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Juries

HOW DO THEY WORK?

DO WE WANT THEM?

JURY PROJECT DISCUSSION PAPER

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Preface

This Project is a “first of its kind” for the Society. We entered upon it with some trepidation. A small association of senior and very busy members of their professions in both common law and *Code* jurisdictions around the world, with an honorary and grossly overworked and under-resourced secretariat, is not the best structured vehicle for the kind of work involved in a Project of any kind, let alone one as important as this is.

True to much modern social history, conception was fairly easy. The Society was meeting in Barbados, it was 11 years old and its members felt that the time had come to produce some “quality, heavy paper” which would be as topical when published as when started. Mode of trial, in particular trial by jury, was then emerging as a hot issue in many jurisdictions and was likely to remain so for some time. So it has proved.

We have learnt a great deal ourselves during the Project about mode of trial issues, of course, but - and importantly for the future - about how to manage any Project which we undertake. In addition to that valuable management learning curve, the Project has proved to us (as it must now prove to the outside world) that we can produce quality, heavy and pertinent paper which criminal law and criminal justice decision-makers around the world might (should) think it right to consider.

We are an international society of judges, practitioners (prosecutors and defenders), senior civil servants, legislators, academics, law enforcement agents and agencies, penal system agencies and others concerned with the criminal law and with criminal justice policy and practice. Thus we are a unique resource upon which governments and judicial agencies can draw for assistance in working through problems of international and national concern. We have been available for this since our foundation in 1988: Our senior members were invited to join because they were seen to have standing and influence in their own jurisdictions. Now, we are established: we have a track record of highly relevant major international conferences (and some national/regional seminars); we are a network; we are a brains trust. We are committed to a programme of bringing in the next generations of people of standing and influence and of demonstrating to the wider world what we can do and how useful a resource we are.

The Jury Project was deliberately chosen to advance this programme. We anticipate - we hope - that the product of our work, contained in this Discussion Paper and in the material upon which the Paper is based, will help to illuminate the continuing debates about trial by jury in our members’ jurisdictions and jurisdictions from which we do not yet draw members.

However, not all the material upon which we have based this Paper is to be found in the submissions we have received. Some of it is in our heads - and now in writing..

There is a wide range of acknowledgments which we should make for ourselves and for the Society, first and foremost to the members of the national working parties, to others in various jurisdictions who, quite independently of the Society, have been considering trial by jury and have been generous enough to allow us access to their draft and final papers and to individuals within and without the Society who have expressed their views on aspects of the Project. We owe a very profound debt, also, to Deirdre Sheehan and Robert de Boer in Victoria and to Isobel Ascherson, barrister, in London who have given essential and highly valued assistance to us by producing summaries and organising the material so that we could put this Paper together.

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Introduction

Methodology

The Project started with a joint letter from Professor Peter Burns Q.C. and Michael Hill Q.C. (then the President and the President-Elect of the Society, respectively), dated 24 September 1998 and sent to all members of the Society. They were invited to participate in the Project by forming working parties amongst themselves and with professional and academic bodies concerned with criminal law and justice in their own jurisdictions. The letter was accompanied by a list of "Possible Sub-Issues" which the participants might want to address¹. At that stage, Michael Hill ("MH") was naive enough to contemplate publication of this Discussion Paper by the end of 1999.

Responses

We received responses from Australia, Canada, the Netherlands, New Zealand and the U.K. (Scotland)². In addition, we considered a number of articles submitted to us which had been selected from what is a very large library of relevant published material³. In addition to these sources, we have consulted some of the other published material, MH has provided some information specific to the English and Welsh jurisdiction in the U.K., has had in mind Linda Dessua's "Speedy Trials and a Speedier Criminal Justice System: Recent Observations in Overseas Jurisdictions"⁴ and has received some helpful comments on the original draft of this Paper from Dr. Paul Robertshaw⁵.

Drafting the Discussion Paper

We have drawn on the Project Papers and the summaries substantially. We have not been able to reflect responses across the whole range of "possible sub-issues". There are two reasons: on some of the sub-issues there has been an insufficient quantum response to make comment significant; and we will be publishing all the material we have received in the Society web-site. Moreover, we are conscious that, by the time that this Paper is published, further information and material from different jurisdictions will have come into the public domain - material which, necessarily, we will not have considered. In the last analysis, this is a Discussion Paper, not a treatise by the Society or by us.

That said, it does contain some expressions of our opinions. Where appropriate, we have included footnotes stating whose opinion is being expressed.

¹ Appendix A.

² Appendix B

³ Appendix C

⁴ (1995) 5 Journal of Judicial Administration 43,

⁵ Law School, Cardiff University.

How Juries Operate

Trial by Jury is one of a number of different criminal justice mechanisms whereby a public court disposes of accusations of crime. The range of alternative modes of trial stretches from a bench of lay magistrates⁶, through professional magistrates⁷, judges sitting alone, judges sitting with juries, judges sitting with assessors, judges sitting *en banc*

There are significant differences with regard to juries amongst those jurisdictions which do have trial by jury. These differences relate principally to size⁸, to verdict⁹, to votes¹⁰ and to responsibility¹¹. Differences notwithstanding, the common features of all those accusatorial systems which have trial by jury are that juries are:

- Required to work exclusively on and with the law as it is explained to them by the judge; Required to work exclusively on and with the evidence which is deployed before them;
- Uniquely responsible for all decisions of fact and inference based upon that evidence; and

⁶ As in England and Wales: Justices of the Peace provide the majority of courts which deal with summary-only cases or those cases which, although triable on indictment, may be tried summarily. Originally, JPs provided local government as well as local justice and their administrative functions survived long after their principal function became judicial. Since the early 19th century, stipendiary magistrates have been appointed to discharge the same functions as JPs in, first, London and then the larger conurbations outside London. There is some political disposition to replace all JPs with stipendiaries.

⁷ The powers and jurisdictions of professional magistrates (and their proper titles) vary across the nations but, (subject to footnote 5, above) it appears that, in all nations, they provide the fora for the disposal of the vast majority of criminal cases.

⁸ The “standard” jury comprises twelve members of the public. In some jurisdictions, the jury comprises 15 members of the public, in others it is as low as six. In some jurisdictions, alternates are sworn as a matter of course, in others there is no provision for alternates.

⁹ In all jurisdictions, save the Scottish, the verdicts available to a jury are “Guilty” and “Not Guilty”. In Scotland, there is an intermediate verdict, “Not Proven” which, although it ranks as an acquittal, has come to signify “the prosecution has not proved its case” as opposed to “the defendant is innocent” for which the verdict is, “Not Guilty.”

¹⁰ In some jurisdictions, only a unanimous verdict may be returned. In others, verdicts of a majority are acceptable but only in Scotland does a simple majority suffice. The more normal majority (in jurisdictions where a jury comprises twelve members) must be at least ten for and two against. Some jurisdictions (as in England and Wales) will accept a majority verdict only after (a) a statutory minimum time has elapsed and (b) the jury then has been given a specific “majority verdict direction.” In some jurisdictions (as, again, in England and Wales), the votes for and against a (majority) verdict of “Guilty” must be stated whereas there is never any such statement with regard to a verdict of “Not Guilty” even if it is returned after a majority verdict direction has been given.

¹¹ In most jurisdictions, juries are responsible only (*sic*) for the verdicts, they have no responsibility for and not *locus* to suggest sentences (beyond recommending mercy). In some jurisdictions, however, juries are involved in the sentencing phase of a criminal trial and may even determine the sentence itself.

- The sole arbiters of the verdicts to be returned¹².

Underlying all this are two crucially important principles relevant to such juries and the discharge of their duties:

- Juries' deliberations are commonly sacrosanct¹³; and
- Juries are not required to give reasons for their verdicts¹⁴.

The Debate

The Project has underlined the wide divide that exists between those who regard the principles behind and the common features of trial by jury as “good” and those who regard them as “bad.” In the “common law” jurisdictions which have jury trial, the two principles have been regarded for generations as “good” almost by definition. On this view, sacrosanct jury deliberations and the absence of reasons are guarantees of independence and of freedom: note that the argument does not extend to saying that they are guarantees of either a “correct” result or “justice.” The reason is simply stated: in a jury trial system, “verdict”, “correct result” and “justice” are co-terminous, at least for so long as the lawyers do not make a mess of the process. In case the lawyers do make such a mess, there is an appellate process which, traditionally, has been focussed on process, rather than substance. In England and Wales, for example, it is only in the last three to four decades that there has been the realistic opportunity of overturning a guilty verdict on the basis that it is “wrong”, that is, that the defendant was truly “not guilty”. The self-confidence of the common law systems generally has been dented by a series of well-known miscarriages of justice, although there is an unattractive (as well as very dangerous) tendency to say that, because these miscarriages have tended to emerge in the U.K. jurisdictions, they are a U.K. problem and not one which need concern the

¹² This needs to be qualified, to the extent that there are jurisdictions, such as Massachusetts, in which the trial judge can amend the jury's verdict to “Guilty” of a lesser offence: see, for example, what happened in the Louise Woodward case.

¹³ This is certainly true of the actual deliberations - these are never contemporaneously monitored. However, there are some instances in which aspects of the way in which a jury has gone about its deliberations have been reviewed after the event and in the course of an appeal. A significant example in the English and Welsh jurisdiction is the decision of the Court of Appeal (Criminal Division) in the “ouija board” case - *R v Young [1995] 2 Cr.App.R. 379*: the Court received affidavit evidence from all twelve jurors that, whilst the jurors were being housed overnight in a hotel having not reached any verdict on their first day of deliberations, four of them had indulged in a “ouija board” seance to contact the deceased in order to discover whether the defendant was guilty of the murder alleged. The Court held that this did not occur during the jury's “deliberations” and, thus, that the Court was not inhibited by statute or common law in enquiring into these events. The Court quashed Young's convictions for murder and ordered a retrial. The defendant was then convicted again on the two counts of murder.

¹⁴ Most jurisdictions empower a judge to require a jury to return special verdicts, particularly in those cases in which it would be possible for the jury to arrive at a guilty verdict in a number of different ways and it is important for sentencing purposes to know in which way the jury has reached its verdict. However, this is a dangerously blunt tool because there cannot be any requirement that all members of the jury arrive at their common verdict by the same route. The use of special verdicts varies across the jurisdictions which have trial by jury.

domestic jurisdictions of the likes of Australia, Canada, New Zealand and the U.S.A. Self-delusion, in this as in other aspects of human endeavour, is a poisonous recipe for the commonweal¹⁵.

In fact, most, if not all, of the miscarriages of justice (in this context, convictions which were wrong in fact or not sustainable on the evidence) which have captured public attention have had their identifiable roots in failures by the agencies servicing the criminal justice system, the police, the forensic science and pathology establishments, the prosecuting authorities, counsel (for prosecution and defence) and the judiciary. Looked at objectively, it is very difficult to attribute wrongful conviction miscarriages of justice to juries.

The same cannot be said about “wrongful” acquittals - if “wrongful” is used in the sense of “against the weight of evidence”, still more if it equates with “wrong in fact”. Anyone who practises in the criminal courts where there is trial by jury can point to cases in which juries have returned verdicts of “not guilty” which surprised the professionals involved in the trials. On some occasions, undoubtedly, the “not guilty” verdicts have been examples of jury nullification, an issue which is discussed below¹⁶. On other occasions, whilst the verdicts have been surprising, they could not be said to have been perverse. Perverse verdicts - if the words are used correctly - are very rare¹⁷.

Those who practise in judge-only jurisdictions frequently express themselves in like terms about judicial verdicts: most are “good” (that is, the professionals agree), some are “wrong” (that is, the professionals disagree), some are “perverse” (that is, they are without any identifiable justification). However, critics and outright opponents of jury trial point to a lack of transparency and a consequential lack of audit process inherent in jury trials. The very sacrosanct nature of deliberations and the absence of stated reasons for verdicts which underpin trial by jury are, for critics and opponents, serious weaknesses. Societies have come to recognise that even the most precious pillars of social organisation and societal good order are not and must not be immune to criticism and opposition. The criminal justice system in any society is one of those pillars and, to critics and opponents, it is a ridiculous (and potentially dangerous) situation that the real process by which individual members of society are convicted (or acquitted) of serious crime cannot be examined and questioned on an informed and case-by-case basis.

