The Secrecy of Jury Deliberations[*]

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In the age of information, secrecy is unfashionable. Respect for convention is an unreliable basis for assuming the confidentiality of communications, especially if they are thought to be newsworthy, or if it is believed that their revelation would advance public or private interests.

Trial by jury, which remains central to the administration of criminal justice in New South Wales, and still has an important role in the administration of civil justice, now has the potential for commercial exploitation. There is pressure upon the courts to permit televising of court proceedings, including jury trials. Australians watched with fascination as jurors in a recent American criminal trial emerged as media figures, and sold their stories to publishers and broadcasters. There have been a number of recent examples in this country of extensive publicity concerning the conduct of jurors at criminal trials. Even amongst lawyers, there is uncertainty as to the extent to which the law prevents disclosures of this kind.[1]

The purpose of this paper is to examine the law as it stands at present in the State of New South Wales, to identify areas of uncertainty which require clarification, and to consider the issues of policy at work in this area.

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[*] This article is a recension of the 1996 Sir Ninian Stephen Lecture. The Sir Ninian Stephen Lecture was established to mark the arrival of the first group of Bachelor of Laws students at the University of Newcastle in 1993. It is an annual event which is to be delivered by an eminent lawyer at the commencement of each academic year.

[1] The following articles contain a detailed examination of the relevant law, its policy, and its history, but it should be noted that they were written before the amendments to the *Jury Act* 1977 which are considered below: E Campbell "Jury Secrecy and Impeachment of Verdicts", (1985) 9 *Criminal Law Journal* 132 at 133 and 187; E Campbell "Jury Secrecy and Contempt of Court", (1985) 11 *Monash University Law Review* 169; M H McHugh "Jury Deliberations, Jury Secrecy, Public Policy and the Law of Contempt", in M Findlay and P Duff (eds) in *The Jury under Attack*, Sydney: Butterworths 1988.

Anonymity of Jurors

As a method of decision-making, trial by jury contrasts with the ordinary procedures characteristic of the administration of justice. A judge, sitting in public, having heard the evidence and the arguments, must give full reasons for the decision in the case, which are then open to public scrutiny and are subject to appellate review. This form of accountability, of which publicity is the essence,[2] is considered to promote good decision-making, and acceptance by the parties and the public of the result. Jurors, unlike judges, are substantially anonymous. They are not volunteers, but are chosen from a roll made up by the Sheriff. Unless excused, they serve by compulsion. They are drawn from the community, they usually express themselves in a simple and inscrutable verdict, they give no reasons for their decision, and they then merge back into the community from which they came.

The anonymity of jurors depends to some extent upon chance. The *Jury Act* 1977[3] makes it an offence wilfully to publish any material, broadcast any matter, or otherwise disclose any information which is likely to lead to the identification of a juror or former juror in a particular trial. That prohibition does not apply to the identification of a former juror with that person's consent. It would not, therefore, prohibit the publication of an article written by a former juror about his or her experiences. On the other hand, it would restrict what the author of the article could say about other jurors. However, whilst persons serving on a jury in a city or a large country centre may be relatively anonymous, many jury trials take place in localities where the identity of some, and occasionally all, members of the jury would be known to other people in the courtroom. A local solicitor, representing an accused person at a criminal trial in a country town, would be quite likely to know, or be able to identify, some of the members of the jury. Even in the city, counsel are given the names of jury members, and a juror with a distinctive name might not be difficult to identify. The anonymity of jurors is far from complete. Even so, jurors in New South Wales have so far been spared the pleasure of seeing themselves, and being seen by others, on the evening television news. The *Jury Act* in its present form would prohibit that.

The desire to preserve, so far as is reasonably practicable, the anonymity of jurors, is based upon understandable policy considerations. Serving on a jury is often an unpleasant and difficult task, and jurors may have to decide cases where strong passions are involved. It is important that jurors should be able to operate without fear of harassment or reprisals. People are required to undertake jury service as a matter of

[2] *Scott v Scott* [1913] AC 417.
[3] Section 68.

community responsibility. They are paid a rather nominal amount for their time, and many of them find their service burdensome. It would greatly add to their burden if they were to be denied the degree of anonymity which the law presently confers upon them.

