Jury misconduct or irregularity

By Donna Spears

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The expression 'jury misconduct' is commonplace in American jurisprudence and covers a wide range of conduct from the juries having access to additional materials to the coercion of fellow jurors by violence.

In Australia, courts have proceeded with more caution, avoiding the general term 'misconduct' and instead referring to all such events as 'irregularities' unless the character of the juror conduct is such that the disapprobation 'misconduct' is clearly justified.

A basic principle of the Australian criminal justice system is that no person shall be convicted of a crime except after a fair trial according to law. One touchstone of a fair trial is an impartial trier of fact and, in the context of a trial by jury, that means a jury capable and willing to decide the case solely on the evidence properly before it. A trial is not necessarily unfair because it is less than perfect[1] but it is unfair if it involves a risk of the accused being improperly convicted. The courts have stressed that the evaluation of such irregularities should proceed on the basis that jurors properly perform their tasks, are true to their oaths and comply with the directions of the trial judge, as to do otherwise would mean that there was no point in having criminal trials.[2]

Critics of the jury system point to the potential of jury irregularities and misconduct to allow extraneous considerations to affect the jury's deliberations and thus impinge upon the right of the accused to a fair trial. They suggest that jury trials are inherently tinged with unfairness. This article looks at the types of irregularities that have been identified through the case law and examines the way in which the existing law and processes operate to ensure a fair trial.

Detecting and dealing with irregularity

At the beginning of a criminal trial the jurors are instructed to make their decisions on the basis of the evidence alone and to set aside any prejudices. They are also told to bring to the judge's attention any instances of irregularity. Most documented instances are either observed by third parties to the jury (such as lawyers, the accused or sheriff's officers) or by jurors themselves. Jurors are often in the best position to detect misconduct or irregularity on the part of other jurors or in relation to incidents that affect the jury as a whole. The problem is that jury misconduct is often insidious—if jurors observe or participate in misconduct and then remain silent, such conduct may never come to light. Legal research can tell us much about reported instances of misconduct but it cannot identify individual instances (or the prevalence) of unreported misconduct.

Once an allegation of misconduct is made during the course of a trial, the focus shifts to the conduct of the trial judge. A trial judge has power to take evidence in relation to the allegation (if this is desirable) and then

(a) do nothing—on the basis that further mention of a minor irregularity will give it more significance than it actually warrants and itself may provoke or induce further problems;

(b) give clear and unambiguous directions to the jury to correct or remove the possibility of prejudice to a defendant; or

(c) discharge a juror or the whole jury if such a course is warranted in the interests of justice.

In deciding whether to discharge a juror for bias the test is whether the circumstances of the relevant incident would give a fair-minded observer a reasonable apprehension of a lack of impartiality on the part of the juror.[3] In some jurisdictions, this is also the test for jury irregularity[4] but in others a separate test has developed.[5] Despite the variation in wording and emphasis, these tests appear to operate in much the same fashion with a basic concern as to whether the accused has been deprived of a fair trial resulting in a miscarriage of justice.

Even if jurors do come forward, the identification of misbehaviour can be made more problematic by reason of the rule that courts will refuse to receive evidence from a juror about the course of deliberations in the jury room (sometimes referred to as the 'jury secrecy' rule).[6] This common law rule still exists, albeit in modified form, in many jurisdictions and is based on public policy considerations including the need to promote full and frank discussion among jurors, the need for finality of the verdict, the need to protect jurors from harassment, pressure, censure and reprisal and the need to maintain public confidence in juries.[7] American courts and jurists have also suggested that it reduces incentives for jury tampering.[8] The rule has a limited scope. It has been held to preclude proof of the subject matter of juror deliberations (such as a juror being racially prejudiced)[9] but not proof of irregularity in proceedings extrinsic to the matters being deliberated on (such as material being given to a jury by mistake).[10]

Types of irregularity

In order to understand how courts regulate jury irregularity it is useful to explore some of the actual situations raised in the case law.