There is nothing really new about this argument. In one form or another, it has been a focus for debate in jury trial jurisdictions over the centuries. It is arguable, therefore, that it is, if not sterile, then an argument going nowhere: the philosophical arguments of supporters and opponents of trial by jury meet head on, the former does not crumble in the face of the onslaught of the latter and the *status quo* is maintained. Of course, there is more to it than that: judgements can (and should) be made about the relative jurisprudential weights of the two arguments. However, “judgement”, in this context, requires an arbiter: the only arbiter that any free, democratic jurisdiction has is, ultimately, public opinion and public opinion itself tends to support the *status quo* - into whichever jurisdiction one looks.

¹⁵ Comment by MH.

¹⁶ See, in particular, pages 15-16, below.

¹⁷ For example, in over 40 years at the independent practising criminal Bar of England and Wales, MH can recall only one verdict of “not guilty” which he regards as perverse, that is, without any apparent justification on the evidence or in abstract terms of “doing justice”.

It may be as a result of this argumentative *impasse* that the focus of the debate about trial by jury has tended to shift over the past four decades. Currently it seems to be an unspecific, frequently confused, concept of efficiency. In some discussions across and within the individual jurisdictions, “efficiency” has had something to do with the verdict returned by a particular jury¹⁸ whereas, in others, it has concentrated upon the cost of trial by jury. This very issue is discussed in the Project Paper submitted by a Working Party¹⁹ of the Scottish Association for the Study of Delinquency (“SASD”)²⁰:

7. Efficiency and effectiveness

5.1 The question whether a jury trial is an efficient way of disposing of criminal charges invites a consideration of what is meant by “efficient”. The question may be “Is jury trial the most economical way of determining whether charges are proved?” Or the question may be “Do juries get it right, in terms of the correctness or otherwise of their verdicts?” Or the question may be “Is trial by jury seen by the public at large as the most appropriate way of dealing with serious cases?”

5.2 In Scotland, there has been very little dissatisfaction expressed with trial by jury as an institution. By and large, it seems to command a more or less unreserved public acceptance...

5.3 As to whether or not juries “get it right”, there are instances from time to time when a jury returns a verdict, either for conviction or for an acquittal, which comes as a surprise to the judges and others with knowledge of the case...It is usually possible to identify a reason or reasons [for such verdicts]. When the reason or reasons are examined, it can generally be said that they were reasons which the jury could reasonably have had for reaching the decision they did.

The SASD Working Party did not address so succinctly the question whether trial by jury is, “the most economical way of determining whether charges are proved.” However, they did look at procedural changes which have been introduced into the Scottish system and which are “targeted” on reducing the time spent awaiting trial and the length of trials themselves²¹:

Since 1995, it has been the duty of the prosecutor and the accused, if represented, to identify facts which are unlikely to be disputed and to take all reasonable steps to secure the agreement of the other party to them. In addition, a party who considers that facts are unlikely to be disputed may send a statement of such facts to his

¹⁸ The so-called debate which followed the acquittals in the “Maxwell Trial” in London is a classic example of this. Comment by MH

¹⁹ The Working Party members were: Lord MacLean (Senator of the College of Justice), Sheriff Richard Scott (Chairman of SASD), Dr Peter Young (Edinburgh University), William Gilchrist (Regional Procurator Fiscal), Alistair Duff (Solicitor) and Kate Frame (Crown Office).

²⁰ See pages 7-8.

²¹ See paragraph 5.8, page 9.

opponent. If the notice is not challenged, the facts in the statement are deemed to be proved. These recent provisions are in addition to a fairly long-standing provision allowing parties to enter into a joint minute of admissions of agreed facts...²²

To many, the “cost” issue reveals a fundamental failure of understanding. They do not accept that it is in accordance with principle to assess the jurisprudential or socio-political value of any mode of trial by reference to the cost of trials. They believe that the only permissible question is whether a particular mode of trial enhances the reality and the perception of justice being done between state and individual.

On the other hand, those who support a cost-effectiveness audit of the modes of trial argue that (a) the chosen mode of trial in any jurisdiction must accord with the state’s ability to fund it and (b) the length of time it takes to bring a case to trial and the length of the trial itself are relevant to the quality of any system of criminal justice. Most of those proponents question whether trial by jury is “efficient and effective.”

All the above relates to the trial up to and including verdict: it does not touch upon the role of a jury in sentencing. Properly considered, the arguments remain the same - save that, whilst there is little apparent jurisprudential value in a “sentencing jury”, there may be a substantial socio-political value in such a body²³.

As the Project Papers have demonstrated clearly, the mode of trial debate follows very much the same pattern in all the jurisdictions which are currently engaged in it. In all these jurisdictions, there seems to be a serious and common confusion in the approach of the proponents and opponents of jury trial. Jurors are not lawyers, they do not think like lawyers, they do not analyse like lawyers. Debating jury trial on the basis that jurors should think and analyse like lawyers is nothing to the point - indeed it misses the point. The real issue is fundamentally different. We attempt to arrive at a description (if not a definition) of that real issue in the next chapter of this Paper²⁴.

The Basic Question

We ran straight into a serious problem when drafting this paper: to identify, if we could, what the fundamental issue about trial by jury really is. The title of Project did not help much once we got down to our work - if only because it has meant different things to different people. And the articles and papers which we have read have not helped much either. The reason seems to be that all commentators, even the Law Commissions, start from pre-determined positions. If the

²² Those who are familiar with ss.7-9 of the English *Criminal Justice Act* 1987 and with the English *Criminal Procedure and Investigations Act* 1996 will immediately recognise that the “recent provisions” in the laws of Scotland reflect procedures which have been in place in England and Wales for thirteen years, at least with regard to serious or complex fraud and are being introduced for a wider range of criminal offences. Comment by MH.

²³ Paradoxically, there is a marked similarity in the argument advanced for the sentencing jury in the USA jurisdiction and the argument for a the “people’s court” structure for sentencing in, for example, many of the totalitarian states of the 20th century.

²⁴ The “efficiency” issue is further discussed at pages 21-23, below.

commentator comes from a system where there is no jury trial, the approach tends to lead to the assertion of judge-trial over jury trial - but for disparate reasons. There is much of the same unconscious nationalist thrust about the arguments from within jurisdictions with some element, substantial or otherwise, of trial by jury²⁵. It hardly needs saying that any worthwhile discussion will be comparative but the trouble is that so many commentators in writing and in presentations at Conferences suffer from serious misconceptions about jurisdictions other than their own.²⁶

We feel strongly that it is essential to craft the basic question about jury trial, arriving at the answer to which must be the overall objective. Indeed, whether the question is expressed in terms of jury trial or, more widely, in terms of mode of trial, there will be, at least, a common starting point for any productive discussion.

The basic question could be expressed in crude terms: "Are jury trials a good idea?" or, somewhat more sophisticated, "Are jury trials a good way of dealing with allegations of crime?" Such questions, however, will not do: they leave too many consequential questions unanswered and those undermine the discussion. For instance, what does "good" mean and what is contemplated by "allegations of crime"? What is the nature of the "good" judgement and does the second questions relate to all allegations of all crimes, some allegations of all crimes, and so on? And then there is the question which must be addressed: is it appropriate to consider jury trial as a separate animal, something that is different in kind from other modes of trial and, as such, is to be considered in isolation? We are quite clear that there is no purpose in or advantage to criminal justice administration, or to the peoples it is supposed to serve, in looking at juries as a mode of trial in isolation. We must consider the alternatives at the same time and ask the same basic question about them, in so far as we can in light of the information which we have, if this Discussion Paper is to do its job.

Which approach has posed another problem for us: we have submissions and information from four jurisdictions which have jury trial, have had it one form or another for generations and, even though it is under scrutiny and may be amended to make it "more relevant to modern conditions" (whatever that may mean), are unlikely to abandon it across the board for the foreseeable future. We have only one Project Paper from a non-jury trial jurisdiction. Such as have been the discussions at the Society's Conferences since 1987, quite apart from our own idiosyncratic researches, we are in a position to supplement argumentatively, if not factually, the Paper from The Netherlands. Nonetheless, we are acutely aware that both our identification and our application of what we have fashioned as the basic question are vulnerable to the riposte, "But you don't know what is happening in my *Code* jurisdiction."

It is axiomatic that the mode of trial is not an end in itself. It is critically important in any criminal justice system because it is the final route to the end. What is the end? It is that those who are

²⁵ We recognise that there is a slim but finite risk that we may be said to deserve similar criticisms.

²⁶ Comment by MH. Thus Chief Justice Lamer at the Vancouver Commonwealth Law Conference, when talking about the presumption of innocence, said that the European jurisdictions, unlike the U.K., did not have the presumption as an entrenched part of their law. The truth was exactly the opposite: at that stage, the U.K. was the only member of the Council of Europe which did not have a formally and entrenched presumption of innocence (although the practical position was that it was - and is - a fundamental of the U.K.'s law). It is this kind of fundamental misapprehension which leads some academics and, worst still, some governments and legislators into serious error.

proved properly to be guilty of the crime alleged should be condemned by verdict and punished appropriately and that those who are not proved properly to be guilty should be acquitted by verdict and freed from present (or future) allegations of committing that crime.²⁷ All Human Rights Declarations, Charters and Conventions, all Bills of Rights and all human rights related constitutional instruments contain a fair trial article. All fair trial articles lay down as a basic human right that a person accused will be tried publicly by a free and independent tribunal and shall not be condemned and punished other than by such tribunal. These articles, thus, are overwhelmingly concerned with process and “process” in this context has a direct relationship to “mode of trial.”

We believe, therefore, that in crafting the basic question to be asked about any form of trial, we must be demanding whether it meets the obligation to provide a forum in which a free and independent tribunal may determine an accused person’s guilt or non-guilt in a fair and transparent way and in public.

But there is more than the independence and the transparency of the tribunal to the right to a fair trial in human rights law. Concentrating solely upon the accused’s right to a fair trial in which an accused person may have his guilt or non-guilt determined, the state must ensure that it makes timely provision for the accused person to defend himself, that is to present and argue his rights and his case from the outset of the procedure. And this requires the state to provide the indigent accused with the human and financial resources to present and argue his case - a requirement that is sometimes encapsulated in the “equality of arms” mantra.

There is one further ingredient which is basic to the concept of a fair trial, namely that the proceedings, including the allegation and the deployment of evidence, shall be “according to law.” This latter requirement is a source of much argument in court and out. The starting point is always domestic law but there are domestic laws in many/all jurisdictions which offend against internationally accepted human rights, civil liberties and criminal justice principles and, in such cases, the field is well-fertilised for arguments whether “according to law” necessarily involves consideration of international principles. We do not have to become involved in that argument for the purposes of this Paper. It is necessary that we recognise that it exists because, it can have an effect on our suggestions and comments about jury/judge trial as particular versions of mode of trial.

Before we leave this discussion about the significance of human rights law in relation to mode of trial, it is necessary to address an argument which is becoming increasingly prevalent in some emerging jurisdictions. It goes along this general line:

Human rights law is an invention of the Western World. It is a post-imperialist, post-industrialist apologia for past (and some present) acts which have caused great harm and suffering to populations, national and colonial, which have been disadvantaged and oppressed. It pays little or no account to the cultures and

²⁷ We recognise that there are two human rights principles wrapped up in this sentence: the presumption of innocence and the double-jeopardy rule. These are such standard features in human rights and constitutional law as recognised in all free and democratic societies that we do not see the need to argue for them in this paper - even though such jurisdictions as the U.K. are currently contemplating abrogating or, at least, changing the double jeopardy rule.

structures of the very societies which have emerged from western domination and, thus, cannot and should not be treated as a model for all jurisdictions.

A particular (and significant) version of that argument is that the fair trial requirements to which we have been referring are irrelevant to settled non-western societies in which it is said that government by elders has been unchallenged in fact and theory for centuries. There is no need, so the argument goes, for such as the independence requirement or, even for a trial in the sense it is understood in the western world and contemplated in human rights law.

