

DIRECTIONS TO CONVICT

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Abstract: This paper explores the regularity of judicial directions to the jury in a divided trial, to convict. Such directions are uncommon, yet current Australian authority sanctions directions of this type. This paper will explore the reasons why other jurisdictions, most recently Canada, have limited the ability of judges to instruct juries to convict, and argues that it is time the Australian position is reappraised judicially or otherwise.

1 THE ISSUE

For a judge to direct a jury to convict is *prima facie* anomalous. The jury in a common law jurisdiction has the task of determining the facts, including the ultimate factual issue, that of liability. Nonetheless, this issue continues to come before courts of appeal.

The question recently resurfaced in a case decided by the Supreme Court of Canada in 2006. In the case of *Krieger v R*¹ the court determined that for a judge to instruct a jury to convict a person brought to trial undermines the accused's right to a jury trial as provided for in the Canadian *Charter of Rights and Freedoms*.² The court was of the opinion that the instructions given to the jury by the judge usurped the jury's function and thereby deprived the accused of a jury trial in the fullest sense.

This decision accords with authority in other jurisdictions, with the exception of Australia. As the law presently stands in Australia, the judge in a jury trial is permitted, in the course of instructing the jury, to direct the jury that the accused must, as a matter of law, be found guilty. Examination of the regularity of this practice requires a consideration of the roles of judge and jury.

To this end, Part 2 of this paper will briefly explore the historical evolution of the jury in the common law tradition, to the contemporary position where the judge and jury came to have their respective roles of arbiter of the law and fact. Part 3 will review the law and practice in several representative common law jurisdictions.

2 JURY TRIAL: SOME HISTORICAL OBSERVATIONS

The 1956 Hamlyn Lectures delivered by Lord (then Sir Patrick) Devlin, stand as one of the most lucid and authoritative statements in recent times on the history and contemporary functioning of the jury trial.³ Lord Devlin surveyed the history of the jury,

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¹ (2006) 272 DLR (4th) 410.

² Section 11(f). This provision mirrors the common law requirement that trial be by jury (so that summary trial can only be the product of legislative intervention).

³ Devlin, P, (Hamlyn Lectures) *Trial by Jury*, Stevens, London, 1956.

and described and commented upon its contemporary role. The historical narrative is of limited assistance in coming to terms with the functioning of a jury trial in a modern sense and engaging with its dynamics. However, history remains instructive in relation to the particular issue of distinguishing the jurisdiction of the tribunals tasked with trying questions of law and questions of fact.

Originally a juror was someone who the King compelled to take an oath in order to extract information for administrative purposes, for example in the compilation of the Domesday Book. Thus historically, jurors were a body of men used in the practice of inquisitorial type activities by the Crown. This inquest of fact was not initially connected with the administration of justice. As Lord Devlin explains, this union was to take place under the reign of the great legal reformer Henry II.⁴ The most relevant aspect of Lord Devlin's exposition to the present analysis is the survey of the evolution of the jury from a body whose intrinsic knowledge of matters was sought for the eliciting of facts, to a panel of laymen unconnected and unfamiliar with the matter before them. The ultimate result of this transformation of the institution of the jury has been the axiomatic position held in the common law that juries determine questions of fact and judge determine the questions of law. This distinction is at the heart of the divided trial.

As will be explored in the cases below, the typical trial situation where the regularity of a judicial direction to convict has come into question, has been one where the facts are not contested, and on their own point to guilt; or at least where the evidence is so strongly in favour of the facts decisive to guilt that a judge has formed the view that the jury will act contrary to its duty not to convict. For his part, Lord Devlin saw the practice of judges directing juries to deliver verdicts of guilty as "unconstitutional".⁵ He perceived this practice as a "doctrine which might blossom into what defenders of trial by jury would be a noxious flower."⁶

Edward Griew, in addressing this issue in the English context in the early 1970s and replying to the position of Lord Devlin, argued in favour of retaining a judge's right to direct verdicts of guilty.⁷ Griew took the view that in a case where the facts are undisputed (as opposed to being "obvious"), and the application of the law to these facts establishes guilt, the jury has no real course of action other than to convict, with a contrary verdict necessarily being perverse. In this class of case, he considered, the judge acted regularly in directing a conviction.⁸

The issue of the regularity of judicial directions to convict has received considerable attention in the intervening years.

⁴ Ibid at p9. Lord Devlin identified the *Assize of Clarendon* (1166) as marking the introduction of the jury into the criminal process.

⁵ *Chandler v DPP* [1964] AC 763 at 803-804.

⁶ Devlin, P, op cit, revised edition 1966, *Forward* at viii.

⁷ Edward Griew, "Directions to Convict" [1972] *Criminal Law Review* 204 at 205 at 209.

⁸ Ibid at 212.

3 TRANSNATIONAL PERSPECTIVES

3.1 United Kingdom

The regularity of judicial directions to convict was recently considered in the United Kingdom in the House of Lords' decision in *Wang v DPP*⁹ in 2005. The House resolved half a century of inconsistency on this issue by deciding that the trial judge does not have the power to direct a conviction, notwithstanding that the same judge has the power to direct an acquittal. *Wang* was followed in the recent Canadian case of *Krieger*.

