Representatives'.

CAN TRIAL BY JURY BE WAIVED?

The words of s.80 'shall be by jury' taken literally, are mandatory. In Brown's case (17), the issue squarely arose as to whether the accused could waive a right to a jury and opt for a trial by judge alone.

In that case, s.7 of the South Australian Juries Act allowed the accused to elect to be tried by a judge alone. Section 68(1) of the Commonwealth's Judiciary Act applied the laws of South Australia to persons charged with a commonwealth offence. Section 68(2), however, stated that this vesting of federal jurisdiction on the State Court was 'subject to ... s.80 of the Constitution'. The issue was, thus, whether s.80 of the Constitution precluded Brown from electing to be tried by a judge alone.

Section 80 of the Australian Constitution was obviously modelled on Article III, section 2(3) of the United States Constitution which has been interpreted by its Supreme Court to confer a personal right upon an accused which can be waived at his or her election.

There are powerful arguments for and against the right to waive, as shown by the 3-2 decision in the High Court in Brown's case itself.(18) Waiver conflicts with the literal meaning of s.80 and may be said to be an unacceptable inroad into the institution of trial by jury. On the other hand, to deny an accused such a choice may be, to use the words of Justice Frankfurter in Adam's case, 'to imprison a man in his privileges and call it the Constitution'.(19)

Brown's case may not be the last word on this issue.

DOES S.80 APPLY TO THE TERRITORIES?

In 1915, Bernasconi's case (20) decided that the guarantee contained in s.80 had no application to the territories. Bernasconi's case was decided when Papua and New Guinea were territories of Australia. There were overwhelming practical reasons why the jury system could not be applied in the existing circumstances to the people of Papua New Guinea. Mr Justice

Isaacs said 'Parliament's sense of justice and fair dealing is sufficient to protect them, without fencing them round with what would be in the vast majority of instances an entirely inappropriate requirement of the British jury system'.(21)

In a later case Spratt v. Hermes, Chief Justice Barwick said of Bernasconi, 'whatever doubts there may be as to that decision what it actually decided ... ought not now to be disturbed'.(22) One of the reasons for not reopening this question was said to be that the significance of what Bernasconi decided was small in the light of the very narrow interpretation given to s.80 in Archdall's case and Lowenstein's case. In other words, since the guarantee in s.80 is illusory, what does it matter whether it applies to the territories or not?

In the light of Kingswell's case and Brown's case it is now much less clear that s.80 is merely a procedural provision and this will obviously affect any future consideration of this issue. Spratt v. Hermes was decided in 1965 and Papua and New Guinea were still territories of Australia. Now that Papua New Guinea is independent the practical political consideration which prevented the application of s.80 to the territories has gone.

Perhaps the only reason this issue has not arisen since Bernasconi's case is that for the most part the Commonwealth has provided for trial on indictment of serious offences in the territories and presumably in the Northern Territory the same has been done by the territorial legislature. In constitutional law, many such questions lie fallow for years, awaiting decision or redecision. In recent years, the scope of the Commonwealth's powers in relation to corporations, external affairs and industrial law are examples.

The idea that the guarantee of trial by jury is restricted to the States is inconsistent with the general framework of the Constitution. Section 80 is in Chapter III, The Judicature, not in Chapter IV, The States. Section 80 itself refers to offences not committed within any State. The Constitution of the Commonwealth would be absurd if it guaranteed a jury trial for federal offences for Australians generally, but not for those in the territories. It would be especially absurd if it did not apply to the Australian Capital Territory which was intended by the Constitution to contain the seat of government, the Parliament and the High Court.

OTHER UNRESOLVED QUESTIONS

Two further questions are whether s.80 requires that the jury be composed of twelve persons and whether the jury's verdict must be unanimous. Both these issues may well arise because state laws which are made applicable to the exercise of Federal jurisdiction by s.68 of the Commonwealth Judiciary Act provide in some states

for majority verdicts or for verdicts by juries composed of less than twelve persons.

For example, s.44 of the Victorian Juries Act provides for the continuation of a trial notwithstanding the jury is reduced in number due to death or illness of a juror. This power lies within the court's discretion. In New South Wales, s.22 of their Juries Act similarly provides for such continuation but only if consent in writing is obtained from both the accused and the Crown. Here again the question of a right to waive may arise. This raises similar issues to those in Brown's.

Quick and Garran, using American authority, state that the words 'by jury' in s.80 'guarantees not merely the form of trial by jury, but all the substantial elements of trial by jury, as they exist at common law'. (23) Changes to state laws, such as those mentioned, expose this issue of what are the indispensable elements of modern concept of trial by jury.

The High Court in recent years has not been called upon to decide what are the essential elements of modern trial by jury, although these questions have arisen in the United States.

THREATS TO TRIAL BY JURY

The main threat is erosion of trial by jury by legislatures, especially state legislatures. The trend is to less and less use of juries.

There are other threats to the institution. The main external threat is the increasing tendency to trial by media in newsworthy cases. Some sections of the media are tending more and more to attempt to orchestrate trials by publication of prejudicial material before and during certain trials.

There are also internal threats, one of which was referred to by the United States Supreme Court in Duncan v. Louisianna. The excessive zeal of prosecutors can be a real threat to a fair jury trial. In Australia cases have come, even to the High Court, in which excessive zeal has been apparent. It is very dangerous to the administration of justice when the career prospects or the prestige of a prosecutor become involved in the prosecution. The classical approach is that 'Counsel for the prosecution ... are to regard themselves as Ministers of justice, and not to struggle for a conviction ... nor to be betrayed by feelings of professional rivalry - [not] to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence' (see Bathgate).(24) Prosecutors should not be scalp-hunters.

In the opinion of many experienced in the criminal law it is no longer safe to rely upon the prosecution observing the

traditional fairness. The remedy may be that the law should require that the traditional standards be observed. The duties of prosecutors should be spelled out in legislation and sanctions should be provided for transgression. Also, there should at least be voluntary peer review to inhibit violation of the standards.

Another threat to effective trial by jury is the failure in Australia to recognise that the accused in a trial of any serious criminal offence should be entitled to the advice and assistance of counsel and that if he or she cannot afford it the community should pay for it as part of the price for justice. McInnis's case (25) showed that poor persons can be forced to trial upon the most serious charges without representation. This offends Article 14(3) of the International Covenant on Civil and Political Rights by which Australia is now bound.

There are other problems. One of these is the absence of a right to a speedy trial. Another tendency is to lengthen trials. This could be curbed by more pre-trial decisions aimed at avoiding collateral issues and prolonged legal argument during the trial.

Trial by jury is a valuable part of the criminal justice system. Its retention is necessary if there is to be continuing respect for the law.

In Australia, as elsewhere, we live in an age when freedom is being rapidly diminished. Our freedoms are too precious to be left to the discretion of legislators and judges. The safeguard of the people's freedom is the people themselves. The means by which they can preserve freedom from unjust laws and from injustice within the law is by their participation through the jury in the administration of justice. In the future the extent to which the jury system is used will be a clear measure of freedom in our society.

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(6) R. v. Federal Court of Bankruptcy: Ex parte Lowenstein (1938) 59 CLR 556, 571.

(7) Spratt v. Hermes (1965) 114 CLR 226, 244.

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(19) Adams v. United States ex rel. McCann (1942) 317 US 269, 280.

(20) The King v. Bernasconi (1915) 19 CLR 629.

(21) ibid; 638.

(22) (1965) 114 CLR 226, 244.

(23) Quick and Garran, 1901, The Annotated Constitution of the Australian Commonwealth, 810.

(24) R. v. Bathgate (1946) 46 S.R.(N.S.W.) 281, 284-5.

(25) McInnis v. The Queen (1979) 143 CLR 575.

(22) (1965) 114 CLR 226, 244

(23) Quick & Garran, The Annotated Constitution of the Australian Commonwealth (1901), p.810.

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SECTION 80

A COMMENTARY ON MR JUSTICE MURPHY'S PAPER

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I am tempted to begin by pressing His Honour Mr Justice Murphy for elucidation of his somewhat cryptic comment on Brown's case, that in relation to the question whether the right to trial by jury can be waived, the 3:2 decision in that case may not be the last word on the issue. But I know that to press him for a more determinate view on that question would be to press in vain. Let me turn to some other aspects of Brown's case.

Brown, decided in March this year, and Kingswell, in November last year, are a clear indication of two things about section 80 of the Constitution. The first is that all the constitutional and technical questions relating to the guarantee of trial by jury are now open questions. There is no longer, if there ever was, a 'settled' High Court view. The second thing is that, however views may continue to differ on particular technical questions, all members of the High Court would approach those questions now in a spirit of sharing the fundamental commitment to the importance of the jury system, of which His Honour has spoken today.

The essential division in Brown's case is between two points of view. One asserts that the right to trial by jury enshrined in section 80 of the Constitution is a fundamental individual right, the corollary being that an individual has the right to waive that right. The other view asserts that the guarantee of trial by jury is not merely an individual right but a fundamental structural guarantee going to the root of our system of justice. Both those views depend on taking trial by jury seriously, neither of them is compatible with reducing section 80 of the Constitution to a mere tautology.

I share with Mr Justice Murphy and with His Honour Mr Justice Deane, in his remarkable judgment in Kingswell's case the belief that the so-called 'settled view' of section 80 is a tautology, an 'inane proposition' as Mr Justice Deane refers to it in Kingswell. I share the view that that proposition is indeed inane, and that it should now be rejected. What I want to draw attention to is an observation in Mr Justice Murphy's paper that that inane view is in fact the 'settled' view. Mr Justice Murphy referred to Archdall (in 1928) and to Lowenstein (in 1938), and told us that 'the effect of these decisions' was summed up by

Chief Justice Barwick in Spratt's case, when Barwick advanced 'the inane proposition'. The fact is that 'the inane proposition', the tautologous view - section 80 only means that there shall be trial by jury in cases where there is trial by jury - has never in fact been decided by the High Court. The myth that a long line of settled decisions of the High Court has entrenched that view has always been a fundamental mistake, an extraordinary example of uncritical legal acquiescence in an unsubstantiated proposition. In 1844 Lord Denman said in the House of Lords that if you took all our legal propositions and wrote them down under three columns - law made by statute, law made by judicial decisions and law taken for granted - you would find that you had more in the third column, 'law taken for granted', than in the other two put together.

The so-called 'settled view' of section 80 is the most extraordinary example of law taken for granted, for which there is no support in any High Court decision, at least not before 1968.

Some of the details of that demonstration have been made by Mr Justice Deane in Kingswell. Let me pick out a couple of points. Mr Justice Murphy refers in his speech today to Archdall, in 1928, in which it's true that Mr Justice Higgins did in a single sentence lay down the so-called tautologous view. Later justices, in particular Sir John Latham in Lowenstein, have said that all six Justices expressed that view. But one of them at least, Mr Justice Starke, expressed no view on the question at all, and the four remaining justices in a joint judgment said only this: 'The suggestion that the Parliament, by reason of section 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition'.

The real question about Archdall is whether that sentence, as His Honour read it to us, is support in precedent for any view of section 80 at all. If when we look for precedent we look for the reasons for the previous High Court decision, then obviously this sentence is no good because it expressly refuses to give us any reasons at all. If we look at the actual decision - if one asked what, if anything, did this passage in the majority judgment in Archdall actually decide - one way of testing that would be to ask whether the actual decision would be inconsistent with the view which Justices Dixon and Evatt later took in Lowenstein's case, which Mr Justice Murphy has taken in Beckwith and Li Chia Hsing, and which Mr Justice Deane at least has taken in Kingswell. That view, the unsettled view, is that section 80 does ensure a guarantee of trial by jury, at least in serious cases.

The actual offence in Archdall's case was an industrial boycott offence. It was an offence which carried a term of one year's imprisonment; it had not been tried on indictment. The attempt to rely on section 80 was framed in the argument in a

single sentence and the single sentence was this: 'To ascertain what are indictable offences within the meaning of section 80 of the Constitution, regard must be had to the law as it stood when the Constitution Act was enacted, and such offences as were then regarded as indictable cannot be declared by Parliament to be other than indictable'.

That is the argument that the majority in Archdall's case were rejecting; that is, the argument which they thought so obviously unsustainable as to need no reasoned exposition. But I have to say after puzzling over the argument that I would have taken the same view of it myself. It is not saying, this argument in Archdall, that the class of indictable offences is frozen as at 1901, in the sense that no new offences could ever be made indictable thereafter, but it is saying that what was in the class of indictable offences in 1901 cannot hereafter be shifted out of that class, and that is all it is saying.

I can see no way in which that argument would have helped the defendant in Archdall, where the issue related to a statutory offence created in 1926. Indeed, I can see no way in which that argument would lead to any workable theory of section 80 at all. To dismiss that argument as the joint judgment in Archdall did, was in my view entirely right; to try to read into that dismissal any implications about any wider view of section 80 is a vain exercise.

One can go on demolishing each of the decisions which are supposed to provide some support for the so-called 'settled view' but the result is the same in each case. Lowenstein, in 1938, which is commonly supposed to be a four/two decision - Dixon and Evatt standing up for the real view of section 80 and the other four judges rejecting it - turns out in fact to be a two/two/two decision: Justices Latham and McTiernan advancing 'the settled view'; Dixon and Evatt in a classic judgment rejecting that view; and the other two members of the court saying nothing on the issue at all. There is no way that that can be read as deciding any issue about section 80 of the Constitution.

Lowenstein's case had a footnote in 1954, which some judges, including the present Chief Justice, have tried to use as reinforcing, entrenching, the supposed decision in Lowenstein. What happened was that Sir Owen Dixon, who had dissented in Lowenstein, became Chief Justice in 1952, and various members of the Bar thought that this might be an opportunity to re-open the Lowenstein issue. The exact decision in Lowenstein, by the way, had been that section 217 of the Bankruptcy Act as it then was did not involve an illegitimate mixture of judicial and non-judicial power, and therefore did not violate the doctrine of separation of powers (if indeed that doctrine was part of our Constitution, a constitutional issue which Lowenstein also left undecided). The only thing decided in Lowenstein was the

operation of section 217 of the Bankruptcy Act; the four majority judges took one view of that question, and on that question Dixon and Evatt did dissent.

Well, in 1954 an attempt was made to re-open Lowenstein's case. Lowenstein was reaffirmed in the Supreme Court of Queensland; the High Court dismissed an appeal. Immediately afterwards, in the case of Sachter v. Attorney General in 1954, an attempt was made in the High Court to re-open Lowenstein's case, and Chief Justice Dixon, as he then was, refused to allow the matter to be re-opened. 'Lowenstein's case' he said in effect, 'is now a precedent of this Court and we will not allow the question to be re-argued at this sittings'. Why he added the qualification 'at this sittings' is one of the minor mysteries.

Now this refusal in 1954 to re-open Lowenstein is one of the factors that is seriously advanced as having entrenched the tautologous view of section 80. But in fact eighteen months later, in the Boilermaker's case when Sir Owen Dixon finally succeeded in persuading a 4:3 majority of the Court to adopt his view of the constitutional separation of powers question, he said: 'If we had supposed, when we were asked to reconsider Lowenstein's case, that a consitutional issue was involved, of course we would have allowed the case to be re-opened'. The rejection, the refusal to re-open Lowenstein dealt only with the construction of section 217 of the Bankruptcy Act.

The irony is, of course, that even in 1956 when Sir Owen Dixon explained the refusal to re-open in 1954 - even in 1956, he was not of course thinking about the constitutional question of trial by jury, he was thinking about the constitutional question of separation of powers. But what is true for one constitutional issue is obviously true for another. If the court would have been prepared to re-open Lowenstein on the inconclusive things it said about separation of powers, it must equally have been prepared to re-open what Lowenstein said on the inconclusive question of trial by jury.

One could go on and on amassing these arguments. The point is not to illustrate the point in any further detail, but rather to underline that the whole history of section 80 is an extraordinary piece of pathology in Australian constitutional law. For generations, the Bar and the Bench have persisted in maintaining the myth that the issue has been decided, when anyone who ever sat down and critically read the decisions would at once perceive that no such issue had ever been decided at all. The cases currently in the court - Brown, Kingswell and the other issues that His Honour referred to in his paper which may now be coming up for decision - show at least that that long fallacy is over.

For my part, I have already spoken longer than I intended, and I shall now sit down. But before doing so I should say this: that

although I think I have properly emphasised the importance of Mr Justice Deane's decision in Kingswell as now the leading judgment in my view on this whole question, one ought also to acknowledge something that His Honour was too modest to do: the important historical role played in the re-opening of the issue, first by His Honour's judgment in Beckwith v. The Queen in 1976, the first clear judicial attempt to take section 80 seriously since Dixon and Evatt's 1938 judgment on the question, and secondly, and more especially His Honour's judgment in Li Chia Hsing v. Rankin. That case, in 1978, was in some ways an irritating case, as the captain of the foreign fishing vessel who had been convicted on a summary offence carrying a maximum of 6 months in prison was clearly not entitled to rely on any guarantee under section 80 of the Constitution; and the whole court, including His Honour Mr Justice Murphy, so held. Nevertheless, the case provided Sir Garfield Barwick with an opportunity to lay down what is probably the most reasoned argument that we have had for the so called 'settled view'. But it also provided His Honour Mr Justice Murphy with the opportunity to lay out at much more length his reasons for the view he had taken in Beckwith.

What is fascinating about that case, as His Honour mentioned in his paper, is the extent to which three judges of the Court abstained from expressing any view on the constitutional question at all, and that abstention is a fascinating feature of the latest High Court cases. In particular the present Chief Justice, Sir Harry Gibbs, began in Li Chia Hsing a pattern which he has followed ever since, referring to the 'settled view' and still calling it the 'settled view', but referring to it in the mildest, almost hesitant terms as something that 'appears' to be settled, as something that cannot be challenged under 'the existing state of the authorities'; always reaffirming the view but always with some qualifying words which indicate that at the proper time, he too would now be prepared to take the issue seriously.

LIST OF CASES

Beckwith v. The Queen, (1976), 135 CLR 569.

Brown v. The Queen, (1986), 60 ALJR 257.

Boilermaker's Case, (1956), 94 CLR 254.

Kingswell v. The Queen, (1985), 62 ALR 161.

Li Chia Hsing v. Rankin, (1978), 141 CLR 182.

R v. Archdall, (1928), 41 CLR 128.

R v. Federal Court of Bankruptcy: Ex parte Lowenstein, (1938), 59 CLR 556.

Sachter v. Attorney-General, (1954), 94 CLR 86.

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PAYING LIPSERVICE TO JURIES

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The institution of the jury trial in criminal cases is presently under considerable pressure from a variety of sources. Some groups, most notably the police, are concerned at what they see as the unacceptably high acquittal rate in jury trials.[1] There is also a significant body of opinion that juries are simply not able to comprehend adequately the evidence in trials involving complicated commercial transactions or highly technical scientific evidence.[2] These concerns have been fuelled of late by substantial community doubt about the correctness of the jury verdicts in a number of very public trials.[3]

These criticisms, however, have not as yet at any rate brought about very much change in the conduct of jury trials. A belief among politicians that the jury system still commands general community confidence and support has doubtless been a significant factor in the maintenance of traditional practice in this area.[4] It is also true that lawyers and judges in general are still strong supporters of the jury system.[5]

However despite the general unpreparedness of governments to respond to overt suggestions for changes to the jury system, in practice there has been a considerable erosion of the jury's role in the criminal justice process in Australian jurisdictions. Governments have been the major cause of this erosion, but the courts have also played a significant part. In large measure, the precipitating factors have been expense and delay - jury trials cost more and take longer than summary trials and guilty pleas. Many of the changes which have diminished the jury's role have occurred with little or no fuss and with virtually no public discussion. In other situations, a major determinant of policy seems to have been a belief that juries could not be relied upon to convict the guilty. Often, too, decisions have been made which on the most charitable explanation would appear to demonstrate a complete failure by both government and courts to take into consideration the needs and interests of jurors.

My aim in this paper is to draw attention to and discuss some of these matters. At the outset, I want to stress that I am not necessarily condemning or criticising these developments. Some of them undoubtedly make good sense; but in general I think it is true that these changes have been subjected to far too little scrutiny. Many of these developments have already quite substantially changed the criminal justice system and have the potential to effect even greater change. They really do demand analysis and justification.

Removing cases from the jury

There are two major means of removing cases from the jury -

(1) making offences triable summarily; and
(2) reducing the number of contested cases.

(1) Making offences triable summarily.

The general tendency of Australian jurisdictions has been to make new statutory offences triable summarily and to increase the number of indictable offences which can be heard summarily. Maximum penalties under much summary legislation are now very substantial. The Trade Practices Act (Cth) provides for maximum fines of $50,000 for corporations and $10,000 for individuals for breaches of the consumer protection provisions of the legislation.[6] Some summary legislation also provides for penalties for "continuing offences". Thus the Environment Protection Act 1970 (Vic) having created various offences has provided a maximum penalty of $10,000 for these offences and a penalty of not more than $4000 for every day the offence continues after conviction or after notice by the Environment Protection Authority of contravention of the Act.[7] In other situations repeated or multiple offences are very likely,[8] as for example under the provisions of the Trade Practices Act (Cth)[8] and the Social Security Act (Cth)[9] dealing with making false statements.

As Fox and Freiberg have stated, "The risk of fines reaching astronomical levels for continuing or repeated offences is increasingly having to be confronted"[10]. In Victoria, quite recently a person was fined in a Magistrates' Court $500,000 for some twenty breaches of the Labour and Industry Act.[11]

At the same time, the number of indictable offences which can be heard summarily has increased substantially in recent times. In Victoria, under the Magistrates' Courts (Jurisdiction) Act 1973, charges of larceny (an indictable offence) where the goods alleged to have been stolen were a car or under $1000 in value could be heard summarily. The defendant still had a right to trial by jury. The maximum penalty that could be imposed summarily was 1 year's imprisonment. In 1975, the summary jurisdiction for theft (which had replaced larceny) and for burglary was increased to $2000,[12] and in 1980, the summary jurisdiction for these offences increased fivefold to $10,000.[13] At the same time, the maximum penalty that could be imposed summarily was increased from 1 year to 2 years' imprisonment.[14] The Attorney-General, the Hon. H. Storey, introducing the 1980 amendments justified these increases essentially on administrative grounds that they would avoid two hearings (committal and trial), and thus enable cases to be disposed of more expeditiously in the interests of both accused and the community. He emphasised that the accused still retained his right to trial by jury. There was little debate in the parliament, all parties agreeing to the amendments.[15]

In New South Wales, larcenies and frauds are broadly speaking divided into three groups: those which can be heard summarily without the defendant's consent; those which can be tried summarily but only with the defendant's consent and subject to the magistrate's approval; and

those which must be heard on indictment. The three groups are divided according to the value of the property involved. The property value below which the matter could be heard summarily without the accused's consent was 10 pounds in 1900, 50 pounds in 1955, $500 in 1974 and became $2000 in 1983. The property value above which the matter must be heard on indictment was 20 pounds in 1900, 100 pounds in 1924 and in 1983 was increased to $10,000.[16] Similar tripartite arrangements exist in A.C.T., N.T. and Tasmania although the property value limits are much lower.[17]

These developments raise large questions of principle and policy; particularly the theft-larceny offences where there is no right to trial by jury. Should a person's right to trial by jury depend on the value of the property involved? Issues that would seem relevant are the seriousness of the offence in the eyes of the community (however that may be measured) and the seriousness of the consequences of a conviction to the defendant. The seriousness of the offence or the consequence of conviction will often not vary directly with the value of the property - the theft by a bank officer or a solicitor of $100 from a pensioner would be considered by many far more serious than shoplifting $1000 from Myers. If, however, the use of property value is seen as necessary, should the determination of the value of the property and the number of counts be a matter for the prosecuting authority? Perhaps more fundamentally, the underlying assumption seems to be that summary trials are in essential ways inferior to jury trials: the magistrates are less expert, counsel less skilled, experienced and, often, less prepared; the facts and the law are less thoroughly examined. Part of this assumption that summary trials are inferior to jury trials relates to fairness. There is a reasonably widespread belief that police evidence is more easily believed in magistrates' courts and that magistrates often have a less stringent view of the "beyond reasonable doubt" standard than juries.[18] In England, a survey in the early 1970's of defendants in the London area who chose trial by jury revealed a similar concern about the quality of summary justice:

> "The reasons mentioned most frequently [sc. for choosing jury trial] were all related to what were seen as the advantages of trial on indictment or the disadvantages of summary trial. In the vast majority of cases the reasons given were that the case was gone into more thoroughly in the Crown Court; that there was a jury to try it; that there was a better chance of being acquitted there; that judges were better qualified than magistrates; and that magistrates' courts were too ready to accept the prosecution case".[19]

Such perceptions of summary justice, regardless of their validity, are of great concern; and they clearly raise large questions about the wide extension of the summary jurisdiction.

Quite apart from questions of fairness and competence, there is the allied issue that if an offence is summary or can be heard summarily then it is not such an important offence. As the James Committee said:

> "Many offences in the intermediate category [i.e. indictable offence which can be heard summarily] ... are extremely serious and for them to be regarded as primarily summary might

> wrongly imply that they were to be thought of more lightly than in the past. A procedure which suggested that summary trial was the normal mode of trial for an offence such as burglary in a dwelling, for example, would not be acceptable".[20]

But, in fact, the great majority of burglaries, in Victoria at least, are dealt with summarily either in Magistrates' Courts or in the Children's Court, and generally it would seem that "often a burglary case is just another summary matter like driving carelessly or assault, of no great import, being processed routinely through a court of summary jurisdiction"[21]. It may be doubted whether the community generally, the victims of burglary and insurance companies would be happy with such an implied assessment of the seriousness of burglary.

From the defendant's viewpoint it may be argued that the existence of a comparatively extensive summary jurisdiction is acceptable provided that the defendant has a right to trial by jury in the more serious cases. This is in varying degrees the situation in Australia. However, the right to trial by jury is often rather hollow. The attractions of summary jurisdiction are substantial - maximum penalties are far lower; cases generally speaking will be heard more quickly, will be cheaper and less traumatic. These considerations merit discussion.

The discrepancy between maximum penalty on indictment and on summary hearing raises serious issues of principle. Mr Justice Murphy in Beckwith[22] has suggested that in drug offences under the Customs Act the massive differences between maximum penalties applicable on indictment and those applicable on summary hearing (life or 25 years' imprisonment on indictment, 2 years' imprisonment on summary conviction) constitute a breach of s.80 of the Constitution (right to trial by jury) by putting improper and excessive pressure on accused persons not to exercise their right to trial by jury. That issue apart, the difference in maximum penalties may in theory reflect the different degrees of seriousness of cases heard in each jurisdiction. But, one suspects, there are other considerations. Lower courts should not be entrusted (or trusted) with cases where larger penalties are appropriate. Is there a trade-off of lower maximum penalties for lower quality justice?

Delays in processing cases in the higher courts no doubt lead some defendants to opt for the quicker summary hearing. To the extent that this occurs, inefficiency in processing cases in the higher courts operates as a disincentive against exercising the right to trial by jury - it is hardly a fair or a proper criterion in choosing trial by jury or summary hearing.

There is no doubt that summary hearings are cheaper than cases dealt with in the higher courts. And cheaper for everyone - governments and legal aid bodies included. Legal aid bodies appear at least in some States to take the view that if a case can be heard summarily then it should be heard summarily unless there are special circumstances - and special circumstances would generally not include the greater probability of acquittal at a jury trial.[23] The difficulties faced by legal aid bodies are, of course, evident. They are largely dependent on government funding, which will generally be insufficient for present demand. In such circumstances, the approach adopted by legal aid bodies

is understandable, but it undoubtedly militates against defendants exercising their right to trial by jury.

Some empirical data

Tables 1 and 2 set out the number of committals and the actual number of trials in the higher courts in various State and Territory jurisdictions from 1978-1982. There are some surprising statistics. The annual number of committal proceedings in both South Australia and Queensland was not significantly dissimilar from those in Victoria, despite the great difference in populations.[24] In the light of these figures, it is of interest to note that in 1980, Victoria massively increased the summary jurisdiction for property offences (from a limit per count of $2000 to $10,000). On the committal figures, the need for such an increase is not obvious. The annual number of trials is, of course, substantially lower than the number of committals - a majority of persons committed plead guilty, some receive a nolle[25] and some cases are not heard within a year. At the least, a comparison of the number of trials heard in various jurisdictions raises questions about the need for Victoria to increase its summary jurisdiction. Of course, these figures by themselves (even if accurate) cannot, without further analysis, provide an adequate basis for any solid conclusions, but they could suggest at the least that the case (even on administrative grounds) for increased summary jurisdiction in Victoria needs more justification that it has hitherto received.

TABLE 1

Number of Committal Proceedings

DATE	QUEENSLAND	NSW	VIC	TAS	S.A.	W.A.	N.T.
1978	1405(1977-78)	n.a.	1498	288	1408	n.a.	183
1979	1436(1978-79)	4255	1669	357	1477	n.a.	186
1980	1658(1979-80)	4591	1694	348	1680	n.a.	149
1981	1917(1980-81)	5028	1608	308	1529	n.a.	201
1982	1956(1981-82)	5693	1722	326	1335	n.a.	193

TABLE 2

Actual Number of Trials in Supreme, District or County Courts

DATE	QUEENSLAND	NSW	VIC	TAS	S.A.	W.A.	N.T.
1979	507	684	446	84	306	n.a.	n.a.
1980	456	697	473	79	367	n.a.	n.a.
1981	447	858	428	86	358	n.a.	n.a.
1982	no reliable figures available	636	400	66	378	n.a.	n.a.

Note:
1. All Queensland figures to be treated with caution because of reporting difficulties.
2. Queensland figures are for financial years.

*Source: Queensland Law Reform Commission, Working Paper on Legislation to Review the Role of Juries in Criminal Trials (Q.L.R.C. WP 28 1984) adapted from Table A p.114, Table B p.118.

(2) Reducing the number of contested cases

Guilty pleas save time and money and reduce the pressure on over-worked and often understaffed higher courts. The attractiveness of increasing the number of guilty pleas is apparent. It has for long been an established principle of sentencing that remorse or repentance is a mitigating factor and that a guilty plea may be evidence of such remorse or repentance.[26] The further question is whether the mere fact that a person has pleaded guilty and thus saved the court time and expense should (quite apart from the issue of remorse or repentance) be a factor which goes towards mitigation of sentence.

In England, it is now well-established that the mere fact of a guilty plea is a factor which will generally lead to a reduction in sentence.[27]

The situation in Australian jurisdictions is less clear. In Gray,[28] a majority of the Court of Criminal Appeal of Victoria held that a guilty plea, not actuated by remorse, could at the judge's discretion be a mitigating factor for sentence by serving the "public interest" of sparing witnesses the ordeal of giving evidence and sparing the State the cost of a trial. Later decisions of the Victorian Court of Criminal Appeal, especially in Page[29] have left the status of Gray somewhat doubtful.[30] In New South Wales, it would appear that a guilty plea, not actuated by remorse, can be a mitigating factor.[31] In South Australia, the issue has received a frank and quite comprehensive analysis in Shannon.[32] In that case, a court of five Supreme Court justices were assembled to consider the weight (if any) to be given by the sentencing tribunal to the fact that an accused had pleaded guilty. In a careful judgment, King C.J., with whom Mohr J. agreed, stated:

> "The conditions under which justice is administered change and the emphasis to be placed upon the various purposes to be achieved in shaping sentences changes accordingly. There are

> features of the current conditions which emphasise the need for practical encouragement for guilty persons to admit their guilt. Legal aid for as many as possible of those charged with serious offences should be a high social priority, and, indeed, it is not too much to say that its availability to persons having a genuine defence to criminal charges is indispensable to the proper administration of justice. The consequences of the general availability of legal aid must, however, be recognised and coped with. It must be recognised that guilty persons can put forward false stories and be defended without cost to themselves. The result is the depletion of funds available for legal aid and congestion and delay in the criminal courts. It is not, generally speaking, for the solicitor assigned or the legal aid authority to judge the truth of the assisted person's story, and it is only in the exceptional case that it can be proper to refuse or discontinue assistance because of the strength of the prosecution's case. If a plea of guilty, as distinct from remorse evidenced by such a plea, cannot be regarded as a factor in mitigation of penalty, there is no incentive, other than the demands of honesty, for an offender to admit his guilty, and experience indicates that the demands of honesty have but little influence on many of those who appear in the docks of criminal courts. In most cases, if the offender has nothing to gain by admitting his guilt, he will see no reason for doing so. I am impressed by the strong practical reasons for recognizing a willingness to co-operate in the administration of justice by pleading guilty as conduct possessing a degree of merit, quite apart from remorse, which can be taken into account in assessing the sentence".[33]

At the close of his judgment, King C.J. laid down five propositions assented to by a majority of the Court:

"(1) A plea of guilty may be taken into account in mitigation of sentence where -

(a) it results from genuine remorse, repentance or contrition, or
(b) it results from a willingness to co-operate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or results from some other consideration which is in the public interest; notwithstanding that the motive, or one of the motives, for such co-operation may be a desire to earn leniency,

and where to allow a mitigatory effect would be conducive to the public purposes which the sentencing judge is seeking to achieve.

(2) A plea of guilty is not of itself a matter of mitigation where it does not result from any of the above motives, but only from a recognition of the inevitable, or is entered as the means of inducing the prosecution not to proceed with a more serious charge.

(3) In cases falling within (1), the judge is not bound to make a reduction, but should consider the plea with all the other relevant factors in arriving at a proper sentence.

(4) In assessing the weight to be attached to a plea of guilty as a factor making for leniency, it is proper for the judge to bear in mind that it is important to the administration of justice that guilty persons should not cause expense to the public and delay to other cases by putting forward false stories and on the basis of such false stories contesting the charges against them.

(5) The above propositions are not to be taken as weakening in any way the principle that there must be no increase in the sentence which is appropriate to the crime because the offender has contested the charge."[34]

Cox J. in disagreeing with the majority, stated:

> "Nothing I have said, of course, is intended to detract from the power, and duty, of the court to take into account everything favourable to the defendant, including his contrition or regret. A genuine desire to spare, say, a victim in a rape case the ordeal of giving evidence is something from which repentance may readily be inferred. However, I would not include among the relevant considerations the mere fact that the defendant has taken a course that happens to have saved the time of the court and the prosecutor, and has refrained from unnecessarily burdening the public purse in the form of the legal aid scheme. The proper detachment of the courts towards such governmental or organisational considerations is better served, in my opinion, by ignoring them altogether."[35]

Shannon is a clear authoritative statement that a guilty plea even when not actuated by remorse may lead to mitigation of sentence, if, as it virtually always does, it leads to a saving of costs or assists the public interest in some other way. In the Australian Capital Territory, the Full Court of the Federal Court of Australia in Schumacher[36] adopted and applied Shannon, although still insisting on the primacy of the sentencing judge's discretion.

There are obvious problems of principle with the idea of a 'sentencing discount' merely for pleading guilty. It does seem in conflict with the principle that a defendant's plea be voluntary; it can very easily (and apparently generally does) give the appearance of penalising persons for pleading not guilty; it increases the risk that innocent persons will plead guilty; and it introduces what amounts to a principle of disparity into sentencing. King C.J. in Shannon attempted to deal with these objections save that of introducing a principle of sentencing disparity. His attempts are ultimately not very convincing, essentially because, as he stated, his judgment is based on "strong practical reasons".

The aim of the sentencing discount is clearly to generate 'guilty pleas' and particularly in cases where they would not without the 'sentencing discount' be expected to occur. Thus both Shannon and Gray would not allow a sentencing discount for pleading guilty where the case against the accused was effectively unanswerable. The discount is to be reserved for cases where, to use the words of King C.J. in Shannon, the

offender has "a real and practical choice"[37] between contesting his guilt and pleading. The implication of this is clear: the discount is to be reserved for those who have an arguable defence. This position is, with respect, of very dubious merit. It was rejected by the Victorian Shorter Trials Committee.

> "It seems to the Committee that the situation where there is an overwhelmingly strong Crown case and the accused appreciates that this is so is precisely the situation where a discount for a guilty plea should apply. The practice which needs most discouragement is that of accused persons who know they are guilty, and have no real defence, using their legal aid entitlement to defend charges on the off-chance that something will turn up.
>
> The Committee also mentions the other aspect of the second of the propositions laid down by Chief Justice King in Shannon. Where plea negotiations result in an accused pleading guilty to a lesser offence than that originally charged, the Committee is of the opinion that the offence to which he has pleaded guilty should be treated as the proper measure of his criminal conduct. The judge should not assume that the original charge was the appropriate measure of criminality nor speculate as to the grounds on which the plea was negotiated. The plea of guilty should operate in mitigation of sentence although it results from plea negotiation."[38]

The fact is that senior judges in appellate courts have decided that the problems of backlog and delay can be dealt with only by placing real and substantial obstacles in the way of persons seeking to exercise their right to trial by jury. That there are problems of backlog and delay is undoubted; that the proper or the only solution was via pressures to plead guilty is surely arguable. The position of Cox J. in Shannon has much to recommend it; at the very least judicial innovation which interferes with basic rights should be tried only as a last resort when all other means of dealing with the problem have been tried and failed. It must be doubted whether this is what has occurred. It is, too, somewhat paradoxical that judges, so often seen as among the strongest supporters of the right to trial by jury, should have been prepared so explicitly to seek to limit that right.

S.80 of the Constitution

In this context, mention should be made of s.80 of the Constitution.

S.80 states in part:

> 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury ..."

On a first reading, one might have assumed that s.80 was intended to provide a constitutional guarantee of trial by jury in serious cases. But the High Court has not so interpreted s.80. In a series of decisions the High court has, for reasons best known to itself, refused to give s.80 any real effect. Even more strangely, the interpretation

chosen by the High Court is not based on any clear, cogent legal principle or policy, a point made with some vigour by Deane J. in his fine dissenting judgment in Kingswell.[39] The interpretation given to s.80 has effectively given the federal government a complete discretion as to whether or not it will made any offence triable summarily or not.

Half-removing Cases from Juries

Much of the law of evidence is said to be based on mistrust of the jury's capacity to grasp and distinguish.[40] There are, however, even more basic examples of keeping the jury only half-way involved. In Victoria, the Crimes Act creates offences of rape, and indecent assault, these offences carrying maximum jail sentences respectively of 10 years and 5 years. There are also offences of rape with aggravating circumstances and indecent assault with aggravating circumstances, these offences carrying maximum jail sentences respectively of 20 years and 10 years. A person is defined as committing an offence with aggravating circumstances if he inflicts serious personal violence upon the victim, has an offensive weapon with him, does an act likely seriously and substantially to degrade or humiliate the victim, or is aided and abetted in the commission of the offence by another person who is present at the time. The legislation then provides that where a person is convicted after a trial of rape or indecent assault, and the judge is satisfied that he has previously been convicted of rape or indecent assault, he may direct that the defendant be found guilty of rape or indecent assault (as the case may be) with aggravating circumstances. The effect is to double the maximum penalty - in the case of rape from 10 to 20 years; in the case of indecent assault from 5 to 10 years.[41]

It may be that judges will rarely exercise this discretion; it may be a most potent charge bargaining tool in the hands of the Crown when dealing with persons with relevant prior convictions, since the power to make the offence one with aggravating circumstances applies only after trial. But it is certainly a substantial derogation from the normal role of the jury, whose verdict generally determines the maximum penalty. Just what purpose is served by this provision is somewhat uncertain.

The drug offences under the Commonwealth Customs Act are not dissimilar in their aim of removing from the jury vital decisions about the applicable maximum penalties. S.233B Customs Act creates, inter alia, an offence of being without reasonable excuse (proof whereof shall lie upon the defendant) in possession of prohibited drugs. The maximum penalties for this offence are set out in s.235 and depend on the finding by the trial judge of further factual matters - including the quantity of drug involved and intentions of the offender. Findings on these factual matters can lead to maximum penalties of from 2 years to life imprisonment. The simple fact of possession without reasonable excuse of prohibited drugs creates presumably a liability for a maximum penalty of only 2 years; it is the findings by the judge after the jury verdict that can immensely increase the defendant's liability.

Forgetting about the Jury

There are instances where procedures and laws are established whose ramifications on juries seem not to have been considered. Thus in New

South Wales under the crime compensation scheme which is court based, a victim who has suffered "injury" can seek an order from the trial judge for compensation at the end of the trial, even if the defendant has been acquitted.[42] In such cases, the judge must be satisfied on the balance of probabilities that a crime has been committed before he can award compensation.[43] In cases where a judge does make a compensation order after an acquittal, while there is in theory no conflict between the jury verdict and the making of the compensation order, it is clear that in practice, the judge's order could very easily be seen as an implied disagreement with the jury's verdict. There seems little justification in creating structures which can fuel dissatisfaction with jury verdicts, particularly when there are alternative and probably superior means of providing criminal compensation.

In Victoria, theft is defined as "dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it".[44] The legislature being anxious to ensure that persons who "joy ride" in cars are convicted of theft created, not a special offence of stealing cars, but merely an evidentiary provision. This provision, s.73(14), states:

> "(14)Notwithstanding anything contained in sub-section (12) in any proceedings -
>
> (a) for stealing a motor car or an aircraft proof that the person charged took or in any manner used the motor car or aircraft without the consent of the owner or person in lawful possession thereof shall be conclusive evidence that the person charged intended to permanently deprive the owner of it;"

The problem is that very often the fact that a person took or in any manner used a car without the consent of the owner does not mean that he intended to permanently deprive the owner of it. And since in order to convict of theft, say, of a car, the jury must be satisfied beyond reasonable doubt that the defendant had the intention to permanently deprive, s.73(14) seems to be telling them that black is white. It will be noted that s.73(14) does not on its terms create a legal presumption rebuttable or irrebuttable; it in effect tells a jury who are supposed to be the deciders of factual issues how it is to interpret certain evidence. It is a singularly crude device.

Providing Ammunition for Critics of the Jury

Critics of the jury have with more than a little justification argued that in the present circumstances juries are inappropriate bodies to decide many criminal cases. These critics argue that the jury cannot cope with the subtle distinctions in the rules of evidence especially in joint trials; do not perceive the significance of much that occurs because of unfamiliarity with legal procedure; and cannot understand the law it is supposed to be applying.

It can be said that in no small measure judges have left the jury open to these criticisms. The rules of evidence often expect somewhat artificial mental gymnastics of jurors - e.g. in joint trials with the use to be made of accomplice evidence.[45] There is evidence that jurors often have added difficulties simply because they do not understand

basic procedures;[46] likewise there has very often been little effort made to assist jurors with note books and biros, or with copies of key documents. This surely is a matter where judges could have taken initiatives.

Various aspects of the substantive law are simply quite unsuitable for jury trials. Justice Roden of the NSW Supreme Court has stated:

> "My own belief is that many of our principles of law and especially those relating to self-defence, provocation and diminished responsibility, which have been carefully and skilfully designed by lawyers and which could provide a very suitable basis upon which lawyers might seek to arrive at verdicts if it were their responsibility to do so, are totally unsuitable for juries".[47]

In similar manner, the use of alternative verdicts in some jurisdictions needs reform. In Victoria, the Crimes Act provides some seven alternative verdicts for a person charged with rape. These include assault with intent to commit rape, attempted rape, assault occasioning actual bodily harm; indecent assault.[48] The task imposed on the trial judge can be well-nigh impossible especially if there are more than one accused. In addition to directing the jury on the law and relevant evidence for the offence of rape and distinguishing clearly between each defendant, he is required to direct them on the law and relevant evidence for whichever of the alternative offences there is evidence on which a jury could convict. And it must be doubted whether a jury could on any terms be expected to have the slightest idea of the legal distinctions between each of these offences.

In all these areas, where judges have a very large say about how things should be, judges have very often failed to pay sufficient attention to the needs of juries. The reasons are not hard to find - juries are transient, silent, with no jurors' union to make demands. There is a greater awareness now of the needs of jurors and even, on occasion a preparedness to hear their point of view - it is a welcome development and one that needs to be taken a good deal further.

Conclusion

The present concern about the performance of juries in the criminal justice system is most timely. At the very least it should lead to greater awareness of the needs of jurors and of the difficulty of their task. It may also lead to a solid, serious debate, about the proper role of juries in the modern trial. Such a development could only be of value.

Notes

1. The remarks of Mr S.I. Miller, Chief Commissioner of the Victoria Police expressing concern about the high rate of acquittals in jury trials have been given very wide and continued publicity: 'The Ritual and the Result', Laura '80, '81, p.14-15, and see Police Life, Oct. 1984.

2. Law Reform Commission of Victoria, The Role of the Jury in Criminal Trials (Background Paper No.1) Nov. 1985, pp.65-8; 130-166.

3. e.g. R v Ratten [1972] A.C. 378; R v Chamberlain (1984) 51 ALR 225; Splatt's case - see Royal Commission concerning the conviction of Edward Charles Splatt, Report (Judge C.R. Shannon) 1984, Adelaide, S.A. Government Printer; the Ananda Marga case; the first trial of Mr Justice Murphy; and the trial of Mr N. Gallagher [1986] V.R. 219.

4. cf. The Age in its editorial (5 November, 1980) stated: "The belief that it [sc. trial by jury] is a guarantee of civil liberties remains implanted in legal mythology and public opinion".

5. e.g. "The judiciary gives almost unqualified praise to the jury. Some judges say the jury is always right; others that juries generally are more right than the judge; yet others that although originally disagreeing, they later realised the correctness of the verdict", Law Reform Commission of Victoria, op. cit., Nov. 1985, p.37. See also Phillips J., 'Jury room disclosures erode the system' (1985) 59 Law Institute Journal, 1330 at 1333; Sir Murray McInerney, 'Murphy' (1985) 59 Law Institute Journal, 894 at 895; statements by Brennan and Deane JJ., in Kingswell v R (62 ALR 161) at 183-4, and 185ff respectively.

6. Part V in s.79.

7. S.43.

8. In Hartnell v Sharp Corporation of Australia Pty Ltd (1975) 5 ALR 493, the defendant corporation pleaded guilty to 10 offences against s.53 of the Trade Practices Act (Cth) dealing with making false representations and was fined a total of $100,000.

9. S.138. It is of note that s.138 makes specific provision for the hearing at the one time of multiple charges.

10. Fox R. and Freiberg A., Sentencing - State and Federal Law in Victoria, O.U.P., Melbourne, 1985, p.149.

11. See The Age, 18th July, 1984.

12. Magistrates' Courts (Amendment) Act 1975, s.4.

13. Magistrates' Courts (Jurisdiction) Act 1979, s.3.

14. Magistrates' Courts (Jurisdiction) Act 1979, s.2.

15. Parliamentary Debates (Victoria). Legislative Council, Vol. 350, p.8244ff; Vol. 351, p.8604ff; Legislative Assembly, Vol. 351, p.8868ff; pp.9571-2.

16. For a brief account of these developments, see New South Wales Law Reform Commission, Criminal Procedure: The Jury in a Criminal Trial, Sydney 1985, pp.22-4.

17. For the relevant legislation, see Crawford J., Australian Courts of Law, O.U.P. Melbourne 1982, pp.76ff and accompanying notes.

18. Law Reform Commission of Victoria, op.cit., p.53.

19. The James Committee, The Distribution of Criminal Business between the Crown Court and Magistrates' Courts, London HMSO 1975, Cmnd 6323, par.53, p.26.

20. Ibid., par.182, p.82.

21. 'Editorial', (1986) 19 ANZ J. of Crim., p.3.

22. Beckwith v R (1977) 12 ALR 333, at 345-6.

23. In Victoria, it is quite common with indictable offences that can be heard summarily that a condition of receiving legal aid is that the offence be dealt with summarily.

24. In 1980, the population of Victoria was 3,914,300; that of Queensland 2,265,900 and that of South Australia 1,308,400, Cameron R.J., Year Book Australia 1985, p.7.

25. A 'nolle' or more fully a 'nolle prosequi' is a decision made by either the Director of Public Prosecutions or the Attorney-General not to proceed with charges against a person who has been committed for trial. It is not the same as an acquittal, and, although charges could be brought at some later date, the granting of a 'nolle' virtually always means that no further action will be taken.

26. R v Gray [1977] V.R. 225, at 231.

27. See Thomas D., Principles of Sentencing (2nd edn.) London, Heinemann, 1979, p.52; R v Ross [1984] Criminal Law Review, 53.

28. [1977] V.R. 225.

29. R v Page (Court of Criminal Appeal, 1 June 1977, unreported).

30. For a discussion of the Victorian cases, see Sallmann, P.A., 'The Guilty Plea as an Element in Sentencing', Part I, (1980) 54 Law Institute Journal, pp.105-112; Part 2, (1980) 54 Law Institute Journal, pp.185-9.

31. See R v Nicholls and Rushby (Court of Criminal Appeal of New South Wales, 21 September, 1978, unreported; R v Lawrence (Court of Criminal Appeal of New South Wales, 17 April 1980, unreported as to sentence).

32. R v Shannon [1979] 21 SASR 442.

33. Ibid., p.451.

34. Ibid., pp.452-3.

35. Ibid., p.459.

36. Robert Glenn Schumacher [1981] 3 A. Crim. R. 441.

37. [1979] 21 SASR 442, at 447.