In western eyes this is a highly suspect statement, frequently made by the present or future elders or by those who align with themselves with the elders. Historically, it is a flawed approach. As communities develop, as their individual members acquire more knowledge, see wider and more distant social and human horizons and look for different shapes to their lives within their own communities, the patronising nature of government by elders becomes increasingly irritating and then contentious. Independence may not be a “now” requirement in some emerging jurisdictions: it is almost certain it will become a requirement for social harmony in the future. But quite apart from that riposte, there is a harsher one: the attempt to side-line human rights law by castigating it as “western” or “post-imperialist” is, in truth, little more than an attempt to avoid having to address palpable injustices in such societies. Thus, we do not believe that the mode of trial discussion upon which this Project is focussed is relevant only to the “western world.”

This Project is about jury trial: it is about jury trial compared with any other existing or proposed mode of trial. If we are to be consistent with the title of the Project, we need to draft the basic question in terms which relate to jury trial. This we have done: but, we believe, the language used is such that it could apply to any mode of trial being considered in this (or any other) Project:

Does trial by jury provide a jurisprudentially and socially appropriate method of discharging a state’s obligations to ensure that every person accused of a criminal offence has a fair trial?

We repeat: in our view this is not a question which can be considered and answered without paying regard to other possible modes of trial. We will refer to at least three other possible modes of trial in this Paper: the main other mode will be by judge alone.

The inclusion of “socially” in the basic question is deliberate.

The socio-political perspective

Every society creates its own “rules” for social conduct, for government and for dispute resolution and, in the latter case, for public and private resolution. Although the suit does not fit wholly comfortably, in the lexicon of societal decisions, the criminal justice system is probably the most important example of a process for the resolution of public disputes, in this case between society and individual.

Left to themselves, societies’ criminal justice rules will be dominated by each society’s introspective view of itself as it is and as it wants to be. In theory, there is no reason why the so-called global community could not have arrived at a situation in which there are different rules for each society on our planet, with no guarantee that any of the rules would mirror, let alone match, the rules of any other society. But that theory is a practical nonsense. It is clear that there are some basic

requirements which every society, certainly every society which is to remain an identifiable unit, has to meet. Whether or not there is equality between or domination/subordination of individuals or groups within any given society, all societies have a dynamic to survive: and survival necessarily requires a productive (not destructive) mode of association within. Thus it is that the rules of different societies are bound to have considerable areas of similarity. And, since societies (generally, at least) do not exist in splendid isolation from each other and, eventually, must come to recognise that war and killing are counter-productive to long-term survival, there is an inevitable cross-fertilisation of rules and a gradual development of norms or standards for both inter- and intra-societal relations.

This, undoubtedly very simplistic, overview of a human and social development which is infinitely more complex provides some explanation for the development of the concept of human rights. But it does more - and this more is directly relevant to the immediate topic. Peoples across societies tend to expect the same sorts of benefit from their essential structures. Of governments they expect, at least, a physical and social environment in which they are safe, secure and free. From their judicial systems they expect procedures and structures which, independent though they must be, focus upon the same trinity - safety, security and freedom. They do not require identical mechanisms to attain the trinity but they do require that the mechanisms are in place to deliver and to maintain confidence that the trinity is being delivered and will continue to be delivered. Finally, they require, such is human nature, that government and judicial system do all this with a minimal cost to the individual citizen. The hardest lesson for the citizen to learn is that a cheap product is frequently an imperfect product and that the cost of the cheap product and of then remedying its failure is higher than what would have been the original cost of the better product.

Mode of trial is a classic example of how important it is to teach that lesson - and not just to the tax-paying lay public and not just to a combination of that public and politicians. The lesson sometimes has to be recalled if not taught to those within the judicial system who have more than enough information and experience to know better.

Much of modern debate about jury trial assumes that (a) it is more expensive than judge alone trial, (b) it takes longer than judge alone trial, (c) it is far more unpredictable than judge alone trial and (d) judge alone trial will be easily accepted and become suitable to jurisdictions which currently have jury trial. Each of those assumptions is just that, an assumption. As the jury trial jurisdictions look over the fence at the judge trial jurisdictions there is, for many, an acute sense that the ground behind them is spare and arid whereas what is ahead of them is beautiful green grass. Some, at least, of those on the supposedly green side look back over the fence and see no aridity ahead of them - all that is behind them: ahead, it is all lush and green. The truth is that we have all got our problems, about our rules and our mechanisms.

Whatever judgement we, as "professionals" working in this field of law, justice and human rights, pass on mode of trial issues, we must remember that what we think is a "good idea" is only such if it works with and captures and maintains the trust of our trinity-seeking lay public. It could be, therefore, that the basic question needs to be amended to read:

Does trial by jury provide a jurisprudentially and socially appropriate method, acceptable to the informed public, of discharging a state's obligations to ensure that every accused person has a fair trial?

Immediately that amended question is posed, it should highlight a closely connected but consequential problem - "What are the conditions necessary for a society to accept jury or judge-alone trial?"

Trial by Jury

Postulation

History apart, there appear to be two principal justifications for having juries:

- They are independent decision-makers.
- They represent society in the disposition of criminal cases and, as such, they satisfy one (at least) of the socio-political imperatives, by demonstrating that, in the words of the Constitution of the United States of America, government is "by the people."

Are those justifications still valid? If so, how do they impact on the basic question? If either of them is not valid, can this mode of trial survive - and should those jurisdictions which do not have trial by jury contemplate introducing it?

We recognise, as we pose these questions, that the justifications will not have an equal relevance across the jurisdictions. Cultural and social histories will differ, social structures will differ, a mode of trial which is apposite for and acceptable to one society may seem to be inapposite for and unacceptable to another.

It is very easy, therefore, to dismiss this question - indeed the whole discussion - by saying that jurisdictions differ and, as a necessary consequence, so will their methods of disposing of criminal cases. Easy but wrong. Clearly, no free and democratic society would be prepared to accept another society which did not afford a fair trial to those who were out of favour with the authorities or which made retrospective laws in order to convict and imprison individuals for what were previously lawful, if unpopular, actions. Nor would a free and democratic society accept a jurisdiction in which the tribunal was a mere creature of the state. And so on. What the free and democratic society would do about such aberrant jurisdictions is nothing to the point. The point is that we do make judgements about other systems of criminal justice as well as about our own. There is strong support for the view that one of the main bases for judgements upon other societies than our own is whether those other societies' criminal justice systems meet our standards for acceptability, whether we believe that those societies are meeting their fair trial obligations. As it seems to us, one major but parallel value of this Project is that it enables each of us to look at the options which are available to individual states as they decide how they are conducting or going to conduct their criminal justice systems and to make comments thereon - just as they would and should do about our own systems.

Common lawyers who work in and support a system which has trial by jury are not blind to the imperfections of the system but make the judgement that the pluses exceed the minuses. They are comforted, of course, by their traditions and they are, almost inevitably, conservative in their approach to proposals for change. Most such common lawyers would say that the involvement of members of the public in the decisions about and the disposition of (serious) criminal cases is one of the elements which underpin a free society. They would go on to say that their involvement ensures

that the practical application of the law to fact situations makes sense in the contemporary environment. They would go on to say that there is nothing inherently better about a single judge's decision about a conflict than an individual juror's, though a single judge may find it easier to bring together the relevant and conflicting evidence. They would say that there is probably a good argument that there is something inherently better in the decision of twelve jurors working together than a single judge's about any disputed fact(s). And, perhaps finally, they would argue that discussions about efficiency, even cost efficiency, subvert the real argument. Justice does not come cheap - and it does not come quickly. Criminal justice costs money and takes time. Rushed, cut-price justice is a contradiction in terms.

Practitioners working in an existing jury trial system ignore the cost argument at their (and the system's) peril. Practitioners and others contemplating introducing trial by jury, do/will find the cost argument difficult to overcome. In part, this is because they and those advancing the cost-efficiency argument are considering different issues. Those contemplating introducing jury trial have immediate and long-term jurisprudential and social concerns. Those against it have no method of evaluating the social concerns in the immediate, let alone the long term: it is doubtful if they see any need to find such a method. They ask simply, "What is the point of introducing a costly and inefficient method of disposing of criminal cases if there is a more efficient way of trying those cases and the cost involved could be better spent in the public interest?" Paradoxically however, it is likely that they would go on to say that their emerging societies needed as many bulwarks as possible against the return of the old, dark dictatorships or oligarchies from which they have emerged and, at the same time, needed to find a mechanism which would encourage confidence in the new society. All of the countries which have emerged from the old Soviet hegemony have faced this paradox: some have introduced or are considering introducing some form of jury trial into their systems. Some of the well-established *Code* systems incorporate some form of jury into their criminal trial procedures: there is some historical support for the proposition that those juries were introduced for a similar reason, to capture and then to encourage confidence in the system.

Why should it be necessary to encourage confidence in the system, whether by the introduction of juries or otherwise? Even in these days of a populist (and, in some jurisdictions, an increasingly emotional and ignorant) media, the core values of the system of trials without juries remain in place in a free and democratic society - or have been introduced and are being developed, as in South Africa, for example. Trials are conducted in public by an independent tribunal; there is some and increasing free representation, just as there is some (and an increasing) equality of arms. Introducing jury trial will not complete the change whilst the contrary is more likely to be true: the diversion of resources, financial and human, which trial by jury would demand, is much more likely to slow down the process.

Here is the nub of the socio-political debate. Which does serve society better now, which carries the greater vulnerability to a loss of public confidence, what will have to be done if that confidence is lost - even more, if it has been lost already?

It is not our responsibility to provide answers to these questions, nor are we qualified so to do. Each jurisdiction must make its own fully and accurately informed choice. There is no room for myth and counter-myth in this field.

Exemplification

In his Project Paper, Professor Nijboer has reviewed the history of the Dutch criminal justice system. He points out that when, in the last years of the Napoleonic era, The Netherlands moved from being under the influence of revolutionary and then imperial France to being a part of the French Empire (1810-1813), there was a form of trial by jury for the now unitary state - one which seemed to have worked well for the two years that it was in operation. Nonetheless, jury trial disappeared from the Dutch system as soon as the French left in 1813 and has never since emerged as a candidate for reinstatement. He explains this in the following extract²⁸:

Why [jury trial] never came back

...But by and large, I think that the politicians and the lawyers who had to work in the situation that only professional judges heard and decided cases, were quite satisfied with the actual situation. Comparatively spoken (*sic*), French, Belgian and Dutch trials are fast...contrasted to the English or German trials, being orally much more the basis of the trial procedure in the latter two countries. When, however, we compare France, Belgium and The Netherlands, then we should note that the Dutch system is by far the most efficient of the three in terms of the time spent to (*sic*) sessions and judicial activity in relation to the number of cases. Dutch procedure is professional and fast, and this may be partially due to [a system] in which no lay element is involved.

Most English and Welsh observers of the French and Belgian systems, at least, would find much of what Professor Nijboer says about time comparisons with the English system (*sic*) almost incomprehensible so fundamentally does it disagree with the observable facts. Moreover, we can see in bare form the deployment of the professional efficiency argument for having trial by judge alone and, to common lawyers, it leaves unclear what the Professor means by “Dutch procedure is professional and fast” and, thus, what is the real justification for judge-alone trials.²⁹

Peter Chapman’s Project Paper contains an answer to Professor Nijboer’s approach. Chapman refers to Professor James Gobert’s treatise, “Justice, Democracy and the Jury” (which, as Dr Robertshaw has pointed out, was related essentially to the U.S.A.) and says:

34 The conventional view is that the verdict represents the law as applied to the facts - nothing more, nothing less. However, Professor Gobert argues that the jury’s responsibility extends beyond the mechanical application of legal rules. A jury must become engaged not only with issues of fact and law, but also with issues of justice. Its ultimate goal is a just verdict, ‘all things considered.’

35 ...First the jury ascertains the facts. Second it applies the law to those facts. [Third] the jury will consider the moral culpability and any explanations, excuses or justifications which he or she might wish to submit. The jury may

²⁸ Paragraph 1.3.

²⁹ Comment by MH.

well be persuaded, for valid reasons, that, under the circumstances of the case, a conviction would be unjust despite proof that the defendant committed the acts attributed to him. Finally, even if the jury concludes that the defendant is factually, legally and morally culpable, it may decide that there are additional aspects of the case that need to be taken into account if justice, all things considered, is to be achieved.

- 36 While the jury is undoubtedly an effective body for [the] discovery of [the] facts, its more important function is to safeguard the rights of the accused.