The appellant in *Wang* was charged with two counts of having an article with a blade or point in a public place, contrary to s139 (1) of the *Criminal Justice Act 1988* (UK). The illegal items were a martial arts sword and a small "Ghurkha style knife." The possession of the items was not disputed. Rather, the accused sought to invoke the statutory defences provided by ss139 (4) and (5) (b) in that the possession of these items was for a good reason (s139 (4)) and that was a religious reason (s139 (5) (b)).¹⁰ The appellant was an adherent of the Buddhist practice of Shaolin, traditional martial art. As such, he was required to become an expert in eighteen weapons, one of which was a sword, to remain true to his beliefs. The prohibited items were with him for two reasons. First, he was not comfortable leaving such valuable items unattended at the place where he was residing, and second, he often liked to meditate with his weapons in secluded places.

At his initial trial, the appellant's defences were not accepted by the presiding judge. Consistently with his view that there were no outstanding questions of fact, the judge directed the jury as follows: "As a matter of law ... the offences themselves are proved and, under those circumstances, I direct that you return guilty verdicts on each of the two counts on this indictment". The judge then proceeded to request that the jury foreman answer "guilty" to both the questions to be put to the jury. The two counts of the indictment were then put to the jury as a matter of procedure, with two guilty verdicts returned.

An appeal to the Court of Appeal was unsuccessful.¹¹ The court made reference to its 2003 decision of *Bown*,¹² where it took the view that a direction to convict was regular, in a trial in which the accused failed to discharge the burden of establishing a defence. The Court of Appeal distinguished two classes of case – (1) where the onus was upon the prosecution to prove the offence (the standard situation); and (2) where the defendant had the burden of proving a defence (the *Wang* situation). In the latter case, the Court of Appeal concluded, where the facts constituting the offence were not in dispute, and the trial judge concluded that the evidence was not capable of establishing the defence, the trial judge may direct a conviction. In the subject case the court was of the view that the defendant's evidence was not capable of discharging the burden that lay on

⁹ [2005] 1 WLR 661; UKHL 9.

¹⁰ *Ibid* at [4]-[6].

¹¹ *Ibid* at [7]ff.

¹² [2003] EWCA Crim 1989; [2004] 1 Cr App R 151.

the accused to establishing the defence, and that accordingly the trial judge had not misdirected the jury. The appellant then appealed to the House of Lords.

The Committee allowed the appeal, in a joint opinion in 2005.¹³ The question certified by the Court of Appeal was thus:

In what circumstances, if any, is a judge entitled to direct a jury to return a verdict of guilty?

The House noted that it was common ground that (1) the trial judge has a duty to direct an acquittal if there is no evidence which could justify the jury convicting the accused and a conviction would be perverse;¹⁴ (2) the judge should withdraw a defence from the jury if there was no evidence to support it; (3) the judge need not direct the jury on any issue not raised by any evidence; and (4) the judge could comment to the jury in stronger terms than would otherwise be permissible, where the only reasonable course is to convict in a case where the facts are uncontested.¹⁵

Notwithstanding that the judge could express his or her opinion that the evidence was consistent with guilt, the appellant contended that there was no circumstance in which the judge could direct a conviction. The House agreed with this proposition.

A starting point in arriving at this conclusion was recognition of the role of judge and jury in the divided court. The House quoted Sir Patrick Devlin in *Trial by Jury*:¹⁶

The jury does not tell the judge the facts so that he can apply the law to them; the judge tells the jury the law so that they can apply it to the facts. The responsibility for its correct application is laid upon the jury and not upon the judge. If the judge wants to apply the law himself, the only way he can do it is by asking for a special verdict.

That is, the jury is sovereign in matters of fact including the application of the law to the facts found by them in order to derive a verdict – that is its role. This doctrine is at the core of the decision in *Wang*.

The House reviewed a series of cases on the issue which were not always consistent. It was noted that Viscount Sankey LC had observed in *Woolmington v DPP*,¹⁷ in terms with which the other members of the House agreed, that if the judge were entitled to direct the jury to convict the effect would be to “make the judge the decide the case and not the jury, which is not the common law.” To similar effect were observations by Lord Oaksey speaking for the Privy Council in *Joshua v The Queen*,¹⁸ where he commented

¹³ *Wang*, op cit.

¹⁴ Ibid at [3], citing *DPP v Stonehouse* [1978] AC 55 at 70,79-80 and 94; and Devlin, *Trial by Jury*, op cit p78.

¹⁵ *Wang*, ibid.

¹⁶ *Trial by Jury*, op cit, Appendix II, p194, cited in ibid at [8].

¹⁷ [1935] AC 462 at 480, cited in *Wang*, ibid at [9].