1. Juror contact or relationships with witnesses and other persons. Australian courts have taken a fairly robust view about casual or innocent conversations between jurors and other court personnel. A brief conversation between a juror and Crown counsel about the weather did not result in a retrial.[11] Nor did polite conversation between a juror and a judge's associate at a private party.[12] The possession of mobile phones by jurors during deliberation did not justify the discharge of the jury.[13] The giving of flowers to the mother of the deceased by a juror was held not to amount to evidence of either juror bias or misconduct.[14] However a conviction was quashed where a juror during a recess approached a detective and asked him questions about the identity of another detective who was a witness at the trial. The possibility that the juror's question might have reflected an opinion about the reliability of the other detective as a witness based on prior information was enough.[15] Likewise a sheriff's officer expressing his own view to the jury that the accused was guilty led to mistrial.[16]

2. Unauthorised visits to crime scenes. There have been several reported instances of jurors visiting crime scenes outside court hours. A visit by several jurors to the general area of a hotel in Hobart referred to in evidence without any detailed measurements or timings was held not to warrant a new trial.[17] By way of contrast, a new trial was ordered where two jurors conducted their own viewing of an alleged rape scene for the apparent purpose of assessing for themselves the circumstances of complainant's identification of the accused.[18]

3. Unauthorised material or information present in the jury room. The main factor in assessing unauthorised material appears to be whether the irregularity is material, that is, whether it ultimately made a difference to the verdict returned. A book about guns in a murder trial where a gun was used was not held to be material because the information it contained was the same as that which was put in evidence during the trial.[19] A newspaper article about unsworn statements brought into the jury room by a juror in a trial where the two accused had made unsworn statements was held to be slightly material but too remote to justify a retrial.[20] The court suggested that a more appropriate course for the jury would have been to ask for specific directions from the trial judge. On the other hand, when pieces of paper containing extremely prejudicial material were inadvertently tendered inside a handbag owned by the deceased in a murder trial, a retrial was ordered because the material was capable of conveying information to the jury about the propensities of the accused.[21] Likewise, where prejudicial subpoenaed documents were given to the jury by mistake the conviction could not be sustained.[22]

The courts have traditionally frowned on attempts by jurors to solicit information from sources outside the courtroom. The so-called digital age with its almost instantaneous public access to vast amounts of information via devices such as the internet and mobile

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phones has provided more scope for such research. Jurors in a trial of an accused for the murder of his first wife discovered via the internet that he had previously been tried and convicted of the murder of the first wife and also that he had been charged and acquitted of the murder of his second wife.[23] The irregularity as to the discovery of the charge of murder of the second wife was held to be potentially prejudicial as it risked the jury engaging in tendency and/or coincidence reasoning or risked raising bad character when that sort of evidence would have otherwise been inadmissible.

Preventative measures

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In most jurisdictions the courts and the legislature have taken significant steps to prevent or at least reduce the potential for jury irregularities. Juries are now given strong and comprehensive directions at the commencement of a trial as to their duties and responsibilities. They are also told about safeguards for the jury including the existence of specific offences such as jury tampering and contempt. They are warned not to undertake any independent investigations or use any material or research tool to access legal databases, earlier court decisions, and/or any other material relating to any matter arising in the trial. In two states, jurors are advised that it is an offence for a juror in a criminal trial to conduct independent research.[24] They are also told that the reason that they are not permitted to make such inquiries is that to do so would change their role from that of impartial jurors to investigators, and lead them to take into account material that was not properly placed before them as evidence, of which those representing the Crown and the accused would be unaware and unable to test. They are warned that the consequences of such prohibited conduct may be that the jury is discharged or its verdict later overturned. In addition, most courts now exercise care in deciding which judgments to place on court websites and provide to other legal publishers so as to minimise the opportunity for jurors to obtain information about persons currently facing trial.

Comment

The role of jurors in criminal trials has been traditionally divided into two distinct but overlapping phases: in the first the evidence is adduced before them; and it is only in the second phase that they are asked to act, that is deliberate, and come to a verdict. Of course jurors can and increasingly do ask questions within the framework of the traditional trial but clearly sometimes that is not sufficient. Despite clear warnings, jurors do sometimes cross the evidentiary boundaries and go out investigating. Unlike the jurors of the past, jurors today know how to find out more. One important question that should be asked is why do they do it. Jurors are obviously not satisfied with the state of the evidence and want to know or find out more. There is nothing that can be inferred from any of the Australian cases (in part due to the exclusionary rule) to suggest the wayward jurors were deviating from their sworn task of determining the guilt or innocence of the accused. They all appear to be attempting to do their authorised work, albeit in an unauthorised mode.