Jury Deliberations

Save in exceptional cases, a jury, having heard the evidence and argument, and having been directed by the trial judge upon the applicable principles of law, must deliver, without reasons, a verdict. In criminal trials that verdict must be unanimous. (In some States there is provision for majority verdicts, but the applicable majority is usually ten or eleven out of twelve).

There are many reasons why someone outside the jury might be interested to know what went on in the course of the jury's deliberations, and there are many circumstances in which individual jurors might be willing, unless restrained, to give information to other people about what went on. It is natural that, in the absence of some binding obligation to the contrary, people who know that their relatives, friends or acquaintances, are serving, or have served, on a jury, would be curious, and many individual jurors would be happy to talk about their experiences. Parties to litigation, and their lawyers, would be interested to know why they won or lost. People preparing for similar litigation might think that there could be valuable lessons to be learned from what had happened at a trial. The proceedings in question might have attracted widespread attention. It might be of assistance to scholarly research to know what had gone on in a jury room. An unsuccessful litigant considering a possible appeal might wish to be able to point to error affecting the jury's process of reasoning.

The last of those reasons, that is, the possible use of information about a jury's deliberations for the purpose of challenging a jury's verdict, is of particular importance to the role of trial by jury in the administration of criminal and civil justice, and will be dealt with separately. In relation to all the other possible reasons why somebody might want to know what went on in a jury room, it is important to be clear about the extent to which the law prohibits solicitation or publication of information.

The law on this subject varies in different common law jurisdictions, and even amongst Australian States. Most people have noticed the difference between local practice and practice in the United States, for example. To a substantial extent that difference is explained by the First Amendment to the *United States Constitution*, which inhibits the enactment of some legislation of the kind which exists in England and most Australian jurisdictions. What is not so well-known is the wide variety of the controls which apply, in the different jurisdictions in the United States, by

way of court-imposed regulations (made in the assertion by courts of an inherent jurisdiction) and by way of canons of professional ethics.[4]

The subject has, in recent years, received the attention of law reform authorities. The current provisions of the *Jury Act* of New South Wales resulted from a recommendation of the New South Wales Law Reform Commission in 1986.[5] The English legislation, which is significantly more restrictive than the New South Wales legislation, followed the English decision in *Attorney General v New Statesmen and National Publishing Co Ltd*,[6] which concerned an article published in a periodical following an interview given by a juror (without payment) to two journalists. The article gave an account of the jury's deliberations at the trial of a prominent politician, Mr Jeremy Thorpe. The article was entitled "Thorpe's Trial — How the Jury Saw It." The potential for commercial and other exploitation of material of that nature requires no explanation.

The *Jury Act* 1977–1995

There are two relevant provisions of the *Jury Act* apart from the section relating to anonymity which has already been mentioned. One is concerned with soliciting information from jurors. The other is concerned with disclosure of information by jurors. Section 68A makes it an offence to solicit information from, or harass, a juror, or a former juror, for the purpose of obtaining information on the deliberations of a jury for inclusion in any material to be published or any matter to be broadcast. There is one important qualification. The section does not prohibit a person from soliciting information pursuant to the authority of the Attorney-General for the conduct of a research project into matters relating to jurors or jury service.

Section 68B makes it an offence for a juror to do certain things. First, a juror may not, except with the consent or at the request of the judge, wilfully disclose, during the trial, the deliberations of the jury to any person. Second, a person including a juror or former juror, shall not, for a fee, gain or reward, disclose or offer to disclose to any person information on the deliberations of the jury. Those restrictions are narrower than the restrictions contained in the *Contempt of Court Act* 1981 of England and they are also narrower than the restrictions contained in some other Australian jurisdictions.[7] It is important to note what the legislation does not prohibit.

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4 See E Campbell, (1985) 9 *Criminal Law Journal*, at 193–199.

5 NSW Law Reform Commission, *Criminal Procedure Report, The Jury in a Criminal Trial*, March 1986, LRC 48.

6 [1981] 1 QB 1.

7 Compare, for example, *Jury Act* 1995 (Qld) s 70, *Juries Act* 1967 (Vic) s 69A. See also *Canadian Criminal Code* s 576.2, which is substantially more restrictive than the New South Wales legislation.