¹⁸ [1955] AC 121 at 129-130, ibid at [9].

that for the judge to direct a conviction would be “to usurp the function of the jury.” In the House of Lords’ decision in *Chandler v DPP*¹⁹ no member of the House accepted that the judge had a power to direct a conviction. Lord Devlin said that such a power would be unconstitutional, but allowed that:

A judge may, of course, give his opinion to the jury on a question of fact and express it as strongly as the circumstances permit, so long as he gives it as advice and not as direction. The trial judge indicated a fairly strong opinion in the present case, particularly at the end of his summing-up, when he hinted to the jury that there was only one verdict which they could in conscience return. But this was not improper, for even in relation to the limited facts which he left for their consideration, he told them clearly several times that the question was for them to answer...²⁰

The issue again arose for consideration by the House in *DPP v Stonehouse*.²¹ The trial judge had told the jury, in relation to certain attempt charges, that: “There is an attempt by the accused within the legal meaning of that word ‘attempt’ if you are satisfied that the matters I have stated to you are proved.” A minority of the House considered that the direction was regular. The majority considered that it was technically wrong, but applied the proviso.²² Lord Salmon noted that “technically, the judge should ... have left it to the jury to decide whether or not the evidence established the attempt charged and to have found him guilty or not guilty”.²³ The judge could make it plain to the jury that in his view the jury should convict but he cannot direct them to convict.²⁴ Lord Edmund Davies said that it was for the jury and not the judge to decide whether the accused had mens rea, and whether the alleged acts constituted the actus reus of attempt.²⁵ He commented further that what happened here was one example of a prevalent tendency in the courts to “withdraw from the jury issues which are solely theirs to determine”.²⁶ Lord Keith of Kinkel commented that the wiser course was “to adhere to the principle that, in every case where a jury may be entitled to convict, the application of the law to the facts is a matter for the jury and not for the judge.”²⁷

These authorities were accepted by the House in *Wang*. To allow the judge a power to direct a conviction would be to usurp the jury’s role. Further, it was noted that authority did not support

¹⁹ [1964] AC 763, *ibid* at [10].

²⁰ *Chandler*, *ibid* at 803-804.

²¹ [1978] AC 55; *Wang* at [11]ff.

²² Section 2(1) of the *Criminal Appeal Act* 1968 (UK), as it then stood, provided that notwithstanding that the point raised might be decided in favour of the appellant, no substantial miscarriage of justice had actually occurred.

²³ *DPP v Stonehouse*, *op cit* at 79-80.

²⁴ *Ibid*.

²⁵ *Ibid* at 87-88.

²⁶ *Ibid*.

²⁷ *Ibid* at 94.

the distinction drawn by the Court of Appeal in the present case between cases in which a burden lies on the defence and those in which the burden lies solely on the Crown. That distinction is indeed inconsistent with the rationale of the majority opinions [in *Stonehouse*], which is that no matter how inescapable a judge may consider a conclusion to be, in the sense that any other conclusion would be perverse, it remains his duty to leave the decision to the jury and not to dictate... what that verdict should be.²⁸

The law in England has now been settled: a trial judge may not in any circumstance direct a verdict of guilty. To allow otherwise usurps the sovereignty of the jury.

3.2 The United States of America

The Supreme Court of the United States ruled on this issue in 1895 in *Sparf v United States*,²⁹ concluding that it is not competent for a court in a criminal case to instruct the jury peremptorily to find the accused guilty of the offense charged. The US Supreme Court decision in 1975 in *United States v Park* is to similar effect.³⁰ The ultimate basis of the American position, however, is the US Constitution. As noted in a 1996 decision in the state of Tennessee:

A directed verdict of criminal guilt not only violates established common law, but also infringes on the constitutional rights of the accused. A directed guilty verdict violates the Due Process Clause of the Fifth Amendment and the right to a speedy and public trial outlined in the Sixth Amendment to the United States Constitution³¹

3.3 Canada

The question of whether a judge could direct a guilty verdict was recently dealt with by the Supreme Court of Canada in its 2006 decision in *Krieger v R*.³² The appellant was convicted in Alberta in 2005 of having unlawfully produced cannabis. He was entitled to trial by jury pursuant to s11(f) of the *Canadian Charter of Rights and Freedoms*. He elected to be tried by jury. He pleaded not guilty. He was a marijuana activist³³ and suffered from multiple sclerosis. Cannabis is a medically recognised palliative for this

²⁸ Wang, op cit at [13].

²⁹ (1895) 156 US 51 (39 Law Ed 343). *Sparf* was followed in the case of *United Brotherhood of Carpenters and Joiners of America v United States* (1946) 330 US 395; 91 L Ed 973. In the latter case Justice Reed, citing *Sparf* and delivering the opinion of the Court, held that “a judge may not direct a verdict of guilty no matter how conclusive the evidence” (at 408).

³⁰ (1975) 421 US 658 at [47]ff, per Stewart, Marshall and Powell JJ who constituted the minority in this case (but did not dissent on this point).

³¹ *State of Tennessee v Marc Burridge* (1996) Ten Crim App Lexis 544 at [8]. The court held that there was not such a direction here.

³² Op cit.

³³ See the report “Pot activist to get new trial” in *The Globe and Mail*, 27 October 2006.

condition. The appellant grew marijuana for his own consumption and provided it to others for their use.

The trial judge directed the jury to return a verdict of guilty. When two jurors asked to be excused, the judge stated in the jury's presence that: "I have a matter that the jury raises. It is apparent that some of the members either didn't understand my direction this morning, *that is that they were to return a verdict of guilty ...* or they refused to do so."³⁴ The jurors asked to see as copy of their oath, by which they had sworn to presume the accused innocent throughout the trial, after which two jurors asked to be excused.³⁵ The judge refused this request. Subsequently the jury returned a guilty verdict.