38. Shorter Trials Committee, Report on Criminal Trials, Victorian Bar Council and the Australian Institute of Judicial Administration, Melbourne 1985, pars. 5.68-69, p.131.

39. Kingswell v R (1985) 62 A.L.R. 161, at 184ff. Deane J.'s judgment contains a good account of the history of the interpretation of s.80 by the High Court.

40. e.g. The Law Reform Commission, Evidence, Volume 1 Report No.26 Interim, A.G.P.S., Canberra, 1985, par.49, p.24; pars.70ff, p.35ff.

41. The relevant section in the Crimes Act (Vic) are: rape, s.45; indecent assault, s.44; the definition of "aggravating circumstances", s.46; judicial discretion to convert verdict to one "with aggravating circumstances", s.46(4).

42. Criminal Injuries Compensation Act 1967 (NSW) s.4.

43. R v McDonald [1979] 1 N.S.W.L.R. 451.

44. Crimes Act (Vic) s.72.

45. The Law Reform Commission, Evidence Volume 1, Report No.26 Interim, par.72, p.35-6.

46. e.g. Molomby T., 'Discussion Paper 4', in The Criminal Trial on Trial, Proceedings of the University of Sydney Institute of Criminology, No.53, 1982, pp.90-4.

47. Roden A., 'Pertinent Comments' in The Criminal Trial on Trial, Proceedings of the University of Sydney Institute of Criminology, No.53, 1982, p.81; see also the comments of Nagle C.J. at C.L. in Petroff [1980] 2 A. Crim. R. 101, at 113.

48. Crimes Act (Vic) s.425(1). On a charge of 'rape with aggravating circumstances' there are some eleven alternative verdicts. Crimes Act (Vic) s.425(1) and (2).

JUSTICE WITHOUT JURIES

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PUBLIC DEBATE

Criticism of the jury system has come as a surprise to many lawyers. Indeed, the community at large does not seem to seriously question the criminal justice system: like taxes, juries seem to be taken for granted. In recent years, public awareness of the jury system has increased considerably, because of revelations by jurors in celebrated cases, such as the Chamberlain, Gallagher, and Murphy trials.

Victorian newspapers in particular have carried numerous articles dealing with the pros and cons of the Anglo-Australian criminal trials, including the 50 per cent acquittal rate (seen by some as an indication of malfunctioning of the system and by others as a sign that the jury has taken its task seriously by acquitting when not convinced beyond reasonable doubt), and issues such as whether there should be a referee in the jury room to explain points of procedure and to keep jurors at their task of deciding the evidence; whether juries sometimes bring in a verdict merely because they wanted to go home; and whether the jurors are or should be the accused's peers.

The jury system and its adversary nature are also being questioned and probed by the young people, our future leaders, as part of their legal studies at Year 12 level.

In the early 1980s the then liberal government in Victoria toyed with the idea of making trial by jury optional as a means of speeding up the whole criminal procedure. In New South Wales, South Australia, Canada and New Zealand optional trial by jury had already been introduced but the issue was shelved in Victoria when the liberal party lost the election. The present labor Attorney-General seems firmly committed to the retention of the jury for all indictable offences dealt with in the higher courts.

For many years, the Chief Commissioner of Police in Victoria, Mr S.I. Miller, has argued that the jury system needs thorough investigation (see, for instance, the Age, 2 June 1984). He has asserted that if jury deliberations were to be revealed, the weakness of the system would be proved beyond reasonable doubt. He bases this contention on views expressed to him by a large number of people who have actually served on juries.

Also, he says, the comparison of the conviction rate of about 90 per cent in the Magistrates' Courts with a conviction rate of about 50 per cent in the higher courts makes one wonder whether one of the two systems may not be wrong.

The legal profession is very protective towards the jury. In the press, some have blamed the jury attacks on increased police militantism. Newspaper articles criticising the jury system are said to be counter-productive, and questioning of jury competence was 'astounding' (Age, 9 August 1984). But even lawyers seem to be starting to feel a lurking doubt about the jury's ability to handle complex scientific or commercial matters following such lengthy trials as those of Van Beelen and Smart, and notable trials such as that of Chamberlain.

The Age poll, conducted last year in the wake of the jury revelations in the Chamberlain, Gallagher, and Murphy trials, indicated that two out of every five citizens in Australia now have doubts about the jury system (Age, 9 October 1986). The jury is alive, but just. The question is, should we let it die its natural death, give it artificial legal life support, or perform drastic surgery.

What is the diagnosis and what is the prognosis of the jury system?

DIAGNOSIS

In Favour of the Jury

The theory in favour of the jury system suggests that it is a democratic institution, that it is a good fact finder, and that it dispenses justice rather than law.

Democratic Institution

As a democratic institution, it is said that the jury keeps in check the power of the law makers (parliament) the law upholders (judiciary) and the law enforcers (police). Does the jury live up to this standard and how necessary is it that these checks are performed by a jury?

History shows that political trials have only led to an acquittal in a handful of cases. Trials inspired by political motives, that is by laying charges without adequate evidence, or otherwise unjustifiably, happen rarely if at all. The independence of the Director of Public Prosecutions and the Prosecutors for the Queen, as well as the independence of the judiciary ensure that political interference is kept out of the conduct of a trial. Recently, Mr Justice Murphy claimed his trial as political.

Even if we assume for the sake of the argument that this were so, the mere fact that he was convicted by the first jury shows that the jury did not follow its reputed distaste for politically inspired prosecutions, but merely found the facts and applied the law as directed by the trial judge. The acquittal on the second trial followed a different course of trial and different directions as to the law.

Similarly, the perceived check on the judiciary, although not begrudged by judges, seems to be fallacious. Firstly, judges have much more influence on the jury's verdict than is generally realised and secondly, they agree with the jury's verdict in at least 75 per cent of the cases so they might as well have given the verdict themselves (Kalven and Zeisel, 1966; Baldwin and McConville 1979). In the 25 per cent of disagreement with the jury, it is legitimate to ask whether society has benefited from those verdicts. Undeserved convictions or acquittals take their human toll.

To avoid an alleged lawyers' bias, which can be recognised and overcome by the judge in a written and reasoned judgment, a jury's bias has been allowed to exist which is uncontrollable and secret (see American research reported in Australian, 1 July 1985).

It is said that the jury ensures that an accused does not stand convicted merely because the police are convinced of that person's guilt. The very fact that the conviction rate in the Magistrates' Courts is so high, may well suggest that the police investigation has not been sufficiently questioned. The other side of the coin, to the European observer, is that undue criticism of the police force has led to a rigidity in the investigation of major crime, since a conviction at odds of 50-50 is quite a triumph. Investigations should include matters pointing to innocenceas well as guilt. A preliminary investigation led by an independent prosecutor (or by a judge, as in Europe) seems to be a more effective way of avoiding unnecessary prosecutions. Relying on a particular jury to distrust police evidence in the appropriate case is putting the cart before the horse.

The Fact Finder

It is not the objective facts that are in dispute in most trials but the subjective intention of the perpetrator of the crime, which in ordinary language is not a true fact but an inference to be drawn from the facts. Even where the facts are denied by the accused, such as in cases of mistaken identity or where circumstantial evidence is challenged by the accused, the tribunal is usually asked to choose between conflicting expert evidence rather than conflicting witnesses' evidence.

Today, there are additional and more accurate means of establishing facts than reliance on a jury's intuition. No longer does the jury possess an inside knowledge about the circumstances of the crime (except, perhaps in country communities). The jury is now more distanced from the case than the judge. The jury which developed as an able bodied assistant to the judge, is now as helpless as a newborn babe.

If the issue is the handling of firearms or the sale of second hand video recorders in a pub or the morals of sub-cultures or ethnic groups, it would make more sense if evidence on the particular issue was given during the trial. For instance, in R v. Dincer (1983 VR 460) where a conservative muslim stabbed his teenage daughter to death upon finding her in bed with her boyfriend, the issue left to the jury was whether an ordinary man with the accused's characteristics, that is a traditionalist Turk, would have reacted similarly to the provocation. Unrealistically, the law does not permit evidence to be called to assist the jury in determining what an ordinary conservative Turkish muslim might have done in those circumstances.

The mens rea of the accused is a much refined concept. Psychiatrists are precluded from commenting on the probable intent of the accused at the time of the crime, because how could they assess the accused's state of mind in the past without knowing all the evidence. The jury is required to distill the past intent out of the proven objective facts, but knows little or nothing about the accused's personality.

To enable a jury to find facts, much time and effort goes into making the process understandable to them. It may well be that by and large the judge and counsel succeed in making the issues sufficiently clear, but their painstaking efforts have not prevented the criminal law from becoming extremely intricate and refined. Some common words, like rape, theft and malice, have acquired a technical legal meaning which differs somewhat from every day language. The terms 'reasonable man' or 'beyond reasonable doubt' are not the recognisable concepts that lawyers had hoped. Distinguished legal minds in the appeal courts are forever refining the concepts of, for instance, the mental element in crime, which requires precise and specific directions by the trial judge to the jury. It is unlikely that a jury will obtain sufficient dexterity during the course of a trial to apply these theoretical concepts with any manner of precision. The beneficial effect of this microsurgery of the law is lost where the holder of the scalpel has no more training than the barber of yore.

Furthermore, in cases of multiple accused or multiple charges, complex scientific evidence or complicated commercial dealings, the evidence cannot be simplified. The clock cannot be set back. Today's trials may be more cumbersome compared to a romanticised past, tomorrow's trials will be even more technical.

By asking a tribunal to apply refined legal concepts and comprehend complex and scientific evidence, without giving it the training and experience to do so, only invites its indiscriminate application and many grounds for appeal.

Justice

Jurors swear an oath to give a true verdict according to the evidence. And in general, jurors seem to bear that in mind. A juror in the first Murphy trial referred to the jury's dislike for a particular law but felt constrained to apply it.

One can imagine cases where sympathy is almost entirely with the accused, such as in euthanasia cases, or where the victim kills a wife and child basher. In English speaking countries one is led to believe that a jury will acquit in the appropriate case, where a judge, who is bound by the law cannot. This however, is a fallacy. Firstly, not all juries feel free to depart from their oath to give a true verdict according to the evidence, in the absence of instructions from the judge to the contrary, so that in some deserving case one jury may acquit but in another equally deserving case another jury may convict. And in which case has justice been done?

Secondly, even in the Anglo-Australian trial, where the judge is bound by precedent (which, by the way, need not be necessary to have an orderly justice system), judges have shown the skill and ingenuity to distinguish a meritorious case. Alternatively, a judge, like a magistrate, could exercise a discretion not to record a conviction. Considering the refinements of the law of murder, lawyers have not shown much confidence in juries getting it 'right', without, metaphorically speaking, putting the jury in a straitjacket of concepts such as provocation, self-defence, reckless murder, felony murder, or intent to do grievous bodily harm. The appeal courts increasingly add further complications to the criminal law. Some judges now regard a criminal trial as more complex than those in jurisdictions traditionally regarded as hard, such as equity or practice court. This development is in part due to the narrow appeal grounds which do not allow for a rehearing on the facts. This has sharpened the ingenuity of counsel and judges in finding errors of law on the most minute distinctions, where perhaps all that was required was to reconsider the factual evidence. Where a trial judge cannot be found to have made an error of law sufficient to overturn the verdict, such as in the Chamberlain case, the accused would have to rely on sufficient public agitation to result in the setting up of an inquisitorial form of inquiry. Those found guilty of lesser indictable offences, such as burglary or assault cannot hope for further deployment of public funds.

One of the merits of the jury system is said to be that it will counter harsh laws by consistent acquittals. Laws have been changed as a result of a large number of acquittals in cases such as sedition, child murder and manslaughter by a drunk motorist. However, such changes have come very late to the British criminal law. Without the reliance on this justice by the jury, such changes would have come much earlier. Indeed, the presence of the various law reform bodies in this country now have the task to advise the Attorney-General on more timely updating of the law.

Furthermore, consistent acquittals by juries should not always be followed by a change in the law, say, for the sake of the argument if juries consistently refuse to convict 'poofter bashers' or rapists of prostitutes. In those cases Parliament should be more enlightened than the public prejudice that might be expressed in jury verdicts.

All in all, Parliament is chosen by the community to pass the laws the community demands and should not slavishly follow acquittals made by a statistically non-representative sample of the community just to ensure the courts register more convictions.

Against the Jury

The arguments against the jury system are, broadly speaking, that it relies on comprehension of the issues which cannot be guaranteed or ascertained, that a jury trial is too narrowly based and wasteful in time, effort and money and that a jury verdict is unpredictable and falsely unanimous.

Intelligence cannot be measured by the level of education alone. Nor is intelligence the only requirement for comprehension of the issues. Concentration, interest in the issues, experience and familiarity with the topic all come into play.

It takes time to develop understanding of courtroom procedure; the who's who, what roles people play, the difference between examination in chief and cross examination, and the impact of an unsworn statement. All common enough for the courtroom expert, but a foreign wilderness to each and every juror alike.

Lawyers will say that by the end of the trial the jury will have a sufficient grasp of the evidence because counsel will explain it all very clearly, and so will the judge. But surely, it is not the point whether the evidence becomes clear on explanation at the end, but that it is understandable from the beginning so that no points are being missed because the jury does not know what counsel is leading up to.

To a certain extent these problems could be alleviated by providing the jury with advance information on courtroom procedure, maps and plans, and even the transcript.

However, even they will not make up for the lack of experience in judicial decision making, which is not a natural but an acquired skill, as is recognised in Western European countries where judges receive training in judicial skills before appointment to the bench.

Lack of comprehension is a real and recognised problem, but cannot be identified in individual cases, because a jury does not give reasons. The jury is the only tribunal that is not required to give reasons for its judgment. The modern rationale is that jurors might have varied reasons (originally, in the days of the bow and arrow, the requirement was not so much unanimity, but that at least twelve people out of a large number, could be found to swear to a particular set of facts). It is realised that it is impracticable to require the jury to give reasons. Indeed, that just shows up the very weakness of the jury system. It leaves the accused and the community to wonder about the verdict.

Is it really true that a jury acquittal leaves the accused's reputation in tact? Controvery around the Murphy verdict remains. Equally, a guilty verdict does not appease public opinion either, as the Chamberlain verdict shows. If reasons had been given for these verdicts, both the accused and the public would have had something concete to point to, something they could agree or disagree on which could provide definite arguments to refute allegations that tarnish the verdict. Without reasons, one is left with speculation and an unwillingness to correct a verdict that was factually wrong, because it cannot be shown to be based on a misdiagnosis except in the extreme cases. A verdict without reasons covers up mistakes that may have been made by these twelve human beings, just as liable to make an error as, for instance, is a board of management.

The British adversary trial hearing is lengthier than its European counterparts. This is in part due to the use of juries. Civil cases, without juries now take up to one third less time than a civil jury trial. Another reason is the completely oral nature of the hearing. In Europe documentary evidence has a much greater role to play. In Holland, with its bench of three professional judges, only the crucial witnesses are heard orally at the trial. Many witness's statements to the police or to the investigating judge are handed over to the court unless the defence objects. Usually, there is very little mileage in attacking a peripheral or supporting witness, so in this way much time is saved during the trial itself. Recently a trial was held in Holland involving alleged fraudulent dealings by the owner-director of a large private bank. The bank was sold to a French concern which uncovered the fraudulent banking practices when it was faced with losses of about $150 million. The trial lasted four days and judgment was handed down a fortnight later. The court acquitted the accused, and reasons were given, exonerating the bank director from criminal liability for these fraudulent practices in his bank, because of his particular position on the board of management at the time.

These reasons were published in newspapers, allowing the public valuable insight into the reasoning behind the acquittal.

Actual Jurors' Experiences

Occasionally a juror lets the proverbial cat out of the bag. Judges have frowned upon this. Disclosure of irregularities or misconceptions during jury deliberations have never yet led to a successful appeal. The courts have been anxious to preserve the finality of the verdict (apart from the statutory grounds of appeal) and the finality of the juror's role upon verdict.

In Victoria, post trial revelations of jurors have recently been made subject to contempt of court proceedings, although the way has been left open for bona fide academic research.

From what has been published so far, it seems that the verdict of the jurors on their crucial role is by no means unanimous. Two detailed accounts of jurors' experiences are of particular interest. One involved a manslaughter case in New South Wales, the other a rape trial in South Australia. In both cases the accused had made an unsworn statement; in both, the jury returned a not guilty verdict. In the N.S.W. case, the jurors (ten of whom were white collar workers or had tertiary qualifications) took notes and during the deliberation stayed close to the evidence. In the South Australian case, where no notes were taken, there was much speculation on matters outside the evidence and signficiant prevalence of prejudices. The juror in N.S.W. comments:

> Jury service was more onerous than I expected. I was impressed with the conscientiousness of the jurors, who took their job responsibly, paid close attention to the evidence, and discussed this intelligently and in depth. A couple of women and one of the men emerged as dominant forces and some clearly understood the process of influence within a group. Yet we worked as a group in quite a democratic way (Petre, 1984)

But the South Australian juror was disillusioned with the way her jury evaluated the evidence and speculated on extraneous matters and whether the system was hiding vital information from them, and stated that 'every aspect of a case where a jury is conscious of its ignorance feeds doubt and suspicion' (Callinan 1984).

A juror in the trial of Ryan, the last person to be hanged in Victoria in 1967, said, the jury would not have convictd him of murder if they had known he would hang. This juror remembers: 'We followed the evidence closely and made up our minds on the facts, without much emotion' (Sun, 14 August 1984).

Also in the first Murphy trial, the jury foreman indicated that the deliberation process had worked very well. 'It required us to listen to the thoughts of others and weigh the evidence before us

and in spite of an emotional or sentimental reluctance to do it, to gradually say "Well, I really don't have any choice"' (Age, 19 July 1985).

The juror in the Gallagher trial who told her story in the National Times in August last year, found the eighth day deliberation highly emotional. She was the only one who throughout insisted on a not guilty verdict. On the fifth day, it appeared that none of the other jurors had understood the evidence on the first count and through her persistence a not guilty verdict was finally agreed upon. On the eight day a verdict of not guilty was reached on eighteen counts and finally a compromise verdict of not guilty on half the counts and guilty on the remainder was reached (National Times, 9-15 August 1985).

From a radio interview with two jurors by Tom Molomby in 'The Law Report' in 1982, it appears that the lack of know-how of the role of the jury and of criminal procedure in general, as well as of the issues in the instant case, seriously affects the juror's concentration and comprehension at the beginning of the trial. Note taking was regarded as essential but extremely difficult, because it was not always immediately clear which are salient points in a witness's evidence until the evidence is contradicted later. Although jurors are aware that they can put questions to the judge, they do not feel encouraged to do so. And, of course, as one juror said, 'If you have missed the point, how can you ask the question?'.

A frequently mentioned problem area for jurors is the 'beyond reasonable doubt' concept. Many a jury has asked a judge to explain this in more detail, only to hear that it means what it says. It seems that 'reasonableness' in legal jargon means little to a juror who encounters the term for the first time. Beyond reasonable doubt can mean to one that any ingenious or fanciful explanation constitutes reasonable doubt, and to another a balance of probabilities.

Professor Devons's experience as a juror and observer of several trials in Britain in the 1960s is that 'you could never tell what bit of evidence would influence the jury, and that frequently they were influenced in arriving at their verdict not merely by whether they thought the accused was guilty but also whether he should be punished' (Devons, 1965, 56)

The responsibility of deciding someone's fate is sometimes regarded as extremely heavy, some jurors flatly refusing to convict anyone, others feeling emotionally very disturbed at having to decide someone's guilt. 'It should not be let to the likes of us to make a decision of this kind', one juror comments in Barber and Gordon, 1976.

On the whole, it seems that most jurors feel out of their depth in the courtroom, find their task onerous, but try very hard to arrive at a just decision. However, there is no guarantee

that every jury is able to cope, there is no control over their decision making and only limited scope for correction of a wrong verdict.

Synopsis

Arguments to retain the jury system, like the arguments in favour of home births, are emotional, even romantic, rather than rational or logical. (Roskill, 1985). The system is dependent on the expertise of counsel: if counsel fails to elicit an available piece of evidence or fails to call a potential witness, an unappellable miscarriage of justice may occur. No expertise has developed in weighing the evidence, assessing the relative importance of documentary evidence or putting circumstantial evidence into perspective. A good judgment is not based on a mere enumeration of all major and minor arguments made during the trial, and letting the side with the largest number of arguments win, but on the careful dissection and weighing of the testimony.

Similarly, to assess the jury system, one should not be satisfied with a list of arguments and counter arguments, but one should weigh the validity of each in the light of known facts.

The first argument is that the jury performs a social or democratic function of lay input tempering judicial power. The more important question is not whether it does or it does not, but whether there should be lay input, whether judicial power should be checked and if so, in what way. In a mixed tribunal (judges and lay persons sitting together) the lay influence appears to be marginal (Casper and Zeisel, 1972). In the separate tribunals of judge and jury, in most cases the jury follows the judge's directions (if that were not so, the system would have faltered long ago) so the judge could equally well have given the judgment. The value of lay input is more apparent than real. Without the presence of lay members, would the courts go haywire? The Magistrates' Courts used to sit with justices of the peace, one would think a most valuable contribution by lay members of society. However, recently, Victoria opted for legally qualified magistrates rather than retaining lay members and the Magistrates' Courts have not fallen into disrepute.

The higher courts have more power over people's lives. This power can be abused as is shown throughout history and in totalitarian countries, but is better safeguarded by an independent judiciary than by a token democratic institution that can be abolished with the stroke of a pen, as the diminishing role of the jury trial in this century shows. The replacement of the total judiciary is not nearly so easy. A safeguard for decent decisions would be the requirement of reasons for verdict, preferably for acquittal and convictions alike, so that no allegations of arbitrary verdicts can be raised. The reasoned verdict is open to scrutiny and convictions can be appealed against in the fullest sense on law and facts thus avoiding miscarriages of justice (Samuels, 1984, 337).

In Holland, where such reasoned verdicts are given and where an appeal by way of rehearing is open as a right, celebrated miscarriages of justice, such as Beck, Evans, Christie, Splatt and many others could just not have occurred.

The next argument is that separation of the function of judge and the jury facilitates and purifies the fact finding process. This is countered by allegations of incompetence, waste and unpredictability. Although a thorough investigation of actual jury deliberations would provide a conclusive picture of the role of the jury, some insight can be gained from what actual jurors have said, from research into group deliberations, from jury experiments, and from comparisons with jurisdictions without juries.

The Law Reform Commission of Victoria's background paper The Role of the Jury in Criminal Trials (1986) refers to research material in those areas. This research is not altogether encouraging as to the actual functioning of the jury process. The jury remains the wild card in the courtroom play. How important is it that there is this separate fact finder? Because of the separation in function, the fact finder need not be influenced by inadmissible prejudicial material, but if prejudicial material is relevant, and merely excluded because of fear that the jury might attach undue weight to it, the jury does not get the whole story. A doctor cannot make a proper diagnosis without a full history, neither can a jury be expected to judge the accused's actions out of context. The doctrine of admissibility is leading verdicts astray, because naturally the jury will speculate on missing links.

Where the jury has no reason to suspect omission of facts, and gives it verdict on an honest appraisal of what was left of the evidence, a jury may well feel despondent at its role. For instance, in two separate incidents, a man has been charged and acquitted of rape on the issue of consent by the girls he picked up from the bus stop. If he is charged with rape after a third such incident, it would strain credulity if we were to think he is merely unlucky in the type of girl he picks up.

Where the issue of consent in rape cases lies in the subjective belief of the accused, the jury should have before it all relevant material. Any subjective issue requires a great deal of information as to the accused's background before an accurate appraisal can be given. Inadmissibility of evidence and determination of subjective intent do not coincide.

A good example of a case where the evidence was fairly simple is provided by a recent unreported case in the Victorian Supreme Court. The accused had been embroiled in a gun fight. The accused received two wounds, one in the groin and one in the knee. His assailant was hit once in the stomach and twice in the head, one of which was fatal.

The case raised the issues of murder, self-defence, provocation and manslaughter by an unlawful and dangerous act. The jury found the accused not guilty of murder but guilty of manslaughter. The conviction was quashed on appeal and a new trial was ordered because the trial judge was held to have erred in certain directions to the jury embodied in documents with a theoretical expose of the relevant concepts in this case. The step of providing written instructions to a jury is not to be taken lightly, because as the Appeal Court judge said 'the extraneous issues by theoretical exposition may result in Juries not being in a position in which they understand the decision they must take and the verdicts which emerge from those decisions'. Such documents are to be expressed only in terms relating to the evidence. Again, this shows a real but not acknowledged distrust of the jury's reasoning power. Although the actual application of these difficult concepts by this jury is anyone's guess, the evidence gave only part of the story. There were two other men at the scene of the crime, whose evidence was not given because of their objections on the ground of self-incrimination. The truth was there all along, but the jury was not to hear it. They were left to wonder and speculate and to apply fanciful doctrines that even judges stumble on.

The picture is even grimmer where the evidence is complex. In several cases, appeal courts have acknowledged the difficulties the jury must have faced with the mass and complexity of the evidence. The answer from most law-reformers has been suggestions to facilitate the task of the jury providing more information beforehand by the use of visual aids and more documentary evidence or perhaps even access to the indexed transcript. The English Fraud Trials Committee Report 1986 (the Roskill Report) considered all those amendments, but recommended, nevertheless,

a tribunal without jury to hear complex fraud cases. The Roskill committee found that the limits of comprehension of the jury, the unfamiliarity with the procedure and the evidence and the difficulties of sustaining concentration for the length of the trial create the serious risk either that the jury will acquit a defendant because they have not understood the evidence or will convict because they mistakenly think they have understood it when they have in fact done little more than applied the maxim 'there's no smoke without fire'.

The presence of a jury also affects the type and number of charges. Sometimes less serious charges than the facts warrant are chosen because of fears by the prosecution that the jury will have trouble following the evidence on the more complicated charge. Sometimes, as with murder, lesser alternative charges are not laid because the jury might take the lesser option without giving the murder charge due consideration. Furthermore, the trial may be about one event or a chain of events: a fraud and an armed robbery by the same accused always require two separate trials, even where it would be in the accused's interest to face the ordeal of a trial only once.

Not only the way the case is started is influenced by the presence of the jury, but also the way the evidence is elicited. The oral nature of the trial is a necessity with the jury. However, psychological research bears out that there are serious flaws in the oral adversary trial - written accounts of a witness's testimony may be more reliable guides in establishing the truth than the observation of the witness's demeanour in the box; cross-examination elicits less accurate accounts than free narration followed by further direct questioning. To be a witness subjected to cross-examination can be a gruelling and humiliating experience, but the impressive witness is not necessarily the better (Re, 1983).

PROGNOSIS: JUSTICE WITHOUT THE JURY

The limitations on the jury in its fact finding function are now clear. Current criticism of the jury system indicates a shift in public opinion: just as in the Middle Ages discontentment grew with the system of ordeals leading to the introduction of more rational methods of proof, so in this century society is gearing up to the reception of a more sophisticated analysis of the evidence. This is a natural evolution, not to be artificially supressed. Equally, in Europe, criminal procedure feels the pressures of technology. Europe went through its most dramatic times of adjustment in the days of Napoleon, when the best features of the English adversarial trial were adopted; changes since have been gradual.

The Anglo Saxon world could now similarly benefit from the 200 years of European experience with a modified adversarial trial. In most Western Europen countries mixed tribunals are still being used in criminal trials, but the tendency is for lay input to be slowly vanishing.

The Dutch are generally happy with their choice of a completely professional bench, but lately the question has arisen whether in fraud cases commercial expertise should be added to the bench. The same question will arise in other trials with complicated technical and scientific aspects. The likely prospect is that all countries in western civilisation will eventually adopt a bench comprised of judges and ad hoc experts.

The fear is that such a tribunal will be inhumane in its approach to life's miseries. Experience with the professional bench shows that soft touches do not depend on the presence of the lay members. Rather it is the face to face confrontation of tribunal and accused, the responsibility of the tribunal towards this person of flesh and blood, whose fate is in their hands, that seems to call up an instinctive protectiveness for the one in trouble. Judges experience that feeling just as much as members of a jury.

The question of euthanasia springs to mind. Active euthanasia is a crime in Holland, but doctors have for years assisted the terminally ill to die when they so wish. One may agree or disagee with this practice, but the point is that in absence of legislative reform, the doctors have deliberately turned to the judges for guidelines, knowing that they would get a balanced and humane response.

Justice does not require a jury. Without truth, justice cannot in fact be done, although it may be seen to be done. The narrow legal proof in the adversarial trial sometimes distorts the wider truth. The law should allow the jury to hear all relevant evidence or else confess its distrust of the jury's ability to find the truth. Fairness to the accused can be achieved by giving them early right to counsel's advice, pre-trial information about all evidence to be led in court, the right before the trial to have forensic evidence checked by independent experts, reasoned judgment and a right to appeal by way of rehearing.

The rights of the victim should also be considered. For instance, the victim should be notified of the outcome of the investigation and whether the accused pleads guilty.

Let us aim for true justice without juries.

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THE POLITICAL SIGNIFICANCE OF THE JURY

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INTRODUCTION

Much of the debate about trial by jury focuses on jury as a legal institution. Titles such as the Role of the Jury in a Criminal Trial direct attention to practical issues about the selection of juries, their qualifications, their ability to understand complex evidence, their cost-effectiveness, etc.[1] This paper emphasises the political not the legal significance of juries; rather than examine the role of the jury in a criminal trial, the paper considers the role of the jury in the Australian political system. The two concerns are not mutually exclusive; indeed I would claim that the political significance of juries implicitly colours many of the practical questions concerning trial by jury. But the fact that the political values underlying jury trial remain implicit, and are sometimes contradictory or ambiguous, allows debate to proceed at cross purposes. Lack of conceptual clarity about the values at stake has, for example, resulted in radically different views about the competence of juries in complex and technical cases. Similarly, whether juries dispense "justice" depends heavily on the meaning attached to that term. The legitimacy of the so-called "perverse" verdict and the associated question of the judge/jury relationship provide another example of issues which can best be resolved by explicit discussion of the values to which the polity is committed.

I have chosen to approach the question of the political underpinnings of the jury system by way of four historical examples. These draw out the values that various people have claimed for the jury. I have chosen examples from within the Anglo-Australian political/legal tradition, but from different eras and geographic locations. They present the views of radical political groups in seventeenth century England, the thoughts of a nineteenth century French political thinker, Alexis de Tocqueville, on the new American democracy, the forcefully made claims for jury trial by Emancipists in early New South Wales, and the arguments of an English historian, E.P.Thompson, on the need for the jury in the modern British state.

The historical accounts emphasise the theme of popular sovereignty and associated convictions about the structure of political power. In the second half of the paper I consider the contemporary relevance of these values to the continued use of the jury system. Underlying this is the view that though longevity is not a sufficient justification for continued reliance on the jury, the reasons for the jury's continued significance can be found in its history.

FOUR HISTORICAL ACCOUNTS

In 1670 Edward Bushel and three fellow jurors became involved in one of the most famous cases ever on trial by jury.(2) They had sat in a case in which the Quakers William Penn and William Mead were charged with unlawful assembly and disturbance of the peace arising out of their public preaching. The jurors found the facts alleged that the the defendants were preaching to a crowd, but refused to conclude that these facts amounted to a crime. The trial judge, Lord Chief Justice Kelyng, fined the jurors and imprisoned Bushel who had refused to pay. Bushel used the writ of habeas corpus to bring the case before the Court of Common Pleas. The court held that jurors may not be punished for their verdicts.(3)

The case was the culmination of a debate about the jury which had begun some thirty years earlier in the trials of the Leveller leader, John Lilburne. The Levellers founded their political theory on what they claimed were the communal Anglo-Saxon institutions which pre-dated "the Norman yoke". Judges, lawyers, law French and legal complexity all stood in the way of the laws of God, the fundamental law of England, to be found in the conscience of all righteous people. This meant that the jury, not the judge nor the parliament, was the ultimate adjudicator of the law. To emphasise the point one of their sympathisers, Henry Marten, advised jurors to "keep their hats on in the presence of the judge, in order to show that they were the chief judges in the court."(4)

Lilburne carried this theory of popular sovereignty and the jury into his trials in 1649 and 1653. In the first, for treason, he stood before a bench of nine ermine-robed judges and told the jury that they were judges of law as well as of fact, and that the judges were mere "cyphers" to impose sentence. In the second trial, this time for breaching an Act of Parliament that had banished him from England, he invited the jury to

treat the Act as a breach of the fundamental law of England. He was acquitted by the jury on both occasions.[5]

.....

Alexis de Tocqueville would not have endorsed the Leveller theory of popular sovereignty. Indeed like many of his early nineteenth century contemporaries he had misgivings about popular democracy, based in part on his view of the French revolution. His account of the new American democracy, published in 1835, detailed three factors which tempered his fears about the "tyranny of the majority".[6] In the first place, the federal system prevented the concentration of power in the hands of central government. The importance of judges and lawyers in American life provided the second safeguard. This was not because, like Coke, they would uphold the law in the face of the monarch or executive government. Quite the contrary, de Tocqueville thought that judges and lawyers supplied an intellectual aristocracy, a substitute for the natural aristocracy which America lacked, which imposed a check on popular passions. Judges and lawyers were far more likely to side with government than with the people.

The jury formed the third protection against the tyranny of the majority. De Tocqueville thought that above all the jury was a political institution through which the people had a say in the execution of the laws made in the popularly elected legislature. "The jury," he wrote, "puts the people themselves, or at least one class of citizens on the judge's bench. Therefore, the jury as an institution really puts control of society into the hands of the people or of that class.... The jury system in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail."[7] The jury box schooled citizens in responsibility and justice, according to de Tocqueville, and this together with the moderating influence of the "aristocratic" judge established respect for the law, the judge, and the rule of the people. It formed a guard against the danger of the excesses of popular passions.

.....

Jury trial has always had opponents in England, especially in governments. Juries frustrated Cromwell's pursuit of the Levellers in the seventeenth century and government prosecutions of the radical publisher, John

Wilkes, in the eighteenth.[8] Nor did England's rulers trust some of their colonies with trial by jury. Refusal of jury trial for certain offences contributed to the revolt of the American colonists.[9]

Opposition to jury trial has a long pedigree in Australia too. For over forty years from colonisation, England refused to allow trial by jury in New South Wales. Convicts dominated the population of New South Wales for the first years of white settlement. Even in the early decades governors and governed complained about the absence of trial by jury, the abuses practised by the officers of the New South Wales Corps who sat as a panel in criminal cases, and the military flavour of the court. However, the real agitation for trial by jury began as the growing number of emancipated convicts began to organise themselves politically.

The first ever petition from emancipists to the English government came in 1819 and placed trial by jury at the top of the list. At first sight this seems a rather strange priority, especially for the respectable leadership of the emancipists who did not expect to find themselves in front of a jury again. The motivation was political. For people who had forfeited their civil rights on conviction, eligibility to serve on juries was a restoration of the badge of citizenship. It was a mark that their "birth rights as Englishmen", "guaranteed by the Magna Carta", to use their terms, had been restored to them. They identified trial by jury with the English constitution and the protection of English liberty from arbitrary government. They also saw trial by jury as inextricably linked with elective institutions and the opportunity for them to participate in the government of the colony.

The exclusive faction (i.e. wealthy free settlers) in the colony opposed jury trial vehemently. They too saw the issue in political terms, posing the threat of an emancipist ascendancy and the possibility that they would be judged and ruled over by their inferiors, former felons. At the behest of the exclusives the English government dragged its feet on the issue until the late 1820s when Governor Darling unwittingly forced its hand. Aggrieved by criticism of his governorship, he brought criminal libel proceedings against a newspaper editor. The prospect that the governor would name the members of the military panel who would sit on his own case proved too much for the English government. It ordered civilian juries in such cases and gradually extended full jury trial in the next few years. Elective institutions followed shortly after and,

despite exclusivist protestations, emancipists were eligible both to serve on juries and to vote on the same property qualifications as those without criminal convictions.(10)

.....

The last historical account of the political significance of the jury comes from the very recent past, the 1970s. In a series of essays Edward Thompson has described the rise of the "secret state" in England and the decline of institutional checks against its incursions.(11) Thompson points to the growth in the power of the executive, especially the security forces and the police. Simultaneously, a dulling of England's traditional "libertarian" sense has allowed an erosion of procedures for making executive government accountable to the people - a "managed parliament" under the sway of bureaucracy, restrictions on information such as the Official Secrets Act, and the too ready sacrifice of traditional political values to "efficiency" and "rationality". Attacks on the independence of juries occupy a central place in Thompson's case. He details a debate in England over jury vetting - or jury stacking to use plain terms - during which the Home Secretary, the Attorney-General and the Director of Public Prosecutions defended the until-then secret practice of consulting police records and striking off the names of potential jurors who fell foul of the guidelines, especially in politically sensitive cases. Not only did English judges fail to condemn these practices, but they used contempt of court powers to suppress discussion of the issue. The Lord Chancellor washed his hands of the matter. Thompson objects that jury vetting is a corruption of the English Constitution. His commitment to the jury rests on:

> ...a total view of the relation between the legislature, judiciary and the people; upon a notion of justice in which the law must be made to seem rational and even humane to lay jurors (hence inhibiting a thousand oppressive practices before they are even commenced, through the knowledge that no jury would convict); and upon a particular national history of contests between "the people" and the Crown or state, in which the jury has won or reserved for itelf, in its verdict, a final power.(p232)

CONTEMPORARY SIGNIFICANCE OF THE JURY

The jury has been a feature of the Anglo-Australian political system for some eight centuries. The long experience of the jury, the continued reassertion of its worth, and its general acceptance merit our continued respect. But this must be a critical respect. The venerable age of the jury cannot privilege it from scrutiny. Like other political institutions, its continued relevance must be open to question. Some have argued that the jury is not appropriate in modern society.(12) I want to consider whether the political reason advanced for the jury in the historical accounts, especially the values about popular sovereignty and the structure of government continue to be relevant.

Popular Sovereignty

Popular sovereignty is a theme common to all four of the historical accounts. In circumstances where other means of expressing the popular will are limited and judges are government appointeees without life tenure (e.g. seventeenth century England and early New South Wales), it may be that the jury had a more important role to play in representing the will of the people. That does not mean, however, that there is no important role for juries in popular democracies; de Tocqueville and Thompson would reject such such a proposition. The question is whether there is anything about modern society that renders the jury obsolete.

Weber argued that the feature of modern societies which distinguishes them from past societies is their high degree of rationality in all aspects of life. Rules and rational calculation characterise public and much of private life.(13) It is accompanied by great faith in expertise and reliance on experts to make all sorts of decisions and to perform tasks which would previously not have been performed by experts.(14) A corollary of these developments is a mistrust of decision making where reasons are not available or not easily given, and a lack of faith in decision by non-experts. Taken to extreme this view would result in the disenfranchisement of large sections of the population on the basis that they did not possess the requisite expertise to vote on the complex issues of modern government.

Very few would take such a radical position on the right to vote even in this highly rational age. And more generally despite the grip of the expert on public consciousness, questions of values still tend to fall outside the jurisdiction of expertise. Moreover,

challenges to the fusion of technical and value elements in scientific decision-making come from a number of fronts. Policy on space and nuclear research is not seen to be the sole preserve of experts. Similarly, in medicine, debates about in vitro fertilization, the care of grossly deformed or extremely premature children, euthanasia, control of procedures such as child birth, etc.,[15] evidence a more discriminating approach to the claims of experts and an unwillingness to commit decisions about values to them that would have cheered John Lilburne.[16] Issues like these bear directly on the continued relevance of the jury. If the sorts of decisions made by juries fall within the domain of values rather than expertise, then the arguments for juries continue to sound in politics, as our historical vignettes suggest.

It follows that the answer to the question about the continued importance of the jury depends on an analysis of the sorts of decision entrusted to juries. Consider the fact-finding role of the jury, first. In a straightforward case, the choice between a jury and some other body is immaterial. But "finding" the facts is a complex business.[17] The task of selecting the relevant facts, especially where the evidence of witnesses conflict, is not obviously one for experts, nor is it obvious what field of expertise could claim jurisdiction even if it were thought to be a task for experts. Sometimes judges and lawyers claim expertise in these matters. Apart from the self-serving and unproved nature of such claims, there is no reason to think that they are not afflicted by the same difficulties in this sort of task as other mortals. Moreover, psychological evidence suggests that the effect of repeated exposure of jurors to the courtroom situation biases decisions in favour of conviction.[18] It is reasonable to surmise that the same process affects judges, lawyers, and would affect full-time assessors were they to be substituted for juries.

The criminal law also requires judgments to be made about highly speculative facts, most importantly, the intention of the defendant. In the "simpler" category the decision will be whether the defendant in a murder case, for example, intended to kill, or knew that the victim in a rape case did not consent. In the more difficult category, for example the property offences, the law requires an explicit moral evaluation of the defendant's conduct: was the defendant's conduct dishonest by community standards? Decisions about negligence also fall into this category. For the reasons advanced in the preceding paragraph, it is not clear that expertise has anything special to contribute

to decisions in either category. Provided that the information in the trial is presented in a clear way, and there is great scope for improvement here,(19) juries are at least as well fitted technically to make these difficult decisions as any feasible alternative. In terms of legitimacy, the jury's popular basis gives it a much better claim to make the hard decisions in situations where expertise has no particular claim. This point is even clearer in the second category where the function of infusing community values into the criminal law is pre-eminently a role for the jury as more representative of the community than experts.

Finally, let us consider what are called "perverse verdicts". Sometimes, the jury will play a role in saying that in a particular case a rule, though logically applicable, should not be applied for reasons of justice. This by the way is not necessarily to reject the general propriety of the rule. Parliaments make general rules and it is unrealistic to think that there will not be particular cases in which application of the rule would clash with community standards of justice. In terms of popular sovereignty, the function of the jury in administering substantive rather than formal justice in such cases should be seen as a legitimate part of the jury's role, not as "perverse".

In other cases juries will consistently refuse to apply a particular rule. Motor manslaughter and rules about provocation in domestic violence situations, are two examples. Once again the legitimacy of this will depend on views about popular sovereignty and how this may be expressed. The view that parliaments are the sole expounders of the popular voice is not a view that would have found favour with John Lilburne or Alexis de Tocqueville. It is naive politics to think that the popular franchise of modern parliaments accurately expresses community standards on all issues at all times. In these cases the jury can be seen as a legitimate and valuable corrective and supplement to the necessarily general pronouncements of parliaments.

The Structure of Government

The second major lesson to be drawn from the historical examples is about the structure of government.

In part the rule of law can be seen as a device which imposes a check on the abuse of governmental power by fragmenting that power. It structures government power in such a way that the executive has to be able to

justify its actions in legal terms to the courts. In the period before the Act of Settlement in England, when the independence of the judges was distinctly doubtful, for people like John Lilburne, the role of the independent jury was crucial to the effective operation of the rule of law. To the emancipists in early New South Wales, the power of the governor who was the prosecutor, held the power to appoint the officers who would try cases, and was the military superior to colonial judges who held office only during the English government's pleasure, also offended this structural understanding about the rule of law. The contemporary question is whether we still need the sort of structural protection supplied by juries at a time when judicial independence is a more realistic notion. Ultimately this is Thompson's central concern in his essays on "the secret state". His answer is unequivocally, yes.

One of the most significant phenomena of this century has been the rise of the state and the growth of its power to reach into the lives of individual citizens. The size of the modern state, modern police and other investigatory forces, and the state's capacity for surveillance is something that would have profoundly shocked our libertarian forebears. Government today is much more intrusive, not less. Even absolute monarchies lacked the machinery available to modern government which provides it with the ability to penetrate the personal sphere.

It would be altogether unrealistic to think that juries can protect us from all of this. But in the area where government has most extreme power, criminal law, the need to guard against the state's "all-intrusive claims" is greater than ever. One way to combat this is to structure power in such a way as to minimise the possibilities for abuse. In terms of the criminal law this means retention of the jury.

There are several reasons for this. One of them is identified by de Tocqueville. Judges form a kind of intellectual aristocracy whose interests and habits of mind will be sympathetic to the maintenance of the status quo and the support of government. They cannot therefore be relied on as a protection against the incursions of the state. De Tocqueville's point resonates strongly in the present. The acquittals by juries of the civil servant, Clyde Ponting, of offences against the Official Secrets Act in the face of a direction to convict by the trial judge, and Cyprus-based service personnel charged with espionage and

verballed by security forces, add recent English examples to those offered by Thompson of the differences in outlook between judges and juries in these sorts of cases. Juries have the virtue that they have no ongoing relationship with the organs of government. They serve anonymously, on a transient basis and are less likely to be swayed by "reasons of state", self-interest, identification with other officials of the state, or identification with the institutional demands of the courts than permanent members of the legal system.

A second major structural characteristic of juries is the effect they have on a whole range of factors affecting prosecutions from the outset. While it should be emphasized that jury trials make up a lamentably small percentage of criminal trials (less than 0.9% of major cases in NSW),[20] to assess the significance of jury trial in terms only of the number of cases that go to trial would be a mistake. Decisions whether to prosecute, for what, the sort of evidence that will be needed, etc., are profoundly affected by the fact that if the case comes to trial, a jury will have to be satisfied.

Finally, and this is related to the preceding point, the fact that the prosecution has to satisfy a lay jury has a profound effect on the public accountability of the criminal process. Unless the prosecution can specify in plain terms just what the defendant has done and how it breaches the rules to the jury, and through that structure to the public, then the prosecution will fail. The criminal law engages deeply held feelings about right and wrong and it places a great deal of power in the hands of the executive. In a democracy the criminal justice system should be publicly accountable and not allowed to fall prey to experts, legal or otherwise. Its procedures should be conducted in terms intelligible to the most highly educated and literate community ever to have been the audience for criminal proceedings. The presence of the jury works very much in favour of this sort of public accountability.

CONCLUSIONS

One of the responses to the controversy over the first Murphy verdict was an attack on people who dared to criticise one of our most revered institutions, the jury.[21] This was a particularly unfortunate response at a time of great public interest in the issue of trial by jury. Proponents of jury trial ought to have grasped the opportunity to debate the general issues about trial by jury. They ought to have pointed out how rare a

phenomenon jury trial is and the ways in which legislatures and courts have cut back on the jury system.[22] They also ought to have taken the opportunity to discuss the historical record of the jury and the reasons that emerge from that history for the retention and expansion of the jury system.[23] Similarly, Law Reform Commission reports ought to deal fully with the general rationale and political significance of the jury. They ought to insert this history and the arguments that arise from it into the political arena. They ought not to assume some sort of unquestioning acceptance of this tradition among the general population or among that very large part of the Australian population which is of non-English origin and cannot be expected to adhere unquestioningly to English traditions.[24]

Trial by jury is one of Australia's defining political traditions. Its history symbolises a commitment to individual liberty, a faith in popular democratic institutions, a distrust of government and experience of how juries may make the difference. In a century in which governments and the experts available to them have extended the power of the state into the lives of citizens, the need for safeguards against misuse of government power has become greater. Nowhere more than in the criminal law. At the same time, little by little, the role of the jury has been stealthily eroded while in the popular imagination jury trials are the norm. Cost, efficiency, competence, etc. are given as reasons for nine hundred and ninety-nine cuts to the jury system. To continue this process of slow death while proclaiming the sacrosanctity of the jury constitutes either an unacceptable deception or self-delusion. On the more charitable interpretation, the clash of values involved in debates over the jury has produced a sort of schizophrenia. The jury symbolizes democratic values to which we remain strongly committed, at least at an abstract level. On the other hand, rational technocratic values undermine our faith in non-experts on juries, their secret deliberations and the absence of reasons for their decision. We worry that they produce unjust results. To the extent that the two sets of values simply fail to analyse the sorts of decisions made by juries, they talk at cross-purposes. To the extent that they come to grips with one another, they strongly conflict. A choice must be made.

My choice must be apparent by now. Some decisions in democracies are too important to trust to anyone but citizens and institutions representative of them. Two of these decisions come through the ballot box and the jury box. Both the symbols and their reality ought to

be reasserted against the anti-democratic tendencies ranged against them. In the case of the jury it should be defended and extended to realign its actual operation with the symbolic importance attached to it.

FOOTNOTES

1. e.g. New South Wales, The Jury in a Criminal Trial N.S.W. Law Reform Commission Discussion Paper, 1985 Victoria, The Role of the Jury in Criminal Trials Law Reform Commission of Victoria, 1985.

2. (1670) 89 E.R. 3.

3. T. Green, Verdict According to Conscience: Perspectives on the English Trial Jury 1200-1800 Chicago U.P., 1985, p.202ff.

4. C.Hill, The World Turned Upside Down: Radical Ideas During the English Revolution Penguin, 1975, p.271.

5. On the Levellers and their views on juries. See Green op.cit. and Hill, op.cit. See too H.N. Brailsford, The Levellers and the English Revolution, esp. ch. 30, "The Jury of Life and Death", and L. Levy, The Origins of the Fifth Amendment Oxford U.P., 1978.

6. A. de Tocqueville, Democracy in America Anchor, 1969.

7. Ibid. p.273.

8. J. Brewer, "The Wilkites and the Law" in J. Brewer and J.Styles (eds.), An Ungovernable People Rutgers U.P., 1980, 128.