Psychologists have suggested that people need to believe the world is a just place in which individuals get what they deserve and so they respond to wrongs by doing everything they can to procure an appropriate remedy.[25] If this is correct, then jurors go out investigating in order to bring perpetrators to justice or equally to ensure that the innocent are not wrongfully convicted. They are sometimes simply not content to stay in the more passive role allocated to them. The other factor that may drive jurors to search for additional evidence, be it by research or other investigation, is a belief in the existence of other physical or scientific evidence capable of resolving particular factual issues. Some commentators have suggested that TV shows like *CSI* have fortified such beliefs, although this effect has been questioned.[26]

Bearing this in mind, the courts themselves may have a role to play in alleviating juror frustration by improving the lines of communication between judge and jury. The stronger directions on irregularity that include reference to the possible prejudice to the parties and procedural consequences have been a move in the right direction. I want to make a more radical suggestion—that judges might admit upfront to juries that sometimes things will be kept from them, not by

incompetence, oversight or error, but because of rules of evidence that are there to ensure that justice is done. It can only further the course of justice for jurors to understand that the search for truth must not be pursued to the exclusion of all else.

Endnotes

1. *Jago v District Court* (NSW) (1989) 168 CLR 23 per Brennan J at 49.
2. *Gilbert v The Queen* (2000) 201 CLR 414 at 425 per McHugh J.
3. *Webb v The Queen* (1994) 181 CLR 41 at 47, recently applied in *I v Western Australia* (2006) 165 A Crim R 420.
4. For Tasmania see, for example, *Fairall v The Queen* (unreported CCA Tas 7 June 1995) and in Queensland eg *R v Martin* [1999] QCA 366.
5. In New South Wales, the test is whether the court could be satisfied that the irregularity had not affected the verdict and that the same verdict would have been returned if the irregularity had not occurred: *R v K* (2003) 59 NSWLR 431. In Victoria, the test for materiality is whether the irregularity was such as to give rise to a reasonable suspicion or concern about the fairness of the trial: *R v Gae* [2000] 1 VR 198.
6. In American jurisdictions, this exclusionary rule is known as the rule against juror impeachment.
7. See *R v Skaf* (2004) 60 NSWLR 86 at 92 [211].
8. See for instance *McDonald v Pless* 238 US 264 (1915).
9. *R v Connor; R v Mirza* [2004] UKHL 2.
10. *R v Rinaldi; R v Kessey* (1993) 30 NSWLR 605.
11. *R v White* [1969] SASR 491.
12. *Duff v R* (1979) 39 FLR 315.
13. *R v Evans* (1995) 79 A Crim R 66.
14. *Webb v The Queen* (1994) 181 CLR 41.
15. *R v Hodgkinson* [1954] VLR 140.
16. *R v Emmett; R v Masland* (1988) 14 NSWLR 327.
17. *Fairall v The Queen* (unreported CCA Tas 7 June 1995).
18. *R v Skaf* (2004) 60 NSWLR 86.
19. *R v Forbes* (2005) 160 A Crim R 1.
20. *R v Minarowska* (1995) 83 A Crim R 78.
21. *R v Rudkowsky* (unreported CCA NSW 15 December 1992).
22. *R v Rinaldi; R v Kessey* (1993) 30 NSWLR 605.
23. *R v K* (2003) 59 NSWLR 431.
24. Section 68C of the *Jury Act 1977* (NSW) and s 69A of the *Jury Act 1995*(Qld).
25. Milton Learner suggests that there is a fundamental human motivation to see justice done which he refers to as 'the belief in a just world'. *The Belief in a Just World* (1980) noted in T Tyler (below).
26. For an excellent discussion of the alleged influences of the *CSI* television show see T Tyler, 'Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction' (2006) 115 *Yale Law Journal* 1050.