The appellant took his conviction to the Alberta Court of Appeal.³⁶ The crown conceded that the direction given by the judge at first instance was indeed erroneous but contended that pursuant to s686 of the *Criminal Code*, R.S.C. 1985, c. C-46 a new trial should be denied. Section s686 (1) (b) (iii), often referred to as the "harmless error proviso" provides that an appellate court can dismiss an appeal against conviction, notwithstanding a wrong decision at trial on any question of law, where no substantial wrong or miscarriage of justice has occurred. The Court of Appeal applied the proviso and affirmed the conviction in a 2:1 decision.

In 2006 the appellant appealed to the Supreme Court of Canada. Fish J, in whose judgment the other members of the court concurred, allowed the appeal. Fish J noted that as the appellant was charged with an indictable offence, he was entitled under s11(f) of the *Canadian Charter of Rights and Freedoms* to "the benefit of trial and jury." (Of course, in the absence of a provision of this type the accused person is still entitled to trial by jury at common law, in the absence of a legislative prescription that trial be summary.) He "elected to exercise that right. At its heart lies a verdict by one's peers – the jury, not the judge."

Unfortunately, the trial judge usurped the jury's function. He directed the jury to convict and said they were bound "to abide by that direction." In substance, their verdict was that of the judge; it was theirs only in form. Mr Krieger was thereby deprived of his constitutional right to the jury trial he had chosen.³⁷

It was for the jury to decide the verdict, not the judge. Fish J quoted Sir Patrick Devlin: for a trial judge to direct a verdict of guilty

would mean that there had not even been the semblance of a trial by jury. Whatever formula may be devised to facilitate the application of the proviso, the statutory requirement is that there should be no miscarriage of justice. It would be going very

³⁴ *Krieger*, op cit, at [9] (emphasis added by the Supreme Court in its joint judgment).

³⁵ *Ibid* at [13]-[14].

³⁶ *Krieger* 2005 ABCA 202.

³⁷ *Krieger v R* (2006) 272 DLR 410 at [2].

far to say that there was no miscarriage in a process which deprived an accused entirely of his constitutional right to trial by jury.³⁸

It was not relevant that the evidence pointed overwhelmingly to guilt, in the eyes of the judge. The determination of guilt was still a decision for the jury.³⁹

This decision is consistent with *Wang* (which was cited): the directed verdict of guilty confuses the role of judge and jury and usurps the latter's role. In effect such a doctrine would be to convert an indictable into a summary offence when the judge considered that the evidence warranted this.

The proviso was inapplicable – the proviso could be applied where there had been an imperfect trial by jury, but not where there had in substance been no trial by jury.⁴⁰

Fish J also referred to the potential role of a jury could in refusing to apply an unjust law. This will be returned to in the conclusion to this paper.

3.4 New Zealand

New Zealand authority has rejected directions to convict. The Supreme Court of New Zealand considered the matter recently in its 2005 decision in *L*.⁴¹ The appellant had been convicted of a criminal attempt. The trial judge had instructed the jury that the accused's acts amounted to an attempt to commit a crime, as charged, although with the qualification that the matter was one for them to decide.⁴² The Supreme Court noted that this direction “appears to have said or at least come perilously close to saying, that the accused was, as a matter of law, guilty of the crime charged”.⁴³ It was one of which the appellant could reasonably complain.⁴⁴ The misdirection was not, however, decisive. The judge had put the position correctly in subsequent remarks, but there were other errors, contradictions and inappropriate directions on jury questions, the end result of which was that the trial had miscarried and that the conviction would have to be set aside.

3.5 Australia

The Australian High Court considered the issue of directions to convict in *Yager v R*⁴⁵ in 1977. The trial judge did not direct the jury to return a guilty verdict, but he gave them

³⁸ “The Judge and the Jury”, in *The Judge*, Oxford University Press, New York, 1979, at pp142-143; *ibid* at [22].

³⁹ *Krieger v R* (2006) 272 DLR 94th) 410 at [24].

⁴⁰ *Ibid* at [25].

⁴¹ SC 49/2005; 2006 NZSC 18.

⁴² *Ibid* at [26].

⁴³ *Ibid* at [35].

⁴⁴ *Ibid* at [36].

⁴⁵ (1977) 139 CLR 28.

very strong advice. The majority of the judgments accept that a directed verdict of guilty is regular.