[Emphases added]

Whether Chapman is doing no more than reflecting Gobert's views or is adopting them as his own and, in the process, reframing them, these paragraphs will attract wildly opposing views. Those who find them unacceptable would be even more outraged by what he later says:

- 44 Juries, in contrast to judges, do not seek lasting principles, nor do they set down any rules for regulating either their own behaviour or that of a future jury. The ultimate question which a jury must decide is whether, given all the facts and circumstances of a case, the defendant...is deserving of society's condemnation and punishment.
- 45 ...The jury brings, and is expected to bring, the law into line with the community's sense of justice.

[Emphases added]

Most practising criminal lawyers, whilst not necessarily regarding what Chapman says as being a justification for trial by jury - and, even, perhaps mounting an argument that it should be replaced - would acknowledge that many juries do base their decisions more on concepts of fairness and justice than merely on law and fact. Moreover, it would be sensible to recall the history of the jury in England and Wales. The Normans brought the idea of a jury into England but it was a jury of deponents of fact rather than finders thereof. They became finders of fact because, in part at least, they were thus a buffer against excesses of power by the barony and the sovereign. By the 17th century, at least, they were coming to be seen as the protectors of the accused rights: indeed, they had shown themselves so to be at various stages during that troubled century, vide, for example, the determination of the jurors in the trial of Bushell and Others at the Central Criminal Court, in which the trial judge locked them up because they would not find the verdict(s) he wanted.³⁰

The issue of "jury nullification" (which is what Chapman - and Gobert - are talking about in the passages cited above from Chapman's Project Paper) was the subject of specific questions posed in the West Australian Project Survey of judges and practitioners. The results were interesting, to put it at its lowest:

³⁰

Comment by MH

Question	Respondent Group		Result		
Should jury nullification be incorporated into the criminal justice system of WA?	Supreme Court judges (14 respondents).	Yes	3	21%	
		No	11	79%	
	District Court judges (11 respondents)	Yes	0		
		No	11	100%	
	Practitioners (55 respondents)	Yes	5	9%	
		No	49	89%	
		Other	1	2%	
	Should the jury be directed that jury nullification is a valid procedure?	Supreme Court judges (3 respondents)	Yes	1	33%
			No	2	67%
District Court judges (no respondents)					
Practitioners (14 respondents)		Yes	5	36%	
		No	9	64%	
Should the jury be directed that jury nullification is prohibited and punishable by contempt?		Supreme Court judges (14 respondents)	Yes	1	7%
	No		11	79%	
	Other		2	14%	
	District Court judges (11 respondents)	Yes	1	9%	
		No	10	91%	
	Practitioners (55 respondents)	Yes	8	15%	
		No	45	82%	
		Neither	2	3%	

There is a fairly consistent uniformity of approach by the three populations surveyed. However, only one comment made by a respondent (a District Court judge) indicated that the respondents individually were addressing the Chapman/Gobert point. He or she said (in answer to the third of

the questions): “Not if it is a matter of law. If the issue is ‘injustice’ my experience is that they acquit without specific direction.”

The experience in the English courts in the 1970s, particularly in cases where the evidence was all police based, would tend to support that Western Australian District Court judge as well as the Chapman/Gobert argument. Juries were acquitting in the face of apparently compelling police evidence, whether of search or interview, or both. Because of “common knowledge” as received in their communities about the way the police were behaving by “verballing” and “planting”, they were not prepared to act on police evidence alone. Ultimately, that worked to the common good, notwithstanding the fact that many provably guilty men were acquitted. The long overdue consequence was that those responsible for police training and supervision - and Parliament - had to act and not merely indulge in rhetoric about the importance of having an honest and transparent as well as an efficient police service. And as a result of that we got the Police and Criminal Evidence Act 1984 - to society’s great benefit.³¹

We have considered, already, the significance (as we see it) of human rights law in this debate about mode of trial. In addition to the issues raised about human rights law, it is necessary now to consider the whole issue of independence in the context of a “fair trial.” It raises the question, again already referred to: which mode of trial is both more independent and gives the greater appearance of being independent?

An Independent Tribunal

As a concept, “independence” is difficult to define, as much in the context of criminal justice as in any other. However, it seems to us that it encapsulates a number of features which are, or should be, common to all jurisdictions which are free and democratic. Thus, for example, “independence” as applied to a court contemplates that the president and all the members should not be members of the government of the particular country. That should not be a contentious proposition: rather, it should be seen as a self-evident truth.

When the structures of particular jurisdictions are examined, the self-evident truth becomes a qualified truth at best. In England and Wales, for example, the Lord Chancellor is responsible for recommending judicial appointment to the sovereign and the Lord Chancellor is a Cabinet Minister in the government of the day. True, s/he makes the recommendations after exhaustive enquiries amongst the practising profession and the senior judges and after an “investigation” into the candidate’s character and reputation - and, true also, there is no basis in modern times of appointments being based on or related to political orientation. But, however good a process it is in fact, it is certainly not transparent. All sorts of arguments are advanced for why there should not be a Judicial Appointments Commission to replace the Lord Chancellor - many of which are related to the disturbing aspects of some of the hearings before the Senate Judicial Committee in the U.S.A. Further, notwithstanding the statutory (and real) independence of the judges of the High Court and Court of Appeal and of the Law Lords and the effective independence of Circuit judges, the fact is that the advancement of judges is itself dependent on the decision of the Lord Chancellor. The English and Welsh may be content with the perception that, notwithstanding the method of

³¹ Comment by MH .

appointment, the judges in that jurisdiction are independent but would they be so content if what was under consideration was the independence of judges similarly appointed in so other jurisdiction?

We would suggest, also, that independence requires that the judges in criminal trials are independent of the other players in the criminal justice system. What is the reality and the perception of independence in those systems where the educational route to appointment as and the career structure route of prosecutors and judges is the same - which is the situation in many, if not all, *Code* countries and was true of countries which have suffered (maybe still suffer) from the 20th century disease of totalitarianism of whatever colour, creed or tribe? Where is the reality of independence and what is the appearance?

And we hear the voices off of the *Code* jurisdictions asking, "Wherein lies the independence of a judiciary which is elected or appointed by an incoming administration intent or apparently intent in appointing its supporters to positions over which it is able to exercise patronage?"

The argument about independence is not all one way. Supporters of trial by jury are wont to assert that, whatever may be the position about the independence of judges in a jury trial system, the jury is independent, it is the result of a random selection from a panel supposedly representative of the population in the relevant area. How far is that true if the particular jurisdiction retains peremptory challenges? How far is it true if the subject-matter of the trial is outwith common experience? How far is true if the subject-matter of the trial is notorious in the locality from which the jurors are drawn or, even, nationally?

Independence is more than a formula: it is a concept which revolves around freedom of choice and decision. Cases which are beyond the intellectual competence of the jurors, considered individually or collectively, deny that freedom of choice and decision. Similarly, publicity before or during a trial which is adverse to either prosecution or defence threatens the freedom of choice and decision.

If the debate about mode of trial and, in particular, about the independence of those making the crucial decisions (given the preferred mode of trial) is to be conducted sensibly, the debate must address the realities and not the packaging of the available choices.

Nonetheless, the packaging is important. When the appearance of independence supports the reality of independence there is in place one of, perhaps the most important of, the elements which make up the context for a fair trial. Even when the appearance is somewhat dulled, if independence is present in fact, a fair trial is always probable. Common law jury trial jurisdictions do have much of the appearance of independence of judges and assert that they have the reality as well.

If it is presumed that the assertion of judicial independence is justified, the question arises, "Why should any jurisdiction wish to maintain or to include *de novo* a fact-finding and verdict-returning (independent) jury?" It seems to us that the relevant jurisprudence reveals only one answer to that question:

A criminal justice system obtains its legitimacy not merely by statute or convention or jurisprudential principle but also because it is the criminal justice system which is recognised by that society as a whole. Juries, therefore, are not only independent in themselves, they are seen as an element in, almost a guarantee of, criminal justice independence. There can be little question about their importance historically in the development of independence in those countries which have gone down the common law route.

Is the same general approach to the socio-political relevance of juries true in the non-common law countries as it is, we suggest, in the common law countries? The answer would seem to be, "Yes." In those *Code* jurisdictions which do have juries in one form or another, the juries are not independent of the judges, but they play an equal part with them in the resolution of issues of fact. It is difficult to see, at any rate in historical terms, why those *Code* jurisdictions should have included juries if it were not to provide at least the appearance of a guarantee of independence in the resolution of guilt or innocence.

But a consideration of the way in which the *Code* jurisdiction juries have developed leads one to another explanation for juries in both types of jurisdiction and goes a good way to explain why countries which have emerged recently into true freedom and democracy have introduced or are considering the introduction of juries into their criminal justice systems. The histories of the common law jurisdictions show very clearly that jurors, not being professional lawyers but being drawn from the general public or a section thereof, are capable of being a brake upon excesses of executive and judicial power as well as a penetrating light into the comfortable beliefs of an educational (and, sometimes, social) elite. More than all that, the involvement of juries would seem to reflect a basic view of free and democratic societies that the decisions of the kind that are made by criminal courts need to be made by more than one person and preferably by people who come from different disciplines and backgrounds. Whether this is described or explained as a reflection of the drive towards democracy is immaterial for present purposes. There is simply no question that at some stage in the development of trial by jury in every jurisdiction which currently has juries or is contemplating having them, this element of providing a powerful external mechanism within the otherwise closed environment of the administration of criminal justice has been critical.

There is, so it is sometimes suggested, a flaw in this approach to jury *versus* judge trial. So far as we are aware, there is no system which is exclusively jury trial. In some, there is a hierarchy of crimes and of courts, such that some (generally "minor") criminal allegations can be tried (or are tried by choice) in courts with no juries. In others, there are statutory provisions which enable one or more of the players to make an effective decision that the case will be tried by a judge alone: not all of these cases could be categorised as "minor". If such jurisdictions are prepared to contemplate judicial trial, many will argue that it is hard to see how it could be maintained (at least about those jurisdictions) that "judge-only" trials do not meet the human rights obligation to have fair trials (and only fair trials).

Responses from jury trial jurisdictions to this line of attack have varied in detail but they seem to come down to:

Every inroad into jury trial is an attack upon the principle that the manifest independence of the decision-making tribunal is the essential element of a fair trial. It may be that practical considerations of cost and time truly cause the jurisdiction to allow for non-jury trial, but that is not a decision that is or could have been made as a matter of principle. If non-jury trial is allowed, then we must double our efforts to ensure that all the other ingredients of a fair trial are in place and do operate as they should if the requirement for and the reality of a fair trial are to coincide.

It is possible that the supporters of jury trial would want to question the practical imperatives which are said to justify non-jury trials. It is not necessary for this Paper to engage in that aspect of the debate. On the other hand, it may be useful to attempt to identify the principal practical arguments for the perceived "inroads" into the existing availability of trial by jury in any jurisdiction:

- Some crimes are of such lesser importance in the general scheme of things that the time and expenditure involved in jury trials cannot be justified. Therefore, the general approach should be that jury trials should not be available, at least at the defendant's behest, for alleged crimes that fall within that category.
- Similarly, some petty criminals, who have turned their petty criminality into its own profession, abuse the system by electing for jury trial whenever they can so as to defeat the processes of justice by delaying decision and taking advantage of the gullibility of juries.
- The best (if not the only) way of dealing with the latter is to restrict the criminal's opportunity to elect for jury trial when accused of further criminal acts of the kind that has marked his/her previous history.

For many, within and without the criminal justice system, the first point is easy to accept: there are, already "summary-only" offences and the extension of the list thereof to similarly minor offences which have remained triable by jury is unexceptional. As usual, however, the devil is in the detail. Take theft, for example: theft of an item worth pence or cents seems a classic for removal from the list of offences which are triable on indictment to the list of summary-only offences - that is, for so long as the consequences of conviction are limited to the conviction itself. If, on the other hand, a conviction for any offence of dishonesty necessarily excludes the convicted person from the profession or work in which he is engaged and for which he has been trained, different considerations arise. Moreover, if there is disquiet about the independence of the judiciary and the standards of justice in summary-only trials, then the practical arguments for the change diminish in impact.

Many people will find the second point compelling - until, that is, they consider the nature of the cure to the problem which it poses set out in the third point. Apart from any other consideration, the damage to the presumption of innocence is strikingly obvious.