The prohibition upon soliciting information from a juror is limited to cases where the solicitation is for the purpose of obtaining information for inclusion in any material to be published or any matter to be broadcast. Reference will be made below to questions of professional conduct, and of contempt of court, which may operate as additional restrictions upon the behaviour or certain classes of people, in certain circumstances, in relation to soliciting information from jurors. However, the *Jury Act* itself, in s 68A, however, confines the legislative restriction in the manner earlier mentioned. It does not, for example, prohibit asking a former juror to explain how the jury reached their decision in a particular case, unless the request is being made for the purpose of obtaining information for inclusion in material to be published or any matter to be broadcast.

There is an area of uncertainty as to the potential reach of the prohibition in s 68A. What is the scope of the expression "material to be published"? Is the concept of publication used in the defamation law sense of communication to some third party, or is it used in a more colloquial sense, having a meaning cognate with the concept of broadcasting? The context may suggest the latter, but because the question may arise for decision I express no view about it. The prohibition certainly includes solicitation of information by, for example, a journalist who intends to include the information in a newspaper article. The question is whether it would also cover the conduct of a lawyer who intended to pass the information on to a third party, such as a barrister briefed to advise on the prospects of success of an appeal, or a member of an interest group intending to convey the information to a meeting (public or private) of people concerned about, say, miscarriages of justice.

In relation to disclosure of information, the first prohibition in s 68B is limited to a prohibition against disclosure during a current trial. The second prohibition, which extends beyond the completion of the trial, is limited to disclosure for fee, gain, or reward. In brief, there is an absolute prohibition upon disclosure while the trial is continuing, and a qualified prohibition, limited to disclosure for reward, after the trial has ended.

The first prohibition in s 68B, that is, the absolute prohibition upon disclosure during a trial, is in line with the admonition which jurors are normally given at the commencement of a trial. In this state, jurors are told by the trial judge that they must not discuss the subject matter of the trial, or their deliberations, with anyone other than another member of the jury, during the course of the trial. This may be contrasted with the English practice, by which jurors are informed that their deliberations are secret, and must never be disclosed to anybody.[8]

[8] E Campbell, above, (1985) 9 *Criminal Law Journal* at 132.

In New South Wales, unlike the United States, sequestration of juries is extremely rare.[9] Most jurors are free to return to their homes each evening during a current trial. Accordingly, if they are involved in a trial which is receiving publicity, they will be exposed to that publicity, and they will be under an obvious temptation to discuss the case with family and friends. Disregard of the judge's admonition not to discuss the case, if it became known, could lead to the discharge of a jury, and, depending upon the circumstances, could involve punishable contempt of court.

The second part of the prohibition in s 68B, which extends beyond the conclusion of a trial, only prohibits disclosure for reward. It would not have prohibited, for example, the disclosures made following the trial of Jeremy Thorpe. (Whether there was, in that case, solicitation of a kind that would have offended against s 68A is not clear.) In its practical operation the legislation appears to be aimed principally at the activities of publishers and broadcasters, who are thought to be likely to offer money to former jurors to describe their experiences.

There are different views as to whether these legislative prohibitions go too far, or not far enough. Parliament, following the advice of the Law Reform Commission, has struck a balance between the interests of free speech, on the one hand, and the interests served by the protection of the confidentiality of jury deliberations on the other.

What are the interests thought to be served by maintaining the confidentiality of jury deliberations, at least to the extent provided for by the legislation? First, there are the interests of jurors themselves, coupled with the wider public interest in assisting jurors to perform their functions with a reasonable assurance that they will be free from subsequent harassment and perhaps even retribution. This is no light matter. Regrettably, it is not uncommon for criminal, or even civil, cases to affect the interests of persons who would not hesitate to seek to influence or threaten jurors, or engage in reprisals for adverse decisions. There is a question whether the jury system would survive a withdrawal of such degree of security as is presently conferred upon jurors. Furthermore, even if the actual identity of the jurors at a highly publicised trial were known to relatively few people, if the jury were to be subjected to public post-trial scrutiny of their decision-making process, this would subject them to a burden which many would find oppressive.

Second, the view has been taken that frankness of communication between jurors in the course of their deliberations would be stultified, or at least jeopardised, if individual jurors knew that there was a possibility of later disclosure of their deliberations. Third, if individual jurors were free, following a trial, to publish information about what went on in the

[9] This is a fact that is often overlooked by people who prefer the United States' more liberal approach to prejudicial publicity during a trial. They forget that one way with which this problem is frequently dealt in the United States is by locking up the jury during the whole of the trial.

jury room, other jurors might well wish to contradict such information, or at least put their version of events. No procedure for resolving such differences exists, and the result in many cases would be highly mischievous. Many jury deliberations occur in circumstances of great stress. Jurors have a variety of personal and educational backgrounds. A discussion between twelve people will often be unstructured, and jurors may form themselves into multiple groups. It would not be in the least surprising if individual jurors had different recollections, or perceptions, of their deliberations. No official records of such deliberations are kept. An individual juror's account of jury deliberations, even though honest, could be unreliable and contentious.