The appellant was convicted of offences of importing into Australia and having in her possession a prohibited import, viz, cannabis, contrary to s233B(1)(b) and (c) of the *Customs Act* 1901(Cth). On one view she admitted all of the facts establishing the offence; on another she admitted all of the facts bar one. She admitted that the plant in her possession was plant of the genus cannabis. The statute prohibited importation and possession of “cannabis plant” which was defined as “a plant of the genus *Cannabis savita*” (s4). The appellant argued that the genus cannabis consisted of several species, of which cannabis savita was only one. There was no evidence that the plant in question was of the species cannabis savita. After hearing expert evidence, the trial judge ruled that the statutory term “plant of the genus *Cannabis savita*” comprehended all forms of cannabis plant. The majority of the High Court (Murphy J dissenting) were of the view that this was a determination of the meaning of a statutory provision and hence one of law and not fact and in consequence one for the judge not the jury. In Barwick CJ’s opinion

the statute was clearly and expressly referring to a genus and not a species. It would be little to the point that the statute may have misdescribed the genus. That circumstance would not warrant the statute being read to apply only to a species when in truth it unambiguously referred to a genus.⁴⁶

In consequence of his determination that all of the facts had been admitted, the trial judge in substance but not in form directed the jury to convict:

I should think that you must be satisfied beyond reasonable doubt that all of the facts which the accused has admitted have been established and if you accept my direction as a matter of law as to the meaning of cannabis as expressed in the *Customs Act*, then with regard to each of the counts against the accused, you will return a verdict of guilty. Probably what I have just said surprises you. It might be...that you would wish to take time to consider the consequences of what I have told you. That might well be unnecessary and in light of that direction you might feel inclined here and now to agree upon the appropriate verdict with regard to each of the counts. The appropriate verdict, as I have told you in my opinion, quite clearly is one of guilty.⁴⁷

This fell short of a direction to convict, but it was very strong advice. Barwick CJ considered the direction to be regular, and added that the jury “consistently with its oath could not have returned any other verdict than that of guilty.” If they had done so it would “have been within the providence of the judge to refuse to accept such a verdict as so patently inconsistent with the evidence and their obligations as jurors”. When the evidence has established without dispute all the ingredients of the case, the judge can

⁴⁶ Ibid at 34. Likewise see Gibbs J at 36, Stephen J at 40, and Mason J at 45.

⁴⁷ Ibid at 35.

“inform the jury that it is their duty to return a verdict of guilty”.⁴⁸ Stephen J concurred with Barwick CJ (and indeed Mason J).

Mason J considered that given the admission of all of the relevant facts, a

a rejection of the admission by the jury would have resulted in a perverse verdict. The learned judge was therefore ...entitled to direct the jury to return a verdict of guilty; it would not have been proper for him to invite the jury to consider whether they should accept or reject the formal admission; to do so would have been to invite them to deal with a matter which was not an issue at the trial.⁴⁹

It follows that three justices considered that a judge could in a case where the critical facts were uncontested, direct a conviction.

Gibbs J was more circumspect. The judge “may never direct a jury to enter a verdict of guilty”, although where there is no issue of fact (and the facts establish the offence) the judge may make

it clear to the jury [or tell them] that if they do their duty they will return a verdict of guilty. But it is still necessary for the judge to leave it to the jury to bring in a verdict, and he cannot dictate the verdict they are to return...[i]f the judge does direct them to return a verdict of guilty, they may disregard his direction.⁵⁰

To hold otherwise would be to usurp the function of the jury: “Directions [to convict] “would tend to weaken an ancient and valuable safeguard in the criminal law”.⁵¹ He emphasised that although the judge could tell the jury that it was their duty to return a verdict of guilty, the judge had to make “it clear to that it was their right and duty to decide what verdict to return”. The judge must not direct a verdict of guilty nor may the judge “otherwise attempt to coerce [the jury] into doing so”.⁵²

In this case he considered that the judge was technically in error in having told the jury that the admissions established all of the elements in the prosecution case, but he considered that the proviso applied, in that such misdirection could not have caused any miscarriage of justice.⁵³

Murphy J dissented, considering both that the judge had been wrong in treating the issue of whether the plant material was a prohibited import as a matter of law, and that he had acted wrongly in directing the jury in substance to convict. The trial judge could never direct the jury to convict.⁵⁴ The common law vested in the jury the responsibility

⁴⁸ Ibid at 36.

⁴⁹ Ibid at 46.

⁵⁰ Ibid at 38, citing *Hendrick* (1921) 15 Cr App R 149.

⁵¹ Ibid at 39.

⁵² Ibid at 40.

⁵³ Such is the implication of his remarks at *ibid*, 40.

⁵⁴ Citing *United Brotherhood of Carpenters and Joiners of America v United States* (1946) 330 US 395, at 408 [91 Law Ed 973 at 985]; *Woolmington*, *op cit* at 480.

for deciding the verdict. Section 80 of the *Australian Constitution* paralleled and reinforced this right to jury trial, in relation to federal indictable offences (at common law of course all offences are indictable).⁵⁵

The proviso⁵⁶ was not applicable in a case where, as here, the judge tried the case and not the jury⁵⁷ (a conclusion reinforced by Murphy J's conclusion that the issue of whether the plant material was prohibited was one of fact).

The majority decision in *Yager* that the judge had acted regularly is at odds with the common law in the United Kingdom, Canada, the United States and New Zealand.

4 CONCLUDING COMMENTS ON DIRECTIONS TO CONVICT

4.1 The weight of authority prohibits directions to convict

United Kingdom, United States, Canadian and New Zealand law is consistent – the trial judge does not have the power to direct the jury to convict. It follows that such a direction is erroneous. United Kingdom law has put the prohibition on a more comprehensive basis: the judge cannot direct a conviction, nor can the judge direct the jury that the defendant has not proven a defence (in a situation where the burden of proof is upon the defendant).