9. A. Olson, "Parliament, Empire, and Parliamentary Law 1776" in J.G.A.Pocock (ed.), Three British Revolutions: 1641, 1688, 1776 Princeton U.P., 1980 p.289 at p.299, 312.

10. D.Neal, "Law and Authority in Early New South Wales: The Campaign for Trial by Jury" Journal of Legal History (forthcoming).

11. Writing by Candlelight Merlin, 1980. See especially the essays entitled, "The State Versus its Enemies" (p.99), "The Secret State" (p.149), and "The Rule of the Judges" (p.211).

12. M.Read, "Justice Without Juries" Paper delivered to the Australian Institute of Criminology Conference, May 1986.

13. M. Weber, Economy and Society University of California Press, 1978, p.1156 and passim.

14. I.Ilich, Limits to Medicine, Medical Nemesis: The Expropriation of Health Penguin 1977. The work of Michel Foucault takes up a similar theme. See, for example, the discussion of the role of psychiatrists and other experts in Discipline and Punish: The Birth of the Prison Vintage, 1979, p.21-2.

15. T.Kuhn, The Structure of Scientific Revolutions University of Chicago Press, 1970; and Ilich, op.cit.

16. B.Selinger, "Expert Evidence and the Ultimate Question" Paper delivered to the Australian Institute of Criminology Conference, May 1986.

17. D.McBarnet, Conviction: Law, the State and the Construction of Justice Macmillan, 1981 p.11-15; P.Sheehan, "Some Psychological Aspects Relevant to the Jury" Paper delivered to the Australian Institute of Criminology, May 1986.

18. Sheehan, op.cit. 3.

19. New South Wales, op.cit. ch.6.

20. Figure derived from: New South Wales, Court Statistics 1982, N.S.W. Bureau of Crime Statistics and Research, 1985. The category of "major cases" excludes juvenile cases, minor traffic and parking offences.

21. See, for example, National Times, 8/7/85 and 12/7/85.

22. J. Willis, "Paying Lip Service to the Jury" Paper delivered to the Australian Institute of Criminology, May, 1986.

23. D.Brown and D. Neal, "The Gang of Twelve" (1986) 5:2 Australian Society p.10.

24. D.Neal, "Review: 'The Jury in a Criminal Trial' New South Wales Law Reform Commission Discussion Paper" (1985) 10 L.S.B. 293.

PUBLIC ATTITUDES ABOUT THE JURY

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THE JURY DEBATE

When Sir Robert Mark, the then London Metropolitan Commissioner of Police gave the annual Dimbleby Lecture on B.B.C. television in 1973 he stated that public confidence in jury trials was based essentially on faith (Mark, 1977). He observed that no one had ever thought it necessary to make a full, practical and important investigation of the jury process and added that the general belief that the system was the best in the world was based on practically no evidence whatsoever.

Determined attacks of this kind on the jury system tend to come from many quarters at times, but inevitably such attacks bring forth as many or more supporters of the jury function. The merits or demerits of jury trial have long been debated. The principal arguments in favour of the system have been the value of participation of ordinary citizens in the administration of justice; the advantage of twelve heads over one; the near certainty that if all, or at least a majority, of a jury are convinced, then the case has been fully established; the protection of the liberties of the subject afforded by entrusting decisions to a group chosen at random; the impossibility of bribing or intimidating a group which does not exist until the trial commences; and the ability of a jury to temper legalism with common sense (Walker, 1980).

The principal arguments against are the inexperience, sometimes ignorance and even stupidity of jurors; the uncertainty whether they properly appreciate the issues or the evidence put before them, or properly understand or apply the judge's directions; the greater expense and delay involved in jury trial; and the inadequacy of appeal. The jury does not give reasons and it is sometimes thought that if they had to, the system would collapse when the inadequacy of the reasons became known. (Walker, 1980)

The two opposing ends of the jury spectrum have been illustrated very aptly in two separate Hamlyn Lectures on the jury system in England in the 1950s. Lord Devlin, (1956) expressed the view that the jury is more than an instrument of justice and more than a wheel of the constitution, 'It is the lamp that shows that freedom lives' (1956, 164).

Glanville Williams, 1955 on the other hand, makes a powerful indictment of the jury system: 'If one proceeds by the light of reason' he maintains there seems to be a formidable weight of argument against the jury system. (1955, 271)

To bring the debate closer to home, two recent Australian viewpoints are now submitted for consideration. Professor Colin Howard, (Age, 3 July 1985) states that his own belief is that the vast majority of juries arrive at perfectly sensible decisions, but he adds, there is no magic about this as judges alone would almost certainly produce the same result. Professor Howard questions whether anything is really achieved by preserving the system which did valuable service in times past but nowadays only complicates an already highly technical system at considerable cost and to no apparent purpose. He states that:

> The issue has been made even more acute recently by the mounting evidence that people no longer have faith in the jury which has sustained the system for so long.'

Brown and Neal (1986) on the other hand maintain that the function of infusing community values into the operation of the criminal law is one of the most compelling arguments in favour of the jury system. They stress:

> The political significance of the jury trial remains as great as ever. It is more important than ever to argue not merely for retention, but for a radical expansion of popular, democratic participation in the administration of criminal justice. (1986, 13)

RESEARCH IN UNITED STATES AND ENGLAND

One very significant result that arose out of the debate was that the various comments stimulated research both in the United States (Graham, 1983) and in England (McCabe, 1974) about the outcome of trial by jury. During the 1960s and 1970s important jury research findings were published in both countries. The most comprehensive United States study was the University of Chicago Project (Kalven and Zeisel, 1966) which was generously funded by the Ford Foundation from the mid 1950s to 1966. This project looked at 3,500 criminal trials presided over by 355 judges and compared the juries' decisions with those that would have been made by the judges had the final decision been theirs. It revealed that judge and jury reached the same verdict in 74.5 per cent of the cases (ie. they both acquitted in 13.4 per cent and convicted in 62.0 per cent of the trials). They were also able to show that in only one third of the disagreements (8.0 per cent) could the juries' verdicts be said to be completely without foundation. Interestingly an English survey of acquittals also revealed that only 8.8 per cent of not guilty verdicts are wayward (McCabe and Purves, 1972).

Probably the most comprehensive jury survey undertaken in England was the study of every case passing through the Birmingham Crown Court between February 1975 and September 1976. Five hundred contested trials were expected but only 370 ended in a full jury deliberation and verdict. For these 370 cases, information was obtained from judges, police, prosecuting and defending solicitors and sometimes the defendant. The researchers Baldwin and McConville (1979a) also studied another 347 trials in the London metropolitan area, but only the police view was available there. Overall it was found the jury acquittal role was 30.8 per cent in Birmingham and 47.8 per cent in London. In Birmingham 39.3 per cent of these acquittals were seen as doubtful or highly questionable. In London the police expressed serious doubts about acquittals in 25.5 per cent of cases and some doubt was expressed about whether an acquittal was justified in 8.5 per cent of cases. The researchers were most concerned to find evidence of some doubtful convictions (Baldwin and McConville 1979b).

These surveys reveal that more is known now about jury trials than was the case ten to fifteen years ago. While there has been constant research into the work of the jury system in both the United States and England, it would appear there has been no real substantial research into public attitudes about juries in these two countries. Indeed Freeman (1981) believes that research undertaken so far on juries is peripheral to the important debates about the place of the jury within the criminal process. He infers that, in the main, the concern of completed research has been to show the close correspondence of jury verdicts to professional expectations. Certainly this approach per se does not allow a scope for objective research into community attitudes to jury trials.

RESEARCH IN CANADA

As far as I am aware the only research on the public's view of criminal jury trials, at least in the 1970s, was undertaken in Canada (Law Reform Commission of Canada, 1980). This research arose because at that particular time, there were no more than a handful of studies on any aspect of the Canadian jury, let alone a comprehensive set of studies addressing a range of features of the jury.

While it was appreciated that a body of research on the American jury had been accumulating, its relevance to the Canadian situation had yet to be determined. Therefore, the Canadian Law Reform Commission decided to conduct or commission a number of research studies on the Canadian jury. Altogether three surveys were conducted and they included an opinion poll of the Canadian public consisting of questions relating to the jury; a survey of actual jurors before and after jury service; and a survey of Canadian trial judges' views on the jury.

The general purpose of the first survey which took place in April 1977 was to obtain some basic information about the public's views of a number of different aspects of the jury. Because of the cost of such surveys the Law Reform Commission decided to limit its involvement to six 'fixed alternative' questions. The Gallup Poll sample was designed to be representative of adult Canadians 18 years and older and on this basic data was obtained from approximately 1,000 respondents. A summary of the major findings of the survey by Doob (Law Reform Commission of Canada, 1979) follows.

Canadians on the whole are very favourable to the jury system. General support for the jury system can be inferred from a number of different results. First of all, of those people who think that verdicts of judges and juries are likely to be different with respect to how fair and just they are, about four times as many people favour the jury as favour the judge. Juries moreover it turns out, are preferred most in Atlantic Canada, where it appears more people have served on juries and where people are most likely to know someone else who has served on a jury. The research revealed that serving on a jury anywhere appears to make people more likely to believe that a jury verdict is most likely to be fair and just. Although only a small proportion of Canadians had actually served on a jury in a criminal case, about a third knew someone who had served. They seemed to be generally aware of at least one aspect of the criminal jury - jury unanimity - and generally were in favour of that aspect of it, particularly for the most serious offences. Support for the unanimity requirement dropped off in regard to less serious offences, although about a third of Canadians wanted it for all offences.

Almost all Canadians thought that accused people should be given the option of trial by jury for at least some offences. About a third of the people wanted the option of trial by jury for all criminal offences. Residents of large cities were more likely to feel that an accused should always have the option of trial by jury than were residents of smaller cities or towns. Generally speaking it was considered Canadians felt that it was most important for accused people to be given the option of trial by jury in the most serious offences.

Finally, Canadians seemed to want the jury to be flexible in application of the law. Most people felt that jurors should be encouraged to come to a just and fair verdict even if it meant that they are not strictly applying the law. Those who had served on juries were even more likely to accept this view of the jury's role than were those who had not served.

To examine whether the different groups in each of the three surveys felt that 'jury equity' was a proper function for the jury the following question was asked in each survey.

Are you in favour of giving jurors in all criminal cases the following instruction?

> It is difficult to write laws that are just for all conceivable circumstances. Therefore you are entitled to follow your own conscience instead of strictly applying the law.

In the public opinion poll the results indicated 76.4 per cent of Canadians solidly supported the jury equity function and felt this instruction should definitely or probably be given (Hans, 1981). The overwhelming positive response with which the public viewed the instruction stands in marked contrast to the judges' reaction to it. Only 4.5 per cent of the Canadian judges agreed that the jury equity instruction should be given to jurors in criminal cases. The researchers expressed the view that the judges' lack of support for the jury equity instruction was surprising not only because it was different from the public's level of support but also because a full 78.2 per cent of the judges themselves listed the fact that 'the jury is a good way of infusing community values into a trial' as a positive feature of trial by jury (Hans, 1981, 149).

RESEARCH IN WESTERN AUSTRALIA

In 1983 I conducted a survey on community attitudes to the jury system in Western Australia as part requirement for Ph.D. studies. The aim of that research was concerned with ascertaining the acceptability and legitimacy of the jury in the eyes of the public. It was also to provide a baseline of credibility for further research which was to be undertaken on the jury system itself at a later stage. In this paper I provide a brief description of the survey method and a review of some of the more significant results.

Research Method

A sample of Western Australians entitled to vote formed the basis of the survey and it was obtained by randomly generating 1,800 electoral roll members from all the federal electoral divisions in Western Australia.

The aim was to achieve 600 completed responses to a questionnaire from the 1800 persons contacted, an earlier research project on community attitudes to the criminal justice system in Western Australia having achieved a 28 per cent response rate (Broadhurst, 1981).

The Questionnaire

It was decided to preface the questions asked with twelve controversial statements selected from various journals, newspaper articles and letters to editors. Each statement reflected some area of concern about the jury system. The questionnaire was pretested on thirty persons and several modifications were made after this exercise was completed. A questionnaire was then mailed out to the 1800 randomly selected voters with a covering letter requesting co-operation and enclosing a postage paid reply envelope.

Survey Particulars

Total sample receiving questionnaire			1,800
No contact			215
Questionnaires completed and returned			747
Completed response rate			41.5%
Sex of respondents	365 females		(48.9%)
	382 males		(51.1%)
Age of respondents	25 years and under	80	(10.7%)
	26-50 years	398	(53.3%)
	50+	251	(33.6%)
	Not stated	18	(2.4%)
Marital status	Married	566	(75.8%)
	Single	90	(12.0%)
	Other	91	(12.2%)
Education	Primary	50	(6.7%)
	Secondary	396	(53.0%)
	Technical	164	(22.0%)
	University	107	(14.3%)
	Not stated	30	(4.0%)
Residence	Urban	550	(73.6%)
	Rural	197	(26.4%)
Participants with previous experience on juries		54	(7.2%)

Research results

The following selected responses indicate the extent of the public's commitment to the jury system.

Q.14 Do you believe trial by jury should be a constitutional right of every Australian?
Yes 85.8 per cent

Q.18 If you were charged with a serious criminal offence would you prefer to have a trial heard by a judge alone?
No 85.0 per cent

Q.19 Or would you prefer that the case be decided before a judge and jury?
Yes 85.7 per cent

Q.26 It is said a jury of average Australians cannot fully understand the lifestyle and cultural circumstances of Aboriginal or migrant offenders. Would you agree?
Yes 73.2 per cent

Q.27 Are you in favour of special juries for migrant offenders who have difficulties understanding our criminal justice system?
Yes 47.5 per cent

Q.28 Many authorities are strongly of the view that there should be special juries where the situations involve difficult scientific, medical or commercial evidence. Do you agree with this view?
Yes 61.0 per cent

Q.36 Do you feel that highly educated persons such as professors, school teachers, doctors, clergymen, should continue to be exempt from jury service?
No 88.9 per cent

Q.38 Do you consider 'loss of business' should be an acceptable excuse to avoid jury service, for a private employer, partner in a firm etc?
No 46.7 per cent

Q.40 Participants were requested to select a maximum length of time they would be prepared to serve as jurors.

1-2 days	15.8 per cent	1-2 weeks	15.1 per cent
2-3 days	14.7 per cent	2-3 weeks	3.3 per cent
3-4 days	5.1 per cent	3-4 weeks	2.1 per cent
4-5 days	29.5 per cent	1 month or more	10.6 per cent
		No response	3.7 per cent

Q.43 Trial by jury was abolished in Singapore in 1969. Do you think Australia should follow this example?

No 87.7 per cent

Q.44 Reasons are not given by a jury. Do you find this practice an acceptable one?

Yes 53.7 per cent

Q.45 Do you think the jury is merely a rubber stamp for the judge's opinions?

No 80.9 per cent

Q.46 Do you feel the jury is justified in going against the judge's summing up at the end of the trial, out of considerations of fairness to the defendant?

Yes 77.6 per cent

Q.48 (Referring to the belief that the jury system is the best in the world is based on practically no evidence whatsoever.) Do you think this belief should be examined and research undertaken to find out how juries work as long as such research does not interfere with the process of justice?

Yes 82.6 per cent

Q.61 Even if you have never been called up for jury service do you nevertheless consider such a duty could be a worthwhile and rewarding experience?

Yes 73.2 per cent

Approximately 550 of the respondents made further comments. Two positive examples of these follow:

> I was happy to participate in this questionnaire. I believe public opinion should be sought in many other fields, possibly in this way although I realise cost is an important consideration ... As for this particular survey I thought it very adequately asked for the public's attitudes to all aspects of the jury system wording the questionnaire so that people (like myself) who know nothing of the workings of the law, were able to respond confidently on an issue that directly or indirectly affects us all.

> I think the jury system is useful because it provides the views of ordinary people. Judges and other people involved with law enforcement usually represent the establishment and could lose touch with the views of the rest of the community.

There were of course some negative comments such as:

> Jurors reflect not only society's values, but also its prejudices, e.g. the notorious delinquent in a large country town on trial for a serious offence. I doubt that one can expect an average person to think, listen and reason at an optimum level when placed in an unfamiliar setting with unfamiliar colleagues watching an unfamiliar ritual in unfamiliar language'.

> I am opposed to the jury system in its present form and would like to see the trial left to a judge and increased to three judges for criminal charges, e.g. murder, kidnapping, high-jacking public transport etc. Alternatively to placate those of the community opposed to radical change and hasten finality of trials, I would like to see a secret ballot enforced after no longer than two days of sitting of the jury and for the trial judge to record his vote, which should represent a big percentage of the overall. This latter to be decided by experts in law.

CONCLUSION

Freeman (1981), observes that there is a large body of professional opinion which unfortunately assumes lay participants (i.e. jurors) should behave like experts and have professional expectations. It is interesting to contrast this view with Harold Laski's observations after he had participated in a 20 day trial as a juryman. He states, 'I firmly believe all my life in the glory of the jury system' (Howe, 1953).

Thompson (1978) also expresses concern about modernisation which finds democratic practice inconvenient and has no use for Lord Devlin's fusty old lamp. It can manage us better in the dark where it has put out our rights. I like his expression 'muggers of the constitution' and 'vandals of the jury box' in this regard. Sallmann and Willis (1984) have expressed concern that the role played by the jury has been and is still being whittled away in Australia, although there is general support for and confidence in it by the public.

Despite these trends there is still extensive and firm ongoing support for the jury system in judicial and legal circles. In an unpublished address to the 23rd Australian Legal Convention at Melbourne in 1985 Canadian Supreme Court Justice William Estey stated:

> The more we cut out the jury, the less participation there is within the community in the judicial system, the less rapport will flow between the citizenry and our complex legal system. Jury service seems to be one of the great experiences of life of a citizen. Why is that? It is because he sees through the window how the system works, where the power is and where his place is in it.

At the 1986 Law Summer School in Western Australia the Chairman of the District Court His Honour Judge Heenan had this to say:

> Within the legal profession in this country there is general satisfaction with the jury system. Perhaps the greatest merit of the system is that it infuses the law with the community's sense of justice and applies community standards in regulating some of the more important affairs of life.

In April 1986, Mr Justice Muirhead presented an unpublished paper on 'The Jury System In Today's Society' to the West Australian Branch of the Australian Crime Prevention Council. He stated that while a strong case can be made out for the abolition of the jury:

> I hope it does not come about; it seems to me its advantages are manifest and well tried by history - I regard the system as a national asset. Its disadvantages can be categorised but in total are not I submit significant when compared with the alternatives.

More recently the Criminal Law Committee of the Western Australian Law Society prepared an unpublished position paper on the jury in relation to media statements which stated:

> The jury system is still perceived by the community as a bastion against the oppressive enforcement of laws.

My research into public attitudes about the jury revealed that well over three quarters of the community has overwhelming support for and confidence in the jury system. Green (1980) examined the many major trials in the United States to assess whether the jury's initial function as a bulwark against oppressive government was being performed. She stated that the results of her findings had not been to claim that the jury is beyond reproach or incapable of error but:

> My aim has simply been to show how an institution run by amateurs, directed and organised by ordinary people, using their common sense, and following formal rules, can perform its duty in a consistently responsible manner; how it can stand above popular prejudice and deliver verdicts that experts steeped and trained in law can expect (Green, 1980, 147).

I find these sentiments most acceptable. Perhaps the last word on the public attitude to the jury should be left to the writer and poet G. K. Chesterton who once served on a jury and later very perceptibly wrote about the experience in his essay 'The Twelve Men':

I saw with a queer and indescribable kind of clearness what a jury really is and why we must never let it go. The trend of our epoch up to this time has been consistently towards specialism and professionalism. The principle has been applied to law and politics by innumerable modern writers.

Many Fabians have insisted that a greater part of our political work should be performed by experts. Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge.

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. When it wishes for light upon that awful manner it asks men who know no more law that I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember rightly, by the Founder of Christianity (Chesterton, 1968, 86).

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MEDIA RESPONSIBILITY FOR FAIR TRIAL

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It has long been acknowledged that there is a conflict between the rights of freedom of the press and the rights of the individual to fair treatment under the legal process, particularly to a fair trial before a jury. In the United States in particular, it is frequently referred to as the free press versus fair trial debate, or a version of that label. There, of course, that debate has a different legal context, because of the First Amendment to the Constitution. But the practical considerations which govern the debate are the same, and the American literature, which is copious, and their experience, have a great influence over the debate here.

Now one thing I should make clear at this point is that though I come from the media, I do not claim to represent their point of view on this issue. There is not, of course, a single media point of view. There is a considerable range, though I think it is fair to say that they all support the general proposition that restrictions on the media should be the least possible. It is in the arguments which go to support that proposition, and in exactly where it is argued the line should be drawn, that the variations are to be found. It is not difficult to find among some sections of the media views on this topic which are essentially rat-bag, thoroughly self-interested and disreputable. There is, however, a history of thoughtful consideration of the issue by the more responsible, though even among them there are, as might be expected, differences of opinion.

I do not propose today to try to pronounce upon what ought to be the media's responsibilities, or how the law ought to provide for them; rather I shall try to outline what seem to me some of the important facts that are necessary to understand in order to appreciate the views held by the more thoughtful media of their responsibilities in this area, and other matters which I suggest ought to be under the attention of those whose task it is to make and review and administer the law in this area.

Having said that, I have to say immediately that in an absolute sense, I do not believe most of the media see themselves as having any responsibility for fair trial at all. That is not to say they set out to be unfair, but their guiding principle is somewhat different. It rests on the proposition that a free press is fundamental for a free society.

To support this unexceptional proposition, they will quote ringing declarations such as that of Mr Justice Black of the United States Supreme Court in the Pentagon Papers case:

> In the first amendment the Founding Fathers gave the free press the protection it must have to fulfil its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of Government and inform the people. Only a free and unrestrained press can effectively expose deception in Government ...
>
> And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell (New York Times v. United States, (1971) 403 US 713 at 717).

Relying on declarations like that, the Australian media argue that they should be as unrestricted as possible. They tend to regard the principle of a free press as fundamental and inalienable, in the American constitutional sense, and I detect very little tolerance for the concept that the rights and interests of society in a free press may on occasion have to be balanced against other rights and interests, such as those of the individual to a fair trial, and on occasion have to yield to them.

The more thoughtful do of course acknowledge the importance of fair trial, but they tend not to concede it the status of a principle, certainly not a principle of the same status as freedom of the press. The rights of a free press are paramount, tends to be the attitude. As with most principles, the real test of what they mean is when it comes to application in individual cases, and here the media use various arguments. In one, the freedom of the press becomes a duty to the community.

There is a good example of that in action from Melbourne last month, where the radio station 3AW and Derryn Hinch were charged with contempt of court in relation to broadcasts in which Hinch had revealed and discussed a prior conviction of a priest who was awaiting trial on a number of sexual offences involving children. Hinch admitted that he knew this could prejudice the trial. He was asked 'In your set of values, the desirability of stopping him was more important than the possibility of affecting his fair trial?'. His reply was 'I felt I had a bigger responsibility to the community at large than I did to Father Glennon'.

That attitude, I suggest - that is, that the media's responsibilities to society are greater than their responsibilities to the individual - is the media's normal response to such situations.

Some in the media would take an even stronger attitude. I cite a striking instance from a recent issue of The American Lawyer magazine, in which the editor was discussing a New York U.S. Attorney's practice of calling a press conference to announce indictments, a practice which some had objected to as prejudicial to defendants. The magazine said: 'In our society reputations are often sacrificed to the value we put on a free flow of information and expression. The presumption of innocence, after all, is an evidentiary rule, not a pretext for thought control'. (The American Lawyer, December 1985, 30). I might say I have read a number of articles by the editor of that magazine, and never found him an unsophisticated or unthoughtful person. But what that quotation seems to me to imply is that inhibiting publication to prevent prejudice is thought control and therefore unacceptable, and that what defendants are entitled to is only the benefit of the presumption of innocence - which is conveniently reduced to the status of an evidentiary rule so that those outside the court process are free to say and think otherwise if they choose - and therefore ultimately that if the benefit to the defendant within the legal process of the presumption of innocence is undermined by the effect of the prejudice created outside it, then that is tough.

At least in those two instances the media were willing to acknowledge that there was prejudice to a fair trial. Another argument used in support of the paramountcy of free press is to deny the existence of prejudice, or at least to demand that there be not just the possibility or risk of it, but proof of a real danger.

Something along this line seems to have been put forward in defence of Mr Hinch in the case I mentioned earlier, where, according to Age on 29 April, the barrister appearing on his behalf said that there had been no real or serious threat to a fair trial, the words used being transitory and not in printed form, and it being a commonplace thing for listeners of radio to be bombarded with items of a sensational nature. I pause to remark that this seems to be trying to have it both ways, as Mr Hinch's reason for broadcasting the item in the face of his recognition that it could be prejudicial was that it was for the benefit of the community, presumably meaning that his words, transitory, not printed and commonplace sensational though they were, had to be and were intended to be remembered. (Hinch was found guilty of contempt of court on Thursday, 22 May 1986.)

Proponents of the view that a real danger of prejudice must be proved point to cases, mostly in the United States, which have received enormous publicity of a type traditionally regarded as prejudicial, yet in which the verdicts reached are generally accepted as correct, and argue that the traditional restraints of our contempt law depend - to quote one unpublished journalist's submission to the Australian Law Reform Commission - 'on unproved assumptions about the effect of publicity on potential jurors and their presumed inability to decide cases on the actual evidence presented during a court hearing'.

That submission brands the view that jurors might be influenced by factors outside the evidence presented in court as 'fundamentally elitist'. I must say I find that attitude rather strange. One does not have to go far in history to find examples of people taking all sorts of cruel and oppressive action, to the point of the extermination of others, on a basis of prejudice. The human mind is not as purely rational as we would like it to be, and the proposition that the worst the media could do would necessarily be evaded by the right words of advice from the trial judge is to me absurd.

Test that in contemporary circumstances by asking what chance of a fair trial there is now for Morgan Ryan.

It may well be that in a relatively stable society such as ours, in a climate conditioned by the existing law of contempt, many of the excesses or aberrations of the media which actually occur could in fact be successfully countered by advice from the trial judge. But it cannot be assumed, if the restrictions of contempt law were removed, that the behaviour of the media would remain unchanged. It would, I think, very soon come to excel the American media, and while there is much to be said in their favour in the public arena generally, there are some sorry examples indeed in the area of prejudice to fair trial. A recent documentation of an appalling demonstration of that is Ludovic Kennedy's book on the Lindbergh kidnapping case, The Airman and the Carpenter (1985).

On this point I quote from a speech given in December last year by Katherine Graham, chairman of the board of the Washington Post Company. She was discussing the responsibilities of the media in covering terrorism in the context of the suggestion that publicity is the life blood of terrorism, but the point on which I am quoting her was a general one:

> All serious professional media around the world are anxious to be as responsible as possible. Unfortunately, high standards of professionalism do not guide every media organisation or every reporter. And I regret to say that once one of these less scrupulous or less careful people reports some piece of information, all the media feel compelled to follow. Thus it is true: the least responsible person involved in the process could determine the level of coverage'. (1985 Churchill Lecture, 6 December 1985, reported in The Guardian, 29 December, 1985, 11).

That, I suggest, is no less true in Australia. Let me mention just one example in our own media. It involves once again Mr Derryn Hinch. Some years ago, when everyone in the Australian media was keeping a discreet and sympathetic silence about the fatal illness of the wife of the Premier of South Australia, Hinch, no doubt in performance of his duty to the community at large, revealed it in a broadcast. That immediately changed the situation for everyone else.

While they would not have done it first themselves, once someone else had, they all felt free, perhaps more than free, compelled to use Katherine Graham's term, to follow. I think I recall some even using the sophistical justification that they were not revealing the woman's illness, because Hinch had already done that, but commenting on the questionable thing which he had done. Personally I'd much rather have seen him tried for that, - not for contempt of court, of course, but contempt of humanity.

The phenomenon to which Katherine Graham was referring is an example of the effects of the pressure under which the media operate - the great pressure of competition which is at times an enormous distorting influence on judgment. The competition is essentially one to be first with the latest; immediacy becomes the highest value, and so for many being late is worse than being wrong. The old fashioned press used to work to one deadline a day; then there came early and late editions, and earlier and later editions, all under the pressure not to miss the opportunity to be first with something. For the electronic media, radio especially, the pressures are now formidable, with deadlines as frequently as every hour. Sober and settled judgments are not made under such pressures, particularly when one of the worst failings of all is to have the opposition broadcast an item of popular scandal, titillation or amusement which you yourself had but decided through some moral principle or fear of the law not to use.

Let me quote on this point from a letter to the Australian Law Reform Commission from an adviser to a major media group:

> .... a lawyer giving advice on contempt to media which is published on a regular periodic basis in a highly competitive market treads an exceptionally fine line. Should he counsel publication of contemptuous material he and his editor are quite likely to finish up in gaol; should he repress material which is not in contempt his error is likely to be exposed the very next morning when the opposition will publish with impunity, what he kept out. The problem is compounded when what he represses and the opposition publishes is in fact clearly in contempt. If no proceedings for contempt are taken against them their publication is nonetheless likely to be seen by his own group as an aspersion on his credibility.

As a result of all that, I suggest that it has to be accepted that a major factor to be considered in all this is the behaviour, not of the thoughtful and responsible media, but of those I will politely call the others. Let me use as an example Mr Rupert Murdoch, one of the most influential media figures in the world, and an instance which does not involve prejudice to fair trial, but one which involves attitudes to the truth, which ought to be similarly strict.

Murdoch's Times, with Murdoch's own personal involvement, was heavily involved in the expensive purchase and publication of the Hitler diaries, which soon turned out to be a little less reliable even than Mr Murdoch's newspapers. Murdoch's three recorded public comments on this fiasco as noted by Harris (1985) were:

- Nothing ventured, nothing gained.
- After all, we are in the entertainment business.
- Circulation went up and it stayed up. We didn't lose money or anything like that.

It is almost too easy to find examples of the crude standards and absent ethics of the Murdochs of the media. I mention them because sometimes in discussion with reasonable and responsible media representatives it is easy to forget how bad many others are. And they have an influence which cannot be ignored, because of the factor to which Katherine Graham draws attention.

I said early on in this paper that I believed most of the media did not see themselves as having any responsibility for fair trial at all. I have already outlined some of the arguments - not very sophisticated ones - which they use to evade any such responsibility. Let me outline another one which I think is crucial to understanding a lot of media thinking. It is perhaps an attitude rather than an argument as such. I illustrate by way of an example from the television program '60 Minutes', not the Channel 9 one here but the American one from which it is copied, and from which sometimes the local one takes items.

In March this year they showed an item on the litigation explosion, and amazing buckets of money being handed out by juries as damages in civil suits of various sorts. This item treated a case in which a ladder manufacturer had been sued successfully by someone who had fallen off one of its ladders. The ladder had collapsed, and the company had gone down for $300,000, and all because, according to the television program, the ladder had been placed on horse manure and had slipped, and the company had failed to give a warning that the ladder could slip if it was placed on horse manure. Now the program made that statement through the mouth of the ladder manufacturer, in an interview. They didn't research the court records or talk to anyone on the other side. The American Lawyer magazine did, and discovered that that story was completely wrong - the case was about a defectively manufactured ladder, not a failure to warn. So the magazine phoned the reporter on '60 Minutes' and asked why he had not made the inquiries which they had. This is his answer: 'Because we were only trying to present this man('s) ... perspective. We weren't taking one side or the other ... All we did was broadcast what one man said' (The American Lawyer, May 1986, 12).

So there it is. Freedom of the press is not freedom in the interests of broadcasting the truth; it is freedom to broadcast whatever people say whether or not it is the truth, and without trying to do anything to discover whether it is.

As long, of course, as it is a good story in the first place. I should remark that this approach conditions quite an amount of media thinking in relation to defamation law; every time reform of defamation law is discussed, you will find lurking somewhere the suggestion that the media should be free to publish things with impunity simply because other people say them.

You will notice even now sometimes that some use the words 'allegedly' and 'reportedly' in articles, as though that is incorporating some sort of protection for themselves on that basis.

I said earlier that the media do not concede that fair trial is a principle of the same importance as a free press. A telling indication of that is that when faced with a potential conflict between the two they demand proof that material which would generally be regarded as prejudicial is in fact prejudicial in the particular case, but always assume that the publication of any material, however mindlessly prurient or scandalous, is necessarily in the interests of the public which are served by the principle of a free press.

I believe that both are important principles, and that when they conflict, they can be reconciled, though not in the way that many of the media would wish. To accord primacy to the freedom of the press over fair trial is in my view to fail to understand the purpose for which the principle of a free press exists. A free press is an essential part of the free society, but the process of reasoning does not stop there. The free society has an objective, and that is the liberty of the individual. Free trial affects the liberty of the individual in the most direct possible way, and that is why the principle of free trial must have primacy. That primacy will exist only if it is guaranteed by law.

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JURY PERSUASION

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Editor's Note: Mr Hosking gave an illuminating and entertaining address to the seminar based on his lengthy experience as counsel in criminal trials. The following are extracts from his address that indicate the issues he saw relevant to jury persuasion.

Jury persuasion begins even before the selection process. The accused is advised to be well groomed and conservatively dressed to make an initially favourable impression upon the jury. The actual selection process is surrounded by considerable mystique and folklore but it is very unscientific, as one never knows whether the decision to reject prospective jurors was right or wrong. It is of course, different in provincial centres where most potential jurors are known to local practitioners.

In New South Wales, the prosecution and the defence each have the right to eight peremptory challenges (twenty in murder cases). The New South Wales Law Reform Commission has recently recommended that these challenges be reduced to three. Whether or not this will operate to the disadvantage of an accused is open to question. What a reduction in challenges would do is prevent practices such as occurred recently in the Georgia Hill case. Hill was charged with the murder of her husband and the prosecution must have exhausted all their challenges on the way to getting a jury of eleven men and one woman. (That jury did convict Mrs Hill.)

All that is known of the prospective juror is his or her name in the short time between the calling of the name and the moment of decision, such things as an R.S.L. badge or the carrying of an expensive brief case, can inspire the rejection of that juror. On the prosecution side, beards, a leather jacket or even worse still, no tie can be a negative factor in jury selection.

At the end of the trial neither side is any better informed as to the wisdom of their respective choices as the jurors sink back into the community. After almost twenty years engaged almost exclusively in appearing in criminal trials, I confess I am none the wiser.

As already observed, the task of jury persuasion begins with the grooming of the accused. The legendary Tony Bellanto Q.C. elevated this to an art form. Such things as mauve shirts, white shoes and loud ties were discarded in favour of dark pin stripes and conservative hues. Bouncers and burglars became indistinguishable from bankers. Bellanto in New South Wales was also the outstanding jury advocate of his generation. His strong voice combined with a passion and sincere presentation represented the pinnacle of the persuader's art.

One summer afternoon pleading for the liberty of a mother of three, accused of murdering her husband, Bellanto so hypnotised a young constable guarding the dock, that when he uttered the closing words of his address 'unlock the door of the dock and return this mother to the arms of her children who are waiting to receive her', the officer was in the process of doing just that before the judge jerked him back to reality.

Styles of advocacy vary with the era and there are many outstanding examples of florid and dramatic performances by counsel attempting to sway the jury to accept their point of view. Colourful phrases and imagery are of course a big help. Ridicule is also a useful weapon, for example:

> You have heard the evidence of 'X'. If you can swallow such nonsense, it will be the greatest gastronomical achievement since the Adventures of Jonah.

In another case, an alleged accomplice gave damning evidence against the accused. Counsel, with great emphasis, introduced his analysis of that evidence in this way:

> The witness 'Y' was called to the witness box and sworn on the Bible in solemn form. Perhaps it would have been better if he had been sworn instead on the dagger - the proper symbol of his profession.

Such exaggerated analogies are designed to leave a lasting impression on the jury. Whereas they are exceedingly unlikely to make such an impression on a judge sitting alone.

THE JUDGE AND THE FACTS

The jury's function is to determine matters of fact and I would suggest that judges are no more skilled than ordinary members of the community at doing that. Indeed the whole jury system is based on the community having the view that decisions on fact affecting the liberty of the accused are far too important to leave to judges and those are the decisions that we as a community seek to keep in our own hands. However, jurors coming to court for the first time face a strange environment, steeped with ancient ritual. It is the role of the advocate to make sure that the jury understood what is their task, the principles which must guide them and what their responsibilities are.

A familiar attitude is that the jury say, 'Well the barristers on both sides are paid to advance a particular point of view. The Judge is impartial and has great experience. He will give us a hint as to what the correct verdict should be.' This of course, is wrong, as the judge in law has no responsibility for decisions on matters of fact.

The fact that the judge is entitled to express a view on the facts is often a source of difficulty. How far, if at all, should the judge be allowed to intrude and even persuade the jury on the facts? A judge who does express a view on the facts must tell the jury that the decision on the facts is theirs alone. A strong argument can be mounted that a judge should not enter this area at all.

During the course of counsel's address, it is vital to remind the jury again and again that the facts are for them alone. Counsel would also be wise to tell the jury matters of law, such as (in New South Wales) the need to be unanimous where such a direction by the judge is not mandatory.

All juries are different and indeed some are quite volatile. There is a story told of a jury at Darlinghurst being sent out late one afternoon and after four hours, with much noise emanating from the jury room they were brought back into court. The judge asked the foreman of the jury to stand, and two jurors rose. The judge remarked 'It looks as if we are in for a late night'. It was.

However, juries are not fools; they are the conscience of the community and a cross-section of it drawn by lot. They represent its sense of justice and its wisdom, they rarely get it wrong in the conviction of an innocent person. The jury system is healthy and the fact that the jury cannot be swayed by rhetoric alone indicates they deal with the real merits of the case.

SOME PSYCHOLOGICAL ASPECTS RELEVANT TO THE JURY

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The task for jurors is a tremendously complicated one. For the most part, the information that is presented to them is piecemeal and fragmented. More often than not, it relates to problematic situations in which the members of the jury have to reach a decision about guilt or responsibility by reducing the ambiguity of the information that is available in order to arrive at a judgment that itself is probablistic in character (Holstein, 1985). Emotional factors can motivate them to reconstruct the events of the courtroom in order to justify their private interpretations of behaviour. They also represent a social group in which plausible alternative explanations of behaviour are presented, their task being to resolve the conflict implied by these co-existing accounts so as to arrive at a judgment that hopefully has the agreement of the remaining jurors in their group. Not only must they come to a well-reasoned conclusion about what they have decided to accept, but they must also evaluate with considerable critical scrutiny the attempts by others to persuade them to accept alternative accounts of what has occurred. Finally, in this task, they must responsibly resist possible bias emanating from the trial conditions and any influence of attitudes and knowledge about the case that is extralegal in character.

The aim of this article is to capture something of this complexity by reviewing a number of the factors that may affect juror decisions and which can lead jurors to make erroneous judgments. The processes responsible for these influences will be canvassed broadly, and data examined especially in relation to jurors' judgments from the viewpoint of the conceptions held by them about how memory works, eyewitness accuracy, and the confidence placed in witness reports. Finally, a number of procedures will be reviewed which may help overcome some of the biasing influences to which jurors are exposed.

OVERVIEW OF SOME MAJOR FACTORS OF INFLUENCE

Influences that affect jurors in reaching judgments of guilt or innocence derive from a number of major sources. These relate to

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NOTE: The author wishes to thank Peggy Doherty for her help in the preparation of this paper.

the selection of the jurors themselves, and to jurors' perceptions of the accused and of the alleged crime. Extralegal factors may also be implicated through the influence of jurors attitudes toward prosecution and conviction.

The verdicts jurors reach are affected not only by the strength of the evidence that jurors perceive, but the perceived strength of the evidence is associated directly with the jurors' attitudes toward the case (Hepburn, 1980); a more favourable attitude to punishment, for example, may enhance the perceived strength of the prosecution's case. Also, legal procedures themselves may exert a biasing influence on jurors' decisions, especially in relation to the way witnesses' memories are tested.

Jury Selection

The legal system acknowledges the right to an impartial jury, but the conditions that ensure impartiality need to take some account of the way the jury is selected, its composition, and the venue of the trial. Considering the first of these in some detail, the main aim of jury selection is to exclude those jurors who are least likely to reach an impartial and fair verdict (Hepburn, 1980), but there are subtle factors operating in the jury selection process that can be easily overlooked. Repeated jury service produces several effects amongst jurors, for example, and one of them is that repeated service creates an increased disposition toward conviction of criminal defendants (Dillehay and Nietzel, 1985). Dillehay and Nietzel (1985) examined 175 criminal trials in order to address the problem of the relationship between juror experience and verdicts and found that there was a greater tendency to convict when there were large numbers of experienced jurors on a jury.

One of the most focused areas of discussion of factors affecting jury selection relates to the consequences of excluding people who are unwilling to impose the death penalty. Those who are included constitute what is known in the American criminal justice system as death-qualified juries, and the findings on such juries have converged on the conclusion that they are biased against capital defendants. Juries sampled in this way are usually unrepresentative of the communities from which they are drawn. Research has shown that proponents and opponents of the death penalty, differ, for example, in their attitudes across a broad spectrum of issues related to criminal justice. Death-qualified jurors have attitudes that predispose them toward the prosecution point of view and consequently toward conviction; excludable jurors have less punitive attitudes than includable jurors, and are more open to particular kinds of criminal defence (Fitgerald and Ellsworth, 1983).

Perceptions of the Criminal and the Crime, and Effect of Dispositions.

Factors affecting jurors' decision-making can emanate from their perception of stimuli impinging on them in the actual courtroom setting, and these include the defendant and the nature of the crime. Jurors' reactions to people as stimuli are likely to be founded on an initial evaluation of complex physical characteristics that incorporate physical appearance, the actions of the persons involved, style of clothing, facial expression, and manner of talking. The influence of these impressions allows one in turn to infer the operation of specific personality traits, intentions and dispositions (see Yarmey, 1979). Factors of these kinds can explicitly affect jurors when, for example, counsel is permitted by the judge to introduce the photographs of victims as evidence in court. Here, the degree of harm done to the victim (as perceived by the juror) has been reported to lead to harsher judgments about the alleged harm-doer (Joseph and Tedeschi, 1983). And such processes of perception are compounded in their influence when they relate to stereotypes that members of the community may share about the victims of crimes and their perpetrators. If defendants possess characteristics, for example, that fit the stereotype of criminals then the accused may be more readily judged as guilty of a criminal act (Deaux, 1976). Further, if jurors see the defendant as different from themselves in the values and life styles that they possess, then the accused is more likely to be categorised as criminal and to receive a severer verdict and sentence (see Dane and Wrightsman, 1982). The influence of factors of these kinds and internal dispositions of jurors (such as authoritarianism) is subtle and unwitting in its effects.

Many influences on a jury are inadvertent, but there is strong evidence to indicate that when they are not, the manipulations that are attempted frequently do not have the effects that are intended. Consider, for example, the introduction of prior conviction evidence. This is introduced to attack the credibility of a witness, but it can also affect juries' decision-making in ways that conflict with legal instruction on how the evidence should be heeded. Knowing that a defendant has a prior conviction may change the meaning or significance of other evidence in a case (Hans and Doob, 1976), decrease the standard of proof or the amount of evidence necessary to find a person guilty (Lempert, 1977), and motivate a jury to generalise negative characteristics and overestimate criminality (Lempert, 1977). One may argue, in fact, that defendants are best protected by excluding evidence of their prior convictions so that the jury's decision processes will not employ the evidence in ways that the law does not condone.

Impact of Legal Procedures

Procedurally, the structure of the questioning process and the procedures of memory testing have major consequences for

influencing jurors' judgments and perceptions. By asking too many questions to get answers, for example, the lawyer can be perceived as hostile (Yarmey, 1979), and this is particularly a risk when the information may equally have come from events being freely narrated. Further, when both lawyer and witness speak at the same time, the lawyer may be perceived as not in control and less credible as a result. Also, attorneys typically suggest multiple interpretations of events for jurors to consider, yet Holstein (1985) has shown that presenting more than one interpretation in support of a particular verdict does little to help that verdict's chances. Decision-making becomes more complex when the number of different versions of 'what really happened' increases and the likelihood of a jury reaching an unanimous verdict then decreases.

The major problem that emerges from memory testing derives from the impact of information witnesses receive after the original event (which may be the subject of the trial) has occurred. The information may come in the form of incorrect facts contained in leading statements in court, or from questioning conducted in trial or pretrial procedures. Postevent information may be assimilated into memory and the reorganised memories accepted as real. Jurors in turn are subject to the acceptance of witnesses' revised memories and to the biasing influences of the new information that is suggestive. These are problems to which we will return later when they are considered in relation to the specific conceptions held by jurors about how memory operates and the findings available in the literature on eyewitness accuracy and confidence.

PROCESSES RESPONSIBLE FOR INFLUENCES

The processes that explain why jurors make the decisions they do are multiple and diverse and no one theory adequately encompasses their influences (for review of several of the theories, see Weiten and Diamond, 1979). Existing theories cover such processes as the extent to which jurors identify or reject the defendant in terms of the reinforcement provided for their own life-styles and attitudes, the degree to which the evidential and non-evidential information to which jurors are exposed is evaluated, weighed and combined by them in a conceptually unified way, the social or group dynamics of the jurors making the final decision, and the nature of the attributions made by jurors in relation to the events of the case. Given the focus of much of the recent literature on the biasing possibilities of witness testimony and identification, however, there is considerable agreement in the literature on the importance of processes that cast the problem within a social-cognitive perspective. The nature of the jurors' task is such that some account must be provided of the cognitive processes involved in judgment formation, as well as the social nature of the give-and-take of opinion in the collective group.

Two specific processes that can be generalised across different theoretical orientations are those of overbelief and cognitive discrimination. Given the extent of response bias evident in witnesses' reports (for review of the evidence, see Hall, Loftus and Tousignant, 1983), the problem of overbelief depicts the extent to which jurors believe too uncritically in the witnesses' reports; this tendency to overbelief is more extensive when original witnessing conditions are poor (Wells, 1983) and the process obviously implicates jurors' socially determined attitudes. Discrimination expresses the extent to which jurors can discriminate between accurate and inaccurate testimony, regardless of their scepticism about the witnesses' testimony, even when the testimony itself is incorrect, and jurors may fail to discriminate between accurate and inaccurate evidence regardless of their beliefs about the evidence.

The processes of overbelief and discrimination are traditionally discussed in the literature in relation to the use of expert testimony aout eyewitness behaviour, particularly with respect to the question of whether expert testimony is safe and effective. They reflect processes, however, that are related directly to the accuracy of jurors' final judgments. Overbelief, for example, expresses a general tendency, now well established, for jurors to be willing to believe eyewitness testimony, especially if the testimony in question is reported confidently. And the concept of discrimination expresses the related process of judging accuracy when there are competing, biasing influences at work in the courtroom setting. The important questions lying behind the relevance of the two processes are 'Can jurors be sceptical enough of the evidence that they receive to assess the evidence objectively?' and 'Is there room for improvement in jurors' ability to discriminate accuracy from inaccuracy?'. The evidence for and against these questions is debated in the literature (see Egeth and McClosky, 1983; and Wells, 1983, in reply), but a reasonable conclusion on the results of the research that has been conducted is that overbelief and lack of discrimination do exist; there is no firm guarantee that eyewitness evidence can be analysed or evaluated completely objectively through normal courtroom and juryroom procedures; and new and more effective legal methods are required to render jurors more critical of the evidence that is presented to them, and more knowledgeable about the influential nature of the ways in which it is communicated.

THE MISCONCEPTIONS OF JURORS

It is important in the context of these remarks to recognise that eyewitness testimony is one of the most persuasive kinds of evidence that frequently leads to conviction (Loftus, 1975). Loftus found, for instance, that simulated juries were much more likely to vote for conviction if there was eyewitness verification or corroboration of the crime; and Brigham and Bothwell (1983) found that over 50 per cent of subjects who were

tested were unaware that an eyewitness's identification of a person from a set of photos was likely to produce an identification of the same person from a lineup at a later date, regardless of whether that person was guilty or not. Both law professionals (Loftus, 1979) and jurors (Deffenbacher and Loftus, 1982) carry false beliefs about witnessaccuracy and how it can be achieved. Loftus found, for example, that law professionals believe incorrectly that high arousal leads to more accurate facial recognition, while Deffenbacher and Loftus found that jurors are frequently ignorant of the factors which actually affect eyewitness accuracy. Wells, Lindsay and Ferguson (1979) also report that jurors rely heavily on their assessment of eyewitness confidence in judging accuracy. The majority of people consider that there is a positive and strong relationship between confidence and accuracy, believing that if a witness is confident about what is recalled, then he or she is much more likely to be accurate in their recollection. In all of these instances common sense assumptions differ from the empirical findings and while there is much empirical evidence to show that eyewitness testimony is unreliable, jurors continue to operate under attitudes that assume substantial accuracy and relative lack of fallibility.

The misconceptions of jurors, however, run deeper than inferring incorrectly about the fallibility of witnesses. They run to holding mistaken conceptions about how memory itself operates. Buckout (1974) argues that most laypersons believe that the perception of events is recorded in the brain in a veridical and literal way - somewhat analagous to a video recorder that records events just as they are happening. According to this view, the impression that is laid down will be retrieved in the same form once the playback mechanism is brought into operation. Also, according to this view, memory duplicates the original perception and original experiences can be retrieved relatively easily by expert hands. Such a model of memory is totally incorrect, however.