Fourth, there is a public interest in the finality of jury verdicts. The finality and inscrutability of verdicts are seen as important in providing general acceptance of the outcome of the trial process.[10]

The above considerations, which are capable of sub-division and elaboration, have been accepted by Parliament as justifying the degree of protection of anonymity, and restriction upon soliciting and providing information, currently imposed by the *Jury Act*. The exception provided for the facilitation of research is important, and represents a concession to scholarly opinion. In recent times in New South Wales there have been at least two significant research projects undertaken in relation to the jury system, although these have not been concerned with the subject matter of deliberations in particular cases.[11]

It is difficult to argue against the absolute prohibition upon disclosure of jury deliberations during a current trial. The readiness with which judges discharge juries in the event of relatively innocent and inconsequential encounters between jurors and other persons during a trial illustrates the caution that applies in this respect, and the care which is taken to ensure that jurors confine their considerations strictly to the admissible evidence, and the arguments put to them, and the directions given to them by the trial judge. Warning jurors not to discuss the case with anyone else during the trial, and prohibiting disclosure of deliberations in the course of a trial, is a much less extreme method of dealing with the problem than locking jurors up during the whole trial. Modern trials tend

[10] With the increasing proportion of criminal cases that are dealt with summarily by magistrates and of trials of indictable offences, by consent of the accused, by a judge sitting without a jury, there is a substantial increase in the proportion of criminal cases for which detailed reasons for the decision must be published. It would be interesting to know how the acceptability of such decisions, to the parties, to victims, and to the public, compares with the acceptability of jury verdicts. A properly conducted survey of this subject would be a worthwhile exercise.

[11] In 1993 a Jury Task Force, established by the present author, and chaired by Justice Abadee of the Supreme Court of New South Wales, surveyed jurors in the course of an investigation of the conditions under which jurors work. See NSW Jury Task Force, *Report of the NSW Jury Task Force* Sydney (1993); Also M Findlay and P Duff, *Jury Management in New South Wales*, a report published by the Australian Institute of Judicial Administration, Sydney (1994).

to be lengthy compared with trials in earlier times, and few would wish to see the adoption in New South Wales of a widespread practice of sequestration of juries.

It is the prohibition on post-trial solicitation and publication of information which is the usual subject of controversy. Should a person who was a member of the jury at, say, one of the trials of the late Justice Lionel Murphy, be free to publish a book which goes into the jury deliberations? Should a distinction be made between the jury which convicted the judge, and the later jury which acquitted him? Should the author of a work about the life of the late judge be free to seek out, and question, individual jurors as to what they made of various witnesses who were called at the trials, or as to the significance of particular pieces of evidence? Should the producer of a film about the trial of Mrs Lindy Chamberlain be free to question jurors as to the significance they attached to the forensic evidence in the case? Where, in a case that has attracted wide public interest, a conviction is quashed upon the ground of some misdirection by the trial judge, or some irregularity in the conduct of the trial, should people be free to question jurors about whether they thought the misdirection or irregularity made any difference to the actual verdict, and publish the results of their inquiries? If that information can be published in a newspaper, why could it not be put as evidence before an appeal court? Should the Crown, at the hearing of a criminal appeal, be able to call evidence from jurors to prove that they regarded an alleged misdirection as immaterial?