United Kingdom authority recognises that the judge can in substance advise the jury in a case where the facts are not contested, that the evidence is consistent with guilt, so long as the judge makes it clear that the verdict is one for the jury to decide. The limits to this advisory role have not been specified. In principle, strong advice that leaves a jury with the message that they should convict would be irregular in the absence of a clear instruction that notwithstanding this advice, the decision is one for the jury. In *Jager v R*, Gibbs J was of the opinion that the judge could in a case where the uncontested facts established guilt, tell the jury that it was their duty to convict, provided that he made it clear that it was the jury's "right and duty to decide what verdict to return and that he did not direct them to return verdicts of guilty or otherwise attempt to coerce them into doing so."⁵⁸ It may be that this advice employing the word "duty" would be overly emphatic, notwithstanding the qualification.

This prohibition obtains notwithstanding that the trial judge has the power to direct an acquittal. The apparent contradiction is to be explained of course by the long-standing bias of the law in favour of the criminal defendant, manifested in, for example, by the

⁵⁵ Section 80 provides "The trial on indictment of any offence against a law of the Commonwealth shall be by jury.

⁵⁶ The *Criminal Code* (WA) provided that the appellate court "may notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred".

⁵⁷ *Yager*, op cit, citing *Makin v Attorney-General (NSW)* [1894] AC 57 at 69-70.

⁵⁸ *Yager*, ibid at 39.

presumption of innocence, the heavy standard of proof that is imposed upon the prosecution, the common law requirement of trial by jury, and the general (although qualified) prohibition of appeals against acquittals.⁵⁹

Notwithstanding the prohibition, the judge (as noted in *Wang*) has the power to and should withdraw a defence from the jury where there is no evidence supporting it.

The basis of the prohibition is straightforward – it is the constitutional role of the jury, in a divided court, to decide the question of liability. The jury decides all questions of fact including the ultimate one of guilt. This is the common law position in these three jurisdictions, and it has been mirrored in the Canadian *Charter of Rights and Freedoms* (and, as noted, in s80 of the *Australian Constitution*). The only circumstance in which the judge is empowered to decide the verdict is where statute law has provided for summary trial. It follows for the judge to decide the verdict, by pressuring the jury to convict, usurps the role of the jury. The common law recognises one exception to this regime – the direction to acquit.

4.2 Application of the proviso

The question has arisen in certain of this class of case as to whether, in a situation where a judge has erroneously directed a conviction, the appellate court can apply the standard proviso which is to the effect that notwithstanding that the court is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, it may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.⁶⁰ The House of Lords applied the proviso in *DPP v Stonehouse*, notwithstanding that a majority were of the opinion that the judge had acted erroneously in (in effect) directing a conviction. The standard justification for applying the proviso has been that having regard to the evidence in the instant case, any verdict other than one

⁵⁹ See 4.2 below.

⁶⁰ See, for example, the *Criminal Appeal Act 1912* (NSW), s6(1). The Australian High Court in its recent decision in *Weiss v R* (2005) 224 CLR 300 commented at length on the proviso, which is in standard form in the Australian jurisdictions. The court in a unanimous judgment took the view that the so-called (judicially approved) tests governing the application of the proviso (such as testing the applicability of the proviso by asking whether the accused lost a real, or fair chance of acquittal, or asking whether the jury would have convicted in the absence of the complained of factor – at [33]ff) were not legally significant, but just reminders of the policies underlying the proviso. The core issue was that identified by the proviso explicitly, that is, was there a substantial miscarriage of justice, which is a matter for the appeals court undistracted by any notion of what a hypothetical reasonable jury might have done (at [35]ff). Two other core considerations are that the appellate court's task is an objective one not materially different from other appellate tasks; and that the standard of proof in criminal matters is beyond reasonable doubt (at [39]). The goal of the proviso is to prevent needless trials (at [47]). No single universal criterion can be identified for determining when it would be proper not to dismiss an appeal pursuant to the proviso; but "there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded... of the appellant's guilt. Cases where there has been a significant denial or procedural fairness at trial may provide examples of cases of that kind" (at [45]). For an instance of the former analysis where judicial tests were seen to be of assistance in applying the proviso, see *Krakouer v R* (1998) 194 CLR 202 at [68]ff (McHugh J).

of guilty would have been perverse.⁶¹ Three of the majority in *Yager* were of the opinion that it was proper to direct a conviction, and that (by implication) the issue of the proviso did not arise. The fourth member of the majority noted that even if the direction was technically wrong, the proviso was applicable in this case.⁶² The House of Lords did not apply the proviso in *Wang*, nor did the Supreme Court of Canada view it as being applicable in *Krieger* (although the intermediate court had applied it).