The tape recorder model of memory says that memory is inviolate to change. The contemporary model of memory, particularly that proposed by Loftus and her associates, says that memory is constructed and can readily assimilate false, suggested information. As a result, witnesses exposed to new information that is incorrect may not only fail to retrieve their original memories, but may behave in ways that will convince others that they should share the same conviction about its veracity as themselves. Threading through both these misconceptions (about the accuracy of witnesses and the essential resistance of memory to change) is the common, general misconception that memory itself is reliable. All of us need only to introspect about what we think we remember concerning this morning's events to know we generally think we are accurate. If all of us, however, checked independently on whether we are right we would learn that we are not, and that our confidence is misplaced.

We turn now to look more closely at how memory works and the evidence for its capacity to change. We will also briefly review some of the forensically relevant findings on accuracy in relation to both witness identification and witness testimony. Finally, we will consider the matter of confidence and its relation to accuracy and how firmly we ought to believe in recollections that have been worked through by methods intended to enhance the accuracy of recall. All of the data have major implications for how jurors operate and how their judgments can be improved.

MEMORY, ACCURACY AND CONFIDENCE AND SOME IMPLICATIONS FOR JURORS

How Memory Works

Memory is considered to involve three stages: encoding, storage and retrieval. An encounter with an event (person, or situation) necessarily starts with the process called encoding, or acquisition of information. This information forms the basis of later retrieval. Once registered, the information is stored in memory and there are a variety of processes that may contribute to why that information will not be retrieved or recalled at a later date. The information, for example, may be destroyed, replaced by other information, or simply misplaced. The main problem in retrieval is that of gaining access to the material that has been encoded and stored. Access may be especially aided as in recognition, where the alternatives for recollection are provided and the person has to choose the right answer or access may be unaided, as in recall, when there are no alternative answers at hand, and the person has to remember by reporting freely, just as events come to mind. Recognition is rather more subject to the influence of suggestion than free recall, because the alternatives provided can subtly or unsubtly suggest the wrong replies.

These three stages of memory are interactive, or related. Encoding, for example, influences storage which also affects retrieval. Also, it is an organised store from which information is retrieved. Organisation plays a critical role in the recall of most types of information and the fact that the process of recall involves the reconstruction of information allows us to infer a close relationship between perception and memory. Mental representations that form our immediate perceptual experience are influenced greatly by knowledge stored in memory, and just as our perception of the world is far from being a passive copy of that world (Glass, Holyoak and Santa, 1979), memory too is actively constructed on the basis of past experience and our knowledge and expectations of what that experience is supposed to be. When viewing conditions are poor, for example, as when a street is dimly lit, details of perception are filled in by memory, and expectations of what ought to have been there or what was supposed to be present structure what we see and remember.

A major factor in understanding memory and perception and their functions is the role of meaning. We encode material in terms of its meaning and most recollections involve the recall of meaning.

One distinction that conveys this point clearly is that made by psychologists between verbatim recall (remembering things in a literal way) and remembering its meaning in terms of the general gist of what has occurred. How often, for example, do we maintain the general gist of things correctly, whilst recalling in a literally quite inexact way? For example, I may remember the instruction given to me at the commencement of this seminar to 'present a paper for 45 minutes' or I may remember it as 'talk for about 16 pages of text'. In both these cases, I may have the gist of the communication correct, but be quite wrong. The actual instruction could have been 'begin at 12 p.m. and talk until about lunch time'. All convey the same meaning, but the first two plausibly reconstruct what was said - but wrongly so. What is said blurs easily with time, and it is thus not surprising that all of us have difficulty in distinguishing plausible reconstructions from each other and from actual memories.

Given these assumptions about how memory works, the data can be fitted with the model that memory is essentially constructive in character. Past experience is organised in ways that are meaningful to the person who is remembering and the rules of organising are the themes we use to help recall and construct the facts. Subsequent judgments come to be influenced by the recollection of the organising themes rather than by the original facts themselves (Sherrod, 1985). After a verdict of liability for example, a jury, over time and when faced with the task of assessing the damages, will be likely to recall more facts relevant to the theme of guilty than innocent, and forget irrelevant facts by drawing or constructing inferences that are supportive of the prosecution's case, rather than that of the defence, and the delay is likely to bias the memory or prior information in the direction of rendering salient beliefs and attitudes more influential.

Perhaps the most intriguing question to pose about memory and its operation is to ask whether the original memory is lost after new additional information has been assimilated. After seeing an accident, for example, someone may ask us how fast the car was going when it smashed into the other car. They might have asked, however, how fast the car was going when it hit the other one, or how fast the car was going when the two cars collided. These three different ways of asking the question subtly convey different messages about the event that was observed (see Loftus, 1979), and the new information that is suggested or implied (e.g. the car was going fast, otherwise it would not have 'smashed' into the other vehicle) may be incorporated into the original memory in a way that makes it difficult for the original experience ever to be retrieved. New details that are suggested can enhance existing memories, but Loftus argues they can change

the memories themselves, or at least become incorporated into previously acquired memories and coexist with the original impressions (see Hall et al; 1983 for the debate). Loftus and her associates tell us that if we do not detect that there is a discrepancy between what we are told subsequently and what we saw originally, then when we try to retrieve the original experience, our reports will be appreciably influenced by the fact that the new information has transformed the original memory. If old memories are restructured into new ones when new information is added by experiences that occur after the event, then witnesses will be influenced in their recall by legal procedures that subtly pose false information to them (e.g. via a legal attorney's inquiries). Jurors will be similarly influenced in their interpretation of events by their perceptions of witness events, and the plausible themes for organising material that jurors carry in their own memory store.

We turn now to look more closely at the evidence for the influence of suggestion on memory, in particular. Two areas have specifically attracted wide attention in research. These are suggestion in eyewitness identifications, and the possibilities for distortion in eyewitness testimony following the introduction of postevent information. Related to both is the major issue of the impact on jurors of the confidence expressed by witnesses in their verbal reports.

EYEWITNESS IDENTIFICATION

Essentially, the task of a witness in eyewitness identification is to choose a member of the lineup as the offender and in this task there are multiple possibilities for the operation of suggestion. Suggestion can be communicated through the social interactions involving people who are present, or through the structure of the lineup itself (Malpass and Devine, 1983). Witnesses, for example, who believe the lineup is held because the police think they have a very likely suspect will be prone to believe that the offender has to be in the lineup and thus will make a firm identification. The task is a complex interaction of the witness choosing, the person who is chosen, and whether the offender is available to be chosen. The factors that are most relevant to the role of suggestion are probably those that relate to the act of choosing, and the choice behaviour is the result of the interplay of witness beliefs and expectations about outcomes, the information that witnesses actually have, and the probabilities of outcomes matching their beliefs (Malpass and Devine, 1983). So extensive are the opportunities for suggestion in this situation that Re (1984) concludes it is dangerous for any jury to assign probative value to identification evidence and she cites examples of cases where identification evidence has been accepted in court when suggestion must have been in operation. In one instance, identification was accepted on the basis of a fleeting glimpse made by a policeman 25 yards from the offender, and identification was made at another time from a photograph in which the person identified was wearing a face stocking.

Witness Testimony

The problems associated with witness testimony loom more largely in some cases than in others (in robbery and rape than in drug possession, for example), but witness testimony remains the major source of bias in the courtroom setting. The final trial also comes at the end of a series of opportunities for recollection, each of which carries its own potential for suggestion. Before the trial, the witness typically answers questions about what happened, is asked perhaps to report on photographs in order to detect the offender, answers questions by the police and the lawyer that focus sharply on the crime, and finally is asked to rehearse these recollections in court whilst answering additional questions and adding new evidence. At each stage of the process, new facts may interfere with memory or become assimilated into memory to form restructured recollections. When questions are asked either in the pretrial police procedures or the trial itself, new information that is not true may be suggested by leading questions (e.g. 'Did you see the stop sign at the scene of the accident' v. 'Was a stop sign there?'), or by new information that is injected into the questions that are asked or the statements that are made (e.g. 'When you saw the stop sign at the scene of the accident, did you stop?). In situations like these, the evidence is consistent with the view that when witnesses are presented with new information they may incorporate the new material into memory, and the new facts may change the character of the original memory. Loftus and her associates (see Loftus, 1979) have shown, for example, that subjects remembered a give-way sign when they actually saw a stop-sign, and remembered a stop sign when they actually saw a give-way sign, depending on the nature of the information given to them prior to their being asked to remember what they saw, and witnesses reacted as if the original memory and the postevent information had been 'inextricably integrated' (Hall et al. 1983, 127).

The research literature is quite specific about the conditions under which the memory distortion will be maximised. The distortion effect is greater if the misleading information is embedded in complex questions; and the error effect is more likely to occur when the information that is suggested concerns peripheral rather than salient material (where the witness may become aware of the discrepancy from fact). The distortion effect also occurs when memories are worked upon by police or by an attorney and when the intention is to enhance memory by the introduction of novel procedures such as hypnosis. Recollections overworked through the application of hypnosis, for example, are just as prone to the distorting effect of misleading information as recollections that are tested in the standard way (Sheehan and Tilden, 1983).

Confidence

The evidence indicates that jurors are more likely to believe witnesses who are convinced about the accuracy of the memories

they report and two central facts emerge as important in the research literature. First, witnesses are frequently confident about memories that demonstrate the assimilation of incorrect facts. The acceptance of the wrong information about the stop/give way sign, for example, was accompanied by greater conviction for the material that was incorrect. The second fact is that for the most part, confidence relates poorly, not well, to accuracy of recall. Despite the intuitive appeal of a close association between confidence and accuracy of memory, the relationship between confidence and accuracy of memory is actually quite weak under good laboratory conditions and functionally useless in forensically representative settings (Wells and Murray, 1983). The median correlation between accuracy and confidence reported by Wells and Murray across the sample of studies they considered was just 0.23; only 5 per cent of the variance in accuracy was accounted for by eyewitness confidence. As social influences increase that association becomes weaker, and as reconstructive memory processes become more influential the association becomes smaller.

In the lineup identification situation, the witnesses' confidence stems from the commitment implied by the fact that a choice has been made (Hall et al., 1983) and in the work reported by Wells and Murray, witnesses who made a choice were far more confident in their decision than witnesses who did not. Choosing someone often means that choice behaviour is accompanied by conviction and even making a tentative decision that the criminal is in a lineup or photospread is sufficient at times to promote confidence in the decision itself.

The major problem created by witness confidence, however, stems from the fact it reliably influences jurors and others to infer that accurate recall has, in fact, occurred. Jurors give confident eyewitness report far greater weight than other sorts of evidence when deciding upon a verdict (Re, 1984) and judgments about accuracy in this instance are frequently based on intuition rather than fact.

Implications For Jurors

Each facet of this view of memory and how it operates has major implications for jury decision-making. Consider encoding, for example. Some aspects of encoding promote stronger acquisition than others. Research has shown, for example, that upper features of the face are encoded better than lower portions and this has definite implications for judged accuracy of criminals based on identification evidence that focuses on facial features (Ellis, 1983). Attorneys trying to elicit descriptions of a criminal might better concentrate on the witness's ability to provide details of hair and eyes rather than nose, mouth and chin - unless the latter are particularly noticeable.

Jurors, like witnesses and the general public, are not aware of subtle differences in wording that can convey misleading information about events that have been experienced. Consider the question, for example, 'How tall was the person you saw?'. An attorney might have asked 'How short was the person you saw?' or 'What was the height of the person you saw?', 'Was the person you saw tall or short?', or 'Was the person you saw short or tall?'. In each case, the possibilities for influence are different. Jurors, however, typically assume that questions asked in court are not biasing recall, but only testing the veracity and the validity of memory (Yarmey, 1979). In this, they are mistaken.

If counsel should ask a witness if he or she saw anyone standing at the kerb and the witness says 'No', both jury and witness may register the suggested fact that a person was there, even if the person was not. But both juror and witness may accept the fact that the person was there, because the witness's answer subtly implies an acknowledgment of that person's presence. The acceptance of misleading information is probably easier for the juror than the witness, however, because the juror has no original experience to conflict or interfere with the new input. The witness has a memory trace that implies the opposite, whereas the juror has not. Thus, the juror has multiple reasons perhaps for thinking the person was present: the force of the counsel's question, and the answer provided by the witness. Errors in jurors' judgments may come to be compounded, then, due to the reinforcement that is provided them from different sources.

The processes of memory construction are obviously similar for witness and juror and there is no reason to doubt that memories that are formed and constructed by jurors will be reorganised by them similarly in the face of new and conflicting information. The evidence tells us that the operation of suggestion in court is mostly inadvertent, but the problem is given extra emphasis in the case of the juror because the experience that is assimilated has been communicated by the witness with conviction. The bias for the juror operates not only through encoding, storage and retrieval of information gathered during the trial, but in the reconciliation of inconsistent facts during decision-making, and the influence of other jurors in the course of the jury deliberations (Hans and Vidmar, 1982).

SOME PROCEDURES FOR ADDRESSING THE RISKS

Given the complexity of the jury decision making process and the extent to which jurors may be exposed to the inadvertent influence of suggestion, some practical guidelines are necessary on ways in which the validity of the decisions made by jurors might be increased and the impact of suggestion reduced.

A number of specific guidelines may be formulated regarding lineups, witness testimony and confidence. In witness

identification, for example, witnesses should not be allowed to glimpse the defendant in the officer's presence at any time prior to line-up, and neither should witnesses be asked to identify the criminal in each other's presence where social facilitation effects can operate (Grano, 1983). In witness testimony, videotape technology might also be contemplated so that the testimony of the witnesses can be played back whenever required (Saks, 1982). Reliable indices of witnessing conditions might also be constructed (Penrod, Loftus, and Winkler, 1982), and witness recollections are probably best collected in free narrative form before specific questioning is introduced in ways that inadvertently suggest new and misleading information (Sheehan, 1982). The optimal combination for collecting memory information is probably to allow the witness to free recall and then to follow this recall by more structured questions that do not suggest (obtrusively or unobtrusively) any incorrect or misleading information about the events that have taken place. Further, when recollections have been overworked, either through the introduction of hypnosis or other methods designed to increase memory accuracy, the prosecution should be obliged to declare the method that has been used and when it was introduced. In New Zealand, for instance, when a prosecution witness has been hypnotised for any purpose relevant to a trial or investigation, this fact must now be disclosed to the defence.

The two major methods of reducing the risks of bias in juror judgments and which relate most directly to current debate in the literature about inadvertent suggestion in the legal setting are cautionary instruction, and expert testimony.

Cautionary Instruction

Instruction to the jury about the risks of suggestion and the possibilities for distortion in both perception and memory is argued by many as a very useful tool in the legal process. It will not remedy the deficiencies of perceptions and recall, but may help eliminate some of the dangers emanating from suggestive procedures (Grano, 1983). How witnesses are informed will affect their choice behaviour and the confidence of their judgments in witness identification and also influence jurors to be more objective in their evaluation of the evidence (Malpass & Devine, 1983). Re (1984) argues, however, that it is not sufficient to give a general warning regarding the unreliability of identification evidence, but a warning should be given that acknowledges the reasons for the warning itself, the possibility of the witness being mistaken (and the fact that several witnesses may all be mistaken), and the warning should also extend an invitation to the jury to examine closely the circumstances of the identification. If such guidelines are accepted, however, it is important that courts are consistent in their adoption. It seems incongruous, for example, that guidelines about identification vary in this country across courts; in the Victorian Supreme Court and the N.S.W. Court of

Appeal, for example, the guidelines appear to differ appreciably in the precision of their instruction about the possibilities of error (Re, 1984).

Expert Testimony

There are many advantages to the use of expert testimony on the processes which affect jury decision-making. Properly delivered expert testimony, for example, can reduce the ambiguity about the probable meaning of certain factors (Wells, 1983) and can have the effect of increasing the deliberation time spent by jurors in discussing eyewitness aspects of the case (Loftus, 1983). Simulation studies on the impact of expert psychological testimony on eyewitness reliability, for instance, (see Wells, Lindsay and Tousignant, 1980) have shown that exposure of jurors to an expert reduces the effect of eyewitness testimony, probably by causing the jurors who are involved to critically evaluate the testimony more closely. It is important to recognise in the use of expert testimony, however, that its use is not intended to invade the province of the jury. However, the knowledge and experience of the juror ought to be as much a question for scrutiny as that of the witness who is asked to give evidence. It is the jury's responsibility to consider the facts about the process of its own decision-making, and accord them the weight it considers appropriate.

One may recommend more radical alternatives for change such as reducing jury size, permitting minority verdicts to be expressed, and lessening the impact of initial majority opinion; but the more general suggestions for change are those likely to gain the wider support. There are caveats among them, however, that require mention. In giving cautionary instructions, for example, the court must be careful not to comment on the evidence itself, but provide the kind of detail that ensures that the appropriate warnings are properly understood by the jury. In some cases, also, the evidence shows that juries may overattend to what they have been told precisely to avoid (Kaplan, 1982). The juror must also not be turned simply into a processor of expert facts about the likelihood of risks, then, due consideration of the facts of the case may be given less emphasis than it should.

Cautionary instruction and expert testimony should both usefully work toward emphasising the possible fallibility of the witness, and render the juror appropriately sceptical of what happens in the courtroom. Jurors must not overestimate the probability that eyewitnesses will be incorrect, nor should they distort the probability that witnesses will be truthful. Since adoption of these mechanisms necessarily accentuates the fact that the processing of facts within the legal system is based on probabilistic information, least of all, they should draw the juror away from the task of reaching particularised decisions (Egeth and McCloskey, 1983).

CONCLUSION

In conclusion, this article has attempted to review a number of the more salient factors that relate to jurors' decision-making and the processes that lie behind it. Of particular importance, is the jurors' processing of the information presented in court and the recollections they construct about the events reported there. A wide variety of issues is involved in assessing the possibility of bias in their judgments and these range from considering how the processes of perception and memory actually work, evaluating the validity of inferences drawn from the events of the trial concerning the accuracy of witnesses, and accounting for the meaning of confidence that witnesses express.

It is important to recognise that jurors share a number of major common misconceptions about how memory works, and are especially unlikely to be aware of the possibilities of memory changing after new facts in a case are introduced. They also share common intuitive judgments about what conviction means in terms of accuracy, and are generally ignorant of the fact that their assumptions frequently depart from the empirical findings. The adoption of special procedures is necessary to increase the validity of jurors' judgments and enhance jurors' ability to discriminate accurate from inaccurate testimony.

The law may feel it is substantially on the alert for the elimination of bias and suggestion and that no new procedures are required. Current procedures, however, do not appear to be adequate in coping with the biases that can occur and considerable potential for juror error appears to remain.

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REFORMERS' VIEWS OF THE JURY

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I propose to make some brief remarks about the New South Wales Law Reform Commission's Report The Jury in a Criminal Trial which has only recently been completed and was distributed yesterday to participants in this seminar. The Report covers a wide range of issues but the comments in this paper will be restricted to a consideration of the three issues which created the greatest discussion during the course of the Commission's deliberations.

In relation to two of those questions, the Commission ultimately failed to reach a unanimous conclusion regarding proposed changes in the law and practice relating to the jury system. These three issues have, not surprisingly, already been frequently mentioned in the proceedings of this seminar.

REPRESENTATIVENESS AND PEREMPTORY CHALLENGES

The first matter which I propose to examine is the question of representation on juries with particular reference to the right of peremptory challenge. As a general rule, jury service should be available to all adult members of the community and be shared equally by them. In this way, the representative character of juries is preserved. There may be, however, certain groups who should be excluded or excused from jury service. The grounds on which this may be done can be broadly stated as being, firstly, personal hardship and, secondly, public necessity.

The jury selection process in New South Wales appears to work reasonably effectively in the sense that jury panels, and indeed juries, are reasonably representative of the general community.[1]

Once the jury selection process reaches the court room, however, the parties to the litigation have, I suggest, the power to make a significant impact upon the constitution of the jury. This can be achieved by the use of the system of peremptory challenges. In New South Wales an accused person has the right to make a maximum of 20 peremptory challenges in a murder trial and eight in any other case.[2] Where there are a number of accused people jointly tried, each of them has the same number of challenges and the number of challenges

available to the Crown in any case[3] is equal to the sum of those available to the individual accused.

A majority of the New South Wales Law Reform Commission has recommended that the relevant legislation should be amended to provide that the maximum number of peremptory challenges available to an accused person should be reduced to three irrespective of the offence being tried.

A further recommendation is that the maximum number of peremptory challenges available to the Crown should be reduced to three for each accused person irrespective of the offence being tried.[4] Two of the Commission's six members dissented from these recommendations.

One was of the view that the maximum number of challenges available should be six; another considered that it should be four but only if the occupation and residential address of the potential juror was disclosed.

In order to place this issue in some perspective, it should be noted that at common law an individual accused had the right to make 35 peremptory challenges.[5] This was, of course, in the days when it was much more likely that an accused person would know and perhaps have reason to object to the people called to serve as jurors from the local community in which the accused person usually lived. This common law rule has been gradually altered as the representative character of juries has been enhanced. Now that jury service has become more widely available, the likelihood of persons known to the accused being called to serve as jurors has accordingly been diminished. The position has now been reached where New South Wales has a larger number of peremptory challenges available to the accused than any other State or Territory.[6]

The essential principle with which these recommendations are designed to conform, is that the jury should be representative of the general community. While the accused person and the Crown each has the right to trial by an impartial jury of twelve people selected randomly from the community, neither party has the right to trial by a jury of its choice. If this argument is taken to its logical extension, it would support the complete abolition of peremptory challenges, leaving only the right to challenge for cause as a means of eliminating jurors who are or who may be seen to be biased. Abolition of the right of peremptory challenge would also mean that the accused person would be denied any role in the jury selection process.

The Commission is of the view that it is legitimate to allow a degree of participation by the accused in the selection of the jury but we do not consider that this level of participation should be extended to permit the accused to eliminate

particular groups in the community from the jury. Another reason for preserving the right of both parties to make peremptory challenges is that this procedure avoids the potentially embarrassing spectacle of the reasons for challenge for cause having to be given in open court.

The right of the Crown to make peremptory challenges was the subject of much discussion. The conclusion the Commission has finally reached is based on a number of practical considerations. One of those has just been referred to. Another is that the Crown may see the need to use its right of peremptory challenge to make the jury more representative of the general community.

The empirical surveys which the Commission conducted revealed that the practice of Crown Prosecutors in exercising the right to make peremptory challenges varied considerably.[7] In one-third of trials there were no challenges by the Crown. In the others the Crown averaged three challenges. In some cases the Crown challenged more people than the accused. According to some practitioners, the reasons for Crown challenges depend very much on the whim of the individual prosecutor concerned. In order to overcome this apparently inconsistent approach and to ensure that challenges are based on legitimate grounds, the Commission has recommended that the Attorney General, in consultation with the Crown Prosecutors, should establish guidelines to govern the Crown's exercise of the right of peremptory challenges and that these guidelines should be published.[8]

The publication of guidelines of this kind would avoid, for example, the situation referred to by Bill Hosking, Q.C., in his address to you earlier today[9] when he cited the Georgia Hill case. In that trial of a woman charged with murder, the Crown Prosecutor challenged twenty women with the result that the jury was constituted by eleven men and only one woman.

In order to appreciate the impact of the changes proposed for the system of peremptory challenges, it is necessary to bear in mind that a number of further recommendations made by the Commission relate directly to the process of jury selection. The Commission's view is that there are a number of alternative and preferable procedures which could be adopted to achieve one of the few legitimate objectives of the peremptory challenge system, namely the elimination of jurors who are not impartial or who may not be seen to be impartial.

The first of these is a procedure which envisages that the Crown Prosecutor make a short address to the jury panel before the selection process commences.[10] This would contain a broad outline of the facts and circumstances of the case and advise the panel of the names of the prosecution witnesses. The judge would then be obliged to invite any member of the jury panel

who felt that they would be unable to give impartial consideration to the case to apply to be excused. We would expect that the direction given by the judge would emphasise the fact that potential jurors should only apply to be excused where the nature of their previous association with the case or the witnesses is such as to give rise to a real risk of bias or prejudice or a real risk that bias or prejudice may be seen to exist.

There is, in addition, a procedure recommended which provides that where the judge is, on application by a party, satisfied that the nature of the issues to be tried is such that people of a nominated occupation, or who live in a nominated area, may be unsuitable as jurors, the judge should ask the jury panel whether any of their number is a member of that group.[11] Any potential juror who is should be liable to challenge for cause by either party without further proof being required of the grounds for the challenge. We consider this procedure to be preferable to the alternative of disclosing the occupation and residential address of each potential juror to the parties.

The combined effect of these two procedures should be to eliminate sources of prejudice or potential prejudice in a more effective manner than the peremptory challenge procedure currently permits.

THE JURY IN A COMPLEX TRIAL

The second question that I propose to deal with is the suitability of the jury as the tribunal of fact in the trial of cases which involve complicated or technical evidence. In recent years there has been a consistent, and at times vigorous, campaign to abolish the jury, at least in certain criminal trials, on the ground that juries are incapable of coping with the complexities of the modern criminal trial. This argument has been most prevalent in the field of white collar crime.[12]

Earlier this year the most authoritative of all the committees so far established to examine this question reported and recommended that trial by jury should be abolished in the case of some fraud trials. This suggestion was contained in the Report of the Fraud Trials Committee, a body which had studied the question for two years under the chairmanship of Lord Roskill, one of the Law Lords in the United Kingdom. The foundations upon which this recommendation is based are doubtful. The Report of the Roskill Committee itself notes that such evidence as there is would seem to suggest that juries are in fact capable of accurately judging the issues in complex commercial cases and that they usually reach what is seen as a correct or at least an understandable decision.[13]

There are two important reasons why these cases should continue to be tried by a jury made up of twelve people randomly selected from the general community. Firstly, the presence of a jury ensures that the standards to be applied in assessing dishonesty are those of ordinary people. The decision to be made in the trial of almost all commercial crimes is, as a matter of common sense and, according to the standards of reasonable people, "Was it dishonest?", "Was it a swindle?". Twelve ordinary citizens using their own experience and common sense of fairness and being given guidance on the law are best equipped to answer that question. The second important reason is that the presence of a jury ensures a publicly comprehensible presentation of the case.

There is the danger in trial by experts that the public dimension will be lost. As Mr. Merricks, who dissented from the Roskill Committee's recommendation to abolish trial by jury in some fraud cases said in his dissenting opinion:

> I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the State admits that it cannot explain its evidence in terms which are commonly comprehensible.[14]

In his judgment in Kingswell's case, which has been mentioned earlier in the proceedings of this seminar,[15] Mr. Justice Deane said:

> [a] system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.[16]

Much of the criticism of the jury system appears to me to be based on the perceived inability of individual jurors to comprehend difficult evidence. Such an approach seriously misses the point that jurors do not act as individuals in fulfilling their task. The jury itself is a single unit comprised of twelve individuals. The collective wisdom of those people is likely to mean that the jury will be able to follow the evidence and reach a "correct" decision.

Some of the remarks that I had proposed to make about the jury's collective wisdom have been tempered in the light of

Professor Peter Sheehan's response to the question from Keith Mason, Q.C. At this seminar Professor Sheehan observed that jurors were liable to make erroneous decisions and that in his view there was no safety in numbers. There is no adequate research on this topic which could be used to reach a reliable conclusion about the efficiency of the jury as a fact-finder. The lack of real information is disturbing in the light of the very confident claims that are sometimes made about the lack of juror comprehension in complex cases.

The case against juries in complex cases is far from compelling. It is made even less attractive by the fact that those who argue it cannot conceive a suitable alternative.

UNANIMOUS OR MAJORITY VERDICTS

The third issue is the question of whether the jury's verdict should be a unanimous one.

Unanimity has long been considered an essential and fundamental feature of trial by jury. The existing rule, which appears to have been settled midway through the fourteenth century, is of ancient origin.[17] There are, in my view, two major arguments in favour of preserving it.

Allowing a majority verdict diminishes the important protection afforded by the high standard of proof required in criminal cases. Where there is only a majority verdict of guilty it can clearly be said that (in the absence of corruption) there exists in the mind of at least one member of the jury a reasonable doubt about the guilt of the accused person. It is simply not valid to say that if a doubt is entertained by only one among twelve, then it cannot be a reasonable doubt. It is inescapable that the existence of a dissenting voice casts a shadow over the validity of the verdict. The acceptability of the verdict may be called into question by the participants in the trial and the general public alike. William Forsyth, a nineteenth century historian who was acclaimed for his work on trial by jury, was a staunch supporter of the rule requiring unanimity. He expressed his view in vivid terms:

> And how must it paralyse the arm of justice, when from the very tribunal appointed by law to try the accused, a voice is heard telling her that she ought not to strike?[18]

The second major argument in favour of retaining the rule requiring the verdict of the jury to be unanimous is that the incidence of juries failing to agree is, and always has been in New South Wales, relatively low. The figure has apparently remained reasonably constant over time at approximately 3 per cent of criminal trials.[19]

It should also be noted that there have been few, perhaps only two in New South Wales, cases in which the jury has failed to agree on a verdict after a long trial. "Majority" verdicts, as have been introduced in various parts of Australia, do not, of course, eliminate the problem of jury disagreements. They merely provide a means of reaching a final verdict in those cases where there is only one or two dissentients from the majority view.

The experience in England following the introduction of majority verdicts is revealing. Majority verdicts were introduced there in 1967. At that time the rate of jury disagreements was in the region of 4 to 5 per cent. Over the years following the introduction of majority verdicts, the incidence of juries giving them gradually increased. In 1968 there were majority verdicts in 7.7 per cent of cases, in 1969 this increased to 8.3 per cent and in 1970 to 9.1 per cent. It appears that the rate at which majority verdicts are given in criminal trials in England has now levelled out at approximately 13 per cent. The important fact that should not be overlooked in all of this is that there are still jury disagreements in England - in those cases where less than ten members of the jury agree on a verdict.

In order to reduce a small number of unsatisfactory verdicts (in the form of jury disagreements) there has been a massive increase in the number of verdicts which are unsatisfactory in another way, that is because they are not unaninmous. The 4 to 5 per cent rate of disagreements has been reduced but not eliminated. At the same time a 13 per cent rate of majority verdicts is tolerated. It would appear that the proposed solution to the problem of jury disagreements created a monster of greater proportions than the problem it was designed to solve.

There is an additional matter of relevance to this issue area. It was raised by Bill Hosking, Q.C., in his address to you earlier this morning. He noted that the trial judge is not bound to tell the jury that their verdict must be unanimous. Whilst this is the law in both England and Australia, in practice judges and counsel, particularly defence counsel, do advise juries that their verdict must be unanimous.

Verdicts which are less than unanimous are permitted in criminal cases in South Australia, Western Australia and Tasmania. Majority verdicts are permitted in civil cases in New South Wales. Quite apart from those who may come from other States, there are many people resident in New South Wales who are qualified to serve on a jury who come from countries where there is no jury system at all. It cannot be presumed that jurors in New South Wales are so well acquainted with the unanimity rule that it is not necessary to inform them of this feature of the jury system in criminal trials.

Accordingly, the Commission has recommended that the trial judge be required to direct the jury in a criminal trial that their verdict must be unanimous. This is consistent with the principle that juries should be informed of the law they are required to apply. The requirement of unanimity is a fundamental feature of trial by jury. The deliberations of the jury must be guided by knowledge of its existence.

There are, of course, many other matters in the New South Wales Report which would be worthwhile discussing at a seminar of this kind. This paper has concentrated on those which seem to me to be the more topical and the more interesting. I urge you to read the Report and would welcome any comments that you may have about the recommendations contained in it.

FOOTNOTES

1. Meredith Wilkie Inside the Jury, proceedings of this seminar.

2. Jury Act 1977 s42.

3. R v Dickens (1983) 1 NSWLR 403.

4. New South Wales Law Reform Commission Report: The Jury in a Criminal Trial p51.

5. Blackstone Commentaries on the Law of England (4th ed 1765) Vol 4 pp353-355; Chitty 1 Criminal Law (1836) pp534-37.

6. In Victoria, Queensland and Western Australia, the accused person has eight challenges for all offences. In Tasmania, the Northern Territory and News Zealand the number is six. In South Australia and the United Kingdom it is three. Jury Act 1899 (Tas) s54; Juries Act 1962 (NT) s44(1); Juries Act 1927 (SA) s61; Criminal Law Act 1977 (UK) s43; Jury Act 1929 (Qld) s35(2)(3); Juries Act 1981 (NZ) s24(1); Juries Act 1957 (WA) s38(1).

7. Report of the New South Wales Law Reform Commission The Jury in a Criminal Trial: Empirical Surveys Ch 7 (forthcoming).

8. New South Wales Law Reform Commission note 4 above p56.

9. W D Hosking QC Juror Persuasion proceedings of this seminar.

10. New South Wales Law Reform Commission note 4 above para 7.23.

11. New South Wales Law Reform Commission note 4 above para 7.29.

12. Department of the Attorney General, Criminal Law Review Division Summary Prosecution in the Supreme Court of Corporate and "White Collar" Offences of an Econmic Nature (1978). See also Law Reform Commission of Queensland Legislation to Review the Role of Juries in Criminal Trials (WP 28, 1985).

13. Fraud Trials Committee Report (Chairman: Lord Roskill) HMSO, 1986 p195.

14. Id p196.

15. The Honourable Mr Justice L K Murphy "Section 80 - Trial by Jury" proceedings of this seminar.

16. Kingswell v The Queen (1986) 60 ALJR 17 at 131.

17. D M Downie Is that the Verdict of You All? (1970) 44 Australian Law Journal 482 p483.

18. Forsyth History of Trial by Jury 1850 pp254-5.

19. New South Wales Law Reform Commission note 4 above pp145-146.

A REFORMER'S VIEW OF JURY SECRECY*

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THE AUSTRALIAN LAW REFORM COMMISSION'S PROPOSALS ON JURY SECRECY

In its recently published discussion paper, Contempt and the Media[1], the Australian Law Reform Commission put forward two alternative proposals as to legal controls on the disclosure and publication of jury deliberations. The preferred proposal was for what I will call a 'bare minimum' set of restrictions coupled with a further set of 'add-on' restrictions. The less favoured proposal was that the 'bare minimum' restrictions should be the only ones to apply.

In outline, the 'bare minimum' restrictions are as follows:

- no disclosure or publication of particulars of jury deliberations should occur in the case of a criminal trial until sentence has been passed;
- the identity of jurors within a particular trial should not be published or disclosed, except that a juror may disclose his or her own identity;
- no person should solicit, harass or seek to induce a juror to disclose or publish his or her identity, or particulars of the deliberations of the relevant jury; and
- no juror should solicit publication of jury deliberations for the principal purpose of financial gain.[2]

The 'add-on' restrictions are described in the discussion paper as follows:

> In addition to the restrictions outlined above, there should be a prohibition on publishing jury deliberations in a manner which identifies the trial concerned. This prohibition should cease one year after the jury verdict, or when all appellate and other legal processes relating to the trial have come to an end, whichever is the later.

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* Except where otherwise indicated, the views expressed in this paper are those of the author, not of the Commission. I would like to acknowledge the considerable assistance furnished in the preparation of this paper by Mr Ian Freckelton, Senior Law Reform Officer, Australian Law Reform Commission.

> In addition, the publisher should be entitled to raise at any time a 'public interest' defence, along the following lines: that, having regard to the significance of the matters disclosed, both for the trial in question and for the administration of the system of justice in general, and to the extent to which prior disclosure by the juror concerned has resulted in official investigation, it was in all the circumstances in the interest of the administration of justice that the material should be made public. A court trying an offence against this prohibition should have a discretionary power to order that the media not publish details of the deliberations in question.[3]

The proposals are intended to relate to civil trials as well as criminal trials, though obviously it is the latter which deserve most attention. A careful distinction is drawn between 'disclosure' and 'publication'. 'Disclosure' is intended to cover any form of communication, whether public or private, and whether by a juror or anybody else. On the other hand, 'publication' refers to dissemination by the established media and other organs of communication to an audience or readership comprising the public or any significant section of the public.

Although put forward as alternatives, these two sets of proposals (the 'bare minimum' restrictions and the combination of 'bare minimum' with 'add-on') are perhaps more profitably viewed as an indication of the legitimate spectrum of restrictions on disclosure and publication of jury deliberations. The Commission is saying, provisionally, that on any view of things the 'bare minimum' restrictions are essential, but that if any further restrictions are also to be imposed, they should go no further than the 'add-on' restrictions. The Commission may ultimately recommend prohibitions somewhere within the spectrum, rather than at one or other end of it.

In this paper, I shall outline briefly what I consider to be a rationale for these two sets of proposals, dealing with the Commission's fall-back position first, then with the preferred alternative.

THE NATURE OF THE 'BARE MINIMUM' RESTRICTIONS

The Commission's fall-back position is that only the 'bare minimum' restrictions should apply. Most of them are relatively non-controversial.[4] Dealing with them in the order in which I have listed them, their principal justifications can be expressed as follows:

'Clamp-down' until sentence passed.

The dangers arising from disclosure or publication of jury deliberations before the verdict is entered are well recognised. In particular, it could lead to a distortion of the verdict by virtue of pressure put upon the jurors by the media, or by or on behalf of a party to the case who appears to be in danger of losing.

The extension of this 'clamp-down' to the time when sentence is passed reflects the consideration that the judge should be entitled to exercise the broad and difficult judicial discretions in the matter of sentencing on the basis that the verdict is final and wholly unqualified.[5] If jury room revelations were allowed to occur before sentence was passed, the judge might be tempted, or might appear to be tempted, to take account of them in passing sentence. If it were later established that the revelations had no real significance, the appropriateness of the sentence would be very much open to question. In the vast majority of cases, the extension of the clamp-down from the time of verdict to the time of sentence is a very short one, less than 24 hours. It should be noted, however, that this proposal would have banned some of the jury revelations in the days following the first Murphy trial.

Identity of jurors.

The right of a juror to remain anonymous, whether on grounds of personal security or on account of a more general wish for privacy, is well recognised. It is common for legislation in Australia to prohibit at least the publication, if not the disclosure, of the identity of jurors, both during the trial and afterwards.[6] While generally the Commission's proposals do not envisage the prosecution of individual jurors, or indeed other members of the public, for disclosure falling short of publication, this seems to be one area where a prohibition in these terms should be framed. A juror may want to tell friends or relatives that he or she has served on a jury in a particular case, but there seems no reason why the names of the other jurors should be spread around in this way.

Soliciting, harassing or seeking to induce jurors.

The task of jurors is difficult and demanding enough without their having to face the prospect of being badgered to relate their jury room experiences. At worst, this prospect might have a direct influence upon their deliberations. They may feel that, if they deliver what is likely to be an unpopular verdict in a highly publicised and controversial case, they will have to account for it publicly in front of microphones, television cameras, reporters' note-books etc. The Commission's

consultations suggest that, in the main, media representatives accept a prohibition along these lines as a legitimate aspect of the preservation of the right of juries to perform their task free from outside intrusion.[7] There may be some difficulty in determining whether a communication by a reporter to a juror along the lines 'I am available to hear your story whenever you want to contact me' would fall within the proposed prohibition. If the communication went no further than this, I myself do not consider that it would have to be prosecuted. In any event, in these days of talk-back radio, most jurors know full well how to get in touch with the media and express their views.

Jurors selling their stories

As far as the Commission is aware, this has not happened in Australia, though ex-jurors in America have been hired to give television or radio broadcasts, act as consultants in re-trials and write books about their experiences. The dangers would appear to be two-fold. First, if an arrangement to disclose jury deliberations for financial gain is made before the trial is over, it may actually distort the juror's decision in the case. He or she may be induced to vote for the verdict which will make the story most saleable. Secondly, even a story which is 'sold' after the verdict may depict the decision as a whole, and the fellow-jurors in particular, in ways which suit the commercial market rather than the pursuit of truth. It may be that this prohibition may have to be modified slightly to make allowance for royalties or other payments received by jurors in return for producing or contributing to serious research studies of the jury process. But otherwise, the prohibition reflects an underlying philosophy that, if jurors are to be permitted to speak out on the subject of jury deliberations in a particular trial, and to procure the publication of what they have to say, this should be done out of a concern for the quality of the verdict in the particular trial, or for the workings of the jury system in general, rather than for commercial motives.

CERTAINTY IN THE LAW AND RESPECT FOR FREE SPEECH

Except for (a) statutory prohibitions preserving the anonymity of individual jurors, (b) the more broad-ranging prohibitions on disclosure and publication recently enacted in Victoria[8] and (c) the legal obligation of confidentiality imposed on jurors in Tasmania by their oath of office[9], restrictions on disclosure and publication of jury deliberations are imposed entirely at common law, under the law of contempt. This makes for considerable uncertainty, because the only criterion offered by contempt law is whether the particular disclosure or

publication 'interferes with the administration of justice'.[10] A detailed interpretation of the operation of this criterion might well produce a set of prohibitions similar to the 'bare minimum' restrictions just discussed.[11] But this could not be guaranteed. A clear advantage of the approach underlying the 'bare minimum' restrictions is that the prohibitions imposed would indicate not only what jurors, other individuals and the media could not do by way of disclosing or publishing jury deliberations, but also what they could do.

Furthermore, what they could do in most instances would be to exercise the right of freedom of speech and publication. The overall effect of the 'bare minimum' restrictions is to put very few obstacles in the way of free disclosure and publication of jury deliberations, even when they relate to a specific, identified trial and are made public in the immediate aftermath of the trial. Practices which more than once have been deplored by judges, without being actually prohibited[12], would receive the 'green light' from the law. The terms of reference for the Law Reform Commission's inquiry into contempt specifically require it to have regard to the guarantee of freedom of speech and publication in Article 19 of the International Covenant on Civil and Political Rights (the equivalent clause in the draft Australian Bill of Rights is Article 7, though it must also take account of the provision in Article 14(1) of the Covenant guaranteeing to individuals a 'fair . . . hearing by a competent, independent and impartial tribunal' in any case in which they are engaged (in the draft Australian Bill of Rights, see Article 26).

Some reasons why this leeway given to freedom of speech and publication under the 'bare minimum' restrictions, taken alone, might endanger the rights of those involved in jury trials, or the system of administration of justice in general terms, will be explored now in my discussion of the Commission's preferred alternative, namely, the 'bare minimum' restrictions taken in conjunction with the 'add-on' restrictions.

THE CASE FOR 'ADD-ON' RESTRICTIONS

In its discussion paper, the Law Reform Commission, not without some hesitation, came down on the side of 'adding-on' a prohibition on publication of jury deliberations, to take effect after verdict and sentence have been delivered. The prohibition is, however, limited in several important respects:

- It bears upon publication only, not disclosure. It thus does not affect private communications by jurors in any way.

- It only applies to publications which identify, or render identifiable, the trial involved. A publication describing the deliberations in 'a recent trial' would thus be acceptable unless further information contained in it made it clear to all concerned which trial was being described.

- The prohibition would have a 'sunset' clause: that is, it would cease one year after the verdict, or at the time when all appeal processes in the case had been exhausted, whichever was the later.

- Even within this period, the 'public interest' defence would be available if the conditions set out in it could be satisfied.

Despite these limitations, the prohibition undoubtedly infringes freedom of speech and publication, though it does so to a significantly lesser degree than the legislation against disclosure of jury deliberations recently enacted in Victoria[13], England[14] and Canada.[15] In brief, the arguments in favour of the type of secrecy sought to be achieved by these prohibitions focus on four considerations, some of which are interlinked. These are: finality of jury verdicts, 'jury equity', the due conduct of appeal processes, and privacy for the other jurors involved. I will elaborate on each of these in turn.

Finality

The argument based on finality of verdicts is that, to the extent that revelations of jury room deliberations may lead to official or unofficial questioning of verdicts once reached, one will never be able to say that a case is concluded when the verdict is delivered. The prospect of further hearings by way of appeal, review, investigation, etc., will always be present. If every possible doubt about a verdict that might come to light through such revelations were to provide grounds for re-opening the verdict by one or other of these means, the system of administration of justice would be placed under intolerable strain. The search for finality, in this sense, justifies the use of twelve individuals, with all the expense that this entails, and the requirement of a unanimous verdict. Not merely one person but twelve people must be satisfied of guilt before a conviction can be entered. The advantages of concluding the case finally in this way would be dispelled if the disclosure and publication of doubts, second thoughts, slip-ups etc within the jury room could go ahead unchecked immediately after the conclusion of the trial.

'Jury Equity'

The argument here is that a well-recognised and often-praised feature of jury trials would be undermined if secrecy were not preserved. It has long been recognised to be a prerogative of juries to modify the letter of the law by bringing in verdicts -- usually acquittals -- which reflect what the jury thinks the law ought to be, rather than what it is. A classic example is the refusal of English juries in the 18th and 19th centuries to enter a conviction for larceny above the value of 40 shillings where this would result in a death sentence. This was done even when the value of the property stolen was clearly more than 40 shillings. A jury would find it much harder to exercise this prerogative if it believed that any one juror could 'spill the beans' to the media and have the detailed grounds for the verdict widely publicised.

Concern for the workings of the appeal system

The argument here draws attention to the fact that, despite what I have just said, a jury verdict is not completely and wholly final. It may be upset on appeal and a retrial may be ordered. It may therefore be asked: why, if challenges on appeal are a normal feature of the system, should not allegations of misconduct within the jury room, misunderstandings by jurors or other jury room events likely to cause a miscarriage of justice be barred from publication? Should not these matters be brought into the open and treated as grounds of appeal? The response of the present law, contained in a rule known as 'Lord Mansfield's rule', is that, generally speaking, such allegations are not admissible on appeal. In extreme cases, they may form part of the grounds for an special inquiry into a conviction, such as occurred in New South Wales in the Ananda Marga case. Lord Mansfield's rule has been subjected to criticism on occasions[16] and the Australian Law Reform Commission has provisionally recommended, in its Interim Report on Evidence, that evidence be permitted to be given in appeal proceedings on matters which would constitute an offence against the administration of justice, such as a threat or an offer of a bribe being communicated to a juror.[17] But as long as Lord Mansfield's rule remains within the law, it can be argued that appeal courts are embarrassed, if not positively impeded, by being compelled to assess the validity of a verdict without paying attention to highly publicised revelations from the jury room, even though the decision reached on appeal appears wholly at odds with these revelations.

Privacy of Jurors

The privacy of members of the relevant jury other than the juror who reveals its deliberations must be considered.

Although, under the 'bare minimum' restrictions, the names of these jurors must not be divulged against their consent, their statements and attitudes within the jury room may well be seriously misrepresented in the revelations. In addition, they may feel that, had they known that their remarks would be widely publicised after the verdict, they would have spoken differently in the juryroom, and possibly even sought to be excused from jury service.[18] It may be argued that there is a fundamental contradiction between, on the one hand, impressing upon jurors the need to conduct their deliberations in private and to talk freely and openly in reliance on this privacy and, on the other hand, allowing individual jurors, once the trial is over, to procure publication of the full particulars of these deliberations, including the identity of the trial. If the law is going to impose obligations of confidentiality during the trial, in order that the verdict should be the outcome of wholly secret deliberations, it seems logical that this confidentiality should be preserved afterwards as well.

THE CASE AGAINST 'ADD-ON' RESTRICTIONS

The principal arguments against imposing the 'add-on' restrictions can be summarised under three heads: freedom of speech and publication, jury research, and justice in the individual case.

The argument based on freedom of speech and publication is that under long standing common law principles, reinforced by the International Covenant on Civil and Political Rights and (if enacted) the Australian Bill of Rights, the onus of justifying a restriction on freedom of speech and publication should lie on those who seek to impose the restriction. This argument is of particular strength when the restriction imposed is backed up by penal sanctions. It is questionable whether the arguments just outlined are sufficient to discharge this onus.

Secondly, restrictions on disclosure and publication of jury deliberations can severely inhibit research into the operations of juries. In this event, the restrictions, far from protecting the interests of the system of administration of justice, act to the detriment of those interests. Important information on such matters as the level of understanding of relevant issues by jurors, the degree to which matters of fact and law are successfully communicated to them and the problems arising from unfamiliarity with the law and legal processes may never be properly researched. The likely outcome is that juries will not evolve in response to changes in the environment in which they operate. The history of the common law jury shows how important it is to leave scope for evolution. It is noteworthy that, after s 8 of the Contempt of Court Act 1981 had imposed a broad prohibition on the disclosure and publication of jury deliberations in England, the Fraud Trials Committee, chaired

by Lord Roskill, reported in 1986 that it found its work hampered seriously by this prohibition.[19]

The third argument, that justice may not be done in the individual case if jury room deliberations must forever remain secret, is perhaps the most important one. Taken to extremes, a prohibition on disclosure and publication would make it illegal to publish an allegation, however well substantiated, that the jury had tossed a coin to determine the verdict, or had been subject to bribes or threats from one of their number, or from an outside source, in reaching the verdict. An abstract principle of 'finality' should never be permitted to prevent such matters being revealed, particularly where the verdict entered by the jury was a conviction. The issue is, of course, linked with 'Lord Mansfield's rule'. Most people would agree that this rule should never impede an appeal court or another review body from overturning a verdict which is clearly tainted with impropriety in the jury room. The controversy arises where the only matter revealed from within the jury room is that some limited extraneous considerations were taken into account, or that some of the jurors had second thoughts, for a while at least, or that a particular strong personality dominated the discussion in a manner which detracted from the unanimity of the verdict. If evidence law were altered so as to make matters such as these admissible on appeal, it would be self-defeating to prohibit their disclosure. But this proposition opens up a further question: is it sufficient to permit such matters to be disclosed to relevant authorities -- such as the Attorney-General's Department, the Director of Public Prosecutions or a judge -- while still prohibiting publication, at least until the allegations in question are brought to light in subsequent proceedings of a court or other reviewing body? The difficulty about adopting this distinction between private disclosure to an appropriate authority and full-scale publication by the media is that an individual juror may feel daunted by the prospect of speaking to official authorities, or may encounter official resistance or inaction. Yet to allow the juror to go straight to the media on the grounds that his or her concerns about the verdict might conceivably justify a retrial or some other sort of review process is to jeopardise the law's concerns, as outlined above, regarding finality and confidentiality.

