QUEENSLAND COURTS

Jury Research and Practice Conference
Banco Court
Friday 14 November 2008, 9:30am

The Hon P de Jersey AC[1]
Chief Justice

Introduction

I am very pleased to welcome you to the Banco Court this morning, and especially if I may say our interstate colleagues, and I am grateful for the opportunity to deliver this opening address.

I will say something about three matters: first, the significance of trial by jury in contemporary times; second, the validity of the assumptions which lie at the foundation of the process; and third, the prospect of further refining the system to meet current challenges.

But many in this room would be surprised were I to pass up the opportunity of first mentioning our new Supreme and District courthouse project. One of the principal drivers of my concern to ensure this development, now proceeding apace, was the abysmal inadequacy of jury facilities in this courthouse: where the jury rooms are claustrophobically small; where jurors attending to basic human needs are denied the dignity of appropriate privacy; where the furnishing was not even acceptable in the year of commissioning, 1980, and is now uninspiring if not depressing; and where for lack of requisite insulation, the prospect of jury contamination persists. Our new building will more than meet these concerns. I am pleased to note that Dr David Tait is to make a presentation today. He is in my experience rivetingly interesting and helpful in the domain of courthouse design. And now to why we should be devoting a day of our lives to trial by jury…

---

[1] I am indebted to my Associate, Mr Ben Hay, for his substantial assistance in the preparation of this address.

The significance of trial by jury in contemporary times

The importance of jury trial should not be underestimated. The successful administration of justice depends heavily on a strong partnership between legal professionals and lay members of civil society.[2] Providing lay people with the opportunity to engage in the court's decision making process operates as a legitimate protection against the arbitrary use of Crown power. It also helps to preserve public confidence in the courts.

As Deane J said in *Brown v R*, "The essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached."[3]

To appreciate the depth of that sentiment, one may pause with the Commonwealth Constitution. Section 80 provides that the trial on indictment of a Commonwealth offence must be by jury. Our s 80 broadly reflects s 2(3) of Article 111 of the United States Constitution. As the US Supreme Court explained in *Strauder v West Virginia* 100 US 303:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbours, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says: - 'The right of trial by the jury, or the country, is a trial by the peers of every Englishmen, and is the great bulwark of his liberties, and is secured to him by the Great Charter.;"[4]

Our founding fathers agreed.

[2] Dr Andrew Buck, "Juries and Movies" in Reform Winter 2007 Issue 90 p. 56
[3] (1986) 160 CLR 171 at 202
[4] *Strauder v West Virginia* 100 US 303 at p 308

In Queensland, the right to trial by jury is enshrined in s 604(1) of the Criminal Code. While the right is not constitutionally entrenched, as in the Commonwealth, a government would remove the right at great peril to itself. That is because the right to trial by jury is, more than 200 years after Blackstone's Commentaries, still regarded as a "great bulwark" of personal liberty.

The "mock trial"

In October this year, a particular event in this jurisdiction illustrated well the public's interest in and "ownership" of the jury process. It was a mock trial hosted by ABC Radio, held here in the Banco Court, a direct broadcast live on morning radio. The 612 morning presenter Ms Madonna King compered the event, with Her Honour Judge Dick on the bench, the Director of Public Prosecutions Mr Tony Moynihan SC as prosecutor, and Mr Rob East from Legal Aid Queensland as defence counsel. There were other participants: from Corrective Services, Legal Aid, the University of Southern Queensland, and the media. That it occupied the whole of Ms King's morning radio session reflected the ABC's assessment of that level of public interest, noting that 612 morning radio has a listener catchment comprising 120,000 persons. The "jury" comprised 140 members of the public, all of whom had applied in advance for a berth. I was later told that the feedback to the ABC was substantial and positive.

I personally consider this was one of the best instances of worthwhile community engagement by the courts in this State for some years. As mentioned, I thought it reflected the public's reliance on or "ownership" of the jury system, as a respected constituent of the criminal justice process.

Criticism of juries

Particular phenomena provoke occasional criticism of trial by jury, especially with regard to its application as of right in certain circumstances. One such phenomenon is the lengthy trial of complex fraud changes – and the criticism will intensify if the trial founders. Another is the determination of criminal responsibility where issues of capacity and understanding depend on weighing complex and conflicting medical evidence. Yet another is the case where necessarily complicated directions have to be given on defences like provocation and self defence. Sometimes particular juries or jurors are criticized. Proven juror misconduct is a rarity. We have in Queensland fortunately been spared the English experience, the most colourful example of that probably being the case where four jurors were shown to have consulted an Ouija board (*R v Young* (1995) QB 324).