Efficiency as a test

It is said that the plain fact is that jury trials are not cost-efficient. What does that mean? Is it a comparative statement or one that it is self-justifying? If it is a comparative statement, what are the comparators and do they take account of the long term good of society? The questions and arguments go on and on. This Project was not designed specifically to address "cost-efficiency", the responses have not provided a basis for doing so and this Paper does not address it.

It does address, however, the other main criticism which is levelled against trial by jury, namely that it is not result-efficient. What does that mean? To those who regard look at their criminal justice systems as a crime control mechanism, result efficiency is a "buzz" expression for a 100% record of convictions. Every acquittal is an inefficient result and, it must be presumed, a manifest example of injustice. To such people, the investigation should/does identify the guilty and the purpose of the criminal justice system should be no more or less than to put the stamp of a fair public trial on the only possible verdict and the resultant sentence. To those who do not regard the criminal justice system as a crime control mechanism, such statements strike at the heart of what they believe is the purpose and function of any "proper" criminal justice system, namely to provide the forum in which allegations of criminal conduct can be examined and determined fairly and publicly. Acquittals, on this argument, are as good an instance of justice being done as convictions.

The argument is not new - any more than is the passion which it can engender. However, there are some statistics which, at least, might illuminate the debate. For example, various studies have been carried out with the objective of getting a handle on what percentage of crimes actually committed result in charges, what percentage of those charged actually come to trial and what percentage of those tried result in convictions and sentences. Informal reports of some such studies in England and Wales suggest that, at the time they were conducted, about 10% of all crimes were investigated, that no more than 10% of those investigated resulted in charges and trial and that roughly only about 60% of those that came to trial resulted in convictions (*i.e.*, 0.60% of the whole). If those percentages do reflect what the studies revealed, how does the "crime control" argument stand up?

Can any mode of trial (jury or non-jury) be judged on the basis of result efficiency? There are some interesting examples of attempts to do so which were found to be flawed when myth was stripped away from fact. Lord Roskill's Committee's Report on Serious Fraud³² seems to have proceeded on the basis, in part at least, that juries demonstrated a higher acquittal rate in fraud cases than in other types of crime. Those actually practising in the field found that assertion impossible to understand because experience demonstrated that, in "hands in the till" frauds at least, jurors were returning a higher rate of conviction than in other types of crime. The assertion that there was a higher rate of acquittals was part of the argument supporting the recommendation that serious or complex fraud cases should be tried by a judge alone - because such cases were beyond a typical jury's intellectual competence and, as a result, juries were returning "wrong" acquittals. We have received very substantial papers from British Columbia which have a direct relevance to juries' apparent or real intellectual competence: we focus a whole chapter of this Paper³³ on those papers and the lessons which might be drawn from them.

Does it matter if trial by jury is not "result efficient"? Both the proponents and opponents of the crime control model of criminal justice would/should say that it does. A verdict which is wrong on the evidence defeats the system. But - and it is a big but - a verdict which is wrong on the evidence or seriously flawed in process may not be wrong in fact. Is it then result-efficient or result-inefficient? Moreover, the presumption of innocence inevitably results in the acquittal of some guilty persons - a price which, it is said, has to be paid to ensure that the innocent are not convicted. Since there have been notorious cases of defendants being convicted when, on the evidence if not in fact, they were not proved to be guilty and even more notorious convictions when it has been quite clear that the alleged crimes were never committed by anyone or were not committed by the convicted and sentenced defendant, it may be that an insufficient price is being paid and that the system has swung too far in favour of the prosecution. When we consider this approach to the issue of result efficiency, we would do well to recognise that the injustices which have been exposed have disfigured the trials of major criminal allegations: can we work on the basis that such injustices do not occur in the smaller and less prominent cases?

If we are to have a criminal justice system which provides an accused with a genuine fair trial, we cannot create a structure by computer or by theory. Justice is a concept designed and adapted by human beings for objectives which appeared right to them at the time: the pursuit of justice is a

³² England and Wales: HMSO 1986: report led, eventually, to the *Criminal Justice Act* 1987 and the establishment of the Serious Fraud Office.

³³ See "The Impediments to Jury Trial", pages 34-39, below. And see, also, "Research" on page 40.

human endeavour. It is accepted wisdom that all human endeavours are flawed. All any jurisdiction can do is to support the basic principles and not to act in contravention of them

Given that requirement, where stands the jury *versus* judge trial debate?

It may be that those involved in this debate will think it right to have in mind (a plagiarised and adapted version of) Winston Churchill's aphorism about democracy:

It has been said that ~~Democracy is the worst form of government~~ *that trial by jury is the worst mode of trial* - except all those other ~~forms of government~~ modes of trial that have been tried from time to time.

Maurice Chevalier may have expressed the same thought but in a more generously focussed context:

Old age is not so bad when you consider the alternatives.

Trial by Judge Alone

All "common law" jury trial jurisdictions have at least some trials by legally qualified judges sitting alone. In England and Wales, for example, Stipendiary Magistrates sitting alone in many of the major urban areas try summary-only offences and some of the each-way offences³⁴. In Scotland, Sheriffs (who have a jurisdiction over cases which require a jury) sit alone to try the lesser offences. In Northern Ireland, constitutionally an integral part of the U.K., jury trial was abandoned for trial by judge alone (in the "Diplock Courts") because the terrorists on both sides of the political/religious divide made trial by jury of terrorist offences impossible. In South Africa, professionally qualified Magistrates sit alone to try a very wide calendar of offences. Even in the United States, there is the opportunity in certain States for a defendant facing trial for an offence which normally requires jury trial to choose trial by judge alone. Trial by judge alone is a feature of most *Code Civile* countries although the more serious offences are tried by a bench of judges. In Israel, which is much closer, jurisprudentially to the common law than to the *Code* jurisdictions, trial of all "indictment" cases is by a bench of judges

Three of the Project Papers which we have received deal specifically with trial by judge alone in the respective jurisdictions - Western Australia, Hong Kong SAR and The Netherlands. In addition, the Discussion Papers published by the New Zealand Law Commission in July 1998 address this central question.

The following quotation comes from Justice Murray's Project Paper³⁵:

Page 3 In 1994, the *Criminal Code* was amended by insertion of Ch LXIV A entitled "*Trial by Judge Alone*." The Chapter allows an election to be made by an accused person for trial by judge alone but the election has no effect unless the Crown consents. The election must be made before the judge is known in order to prevent "judge shopping." As with majority verdicts, trial by

³⁴ That is, offences which may be tried summarily or on indictment.

³⁵ Justice Murray is a judge of the Supreme Court of Western Australia.

judge alone is not available to a person charged on indictment with an offence against the law of the Commonwealth...

Page 7 Trial by judge alone has been little utilised in the Supreme and District Courts of Western Australia...In the District Court computer records show that only 16 judge alone trials have been held since 1994...During that period there were 2,452 trials held in the District Court and only 0.6% of trials in the District Court were by judge alone. Similar statistics can be found in the Supreme Court records. Some of the under-utilisation can be as a result of the provision that where the Crown refuses consent a trial by judge alone cannot proceed but must be by jury. But there are few applications for trial by judge alone. One assumes that in general throughout the community there is an appreciation of the fact that the most fair and just trial for all concerned will be a trial by judge and jury.³⁶

Justice Murray's Working Party sent us a copy of the Consultation Draft of December 1998 published by the Law Reform Commission of Western Australia, "Trial by Judge Alone."³⁷ This central issue is set out at the very beginning of the Draft:

An accused's right to trial by jury when charged with serious criminal offences is sometimes regarded as a key feature of our justice system. However, trial by judge alone would be likely to reduce the time and cost of criminal trials. The Law Reform Commission has been asked to make recommendations to provide for more efficient and cost-effective methods for resolving cases, at the same time ensuring that the standards and requirements of a fair and equitable justice system be maintained. Can trial by judge alone ever be appropriate in case involving serious criminal charges? If there are matters which should not be left to the judge alone, must a jury determine the case or are there other options?

The judicial sentiment in Western Australia against trial by judge alone is reflected in Chapter VI of the Consultation Draft:

None of the Law Reform papers to which we have had access...recommend abolition to the right to trial by jury, nor has that solution been proposed by any of the trial judges with whom we have had discussion. Indeed there is general support for retention of trial by jury. That is the unanimous view of those judges of the Supreme and District Courts of this State to whom we have spoken for the purposes of this paper. Generally, trial by a judge alone in the case of serious offences or those involving public figures receives little support from the judiciary. There is also a strong consensus of opinion among serving judges that in the present climate of attacks on judicial officers, trial by jury is a bulwark supporting the integrity of the

³⁶ The Consultation Draft, "Trial by Judge Alone" (next referred to) reflects this last sentiment: see passage cited below.

³⁷ The Draft was prepared by the Hon E.M. Franklyn, a former judge of the Supreme Court of Western Australia.

judicial system in that it prevent[s] the perception of undue influence on or bias by the trial judge.

Elsewhere, the Draft refers with approbation to the US Supreme Court case, *Taylor v Louisiana*³⁸ (which the New Zealand Law Commission cited with similar approval in its 1998 Discussion Paper, “Juries in Criminal Trials”):

The purpose of the jury is to guard against the exercise of arbitrary power - to make available the common sense judgement of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of the judge...Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical for public confidence in the fairness of the criminal justice system.

And see, also, the well-known *dictum* of Dean J in *Brown v The Queen*³⁹ cited in the Draft:

...the deep seated conviction of free men and women about the way in which justice should be administered in criminal cases, namely that, regardless of the position of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment.

The Draft is not all one-sided, however. In a further passage in Chapter VI, appears the following:

Trial by judge alone can be seen to be appropriate in cases where the only real issue is a question of law, or where the issues are simple fact issues which do not require community input, or where the issues are so complex that there is a risk the jury will not properly turn its collective mind to the same, or where the trial can be fairly seen in advance to be of such length as to be an imposition on and oppressive to the members of the public sitting as a jury...

True it is that the Draft then goes on for 5½ pages to discuss the disadvantages of trial by judge alone. Nonetheless, the author has identified the types of cases in which judge alone trial might be seen by government and the public as justified. Withal, the Draft does recommend the retention of trial by judge alone which

should remain an option in respect of all serious offences but utilised only if it is shown to be appropriate and without prejudice to a fair trial but is also more expeditious than trial by jury.

There is much force in the suggestion that the Draft is a classic example of a “push-me-pull-you” argument.

³⁸ (1975) 419 US 522 at p. 530

³⁹ (1986) 60 ALJR 257 at p. 269

The New Zealand Law Commission's 1998 Discussion Paper on "Juries on Criminal Trials" suggests that cases which fall within the following categories are or may be proper candidates for judge alone trial:

- Fraud trials
- Other complex cases
- Trials attracting publicity
- Sexual offences

A perusal of the reasons given to support the proposition reveals a situation which is and should be a cause for concern when this reform proposal and others of like kind are being discussed in the context of information derived from "foreign" jurisdictions. The received information clearly comes or is taken from "official" sources. Too often this is a case of the blind and obdurate leading the blind and naive. A very good example is the way in which the "Maxwell Case" and its result has spawned a wealth of mis-statements. In the context of the debate about jury *versus* judge alone trial, the most perniciously dangerous has been that it was too complicated for a jury to understand - with the implication that that explains the acquittal. This perception that the case was beyond the jury is simply wrong and provides no explanation for the acquittals. Indeed, a number of members of the jury were so incensed by this suggestion that they turned up at the subsequent abuse of process of hearing (the prosecution wanted to proceed against the defendants on further charges) asking to be allowed to give evidence that they understood the case perfectly well (as their discussions showed clearly that they did).⁴⁰

The Law Commission's Discussion Paper lives up to its name. It was intended to and has provided a basis for discussion and was never intended to be read or treated as a position paper. However, it does confirm that, in New Zealand as elsewhere, there is no real sign of an intuitive support for trial by judge alone. It may be safe to say that the Commission was clearly of the view that it should remain an option but severely circumscribed.