There is a further practical consideration to be noted. It concerns a point made above. Suppose an individual juror, without contravention of s 68B, publishes, or provides to a publisher information with which some other juror disagrees. What redress is available? Is the other juror forced to choose between maintaining silence and preserving anonymity, on the one hand, and becoming involved in an inconclusive public conflict, on the other? The consequences of having one talking juror could be invidious for others who wished to preserve their traditional silence. It is interesting to reflect upon whether jurors who wished to remain silent could invoke the law relating to confidential information in order to restrain the loquacity of one who decided to "go public".[12]

As in most situations where the law seeks to draw a definite line between what is prohibited and what is permitted, there are cases falling on either side of the line that are difficult to distinguish from one another. Under the existing provisions of the *Jury Act* what is there to stop a former juror, who learns that a conviction has been quashed on the basis of a misdirection of law, contacting a journalist and asserting that, as the jury looked at the case, the misdirection was irrelevant? The answer to that

[12] For a consideration of some of the relevant principles see *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

question depends upon whether the juror seeks some form of payment. That is not an entirely satisfactory basis of distinction. However, the existence of anomalies of that kind is the price which often has to be paid for bright-line rules of law. The alternative is a more flexible, but potentially uncertain, principle, of the kind which exists in the area of contempt of court, which is the topic next to be considered.

An abiding problem in the formulation by judges of principles of common law, and in the drafting of legislation or regulations, is the tension between the requirements of certainty, on the one hand, and reasonable flexibility, on the other. A statement of general principle, the application of which will depend upon the facts and circumstances of the individual case, may be perfectly reasonable, but may give rise to complaints that its operation is uncertain, and that it is therefore unfair or oppressive. A bright-line rule, formulated in the interests of certainty, may be criticised on the ground that it is illogical and unreasonable to distinguish between cases which fall a little to either side of the line. Any person, or institution, having the responsibility of laying down rules governing human behaviour, is confronted with this dilemma. It is a common rhetorical device, employed by advocates arguing about the meaning of legislation, or of contracts or other documents, to point out that, if a line is drawn in accordance with an opponent's argument, anomalous differences between substantially indistinguishable cases will result. That is sometimes a fair argument, but it is often a fair answer to it to observe that this is a common consequence of drawing lines.

The Law Reform Commission, in proposing the legislation considered above, pointed out that one of the principal criticisms of the previous law was its uncertainty. Parliament has enacted legislation which is reasonably clear. However, as is often the case, the price of certainty is the drawing of some surprising distinctions. Whether the price is worthy paying is a question of policy.

Contempt of Court

The prohibitions contained in the *Jury Act* do not constitute the only legal inhibitions against disclosure of jury deliberations. However, once one moves away from the statute, the operation of such inhibitions becomes much less clear.

The law relating to contempt of court suffers from bearing a description which is easily misunderstood. It does not address challenges to the dignity or self-regard of those involved in the administration of justice. Its proper subject is interference with the due administration of justice, either in a particular case or as a continuing process.[13] Approaches to, or

[13] *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 449 per Lord Diplock.

the publication of disclosures by, jurors may or may not amount to such an interference, depending upon the facts and circumstances of the case. The English court dealing with the disclosures following the trial of Jeremy Thorpe, referred to above[14], held that what occurred in that case did not constitute contempt, even though it was "a serious and dangerous encroachment into the convention of jury secrecy".[15] The court said[16] that the primary test was whether the activity in question tended, or would tend, to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations.

This subject was examined in depth in an article by Professor Enid Campbell published in 1986.[17] She was writing before the amendments to the New South Wales *Jury Act* discussed above, but after the enactment of s 8 of the English *Contempt of Court Act* 1981, which goes much further than the New South Wales legislation in enforcing jury secrecy.

The recommendations of the New South Wales Law Reform Commission, which resulted in the present legislation, were partly a response to the dissatisfaction felt with the uncertainty of the law of contempt, and reflected a desire to put the law relating to jury secrecy on a more certain footing.[18] Whilst the statute does not abolish or replace the law of contempt, and whilst human ingenuity is such that people may well be able to devise forms of conduct which are not inconsistent with the statute, but which nevertheless manifest the tendency to interfere with the administration of justice, (which is of the essence of contempt), it may be accepted that a court would ordinarily be reluctant to find contempt of court in conduct which is of a kind that would clearly have been within the contemplation of Parliament but that is not prohibited by the statute.

Legal Professional Standards

With the possible exception of journalists, lawyers constitute the class of persons most likely, for a number of possible reasons, to discuss their deliberations with jurors following a trial. Casual conversations, between a lawyer for one party, and a former juror, following completion of a trial, are not uncommon, and some of the law's more colourful anecdotes concern revelations made in the course of such conversations. Is there anything unethical about a lawyer approaching a former juror, and seeking information, assuming, of course, that no breach of s 68A of the *Jury Act* is involved?