A BALANCING ACT

In the manner of many proposals by law reform commissions, the discussion paper, Contempt and the Media, attempts a balancing act. It seeks to accommodate these various arguments by framing the limited prohibitions which I have described as the 'add-on' restrictions. The discussion paper seeks to explain and justify this balancing act in the following way:

> This proposal allows jurors themselves to disclose deliberations in whatever way is thought fit, so long as their actions do not amount to the prohibited publication. It does not prevent jurors who are concerned about an aspect of the trial making representations to the Attorney-General, the Director of Public Prosecutions, the Ombudsman, a judge or another appropriate official. It places the onus upon the publisher to observe the law without placing a heavy burden upon jurors who are concerned about what transpired in the jury proceedings in which they participated. The Commission is not inclined to recommend punishment of those who simply supply information to the media without demonstration of further culpability on their part: once it is supplied, the media have the choice about whether or not to disseminate it. They also have readier access to informed legal advice about their rights and obligations. The proposal also dispenses with the need for express permission for all circumstances in which a juror could properly disclose information without the possibility of incurring liability for prosecution. On the other hand, the media and any other persons engaged in publishing are still free to publish 'jury revelations' which do not identify the trial or any juror. If they identify the trial, they must be ready to argue the 'public interest' defence. This is framed in such a way as to recognise their watchdog role as regards both court cases and the actions of the executive in dealing with complaints or anxieties expressed by individual jurors. They are protected in any case where a miscarriage seems to have occurred in the jury room but the efforts of one or more individual jurors to have the matter investigated are, or appear to be, frustrated by a 'cover-up' or by official inaction.[20]

The question whether this form of compromise is an appropriate resolution of all the issues is now one for public discussion, particularly in the public hearings which begin in Canberra on 22 May and continue over the next month in all the other capital cities.

I would like to throw in three final comments. First, I think that we have some more work to do at the Commission in terms of examining the validity and viability of 'Lord Mansfield's rule' in its present form[21] and tailoring the proposed 'public interest' defence under the 'add-on' restrictions more closely to the terms of that rule, as possibly modified. What I am suggesting is that, in determining whether the media can successfully plead the proposed 'public interest' defence, due regard should be had to the extent to which the allegations which they have publicised might possibly be admissible,

whether or not in precisely the same form, in appeal proceedings. Secondly, the proposed 'sunset clause' may require modification. One year may be too short a time, in view of the high level of sustained publicity given to some cases (the outstanding example being of course the Chamberlain case) and we should consider whether, in circumstances where the appeal proceedings last longer than one year or any substituted period, the prohibition should itself last still longer, in order to protect the integrity of the appeal proceedings. Third and finally, a useful practical suggestion which has twice been put to me in talk-back radio programs dealing with these proposals is that jurors who have concerns as to how the verdict was reached should have already been told (for example, in a brochure issued at the beginning of the trial) what agency is the appropriate one to hear their complaint. It is all very well for lawyers to talk about individual jurors taking allegations of bribery, misunderstanding etc to 'the Attorney-General' or 'a judge', but this gives no indication whatsoever as to how a juror should approach any of these somewhat remote individuals. This is not to say that we need a new government agency, called the Jurors' Complaints Board, but that some person or department within an existing office, such as the Sheriff's Office, should be formally designated to act as a receiving agent for juror concerns.

NOTES

1 Australian Law Reform Commission, Sydney, 1986 (hereafter ALRC DP26) para 105--11.

2 id, para 106.

3 id, para 110.

4 Restrictions formulated along very similar lines are recommended as a necessary minimum in the recently released Report of the New South Wales Law Reform Commission, The Jury in a Criminal Trial, NSW Law Reform Commission, Sydney, 1986 (NSWLRC 48) para 5.13--5.15, 11.24--11.30.

5 This is said on the assumption that nothing in the nature of a rider recommending mercy has been formally communicated by the jury to the judge.

6 See for example Jury Act 1977 (NSW) s 68; Juries Act 1957 (WA) s 57; Juries Act 1967 (Vic) s 69.

7 cf a comment by Mr Dan O'Sullivan, Editor-in-Chief, West Australian Newspapers Ltd at a recent seminar, to the effect that harassment of jurors should certainly be an offence but subject to a defence of public interest: D O'Sullivan, 'Journalists and Jurors: a View from the Gallery', Paper delivered to a seminar of the Media Law Association of Australia, Sydney (12 February 1986).

8 Juries (Amendment) Act 1985, inserting a new s 69A in the Juries Act 1967.

9 Criminal Code Act 1924 (Tas) s 365; Appendix D, Form 1.

10 See for example Attorney-General v New Statesman & Nation Publishing Co Ltd [1981] 1 QB 1.

11 cf the interpretation offered by Justice M McHugh, 'Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt', Paper presented to a seminar of the Media Law Association of Australia, Sydney (12 February 1986); M Chesterman, 'Specific Safeguards Against Media Prejudice' (1985) 57 Australian Quarterly 354, 363--5.

12 See for example R v Armstrong [1922] 2 KB 555, 568--9; Re Matthews and Ford [1973] VR 199, 213.

13 Juries (Amendment) Act 1985.

14 Contempt of Court Act 1981 s 8.

15 Criminal Code 1970 s 576.2.

16 See for example E Campbell, 'Jury Secrecy and Impeachment of Jury Verdicts -- Part I' (1985) 9 Crim LJ 132, 147--52.

17 Australian Law Reform Commission, Report No 26 (Interim), Evidence, AGPS, Canberra, 1985 (ALRC 26) Vol I, para 873--6.

18 cf a statement by the Sheriff's Office in New South Wales that, after the publicity given to jury deliberations in the first Murphy trial, applications by prospective jurors to be excused trebled in number.

19 Report of Fraud Trials Committee, HMSO, London, 1986, Appendix A, para 7, pp. 201--2.

20 ALRC DP 26, para 111.

21 This issue will be directly addressed in the final Report on Evidence.

THE JURY IN THE CRIMINAL JUSTICE SYSTEM

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The role of the jury in criminal cases, its utility or otherwise, its position as bastion of civil rights or over-inflated anachronism have long been subjects for debate. Of late the jury system has been vigorously discussed as a result of instances where jurors have spoken out about the decision-making processes of the jury room. At the same time, the perennial debate about the usefulness of the jury in complicated commercial trials has continued, and argument about the value or otherwise of juries in cases where forensic evidence is put forward by competing experts has not lessened. Possible jury prejudice in particular instances relating to racial, religious, ethnic or political background, and also to gender of offender or of the victim of a crime, has been the subject of comment.

It is always possible for the criminal justice system to be improved. It is also imperative that the criminal justice system maintain the confidence of the community generally; of those being dealt with as offenders, accused persons, victims and witnesses; and of those operating within it as professionals: the judiciary, magistracy, lawyers, workers from support services and court personnel generally. The onus on law reform commissions, governments and those concerned with the just operation of criminal justice is to pinpoint areas of legitimate concern, then work toward correcting deficiencies.

JURY PREJUDICE

It is imperative that jurors be enlightened as to possible prejudices they may harbour as a result of socialisation or cultural beliefs. For civil juries, in an address to the Australian Institute of Multicultural Affairs, the Hon. Justice Gobbo of the Supreme Court of Victoria defined the problem thus:

> ... in my experience barristers infrequently refer to cultural factors in their addresses to juries. For example, a witness may have given what appears to be an exaggerated version of ... symptoms [in claims for damages for injury]. A barrister will seldom say to a jury that this may reflect his client's fears in a new land or his desire to stress the threat to his life posed by the injury. Nor will he point to other possible cultural

> factors. This either represents their professional judgement or it shows an insensitivity to the cultural background. In my view it is their skill rather than their insensitivity. It is unfortunate then that experienced barristers are not confident that juries can always be trusted not to throw up some intolerance or bias against the non-British migrant, or at any rate, to understand a particular resort to special cultural factors. This is not an area where progress or change can be effected by rules or regulations. Sensitivity and acceptance through the community of differing social attitudes to injury and pain and, indeed, community acceptance of the spirit of multiculturalism, cannot be achieved by legislation. It is essentially for education - a difficult task if one talks of altering existing attitudes. (Gobbo, 1983,4)

As Justice Gobbo states, rather than simply asserting that juries may be prejudiced, or individual members of a jury may be prejudiced, on various counts, it is important that possible prejudices are confronted effectively. And as another judge of the Supreme Court of Victoria has pointed out, it is not only jurors who may suffer from such human failings. Judges too are human (Age, 23 November, 1985).

Justice Gobbo went on to enumerate various means of educating juries and improving the system - including the access of persons of non-English speaking backgrounds to competent interpreter services at all levels of the system: 'Considerable progress has been made, but much remains to be done'. Traditional doctrines must be interpreted to reflect the multicultural nature of Australian society, as for example in the High Court decision of Moffa v. the Queen, (1977, 138, CLR, 601), taking into account cultural factors in the question whether the hypothetical ordinary person would have been provoked, where the charge is unlawfully killing. A legitimate assessment of such issues must be put to juries for adequate decision-making.

Other groups similarly disadvantaged include black Australians: Aboriginals and Torres Strait Islanders. In its 1975 Interim Report - Criminal Investigation the Australian Law Reform Commission recognised this in relation to police interrogation. The Report cites instances of difficulty experienced by black Australians of the traditional culture in contacts with Europeans:

> Aboriginal people [may be] severely limited in their understanding of English ... [Some of the] people have no understanding of connecting or qualifying words like 'if', 'but', 'because', 'or'. For these there is one ending that goes on other words. Most of the people when ... speak[ing] English leave out these words. When they hear

> them they don't understand their meaning. [They] have a different idea of time ... They [may seem] confused about place. If asked 'Did you go into his house?' they will say 'yes'. It may have been only in the driveway, or inside the fence, but that means 'in the house' to them. (ALRC, 1975, 119)

Concepts in the English language are not necessarily the same as concepts in other languages, including Aboriginal and Torres Strait languages. As well, some persons in particular cultural groups may be susceptible 'to authority situations which ... [means] there is a tendency to give the answer thought to be expected, rather than that necessarily the case'. The Australian Law Reform Commission found that this difficulty was highlighted by many witnesses giving evidence to the Commission during its researches on the criminal investigation reference. Further, that Commission currently has before it a reference on Aboriginal customary law. A number of discussion papers have been produced in relation to the reference. As with the matters disclosed during hearings on the criminal investigation reference, some of these issues are directly relevant to jury decision-making.

The Commission points out, for example, that Aboriginal defendants 'on occasions ... have little or no understanding of the nature of the criminal trial':

> The difficulty is not confined to problems of language many of the concepts upon which criminal trials are based have no equivalent in Aboriginal law. The greatest difficulty is experienced by traditionally oriented Aborigines but Aborigines with limited English may also find it difficult to follow the course of the trial. The problem has two facets. First, the pleas at the beginning of the trial may be unintelligible to a traditional Aborigine. Aborigines have no word for guilty or not guilty. The view taken by the criminal law that an accused is entitled to test the prosecution case against him rather than plead guilty is foreign to customary law (ALRC, 1980, 76).

Just as cultural differences of those recently emigrated to Australia, or those who have retained part of their non Anglo-Saxon cultural heritage though having spent longer in Australia, may be relevant to defences to murder (as the High Court pointed out in the Moffa case), those differences may be relevant to defences for persons of Aboriginal descent. The Australian Law Reform Commission said:

> Although an Aborigine may have killed another, a defence may be available to a charge of murder on the ground of provocation or self-defence. An Aborigine may not understand the distinction between murder and manslaughter. According to his law a person who has killed another has committed that act and is guilty and there may be no amelioration (ALRC, 1980, 76).

The view was put to the Commission that 'a white jury is not qualified to decide on the guilt of traditional Aborigines' as a result of the substantial differences in cultural perceptions and thought processes which have been documented. In the Northern Territory the practice has been for judges to sit without juries, on criminal trials. Suggestions were made to the Commission that Aboriginals should be tried by alternative methods than jury trial, perhaps by two assessors sitting with a judge, or a 'special court of native affairs'. The Australian Law Reform Commission commented in response that experience in Australia with special courts of native affairs 'is not encouraging'. It was considered there was no evidence before the Commission to justify special tribunals to try Aboriginals charged with serious crimes.

As well, women's socialisation and the double standard having effect in the court system - both at juvenile and adult level - are matters requiring consideration (Mukherjee and Scutt, 1980; Edwards, 1984). Legitimate debate has commenced about the relevance of 'reasonable man' standard where a woman stands accused of a crime. (Edwards, 1984; Scutt, 1983)

This is a matter of importance to jury decision-making in important instances, with, for example, instances of pleas of provocation, self-defence, diminished responsibility and the like. The aim in attempting to acquaint juries with these factors is not to convey the idea that particular groups are 'hard done by' or require paternalistic or 'soft footed' treatment. Rather, it is to incorporate into the system avenues for conveying the reality of offences to jurors, taking into account cultural context and other relevant matters.

EXPERT EVIDENCE

From time to time in Australia criminal cases have become celebrated causes, not the least on the basis that forensic evidence has been admitted, or not admitted, which has swayed a jury in a seemingly inappropriate way. Others have asserted that experts can be found to support whatever case a prosecution wishes to run and that it is not difficult for the defence simultaneously to find equally qualified experts to argue for the precise opposite.

According to the philosophy of our legal system, expert witnesses are not engaged by the prosecution to take a partisan pose in the criminal trials. Standards should be set high. As the former Director of the Australian Institute of Criminology has pointed out in an unpublished paper 'The Relationship Between Criminology and the Forensic Sciences':

> The modern forensic scientist is not always happy with his apportioned role as an adjunct to the police forces. He too has been affected by the modern emphasis on the

> balance which needs to be maintained between law enforcement and human rights. More than that, the forensic scientist as a scientist is jealous of the independence of his discipline. He prefers to serve the court independently and not any system of law enforcement. He wants his services to be truly forensic or judicial and less partisan.

The standard desired is not always reached. As the Hon. Justice Murphy stated in Perry v. The Queen (1983, 57, ALJR, 110):

> The prosecution's evidence fell far short of this ideal. If the expert assistance available to the prosecution in this case is typical, then the interests of justice demand an improvement in investigation and interpretation of data and presentation to the court by witnesses who are substantially and not nominally experts in the subject which calls for expertise.

Sometimes it is alleged that expert witnesses for the prosecution identify with the cause of 'proving' the accused guilty of the crime charged. This is not the role of an expert witness for the prosecution, just as it is not the role of the prosecution to seek to have the accused person convicted, whatever the rights or wrongs of the case.

It has been suggested that a way to overcome the problem is to eliminate juries; replace the jury with a 'jury of experts'; improve the state of forensic science generally. The elimination of juries would not solve the problem, however, judges are not necessarily well-versed in matters of forensic medicine, nor immune from partisan persuasion of experts.

Training of judges, as recommended by the Shorter Trials Committee in Victoria, (Sallmann, 1985) should go some way toward improving judicial knowledge and understanding in this area. It is also open to suggest equally strongly that education of jurors in relation to forensic evidence and expert witnesses may be of similar value.

Indeed, the training of judges would enhance juror understanding, by ensuring judges convey the information in the most readily understood way. The 'jury of experts' proposal is not without flaws. Just as it can be asserted that experts may easily be found to support the prosecution case as to support that of the defence, it is open to believe that a jury of experts would harbour amongst its members those agreeing with prosecution expert witnesses, those agreeing with expert witnesses for the defence, and doubtless those emerging with an entirely new view of the evidence and what it conveys in terms of guilt or innocence, or its inappropriateness to conclusively or supportively decide either. Dr Ben Selinger of the Australian National University has suggested that three basic rights should extend to those accused of crimes, where forensic evidence is relevant:

- the right to immediate access to all scientific evidence
- the right to obtain independent scientific testing of samples
- the right to challenge the evidence before its presentation to a jury.

He also contended that strict screening processes should cover admission of scientific evidence in trials, including questioning of the techniques used, questioning whether the tests are appropriate for eliciting evidence of possible innocence as well as possible guilt; standardisation of procedures so that disputes arise less often about the 'rightness' or 'wrongness' of tests; the admission into argument of all outcomes of tests, not just those directed toward the support of a guilty finding (Sellinger, 1984).

At the same time the Attorney-General for Victoria, the Hon. J.H. Kennan, M.L.C. announced the establishment of a Chair of Forensic Medicine at Monash University. The appointed professor will simultaneously hold the post of Director of the Victorian Institute of Forensic Pathology. The Institute is to be established to provide 'an independent high level of pathology service long overdue in Victoria'. In a press release on the project issued on 19 December 1984 the Attorney-General said:

> In 1977 the Coroner's Court Review Committee commented on the lack of qualified pathologists with specialised training in forensic pathology in Victoria. The proposed institute ... will ensure that the quality of forensic pathology services available to the Coroner is sufficient for proper administration of justice.

Obviously, rather than seek to place blame on juries for failures in the giving of expert evidence or adequate forensic testing and the like, it is wiser to take the Victorian government approach of ensuring that evidence given in criminal cases involving forensic medicine is of the soundest quality possible. Together with this, education of jurors and juries in the most appropriate way to handle expert evidence and consider forensic evidence of all types should be a priority. Ways of effecting this education should be devised and implemented without unnecessary delay.

COMPLICATED COMMERCIAL CASES

It may be considered odd that complicated commercial cases are singled out for attention, as somehow distinct or apart from other complex cases of a non-commercial nature: there is no reason to believe that tangled commercial matters are more difficult to understand the labyrinthine conspiracy cases, or cases of another nature involving convoluted fact situations and perplexing evidence of various types.

It is not immediately evident why it should be accepted wisdom in some quarters that juries are incompetent to deal with such matters, and that to leave these cases to judges would be preferable, or non-problematic. No doubt judges may have a difficult time understanding knotty commercial matters: not all are well versed in commercial law. Not all, even if expert in some or many commercial law areas, need be without any difficulties in handling decision-making in this area, as in other areas of complexity in criminal trials.

Were a decision made to eliminate jury trials from complicated commercial matters, how would it be determined which commercial matters are so complicated that they should go to a judge sitting alone, or a specially constituted tribunal? If the defendant is to be given a choice, in which cases would the choice be relevant? Taking such routes might well create problems directly related to selecting out cases, selecting 'special' tribunals and the like. This process would have its own momentum, delay and complexity. And would such an approach in fact lead to greater justice, more efficiency, or greater respect for the criminal justice system?

The response to problems of the sort arising in complex criminal cases cannot readily be dealt with, and particularly not by knee jerk reactions. The involvement of the jury in the criminal justice system would better be enhanced by considering means of properly educating jurors to participate competently in trials be they of whatever nature. Eliminating jurors from the system would serve only to further remove the criminal justice system from its origins as a relevant part of the community, whilst removing the community from its major opportunity to participate in our system of justice.

EDUCATING THE JUDGES AND THE JURORS

Real efforts are being made in some jurisdictions to ensure that the courts are as well equipped as possible to carry out their task of implementing the criminal law. In Victoria the Shorter Trials Committee has commented upon 'the important dimension to the role of the judge in a criminal trial' as being 'expertise in the substantive and procedural aspects of criminal law and the running of a criminal trial'. The Committee noted the general acceptance, today, that the criminal law is 'a complex area of law and becoming more so, and that the conduct of criminal trials is a demanding task' (Sallmann, 1985, 186). The views of Victorian judges on the idea of judicial training were sought, with particlar emphasis on the conduct of criminal trials. Slightly more than half the two thirds of judges expressing a view did not favour judicial training. A number, however, said 'it would be a good idea for new judges unfamiliar with the criminal jurisdiction to 'watch their senior brethren running a trial' and to 'receive guidance and assistance from the senior

judges'." The Committee concluded that it 'would like to see a programme of training established in this area for newly appointed judges' (Sallmann, 1985, 186-7).

In support, the former Chief Justice of Australia, Chief Justice Barwick, was quoted as saying:

> Judges in our system are drawn predominantly from the Bar. It is thought, and you might think correctly thought, that the work of the Bar provides a very good in-service training for the potential judge, though it by no means follows that a successful advocate becomes a good judge or that there is not room for continuing education of the judge in the art of being a judge. The training of a new judge in what to him is a new role is a matter which ought to be taken in hand on a systematic basis (Barwick, 1979, 490).

It should be noted that in the United States and in the United Kingdom the idea of judicial training is not new, and indeed those jurisdictions have gone beyond the idea to the implementation of judicial training schemes. The Shorter Trials Committee commented that 'the concept and the practice of training for judges is now well entrenched in England and is generally accepted as performing an essential part of the quipment of all members of the judiciary' (Sallmann, 1985, 187). The Committee called for a training scheme for judges to be developed on a national basis, noting with approval that the Australian Institute of Judicial Administration (AIJA) is currently working on a scheme for judicial training:

> The work of the AIJA in this regard should be firmly supported from Victoria, especially by the judiciary and the Government. The Committee takes the view that the skill and competence of judges in conducting criminal trials is an important factor in determining the length of trials and that the training of judges in these skills can make a worthwhile contribution to improving their performance (Sallmann, 1985, 187).

As judges are 'at the coal-face' with regard to their role in the courtroom and their interaction with the jury at what might be considered the most crucial stage of the criminal justice process, it is vital that they be equipped to convey as clearly as possible to jurors those matters which are relevant to jury deliberations. It is also vital that they ensure that jurors are not potentially befuddled or bemused by irrelevant or inadmissible evidence creeping into the arena. The Shorter Trials Committee observed that this is a difficult area for the judiciary, but emphasised that judges 'can and certainly should exercise a firm hand on the tiller of the trial', within the limitations laid down by the Chief Justice of the Supreme Court of South Australia:

> It is well recognised that a trial judge has a duty to supervise the trial in such a way as to prevent undue repetition and prolixity ... It is a duty which must be exercised with tact and purdence. Injustice can easily result from ill-advised interventions by the judge. The judge does not know what is in counsel's brief and a line of questioning which may appear to the judge to be repetitious or have little bearing on the case may be fully justified by counsel's instructions ... Nevertheless, judges must not lose sight of the importance of that part of their function which is concerned with controlling the length of proceedings in the interests of economy (Sallmann, 1985, 186).

These words are equally applicable to the issue at hand, namely the need for jurors to clearly understand the issues before them, and the fact that it is the judge overall whose responsibility it is to ensure that, as far as possible, jurors are appraised of the matters relevant to the decision they are called upon to make.

Jury directions have been the subject of criticism on occasions. The Victoria Law Foundation currently has before it a project to research the most easily understood manner of conveying to jurors the matters which are important in assisting them to reach a true verdict. Various judges have made exceptional efforts to assist jurors in this regard, in Victoria as elsewhere. A recent note in the Australian Law Journal, 1985, has commented upon this in a case before the Supreme Court of New South Wales where the Chief Justice suggested a form of directions by a trial judge to the jury, where the accused was seeking to rely upon a plea of self-defence to a charge of murder or attempted murder, or a charge for an offence involving an intent to murder or to cause grievous bodily harm:

> This suggested form represented an attempt by his Honour to translate into language, which a jury might be capable of readily undertanding, the six-point formulation of the jury's task in dealing with a plea of self-defence to such charges, as stated by Mason J., with the concurrence of Stephen and Aickin JJ. in the leading High Court decision of Viro v. The Queen ...

Chief Justice Street of the New South Wales Supreme Court stated that his intention in formulating the directions was that:

> I have drafted the ... direction in the contemplation that trial judges may find it of assistance to use it in preference to the terms of the six-point crystallisation [as made by Justice Mason of the High Court]. Whether or not to use it, whether or not to amplify it, how it is used, how it is related to, and explained in the context of, the evidence, are essentially matters for the trial judge.

> I intend it as no more than a suggested paraphrase of the Viro crystallisation in terms that may be more meaningful to jurors (Current Topic, 1985, 645).

Certainly it has been the case the judges at all times have been mindful of the need to ensure jurors understand what they are saying and the import of the directions they give. Yet is is equally certain that the project being undertaken by the Victoria Law Foundation could well be of immense assistance in ensuring that these efforts are universalised. The good operation of the jury system and the criminal justice system as a whole, and the perception of accused persons, witnesses, victims of crime and the general community of the criminal justice system will surely be enhanced by these and like efforts.

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REFORMING THE JURY: THE COMMON GROUND

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When faced with the responsibility of proposing reforms to the structure and operation of the jury, law reform bodies are confronted by a unique ideological framework. More than any other institution within the criminal justice process, the jury is both represented and perceived of, as embodying and promoting the rule of law. The police, the judiciary and the legal profession can be appreciated ambivalently by the general community (as it the case in some states more than others) and the operation of all other institutional aspects of the trial process might be signficantly criticised as working against the achievement of equality, unanimity and universality of the legal process. But not so the jury. We heard much yesterday to confirm the view that whether by 'epidemic suggestion' or not, the vast majority of citizens hold great confidence in the institution of the jury. They believe in the 'communion of peers'. Yet as is the case with much justification behind arguments for and against the jury, I believe that such confidence rests on ideology rather than experience or factual understanding. For example, what is meant by the communion of peers, so that it can be so trusted? Does it mean the judgment of one's equals or neighbours, the judgment by a body of fair minded people, the judgment of an independent or impartial body, the judgment of a randomly chosen body of persons, the judgment of a representative body of persons, or the judgment by twelve clones of the accused? Towards which of these images is confidence directed?

Faced with a fairly strong and uncontested ideological base for the jury which is so significantly endorsed by the community, reformers might fear that their options for reform might be somewhat constrained. I would argue not so. In fact any number of reform directions might be made all the more acceptable and achievable so long as they are argued for as consistently supporting the accepted ideology.

As Peter Duff and I have argued in our recent unpublished paper, 'The English Jury and Due Process', the rhetoric surrounding reform challenges to the jury consists largely of claims that disputed territory is really common ground. Both for those reformers who principally hold crime control values, and those who are more concerned with the preservation of due process, the contest is over whose reform direction best colonises the common ground.

In order to substantiate this point, and draw my commentary back to the specifics of what have been put forward by the previous three speakers I propose to look at several of the central ideological premises on which the jury is said to be built, and to look at the different lines of argument and forms of reform direction which are supposed to ensure that:

i) the jury is the best finder of fact in the trial process

ii) the jury adds certainty to the law

iii) the jury presents a 'just face' for the trial process

iv) the jury is a mechanism for lay participation and the representation of the community conscience

These four are the central ideological presumptions that Duff and I identified in our article entitled 'The Jury in England: Practice and Ideology (1982).

THE JURY, LAY PARTICIPATION AND THE REPRESENTATION OF COMMUNITY CONSCIENCES.

As I said yesterday, in open discussion, the decision that community involvement in the justice process is a good thing, is a political decision as much as anything else. In fact it is in keeping with Bankowski and Mungham's (1976) challenging assessment of the jury that 'the function of the jury is ideological' and Baldwin and McConville's observation that:

> It is clear that arguments about the retention or abolition of the jury are at base, political in nature. The particular value of empirical research is that it may provide a better understanding of the circumstances in which lawyers and juries will differ. If it does that, it will at least impel the disputants to make more explicit the philosophical and political assumptions on which they found their beliefs (1979, 19).

I would suggest that the substance of concern about lay participation revolves around issues such as independence, impartiality and representativeness. (In passing it is worth noting that these ideological concerns may in fact be somewhat mutually inconsistent. It is therefore difficult as Paul Byrne says, to advance them as of similar import.) Consider the proposition that a representative jury may well be partial, and an independent jury may well not be representative.

The protection of impartiality and representativeness might be explored at the level of jury selection. Here recommendations regarding the extension of jury franchise, the extension of exclusions, the restriction of challenges, and the consideration of vetting may all be relevant.

But arguments for or against any of these may not be consistent. For instance, with respect to vetting, proponents and critics all argue that their position better ensures representativeness and independence. The English position is that vetting overcomes juror 'nobbling' and bias, whereas the N.S.W.L.R.C. argue that vetting works against the concept of random selection. Interestingly then, while admitting that the challenge system may also go against randomness and impartiality, the N.S.W.L.R.C. accepts a continuation of the challenge system in a somewhat reduced form. Perhaps this recognises the view that both the crown and the defence actively promote a partial or biased jury, or at least one which might be representative of their view. (This could be the only justification for the practice of allowing more challenges for murder charges.) Also, the challenge system, as Jocelynne Scutt implies, obviously works against the representation of the male, middle class and 'middle minded' view.

As to independence, some would argue that the very arbitrariness and prejudice evidenced by juries in certain celebrated cases (which a variety of reform proposals may be designed to overcome) is in fact evidence of its independence. The very unpredictability of the institution is said to ensure this. The argument in favour of special or expert juries (which after all are only examples of sophisticated vetting) might revolve around considerations of greater efficiency and certainty, but depending on the perspective of the arguer, they are usually proposed as being more likely to return the type of verdict which that party wants.

Proposals to expand jury franchise such as those proposed by the N.S.W.L.R.C. and to change the rules governing jury disqualification may be couched in a concern for fairness, efficiency and justice, but what do they mean for random selection and representativeness?

These two aspirations may work against one another by leading to an expansion or contraction of the significance of the jury respectively.

IDEOLOGY OF CERTAINTY AND PREFERRED FACT FINDER

The arguments voiced in support of jury secrecy and the retention or abolition of the majority verdict are seen as motivated by a desire to enhance the jury's fact finding potential or ensure greater certainty. The latter also attempts to overcome public trial rather than the court based monopoly over such trial.

Yet one could argue that an absolute, incontrovertible and silent verdict does as much to confuse the appreciation of the dynamics of the verdict process, as it does to ensure public confidence in the certainty of the law. Hence, the balancing act required when looking at juror disclosure and contempt is, certainty versus public interest.

On the unanimous versus majority verdict debate, it is worthwhile reflecting on the separate arguments referred to in the N.S.W. L.R.C. (1986) report at pages 143 and 151. I would suggest that while being somewhat similar in substance, they lead to quite different reform proposals.

There is also the issue of conflicting objectives which is well evidenced in the debate over jury secrecy and the incontrovertible verdict. Are we to go for certainty, the appearance of unanimity, the recognition of juror diversity, or public accountability?

FACT FINDER

As for the jury's dominion over the finding of fact, there are a great variety of recommendations concerning juror comprehension, the rules of evidence, the judge's direction etc. which are put forward against one another, in support of this aim. These are attempts to deal with problems associated with the functional reality of the jury as constrained from the start by the artificial rigidity of the 'fact/law' distinction.

THE JUST FACE OF THE JURY

Finally, all the mechanisms proposed to minimise jurors' waywardness and unpredictability and in fact limit their ability to ignore repugnant laws, may militate against this. Are we anxious to make the communion of peers little more than twelve versions of the trial judge?

As was stated by Baldwin and McConville:

> So although serious criticism may be levelled against the jury on the grounds of arbitrariness, prejudice and the like, one may nevertheless state with confidence that the very unpredictability of the institution is the surest evidence of its genuine independence (Baldwin and McConville, 1979, 131).

CONCLUSION

While certain law reform proposals may appear contradictory this may be a natural consequence of the internal contradictions within the ideology of the jury, and between this ideology and the reality of the jury's function.

Generally both critics and proponents of the jury alike, absorb and absolve the failure of the jury, in both an ideological and functional sense, too simply on the basis of a dichotomy between the administration of justice and the rule of law.

They argue over the apparent irreconcilability of the ideology and function of the jury as if it were a contradiction in logic. Yet such a dichotomy is only as real as the paradoxes on which all aspects of criminal justice are based. How else could one explain the perpetuation of the jury as common ground?

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UNIFORM JURY INSTRUCTIONS

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Uniform jury instructions are commonplace in the United States and while this may be reason enough for Australians to view the concept sceptically, the experience gained in the creation and use of these uniform instructions in the various jurisdictions may prove to be of some value as Australian courts experiment with such instructions. Experiments are currently under way in three states: Western Australia has been using the forty-one specimen directions issued by the Judicial Studies Board in England; in New South Wales a committee of Supreme Court and District Court judges has drafted some initial standard jury instructions; and in Victoria the Victorian Law Foundation has begun a project to develop standard jury instructions.

This article will discuss the strengths and weaknesses of uniform instructions, describe the procedures for their creation and use, and provide specific examples from the California Jury Instructions - Criminal [CALJIC] (1986)., some of which are reproduced in the Appendix.

STRENGTHS

The obvious strength of uniform instructions is uniformity. Similar cases will be subject to the same legal direction. Similar issues which occur in otherwise differing cases will be subject to the same legal direction.

In addition to uniformity, the use of prepared uniform instructions decreases the chance of reversal for misdirection. In a foreword to the third edition of CALJIC in 1970, which was directed to the California bench and bar, the then Chief Justice of the California Supreme Court noted:

> California Jury Instructions - Criminal, ... for many years have filled a vital need in criminal jury trials. Moreover, their use has reduced the causes for appeal and thus lessened the load of the Supreme Court and Courts of Appeal. More importantly, they have decreased the number of new trials necessitated by reversals due to erroneous jury instructions.

The third main value is that the preparation process for creation of the instructions produces a better instruction than could reasonably be expected from even the most careful deliberations of a single judge performing the task.

SPECIFIC EXAMPLES

Jury instructions in most jurisdictions are assembled in book form. Some of these are bound volumes, such as the California Jury Instructions some of which are reproduced in the Appendix to this article. Where the instructions are bound, they are usually supplemented with periodic pocket parts. Other jury instruction books such as the Oregon Uniform Jury Instructions are issued in loose-leaf form. Where they are in loose-leaf form, revisions are issued which take the place of the prior instruction.

Within the book, instructions are generally grouped by broad categories, much as chapters in a narrative book. CALJIC 2.80 on expert testimony appears under the specific chapter heading 'Evidence and Guides for its Consideration', and is an illustration of the general category of how jurors are advised to approach their task. It includes instructions on topics such as the presumption of innocence and the burden of proof and is reproduced in the Appendix. Contrary to the Australian rule of not elaborating on the notion of proof beyond a reasonable doubt (Dawson v. R (1961) 106 CLR 1, per Dixon CJ; Green v. R., (1971) 126 CLR 28), courts in the United States usually provide a definition of the term (e.g. CALJIC 2.90). The chapter also provides guides for the evaluation of witnesses with instructions covering credibility of witnesses (see CALJIC 2.20 in Appendix), wilful false testimony, conflicting testimony when a witness has been convicted of a felony, character evidence, and the claim of a privilege by a witness. And it includes guidance on general credibility factors including demeanour of a witness, capacity of a witness to perceive, recollect or communicate, character for honesty or veracity 'or their opposites', bias, interest, motive, prior inconsistent or prior consistent statement, an admission of untruthfulness, and the witness's attitude toward the giving of testimony.

Likewise, CALJIC 14.50 defining the crime of burglary illustrates the way in which specific crimes are defined in the uniform instructions. Similar definitions are included for all crimes which might be tried before a jury. United States Supreme Court decisions interpreting the constitutional guarantee of a jury trial in criminal matters have limited summary jurisdiction to cases in which the risk of imprisonment is for no greater than six months (Baldwin v. New York, 399 US 66, to S.Ct. 1886 (1970)). Thus jury trial is available in many cases tried summarily in Australia. The definitional chapters in the uniform jury instruction books are therefore quite large. A third example is the section on defenses, illustrated by CALJIC 4.50 through 5.30 which are reproduced in the Appendix.

It should be noted that these uniform jury instructions are secondary authority, and thus are not binding. However, because of the process of preparation they are very likely to be accepted as authoritative. The 'Use Note' and 'Comment' which follow most instructions shows the sources of the instruction. Thus, the comment to CALJIC 2.80 cites statutory authority, treatises and

an appellate case. The use note adds a guide for the trial judge reminding him or her that the instruction should be given sua aponte whenever an expert has given an opinion.

The use notes and comments to, for instance, CALJIC 2.80, 5.50 to 5.54 and 14.51 to 14.58 are fairly short and to the point, those accompanying CALJIC 14.50 and other instructions may require extensive and detailed comments and use notes. These include CALJIC 2.50 (Evidence of Other Offenses); CALJIC 2.60 (Defendant Not Testifying - No Inference of Guilt May Be Drawn); CALJIC 2.62 (Defendant Testifying - When Adverse Inference May Be Drawn.)

CALJIC 14.50 provides an illustration of drafting instructions in the alternative, employing brackets for the different options (see Appendix). This instruction also leaves blanks to be filled in by the trial judges as required by the specific case. The use note guides the judge in selecting among bracketed portions and completing the blank. The use note also directs the judge to a different instruction when the burglary involves entering a motor vehicle.

The self-defence instructions illustrate the way in which the uniform instructions have been drafted so as to anticipate the various situations which might arise in a self-defence situation. The trial judge should select the appropriate instruction and include it with the rest of the instruction. The result will be the inclusion or exclusion of a particular paragraph in the judge's total summing up to the jury.

PROCEDURES

One of the strengths of uniform jury instructions is that they are compiled through a collaborative process. Each jurisdiction has its own format, but generally there is a committee which includes trial judges at all levels of jurisdiction, and practicing lawyers from both the prosecution and defence sides. Some states also include appellate judges on their committee.

The committee reviews all relevant authority, any existing instructions in the state, comparable instructions from other states, and the standard from which may have come into common use. Then draft instructions are prepared and circulated (generally in large lots, chapter by chapter). These drafts are revised in sub-committee and full committee, approved and published. The final instruction benefits from this group deliberation and is likely to be an accurate unbiased statement of the appropriate law for the jury's guidance. As years pass, this process is repeated to take account of new developments in the law, and the committee considers the experience of use under the prior instruction. Thus, the instructions become better and more refined as years go by.

The usual practice in United States' courts is for counsel on either side of the case to submit proposed jury instructions either at the beginning of the case or at the close of all the evidence. These proposals are developed either by preparing draft instructions from the uniform book and submitting them in final textual form, or by requesting standard instructions by number, leaving it to the judge to actually assemble the text from the uniform jury instruction book. In California the most common instructions are printed on separate pages and are available to both the judge and counsel. At the close of all the evidence - but before the closing addresses to the jury - the judge will hold a conference with all counsel to discuss the proposed instructions. This conference may be in open court with the jury excused, or may be in chambers. It is common for the conference to be recorded contemporaneously by the court reporter, but this is not necessary so long as the results and any objections are recorded at the end of the conference. At this conference the judge will consider the proposed instructions, hear submissions from counsel in the event of a conflict, and decide which instructions to give. The ultimate responsibility for giving correct instructions remains with the judge, but in many situations the failure of a party to request a particular instruction will be fatal to an appeal from the failure to so instruct.

The value of this jury instruction conference is twofold. First, the judge is unlikely to give an incorrect instruction if he or she has heard from both parties in advance of the instructions. Exceptions to the proposed instructions will be made and recorded either at the time of the conference or immediately upon the conclusion of the instructions and the retirement of the jury. Some jurisdictions do have a statutory requirement that counsel take formal exception to the summation at the conclusion the judges' summing up. Failure to do so may result in waiver of the issue on appeal. Under this procedure the only time the judge should have to recall the jury and re-instruct or correct an instruction is the rare circumstance in which the judge has changed his or her mind between the time of the conference and the submission of the case to the jury.

Second, the settling of the instructions before the closing addresses to the jury improves the quality of the addresses, particularly in that respective counsel will know precisely which matters are going to be covered in the summation, and the form of words to be employed by the trial judge.

A related point comes from publication of the uniform instructions for the entire legal community. Not only will counsel know at the end of the evidence precisely which instructions will be given by the trial judge, but they will also know the form of words that the judge will use in describing the law on a particular point as they prepare and present their case.

This advance knowledge allows the counsel to focus their case presentation, as well as their closing argument. In my judgment, this improves the quality of advocacy throughout.

The New South Wales Law Reform Commission (1986) conducted a survey of judges and found that approximately two-thirds of the judges responding felt that pattern jury instructions would aid the jury, and approximately three-quarters felt that they would aid the judge. No survey has been conducted of lawyers, but my guess would be that nine-tenths of lawyers would express the opinion that the existence of a uniform jury instruction book is a great aid to the lawyers.

The breakdown of the instructions in a point by point way and the use notes and comments which follow the instructions are a useful research aid when commencing the case. This is valuable for both the judge and counsel, particularly when facing an infrequent crime or an unusual trial situation.

WEAKNESSES

The instructions included in the Appendix are representative of uniform jury instructions throughout the United States. Although some attempts have been made to simplify instructions and write them in 'plain English', the law is not always capable of accurate simplification as noted locally by Potas and Rickwood (1984). Since appellant decisions generally approve jury instructions which follow the language of the relevant statute, there is a great temptation to draft uniform instructions in the same language that the legislature used in defining the crime, defence or rule of evidence. With the greatest of respect, statutory language is rarely in 'plain English'. This is a weakness in the uniform instructions.

The other main weakness of the uniform instructions in the United States is that they are so thorough and complete that a judge could properly instruct a jury without deviating one word from the uniform instruction. This is useful in avoiding error in instructions, but the price paid is the failure to personalise the instructions to the case before the jury.

This failure to personalise to the particular case is not accidental. Generally, judges in the United States are more restrained in their comments on the evidence than are judges in Australia. In a number of states the constitution of the state forbids judges from commenting on the evidence. Where comment is allowed, the judge is generally required to confine his or her comments to a particular place in the summing up, clearly draw the jurors' attention to the fact, and inform the jury that his or her comments are not binding on them.

This limitation is foreign to Australian jurisprudence and can be easily corrected to suit local conditions. Uniform jury instructions would be particularly helpful to Australian judges in complex areas such as joint trials, unsworn statements by the accused, lesser included offences, and complicated definitions of crime. Such instructions would avoid reversible error, ease the burden on the trial judge at the conclusion of the trial, and ensure greater uniformity. But they need not be as complete as the uniform instructions described in this article; the trial judge could weave them together with appropriate comments concerning the case before the jury, thereby injecting the personal features of the case on trial which is unfortunately lacking in most trials in the United States.

CONCLUSION

Uniform jury instructions have reached a level of detail and sophistication in many jurisdictions in the United States which makes the task of the judge and counsel much easier, improves the accuracy of instructions given in cases, and ensures greater uniformity in treatment of cases and issues. In the process such uniform instructions run the risk of being too 'legalistic' for ready juror comprehension and of being too abstract to bear ready relationship to the pending case.

Taking these factors into account, the experience gained, both in substance and in the procedure, may be of some guidance as various Australian courts strive to make the task of summing up more uniform and easier, while retaining the traditional role of the judge to comment on the evidence and to relate the law to the facts of the particular case on trial. Finally, the quality of advocacy may be improved by advance knowledge of the form of words to be used by the trial judge for many of the issues which will arise in a trial.

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APPENDIX

The following are examples of the California Jury Instructions, Criminal, extracted with acknowledgement from West Publishing Company's Fourth Revised Edition (1979) and Cumulative Pocket Part (1986).

CALJIC 2.20 (1980 Revision)

CREDIBILITY OF WITNESS

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

[A statement previously made by the witness that is [consistent] [or] [inconsistent] with the testimony of the witness;]

[The character of the witness for honesty or truthfulness or their opposites;]

[An admission by the witness of untruthfulness;]

[The witness' prior conviction of a felony.]

USE NOTE

Any of the paragraphs not applicable under the evidence should be stricken.

Jurors must be instructed sua sponte that they are the exclusive judges of the credibility of the witnesses. Penal Code, § 1127.

The substance of this instruction must be given sua sponte in every criminal case, omitting those paragraphs inapplicable under the evidence. The paragraph as to the "existence or nonexistence of a bias, interest, or other motive" and the paragraph as to the attitude of the witness "toward the action in which he testifies, etc.," should be given in any case in which the victim of an alleged offense has testified for the prosecution, regardless of whether specific evidence of any motive or disposition to misstate facts on the part of the complaining witness has been adduced by the defendant. People v. Rincon-Pineda, 14 Cal.3d 864, 123 Cal.Rptr. 119, 538 P.2d 247.

Impeachment of a witness generally, see Fricke-Alarcon, Calif. Crim.Evid. (8th ed.), pp. 229–260.

COMMENT

Evid.Code, § 312; Penal Code, § 1127.

Witkin, Calif.Evid. (2d ed.), §§ 1109–1116; Jefferson, Calif.Evid. Benchbook, §§ 28.2-28.4, 28.8.

This instruction catalogs the matters affecting credibility as set forth in Evid.Code, §§ 780 and 788.

Prior inconsistent statements are not admissible as substantive evidence under Evidence Code, § 1235 for lack of cross-examination under California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489, on remand 3 Cal.3d 981, 92 Cal.Rptr. 494, 479 P.2d 998, where the declarant takes the stand but refuses to admit, deny or qualify his previous statements. People v. Woodberry, 10 Cal.App.3d 695, 89 Cal.Rptr. 330.

Evidence of prior arrests of a witness cannot be used for impeachment to prove his bias under Evid.Code, § 780(f) against peace officers. Grudt v. City of Los Angeles, 2 Cal.3d 575, 86 Cal. Rptr. 465, 468 P.2d 825.

Under proper circumstances and upon request the defendant is entitled to an instruction relating to the credibility of a witness by considering whether the witness is under the influence of alcohol or drugs while testifying. People v. Barnett, 54 Cal.App.3d 1046, 127 Cal.Rptr. 88.

Deletion of provision re inconsistent statement is error if there is any evidence of an inconsistent statement by a witness.

People v. Galloway, 100 Cal.App.3d 551, 160 Cal.Rptr. 914.

CALJIC 2.20 and 2.27 adequately alerts the jury to examine and view an informer's testimony in the light of bias, interest or other motive that may be demonstrated by the evidence, and it is not necessary to give an instruction that testimony of a paid informer should be viewed with suspicion. People v. Castro, 99 Cal.App.3d 191, 160 Cal.Rptr. 156.

Former CALJIC 2.91 and CALJIC 2.20 (1980 Revision) "are not alone sufficient to render the failure to give requested instruction linking reasonable doubt to identification harmless error." People v. Brown, 152 Cal.App.3d 674, 199 Cal.Rptr. 680.

CALJIC 2.80

EXPERT TESTIMONY

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

[In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.]

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

USE NOTE

When the opinion of any expert witness has been received in evidence, this instruction must be given sua sponte. Penal Code, § 1127b; People v. Bowens, 229 Cal.App.2d 690, 40 Cal.Rptr. 435; People v. Ruiz, 11 Cal.App.3d 852, 90 Cal.Rptr. 110.

COMMENT

Penal Code, § 1127b; Evid.Code, § 720; Witkin, Calif.Evid. (2d ed.), §§ 406–424; Fricke-Alarcon, Cal.Crim.Evid. (8th ed.), pp. 191–209; People v. Wolff, 61 Cal.2d 795, 40 Cal.Rptr. 271, 394 P.2d 959.

Library References:

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CALJIC 4.50 (1979 Revision)

ALIBI

The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.

USE NOTE

This instruction is designed for use where the only theory of the prosecution is that defendant was present at the commission of the crime and defendant's evidence of an alibi is admitted. If the prosecution theory is either that the defendant was present or, if not present, that he was an aider and abettor or a conspirator and evidence of an alibi is admitted, Instruction 4.51 should also be given.

Alibi instruction is not required to be given sua sponte. People v. Freeman, 22 Cal.3d 484, 149 Cal.Rptr. 396, 584 P.2d 533.

COMMENT

The function of evidence relating to alibi is not to establish a defense nor to prove anything, but merely to raise a reasonable doubt of the defendant's presence at the scene of the crime. In re Corey, 230 Cal.App.2d 813, 41 Cal.Rptr. 379; People v. Williamson, 168 Cal.App.2d 735, 336 P.2d 214; People v. Lewis, 81 Cal.App.2d 119, 183 P.2d 271.

Library References:

West's Key No. Digests, Criminal Law ⇐31, 775(3).

CALJIC 5.30

SELF-DEFENSE AGAINST ASSAULT

It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary, and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

COMMENT

Penal Code, §§ 692, 693; 1 Witkin, Calif.Crimes, §§ 159–161, 163; Fricke-Alarcon, Calif.Crim.Law (11th ed.), pp. 197–198; People v. Holt, 25 Cal.2d 59, 153 P.2d 21.

Similar instruction given and approved in People v. Hughes, 107 Cal.App.2d 487, 237 P.2d 64.