Chapman does not deal with trial by judge alone as a distinct issue. However, under the general heading, "The Jury as a Convenient Target", he says the following:

- 22 Running through all these criticisms [of trial by jury] is the unstated, but implicit, thesis that a judge would have done a better job. But is this so? Are judges less prejudiced than jurors? Are they better at ascertaining the facts, at seeing through the lying witness, at separating truth from fiction? Are they more likely to be able to achieve justice in the individual case? Human beings are fallible and any system which relies on human beings - be they judges or jurors - will occasionally err. The only question is whether a judge-based system or a jury-based system is likely to err more often and in more serious ways.

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Comment by MH - who was leading counsel for one of the defendants in the Maxwell Case.

The remainder of his Project Paper makes clear what answers he would give to those questions.

As has been seen, Professor Nijboer does not give much house room to jury trial: he is wholly committed to the process of trial by judge alone and passionately committed to trial by Dutch judge alone. In different ways he makes the same point: (Dutch) judges are professionals and not to be diverted from the pursuit of justice through law or fact. The professionalism of judges is one of the principal arguments advanced internationally in support of supplementing (sometimes, replacing) trial by jury - as well as for not moving from judge trial to jury trial in which the former is the norm.

Beyond that (by many questioned - including trial judges) principal argument, the practical driving forces for the active involvement of trial by judge alone, whether or not trial by jury is retained, appear to be the twin players: time and cost efficiency. It is strongly arguable that these are justifications which are flawed by their own dynamics. Every communicator knows that failures in communication are the communicator's, not the audience's, fault. So it is with advocates (the lesson is a standard in all advocacy training programmes): it is to be assumed that is similarly "taught" to judges and Ministers and legislators, including the very people who argue that there are cases which cannot (and should not) be tried by jury because they are so difficult to understand. If counsel and/or judges are unable to make a complex and difficult case of any kind and length comprehensible to a jury, they ought not to be counsel or judges: they are failing to do their jobs. Arguing that juries could not and do not cope is an excuse for those failures and not a justification for the proposition that juries should not be charged with the burden of trying such cases.⁴¹

The debate about the possibility of having judge only trials raises another question about public acceptance of the administration of criminal justice.

We have cited from the Law Reform Commission's Consultation Draft. The following words appear in the passage cited at p.22, above:

There is also a strong consensus of opinion among serving judges that in the present climate of attacks on judicial officers, trial by jury is a bulwark supporting the integrity of the judicial system in that it prevent[s] the perception of undue influence on or bias by the trial judge.

Most trial judges in most "common law" jurisdictions - and in others which preserve freedom of the press - must be conscious that society's acceptance of the independence of judges is called into question in many of the high profile cases. The hard truth is that the more that judicial independence is called into question, the greater is the dysfunction between the administration of criminal justice and the domestic society. It is manifestly more difficult to undermine public acceptance of the administration of criminal justice if the decision makers are randomly selected members of the public itself acting as jurors.

In the Project Papers there are occasional references (sometimes more substantial than that) to the socio-political importance of the debate about mode of trial. The recognition of that importance applies equally to jury trial jurisdictions and to those jurisdictions which do not have jury trial, whether or not they are considering its possible introduction.

⁴¹ Comment by MH. The discussion on this point is developed further in the chapter "Impediments to Jury Trial."

Much of the discussion about jury nullification⁴² has a relevance to this part of the Society's Discussion Paper.

If we move away from the established "western" jurisdictions and turn to those jurisdictions emerging from one form or another of gross political oppression, the problem which they face is to create structures upon which their forms of free, democratic societies may be built and last. Most of these jurisdictions have suffered from governments under which the idea of independent, open justice has been a mockery or, at least, under which the remaining forms of independent, open justice have been under constant threat, the more so if the judiciary and legal profession have been amongst of the surviving elements of freedom. All of these jurisdictions have recognised, rightly, that an independent criminal justice system is essential - and in substantial part for socio-political reasons. Some have faced problems so severe that they have looked to the immediate introduction into the system of lay juries fact- and verdict-finding juries, because they carry with them the imprint of independence and are seen as a "bulwark" against the return of oppression. But sometimes these jurisdictions face such acute social problems that the introduction of jury trial is not seen as a viable solution: their societies are so divided, racially, ethnically, socially, religiously, that the strong perception is that juries simply could not function⁴³. The material available to us is simply insufficient for the Society to address this issue in this Discussion Paper - save, perhaps, that in the making of an emerging free, democratic state, caution is not always the best way of proceeding. Such fractured societies need binding mechanisms and there should be little doubt about the *capacity* of a jury to be such a mechanism and, through it, to advance the new criminal justice system to become one of the strong and abiding structures which every society needs. Is it likely that a new (or old) judiciary could fulfil that role - however independent it is in fact? That may be the question which these emerging jurisdictions need to address and answer for themselves.

It is true that jury trials are not efficient - if the measure of efficiency is cost as against result or turnover. But is efficiency in any of these aspects the appropriate measure? If it is, then most people would accept that judge alone trials better serve society than jury trials. If it is not, then the balance between judge alone and jury trials needs to found by a different kind of audit. However clumsy it may be as a basis for audit, informed public opinion may be the best measure which mode of trial is better for that jurisdiction.

The SASD Working Party paper considered the jury trial/judge trial issue thus⁴⁴:

- 6.3 The principal argument for taking complex and lengthy fraud trials away from juries is that a jury of ordinary men and women simply cannot understand what such cases are about. But it is pointed out that the proposition is not proved, in the absence of research findings into how juries work⁴⁵. Opponents of change point out that trial by jury has the character of

⁴² See pages 15-16, above.

⁴³ This is not a problem confined to emerging democracies, *vide* the problems apparently experienced in the U.S.A. with what is called the "race card" deployed by counsel in a number of notorious cases in recent years.

⁴⁴ See para 6.3, p. 11.

⁴⁵ On which see, further, the Research chapter at page 37, below.

a constitutional right. They suggest that better methods of presentation might be the way forward, when the fundamental question in such cases, whether the accused has been dishonest, is very much a jury question. Those who favour change refer to cases in England and Wales which have lasted many months and given rise to all sorts of practical problems in keeping the jury together. Evidence has had to be pruned and charges dropped to prevent cases lasting even longer than they do. Much time is taken up with explaining the background to the case when it is beyond the experience of any of the jurors. The solution which recommends itself to most of those who are in favour of change is to give the court the power to direct, in appropriate, exceptional cases that the trial should be before a single judge.

The last five sentences of this passage further exemplify a real problem about the mode of trial debate: the persistent - and potentially very dangerous - misunderstanding of what happens in other jurisdictions⁴⁶. There is no doubt that the English and Welsh jurisdiction has spawned long trials, not just in serious or complex fraud cases, nor is there much doubt that they present problems. It is not an unfamiliar situation that judges have severed counts from indictments and/or ordered separate trials of some of a large number of defendants - but these orders have been more related to the tendency of prosecuting authorities to overload indictments and/or to fail to exercise sensible discretion to separate the minnows from the sharks. These decisions are not necessarily (and, frequently, not all) related to trial by a jury. Similar decisions would be made if the trial were by judge alone or by judge and assessors. The primary concern is that the trial should be fair, a concern which is underlined by the European Convention on Human Rights, now said to have been incorporated into the domestic laws of the U.K. jurisdictions by the *Human Rights Act* 1998⁴⁷.

Supporters of judge-alone trials in preference to jury trials, especially when their argument is based on either or both of the propositions that some/many cases are unsuitable for jury trial and jury trial is unacceptably inefficient, have had a hard time in most trial by jury jurisdictions in which the issue has been raised. They have then advanced an alternative way of avoiding the failures (as they describe them) of the jury system. We turn now to consider the evidence about such alternative.

Professional or special jurors and assessors

English and Welsh criminal lawyers will look at the recommendations for a trial with such jurors/assessors with a somewhat weary shrug. The proposal was an element in the Report of Lord

⁴⁶ A misunderstanding that is not infrequently coupled with a tendency for commentators to delude themselves about the merits of their own jurisdictions. A good example of this tendency is to be seen in the SASD Working Party Project Paper, itself: see paragraph 5.7, page 9:

“That said we in Scotland think we do better than many other jurisdictions in dealing with our cases in an expeditious manner.”

Outside commentators on the Scottish system might be minded to say that the real problem with the Scottish system is that quality has been sacrificed too often on the altar of expedition.

⁴⁷ Comment by MH.

Roskill's Fraud Trials Committee.⁴⁸ The Committee dealt with various alternatives to trial by jury for serious or complex fraud cases - having concluded that jury trial should not be the preferred mode. It said about trial by jury⁴⁹:

...in the light of the foregoing analysis of the nature of a complex fraud case and the uncertain quality of a jury of 12 persons selected at random, we are satisfied that a different form of tribunal is necessary to try cases which fall within the Guidelines⁵⁰.

The Committee then dismissed trials with special juries, by judge alone and by a bench of judges and recommended trials by a judge and qualified lay members⁵¹.

The recommendation that there should be a "Fraud Trials Tribunal" of that or any kind was not adopted by Parliament. The British still have serious or complex fraud cases tried by an ordinary jury. Probably the best response to the Roskill Committee's Report was that submitted by the Criminal Bar Association of England and Wales. In the end it came to this: "experts" are not infallible, their views may be contentious and, in any event, only trial by jury, with all its imperfections, would satisfy the public's proper insistence that the administration of criminal justice in fraud cases, like all other major offences calling for trial on indictment, should be fair, transparent and independent.⁵²

Some of the Project Papers (and others which have been drawn to our attention) have made comments in relation to this kind of alternative to jury trials. The most significant may be seen in the survey of Western Australian judges and practitioners. The relevant questions were:

C 9: Is there a need for professional jurors to decide particular cases?

C10: Is there a need for persons trained in specific areas of expertise to decide particular cases?

⁴⁸ *Op.cit.*

⁴⁹ Para 8.30, pages 143-4

⁵⁰ Set out in the Annex to Chapter 8 of the Report at page 153. Their purpose was to set out the criteria for defining a fraud as "complex."

⁵¹ See paragraphs 8.48-51.

⁵² Comment by MH - who was the Chairman of the Criminal Bar Association when it worked on submissions to the Roskill Committee!

The survey results were:

NO:	RESPONDENTS	RESULT	RESPONDENTS' COMMENTARY
C 9	Supreme Ct judges (14 respondents)	Yes 3 21% No 11 79%	<ul style="list-style-type: none">• Cases involving specialist knowledge, <i>eg</i>, accountancy.• In specific complex technical trials there is a case for either qualified jurors or at least a qualified jury adviser who would be a court officer trained in the area of expertise and whose role would be limited to explaining the evidence.
	District Ct judges (11 respondents)	Yes 2 18% No 9 82%	<ul style="list-style-type: none">• In complex fraud cases or cases involving matters of great financial complexity.• There is difficulty with long trials, particularly white collar crime...worthwhile jurors for a lengthy trial.• Only in extremely complex commercial fraud cases where a jury would be unable to understand accounting evidence or evidence concerning corporations and corporate structures
	Practitioners (55 respondents)	Yes 16 29% No 39 71%	<p>14 responses included:</p> <ul style="list-style-type: none">• Where expertise involved in evidence (such as fraud, arson, factually complex cases, child sexual abuse, domestic violence cases involving aboriginal people) and/or needed to resolve factual issues.• Two responses suggested that professional jurors needed for all cases: “The training shouldn’t be rigorous and it definitely shouldn’t be the primary occupation but the jury pool needs to be shrunk and subject to scrutiny. Jurors could be like the Army Reserve, <i>i.e.</i>, paid to serve 4 weeks per year or similar.”

NO:	RESPONDENTS	RESULT	RESPONDENTS' COMMENTARY
C10	Supreme Ct judges (14 respondents)	Yes 2 14% No 11 79% Other 1 7%	<ul style="list-style-type: none"> • There may be cases where a trial is best conducted by a Judge with two expert assessors having expertise in a field or expertise arising in the trial. • All areas that would be difficult for laymen to understand
	District Ct judges (11 respondents)	Yes 5 45% No 6 55%	<ul style="list-style-type: none"> • I am not positive with that answer [yes]. Perhaps accountants for cases of the type referred to in [white collar crime]. • I would only ever countenance this in commercial fraud cases. • In a small number of cases <i>eg</i>, highly technical scientific assessments and perhaps some fraud cases. • In the cases referred to in Q9, persons with accountancy and/or corporate law background
	Practitioners (55 respondents)	Yes 18 33% No 37 67%	<p>There were 10 responses. Offences included in the responses were:</p> <ul style="list-style-type: none"> • scientific, medical, complex fraud, involving specialised evidence, accountancy, corporate crimes. <p>There was one differently focussed response:</p> <ul style="list-style-type: none"> • Providing jurors are intelligent enough, evidence can be presented simply

It may be thought that enough has been said about this possible alternative to trial by jury. This is certainly our view and explains why we have concentrated so much on trial by judge alone as the alternative mode of trial.