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[14] *Attorney-General v New Statesman* [1981] 1 QB 1.
[15] Above n 14, at 7.
[16] Above n 14, at 10.
[17] E Campbell, "Jury Secrecy and Contempt of Court", (1986) 11 *Monash University Law Review* 169.
[18] Above n 5, at 182.

In considering ethical obligations, three matters should be remembered. First, jurors take no oath of secrecy, so an approach to a former juror does not involve an invitation to break an oath. Second, jurors in New South Wales are not told that they must forever keep secret their deliberations; they are warned not to disclose them during the course of the trial. For that reason, some of the observations of English judges on this subject should not be applied uncritically here. Third, the *Jury Act* declares the intention of Parliament as to the limits of jury secrecy, and if people other than lawyers may, consistently with the statute, ask questions of, or receive information from, jurors, it is not easy to see why lawyers should be discriminated against.

The question of what a lawyer might hope to achieve from questioning jurors after a trial is closely related to the subject to be considered next, ie the use of evidence of jurors to impugn a jury's verdict or otherwise in aid of an appeal. Let it be assumed, however, that, for what is thought to be good reason, or merely out of idle curiosity, a lawyer approaches former jurors and questions them about their decision. In what circumstances might that involve professional misconduct?

In 1976 the New South Wales Court of Appeal reprimanded a solicitor for improper conduct in a case where, after a trial, the solicitor, for what he regarded as good professional reasons, telephoned members of the jury to inquire as to their views of certain matters about the case.[19] The essence of the impropriety lay in the invasion of privacy of the jurors who, having performed their task, were said to be entitled to return anonymously to the community. Consistently with a decision in a similar case in the Australian Capital Territory[20] the Court, finding that the solicitor's motives were not subjectively dishonourable, did not characterise the case as one of disgraceful or dishonourable conduct, but treated it, rather, as one of objective impropriety, deserving censure, but not more severe punishment. Of course, conduct involving harassment of a former juror would now contravene s 68A of the *Jury Act*.

The rules of the Bar Association and the Law Society do not specifically address the issue. Apart from what appears in the *Jury Act*, there is no absolute prohibition upon communications between lawyers and former jurors about jury deliberations. Depending on the circumstances of the case, such communications could involve objective impropriety or even professional misconduct, but the mere fact of communication would not suffice.

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[19] *Prothonotary v Jackson* [1976] 2 NSWLR 457.

[20] *Re a Solicitor*, Smithers J, Supreme Court, Australian Capital Territory, 4 June 1971, Unreported.

Exclusion of Evidence

For more than two hundred years courts in England and Australia have sought to protect the finality of jury verdicts, and the secrecy of jury deliberations, by the application of an exclusionary rule of evidence first enunciated by Lord Mansfield CJ in 1785.[21] In that case an attempt was made to prove, in an appeal, that jurors had resolved their disagreement by the toss of a coin. An affidavit to that effect was sworn by two jurors. Lord Mansfield ruled that the evidence was inadmissible and that, as a matter of public policy, courts would decline to receive evidence, directly or indirectly, from jurors purporting to disclose what took place in the course of their deliberations in the jury room.

That general exclusionary rule is not unqualified, as will appear below. However, the strictness with which it is applied can be illustrated by a 1986 decision of the Privy Council in a case involving capital punishment.[22] A jury, in Trinidad and Tobago, brought in a verdict of guilty of murder, and the accused was sentenced to death. According to the law of Trinidad and Tobago, the jury's verdict had to be unanimous. Unfortunately, nobody had explained that to the jury. After the verdict was given, and the accused was sentenced to death, the foreman of the jury and three other jurors swore affidavits stating that they had not been aware of the need for unanimity, and that eight jurors had been in favour of a guilty verdict and four jurors had been in favour of a not guilty verdict. The Privy Council ruled that this evidence was inadmissible in support of an appeal by the man who had been condemned to death. It was also held that there was no rule of law or practice in Trinidad and Tobago which obliged a trial judge to tell jurors that their verdict must be unanimous. (However, their Lordships added in their judgment the observation that perhaps there should be an improvement in procedures in Trinidad and Tobago relating to receiving verdicts from juries). Their Lordships referred to the ancient exclusionary principle, and to its more modern applications, and said that it was founded on two reasons of policy. The first was the need to ensure the finality of the decisions of juries and the second was the need to protect jurors from inducement or pressure either to reveal what had occurred in the jury room or to alter their opinions.[23] Their Lordships were obviously not going to let a hard case make bad law.