Similar instruction held a correct statement of the law in Bartosh v. Banning, 251 Cal.App.2d 378, 59 Cal.Rptr. 382.

Person assailed may rely on apparent existence of danger. People v. Jackson, 233 Cal.App.2d 639, 43 Cal.Rptr. 817.

Library References:

West's Key No. Digests, Assault and Battery ⇐67, 96(3); Homicide ⇐300(2, 3).

CALJIC 14.50 (1981 Revision)

BURGLARY—DEFINED

[Defendant is charged in [Count _____ of] the information, with the commission of the crime of burglary, a violation of Section 459 of the Penal Code.]

Every person who enters [any structure of the type shown by the evidence in this case] [any _____], [with the specific intent to steal, take and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of such property] [or] [with the specific intent to commit _____, a felony], is guilty of the crime of burglary.

It is immaterial whether the intent with which the entry was made was thereafter carried out.

In order to prove the commission of the crime of burglary, each of the following elements must be proved:

1. That a person entered a _____,

[2. That at the time of the entry, such person had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of such property.]

[2. That at the time of the entry, such person had the specific intent to commit the crime of _____.]

USE NOTE

The specific felonies, other than theft, which the jury could infer that defendant intended to commit, must be stated in the instruction and other instructions must be given defining each such felony. People v. Failla, 64 Cal.2d 560, 51 Cal.Rptr. 103, 414 P.2d 39.

See Instruction 14.58 (1979 Revision) for definition of burglary in entering motor vehicle.

Use second bracket only when specifically naming kind of structure or place entered.

COMMENT

(Penal Code, § 459)

A general list of structures and places which may be the subject of burglary is found in Sec. 459. For more detailed discussion, see 1 Witkin, Calif.Crimes, § 455; Fricke-Alarcon, Calif.Crim.Law (11th ed.) pp. 321–322.

As to what constitutes "entry", see 1 Witkin, op. cit. §§ 456–457; Fricke-Alarcon, op. cit. pp. 319–321.

As to specific intent required, see 1 Witkin, op. cit. §§ 458–460; Fricke-Alarcon, op. cit. pp. 316–319.

Entry into a building with intent to steal from an adjoining shed which is physically attached is burglary even though shed is not a structure within Penal Code, § 459. People v. Wright, 206 Cal.App. 2d 184, 23 Cal.Rptr. 734. See also In re Christopher Lee J., 102 Cal. App.3d 76, 162 Cal.Rptr. 147.

Even though entry into a building is lawful, it is burglary to enter an inner door with intent to commit a felony. People v. Davis, 175 Cal.App.2d 365, 346 P.2d 248.

A defendant may not be convicted of burglarizing his own home even though his entry is for a felonious purpose. People v. Gauze, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365. Nor may he or his agent acting under his direction be convicted of burglarizing his own store. People v. Thomas, 74 Cal.App.3d 320, 141 Cal.Rptr. 340.

Gauze did not overrule existing authority upholding burglary convictions in which there was consensual entry. A person "may be guilty of burglary even if he enters with consent provided he does not have an unconditional possessory right to enter." People v. Pendleton, 25 Cal.3d 371, 382, 158 Cal.Rptr. 343, 349.

Entry of dwelling without consent is not a lesser and necessarily included offense. People v. Lohbauer, 29 Cal.3d 364, 173 Cal.Rptr. 453; People v. Yoder, 100 Cal.App.3d 333, 340, 161 Cal.Rptr. 35, 39.

A defendant may be guilty of burglary where he enters the lobby of an apartment building with intent to burglarize an apartment. People v. Nunley, 168 Cal.App.3d 225, 214 Cal.Rptr. 82.

INSTRUCTING THE JURY

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About 18 months ago an article by Rod Campbell, entitled 'Inside the Jury' was published in the Canberra Times. It was a typical article which dealt with jurors' experiences in the jury room. It concerned the longest running criminal trial dealt with by the ACT Supreme Court during 1984. The case ran for almost 3 months and the transcript was 6,000 pages in length. The article describes such things as the poor facilities provided for jurors, hard benches, cramped claustrophobic facilities and unsatisfactory hostel food. Other issues canvassed included, the awkwardness of selecting a jury foreman, the jurors' opinions concerning the performance of the key participants in the trial, the emotional strain of a long drawn out trial and the trauma or pain in the process of finally reaching a verdict.

Campbell reports that the jurors had little notion as to what was expected of them particularly during the early part of the proceedings. Indeed one juror felt that the most 'criminal looking bloke', who was definitely guilty, turned out to be one of the court interpreters. As the trial was a long one the trial judge had indicated that it was a good idea for them to take notes because of the volume of evidence. In fact it was reported that three jurors had taken notes and these were found to be particularly valuable at a much later stage of the proceedings although they had not appreciated that fact at the beginning of the trial. The juror interviewed commented that it would have been very useful if the jury had access to the transcripts of the proceedings which were available to the judge, counsel and the press each day. Even a summary of the transcripts would have been appreciated.

The actual experience of serving on the jury was described by this juror as primitive.

> It was not unlike any group of people forced together 'but under a pressure-cooker situation ..' You can't walk out the door and cool down. You're in a place about the size of a gent's dunny.
>
> The jury room appeared to have 'come out of the Endeavour' it was abysmal that people should be confined in that sort of environment. It should have been built on the outside of the building and there

> should be a window, even if it was only one way. I think the idea of having the toilets about 3 feet away from the rest of the jurors makes it very embarrassing for a lot of people, he said. It was just so primitive.
>
> You're dragged in there, you've no idea why you're there, barring that you know you're going to be on a jury, maybe. You don't know what your rights are, you don't know the way of doing things, what you're allowed to do and what you can get others to do for you.

It is broadly in this context that we must consider the problem of assisting members of the jury to carry out the task for which they are selected. Given the discomfort and the confusion thus described it is little wonder that many fear or seek to shirk the responsibility of jury service. It is these very same issues also that lend support for the call to cut down upon the use of juries, and it is pleasing to see that the Law Reform Commissions of both NSW and Victoria have recognised these defficiencies and are proposing appropriate reforms (Law Reform Commision of Victoria, 1985; New South Wales Law Reform Commission, 1985). It is in my view that many of the criticisms relating to the jury could and should be remedied, so that the jury can remain central to the administration of criminal justice in this country.

Despite criticims of these kinds, there is no doubt in my mind that the jury is both a workable and worthwhile institution, for as Dean J put it in Kingswell (1986 60 ALJR 17).

> The institution of trial by a jury [also] serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberatative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the

> accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passion of the mob (1986 60 ALJR 257).

Complex Cases

From time to time suggestions have been made of restricting the use of juries in complex cases. Of course if recommendations following the Roskill Committee's report were to be followed in this country, and the use of juries in complicated serious fraud cases were to be abandoned, the trial judge would not need to sum up at the conclusion of the case, but rather would proceed to deliver a reasoned judgment in explanation of his findings (1986 60 ALJ 193, 194). This would greatly simplify the judges task and so would do away with misdirections on matters of law or fact that currently form the basic ground of many appeals from jury verdicts. However I would join professor Harding in his remarks concerning the dumping of the jury system, and his criticism of the Roskill Committee report in that first it must be established that the jury system is failing. The evidence is simply not there to establish first, that the jury system cannot cope with complicated trials, and secondly, that it cannot be improved or modified in such a way as to reduce the general criticisms that have been aired of late (see generally Harding, 1986, 'Jury Performance in Complex Cases', presented earlier at this conference).

Understanding the Language

It is trite, yet fundamental that members of the jury should understand the evidence which they are called upon to consider, and further that they should understand the judge's instructions on the law. If the judge misdirects the jury in a material particular, then the jury will be misled. Conversely, if the judge's summing up is legally correct, yet, owing to its prolixity or technical nature, it may not be properly understood and therefore applied by the jury. Such errors may lead to incorrect verdicts which, if detected, can be identified by an appellate court. If they are not detected there is a possibility of a miscarriage of justice.

Concern over this problem has led members of the NSW judiciary, and now also I understand the Victorian Law Foundation to consider whether the production of standard jury directions would assist in reducing the incidence of appeals brought about by misdirections. Certainly both the Victorian and New South Wales Law Reform Commissions have adverted to this issue (Victorian Law Reform Commission, 1985, 182 and New South Wales Law Reform Commission 1985, para 6.27, 6.28). In both jurisdictions there is research currently undertaken or in contemplation to find the most easily understood manner of conveying to jurors the matters

which are important in assisting them to reach a true verdict (Victorian Law Reform Commission, 1985, 182).

In recognition of the need to simplify legal language the Chief Justice of New South Wales set up a small Committee of senior judges, two from the Supreme Court and two from the District Court to look into the matter. This Institute also offerred some assistance to this committee as it set about considering the virtues of producing a set of standard jury instructions. In fact this Committee did draft some instructions which it believed fitted the bill of being both legally accurate and being expressed in simple or plain English. These draft directions, which have never been published and have no official status covered the following areas:

Reckless indifference - in murder
Self-Defence (standard ordinary case where one party obviously aggressor. See separate direction for cases of murder)
Good Character
Larceny
Common Purpose
Desirability of Jury Agreeing on a Verdict
Circumstantial Evidence
Corroboration
Statement from the Dock
Onus of Proof
Attempt
Duress
Lies
Identification
Conspiracy
Previous Inconsistent statement
Intoxication - specific intent
Alibi
Self-Defence - in murder
Provocation

At the outset it was quite clear that it would not always be possible to express complex concepts in simple terms. There were boundaries beyond which it was not possible to go, given that the instructions had to be legally accurate, and the judges were there to ensure that they did conform to the law.

Once the instructions had been drafted I, with the assistance of a psychologist, Ms Debra Rickwood, set about to measure the extent to which ordinary people could understand and apply the jury instructions. Our findings are now published by this Institute in a study entitled Do Juries Understand? (Potas and Rickwood, 1984), and accordingly it is proposed to provide only a broad overview of the methodology here.

Suffice it to say that the study was undertaken in the tradition of 'mock jury' research (see generally Law Reform Commission of Victoria, 1985 Chapter 4). A fictitious case was devised incorporating a large selection of the drafted jury instructions. These were presented to groups of young people in the form of a judge's summing up in relation to a hypothetical murder robbery case involving three accused. The subjects were asked to place themselves into the position of jurors and subsequently were asked a series of multiple choice questions so that we could guage their understanding of the concepts employed.

The experimental groups consisted of a total of 128 Stirling College students. In addition a group of 15 Canberra College of Advanced Education students were also tested. The control group, which consisted of 24 people, were read the facts of the case but were not given the jury instructions at all.

It did not surprise us to find that the Canberra College of Advanced Education students understood the instructions better than the younger, less experienced Stirling College students. However, the majority of Stirling College students also understood the instructions reasonably well although it was also found that a minority exhibited very poor understanding indeed (Potas and Rickwood, 1984, 45).

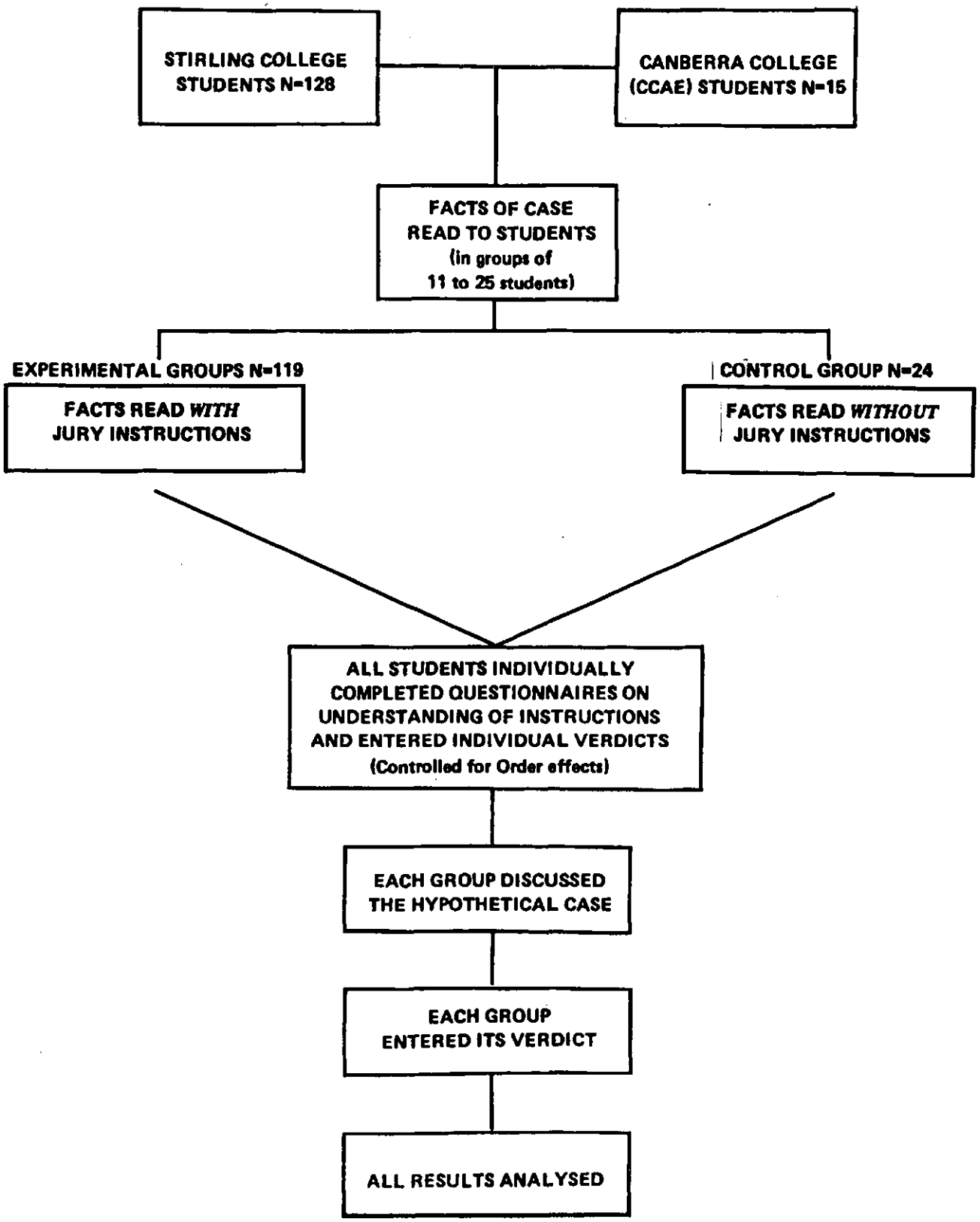
An unexpected finding was that the control group, that is, the group which did not hear the instructions, did not differ significantly on any of the measures of understanding, comprehension or applicability from those students who received the instructions. However, the control group did differ in one respect - they were less severe in their individual verdicts - that is they were less likely to find the offenders in the hypothetical case guilty of the principal charge for which each was tried.

Figure 1 (over page) describes the procedure that we followed.

An anticipated finding was that some instructions were less well understood that others. Thus, the draft instructions relating to common purpose and self-defence as presented in our hypothetical robbery murder case were significantly less well understood than directions relating to good character, identification, provocation and alibi (Potas and Rickwood, 1984, 50).

We were at pains to point out some of the limitations of our study. The majority of students were aged in the 17 to 18 year bracket, and thus were not a truely representative sample of jurors. The Canberra College of Advanced Education students were closer in age to a typical sample of jurors but were probably better educated. Women were also probably over-represented in our sample.

Figure 1
EXPERIMENTAL DESIGN



Furthermore, a criticism applying to all mock jury trials, was that the testing environment was artificial. Our study did not attempt to replicate witness testimony, and so the subjects did not have the advantaged of hearing and seeing the witnesses. The availability of body language cues, an essential part of normal communication processes were therefore lacking, except insofar as those cues could have been picked up by the presenter of the summing up used in our experiment.

We had difficulty in explaining why it was that the control group seemed to score as well as the experimental groups. We attempted to explain this by suggesting that most people have an intuitive knowledge of the law. Much is learned via the press, particularly the electronic news media, and by court room dramas, whether real or fictional. Thus, most people have a baseline understanding of legal terms and concepts. A further possible explanation for the degree of concordance between the two groups may be that the legal concepts themselves are attuned to ordinary notions of fairness and morality so that, whether instructions are given or not, similar responses are invited once the factual circumstances of the offence have been presented.

We also canvassed the possibility that our methodology was to blame for this surprising outcome. However, I note that other studies have encountered similar problems. Thus, one group of researchers, in the course of reviewing empirical studies of linguistic difficulties experienced by jurors noted as follows:

> Recent social science research suggests that juror's difficulties in understanding instructions on the law are considerable and widespread. Strawn and Buchanan assessed juror comprehension of oral criminal pattern instructions used in Florida by compairing the understanding of subject-jurors who received instructions to that of a comparable group of subjects that did not receive instructions. They found that although the instructions helped to some extent, the instructed jurors still missed 27 per cent of the test items and failed to show any improved comprehension for four of nine crucial content areas addressed by the instructions. Elwork, Sales and Alfini studies Michigan civil pattern instructions on the law of negligence and found no reliable differences between a group receiving no instructions and a group receiving the pattern instructions. More recently, on the basis of further extensive testing, these researchers concluded that prior to deliberating on a defendant's guilt or innocence, the average juror may understand only about half of the legal instructions presented by the judge. From this they concluded that many verdicts in criminal jury trials reflect misunderstandings of the juror's role in the process and of what the law required.

> These data corroborate the subjective impressions of the judges and commentators. One Oregan trial judge states, for example,'When I read instructions to the jury, I hope that I will see a light go on in the juror's eyes, but I never do' (Severance, Green, and Loftus, 1984, 202).

The authors of the previous quote have indeed undertaken quite sophisticated research on pattern instructions, on revised instructions and on super-simplified instructions. They illustrate quite convincingly that improvements in communication can be achieved through persistent and long term research. Certainly there is a great need in this country to investigate the jury with the aim of improving its efficiency and its reliability and it is a source of some regret that juries have tended to be a closed shop to researchers. There is no doubt in my mind that if the jury system is to survive, it will have to be subjected to some form of empirical investigation and analysis. How else can improvements be made? Our humble efforts should be but a first step in that direction.

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INSIDE THE JURY

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INTRODUCTION

It goes without saying that in New South Wales, as elsewhere in the common law world, getting inside a jury from the outside is impossible to do, at least legally, while the jury is deliberating and a difficult move to achieve even after the jury is discharged and the jurors lose their character as such. An interest in how juries actually work led British and American researchers either to film actual deliberations or to interview jurors afterwards in several projects in the 1960s and 1970s. In both the United States and the United Kingdom these practices were soon stopped in one way or another and new methods focus on the mock jury, which is, for many reasons, far inferior.

In Australia we have always relied on former jurors 'speaking out' in one way or another. From time to time articles have appeared in journals or newspapers relating one juror's account of his or her experiences in an unidentified trial. More recently we have witnessed jurors giving such accounts to the media in identified and celebrated trials. These sorts of disclosures can highlight important problems in the jury system but they are hardly an accurate gauge of its overall operation. The New South Wales Law Reform Commission determined, early in 1985, on an empirical research programme to give it an overall picture of juries and jurors and the operation of the jury system. The full report of the results of that research will be published soon. In this paper I pose, and answer as well as I can, three questions.

1. Who are the jurors?

2. What assistance are they given?

3. How do they feel about their task?

METHODOLOGY

Before addressing those questions I should briefly describe the Commission's research method. A number of surveys were conducted and these are described in turn.

Survey of Jury Roll Compilation

The jury roll for each jury district is renewed at least every three years in New South Wales.

During 1985 jury rolls were renewed for 49 districts. From those renewed during the second half of the year, the Commission chose to examine the process of compiling the rolls for Penrith (an outer metropolitan district), Newcastle (a large city) and Dubbo, Cessnock, Bathurst and Lithgow (country districts).

These districts were chosen because together they represent a cross-section of New South Wales jury districts. In fact the rolls for Newcastle and Cessnock are compiled at the same time by the Sheriff and the Commission analysed the results together because of the small numbers in Cessnock. The same is true for Dubbo, Bathurst and Lithgow.

The current electoral roll for each electoral subdivision within the jury district is stored on a computer. When a jury roll is being renewed, a computer is used to randomly select the requisite number of names to form
a draft jury roll.

All people selected for a draft jury roll are sent a "Notification of Inclusion on a Draft Jury Roll". This Notification requires the recipient to advise the Sheriff if he or she is disqualified or ineligible for jury service, or wishes to claim an exemption as of right.

The first stage of our survey was designed to ascertain the numbers of people included on the draft roll who notified the Sheriff that they were disqualified, ineligible or exempt from jury service and the particular reasons for this. The collection of statistics on jury selection consisted of categorising notification sheets returned and counting the sheets in each category. Table 1 summarises the major findings of this survey.

Table 1

Jury Roll Compilation

	Penrith		Newcastle-Cessnock Lithgow		Dubbo-Bathurst-	
	n	%	n	%	n	%
Total Notifications	23605		20241		6608	
Total Returns	7044		7723		1861	
No longer qualified (1)	1384	19.6	1551	20.1	421	22.6
Disqualified (2)	276	3.9	207	2.7	52	2.8
Ineligible (3)	2164	30.7	2450	31.7	447	24.0
Exempt (4)	3145	44.6	3432	44.4	930	50.0
Unauthorised (5)	75	1.1	83	1.1	11	0.6

1. To qualify for jury service in New South Wales one must be resident in the jury district and qualified and enrolled to vote: Jury Act 1977 (NSW) ss5,12. The category of those no longer qualified includes those who are deceased, those who have moved out of the jury district and those whose Notifications were returned unclaimed.

2. Schedule 1 to the Jury Act 1977 (NSW) disqualifies for different periods people who have been convicted of offences and given sentences of imprisonment, recognizance to be of good behaviour, probation or driver's licence disqualification.

3. Schedule 2 to the Jury Act 1977 (NSW) lists 24 categories of people who are ineligible to be jurors. They include primarily people involved in the administration of justice (and their spouses in some cases), the chief emergency services, and people with poor English or who are ill.

4. Schedule 3 to the Jury Act 1977 (NSW) lists 17 categories of people entitled to claim an exemption from jury service. They may serve if they wish. Some professionals, the elderly and people having the care, custody and control of children are among those who are exempt as of right.

5. Apart from considering whether a person is qualified to be a juror in terms of section 5 of the Jury Act 1977 (NSW), the Sheriff has no discretion to delete people from the roll for reasons other than those listed in Schedules 1, 2 and 3. The unauthorised deletions recorded included:

   * Jehovah's Witnesses and other conscientious objectors;

   * past offenders no longer disqualified;

   * people expressing general bias; and

   * self-employed people.

Survey of Prospective Jurors

Once the Sheriff has certified a jury roll, it will supply jurors for the district for up to three years. In response to an order from a judge or registrar of a court to summon a specified number of jurors for a trial (called a jury precept), the Sheriff, using a computer again, selects the required number at random from the appropriate current jury roll. Each person selected is issued with a Jury Summons through the post requiring his or her attendance at a specified place, date and time. People so summoned may apply to the Sheriff, personally or in writing, to be excused from jury duty on that particular occasion. Those who do attend in response to a summons are "prospective jurors" who form a jury panel (or panels) from which the jury is chosen in open court.

The Commission surveyed prospective jurors by an anonymous and voluntary questionnaire administered when the prospective juror arrived at the court and before the empanelment procedure commenced. (Although in one case, the trial judge did not allow the 12 jurors empanelled for the trial to complete the questionnaire). The survey was conducted during two weeks in October 1985. All jury panels called on 21, 23, 28 and 30 October were included and all criminal sittings of the District and Supreme Courts in New South Wales were included. Prospective jurors were summoned to 16 District Courts and one Supreme Court in New South Wales during the survey period. Returns were received from 15 District Courts and the one Supreme Court. The survey forms did not arrive in time to be distributed at one remote country District Court.

The questionnaire was designed to elicit three main types of information. Firstly, it collected demographic information. Secondly, data on the attitudes of prospective jurors to their jury service was collected. Thirdly, factual data on financial loss and the need of jurors for information was recorded. A total of 1779 people responded, a response rate of 98.5%.

Survey of Jurors

With the agreement of the presiding judge, jurors who had just completed their jury service in criminal trials in New South Wales commencing between 30 September and 13 December 1985 were invited to answer an anonymous six-page questionnaire. The questionnaire asked demographic questions identical to those asked by the Survey of Prospective Jurors. Jurors were also asked about some of the practices adopted during the trial on which they had served, whether they understood the proceedings, whether they were inconvenienced, their attitude to juries generally and their suggestions for improvements. A total of 1834 jurors from 181 juries took part in this survey. Court administrators estimate that there were about 260 juries empanelled in the survey period.

Survey of Court Procedures

Judges' associates were asked to complete detailed information sheets on each criminal jury trial commenced in New South Wales between 30 September and 13 December 1985. The information sought can usefully be considered in four categories:

* Details of the trial, including the location of the court, the length of the trial, the jury selection process, the provision of documents and other materials to the jury, the questions asked by the jury.

* The accused, giving details with respect to each accused in each trial, namely sex, charge(s), use of peremptory challenges, and verdict(s).

* Personal applications by prospective jurors to the judge to be excused from jury service: the sex of each applicant, the reason put forward and whether the application was successful.

* The time taken, both as a total and as a proportion of the total length of each trial, on various stages including the Crown opening, any unsworn statement, jury absences and the jury's deliberations.

Of the estimated 260 criminal trials which commenced during the survey period, such a data sheet was completed and returned for 197 or three-quarters of all trials.

Survey of Judges

The Commission also sought direct information from judges about their practices in criminal jury trials and their attitudes to a range of proposals for reform. Judges' attitudes to the abilities of juries in complex cases were also sought. This information was gathered by means of an anonymous questionnaire distributed to 60 New South Wales Supreme Court and District Court judges in July 1985. A total of 42 judges (two-thirds of those invited) completed the questionnaire.

WHO SERVES ON JURIES?

Research conducted in 1974-75 showed that an overwhelming majority (93.5%) of jurors in New South Wales were males and that the number of middle-aged jurors significantly exceeded the proportion in the general community. (NSW Bureau of Crime Statistics and Research, 1975). The government acted to introduce new juries legislation early in 1977 with one aim being to make juries more representative.

When introducing the new Act the then Attorney General, the Hon Frank Walker QC MP, said:

> The jury system aims to provide the courts with a tribunal that is both impartial and representative of the ordinary citizen.

He articulated the philosophy underlying the new Act to be:

> ... that jury service, so far as is practicable, will be shared equally by all adult members of the community. (NSW Parliament, 1977, 4254).

Is jury service now shared equally? Are jurors representative of the general community?

Deletions

In its Survey of Jury Roll Compilation the Commission found that up to 44% of people enrolled to vote and chosen for a draft jury roll are deleted before the jury roll is finalised, and that, because deletions continue to be made once the roll comes into operation, the roll is less than half its original size before it's very much older: Table 2. Around 20% of initial deletions are of people who are possibly qualified in general terms but who have moved from the district (or address) in which they are enrolled to vote.

Table 2

Jury Roll History

	Jury District					
	Sydney	Penrith	New-castle	Dubbo	Bath-hurst	Cess-nock
Size of Draft Roll	202,541	21,477	18,931	2,953	1,994	801
Notifications Returned Unclaimed	8,864	632	521	125	92	11
Applications for Exemption Refused	3,652	497	305	57	37	10
Date Roll Proclaimed	Mar 84	Jun 82	Aug 82	Oct 82	Oct 82	Aug 82
Size of Final Roll	113,262	14,232	11,894	2,141	1,292	492
% Deleted Before Proclamation	44.1	33.7	37.2	27.5	35.2	38.6
Size of Roll at March '85	87,959	9,968	8,214	1,282	808	397
Total % Excluded by March '85	56.6	53.6	56.6	56.6	59.5	50.4

Over three-quarters of deletions are for reasons specified in the first three schedules to the Jury Act. The Commission's Survey of Jury Roll Compilation looked at which particular categories account for most deletions. Table 3 summarises the major findings for each of the three districts surveyed.

Table 3

Deletions from the Jury Roll

Category	Penrith		Newcastle Cessnock		Dubbo-Bathurst-Lithgow	
	n	%	n	%	n	%
People having the care custody and control of children under the age of 18	1658	23.5	909	11.8	272	14.6
People of or above the age of 65	1031	14.6	2143	27.7	474	25.5
People unable because of illness or infirmity to discharge the duties of a juror	1042	14.8	1900	24.6	312	16.8
People unable to read or understand the English language	516	7.3	273	3.5	38	2.0
Total	4246	60.3	5225	67.7	1096	58.9

The first two categories are categories of exemption as of right. People in these categories may serve if they wish. The latter categories are categories of ineligibility. The four categories are, together with those no longer qualified, clearly the major reasons for deletions from final jury rolls, but to what extent do they affect the ultimate representativeness of jury panels (ie prospective jurors) and juries selected from them?

Representative

The Commission's Surveys of Prospective Jurors and Jurors revealed that, on the whole, jury panels and juries are representative of the general community as derived from the latest available census data. (Australian Bureau of Statistics, 1984). Indices investigated were:

* age;
* sex;
* employment status;
* occupation;
* education;
* country of birth;
* length of residence;
* Aboriginality; and
* physical disability.

The Surveys revealed that about one-half of both samples (prospective jurors and serving jurors) were women; all age groups were represented; all occupational groups, including the self-employed, were represented; all levels of educational achievement and all countries of origin were represented.

Under-representation of some groups did become apparent, however. People aged 65 and over were seriously under-represented: Table 4. This is to be expected as such people may claim an exemption as of right. When aware of the extent of under-representation, however, the Commission recommended that the age at which people can claim the exemption should be increased from 65 to 70. (NSW Law Reform Commission, 1986, para 4.35).

Young males (18-29) were under-represented, a cause for concern in light of the fact that 67% of people convicted by the higher criminal courts in New South Wales in 1983 were males under 30. (Australian Bureau of Statistics, 1983). Are young males the ones moving from district to district without changing their electoral affiliation? Are they failing to register to vote? Do they ignore the Jury Summons or put forward more and better excuses?

The unemployed were also under-represented among both prospective and serving jurors. Again this is a serious matter because one-half of people convicted by the higher criminal

courts in New South Wales in 1983 had been unemployed at the time of committing the offence. (Australian Bureau of Statistics, 1983).

Tradespeople and labourers are quite significantly under-represented, a factor, perhaps, of a degree of self-employment enabling these workers to satisfy the Sheriff of their need to be excused. Tradespeople may be a major proportion of people holding tertiary diplomas and certificates.

I have included as a matter of interest the figures for Aborigines which do not appear to be significant. The total numbers themselves are very small.

Table 4

Classes of People Under-represented in Jury Panels and Juries

Class	Population	Prospective Jurors		Jurors	
	%	n	%	n	%
65 +	14.6	51	3.0	36	2.0
Males 18-29	28.7	199	22.4	211	23.6
Unemployed in labour force	7.6	42	3.0	41	2.9
Tradesmen, production-process workers, labourers	30.8	256	23.9	225	20.4
Tertiary diploma or certificate, not university	23.8	274	16.0	332	18.9
Born in continental Europe	9.2	121	6.8	114	6.2
Aboriginal	0.5	8	0.4	7	0.4
Disabled	11.5	76	4.3	70	3.8

The sex composition of individual juries was investigated by our Survey of Court Procedures in which associates recorded the sex only of each juror. In the 197 trials surveyed there were no single-sex juries. One-quarter of the juries surveyed were constituted by seven males and five females. Well over one-half of the juries (113 of 197: 57%) were constituted 6:6 or 5:7.

Table 5

Composition of Juries Surveyed

	n	%
1 man 11 women	2	1.0
2 men 10 women	1	0.5
3 men 9 women	15	7.6
4 men 8 women	21	10.7
5 men 7 women	37	18.8
6 men 6 women	28	14.2
7 men 5 women	48	24.4
7 men 4 women	2	1.0
8 men 4 women	25	12.7
9 men 3 women	7	3.6
10 men 2 women	7	3.6
11 men 1 women	2	1.0
Not stated	2	1.0
Total	197	100.0

Although women were equally represented on juries, foremen tended to be males. There was a male foreman in 142 (79%) of the 180 trials for which the sex of the foreman was recorded.

Jurors Excused by the Judge or Challenged

Once a jury panel is finalised and present in court at the beginning of a trial, there are two ways in which the profile of the body of jurors compared to that of prospective jurors can be altered. These are:

* personal applications by the individual prospective juror to the judge to be excused; and

* peremptory challenges exercised by Crown and defence counsel.

The Survey of Court Procedure recorded some information about each of these.

Personal Applications

Applications to be excused may be directed to the Sheriff. The Sheriff has a discretion to excuse people who have been summoned on the basis of "good cause". He usually requires a statutory declaration. People who don't submit applications until the day of the trial (or whose applications are refused by the Sheriff) may make their applications directly to the presiding judge. Our sample of prospective jurors had yet to go through this procedure.

In one of the trials we surveyed - one expected to be relatively lengthy - there were 61 applications to be excused. But generally the numbers were more modest with an average of four per trial in the trials where applications were recorded. We looked at a total of 633 applications and found the sex of applicants to be roughly evenly split between males and females. 87% of applications made were successful. The grounds most often put forward by applicants were:

* employment difficulties;

* ill-health; and

* being self-employed.

Table 6

Personal Applications to be Excused

Ground	Male n	Male %	Female n	Female %	Successful %
Employment difficulties	113	32.5	71	24.9	81.0
Ill-health	32	9.2	57	20.0	97.8
Self-employed	66	19.0	9	3.2	84.0
Vacation or business trip planned	40	11.5	28	9.8	77.9
Care of children or sick relative	10	2.9	47	16.5	98.2
Personal crisis/ family event	17	4.9	17	6.0	100.0
Inadequate English	15	4.3	17	6.0	93.8
Exams	15	4.3	15	5.3	90.0
Conscientious objection	6	1.7	2	0.7	87.5
Other	34	9.8	22	7.7	76.8
Total	348	100.0	285	100.0	86.7

Peremptory Challenges

In New South Wales each party has eight peremptory challenges in cases other than murder and 20 in the case of murder. The Crown does not have an unlimited right to stand by potential jurors as in some jurisdictions but does have eight (or 20) challenges for each accused person when more than one are charged together. All parties have unlimited challenges for cause in addition but these are rarely used.

Crown Prosecutors often assert, in arguing for retention of the Crown's right to challenge, that they use the Crown peremptory challenges to redress imbalances on a jury caused by defence challenges; to secure a representative jury. The Commission's Survey of Court Procedures revealed that the Crown did not challenge at all in one-third of the trials surveyed (72 of 197 trials: 36%). In those trials in which the Crown did exercise challenges it averaged only three challenges per trial compared to a defence average of five. In 17 of the cases surveyed the Crown in fact made more challenges than the defence but, on the whole, the trend was for Crown challenges to be few and for the defence to utilize most or all challenges available. In over one-half of cases the Crown made only one or two challenges while in the same proportion of cases there were six to eight defence challenges per accused.

Associates recorded the sex of each person challenged and it is interesting to note that defence challenges were quite evenly split between the sexes (561 (53%) men; 501 (47%) women) while the Crown tended to challenge a greater proportion of men (231 (65%) men; 123 (35%) women).

Effects on Demographic Profile

There was considerably less difference between the two samples, prospective jurors and serving jurors, than between both samples and the population. Some of the more significant differences are listed in Table 7.

Table 7

Differences in Demographic Profiles: Prospective Jurors and Serving Jurors

Class	Prospective Jurors		Jurors	
	n	%	n	%
65+	51	3.0	36	2.0
Part-time employees	176	10.1	155	8.6
Self-employed	214	12.3	186	10.4
Professional, technical and related workers	198	18.5	254	23.0
Sales workers	134	12.5	112	10.2
Primary school only or less than 3 years at high school	339	19.9	249	14.2
HSC but no tertiary qualification	291	17.0	356	20.3

The potential which eight challenges (20 for murder) permit a party to affect the representative nature of a jury caused the Commission to recommend that the number of peremptory challenges should be reduced to three only. (NSW Law Reform Commission, 1986, para 4.59).

WHAT ASSISTANCE ARE JURORS GIVEN?

American and British research on juries has given us some insight into the way they work and the effectiveness with which they cope with the manner in which evidence is traditionally adduced. Direct questioning of witnesses and counsel by jurors is generally forbidden, information is not presented chronologically but in a fragmentary manner, jurors are not encouraged to take their own notes (and are sometimes forbidden to do so) and do not have access to the transcripts of evidence. Criminal trials are "dominated by the dispute mode and persuasive argument" (Mungham and Bankowski, 1976, 213); they are dramas at which the jurors, until the very end, are merely the audience. Some argue that this mode of presentation requires juries to work irrationally.

> ... how, in the midst of the turmoil of the adversary mode, can any jury be expected to do its own work 'efficiently'? (Mungham and Bankowski, 1976, 213).

Much of the Commission's Discussion Paper The Jury in a Criminal Trial published in September 1985 was devoted to examining means by which the rationality of jury trials could be improved. Without detailing the proposals tentatively made in that Paper, there was an emphasis on improving communication between counsel, judges and jurors and on assisting jurors to take a more participatory role in trials without altering the existing balance of responsibilities and without overwhelming jurors. Thus the Commission suggested the provision of improved introductory information, in written form with the Jury Summons and in oral form by the judge at the beginning of the trial. Jurors should be enabled to take notes, the judge and counsel should avoid legalese, and so on.

From our Surveys of Court Procedures and of Jurors we gathered some information about the conditions in which juries work and the material assistance they are given. What is most apparent is that there is little consistency among judges and counsel. In some ways, this is to be expected as judges have a very wide discretion in the details of jury trial procedure.

Notes, Transcripts, Questions and Other Aids

Only one-third (592 of 1834: 32%) of the jurors surveyed took notes during the trial. Of those who had not, over 40% (506 of 1200: 42%) reported notes would have assisted them. Judges, however, do not always advise jurors of their right to take notes. Nine (21%) of the 42 surveyed never do so and another 19 (45%) only do so sometimes.

Judges objections included the danger of "a defective record of the evidence being made privately and with no notice of it to anyone". The Commission, on the other hand, was persuaded by the value of jurors taking their own notes and recommended that note-taking should be a statutory right. (NSW Law Reform Commission, 1986, para 6.20).

About half of the jurors surveyed (853 of 1834: 47%) were on juries which asked questions of the judge. Our Survey of Court Procedures confirmed that about one-half of juries (88 of 197: 45%) asked at least one question. About one-third of questions asked (64 of 202: 31%) were requests made by the jury during proceedings for additional evidence or clarification of evidence given. Another one-third (66 of 202:33%) were asked during deliberations and consisted of requests for directions of law to be repeated or for part of the transcript of evidence to be read. The high rate at which juries actually do participate in the trial by asking questions is surprising in

light of the fact that 40% of judges surveyed by the Commission reported that they never advise juries of their right to ask questions. The Commission recognised the usefulness of questions from the jury to or through the judge but did not go so far as to propose that jurors should be entitled to have their questions put and answered. With respect to questions it is clear that the judge should retain control. Nevertheless the Commission recommended that judges should advise juries of their right to propose questions. (NSW Law Reform Commission, 1986, para 6.22).

Of our 197 juries:

* only 27 (14%) received a copy of the indictment or a written statement of the charge;

* only 4 (2%) received any directions of law in writing;

* only 1 (0.5%) received a copy of any part of the transcript (in that case the transcript of the dock statement);

* only 7 (4%) benefited from counsels' use of visual aids ranging from a video film through a sketch plan of the scene to a magnifying glass; and

* only 2 (1%) were taken on a view of the scene of the alleged offence.

When jurors were asked whether having any of the above would have assisted them, over one-half (1076 of 1834: 59%) affirmed that a copy of the charges would have helped and about the same proportion (1104 of 1834: 60%) would have liked a written statement of what the Crown had to prove. One juror stated the jury should have been provided with a statement of the "exact nature of the offence" to assist in determining the relevance of the evidence.

One-half (969 of 1834: 53%) of jurors would have liked a copy of the judge's summing-up or part of it and about one-half (880 of 1834: 48%) reported they would have been assisted by a list of the available verdicts.

Two-thirds (820 of 1221: 67%) of jurors answering this question felt they would have been assisted by a copy of all or part of the transcript of evidence and nine juries had in fact requested a copy of the transcript. Nearly one-fifth (57 of 316: 18%) of suggestions made by jurors for improving jury trials related to the availability of transcripts and the provision of other written materials. One juror commented "The jury was surprised that a transcript was not available."

Another suggested that a video film of the proceedings should be available in the jury room because "early events tend to become clouded" as the trial proceeds.

Other suggestions included one juror's plea for "explanation/ simplification of technical evidence" and another's for "a complete guide [as to the role of the jury] [which] would assist us in not trying to assimilate irrelevant evidence or answers to questions". One juror proposed that jurors should be able to question witnesses directly to obtain extra evidence or clarification.

These results raise a difficult issue, namely, whether jurors should be provided with more information and assistance and, if so, what form it should take. The traditional reluctance to provide much in the way of written material may no longer be soundly based. Yet, in the absence of solid research on the uses and abuses of such materials, judges are in the best position to assess their impact. The decisions of some very few judges to provide written statements setting out the charge and/or written directions of law suggest the value of such assistance is being gradually accepted.

Summing-up

From what we know of judicial practice, judges do not detail how a jury should deliberate or reach a verdict. Not all explain about the election of a foreman or that the verdict must be unanimous. Several jurors commented that clear guidelines on these matters should have been provided.

> When the jury leaves the court room to decide the verdict a printed list of instruction should be mandatory stating the format of how the case should be discussed and the decision reached.

In spite of such difficulties, the vast majority of jurors (95%) felt they had been assisted by the judge's summing-up to understand the case.

HOW DO JURORS FEEL ABOUT THEIR TASK?

80% (1439 of 1779) of prospective jurors surveyed by the Commission had never served on a jury before. To try and gauge how prospective jurors were feeling upon their arrival at court, our questionnaire asked whether they minded attending, would have liked more information, suffered financial loss or personal inconvenience or would like to have been exempted. One-fifth (315 of 1779: 18%) of prospective jurors objected to attending. Self-employed and unemployed people minded most: 31% and 28% respectively of prospective jurors in these categories did mind.

One-quarter of prospective jurors who were self-employed (25%) believed they should have been exempted because of their responsibilities. One-quarter (25%) of students responding also felt they should have been exempt.

Almost one-third of prospective jurors (514 of 1779: 29%) claimed to have suffered financial loss as a result of simply attending in response to a Jury Summons. Men who were self-employed or employed part-time were by far the most likely to suffer in this way: 79% and 74% respectively of prospective jurors in these categories reported loss. One-fifth (399 of 1779: 22%) of prospective jurors identified other personal problems or inconvenience in attending court. Problems related to work were the most often cited (207 of 411: 50%). Others included child care (11%), transport difficulties (13%), sick relatives (7%) and other personal problems including own health (20%).

Given the opportunity to suggest what further information could have been provided, only 13% (229 of 1779) of prospective jurors answered that they would have liked more and slightly fewer (208 of 1779:12%) actually made one or more suggestions. Many of those suggestions (80 of 232: 34%) were for the provision of general information about car-parking, overnight stays, a contact number and other general operations of the system. Another large group of suggestions was for information about court procedure and the role and functions of juries (88 of 232: 38%).

Serving jurors, on their much longer questionnaire, had a greater opportunity to comment on their feelings at the commencement of the trial. One stated:

> It should be realised that jurors are mostly unfamiliar with the formalities of the courtroom and could be awestruck by the scene.

Another suggested:

> Pamphlets or booklets should be provided as to the events that will occur when getting to court as little is known beforehand of what to do which unnecessarily creates nerves for many jurors.

15% (276 of 1834) of jurors made at least one suggestion for improving the information provided before coming to court. They agreed with prospective jurors in nominating the role, rights and duties of jurors (91 of 339 suggestions: 27%), court procedures (65: 19%) and general information on practical issues (61: 18%) as the subjects on which more information is most needed.

Most prospective jurors, however, did not feel too much trepidation (or at least did not admit to any). 70% (1250 of 1779) actually believed they were going to benefit from the experience.

The average length of the trials surveyed by the Commission was three days. One-half lasted a mere 2 days. This is not really enough time to become familiar with procedures and proprieties. Jurors who, in that time, begin to feel confident enough to assert themselves in the courtroom and to court personnel would be few and far between. Yet jurors did make some complaints about their working conditions.

One-fifth (392 of 1834: 21%) of respondents made at least one suggestion for the improvement of juror's working conditions. Refreshments were the subject of most complaints (129 of a total of 515 suggestions: 25%). Other jury room conditions were also strongly criticised (eg the lack of air-conditioning) (127: 25%) as was the seating in the jury box itself (112: 22%).

Apart from irritations of this kind, it is clear that jury duty, even for a short period, is an interruption to one's daily life. Some may welcome it; others accept it. Some may be quite seriously affected.

Jurors who had completed their service were asked about financial loss and personal inconvenience. One-fifth of jurors (411 of 1834: 22%) reported suffering financial loss. Over one-half of these jurors (243 of 411: 59%) reported losses between $50 and $500 and most loss was work-related.

Only 16% (301 of 1834) of jurors said they experienced some other personal problems or inconvenience. Work-related problems again accounted for the bulk of problems (131 of 333: 39%). Jurors were also affected by the other problems worrying prospective jurors: child care, stress, transport difficulties and so on.

In spite of the problems expressed, 90% of jurors surveyed (1646 of 1834) had not minded serving. Of those who gave their reasons, one-third had found the experience informative and educational (342 of 1025: 33%) and one-third expressed the view that it was interesting and worthwhile (320 of 1025: 31%). Over one-third (370 of 1025: 36%) also stressed that jury service is a civic duty or a service to the community.

Those who did mind serving (136 of 1834: 7%) gave reasons including the difficulty of judging the question of guilt and emotional stress.

CONCLUSION

Compared to prospective jurors, who tended to be a bit luke warm on the advantages of the jury system (66% believed the community would benefit), 94% of jurors surveyed agreed that juries should be retained for criminal trials. 224 (13%)of those jurors had changed their minds on the subject as a result of their experience. Only 28 respondents (1% of 1834) had come to the view that juries should be abandoned as a result of their own experience.

Jurors were invited to make suggestions for improving jury trials and 15% (280 of 1834) did so. Forty-one jurors (2%) advocated the introduction of majority verdicts. One juror commented:

> I found that a unanimous decision is sometimes very difficult and frustrating and led to some very bad feelings among the jurors. Especially when it was 11 for, 1 against.

Another also commented on the amount of pressure on the jury when unanimity is required and stated:

> I feel it should be a majority verdict say 9-3. I feel that there should be three options - guilty, not guilty or not proven.

Other changes proposed included the reduction in the size of the jury in more minor charges, the use of professional (ie full-time) jurors and the screening of jurors "to weed out non-interest or low intelligence". Others criticised interruptions, repetition and waiting time, seeking a reduction in delays and there was also a range of suggestions to the effect that the prosecution should get its act together.

Suggestions and complaints of this kind, together with other comments jurors made combine to give a strong impression of a group of people who are, on the whole, careful, serious and responsible about their task. The majority of prospective jurors seem to have been confident and the majority of jurors seem to have been satisfied by their performance. The factual information on the actual assistance given, however, leaves a nagging doubt as to whether these people, strangers to the system on whom so much depends, are really given the consideration they not only deserve but which they actually need to do their job well.

* I wish to acknowledge the work done on the Commission's empirical research programme by Ms Concetta Rizzo, consultant statistician. Ms Rizzo directed the project and is co-author of the Commission's Report on the results of the research.

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THE EXPERIENCE OF PAST JURORS

Those members of the public who do serve on juries provide a source of information about the jury system that should not be ignored. In order to tap that information source, the Institute recently used modest advertising, newspaper and radio interviews to attract past jurors to reminisce with us about their jury service. In the event some two dozen past jurors contacted the Institute and their comments covered a range of issues most of which have been canvassed in public sources or the academic literature.

Plainly the views of this small sample of jurors cannot in anyway be seen as representative of all Australian jurors, but their comments are nevertheless real comments from real jurors about their real experiences. As such they are worth serious consideration especially in the light of contemplating change to our existing jury system.

Why is it that more use is not made of these experiences in considering change? Generally disclosure of what happens in the jury room is seen to threaten the doctrine of jury secrecy. But implicit in that is a strong notion that unanimous verdicts may not be quite what many would hope them to be. But, if nothing is allowed to become known about the real behaviour of jurors then little can be done to improve the operation of the jury (if that is shown to be necessary).

The little of what is known about deliberations in the jury room generally emerges from public statements by jurors from notable trials such as the Murphy, Maher and Chamberlain trials in Australia, and the Jeremy Thorpe trial in England. In the last instance, action for contempt of court was taken by the Attorney General against the publishers of New Statesman the journal in which a juror's recollections were published. But that article was more critical of the presentation of the crown case than it was fatal to the notion of jury solidarity. In fact the juror's remarks about jury dynamics tend to have much in common with Australian jurors' remarks that were collected for this paper.