The Impediments to Jury Trial

Time and again, the opponents of trial by jury - and those who claim not to be opponents *in limine* but “reformers” - argue that some cases are so complex in fact and/or law that they are (almost by definition) unsuitable for trial by jury.

Virtually no evidence focussed on this criticism is adduced but the quantum of the comments and the quality of many of the critics have given weight to the criticism and, as a result, impressed those who have tended to the same view.

When the criticism is examined in depth, however, what emerges is a belief that it is not possible for counsel or judge or both to convey to the jury what the law requires to be conveyed and what the case itself demands should be. Advocacy is all about communication - communication of concepts, facts, technicalities and (in the case of a trial) law. It is a fundamental principle of advocacy that if there is no or only imperfect communication, the fault is the communicator's not the audience's. It may be very difficult to explain, for example, the niceties of navigation in a case which arises out a marine casualty or of banking or accounting or money tracing in a fraud case: it is the task and should be the skill of the advocates (and the judge) to make effective communication in such cases. If they cannot, they should not be doing the job: the fault is theirs, not the jury's.⁵³

What do we know about how juries do cope with their duties? Because of the reluctance of most jurisdictions to invade the privacy and confidentiality of jury deliberations, much of the research that has been undertaken in the last half century has been unable to examine the whole picture and, in particular, to observe the way in which juries deliberate⁵⁴. Some of the research has used shadow juries: this was what the Oxford Penal Research Institute did in, as we recall, the early 1960s. The shadow jurors were summoned and selected in as near the same way as the real jury as the researchers could arrange and were in court throughout the trial listening to the evidence and watching the witnesses: they listened to counsel's speeches and the judges' directions and summings-up. They retired at the same time as the real jurors to their own jury room and deliberated on their verdicts. The shadow juries' deliberations were recorded. The verdicts of the real and shadow juries were compared. The coincidence of verdicts was high⁵⁵ and the differences were fairly easily explicable, given the evidential material upon which the juries worked. The recorded deliberations were interesting. They showed that there was no uniformity of approach to the issues, which was hardly surprising: they showed that some jurors went into their retirement room with some residual prejudices which did not survive long in the deliberations - and they showed that there were some very bright jurors and some who were having difficulty holding their own, that there were some jurors who were used to working in a committee and some who were not and that there were some obstinate jurors and some who were very easily swayed. None of this could have taken anyone by surprise. Jurors are supposed to be a randomly selected group of individuals who roughly reflect the population from which they are drawn. None of the cases was unduly long or particularly complex.

⁵³ Comment by MH. See, also, his comment on similar lines on pages 27-28, above.

⁵⁴ Thus, in the U.K., there is a statutory prohibition on investigating a jury's deliberations: see s.8(1), *Contempt of Court Act* 1981. In **Young** (*op.cit.*) the Court of Appeal held that, since the "ouija board" incident occurred when the jury's deliberations were suspended whilst they were in segregation in a hotel overnight, s.8(1) did not apply.

⁵⁵ Dr Robertshaw, having read the penultimate draft of this Paper, has pointed out that there was only a 75% coincidence of verdict: he says, "However, this is very much a part of life." MH's view was and still is that "the coincidence...was high" given the quite different contexts in which the real and shadow juries were operating: see, also, the comments on the validation of the Ogloff/Rose methodology on pages 36-37, below.

As the decades have passed, however, cases have become more complicated (both as to fact and law) and investigation methods and resources have become vastly more sophisticated. The law itself has become more convoluted and more detached (in language certainly and in substance more often than is acceptable) from the easy comprehension of the so-called “ordinary reasonable man in the street.”

More recent research has suggested that, as a consequence, individual jurors may be finding it increasingly difficult to cope with the demands made upon them. Further, the experience in England and Wales over the last 30-40 years - and no doubt in other developed jurisdictions - is that trials have become increasingly weighed down with detail and longer to try than in previous “golden” times. This may be due partly to the fact that, in England and Wales at least, the provision of legal aid for the vast majority of defendants has done something to provide the defence with the resources properly to challenge the prosecution. A larger part of this increase in detail and time is undoubtedly due to the increasing sophistication of professional crime. And some of it must be attributed to inadequate performances by one or more of counsel and/or trial judge.

Even the most devoted and committed supporter of trial by jury must acknowledge that the strains on jurors when trying major cases and, thus, the strains on the administration of justice, are unacceptable.

Something has to be done - but the problem is that, unless and until those responsible for doing the “something” know how the strain manifests itself in the discharge of their functions by real juries, governments and the criminal justice world will be back in the realms of myths and counter-myths. There are pending changes to mode of trial in most jurisdictions and the disturbing and dangerous risk is that those changes will be made on the basis of convictions founded on myth. That could produce a disaster.

The emphasis placed on “know” in the last paragraph was deliberate. There are some researches which fall short of the kind of knowledge which we regard as essential to found any changes but which, nonetheless, point a number of crucial lessons.

In “*Judicial Instructions and the Jury*”, James Ogloff starts from the proposition that⁵⁶

Given the complexity of the law, concern has been expressed that juries are unable to comprehend the judge’s instructions. Indeed, if jurors do not understand the judge’s instructions, “there can be no assurance that the verdict represents a finding by the jury under the law and upon the evidence presented.”⁵⁷

He goes on to refer to a number of research studies, dating back to the 1970s, which were designed to test jurors’ comprehension of judges’ law instructions. In some studies, the participants saw and heard video-tape instructions, in others they received them in writing: in some the instructions were as given, in others they were re-written with the intention that they should be more easily comprehensible. Hardly surprisingly, the comprehension rate was higher with video-taped

⁵⁶ See page 1.

⁵⁷ The source of the quotation is a 1976 case (presumably from a Canadian jurisdiction) called *Warren v Parks*.

instructions than with merely written instructions and higher with the redrafted instructions than with the original. However, even the “hit rate” of comprehension appears to have been disturbingly low (although no actual figures or percentages are given). A similar range of studies was done with undergraduates eligible for jury service: hardly surprisingly, again, they seem to have done better in the comprehension rate than the representative samples and, even better if they saw a compressed video of the trial(s) it/themselves. The hit rate seems to have ranged from about 64% at worst to about 80% at best.

In two studies in the second half of the 1990s, Ogloff reports evidence of serious comprehension problems related to instructions about the (then) new law about what English and Welsh (and other) lawyers would call a cross between the insanity and the diminished responsibility defences in homicide. He comments⁵⁸:

Finally, the process of deliberation did not appear to enhance the jurors’ comprehension of the insanity defence instructions, the main offence standards, or the standard of proof instructions. Not only did people fail to comprehend these issues, they construed them in a myriad of ways, many of which were completely unrelated to the original issues.

In what appears to be the later joint paper which Ogloff authored with V. Gordon Rose⁵⁹, careful consideration is given to the ways in which studies of the comprehension rate of judicial instructions by simulated juries and individual jurors may be validated. For the purposes of this, the Society’s Discussion Paper, the Ogloff/Rose “validation paper” is important for two reasons:

1. Validation mechanisms are essential because the environment in which a real jury works is manifestly different from that in which the simulated juries/jurors worked, as presented in all the studies to which Ogloff refers. A jury charged with the responsibility of actually trying a case and determining guilt or non-guilt “for real” will have more stored knowledge about the case than any simulated jury by the time that they start receiving the judge’s instructions and will have a real, not simulated, context within which to receive and digest the judge’s words. There must be a very high degree of probability that their comprehension and retention rates will be higher than the simulated jury’s. If that is not so (as Ogloff and Rose appear to be suggesting) then an examination and assessment of their validation mechanisms is essential.
2. In this paper, there is more detail about the populations being surveyed than appeared in the first (Ogloff only) paper. Further, Appendix A contains a questionnaire that was used in the study, a table setting out the demographic information about the respondents in the study and graphs showing the correct responses by the two groups surveyed (undergraduates and “civilian jurors”).

The message that these two papers convey is that Canadian judicial instructions tend to be less comprehensible than they should be, when provided to the various surveyed groups made up of Canadians who had been jurors or were eligible for jury service. There will be cultural differences

⁵⁸ At page 5.

⁵⁹ *Incomprehensibility of Jury Instructions: Validating a Method of Assessing the Comprehensibility of Jury Instructions*

between different nationalities and differences in the terms in which judges believe they should or are required to direct jurors on the law. Nonetheless, if the methodology used in these studies is valid, the message is that there is a really serious comprehension problem for all jurisdictions which have jury trial.

The Western Australian survey of judges and practitioners provides some further “perception information” on this issue. Section D “Understanding the evidence during the trial” and Section E “Understanding the Law”, as well as Section I “Trial by Judge Alone” are in point. Interestingly, the survey suggests that some judges are so dismissive of jurors that they put quite untenable impediments in the path of jurors’ comprehension of issues and law. Thus, for example, one Supreme Court judge answered question 1 (Should jurors be given the option to take notes?) by saying “No!” and perhaps that same judge, probably another, made the comment, “Should be allowed but in most cases should be discouraged.” Ten Supreme Court judges said that jurors should not be told that they could ask questions of witnesses (even with safeguards): one of them explained his opposition by commenting, “Too likely to slow down and complicate an already slow and complex procedure.” The responses from District Court Judges to the same questions appears to have been on the same lines: nine out of the eleven would allow jurors to take notes and the same number would not tell jurors that they could ask questions of witnesses. The responses of practitioners was less consistent: 13 of the 55 (24%) would not give jurors the opportunity to take notes and nine (16%) would have a judge tell jurors that they could ask questions. Asked the question, “Should jurors be provided with written definitions or directions about (a) complex scientific evidence, (b) complex medical evidence, (c) complex legal terms?” 71% of Supreme Court judges answered (a) and (b) “Yes” and 79% of them answered (c) positively. The percentages of District Court judges answering positively was even higher - 91% for (a) and (b) and 100% for (c). The responses from the practitioners were significantly closer to those from the Supreme Court judges than from the District Court judges: 69% for (a) and (b), 80% for (c). 79% of Supreme Court judges, 73% of District Court judges but only 65% of practitioners thought that there should be “greater effort by the trial judge and counsel to avoid the use of legal terminology when addressing the jury.” Taking into account the differences in the percentages, as well as some apparent inconsistencies, the survey showed that there is (in Western Australia) some recognition that jurors could be better served by the professionals. These are not unique findings - even if the survey itself was unusual: similar concerns have been expressed by judges and practitioners in most, if not all, jury trial jurisdictions. Not only are they not unique, they are not the earliest expressions of like concerns. One has to ask why the concerns persist: there is not much point in identifying a curable deficiency if you do not set about curing it. The unkind commentator might be moved to say, rather acidly, to those present and past judges who have seated themselves in the “complex cases are beyond the competence of jurors” wagon, “Whose competence is really in question here?”

Many advocates and groups of advocates practising in crime (at least in Canada and the U.K., of which MH and DW have direct knowledge) might also descend into acid comment about this topic. They have been addressing the difficulties posed to jury trial by complex cases by training, by trying to introduce procedures which will enable the real issues to be identified before the trial begins and developing and improving their expertise in the essential communication skills. The paper by Peck and Levy⁶⁰ is a case in point. Building on further Ogloff research which revealed such disturbing

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Jury Aids 1998

answers from simulated jurors who had watched a videotaped re-enactment of an aggravated assault trial as

[Aggravated assault means] assaulting someone who aggravated them.

and from another simulated juror who, asked to define “reasonable doubt” after receiving a proper direction, said

Reasonable doubt means there can be reasonable doubt about a person’s guilt but you may still convict based on other reasons.⁶¹

After looking at other sources of information about jurors (including some judicial *dicta*), Peck and Levy considered “Methods to Assist Juror Comprehension.” The list produced (with discussion) was:

- Juror Note-taking.
- Leaving Written Instructions with the Jury.
- Leaving Sections of the Criminal Code with the Jury.
- Leaving Transcripts of Evidence with the Jury.
- Verdict Sheets.
- Model Jury Charges.
- Decision Tree Model Jury Charges.