Should the proviso be applicable, in a jurisdiction where the common law rule prohibiting appeals against acquittals on the merits⁶³ continues to apply?⁶⁴

In the absence of a constitutional prescription of jury trial in the case of indictable offences, the legal foundation for jury trial is common law. It is of course open to the legislature to entrench upon the common law. On one view the proviso has done this. It is in expansive terms at it allows a court to reverse a jury's verdict of not guilty, even as there is not (in the usual case) a general statutory provision in the jurisdiction allowing the prosecution to appeal

The case against applying the proviso was put by Murphy J in his dissenting judgment in *Yager*. He was of the opinion that there was a significant issue of fact to be decided by the jury (the majority were of the opposite view), so that, in these terms, necessarily there was a miscarriage of justice. More comprehensively, however, he commented that in "this case the judge deprived the jury of their right to decide every fact in the issue. The accused was tried by the judge, and if the proviso is applied, by the appellate court. This is not trial by jury..."⁶⁵ In substance, that is, the proviso ought not to be applied where there has not been a trial by jury in the first place, which self-evidently there has not in a case where the judge has de facto decided the verdict. In the Canadian Supreme Court's decision in *Krieger*, it was commented that while the proviso "may perhaps be applied where there has been an imperfect trial by jury", it cannot be applied "where, as here, there has in effect been no trial by jury at all."⁶⁶ The court quoted Lord Devlin, as noted in 3.3 above, to like effect.

⁶¹ See, for example, *Yager*, op cit, at 46 (Mason J); *DPP v Stonehouse*, op cit, at 70 (Lord Diplock), 74 (Viscount Dilhorne).

⁶² *Yager*, ibid at 40 (Mason J).

⁶³ See *CI & D Manufacturing Pty Ltd v Registrar, Industrial Court of NSW* (1996) 91 A Crim R 194 at 195, citing *Davern v Messel* (1984) 155 CLR 21 at 30 (Gibbs J, who commented on the rationale for the rule).

⁶⁴ Although there may be more limited grounds for Crown appeals, such as in New South Wales where, inter alia, the prosecution can appeal against the quashing of an indictment (s5C), or sentence (s5D): *Criminal Appeal Act* 1912 (NSW); and where the prosecution can appeal against an acquittal for a life sentence offence on the grounds that there is fresh and compelling evidence against the person acquitted, and in all the circumstances it is in the interests of justice for such an order to be made: *Crimes (Appeal and Review) Act* 2001 (NSW), s100. The *Criminal Code* (WA) contains a typical provision (s688(2)(b)) allowing the prosecution to appeal against the quashing of an indictment, a directed acquittal, and an acquittal by a judge trying an offence summarily.

⁶⁵ *Yager*, op cit, at 53 – noting that s80 of the Australian constitution required trial by jury in the case of indictable Commonwealth offences – the common law requires likewise.

⁶⁶ Ibid at [24].

4.3 Australia – an exception to the weight of common law authority

In Australia authority sanctions directions to acquit. The instant case is 30 years old – perhaps it will not survive reconsideration by the High Court, although it is binding on lower courts until reversed by the High Court. The New South Wales Law Reform Commission considered the issue in 1986, where it recommended as follows: “Legislation should provide that the judge should not direct the jury that they must find the accused person guilty.” The Commission referred to comments by Gibbs J and Murphy J in *Yager* to the effect that it was a basic principle of the law that verdicts in a divided court were for the jury and not the judge, and that it was not for the judge to direct a conviction because to do otherwise would be to usurp the role of the jury.⁶⁷ This, it is submitted, is as the law ought to be. In the years since *Yager* there would appear to have been few instances of directions to convict, but there is a clear potential for such a direction, or overly emphatic advice of similar effect, to be given by a judge to a jury.

5 A RELATED ISSUE – REFUSING TO APPLY AN UNJUST LAW

5.1 Jury Nullification or “Jury Equity”

A case like *Krieger* also raises a more basic issue – should a jury be able to return a verdict of not guilty in the face of evidence to the contrary. The reasons why a jury may, despite clear evidence of guilt, refuse to convict an accused person, arise from a view that may be held by the jury that the application of the law in this instance would be unjust.⁶⁸ This practice is known in the United States as “jury nullification”, and as “jury equity” in Australia and the United Kingdom. The term nullification is used in this context to reflect the fact that in not being enforced, the particular law in question is essentially nullified from operation. Despite some well-known and celebrated historical examples of jury nullification, the practice also has a dark side. It has repeatedly been proven that prejudice may form the basis of a jury’s independent verdict rather than any sense of propriety, fairness or justice.

The issue of whether a judge can direct a jury to convict is closely related to idea of jury independence. There is, it is submitted, something to be said for recognising that a jury may properly acquit when it views the law as unjust. This recognition, however, cannot be embraced too readily for it carries with it distinct dangers. Those dangers include the potential of allowing prejudice and bias to infiltrate the jury process rather than the jury basing their ultimate verdict on a dispassionate application of the law and upon the evidence presented. Jury nullification is often associated with positive connotations of justice and fairness, a proverbial “blow for freedom.” This image, however, sometimes hides the less palatable aspect of the practice. For example, during the mid twentieth century, there were instances of all white juries in the United States

⁶⁷ Report 48 (1986) – *Criminal Procedure: The Jury in a Criminal Trial*, 8.22-8.23.

⁶⁸ See the comments in Devlin, P, *Trial by Jury*, op cit, at pp160ff.

acquitting white defendants of the murder of African-Americans despite clear evidence of guilt.⁶⁹

Some of the most celebrated, and in some instances infamous, cases of jury nullification have arisen in acutely sensitive political and social contexts making this legal doctrine particularly controversial.