It is generally uncommon for sustained bursts of criticism to be levelled against the jury system, though a recent exceptional trial in NSW deserves mention. A long drug trial in Sydney's District Court was abandoned because some jurors were found to have been playing Sudoku while attending to the evidence. After more than three months, with over 100 witnesses having given their evidence, the jury was discharged. Without wanting to overanalyse these events, one could safely hypothesise that as trials become longer and the evidence more technical, with greater consequent demands on jurors, the risk of juror inattention increases.

This was an illustration of the intrusion of abiding human frailty. For balance, I should mention the convictions recently overturned by the High Court for the somnolence of the trial judge. Frailty is not confined to jurors.

The capacity of jurors: how well are they informed?

Although critics of the modern jury system sometimes argue that jurors lack the intellectual capacity to make increasingly complicated determinations of fact, empirical studies suggest that it is not so much the intellectual capacity of jurors which is the problem, but rather, the manner in which the evidence is presented.[5] In other words, any fault rests with the lawyers and the judges. Perhaps it is time to reassess the way we communicate with jurors, to multiply techniques to ease the jury's fact finding process.

Change in the manner of informing juries

Charts, flow-sheets, written summaries, video re-enactments, computer based crime scene analysis, increasingly a feature of our approach, are movements in that direction. Simple expedients can produce disproportionately beneficial consequences. I was amazed at the dramatic improvement to criminal trial presentations wrought by the simple "document viewer", in displaying documents in magnified form.

We also need to be alive to differences among the generations and age-groups in the manner in which information is optimally assimilated. Juries increasingly include members of Generations X and Y. Whereas "baby boomers" most generally have informed themselves by listening and reading the printed word, younger citizens are generally more interested in electronic forms of communication; the Internet, mobile phones etc. The prospect of best informing your subject will be enhanced if you use his or her preferred means of communication. Now juries reflect a mix of ages, and so the means of communicating with them could involve a mix of techniques. The modern approaches just mentioned show that, but we must not stop there. Effective

[5] Jacqueline Horan, "Communicating with Jurors in the twenty-first century", (2007) 29 ABR 75

communication rests at the heart of the advocate's mission of persuasion, and the trial judge's instructions.

Courts are sometimes criticized, fairly or not, for being tardy in their embrace of change. When I joined the Supreme Court of Queensland in 1985, it was not the practice for trial judges to offer a jury any assistance, as to their role, the procedure or the law, until right at the end of the trial, in the summing up, or the "charge" as it was then styled. In the early to mid-1990's, we (or most of us) adopted the practice of giving a jury a fairly comprehensive opening statement about those matters. We came to "countenance" other things, such as jurors asking questions about the evidence during the trial: why has X not been called as a witness? Could witness Y explain this aspect of the facts? Then the late 1990's saw the introduction of aids to the comprehension of evidence, the use of flowcharts, providing juries with summaries of the legal issues to be considered, the use of overhead projectors, the provision of books of copies of exhibits to jurors, etc. In 1998 we produced a video about the process which has since been played throughout the State daily to all potential jurors before they enter the courtroom. We developed explanatory brochures, and the Jurors' Handbook which is provided to prospective jurors when summoned. There is explanatory material on the courts' webpage.

So there have been substantial changes over the last, dare I concede, 23 years. But more will be necessary. Our challenge is to recognize the need and respond with measure, if not celerity, and thereby not only enhance the reliability of the process, but also, forestall the criticism to which I earlier referred.

The justification for change

Those who baulk at attempts to reform the jury system sometimes defensively refer to the centuries of tradition underpinning it, as though any refinement would insult those critical historical foundations. The argument overlooks the social context in which the jury trial now operates. It also rests on the flawed assumption that because the jury system has for so long remained relatively unchanged, largely unexamined, any tinkering would open flood gates and imperil its very existence.

The social, political and legal context has changed dramatically since the 13th century. When juries were first introduced, trials were short and memory based. These days, with lengthier trials, more complex evidence, jurors are under greater pressures. For jurors, determinations of fact are becoming increasingly difficult. It behoves the courts to remain responsive.

Changes in the way trials are being conducted have meant that modern jurors face a variety of new challenges. One of the major problems we face in responding to these challenges is that until relatively recently, little empirical data based on relevant research was available. Necessary restrictions on the interrogation of jurors limit our understanding of jurors' deliberations. The mysteries of the jury room have for a long time limited positive reform.