Peck and Levy do not approach each of the proposals with the same degree of enthusiasm: indeed it is rather difficult to find much enthusiasm about some of them. However, their “Conclusion” will find an echo with both proponents and opponents of trial by jury:

Numerous questions, - some philosophical, some practical - arise from the foregoing discussion. Many argue compellingly for the abolition of the jury. Others regard it as a “bulwark of liberty” whose continued existence is vital to democracy. On whichever side of this debate one falls, we are, for the moment, working with an institution that may not be working as intended. Once they have been sworn in, jurors are instructed to “hearken to the evidence” and “a true verdict give”. We now have an unsettling sense that they may be failing to accomplish these tasks. If this is so, remedies must be sought and we must be innovative in our quest for solutions.

⁶¹ If they had known of it, Peck and Levy might also have cited the statement by the chairman of a Bench of lay Magistrates in England who pronounced verdict (and sentence) after retirement in approximately these words: “We have considered the evidence and what your lawyer has said. We are satisfied that there is a reasonable doubt whether you committed this offence so we shall convict you and give you a conditional discharge.”

Given the last sentence, it may be seen as somewhat surprising that, in their list of possible jury aids, Peck and Levy did not include two very obvious (and not really innovative) aids - which are and have been in regular use in the English and Welsh jurisdiction for over a decade:

- Written admissions by both parties. Pre-trial, these are usually called for by the prosecution. They have the effect of clarifying the issues if the defence is prepared to make them in the original or amended form. The defence may well ask for admissions from the prosecution as well. In either case, if the admissions are made, the jury receives them in written as well as spoken mode.
- Charts, schedules, simulations, *etc.* It is a commonplace that the members of most western societies (at least) learn, absorb and retain information more readily and more accurately through pictures than through the written or spoken word. Conveying how money has moved or how a vehicle went from A to B on a most important journey is much better done by pictures and graphs (accompanied, of course, by spoken explanations) than by a verbal explanation alone.

Research

As will be very apparent from the preceding chapter, we are deeply concerned that the debate about mode of trial is proceeding on an unsatisfactory information base.

The only way to remedy that serious deficiency is for the system to allow for relevant research into what actually happens. Monitoring real juries when they are trying cases is dangerous since the jurors themselves may be inhibited in their deliberations because “big brother” is in the room with them. It is dangerous, also, because the (presumably) carefully controlled breach of their essential confidentiality may itself be breached - and not necessarily by persons outside the trial and/or the research itself. To illustrate the latter danger, suppose that a jury is being monitored when it is deliberating and those who review the record for the research discover that one of the jurors is paying the others to return a particular verdict. Of course that is an extreme case, but the problem so dramatically illustrated is no different in principle from that which would be raised if the record revealed to the researcher that the jurors were working on the basis that the burden of proof was throughout on the defendant. What is the researcher to do with the material? Suppress it or reveal it and, if reveal it, to whom? Speaking entirely for ourselves, we believe that it would be wholly unconscionable if he did not reveal it: a palpable injustice would have been done. Whatever, the confidentiality of a jury’s deliberations would have been breached. Once that confidentiality is breached for the extreme cases, can it be maintained in less extreme cases, as where the route to decision taken by a particular jury is seen as being less than perfect? The issue would then become, “How to distinguish between the situation in which the researcher must report to some person or body that an injustice has been done and a situation in which there would have been better ways for the jury to go about its task but nothing which raises an injustice issue?” And that would then lead to the question, “Who exercises the judgement that there is no ‘injustice issue?’”

The “Pandora’s Box” argument has held sway so far. Should it continue to do so? Can we continue to decide mode of trial issues on anecdotes and research, the methodology of which is doubtful, on pre-judgement and on myth? Even though mode of trial decisions are ultimately political, are legislators to be treated as a class apart, able to shape our criminal justice systems in ignorance of the real facts?

Is research on the conduct and deliberations of real juries a price that must be paid in the overarching interests of criminal justice? This is a question which can no longer be avoided.

Postscript

The choice of mode of trial cannot be a scientific exercise. As we have attempted to show, social and legal history, traditions and present reality are all necessary ingredients in the decision.

In the end, the decision ought to be made so that the chosen mode of trial satisfies the relevant society's expressed needs and requirement. The trouble with much of the debate is, we believe, that so many commentators, professional and lay, justify their arguments for or against jury or judge alone trial in social as well as legal terms without finding out what the population really wants.

Is that satisfactory?

Appendix A

POSSIBLE SUB-ISSUES

- How do juries function? Should there be research into this? If so, by whom, what conditions, what methodology?
- Is trial by jury an efficient method of disposing of all/some criminal charges? If not, does it have any other value, legal, political, social? If so, what, and what value?
- Are there some and, if so, which criminal charges which are not appropriate for trial by jury? If so, why not?
- What should be the size of a jury? Should the size of a jury vary according to the nature of the charge(s) and/or the level of jurisdiction? Should alternatives be sworn on every occasion that a jury is empanelled - or at all?
- Should jury panels be subjected to pre-trial vetting by prosecution and/or defence? If so, for what reason(s) and subject to what control(s)?
- How should juries be selected? What rights of challenge/standby should be enjoyed or accorded to the parties? What role should trial judges have in the selection process?
- Should juries be provided with aids to assist them in absorbing, retaining, recalling and understanding evidence and legal directions? If so, what?
- Should trial judges review the evidence as well as direct juries as to the law?
- What part, if any, should the trial judge play in the jury's deliberations?
- Should "jury nullification" - the power of a jury to reject a judge's instruction, or not apply the law if it believes the result would be injustice and, therefore, acquit - be recognised or should it be punished as contempt?
- Should juries' verdicts be unanimous or by a majority? If by a majority, what majority and should that be common to conviction and acquittal?
- Should juries give "simple" guilty/not guilty verdicts or should they be required to give special verdicts demonstrating agreement on the bases therefor? In any event, is there any value in the Scottish "not proven" verdict as a middle ground between "guilty" and "not guilty" - and, if so, what value?
- Should juries be used for aspects of sentencing, setting parole eligibility, or reviewing parole eligibility for persons sentenced to life or long terms?

Appendix B

PAPERS SUBMITTED

- Australia Review of the Criminal and Civil Justice System: Consultation Paper, Trial by Judge Alone (December 1998, Law Reform Commission of Western Australia)
- Summary of Australasian Research: *Nicholas Cowdery Q.C., D.P.P.* (March 1999, New South Wales)
- Project Paper by Working Party chaired by the Hon Justice Michael Murray (March 1999: Judges of the Supreme and District Courts of Western Australia)
- Project Survey of Supreme and District Courts of Western Australia and of legal practitioners in Western Australia: *H.H. Judge Mary Ann Yeats* (January 2000)
- Canada Jury Aids: *Richard C.C. Peck QC and Tamara Levy* (1998 National Criminal Law Program, University of Victoria, B.C.)
- Judicial Instructions and Jury: a Comparison of Alternative Strategies: *James R.P. Oglloff, J.D., Ph.D., R. Psych* (Undated: Department of Psychology and Mental Health, Law, & Policy Institute, Simon Fraser University, Burnaby, B.C.)
- Incomprehensibility of Jury Instructions: Validating a Method of Assessing the Comprehensibility of Jury Instructions: *V. Gordon Rose and James R.P. Oglloff* (Undated: Simon Fraser University, *ibid.* unpublished)
- Hong Kong SAR Project Paper: *Peter Chapman*, Senior Assistant Director of Public Prosecutions (July 1999: Department of Justice, Prosecutions Division, Hong Kong)
- Netherlands Project Paper: Jury and Professional Judges in The Netherlands: *Professor Johannes F. Nijboer*, University of Leiden (1999)
- New Zealand Preliminary Papers 32 and 37 "Juries in Criminal Trials" (July 1998 and November 1999: Law Commission)
- U.K. Project Paper (1999: Criminal Committee of the Law Society of Scotland)
- Project Paper (March 1999: Working Party of the Scottish Association for the Study of Delinquency)

Appendix C

ARTICLES CONSIDERED

- Australia Media Publicity and Jury Trials: *Michael Chesterman*
- International Jury Reform: of Myths and Moral Panics: *Peter Duff and Mark Findlay* (International Journal of the Sociology of Law, 1997, Vol 25, 363)
- New Zealand Juries in Serious Fraud Trials: *Mr Justice Hansen*, Executive High Court Judge (Amicus Curiae)
- U.K. The best way forward in Fraud Trials: *Christopher W. Dickson*, Executive Counsel, Accountants' Joint Disciplinary Scheme; formerly Senior Assistant Director, Serious Fraud Office, London (Amicus Curiae)
- The Importance of Preserving the Jury System and the Right of Election for Trial, *Bruce Houlder Q.C.* ([1997] Crim.L.R. 875)

Appendix D

Table 1: Comparative Information

REF	SOURCE	HAS JURIES?	EXTENT	ELECTION OF MODE OF TRIAL?	CHALLENGES	VERDICTS	CHANGES SUGGESTED
A	Dept of Justice (Prosecutions Division) <u>Hong Kong SAR</u>	Yes. Seven jurors: may be increased by trial judge to nine.	In Court of First Instance only: for reserved serious criminal cases and cases transferred to Court by the prosecutor	No right in a defendant. Forum decided by the prosecutor.	Defendant has right to five peremptory challenges. Prosecution may “stand-by” any potential juror. Prosecution and defendant may challenge for cause.	(1) Judge: directions as to law; summary of evidence and issues (2) Majority (at least 5 jurors) in all save capital cases which require unanimous verdict (3) Not Guilty; Guilty (4) Nothing related to sentence (5) [Sequestering: not addressed]	Re-examine right to peremptory challenges. Procedure and language to be more user (jury) friendly.
B	Professor Johannes F. Nijboer, <u>Netherlands</u>	No. All trials by judge alone					
C	Law Society of <u>Scotland</u>	Yes. (15 jurors: selected by ballot from random poll)	For Solemn Procedure only: High Court and Sheriff’s Courts	No. Forum for trial decided by prosecution	No peremptory challenges	(1) [Judge: directions and evidence summary: not addressed] (2) [Unanimity: not addressed] (3) [Verdicts: not addressed] (4) Nothing with regard to sentence. (5) Not sequestered	Simplify complex language.

REF	SOURCE	HAS JURIES?	EXTENT	ELECTION OF MODE OF TRIAL?	CHALLENGES	VERDICTS	CHANGES SUGGESTED
D	Working Party appointed by the <u>Scottish Association for the Study of Delinquency</u>	See B				(1) Judge: directions as to law; summary of evidence and issues (2) Simple majority (3) Not Guilty; Not Proven; Guilty (4) Nothing related to sentence (5) May be sequestered.	
E	Working Party of Supreme and District Courts judges of <u>Western Australia</u>	Yes. (12 jurors: selected by ballot from random poll. Possible reserve jurors up to max of six.)	In all indictment cases <u>but</u> provision for judge only trials in State cases		Yes. (1) Prosecution and defence may make peremptory challenge to up to eight jurors, subject to reduction to make up to six peremptory challenges when two or more defendants to be tried. (2) Prosecution may stand aside up to four jurors. (3) Defence may make challenge to the array and to challenge any individual potential juror for cause.	(1) [Judge: directions and evidence summary: not addressed] (2) Unanimity in Commonwealth, Majority (at least 10 jurors) in State cases (3) Not Guilty; Guilty (4) Nothing with regard to sentence. (5) Sequestered	Legislation pending to reduce peremptory challenges to three per party and to remove prosecution's right to stand aside.
Extra	President of ISRCL for <u>England and Wales</u>	Yes (12 jurors)	All trials on indictment.	Incomplete: in each way cases, prosecution and defence may submit choice to magistrate but mode of trial determined by magistrate.	For cause only	(1) Judge: directions as to law; summary of evidence and issues (2) Majority (at least 10 jurors) (3) Not Guilty; Guilty (4) Nothing related to sentence (5) May be sequestered.	Defendant's right to elect mode of trial under threat as is right to jury trial for certain offences. Language to be made for simple