5.2 United Kingdom

The foundations of jury nullification have been traced back to the late seventeenth century and the common law courts of England.

In 1670 William Penn (later to found the colony of Pennsylvania) was brought to trial in England for illegally preaching a Quaker sermon. Penn was acquitted by a sympathetic jury (who were ordered to convict but refused as they were not allowed to read the actual statute Penn stood accused of breaching and they could not see how what Penn had done was at all criminal). The jury was itself subsequently imprisoned and fined. One of the jurors, Edward Bushnell, refused to pay the fine and his matter was brought before the Court of Common Pleas. Chief Justice Vaughan determined in *Bushel's Case*⁷⁰ (sometimes called *Bushnell's Case*) that jurors could not be punished for their verdicts. This principle, coupled with the established doctrine that an accused could not later be tried on the same charge after being acquitted had the consequence that the institution of jury nullification was in substance recognised.

More recently, Lord Justice Robin Auld, in his review of the English criminal court system published in 2001, took a critical view of jury equity. He recommended “that the law should be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly”.⁷¹

The ability of a jury to defy the law and in effect cast judgement on its propriety, for Auld LJ, was more than “illogicality”; it represented “a blatant affront to the legal process”.⁷² On this basis Auld LJ posed the question of whether juries should be given an express power to nullify or dispense with the law rather than just letting them “get away with it”.⁷³ In addressing this difficult issue, the review conceded that whilst procedurally nullification cannot be prevented, exposing it and making its exercise transparent may be the most an honest legal order could hope for.

For the present, jury equity remains a feature of the legal systems of England and Wales.

⁶⁹ See, for example, the well documented case of the murder of Emmet Till in Mississippi in 1955.

⁷⁰ (1670) 6 How 999.

⁷¹ Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, Stationary Office, 2001, at [107].

⁷² *Ibid* [105]

⁷³ *Ibid* [108]

5.3 United States of America

In the United States jury nullification enjoys a long history touching upon the development of American constitutional and political institutions. Perhaps the most famous pre-revolutionary case of jury nullification occurred in 1735. A printer by the name of John Peter Zenger was tried for seditious libel in New York for publishing criticisms of the Governor of the colony of New York. Zenger was acquitted by a jury and the institution of the jury became part of the platform that was to characterise the American Revolution.

Although presently largely unknown to the mainstream of American citizens⁷⁴, the power of jury nullification still exists in the state and federal legal systems of America.⁷⁵ Given the fundamental doctrines that underpin jury nullification, its existence is difficult to deny without repudiating some of the most well established elements of the common law which include, as noted, the principles that a jury cannot be punished for their verdict, and an accused cannot be retried for an offence of which they have been acquitted.

5.4 Australia

The Australian experience in this regard has been much less dramatic with the notable exception of the 'Eureka Stockade' trials. In 1855 13 gold prospectors were brought to trial for treason in Melbourne in connection with the Eureka Stockade insurrection. The acquittal of the men after a very short period of deliberation by the jury has been described as "an outstanding instance of "jury equity".⁷⁶

As with the United States and the United Kingdom, jury equity continues to remain a part of the trial process. It exists, as previously noted, not as a positive doctrine but rather as an unintended consequence of the constellation of other basic legal premises.

⁷⁴ In the 1895 case of *Sparf*, op cit, it was held that a trial judge has no responsibility to inform the jury of the right to nullify laws. In 1969 the case of *US v Moylan* 417 F.2d 1002, 1004 saw jury nullification being upheld but the court retained the power to refuse to permit an instruction to the jury informing jurors of their power to nullify. A similar position was later upheld in the 1972 case of *US v Dougherty* 473 F.2d 1113.

⁷⁵ See Teresa L. Conaway, Carol L. Mutz, and Joann M. Ross, "Jury Nullification: A Selective Bibliography" (2004) 29 *Valparaiso University Law Review* 393.

⁷⁶ Michael Chesterman "Criminal Trial Juries in Australia: From Penal Colonies to A Federal Democracy" (1999) 62 *Law and Contemporary Problems* 69, 97.

5.5 Concluding remarks

If it is accepted that jury nullification cannot be prevented in the absence of a power vested in the trial judge to direct a conviction, there may be something to be said for Justice Auld's argument in favour of formal recognition of the practice. The practice may be viewed optimistically or cynically – a middle ground may be a neutral quest for transparency. In two American states, Maryland and Indiana, for example, the state constitution provides for the jury to determine both law and fact in a trial.⁷⁷ Such an explicit empowerment of the jury raises serious implications, but it has the advantage of promoting transparency in relation to nullification questions. Its effect would be to apprise every jury in appropriate cases that it had the power to nullify the law. The alternative, common law situation is thus: the jury has the prerogative, but in not being informed of this its exercise may come to be dependent upon the presence of a knowledgeable juror who can inform their fellow jurors of their power. As such the prerogative has the potential to be exercised capriciously.

⁷⁷ Indiana Code Title 35, Art 37, Ch 2, s 2(5); Maryland State Constitution, Declaration of Rights, Art 23.