The jury system is inherently less than perfect. This product of a balancing of competing interests means that at times, less than ideal outcomes will eventuate. Nevertheless, that it is imperfect does not mean it cannot be improved. The challenge we face is this – how to ensure the system remains strong, while at the same time, responding appropriately when opportunities for reform emerge.

I mentioned a lack of empirical evidence addressing the nature of jurors' deliberations. Survey-based investigation of the workings of juries has the fascination of unlocking Aladdin's cave. In that context I turn to my second subject, the question of how far our basic assumptions about goings-on within the impenetrable jury room are justified?

The assumptions underlying confidence in the jury system

There are some fundamental assumptions we make about juries, and they go ultimately to explain our confidence in their determinations. The essential assumption is that jurors are true to their oaths, basically to be honest; and that they act in accordance with the judge's directions. They may find those directions difficult to assimilate, especially in complicated areas like self-defence and provocation. But the reasonable assumption is that they do their best and generally succeed.

Do jurors respect their oaths? - "merciful verdicts" and some High Court scepticism

In that context, I wish to mention the decision of the High Court in *Gilbert v R* (2000) 201 CLR 414, a case about the proviso. Some of the observations in that case surprised me at the time, and still do.

The appellant, his brother and another man were charged with the murder of a victim who was brutally assaulted. The prosecution case was that the main perpetrator was the brother. The appellant had driven his brother and the other man to the scene. The prosecution contended the appellant did so to enable his brother to murder the deceased. The defence case was that the appellant knew no more than that his brother intended to assault the deceased.

The appellant was convicted of murder. Consistently with Queensland law at the time, the Trial Judge had left only murder for the jury's consideration. The High Court held that manslaughter should have been left as an alternative.

I mention the case today because of one particular issue which arose in the High Court, whether we rightly assume that juries are not swayed by matters of prejudice. Of course one of the fundamental directions given by judges is that they must not be.

When at the time I read the High Court reasons, I was surprised by this passage in the joint judgment of the Chief Justice and Gummow J (p 420):

> "The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. *It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice."*

Their Honours went on to refer to the High Court's decision in *Mraz v R* (1955) 93 CLR 492, a decision given when the death penalty was available, and said (p 420):

> "In the days when murder attracted the death penalty, appellate courts were well aware, and took account, of the possibility that juries may be influenced in their deliberations by the presence or absence of manslaughter as a possible verdict."

They referred to the observation of Sir Wilfred Fullagar in *Mraz* (p 513) that:

> "a jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them."

In *Gilbert*, Gleeson CJ and Gummow J said that such statements were:

> "inconsistent with the notion that an appellate court must assume, on the part of a jury, a mechanistic approach to the

> task of fact-finding, divorced from a consideration of the consequences…when, in Mraz the majority referred to 'ignoring the realities of the matter', one of the contemporary realities to which they were referring was the death penalty. That was why, tactically, defence counsel might prefer to conduct a homicide case on a 'murder or nothing' basis. The death penalty has gone, but there are other, perhaps equally influential realities. This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J, a jury may hesitate to acquit, and may be glad to take the middle course which is offered to them."

This brings up the contention that juries may sometimes bring in a verdict which is actually contrary to their oaths. Callinan J dealt with this matter in *Gilbert* from p 440.

His Honour referred to the direction given in *Gammage v R* (1969) 122 CLR 444, 445, which was in these terms:

> "You must not, as it were, say to yourselves, we are satisfied it is murder but we have the right to bring in manslaughter and although we think it is murder we are going to be merciful to this man and find him guilty of the lesser offence."

It is impossible to reconcile the returning of a so-called merciful verdict with the discharge of a juror's oath. Chief Justice Barwick said in *Gammage* (p 451):

> "They have no right, in my opinion, to return a verdict of manslaughter where they are satisfied of murder. But, as I have said, persistence by them in returning another verdict must ultimately result in the acceptance of that verdict. In that sense, but in no other sense, it is both within their power and, if you will, their privilege to return a wrong verdict."

All he was saying was that the judge has to accept the jury's verdict. It seemed to me that the High Court took the matter further, however, in

MacKenzie v R (1996) 190 CLR 348, 347, where Gaudron, Gummow and Kirby JJ said this:

> "The appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries."

Why is it "open" to render a verdict inconsistent with the oath? Also, where is the evidence that juries "often" abnegate their sworn duty? Those judges referred to what they described as the "practical and sensible" remarks of King CJ in *R v Kirkman* (1987) 44 SASR 591, 593:

> "Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of the law."

But how can a court even implicitly sanction a jury's reliance on <u>subjective</u> notions of "justice"?