JOINING A JURY

While it sounds slightly dramatic, being taken from the street and plunged into legal theatre is itself a difficulty faced by many jurors. It commences with jury selection which can compromise an episode of some strain. One juror who had actually been challenged on three separate occasions said he felt exceedingly embarrassed by the procedure. And a female potential juror who was challenged twice recently, while not as threatened by the procedure, ventured that it was plain the defence was aiming for 'an all-male working class jury' for their client charged with rape. This, in her mind causes the whole representativeness of juries to be quite suspect, and she argues for fewer challenges to be allowed.

After a jury is selected there is further confusion in the minds of some jurors. One put it quite elegantly:

> ... the whole experience of attending court and the several tense hours [sic] during the jury selection process is daunting. Most us by the time the trial begins are feeling 'numb with shock' but there is no time for recovery. None of the assembled court are introduced.

This juror suggests as a solution to this problem, 'a break in proceedings immediately after empanelling to allow [the jury] to mentally adjust to their new role. The subconscious preoccupation with what is going one in the courtroom is distracting and makes concentration at this crucial time difficult'.

At or around this time it seems the jury could be acquainted with courtroom procedure and personnel, and could have the legal facts of the particular case explained. This is important as several jurors indicated they were not clear what facts they were going to need to consider and what their options were. For instance one juror in a murder trial related how

> most of the jury were under the misapprehension for some time that only a guilty or not guilty for murder was the charge [sic] and that manslaughter could not be considered. It may have been clearly spelled out (in the court's view) early in the trial, but we did not take it in properly.

Indeed a number of jurors indicated that they had difficulty with legal arguments and explanations. One bemoaned 'the lawyers didn't explain ... we needed it in English'. And ex-juror Callinan (1984, 166) remarks on 'the confusion which the law can create for people by the intricacies of its rules'. Obviously it is the responsibility of participating barristers to ensure their point of view is appreciated by the jury; it appears that in a number of cases at the moment this does not occur.

The fact that there is often a large amount of material to be considered, exacerbates the problem of not understanding legal niceties. As Du Cann puts it: 'In every trial thousands of words are poured into the jury's ears. The amount they carry into the jury room with them when they retire can only be a minute fraction of the whole.' (Du Cann, 1980, 135) Several jurors in this sample commented on this, one saying that after the judge's summing up her head was 'reeling'.

A further task that could occurduring this suggested break in proceedings is the selection of jury foreman. An A.C.T. juror, who was reported in the Canberra Times related how 'the system of electing a foreman had been rather strained' (Campbell 1984) and in the Institute's current sample a juror said 'the last bloke selected sat in the foreman's chair so he was picked'. Another said:

> We were herded into a tiny airless claustrophobic jury room to have morning tea and to elect the foreman - in approximately 20 minutes! We had absolutely no knowledge of each other and in our numbed mental state, we took a cavalier approach to choosing our foreman. We did not realise at this stage how important this role was to become.

As the jury is meant to operate as a decision-making group it does seem that all should be done to make that a more likely event. The assistance and briefing period suggested above could well enable positive interaction amongst jurors which would help them develop the group feeling which is essential to their task.

PRESSURE ON THE JURY

The consistent psychological and emotional pressure on members of the jury was often mentioned by jurors in the sample. In some instances the pressure was exacerbated by personality considerations: 'Emotionally I shouldn't have been there - I couldn't sleep for weeks' said one. In another instance additional pressure was environmental. A countrytown juror pointed out that 'everyone' in the town knew the defendant and the members of the jury, and a finding of guilt was highly likely to lead to future uncomfortable scenes in public places when the defendant's family or friends encountered jury members. This fact, he said, explained why many residents of country towns dreaded being selected on a jury.

These aside, the common pressure faced by all juries results as a consequence of being placed in a confined situation to make an important decision with major impact on the lives of other people. One feature of this pressure is that it is continuous, there is no escape from it because as one juror said 'You're bunched together all the time and can't talk about (the trial) at home'.

This last point is another important aspect of the pressure. As the American psychiatrist Kaplan puts it 'one of the jurors' biggest problems is the absence of their usual support systems', which he suggested leads the jurors to grow close to each other 'cut off from their usual friends and family' (Kaplan, 1985, 52).

This increasing juror solidarity was not usually mentioned by jurors in this sample, but some did indicate that they had had some post-trial contact with other jurors.

Others spoke of the relief that followed after the trial when they were able to finally talk with their close ones about the experience they had been through. One female juror related how, after the verdict, she had stayed up till 4a.m. the next morning describing the trial to her family.

It is not surprising that many jurors started to show physical symptoms of stress. One admitted she 'didn't want to eat lunch or tea or breakfast' as she was too tense. Another juror described the 'pill popping' of a fellow juror who was 'finding it hard'. These do not concur fully with Kaplan's comment that 'most [jurors] suffered intense physiological symptoms during the trial' (Kaplan, 1985, 51), but it is plain that the stress of being on a jury is severe for some people.

There is no doubt that the pressure on the jury during deliberation is even greater than that during the trial, so there is a strong argument for positive post-trial consideration to be given to jurors. (One juror did mention some negative post-trial attention from police officers 'who were plainly disgusted with the acquittal and were really staring at us'.)

Kaplan (1985) found post-traumatic stress disorder present amongst jurors from a capital trial in America, and that led him to talk of post-trial counselling for jurors. But there are probably less dramatic ways in which recently discharged jurors might receive some relief from accumulated tension.

One was suggested by a juror who indicated that his jury had 'felt really involved in their task', had deliberated for almost ten hours and reached a unanimous guilty verdict (after starting 8-4). 'We had', he said, 'a deep and emotional involvement in the case, yet were simply sent home after announcing our verdict while the defendant was remanded in custody'. The juror claimed that this left the jurors 'up in the air' but he at least terminated his emotional involvement by contacting the court later and learning the consequences of his decision: the sentence of the offender. This simple action would appear to have the effect of tidying up an important and stressful episode in a juror's life. A letter from the court expressing thanks and acquainting a juror with the result of the trial seems little enough to do.

JURY DELIBERATION

Anyone who has been a member of a committee knows the rigors of small group decision-making. But at least committee members have grouped together for a common purpose or interest. The jury is a (theoretically) random group of people brought together under some compulsion, so it is unsurprising that their group decision-making is often strained.

One juror said that his jury had found the trial not particularly stressful but that 'when it actually came to making decisions the whole atmosphere changed', and initial discussion was 'slow and heavy'. Several other jurors commented on final deliberations in the jury room. It was 'like fighting with the family'. It was 'nasty, people got very angry and we all said things we regretted later'.

And, 'I abused hell out of him', he being the one juror maintaining a guilty verdict after six hours without his discussing or arguing the merits of the case. This is of course not an isolated instance. In the celebrated Thorpe casein England the bulk of the two days of jury deliberation was spent trying 'to persuade a single juror, who held out for conviction, to accept the view of the other eleven' (Chippindale and Leigh, 1979, 120).

Callinan (1984, 167) suggests that 'the fact that jury decision making is a group process raises the question of whether minimum social skills should be required of a juror in major trials'. But just having such skills may not be that helpful. One juror indicated that discussion in her jury room was hampered by the difficulties faced by a couple of 'businessmen' who were not used to having to justify their decisions, especially 'not to women'.

This last point receives mention in newspaper reports of interviews with Australian jurors which read:

> Three women (the fourth, a housewife, abstained from most discussion because she was not confident about expressing herself) were reduced to tears on a number of occasions because they tended to be shouted down by the men (Loane, 1985, 22),

and

> A couple of the girls were particularly concerned about being put down by the fellas. And a couple of the blokes, at different times, tried to put them down (Campbell, 1984).

A similar view was given by a female juror in this sample. She wrote:

> Not all jurors were given the opportunity to adequately express their concerns or raise queries. This was particularly true of the women jurors.

This last comment is plainly a criticism of the foreman. But as that person is selected withoutany great thought as to their duties, and, as those duties in any event are not specified, this is not altogether surprising. The obvious solution is for those who act as foremen of a jury to receive quite precise instructions regarding their role. Further, because the foreman may also have no great grasp of the legal points involved in coming to a verdict, and may therefore not be able to lead the discussions, it is not surprising that jurors in this sample described their decision making in the following sorts of ways.

'People didn't make decisions on the evidence', 'I personally felt unable to make a decision', 'to get twelve people to agree is too hard', and 'the sole person who thought he was guilty could only keep replying "but I feel he did it".'

This last commentreflects the first of a number of approaches to reaching a verdict all of which ignore the legal arguments. It involves the personal perspective of the juror. Loane's (1985) juror believed that his jury's decision was reached according to 'the juror's own personal prejudices' as there had been little attempt 'to logically sift through the evidence because of its sheer bulk' (Loan, 1985, 22).

Illustrations of these personal perspectives were given by jurors in this sample. They include the 'two jurors who just didn't want to be there',one who was described as 'irrational' and thought 'whateverthe police said was rubbish', another who believed 'he [the defendant] wouldn't be there if he hadn't done it', and one who 'either misunderstood or refused to accept the task of the jury' at the commencement of deliberations, and who after pressure from the others announced that 'the law stinks' and 'even if the defendant was guilty under the law he refused to find him guilty'.

Jurors whose decisisons are most affected by what might be called expedient considerations comprise another group of some concern. They are ready to reach any decision or compromise in order to bring their jury service to an end. A distinction needs to be drawn between those who adopt this view from the commencement of deliberations (those who 'just want to get home') and those who finally compromise after some period of deliberation responding to the pressure from the rest of the jury to bring matters to an end.

This last scenario was apparently enacted in the Maher trial causing an editorial in the Melbourne Age to ask 'what sort of justice is this where verdicts are negotiated between jurors so they can escape from the jury room?' (Age, 1 November 1985).

Explanations or interpretations of the offence also frequently played a major role during deliberations. Members of the jury on which Callinan served developed 'fantastical [sic] scenarios in the style of a soap opera' or 'most outrageous conclusions' about the relationship between the accused and the rape victim (Callinan, 1984, 167). And jurors in this sample, indicated how their fellows sometimes behaved in this way. One explained how a couple of men on the jury could not believe the defendant's behaviour (under circumstances of considerable threat) indicating that real men would simply not behave in that way so none of his evidence could be trusted. Another juror identified with the young defendant and decided because her son 'wouldn't do such a thing' nor could he have. And another interpreted the behaviour of the victim as unlikely, helping to make a case for the defendant.

Consideration of the consequences of a decision was plainly important to many jurors. The following comments made by jurors illustrate this point. 'I felt it would be awful for her to go to gaol if she really wasn't guilty', 'there's no point putting the man in prison, it won't bring the girl back', and 'look what we're putting him through, hasn't he paid enough?'

The personal situation or characteristics of the defendant appeared to affect some jurors' decision-making quite considerably. One female juror said 'Deep in my heart I knew he was guilty but he turned up with his pregnant wife and kids in court ... I just couldn't convict'. At the other end of the spectrum the foreman of one jury is alleged to have said that the defendant 'looks a wrong'un' and advanced that as his important consideration in reaching a verdict.

POINTING THE JURY IN THE RIGHT DIRECTION

Nobody would suggest that the particular idiosyncrasies of individual jurors should somehow be repressed as it is the balance of prejudices represented on the jury that help make it impartial. However, these idiosyncrasies should not have a greater influence on the verdict than the evidence and legal considerations. In order to assist achieve this end a couple of moves could be undertaken.

The first is a response to the problem of information overload. An obvious way to tackle this is to allow, or even encourage, jurors to take notes. In a modest study Flango (1980) found that jurors would generally take notes if allowed to, and note-takers generally found cases less difficult to understand.

One juror in the current sample recalled how he took notes that were actually used to settle disputes in the jury room later. Another wished that she had taken notes as others in her jury had done as they were most useful at the deliberation stage.

A Canberra juror whose experiences were published in the press makes this point: 'we found note taking very valuable later although we didn't realise it at the time' (Campbell, 1984)

The secondmove is to provide specific directions to the jury to enable them to thread their way through the legal material to reach the correct decision. The innovative jury instruction described by Taylor et al., (1980) involves preparation of a series of questions which the jury has to consider in order to decide the component parts of the legal definition of the alleged crime. These questions are read to the jury by the judge, and presented to them in written form for their deliberation. Based on the consideration of the difficulties of small group decision making, these 'process instructions' would plainly overcome problems suggested by jurors in this survey as having troubled them.

A POSITIVE EXPERIENCE

The foregoing might give the impression that all jurors found their jury service a particularly unpleasant experience that they would rather forget. But this is not the case. Despite the difficulties canvassed above, many jurors found the experience a positive one. Kaplan (1985 makes this point. He says:

> 'just being able to make it through so much stress was meaningful to one juror; another who had always distanced himself from people found that he could be accepted when he was forced to be with others during sequestration. He said that he was now getting along better with people socially and at work.

But the fact that some jurors 'enjoyed' the experience, and are more than willing to act on a jury again should not be allowed to detract from those who found jury service a real agony. What is necessary is the introduction of changes such as those suggested here, to make jury service, a non-negative experience and a civic duty happily undertaken by all.

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PRESENTING SCIENTIFIC INFORMATION IN COURT

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INTRODUCTION

Forensic science is defined in the Oxford dictionary as that branch of science which applies the principles and methods of science to the elucidation of legal problems. Scientists from any discipline can become involved in legally disputed matters where their particular expertise is appropriate to the problem in question.

However, because there is a continual need for scientific assistance in criminal investigation, specialised forensic science laboratories have become established. There is a growing number of scientists who have applied their skills and knowledge to this area. Techniques and methods have been developed that are applicable to the materials and types of samples encountered in criminal investigation, and the scientists have developed experience invaluable in this type of work. Thus, forensic science can now be regarded as a profession.

The objectives of forensic science examinations can be summarised as follows:

(i) To identify unknown materials involved in criminal matters.

(ii) To determine, if possible, the manner in which a crime was committed.

(iii) To associate or eliminate a suspect with a crime scene.

(iv) To produce scientific evidence as a result of examinations performed for presentation to the courts.

INTERPRETATION OF SCIENTIFIC INFORMATION

The production of evidence is clearly the important end product of any scientific work performed. In criminal proceedings this will result in a jury having to consider scientific information in coming to a final decision.

The juries are composed of people who may have very little scientific background, and it is grossly unfair to expect them to make scientific decisions. This, therefore, places great responsibility on the scientific witness to make clear and honest interpretations on the scientific results he or she has obtained. It is central to the presentation of scientific evidence to a jury that the meaning of the scientific evidence is explained.

Fortunately, in most cases, the scientific evidence is easily interpreted and understood. The simplest examples are where a suspect substance such as an illicit drug powder can be positively identified or a fingerprint matched with a suspect. The presentation of such evidence should present no problem for any jury.

However, it is in cases where associative evidence is presented that interpretation can be difficult. The presence of a bloodstain on a suspect's clothing, textile fibres on a murder weapon, or paint flakes or glass on the clothing of a hit-run accident victim all need to be interpreted so that the jury can arrive at a correct decision. Also of vital importance at this stage is that the jury and the court are confident that the appropriate scientific tests have been correctly performed. For example, the presence of paint and glass on a hit-run victim that matches a suspect car as well as blood and clothing fibres on the car that match the victim, would be considered very strong associative evidence, while the presence of fibres only on the car would not be as meaningful.

It is the experience and credibility of the scientific witness that is the important factor in explaining the evidence to the jury.

SCIENCE AND THE ADVERSARY SYSTEM

Unfortunately, science and the adversary system do not live together easily, and it is this factor more than any other that produces problems for the jury when scientific evidence is questioned.

A factor that contributes to this problem is that forensic science laboratories are seen as arms of the prosecution for two reasons:

(i) All criminal investigation is associated with the police initially and it is logical that forensic science laboratories have a close liaison with police forces.

(ii) Forensic science laboratories are funded by the state and its employees are therefore public servants.

Creating doubt about scientific evidence is sufficient in a cross-examination process, and establishing the scientific truth may not be in the best interests of winning a case. This is completely foreign to the practice of science. It is vital that the scientific evidence is evidence for the court and not specifically for prosecution or defence.

A scientific problem left unsolved leaves questions unanswered, the jury confused, and the court misinformed. Although this approach may achieve a desired goal, the best interests of justice are not served. Unfortunately, there is no shortage of scientific 'Perry Masons' who see the witness box as a forum for projecting their own egos often based on a shaky scientific foundation.

A WORKABLE APPROACH TO FORENSIC SCIENCE EVIDENCE

The following factors are important in providing a satisfactory forensic science service to the courts:

(i) A service independent of police and prosecution and also available to the defence.

(ii) A laboratory staffed by competent and well qualified scientists.

(iii) A laboratory which encourages and maintains its contacts with the scientific community at large.

This, I believe, is the direction the Forensic Science Division in Adelaide is proceeding.

Such a completely open system would allow defence lawyers to discuss the scientific evidence with the scientist, if necessary in the company of their own independent scientist. Any difficulties can be resolved, further relevant examinations be requested, and the need for detailed scientific debate in the courts eliminated. The present plight of forensic science in Australia is as much due to the poor way it has been used by lawyers as it is due to deficiencies in the system.

Thus, an adjustment to the adversary system in the way it handles scientific evidence would be necessary. A trust in the results and opinions produced by the forensic laboratory would be developed and the scientific evidence will be genuinely seen as impartial.

EXPERT EVIDENCE AND THE ULTIMATE QUESTION

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INTRODUCTION

In the process of doing the research, scientists work on the basis of a particular idea (or hypothesis) and spend most of their energy gathering information and results to support that idea. In practice, you cannot do research except on the basis of some explicit or implicit theory. Consider how 'discovery' of penicillin by Flemming was useless because he could not cope with the result. He had no theory. It took twenty years before Florey (with an idea) was able to do the productive experiments.

However, when this research work is publicly presented (at a seminar or as a published piece of work), it is assessed on the basis as to how well all reasonable alternatives have been rejected. The set of alternatives is generally infinite and so 'reasonable' is a social decision of the scientific community, dependent on the state of knowledge at the time, the importance of the work, and the perceived consequences of the decisions based on the results. Except in a few limited areas (axiomatic mathematics, logic etc.), proof is a default option. It is not always seen that way, and in fact in the 'harder' sciences (physics and chemistry), students are not taught properly in the logic of their subject.

Forensic science is no different. The police have to have some theory of the crime in order to collect evidence. The forensic laboratories have to be told what the police are trying to establish in order to devise an appropriate testing regime etc. However, when the results are 'published' in court, the full inference system of rejecting alternatives at each stage must have been previously done and then properly demonstrated in court.

Scientific analysis procedures may fail to provide the correct answer for a variety of reasons. The failure can occur at different stages. The aim of an inference chart is to break up the analysis procedure into logical stages and ensure that each stage is tested sequentially. Because forensic evidence covers such wide fields and conditions of samples vary greatly, the standardization of methodology will be a difficult and long process. On occasions, use will need to be made of the scientific equivalent to the legal term 'reasonable', namely Good Laboratory Practice (GLP). Nevertheless, the more the procedures are classified and opened to inspection, the greater will be confidence in the results and the more concentrated will be the examination on the relevant and weakest areas.

A study of court cases which have resulted in prolonged and expensive controversy has shown that the point of weakness is the fact that reasonable alternatives had not been rejected (Selinger, 1984).

AIM

The final outcome of this proposal is to provide an inference scheme attached to a set of standard procedures to be produced under the auspices of the Standards Association of Australia, which will focus the examination and cross-examination of scientific evidence on the critical relevant points so that the jury and judge can see clearly what is in dispute and why it is in dispute.

A spin-off from the need to standardise procedures will be to raise competence of professional expert evidence. The proposal does not exclude evidence outside the range standardised (and so does not have the limitations of the Frye Test used in the US courts when testing the admissability of scientific evidence judged on whether the techniques are acceptable to "the appropriate scientific community") but encourages the use of standard methods (because the question as to why they were not used must then be answered). It also discourages the use of private, or in-house methodology (and associated attempts to keep such methodology secret For example, it can be very difficult for a defence expert witness to obtain a copy of the recommended procedures to be used for a Breathalyser or a copy of the relevant training manual).

A major consequence will be that much shonky expert evidence will not reach the courts. Time will be saved and confusion minimised.

WHERE EXPERTISE ENDS AND THE JURY BEGINS

A classic example where failure to separate out a scientific procedure from legal evaluation occurred in the Royal Commission on Agent Orange. As far as can be ascertained from the evidence, the scientific statistical results were competently obtained but their presentation in the traditional manner meant that the experts decided 'on the ultimate issue'. The function of the Commission was usurped. In my view, the task of the statistical expert was to take data that indicates that a series of diseases or abnormalities in offspring occurs at a higher rate in exposed veterans' families compared to unexposed controls, and to calculate the odds that this has not happened by chance alone. However, the experts go beyond this. They make an arbitrary social and legal decision. They say in effect to the bench that unless these odds are greater than 19:1, then one must say that the difference between exposed and unexposed groups is due to chance, i.e. 'not statistically significant at the 95 percent confidence limit'. They have in effect decided for the court what the appropriate odds are, at which chance, as an explanation, is no longer acceptable. This contrasted directly with what the Royal Commission itself stated as its modus operandus.

Standard of Proof

1. The Commission adopted the normal civil onus of proof, i.e. it needed to be comfortably satisfied that a fact or connection was established before it found that it existed.

2. It kept in mind those sections of the Repatriation Act dealing with the standard and so-called onus of proof required in determinations.

3. Appropriate scientific principles have also been applied. (Royal Commission, 1985, Chapter II, p.10).

It is highly ironic that the Royal Commission's epilogue consist of a scathing attack on scientists and publicists arguing that Agent Orange was a causative agent, when the Commission itself obviously understood little of the scientific philosophy of its own experts. As I will now show, these experts adopted an onus of proof beyond even the criminal level.

There is a long and fascinating history of the development of the statistical rules of assessment of evidence for scientific purposes. I have studied this with a statistical colleague and we have contrasted that with a current legal attitudes (Hall and Selinger, 1986). The 'law' for statisticians (and for other scientists using statistics) was laid down by R.A. Fisher in 1925 in an often-quoted paragraph:

> If one in twenty does not seem high enough odds, we may, if we prefer it, draw the line at one in fifty (the 2 per cent point), or one in a hundred (the 1 per cent point). Personally, the writer prefers to set a low standard of significance at the 5 per cent point, and ignore entirely all results which fail to reach this level. A scientific fact should be regarded as experimentally established only if a properly designed experiment rarely fails to give this level of significance. (Fisher, 1925, 80).

This principle was to have dramatic repercussions. It appeared to draw a sharp dividing line between white and grey, where a continuous gradation of grey had existed before. And it proved very popular.

To quote Fisher so baldly, without more careful reference to his context, is a little unfair. As we shall see, Fisher saw the "5 percent principle" not as a dogma but as a useful rule which was appropriate in an important class of circumstances. The convenience of the rule enabled him to sell his ideas to many non-statisticians (including, with enthusiasm, the tobacco industry for whom he consulted). But the dividing line between 'appropriate' and 'inappropriate' uses of the rule was not at all clear in Fisher's early writing. Scientists have on the whole stuck slavishly to this early axiom and ignored the possibility that legal and scientific requirements might be different.

There have been several efforts to quantify the level of significance which juries (and judges) take 'reasonable doubt' to imply. Samples of U.S. students' and jurors' opinions of the meaning of "beyond reasonable doubt" showed that it meant a level of doubt of about 0.2 or less (estimated as the medians of samples of sizes about 70). However, as Table 1 shows, judges were more stringent and assessed 'reasonable doubt' at about 0.1 or less. A survey of ten Federal District Judges from the Eastern District of New York suggested that 'reasonable doubt' means a probability of 0.15 or less (Simon and Mahan, 1971). These figures are only

TABLE 1

PROBABILITY OF GUILT REQUIRED FOR PROOF BEYOND REASONABLE DOUBT

Crime	Mean of persons surveyed		
	Judges	Jurors	Students
Murder	0.92	0.86	0.93
Forcible rape	0.91	0.75	0.89
Burglary	0.89	0.79	0.86
Assault	0.88	0.75	0.85
Petty Larceny	0.87	0.74	0.82

averages. The level of significance required must depend on the circumstance: 'In proportion as the crime is enormous, so ought the proof to be clear'. Furthermore, the figures are for individuals and not for juries. Most people would be prepared to send a person to gaol on evidence less statistically significant than a scientist requires to publish a research paper. The statistical evidence that needed to be evaluated by the experts for the Agent Orange Royal Commission was unbelievably 'dirty'. There were many confounding variables which had to be eliminated etc. In the end, some questions are easier to answer than others.

(1) What are the odds that the higher incidence of X in the exposed veterans compared to the unexposed controls was not due to chance [related to the size of type I error]? These odds can be calculated and a legal decision on whether to pay on those odds can be left to the court.

(2) What are the odds that we will be wrong if, on the basis of these odds we accept that the effect was not due to chance [type II error]? These odds cannot be calculated - so the court cannot calculate the risk to the Government of paying out unneccessarily.

The reason these latter odds cannot be calculated is that this requires a single alternate hypothesis, for example, the rate of incidence of X in the veterans is 'y' times the rate in the controls - where 'y' needs to be known but is not. You can assume varied values for 'y' and calculate odds for question (2), but the answer is only as good as the assumption.

The experts should say what can and what cannot be calculated, and leave as much of the arbitrary (social, legal) decision to the court.

The rules that these experts use in their own field and in academic science are that they would not back a horse unless the odds of it winning are at least 19:1. Such a harsh filter for science may be appropriate (although there are circumstances where this is disputed) because experiments are repeated many times and in many places. Unjustified rejection in the scientific sense does no long term damage. However, this approach does great damage when transferred to the one-off decision-making process of the law.

The separation of scientific evaluation and social decisions based on that evaluation is a requirement in spheres other than the law. Experts calculate risks, for example the effect of setting various speed limits for cars in various situations (city, urban etc.) on, for instance, the number of accidents and the severity of the accidents that occur, and also the economic cost of slower speeds on total traffic movement. The assessment of safety, that is what speed limits to set, is a social decision of which the scientific evidence is only an input.

In occupational health, risk assessment (science) and safety standards (social) are also separated (Lowrance, 1976). Care is taken to separate the empirical (factual) from the normative (value judgment) as the following shows.

EMPIRICAL	NORMATIVE
RISK	SAFETY
EFFICACY	BENEFIT
WHICH PARTIES FACE THE HAZARDS, GET THE BENEFIT AND PAY THE COSTS	EQUITY OF THIS DISTRIBUTION
DETERMINING CRITERIA	SETTING STANDARDS

These in-principle separations are not always kept in practice. The price of good decisions is eternal vigilance.

The separation of the expert statistical calculations from a decision based on those results is relatively simple, but understanding statistical methods is not. One fashionable confusion results from the use of Bayes' theorem for conditional probabilities (Darroch and Eggleston, 1985; Tyree, 1984). Let us take an example from medicine. Some years ago it was compulsory to

undertake mass chest X-rays for detecting tuberculosis in the general population. Let us assume that such a screen was very accurate.

- If someone had TB, the screen would detect it 99 percent of the time.
- If someone did not have TB, the screen would clear him 99 percent of the time.

In terms of conditional probability this would be written

$$P(+|TB) = 0.99 \{\text{or in legal terms } P(E|G)\}$$
$$P(-|\bar{TB}) = 0.99 \{\text{or in legal terms, } P(E|\bar{G})\}$$

Now we assume that the average incidence of TB in the population is say 1 in 10,000 and an average person is forced to undergo a chest X-ray. If the result is positive, what is the chance that this poor individual has TB? You may be swayed by the accuracy of the testing procedure but then neglect the low incidence of the disease. In statistical terms you are asking for the value of $P(TB|+)$ {or in legal terms $P(G|E)$}. Note that we are now 'conditioning' on the test (evidence) not the disease (guilt) or its absence (non-guilt).

Bayes' theorem (Tyree, 1984) allows us to calculate this probability

$$P(TB|+) = 0.99 \times 10^{-4}/\{0.99 \times 10^{-4} + 0.01 \times (1-10^{-4})\}$$
$$= 0.0098$$

The individual with the positive test result has less than 1 percent chance of actually having the disease. The X-ray screen has an odds reducing power (that is, of reducing the odds before the test to the odds after the test) of 100. This sounds great. But if the odds before are 1 in 10,000, then the odds afterwards are 1 in 100. The result is not impressive. Accurate tests become inaccurate if the event is rare. Unfortunately in most legal situations there is no agreement on the prior odds, although where an estimate can be made as in the Splatt Royal Commission, (Shannon, 1984) the result can be devastating.

Precisely the opposite effect of rarity is seen in epidemiology. In the Agent Orange Royal Commission the veterans exposed to pesticide seem to have a higher incidence of certain disease/abnormalities etc. However, it is not the absolute rate in the veterans but the ratio to unexposed controls that suggests cause and effect. The rarer the incidence in the controls, the more significant the effect in the exposed. In occupational health it is really only very unusual diseases that have led to uncontroversial attribution of cause and effect. With more usual diseases, courts have to be given a chance to use their social judgement.

What we are seeing over and over again, is the critical issue of analysing the alternate hypotheses. In an article 'The mathematics of corroboration', Sir Richard Eggleston provides a Bayesian analysis of corroboration by unreliable witnesses (Eggleston, 1985).His critical argument evolves around the point of how many different credible lies are available to the witnesses, that is alternate stories to the one actually told. Without clarity on

this point, popular legal phrases such as the following, become so much mumbo jumbo...', Many rays of weak light combine to illuminate ...', Many thin threads in a rope together ...', or, 'The weakest link in a chain ...'.

A classic illustration of how important it is to clarify the hypotheses being tested is in the popular lecture ploy of asking whether two people in a room have a birthday on the same day. The answer is given as follows:

Select the first person's birthday, then the probability that the second person has a different one is 364/365 and so on, giving for 3 people

$$= 1 - [364/365 \times 363/365]$$

For n people the probability

$$= 1 - \frac{364!}{(365)^{n-1}\ (365-n)!}$$

which results in the following probabilities:

TABLE 2

COINCIDENTAL BIRTHDAYS (365 HYPOTHESES)

No. of people in audience	10	12	20	30	50
Probability of two identical birthdays	0.12	0.17	0.41	0.71	0.96

The probabilities appear surprisingly high unless you realise that you are simultaneously testing 365 hypotheses, namely that the common birthday is on the 1 January, 2 January etc. Even for a jury of twelve, the odds are better than 1 in 6.

If we insist on a single hypothesis, for example, do two jurors both have their birthday on a particular day (such as my birthday) then the odds for a jury of 12 drop to five in ten thousand.

Well, if you think statistics is too hard, it is at least quantifiable. While much of chemical analysis can be quantified, there is much that cannot. A simple case of quantified evidence is when for example a breath alcohol result obtained on a Breathalyser (TM) is reported as 0.14 ± .02 (2.s.d.) where the error is quoted as a 95 percent confidence range. In this case the use of 'scientific' confidence limits is justified as part of the scientific evidence because we are dealing with an 'experiment' which has a high precision and so demanding limits can be placed on its confidence levels. Houts, Baselt and Carrey's (1985) standard text explains the terminology and importance of procedures, and the meaning of variables of legal significance. It provides a toxico-legal checklist. An inference chart could be built from this check-list to provide the scientific equivalent of forensic continuity, that is, to establish that the procedural track is sound and that all confusions, confoundings and contradictions have been suitably accounted for.

In the Chamberlain case (Tipple, 1986) the forensic biologist gave evidence that while examining the Chamberlain car she unbolted a hinge on the passenger seat and observed "a lot of flakes of dried blood. It was just virtually suspended there between the hinge and the vinyl..." The amount of material described would have allowed thousands of tests to have been performed. None of this material was preserved, because the biologist explained (Second Inquest 1981-82 transcript 643)"... I was not requested to keep any of the sample."

The tragedy of not preserving any of this extensive sample is now well known. Not only did it prevent the accused from being able to carry out any independent testing but the loss was accentuated because unlike other forensic laboratories within Australia and around the world the test plates were destroyed and no photographic records were kept. The greatest tragedy however has been that now a completely new technique has been perfected which would allow a pico-gram amount of blood to be analysed and typed for DNA. This would have provided a good identification of Azaria. These results would not have been affected by denaturation of protein (as were the evidential tests).

The legal system must allow science to progress and be able to come back later with new ways of assessing evidence. As stated in the High Court of Australia by Deane J in his judgement on this case

> The principle that no person should be convicted of a serious crime except by a jury on the evidence - has no corollary requiring that every person who is found guilty by a jury's verdict should remain so convicted. (1984, 51 A.L.R. 305).

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A FORENSIC STANDARDS PROPOSAL: THE INFERENCE CHART

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The criminal justice system is vulnerable to human error, intentional and unintentional, at many points. Those in which the jury is involved are:

(a) the jury is CONFUSED by technical detail,
(b) the jury is CONFUSED by conflict between experts,
(c) the jury is MISLED by an expert incompetent in technique or methodology,
(d) the jury is MISLED by an expert incompetent in logic,
(e) the jury is MISLED by a dishonest expert.

Safeguards against these dangers must be set up because, firstly, the justice system is manifestly being damaged by the improper application of science, and secondly, because the application of science to the justice system is expanding rapidly. The dangers are not removed by the rapid improvement in scientific qualifications of forensic scientists now under way, since many of the more notorious misapplications of science in the courtroom have occurred at the hands of highly qualified and experienced practitioners.

The system of forensic standards now being proposed aims not only at the methodology of scientific testing employed by the profession but at the way in whch inferences are drawn from the test results and the way in which the inferences are communicated. By removing the jargon from scientists' reports it should be possible to expose to the view of the court the logical pathways they follow in getting from their test results to their final opinions. Justice is most likely to be served if the scientist retains control of the testing procedures, the qualifications for which are well understood and easily examined by the court but leaving to the jury the control of matters of opinion. This is not to deprive experts of their opinions, but merely ask them to explain how they reached them.

The logic involved in reaching conclusions from scientific data is not more difficult to follow than logic employed in other items discussed before a jury and there seems to be no barrier other than the unfamiliarity of scientific language to prevent the court following it. A major aim of the proposed system of forensic standards is the removal of this barrier, enabling the court to return the expert to his proper function which, as stated in Cross on Evidence (Gobbo et al., 1980):

> ... is to furnish the Court with the scientific criteria necessary to come to a reasonable and independent judgment on the merits of the scientific or specialist issue which would otherwise be beyond them.

In the criminal investigation the benefits of expertise in forensic science are felt in several different ways. The competent expert knows the overall procedure to adopt when presented with a sample and asked to report on it. (Strategy) He knows how to select the various individual tests which properly comprise the method, including the 'controls', which he uses to exclude false positive and false negative results. (Methodology) He knows how to physically perform the tests on his behalf. (Technique) He knows how to exclude alternative explanations of his results, both by recourse to the control experiments carried out before tests were performed and by new experiments. (Reasoning) Finally, he understands the importance of each of these separate activities in the logical pathway leading from the test results to final conclusion. (Reasoning)

It is now clear that impressive academic qualifications and long experience provide no guarantee to a jury of the accuracy of a scientist's logic, or even of his or her objectivity. It is necessary to require, as in science, generally, that the conclusions scientist offer be judged on their merits. Helping courts carry out this judgment for themselves is the aim of this proposal for forensic science standards and, in particular, a new kind of courtroom exhibit, the Inference Chart.

Helping courts to follow the logic of scientific evidence is likely to have two important effects on jury trials. First, it will remove the mystique which confers on the forensic scientist the unjustifiable infallibility of Sherlock Holmes. Second, it will help to display the real worth of Rumpole's declamations when he presents his perceptions of science to the jury. When the logical pathway can be laid out on paper it ought to become possible for the court to follow the argument, at least with no greater difficulty than that involved in other parts of criminal trials.

The precision offered by technical language is indispensable for the scientist, but once the science is done, the structure of the argument is quite susceptible to simple description. If this can be accomplished, judges may be as willing to intervene in instances where scientific evidence may be apt to confuse or mislead the jury, as they are now with other kinds of evidence. It is because the logic can be understood that fingerprint evidence is so rarely the cause of courtroom confusion or wrongful conviction.

AUSTRALIAN STANDARDS AND FORENSIC SCIENCE

Given that the Standards Association of Australia or some similar body is willing to disseminate an Australian standard for each forensic test used routinely in criminal investigation, courts will be able to test the materials and assess their value. Such a standard will incorporate full information about techniques (sampling, physical performance of tests ...), the precision attainable, the range of materials to which the test can be applied, the controls necessary to avoid spurious results, and the safeguards necessary to avoid invalid conclusions. Summary materials will provide general information about the method, its capabilities and its dangers, in a form intelligible to counsel and, if necessary, the court.

A vital part of the Australian standard for a test is the document designed to bridge the gap between the knowledge which the expert brings to a test and the level of understanding of the jury which must form an opinion on it. We propose a single-sheet document to be used in pre-trial proceedings and in trial by judge and counsel or, if necessary, introduced to court as an exhibit. The primary purpose of the inference chart is to show how the test result (a meter reading, say, or a colour reaction in a test-tube) is able to yield a reliable, positive conclusion, if and only if, (a) false positive tests are excluded, and (b) alternative explanations for a true positive results are excluded. Because of this, the inference chart is framed in such a way as to require an unbroken chain of YES responses before a positive final conclusion can be accepted as valid.

The existence of an Australian standard for a test will indicate the confidence the scientific community places in the method described. Unusual measures, commonly necessary for a science dealing with minute traces of evidence collected under adverse conditions, are not excluded, but the onus is placed squarely on the professional scientist to explain why a non-standard procedure is being used and to explain to the court the effect of such a measure on the precision of the test results and the validity of the conclusions. Likewise, when a laboratory chooses a test for which no standard has been prepared or one not yet widely accepted, the onus is on the expert to show that he has conformed to criteria no less stringent than those used in standard procedures.

An immediate advantage in court of the use of tests for which Australian forensic standards exist would be the barrier placed against any attempt to reverse the onus of proof. Suggestions, such as the one made in a recent highly publicised trial by a very experienced overseas scientist, that results show such-and-such to be the case 'until proved otherwise' are clearly exposed. Contrariwise, arguments carefully formed by systematic exclusion of alternative ways of explaining the results will present themselves with the weight which is their due.

A second benefit of the inference chart method of documenting forensic science evidence is of the kind most noticed when it is absent. Evidence which is incapable of meeting the criteria laid out in sequence in the inference chart is unlikely to be introduced.

The necessity of the Inference Chart is the recent and frequent exhibition in court of experts disputing scientific matters which juries and judges cannot possibly understand, much less adjudicate. Confusion is inevitable. The aim of the forensic standards proposal is the raising of standards of evidence presented in court to the point where unprofessional material will not be offered. The high standards insisted upon in Fingerprint Bureaux in Australia and England have led to a situation where evidence is rarely, if ever, challenged. Fingerprint experts are proud of the fact that evidence which fails to meet the convention (in Australia 12 points of resemblance, no unexplained dissimilarity; in the U.K. 16 points of resemblance) never reaches court. In the U.S.A. no such convention exists and conflict between experts (as many as six disputing the validity of identification) is the unfortunate result.

In cases where conflict is unavoidable, the chart might be introduced as an exhibit, providing the jury with a clear outline of what features of the evidence are being disputed and why, thus reducing the premium on theatrical performance by barristers. When experts disagree on matters too high for ordinary people to understand it is not likely that ordinary people will withhold their judgment. A decision is reached just the same, but on matters unconnected with the facts.

It is taken as a right of every citizen in a democratic country to full and early disclosure of scientific evidence to be brought against him. If this right is exercised, the fact that an inference chart is available in pre-trial conference to both counsel ensures that the defects or the strengths of the evidence are clearly known. The judge may use the Chart to determine the approach likely to be taken by the prosecution when the case comes to trial and, consistent with the right of the accused to reserve his defence, to assess in advance whether or not forensic evidence will be challenged. Early warning will assist him to decide whether the confusion caused by an ensuing conflict between experts will outweigh any possible value it may have.

The logical chain necessary to reach a conclusion from results obtained from chemical, spectrometric, and immunological tests lends itself well to presentation by an inference chart. Other kinds of testing, no less vulnerable to low standards, are more difficult to adapt to a presentation which relies on decisions made in sequence.

Tests which tend towards subjective evaluation based on the assessment of numerous observations simultaneously require a different approach, perhaps one in which the dangers associated with a single opinion are reduced by referring the assessment to a group of scientists rather than a single expert. Methods in this category include bloodstain pattern interpretation and the assessment of psychiatric illness.

CONCLUSION

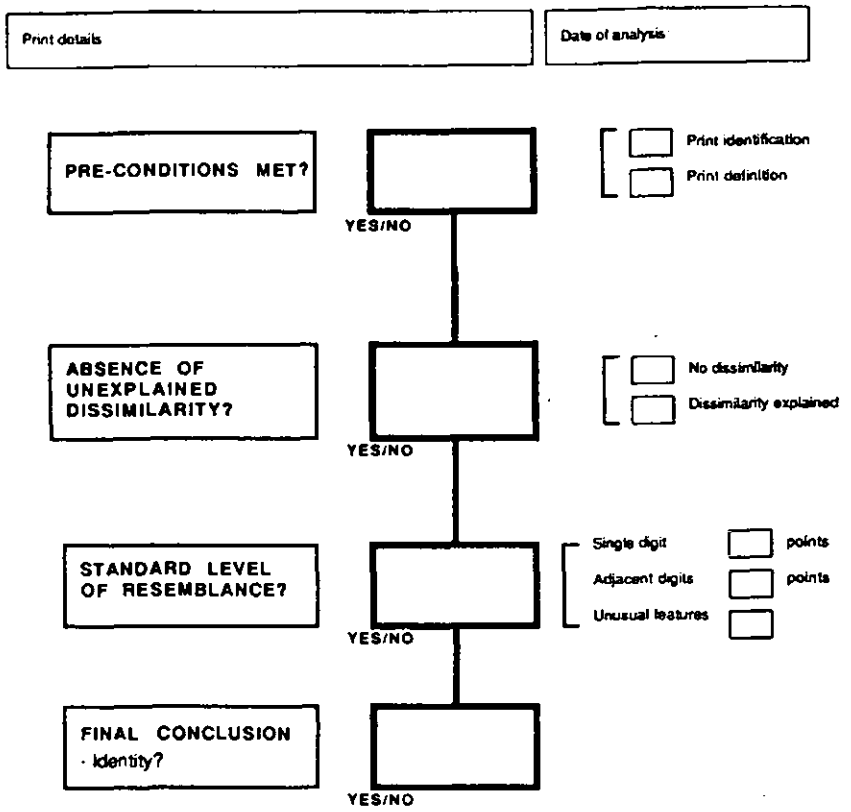
The Inference Chart, a jargon-free outline of the logical pathway followed by a forensic scientist in reporting the results of his testing and the conclusions drawn from them, is devised to assist juries to reach their own independent assessment of the expert's evidence. It uses the method used by courts to remove their doubts about any other argument, reducing it to steps and taking the steps one at a time. It advertises the fact that faulty logic in the office is just as deadly to forensic science as faulty technique in the laboratory, and it recommends that juries no longer delegate to others the responsibility of deciding whether an expert's opinion is valid or not.

Acknowledgement: The authors thank Mr Tom Smith, Q.C. and Professor Barry Boettcher for comments and criticism and Judge Raymond Watson for encouragement.

REFERENCE

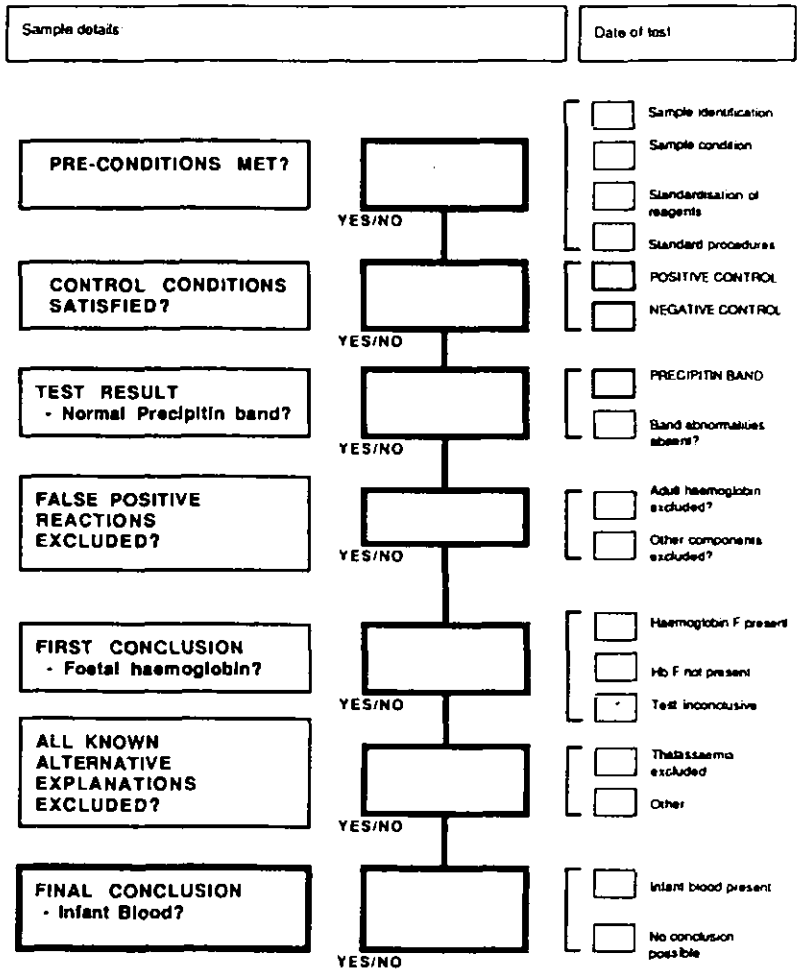
Gobbo, J.A., Byrne, D. and Heydon, J.D., (1980), Cross on Evidence, Butterworths, Sydney.

INFERENCE CHART: FINGERPRINT ANALYSIS



INFERENCE CHART: OUCHTERLONY TEST

IMMUNOLOGICAL TEST FOR FOETAL HAEMOGLOBIN / INFANT BLOOD



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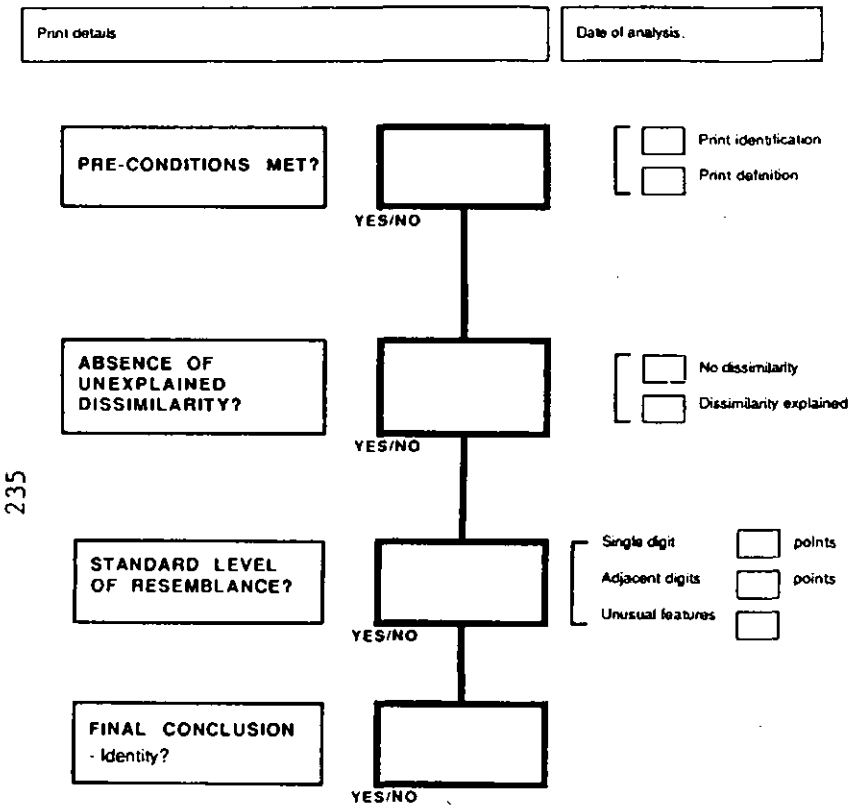

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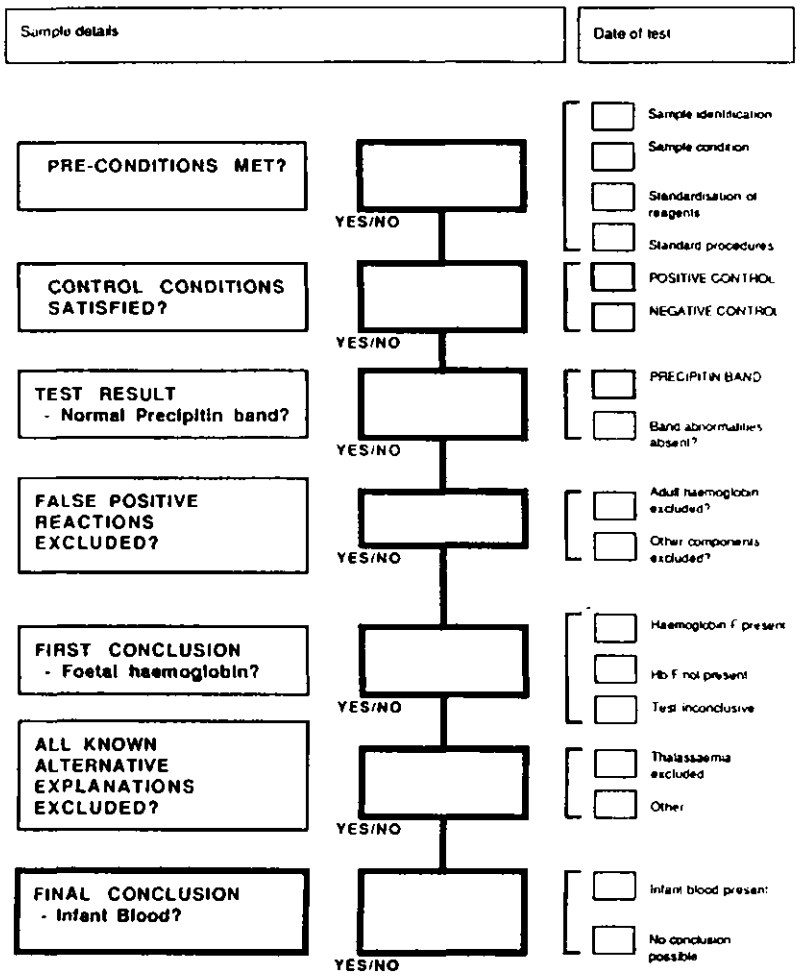
IMMUNOLOGICAL TEST FOR FOETAL HAEMOGLOBIN / INFANT BLOOD



JURY PERFORMANCE IN COMPLEX CASES, particularly those involving fraud or the presentation of forensic evidence

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INTRODUCTION

During the last year or so, the jury system has been under intense scrutiny, both in its birthplace, England, and in Australia. Much of that scrutiny has been hostile. Several strands of criticism can be identified.