In England, s 8 of the *Contempt of Court Act* 1981 makes it a contempt of court to obtain, disclose or solicit any particulars of statements made,

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[21] *Vaise v Delaval* (1785) 1 T R 11; 99 ER 944. It is typical of the methodology of the early common law that an important rule of substantive law developed as a rule of adjectival law.

[22] *Nanan v The State* [1986] 1 AC 860.

[23] See also *Ellis v Deheer* [1922] 2 KB 113; *Attorney-General for New South Wales v Murphy* (1869) Cox 11 CC 372; *R v Papadopoulos* [1979] 1 NZLR 621; *R v Minarowska*, Court of Criminal Appeal NSW, unreported, 23 October 1995.

opinions expressed, arguments expressed or votes cast by members of a jury in the course of their deliberations in any legal proceedings. In a recent case,[24] the Court of Appeal set aside a verdict of a jury in a murder case in which some members of the jury used an ouija board to consult the deceased victim as to the identity of his killer. According to the medium, the deceased blamed the accused. The decision turned upon the fact that the use of the ouija board had taken place in a hotel overnight, rather than in the jury room in the course of the jury's formal deliberations. Once again, this is hardly a satisfactory distinction. However, it followed from the terms of the English legislation, and is yet another example of the price that has to be paid for rules of law with hard edges.

It was said above that the exclusionary rule is not unqualified. The first qualification arises out of a distinction which has been drawn by the courts, but which is not always easy to apply, between evidence (first hand or hearsay) concerning the deliberations of a jury, and evidence relating to extrinsic matters which proves the existence of a material irregularity in the proceedings. It has been held permissible to lead evidence to show that inadmissible and prejudicial evidence was sent into a jury room and was available to be considered by the jury,[25] that a Sheriff's officer wrongly intruded into a jury's deliberations and expressed an opinion unfavourable to the accused,[26] that a bailiff told a jury that an accused had previous convictions,[27] or that a juror was drunk, or could not speak English, or refused to participate in deliberations.[28] The dividing line between evidence concerning the deliberations of a jury and evidence of an irregularity in conduct or procedure, whilst well established by authority, is not always clear.

Another qualification which has been proposed by the Court of Appeal of New Zealand,[29] is that there may be circumstances in which the need to avoid a miscarriage of justice would be regarded as a sufficiently compelling reason to depart from the normal rule of confidentiality. It may be argued that it is not easy to reconcile that proposed qualification with the decision of the Privy Council in the appeal from Trinidad and Tobago referred to above. It is difficult to imagine a more extreme case than one involving capital punishment, where there was evidence that the verdict of the jury had not been, as it was required to be, unanimous. It is also difficult to envisage where such an open-ended qualification may lead. However, this also is an issue which could arise for decision and I express no opinion about it.

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[24] *Reg v Young* [1995] 2 WLR 430.
[25] *R v Rinaldi* (1993) 30 NSWLR 605.
[26] *R v Emmett* (1988) 14 NSWLR 327.
[27] *R v Brandon* (1969) 53 Cr App Rep 466.
[28] *Tuia v The Queen* [1994] 3 NZLR 553.
[29] *Tuia v The Queen*, above, n 28; *R v Tawhiti* [1994] 2 NZLR 696, at 699.

Conclusion

The rules aimed at maintaining a substantial degree of secrecy in relation to jury deliberations are based upon considerations of policy closely related to the finality and inscrutability of jury verdicts, and a desire to maintain the integrity of verdicts by protecting jurors from unwelcome or inappropriate external pressures.

Most common law jurisdictions accept the general policy underlying such rules, but there are significant differences in the way in which a balance is struck between the need to give effect to those policy considerations, the interest of free speech, and the desire to avoid miscarriages of justice. Unquestionably, there is room for legitimate difference of opinion on that matter.

It is, of course, possible to argue that, in modern conditions, where such emphasis is placed upon the need for accountability, unreasoned, inscrutable, secret, decision-making should have no place in the legal system. That, however, is not an argument against the rules that have been discussed above. It is an argument against the system of trial by jury. The challenge which confronts those who wish to maintain trial by jury, and yet at the same time allow greater access to jury deliberations, is to formulate alternative rules which are consistent with the maintenance of the essential aspects of trial by jury.