Callinan J said he recognized "the reality that a jury room might not be a place of undeviating intellectual and logical rigour." (p 440) That obviously may be accepted. In the context however of the asserted right of juries to return "merciful" verdicts inconsistently with their oaths, Callinan J was unmoved. He said:

> "It is not to say that a jury should not perform their sworn duty to determine a case before them according to the evidence." (p 440)

…meaning there is never justification for divergence from the oath. There is no "entitlement" to deliver a so-called "merciful" verdict: the law requires a true verdict.

My own confidence in juries

My own view is that there may be added, to the assumption that juries follow judges' instructions, a further assumption, and that is that jurors act

consistently with their oaths. In other words, based on 23 years of trial court experience, I do not share the scepticism evident in those sentiments expressed by some High Court Justices. They would be the more compelling if based on substantial trial experience, or empirical evidence.

I readily accept that juries may have difficulty with necessarily complicated directions by trial judges. But I am confident that they nevertheless do their best, and as I have said, generally succeed. The persisting challenge for trial judges is to render their directions, when summing up to juries, as easy to understand as may be.

But I have confidence jurors seek to be true to their oaths, that they act conscientiously. My observation of juries is that they apply themselves with almost palpable dedication to their task. Their attentiveness to their sworn duty explains no doubt, in most cases which have to be retried, why the requisite unanimity was not achieved. It also explains my intrigue at the conclusion expressed in *Gilbert* that we cannot assume verdicts are uninfluenced by prejudice. Unless and until the surveys which may be discussed at this seminar prove me wrong, I will be holding fast to my contrary conviction.

My faith in the jury system as it currently operates does not however exclude embracing refinements to meet current conditions, which brings me to my third subject this morning.

Further refinement to meet current conditions

The jury system in Queensland has been refined from time to time. As an example, the prosecution has been given the right to elect that charges of certain indictable offences be determined summarily (s 552A Criminal Code).

Certain other offences must be dealt with summarily unless the defence requires trial by jury (s 552B). This year saw the introduction of a right to trial by judge alone, intended for complex or notorious cases (s 615), and the according of a discretion in a judge to take an 11:1 majority verdict (s 59A Jury Act 1995). The other major amendment was granting a discretion to allow jurors to separate while deliberating (s 53 Jury Act).

Judge only trials will follow an application made either by the defence or the prosecution, and then obviously only if a judge determines it is appropriate. When application is made by the Crown, the accused must consent.

As for majority verdicts, a judge will be able to employ this option only if a jury cannot reach a unanimous decision after lengthy deliberation (at least 8 hours). In the case of trials of the most serious criminal charges, unanimous verdicts have been retained.

These reforms have been introduced in the recognition of the reasonable rights and expectations of accused persons, and victims of crime, while at the same time, improving the court's capacity to ensure trials proceed in a timely and appropriate manner.[6]

These two reforms, judge only trials and majority verdicts, provoked substantial expressions of concern from the legal profession, especially from those who practise in the criminal courts – notably on the defence side. I thought it was interesting that the first majority verdict taken in the State, and it was taken on 30 September by the Northern Judge in Townsville, was, on a charge of attempted murder, an acquittal. And more recently, I think last Thursday, the

[6] "11 Angry Men: QLD adopts majority verdicts", Sept 12, 2008, www.brisbanetimes.com.au

result of the first judge only trial, conducted in the District Court at Ipswich in relation to sex charges, led to an acquittal.

As to majority verdicts in particular, juries may occasionally include one or two intransigent members. Criminal trials are often conducted many years after the offences have been committed. Re-trials necessitated by intransigence not only cause undue pain and inconvenience, they also erode court resources. Allowing majority verdicts in limited circumstances, and in a measured way, in no way diminishes the significance of trial by jury: on my assessment, it enhances it, by updating it in a sensible way to recognize actualities.

Conclusion

This is a good system, which has been occasionally incrementally streamlined. A notably progressive, if particularly utilitarian, reform in this jurisdiction this year, was giving the trial judge a discretion to allow the jurors to separate after commencing deliberations – frankly a courtesy to jurors, who after all are human beings, and to their families: a patently beneficial change ordinarily without risk to the integrity of the jury's deliberation.

As time goes on, other desirable changes may be identified. Making them will similarly not diminish the significance of trial by jury as the "great bulwark" of individual liberty.

I see our jury system as a very good example of so-called participatory democracy. When judges not infrequently tell juries that they discharge the most significant civic duty a person may be asked to undertake, their words are not hollow.

In opening the conference, I wish you well as you explore these and other important issues.