First, all too predictably, there is the 'law and order' push - a belief that the jury system can be manipulated or naturally operates so as to increase the likelihood of unjustified acquittal. There is, of course, nothing new about this either in England (Mark, 1973) or in Australia (Miller, 1980). Howard (1985) has recently argued with regard to Australia that:

> It is by no means obvious that a system which is already heavily weighted in favour of the defence by restrictions on police powers of investigation, by many rules of evidence, by preliminary hearings or by rights of appeal which to a large extent are available only to the defendant, should have juries added in at the trial stage as well.

This contribution typifies the quality of this strand of criticism. Not a scintilla of evidence is offered that actual distortion of the criminal justice process is brought about by the operation of the jury system. Nor does the protagonist feel any obligation to refer to sources of possible distortion under the control of the Crown - for example, jury-vetting.

A second strand of the debate springs from concern, even compassion, for individual jurors. The spate of jury-room disclosures arising during 1985 in relation to the Gallagher, Maher and Murphy trials highlighted the pressures under which juries are expected to function. An article in the Sydney Morning Herald, 'Too Much Pressure on Jurors?', referred in

detail to the fact that individual jurors felt under attack when an avalanche of comment followed their verdict (SMH, 18 February 1986). An earlier article in the National Times (Loane, 1985) took the matter back one stage to the process of deliberation. Under the title, 'Psychological Warfare in the Jury Room', it purported to describe how harrowing is the experience of being a juror in a case of great public interest.

There is a great deal in these concerns. They find expression also in more reputable ways than as articles written by staff writers of the Fairfax Press (which almost singlehandedly has created the atmosphere of juror trauma which it purports so much to deplore): see, for example, Lovitt, 1985; New South Wales Law Reform Commission, 1985; Victoria Law Reform Commission, 1985; and Australian Law Reform Commission, 1986. In Victoria there has been a quick legislative response by way of the Juries Act Amendment Act 1985, the purpose of which is to provide comprehensive protection for jury confidentiality.

A third strand of criticism is technocratic. This questions the intellectual or experiential competence of the jury either to discharge its task at all or to do so in particular types of cases. The most sweeping attack is, once more, that of Howard (1985):

> It is often suggested that the jury is a corrective to the individual attitudes of particular judges. This may or may not be the case. It is also not the point.
>
> The point is that any human institution is bound to be only as good as the people who comprise it. There is no reason to suppose that a more or less random selection of ordinary people is going to have any less impressive an array of prejudices than a judge.

Usually, however, the technocratic argument takes a narrower form than this, being confined to fraud cases, trials involving the presentation of forensic evidence and cases which are otherwise complex or highly technical - the subject matter of this paper. Discussion thus seems to start from the premise that the jury system as such should be retained. However, the question obviously arises whether erosion of jury authority based on supposed incompetence is not, in reality, a crucial political step in de-legitimising the whole system. Is it not different from quantitative limitations of jurisdiction made, for example, by way of provision to elect summary trial by a lower court? In addressing the narrower set of issues, therefore, one must be mindful to some extent of the broader issue: should jury trial be retained at all?

FRAUD TRIALS

In 1983 the Roskill Committee was set up in the U.K. 'to consider

in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings'. The Committee reported in 1985 and its Report, it is fair to say, canvasses the principal issues constituting this debate in Australia also. (New South Wales Law Reform Commission, 1985, paras 10.1 to 10.2.)

Roskill draws upon the technocratic argument par excellence:

> There is, however, one particular class of case which, in the view of a majority of us, needs special treatment: that is the fraud case of such complexity and difficulty that it cannot reasonably be expected to be understood by a jury selected at random. (Roskill, 1985, para. 1.6.)

Later it emerges that belief in jury incompetence is an article of faith rather than a construct of empirical evidence:

> There is 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 random jury 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, 1985, para. 8.35.)

Before ascertaining where the available empirical evidence might have led the Roskill Committee, had they cared to look at it, one should refer to its recommendations on broader issues - for example, with regard to such matters as the processes of investigation and preparation of a case for trial, the identification of defects in the substantive law, and in particular the question of interlocutory headings. (Roskill, 1985, Chapters 2, 3 and 6.)

As to the latter, a pilot project had been set up in 1983 in relation to all criminal cases, not merely those involving fraud. The objective had been to achieve, broadly speaking, in criminal litigation what is intended to be achieved by interlocutory procedures in civil litigation. Of course, a natural limit is set to this by rules as to onus and standard of proof and against self-incrimination. The Committee nevertheless found that 'pre-trial reviews [the term used to describe this interlocutory process] operate sensibly and efficiently in a large number of cases in which they are held'. (Roskill, 1985, para. 6.11.) This finding was somewhat impressionistic inasmuch as 'there has been no quantitative or qualitative research into the effects of pre-trial reviews'. (Roskill, 1985, para. 6.10; Ashworth, 1984.) It was based on interviews with judges, court officials and lawyers. In the absence of any other information it is entitled to some credence.

So too is the further finding that 'in fraud cases ... the additional expense of holding a pre-trial review has not been justified by any significant savings in trial time nor has it resulted in any other obvious benefits'. (Roskill, 1985, para. 6.11.) However, the Report does identify factors that would seem to have caused this failure: they include such matters as the pre-trial and trial judges not being the same person; tardy distribution of documentation; inadequate preparation by counsel and/or change of counsel during the case; and above all the absence of sanctions to persuade parties to co-operate at that stage of proceedings. (Roskill, 1985, paras 6.12 to 6.22.)

The Committee accordingly made detailed recommendations to improve pre-trial procedures. They are of considerable interest also in an Australian context (New South Wales Law Reform Commission, 1985; 1986). From the point of view of the debate about the jury system, the essence of the recommendations is that they would tend to increase the comprehensibility and diminish the duration of complex fraud trials. This in turn would erode arguments based on supposed lack of capacity of jurors to grasp the crucial issues and maintain concentration. In summary, the Roskill recommendations were as follows:

(a) the pre-trial review or preparatory hearing [henceforth the preferred terminology] should be an integral part of the trial itself, with the consequence that it would normally take place in open court;

(b) the court itself, rather than the parties, would decide upon the necessity of such a hearing;

(c) the same judge would, naturally, preside at each stage of the trial;

(d) scheduling of cases would ensure that the presiding judge had sufficient time to study relevant documents, and secretarial assistance would be improved;

(e) the prosecution would be obliged to supply the outline of its case and all supporting documentation to the court and to the defence;

(f) procedures would be established to enable the defence to make factual admissions;

(g) by negotiation and agreement, case summaries, chronologies and glossaries of legal terms would be drawn up for the benefit of the court, parties and the jury;

(h) contested evidence would be presented in ways which were easier to comprehend than by merely verbal presentation - for example, by way of graphs, tables, other graphics and diagrams;

(i) preliminary arguments as to admissibility of evidence and points of law would take place before empanelment of a jury, and only those matters which could not reasonably have been anticipated would be subject to further voir dire during trial.

This is a cogent program of reform. If the essential question in a complex fraud case is ultimately that of dishonesty, and if it is thought that this issue may often be obfuscated by complexity or sheer volume of evidence, then it would seem that the proposed reform package would sharpen that question considerably. One would have thought that the Roskill Committee would have put its eggs first into this reform basket. Once implemented, such reforms could have been systematically monitored for their impact. A more radical fallback position - changing the jury system itself - could then have been considered in due course if there were a perceived need.

However, what should have been the Committee's fallback position - the creation of a special non-jury procedure for complex fraud trials - is presented as if it were logically the primary position. Indeed, the introductory chapter highlights this proposed non-jury procedure, the creation of a Fraud Trials Tribunal. (Roskill, 1985, para. 1.6.) The Government White Paper (Home Office, 1986, para.43) in turn highlights this as the issue requiring urgent resolution; and it skirts by the proposed procedural changes as if their raison d'etre was to facilitate the working of the proposed Fraud Trials Tribunal. This was certainly not intended to be the case. (Roskill, 1985, para. 8.39.) It is a neat piece of sleight of hand by the author of the White Paper; the jury disappears up the conjuror's sleeve.

Yet it is evident that the Roskill Report itself does not make out even a prima facie case of jury incompetence. As mentioned earlier, its attitude is more an article of faith than a construct of empirical evidence. (Roskill, 1985, paras 1.6, 8.35 and 8.12.) In fact, worthwhile research tending to confirm jury competence does exist, though the Roskill Report does not cite any of it.

The English research may be found in the book, Jury Trials, (Baldwin and McConville, 1979). The research related to 370 jury trials in Birmingham and 347 in London. The authors characterised certain aquittals as 'questionable', the criterion adopted being that of both the trial judge and either the prosecution or the police or the defence itself regarding the acquittal as unjustified. In the Birmingham sample there were 114 acquittals of which 41 (36 per cent) were 'questionable'. On this basis the researchers stated that trial by jury was 'an arbitrary and

unpredictable business', and that their own confidence in the jury system had been shaken. The Roskill Report cites these conclusions with relish. (Roskill, 1985, para. 8.11.) Yet it fails to refer to the more cogent finding specific to fraud trials:

> Furthermore, not one of the questionable acquittals involved complex frauds, offences which were rarely contested before juries in Birmingham during the study period. Indeed, of the eight cases of fraud which raised questions of some complexity, six resulted in the defendants being convicted and the two acquittals were regarded as broadly justified by the respondents. (Baldwin and McConville, 1979, 61-2.)

Eight cases may not be an ideal sample; but in the absence of any other objectively obtained empirical evidence it is disingenuous if not dishonest of the Roskill Committee not to mention these findings. They were fortified, moreover, by the conclusion that there were no questionable verdicts at all in the 25 long trials within the total sample.

The Roskill Report also failed to make any mention of the findings of Kalven and Zeisel in their seminal research, The American Jury (Kalven and Zeisel, 1966). The methodology adopted there was as follows: asking trial judges, upon retirement of the jury and before verdict, a series of questions including what they considered the verdict should be, how finely balanced the evidence was and how difficult overall the case was. Against their answers was measured the actual verdict in the case. The sample was 3576 trials. It was found that in 75.4 per cent of these cases, judge and jury verdicts (whether of conviction or acquittal) coincided; that in 16.9 per cent of cases the judge would have convicted where the jury acquitted; and that in 2.2 per cent of cases the judge would have acquitted where the jury convicted. The remaining cases involved a hung jury.

The analysis went further by attempting to ascertain whether the likelihood of notional disagreement was greater with regard to 'difficult' cases. In other words, the researchers confronted the basis of the technocratic argument that there are limits to the ability of the jury to understand. A random sample of 1191 of the 3576 cases showed that the rate of disagreement was no greater with regard to difficult cases than easy ones. The same was true as between close and clear cases.

Disagreement	Easy	Difficult
Clear cases	9% (N=618)	8% (N=57)
Close cases	41% (N=406)	39% (N=110)

'The result', claimed the authors, 'is a stunning refutation of the hypothesis that the jury does not understand'. (Kalven and Zeisel, 1966, 157.)

It must be said that Kalven and Zeisel did not identify a separate category of complex fraud cases. However, 3.9 per cent of their total sample (i.e. 131 cases) involved fraud of some kind or another. It is not unreasonable to presume that some of these were captured in the sub-sample analysed above. Whilst the evidence that juries cope no less well with complex fraud cases than with other cases is thus not direct, the American research is nevertheless sufficiently cogent to have deserved some reference.

If the Roskill Committee displayed the Nelson touch in this respect, it emulated Don Quixote in another. The windmill at which it chose to tilt was that the Crown may decide not to prosecute at all in a major fraud case because of the expectation that the case could not be presented in a way which an ordinary jury could comprehend:

> We were told that this was rarely the sole reason, but that it was sometimes a major contributory factor in deciding not to proceed with a prosecution. We also had evidence that the difficulty of presenting a complex case often resulted in a decision to opt for less serious charges than the offences warranted. (Roskill, 1985, para. 8.36.)

The dissenting member of the Committee, Mr Walter Merricks, met these rather general abstractions with specifics:

> As far as lack of prosecution is concerned, the DPP supplied us with an analysis of cases referred to his fraud division for the year 1983. Of the 179 referred for prosecution (as opposed to criminal bankruptcy cases and others), in 31 cases the decision was to prosecute, 77 were still pending at the time, and in 71 the decision was not to prosecute. Of these, the largest category revealed insufficient evidence to justify proceedings (32), in some there was no evidence of an offence (12), 9 were referred to the Department of Trade and Industry, in 10 cases there were difficulties over extradition. The remainder either revealed other offences but no fraud (9), were not prosecuted by reason of staleness (6), or the small amount of the deficiency (5). One case was not prosecuted due to complexity: the case involved the theft of intellectual property. Civil proceedings were pending, and independent counsel had advised that the cost of a prosecution would be enormous and that the chances of success did not warrant it. (Roskill, 1985, 193.)

So much for the English position. The debate seems to be a contrived one, deriving not so much from documented inadequacy of the jury system as from ideology. Indeed, the Australian Director of Public Prosecutions has pointed out that the English practice is not to bring charges for major fraud but rather to compromise the action, 'which means that people buy their way out'. The English D.P.P. simply does 'not have the basic experience of the work problems'. (Temby, 1986c.)

Whilst the Australian debate has not gone quite so far down the track, the attitudes traversed by the Roskill Committee have certainly permeated public consciousness. For example, following the Maher trial, where the jury deliberated for a record eight days, the views of one juror received great prominence in the National Times:

> After Sunday's bus outing, Monday morning was the showdown. The women felt strongly about returning a guilty verdict on all counts. We finally came to a compromise - with guilty on counts one and 20 and not guilty on counts 16 and 21. [Counts 2-15, 17-19 and 22 had been withdrawn from the jury at an earlier stage.] In the end no one was completely happy because not one verdict reflected a unanimous decision ...
>
> Most people, especially those selected for jury duty, don't often discuss complex issues as a matter of daily life. It is a mechanism they have never developed, and they have to try to do it for the first time. After a few days in that room, there is no logical discussion - it becomes psychological warfare, where people start thinking of tactics to change other people's minds. (Loane, 1985.)

Other media coverage adopts a not dissimilar tone. Specious legitimacy may be lent to this by the suggestion that 'those who support a change in the jury system in complicated fraud cases or where scientific evidence is confusing to the average ... juror include a large section of the Australian legal profession'. (Adelaide Advertiser, 17 October 1985.) This claim is not substantiated by empirical evidence; it might be more accurate to suggest that some members of the legal profession are concerned.

For example, the principal researcher concerned with the preparation of the Victoria Law Reform Commission's paper, The Role of the Jury in Criminal Trials, has suggested that addresses by counsel and summings-up by judges in complicated commercial cases are becoming increasingly technical. (Read, 1985.) The context of her remarks seems to indicate that, for this reason, it may be appropriate to limit jury trial in such cases - an interpretation borne out by a later paper. (Read, 1986.)

Mr Justice Deane, whose dissenting judgment in Kingswell (1985, 60 A.L.J.R.17) was a stirring defence of the jury system as such, is another who has acknowledged the pertinence of such issues:

> ... contemporary circumstances have raised new questions about, and placed additional strains upon, the institution of the criminal trial by jury. There is, for example, obvious force in the argument that a jury of ordinary men and women selected at random from the community lacks the knowledge and experience necessary to sit in responsible judgment upon the type of scientific dispute between specialists that may arise in the course of a criminal trial or upon the detailed technical questions which may be involved in the trial of white collar and computer crime.

On the other hand, the Director of Public Prosecutions, who had previously (The Age, 15 October 1984) expressed some reservations about the capacity of jurors to cope with such matters, has more recently taken a pro-jury stance. He has stated:

> Some prosecutors think they would have a better chance of success (particularly in complex taxation and commercial cases) if there were trial by judge alone or by specialist jurors. Indeed, recently in England a Committee chaired by Lord Roskill has recommended that trial by jury be abolished in complex fraud cases. The recommended alternative is that such cases should be tried by a judge and two lay persons with business experience and the capacity to grasp intricate issues. I would be against any such change in this country. I strongly believe in the jury system of trial and remain unconvinced that it is inappropriate for various sorts of complex criminal matters.
>
> The jury system is not perfect. Like most institutions it has strong and weak points. Some changes may be desirable. Nevertheless, critics of the jury system itself should not be heard unless they are able to prefer an alternative which is better than the present system. Thus far such an alternative has not been devised. (Temby, 1986a.)

It should be noted that the Director has the carriage of a major number of complex fraud cases (including the Maher case itself) arising out of 'bottom-of-the-harbour' tax evasion schemes; his quoted views presumably reflect his Office's evolving experience in this area.

The Victoria Law Reform Commission itself, whatever the personal views of its principal researcher, also tentatively lends its support to the status quo:

> It may be considered odd that complicated commercial cases are singled out for attention, as somehow distinct or apart from other complex cases of a non-commercial nature: there is no reason to believe that tangled commercial matters are more difficult to understand than labyrnthine conspiracy cases, or cases of another nature involving convoluted fact situations and perplexing evidence of various types. It is not immediately evident why it should be accepted wisdom in some quarters that juries are incompetent to deal with such matters and that to leave these cases to judges would be preferable, or non-problematic. No doubt judges may have a difficult time understanding knotty commercial matters: not all are well versed in commercial law. Not all, even if expert in some or many commercial law areas, need be without any difficulties in handling decision-making in this area, as in other areas of complexity in criminal trials. (Victoria Law Reform Commission, 1985, 177-8.)

A final view on this is that of jurors themselves - not individual jurors fresh from the trauma of a difficult case but jurors as a group, recollecting their experience in tranquility. Vodanovich (1986) has documented the attitudes of a sample of 747 Western Australians towards the jury system. Within that sample was a sub-sample of 54 respondents who had served as jurors. One question in the survey asked:

> Many authorities are strongly of the view that there should be special juries where the situations involve difficult scientific, medical or commercial evidence. Do you agree?

Sixty-two percent of non-jurors agreed and only 25 per cent disagreed with this. However, 40 per cent of those with actual experience of some kind of jury trial disagreed, whilst 53 per cent agreed. This, it must be said, is double-edged evidence. But it does seem to indicate that the technocratic argument is more appealing in the abstract than it is in the concrete, that as citizens gain experience of the jury system they gain also confidence in their ability to cope with it. Similar findings have been made in Canada, (Doob, 1979) and in New South Wales (New South Wales Law Reform Commission, 1986, 14; Wilkie, 1986.)

In summary, the case for interfering with the jury in complex fraud cases has not been made out. To the extent that there are technical weaknesses in the present system, technical means of strengthening it can and should be found. Such means have been described in the Roskill Report and by the New South Wales Law Reform Commission. (1986, paras 10.6 - 10.11.) That Commission has also affirmed its view that in such cases there is no basis for trying the matter in an abnormal manner. (1986, paras 8.24 - 8.38.)

CASES INVOLVING FORENSIC EVIDENCE

This debate parallels the previous one in that a radical 'solution' is offered, on technocratic grounds, for a 'problem' whose existence and nature is never really established. However, it must be said that in Australia there has been a considerable body of controversial material to fuel the debate, more so certainly than with complex fraud cases. These are the trials of van Beelen, Splatt and Chamberlain, all in their different ways causes celebres.

In van Beelen (1972, 4 S.A.S.R.353) the trial for murder lasted 71 sitting days; there were 214 exhibits and some 3300 foolscap pages of transcripts. Some five-sixths of all the evidence was made up by expert scientific evidence presented by each side. In these circumstances, the Mitchell Committee regarded it as axiomatic that 'special juries' should be empanelled for such trials:

> In the long run we believe that the fact that jurors have certain basic knowledge concerning the matters in respect of which expert evidence will be called will save time of counsel in addressing and will save a good deal of time in the examination and cross-examination of experts. (Mitchell, 1975, 102.)

In Splatt the difficulties were not dissimilar:

> Some of the jurors who convicted Edward Splatt in South Australia, chiefly on the basis of forensic evidence, have since his release publicly admitted that they did not understand that evidence. Recommending Splatt's release, Royal Commissioner Shannon reportedly said that problems as complex as those involved in the case are 'so detailed and convoluted that the jury needs to be furnished with considerable assistance'. (New South Wales Law Reform Commission, 1985, para. 10.3.)

As for the Chamberlain case (Bryson, 1985) it is of course subject to a Royal Commission and nothing that will be said should be construed as expressing a view as to the appropriate outcome. However, on any view the only evidence that could have founded a verdict of guilty was the forensic evidence - to the point where a reversal of the trial verdict would be likely to be seen as adversely reflecting, at least in part, upon the competence of the jury in forensic matters. The technocratic argument against the jury must, therefore, be confronted.

To put the matter in perspective, the obvious point should be made that many serious criminal cases involve the presentation of forensic evidence - as to cause and time of death, calibre of bullet, identification of body from parts, speed or angle or point of impact of motor vehicles, fingerprints, mental state of

the accused, and so on. Procedures for presenting this evidence and evaluating its significance are relatively straightforward and familiar. When such evidence is presented in conjunction with other direct evidence, such as witness identification, confessions, demeanour and opportunity, it is seldom suggested that the jury lacks competence to comprehend it.

Of course, these examples concern relatively accessible scientific concepts, dependent for their ascertainment on fairly crude technologies or no technology at all. However, new techniques have taken these and other areas to previously unimaginable degrees of sophistication - for example, gas chromatography, micro-spectrophotometric analysis and infra-red examination. The more complex the scientific concept and the more technical the means of ascertaining or measuring a scientific fact, the less accessible it is to the average juror. Nevertheless, the point should once more be made that where such evidence is part of a more complete jigsaw of other evidence, the jury can comprehend its significance, as strikingly illustrated in the earlier Australian case of Bradley (Thorwald, 1966, 359-82). What should also be apparent is that high-quality forensic investigation tends to lead to the discovery or disclosure of other, more accessible, evidence - confessions or physical evidence, for example.

Difficulties tend to arise when forensic evidence is, to all intents and purposes, the sole evidence. These difficulties are compounded when such evidence is complex in its nature and in its mode of ascertainment. In such circumstances, not only jurors but also judges may become perplexed. The Victoria Law Reform Commission has encapsulated the issue:

> The elimination of juries would not solve the problem, however - judges are not necessarily well-versed in matters of forensic medicine, nor immune from partisan persuasion of experts. (1985, 174-5.)

This is resoundingly true. My own view is that in this area jury malfeasance is invariably a direct function of legal or scientific malfeasance.

The popular media does not, of course, present the matter in quite this way. For example, a leading article about the Chamberlain case stated:

> In an age of mind-blowing technology, have lay juries in criminal cases become incompetent to judge any complex scientific issues? Or should expert jury panels be taking their place in the courtroom? (Northern Territory News, 15 February 1986.)

Again, an article in The Bulletin portrayed the jury as a group lured by the form rather than the substance of complex forensic

evidence, consumers in search of attractive packaging rather than content:

> Why was Boettcher's evidence [tending to exonerate the accused in the Chamberlain case] not accepted at the original trial? It is easy to see how his rather heavy academic style could bore a jury. He says that the jury was more impressed by the dramatic and more practised presentations of Kuhl and Cameron [Crown forensic witnesses]. (Abbott, 1986.)

In much the same way, a prominent article about the Splatt case, having referred to the fact that some jurors had publicly admitted that they did not understand the forensic evidence, went on to question the suitability of the jury system as such in cases of that sort. (Cockburn, 1984.)

The issues are far broader than this. They include: the mode of presentation of forensic evidence; the present role and professionalism of forensic scientists in Australia; and the capacity of the legal profession (judges and counsel) to control and direct the evidence of forensic witnesses. It is only in the light of such factors that the question of jury competence can properly be addressed.

a. Mode and presentation of forensic evidence

In both the Splatt and the Chamberlain cases, key forensic witnesses seemed to take on the role of protagonist rather than that of dispassionate provider of scientific information. To make this a point of criticism is not to deny that the trial procedure is, and should remain, adversarial in nature. Rather, it is to make the point that the adversarial edge is normally injected by counsel on each side, emphasising and probing the strengths and weaknesses of evidence. Broadly speaking, witnesses of other facts - even victim-witnesses - are constrained by procedural rules from identifying their own interests too overtly with any particular outcome. However, with expert witnesses the crucial difference is that traditionally they are permitted considerable latitude as to their opinion on facts in issue. Thus it is that their professional standing and reputation can themselves indirectly become an issue, at least in their own perception of proceedings. For a Crown forensic witness, the verdict of guilty may seem to be professional vindication and that of not guilty professional failure. Mutatis mutandis this may also be the case with forensic witnesses for the defence. (Kobus, 1986.)

Of course, not all forensic scientists allow themselves to fall into this false dilemma. Indeed, it should be put on the record that the overwhelming majority discharge their functions as dispassionately as one can realistically hope for in human affairs. Nevertheless, the point is not fanciful. In the U.K. dozens of convictions, including murder convictions, have

recently had to be reviewed as the result of the discrediting of a Home Office forensic scientist, Dr Alan Clift. (Cockburn, 1984; Phillips and Bowen, 1985.) In Australia a prominent trial lawyer has argued, on the basis of the van Beelen case and practices that have purportedly developed since then with regard to the presentation of forensic evidence, that no scientist should be permitted to express an opinion except in the rarest and most exceptional cases. (Abbott, 1985.) In the Splatt case the evidence of the dominant forensic witness was excoriated by the Royal Commissioner precisely because of its protagonist nature. (Shannon, 1984, 31-7.)

The most striking example of all concerns the Chamberlain case. It will be recalled that there were two key elements without which, on any view, the prosecution case could not succeed. These were: first, that incisions in the baby's jump-suit could not have been made by dingo teeth and were indeed positively made by scissors; second, that the substance detected under the dashboard of the Chamberlain's car and in Mr Chamberlain's camera-bag was a mix of foetal and adult blood of a proportion appropriate to a nine and a half week old baby (i.e. approximately 70:30). Each of these issues was, in the absence of any kind of direct evidence, exclusively forensic in nature.

The principal witness for the first proposition was Professor James Cameron. He was a British expert whom the Crown had brought to Australia for the second inquest (which led to the laying of charges against the accused) and for the trial itself. Bryson (1985) has analysed Professor Cameron's evidence in detail, and there would be no further benefit in setting it out at length. There can be no real doubt on the basis of Bryson's analysis that Professor Cameron became at some stage and to some extent a protagonist for his own views as much as a dispassionate witness of scientific fact. Two examples of how this manifested itself will serve.

First, Professor Cameron seemed to regard it as part of his task to play detective in relation to <u>non-forensic</u> evidence in the case. His report to the second inquest stated:

> On reading all the evidence, it would suggest that the last time the child was seen, by an independent observer, was 1530 hours on the day of the alleged disappearance of the child, although there is evidence given that the child moved, or was seen to be held by the mother. Nobody actually saw the child, apart from an alleged kicking motion seen at the barbecue site. (Bryson, 1985, 450.)

To include such a statement in a forensic report seems to display some role confusion. This was exacerbated by the fact that the statement seems to have been erroneous in some key aspects. (Bryson, 1985, 450.)

Second, Professor Cameron some six months after the conclusion of the Chamberlain trial gave an address in England to the Royal Society of Medicine in which he again took on the role of one who had successfully participated in the process of detecting and convicting an offender. (Bryson, 452-4.) This is a quality which he had also displayed in an earlier English case, Confait, which had been the subject of an adverse comment at an Official Inquiry. (Fisher, 1977, para. 2.32.)

The principal witness on the second key forensic issue - adult/foetal blood - was Mrs Joy Kuhl, a biologist then employed by the New South Wales Health Commission. Apparently, one of the techniques available to identify the blood characteristics is to place a sample on a polyacrylamide gel and expose it to an electric current of a certain voltage. As the size of the molecules of adult and foetal blood are different, they separate under this treatment. The proportion of each can then be measured. According to notes made by Mrs Kuhl of this experiment, the separation showed a 50:50 ratio - significantly too much foetal haemoglobin for a baby of 9-1/2 weeks. A second available technique is immunological in nature, measuring blood samples for reactions against anti-sera. The foetal and adult haemoglobin components should be able to be ascertained, this time by comparing the strength of the reaction with that caused by umbilical cord haemoglobin. Again, the results obtained seemed to show markedly too high a ratio of foetal blood. Yet the witness was not deflected from her conclusions. Bryson's analysis (1985, 428-32) suggests that the explanation for this lies in a degree of involvement which did not sit well with dispassionate presentation of objective fact.

Of course, to a degree protagonism is inevitable. Its extent and form will vary with individual personalities. But the potential for protagonism is also systemic and structural, bound up with the extent to which forensic scientists work for, or closely in association with, crime investigation authorities. Scientists, like the rest of us, can get caught up in the excitement of the chase. Also, external pressure from investigators can sometimes be enormous, resulting even in the making of false reports. (Dibben, 1986.)

b. Professional standards

This issue is intertwined with that of courtroom conduct and attitudes, but relates more to pre-trial ethics. Both the Splatt and the Chamberlain cases seem to indicate ethical hiatuses within the forensic sciences professions or some parts thereof.

To bring out the first example of this, let us consider the crudest of criminal investigation techniques - the identification parade. Under the general rubric of 'fairness', certain well-known practices have been developed. If the description of a mugger is that he is about 20 years old, blonde and stocky, a

parade of the accused (broadly answering that description) and one other person of quite dissimilar appearance would be worthless as evidence. That is obvious enough; the circumstances unduly influence the witness in reaching a conclusion. Yet, fantastic as it may sound, practices akin to this were followed in the Splatt case with regard to forensic evidence. For what were sent off to the scientists in that case were samples 'in tandem' - one from the crime scene, the other from the accused's belongings - with a request to indicate whether they were similar to each other. The Royal Commissioner commented:

> It seems to me that what has just been described is a wrong procedure; and it is a dangerous one because of the serious risk of unconscious bias. (Shannon, 1984, 48.)

Whilst the decision to send the material in tandem was not, of course, made by a forensic scientist but by the investigating officer, the point is that the scientists did not themselves regard the procedure as inappropriate or question it in any way. Quite the contrary; they fortified it by failing to bring out in their evidence the inherent limitations on its cogency. For example, crucial evidence concerned foam spicules found on the bedsheet beneath the victim's body; the question was whether these came from the car-coat of the accused. Forensic evidence presented to the court was that there were 'no dissimilarities' between foam spicules from the two sources. What was meant by this, it emerged at the Royal Commission, was that sufficient similarities were found to indicate that both samples were degraded polyurethane foam - a common enough substance in which potential points of dissimilarity were relatively few. The witness knew this but did not volunteer it at the trial, explaining later:

> I believe I answered the questions as best I could within the frame of the questions I was being asked. (Shannon, 1984, 53; see also 166.)

Such an answer would be impeccable from an ordinary witness, confined strictly to matters of fact. But with an expert witness, possessing the privilege of ranging beyond fact to opinion, is there not a matching responsibility to put facts into full perspective, whether asked to do so or not? Does the profession as a whole not perceive this ethical issue and guide its members' conduct? The Royal Commissioner certainly considered that there was such a responsibility:

> Of course, in that context of question and answer, the primary responsibility must always remain with the scientist; because it is he who should know the nature and scope of his scientific analysis and the limitations and exceptions properly attachable to the results which he achieves.

> Accordingly, in my view it is not properly open to a scientist ... to say: 'I answered correctly such questions as I was asked. If I had been asked others and more relevant questions I would also have answered them correctly. It is not my fault that the correct questions were not asked of me'. (Shannon, 1984, 52.)

The issue, then, is that of the duty of the forensic witness to the court to ensure that his own evidence is presented conformably with the dictates of justice. Integral to this is the question of disclosure to the defence of possibly exculpatory forensic facts discovered in the course of tests and also the question of preservation of material relied upon by Crown forensic witnesses.

In Australia is must be said that the doctrine of the duty to disclose exculpatory evidence has been slow to develop. (Lane, 1982.) To all intents and purposes, the matter is left to the discretion of the prosecutor which, in reality, often means to the police officer in overall charge of the investigation. In Splatt an exculpatory item of forensic evidence was positively suppressed by the Crown, epitomising both the protagonist role into which forensic witnesses can fall and a lack of clear ethical standards. (Shannon, 1984, 223.)

In addition, forensic information - even though not thought to be positively exculpatory - may be withheld from the court despite the fact that its disclosure would tend to assist a proper evaluation of the total worth of evidence of that sort. This surely is because such evidence is thought of as 'belonging' to one of the adversaries. The most noteworthy recent example of this occurred in the Chamberlain case.

It will be recalled that one of the tests used to try to determine the proportions of adult/foetal blood involved the use of anti-serums. The testing solution used by a defence forensic witness reacted in such an odd way as to raise suspicions that it might be defective. The question therefore arose: had the Crown witness used testing solution from the same batch of the same manufacturer? Such an eventuality was anything but fanciful given the highly specialised nature of the product and the very limited number of manufacturers. Before trial, the defence sought to ascertain the batch number from the Crown's forensic witness; she refused to answer the question one way or another. The pertinence of the question was subsequently highlighted by a manufacturer's admission that the defence batch was defective in a way which might cause it to react to a substance other than blood. What conceivable justification could there have been for refusal to supply this scientifically neutral information? It was only explicable in terms of a lack of proper ethics and guidelines within the profession. (Bryson, 1985, 426-7.)

The most startling example of inadequate professional standards was, however, that of the destruction before trial of the test

plates upon which the Crown forensic witness had conducted each set of foetal haemoglobin experiments. The tests, it must be stressed, had been conducted for the purposes of the second inquest, i.e. at a time when the possibility of criminal charges would have been uppermost in people's thoughts. The evidence was the single most significant part of the Crown case. As Murphy J. stated in the High Court:

> The foetal blood was the hinge of the Crown's theory that the baby was murdered in the family car .... Once it is accepted that it was unsafe to conclude that there was foetal blood in the car, then the conviction of Mrs Chamberlain was unsafe. (1984, 51 A.L.R.271.)

Although the majority in the High Court did not see this question as absolutely disposing of the issue, they nevertheless accorded it a high significance. In these circumstances, prudent professional conduct would surely have been to ensure that the most comprehensive evidence was available to the trial court, i.e. not just the Crown's records of forensic tests but also the defence's check analyses. The jury was entitled to the best evidence; in its absence arguments as to their competence to assess forensic evidence simply do not get to first base. Yet, apparently, professional standards as a whole would have regarded the destruction of the test plates as not unusual. In the United States, failure to preserve this evidence would have invalidated the trial. (Newman, 1975.)

c. The role of the legal profession

Do lawyers - counsel and the judiciary - possess the capacity to control and direct effectively the presentation of complex forensic evidence to the jury? If they fall short, the jury can hardly be expected to make good their deficiencies.

The Splatt case inexorably suggests that the input of lawyers is defective. Time and time again, the Royal Commission Report refers to a line of evidence which should never have been started and, once begun, should have been stopped; to the presentation of inferences or opinions that were not supportable by established forensic facts; and to misleading or inadequate summing-up. (Shannon, 1984, 39-40, 47, 175-6, 184, 186.)

Mr Shannon does not throw individual brickbats on this account but rather looks for a systemic explanation:

> The Trial, as it was conducted, represented an encounter of the closest possible nature between two systems, or disciplines: the discipline of Law and the discipline of Science. It is my opinion that from this encounter neither discipline escaped unscathed; they both bear the scars of that encounter. This was a very unusual ... case;

> there are aspects of the Trial and of the evidence and of the presentation of such evidence to the jury with which neither the discipline of Law nor the discipline of Science managed successfully to cope. (Shannon, 1984, 29.)

It was decidedly not the jury system as such which let the criminal justice process down:

> Such defects as may have occurred were ... defects arising from that particular encounter between the legal system and the scientific system .... If the jury system is to be maintained [in such cases], and in my opinion it should be so, the machinery of assisting the jury to reach a correct verdict on the evidence needs considerable change and improvement. (Shannon, 1984, 51.)

This could be the epitaph also for the van Beelen and Chamberlain cases. It makes a constructive launching point for discussion of possible procedural reforms in this area.

d. Procedural reforms

First, reforms should be made which parallel those discussed for complex fraud cases by the Roskill Committee and the New South Wales Law Reform Commission (1986, paras 6.28, 10.6 to 10.15.) Their objective would be to enable issues to be identified and participants to become familiar with complex factual matters before the helter-skelter of the trial process commences. Such weaknesses in the performance of judge and counsel as were documented by Shannon might thus be able to be minimised. (The Victoria Law Reform Commission's suggestion that judges should be trained to handle forensic matters also possesses some merit in principle : 1985, 177, 179-80.) In addition, each side would outline its forensic evidence, summaries could be prepared, mode of presentation agreed upon, and preliminary arguments as to admissibility settled. These proposals would conform with the spirit of resolutions passed by the Royal College of Pathologists and the British Association of Forensic Medicine in 1980 deploring the use of forensic evidence in legal proceedings. (Phillips and Bowen, 1985.)

Consideration should also be given to going rather further than has been suggested for complex fraud cases by empowering the trial judge to require that additional forensic evidence should be obtained for the benefit of the court with regard to any matter which he considered required further clarification. This is a radical suggestion, departing in spirit from the strong common law tradition that the court itself has no power to compel any particular evidence to be led. (Skubevski, 1977, 2 C.L.J.73-5.) However, there are precedents at the pre-trial stage (regarding the issue of fitness to plead, inquiry into which may be activated by the trial judge) and at the post-trial

stage (regarding pre-sentence reports to assist the court). Being highly exceptional, this procedure could be made workable without imposing undue tension upon the adversarial philosophy.

A further reform which should be considered is the development of prosecutorial guidelines with regard to the disclosure of exculpatory evidence generally and the preservation of forensic evidence until the conclusion of trial and appellate processes. At the Federal level, the Director of Public Prosecutions has already published general guidelines relating to prosecutorial practices and discretion. (Temby, 1986b.) It is certainly within his Office's authority to develop guidelines in this and other areas - for example, jury selection procedures, search warrants and their execution and the role of the prosecutor in the sentencing process. Appropriate administrative guidelines would bring fairness into this area more rapidly than is likely to be achieved by the development of judicial precedent. They might also be a model for comparable State developments.

COMPLEX CASES

Not all commercial fraud cases or trials involving forensic evidence are complex; and not all complex cases involve commercial fraud or forensic issues. To the extent that the category of complex cases is a distinct one, what is normally contemplated is excessively long cases. To take a topical example, it is suggested that the 'Bikies Shoot-out Trial' in New South Wales, involving more than thirty defendants charged with a series of offences arising out of a single incident, may last for a year or even two years.

Doubtless, the complexity - in the sense of massive detail - of cases such as this would throw an intolerable burden on to the powers of concentration of any jury. But that, it seems to me, is not the most serious concern. Rather, it is the sheer imposition upon the lives of ordinary citizens. If the lifeblood of the jury system is that citizen-participation is the epitome of a free society, we must not ignore the freedom of jurors. No one should be expected to devote two per cent or possibly four per cent of his or her adult life to involuntary participation in the criminal process. This turns the notion of freedom on its head. What should be done, then? Prosecution authorities simply have to do better, in my view. More thought should be given to splitting trials, isolating issues and presenting evidence in a more economical way. For example, defendants charged merely with making an affray could have been dropped off the main presentment and tried separately; so too could defendants from one side of the battle have been tried separately from those on the other side. The issue of splitting trials has traditionally been litigated in terms of whether the accused is likely to be prejudiced by the joinder of counts; but it is time the criterion was developed of whether the administration of criminal justice generally is likely to be prejudiced. This could be done, once more, through the development of prosecutorial guidelines or by

way of judicial jurisdiction over abuse of process. Clearly, such trials do impact negatively upon the acceptability of the criminal justice system to the community generally and to the key participants in that system - jurors.

Apart from this, the residual category of complex cases raise identical issues to those already discussed. No case of jury incompetence has been made out. Quite the contrary: where cases are presented properly and judge and counsel play their parts effectively, juries are able to cope with whatever comes their way. All Australian jurisdictions permit appeal against a verdict of guilty on the basis that such verdict was unreasonable or cannot be supported having regard to the evidence - i.e. that the jury got it wrong. Appeals on this basis alone are extremely uncommon, and they very rarely succeed. By contrast, appeals on the basis of a misdirection of law are relatively commonplace, and it is on this basis that verdicts are most often quashed. In Chamberlain (1984, 51 A.L.R.225) an appeal on the basis that the verdict could not be supported on the evidence was lost by a bare majority (3:2), as had been the case in the Full Court of the Federal Courts (2:1). As we have seen, however, that case did not involve idiosyncratic jury behaviour so much as skewed presentation of forensic evidence. In the Splatt case, where the Royal Commisson finding was that the verdict could not be sustained, there was no question of jury idiosyncracy or bloody-mindedness but rather skewed forensic evidence and legal non-feasance.

CONCLUSIONS

The media debate about supposed jury incompetence in Australia has been rather ill-informed. Perhaps that is in part due to failure by the legal profession to explain the operation of the jury system adequately. Fortunately, ballast has now been restored by sober and scholarly analyses, based on empirical research, by the New South Wales Law Reform Commission (1985; 1986), the Victoria Law Reform Commission (1985), the Australian Law Reform Commission (1986), the Director of Public Prosecutions (1986 a), Vodanovich (1986) and many others.

Attacks on the jury at its most vulnerable point - sitting in cases which are difficult to comprehend - would, if successful, begin to de-legitimise jury trial as such. This paper demonstrates that such attacks will not stand up. That being so, not only is there no case for further erosion of the jury system but also there is a positive case for strengthening and possibly extending it. A blueprint for doing so would be the recent recommendations of the New South Wales Law Reform Commission (1986), which range from such questions as jury comfort and dignity through the question of eligibility and randomness to matters of jury protection, prejudicial pre-trial publicity and privacy.

Of course, when all the mechanical, logistical and technocratic arguments are stripped away, a discussion of the jury system is a discussion of the relationship between the citizen and the State. E.P. Thompson (1980, 108) has put it as follows:

> In my books, the ... common law rests upon a bargain between the Law and the people. The jury box is where the people come into the court: the judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgment not only upon the accused, but also upon the justice and humanity of the law.

In Australia we must ensure that 'the bargain continues to be struck' in the daily operation of the criminal justice system.

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PRESERVING THE JURY
A COMMENTARY ON PROFESSOR HARDING'S PAPER

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My comments principally relate to the paper which was written by Professor Harding. I refer to the paper that was written, rather than what he said relative to it this morning, because my chief interest is in relation to major fraud trials. Now, as will be clear to those who have read the paper, I am a strong proponent of the jury system for reasons which have been stated by persons more eloquent than myself, the principal of those reasons being that the jury represents a deeply democratic institution of the law. As our chairman just said in effect: it can not be good enough to leave it to the lawyers and the judges, who might be described as the witch doctors of the system, to decide what content the system should have. The law belongs to the people not to the practitioners, it is the people's rights which are paramount, and the jury represents a very important part of these rights, I am accordingly very reluctant to see any suggestion that juries should be done away with. I think the case for the proposition that juries cannot be relied upon to handle major fraud trials is certainly not proven.

Professor Harding, in his paper, refers at some length and with appropriate disparagement, to the recommendations of the Roskill Committee. What he does not say is that the members of that committee, almost necessarily, did not know what they were talking about, because in England they do not handle major fraud trials. There are practically no charges laid for defrauding the revenue in the guise of the taxation authorities in England. What they do is reach compromises, which means that people buy their way out, they compound the prosecution as a matter of conscious policy and there is far more prosecution of major fraud in this small country than there is in the United Kingdom as a whole. They have simply not been prepared to try and see if major fraud trials can be conducted in England, and they do not have the basic experience of the work problems.

As to the suggestion that juries should be dispensed with in this or, indeed in any other area, there are two main points. One which Professor Harding made is that before you go down that road you should do everything possible to make the criminal trial process one which a jury can handle. There is a very great deal to be done in that regard by simplifying

procedures, by simplifying the laws of evidence which will shorten and simplify jury trials and make what happens comprehensible to the jury. Manifestly at the moment it frequently is not.

There is also quite a lot that can be done by prosecutors and I think that we, at federal level, are heading in the right direction. There is a great deal one can do in in presenting a case, even a complex case, before a jury so as to make it fairly readily comprehensible despite the most archaic rules we have as to procedure and evidence.

The second point is that if you reach the conclusion in a particular area, whether it be cases involving forensic evidence, or major fraud trials, or any other area, that the jury should be dispensed with, then there must be a trade-off in terms of maximum penalty. Now, we accept with relative equanimity magistrates sending people to prison for a year, a couple of years, in some jurisdictions for three years, and nobody seems to too fussed about that. The proposition that a magistrate, or indeed any non-jury tribunal should send somebody to prison for life, is one which I think most of us, perhaps everyone this room, would reject as being inappropriate. If the authorities decide and the parliaments decide that major fraud trials can not be handled by juries and that the jury must be dispensed with, then they must be prepared to trade-off against that lower penalties, so the offence of defrauding the revenue attracts relatively, a low maximum penalty (up to perhaps three years imprisonment). I would urge that you can not have non-jury trials and potentially heavy penalties at the end of the day.

Could I finally, Mr Chairman, make a couple of broader comments with respect to juries. Professor Sheehan suggested yesterday that the institution of the jury has imperfections, that jurors are not terribly good at confidently finding the truth on the evidence before them. As he pointed out that is a difficult deed which all of us share to a significant extent, although perhaps to a slightly varying extent. And as he also pointed out, although the game might not be perfectly straight, it is the best game in town and that is a proposition with which I would wish to join.

If one looks on the jury as a final filter designed to get rid of weak cases not previously filtered out of the system, and if it be remembered that juries inject nothing more valuable than their collective common sense, then it seems to me there is no cause to be alarmed if it transpires as a result of experimentation that individual jurors do not remember fully or understand perfectly everything they have heard during the course of the trial process. Indeed I would urge upon you the analogy of the jury as a final filter; the system has a whole series of filters built in which are designed to chop <u>out</u> the weak cases. One starts with

a couple of police decisions whether to investigate, whether to charge rather than warn. Then there is a series of decisions, some of which the prosecutors have to make, as to whether the case should be pursued or abandoned, prior to committal and post committal, and of course a series of decisions which courts have to make.

Each of those filters is designed to get rid of the unpromising or weak cases and on that basis the jury may be looked upon as the final filter.

Finally, could I make a brief comment about the suggestion we have heard from more than one quarter in recent times that the over-zealous prosecutor represents a danger to the community. I would have thought that that was a blindingly obvious proposition. No head of a prosecution service would claim infallibility for all of those who work for him or her or are retained by him or her. Human institutions are by definition imperfect. But any student of history would know that at almost all prior times prosecutors have been less fair, have been more savage, if you like, than is the case in this country presently. If you think about the way in which the legal system operates in most other parts of the world, I think the same could be said about almost all parts of the world compared to Australia. Look at our cousins in America, I would wish to applaud our prosecution system enormously compared to the system that prevails in all parts of the United States. If some prosecutors occasionally lapse into impropriety there are adequate safeguards which are immediately available.

It must be remembered that what we do is done in open court, and that judges are not loath to criticise either unfairness or inefficiency. Everything we do, unless it is a decision not to proceed, ultimately finishes up in court. The courts are open. The judges are there with a clear charter, amongst other things, to look after the interests of accused persons and to ensure that fairness is accorded to accused persons. They are not reluctant to criticise. It is heartening that, at least at Commonwealth level, such criticism has occurred with very great rarity, at least over the two years plus that I have occupied my present position.

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

SEMINAR ON 'THE JURY'

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