

# A Future for Jury Research?

By Dr. Paul Robertshaw

Even during the passage of the Contempt of Court of Court Act 1981, whose section 8 prohibited access to jury deliberations, including research, there was concern that this restriction was too absolute- expressed by the then Lord Advocate, Lord MacKay of Clashfern. Since then the Royal Commission on Criminal Justice and the Law Commission have recommended that jury deliberations research should become lawful. There was a Private Member's Bill in 1992 to that effect and this year Lord Gordon Borrie QC put down an amendment to the Mode of Trial Bill. His amendment fell with the Bill itself. Now we have Sir Robin Auld's views in the *Criminal Courts Review*.

The chapter on the jury contains a section on jury research (paras 76-87 and three recommendations); there is a degree of overlap between this section and two others on unreasoned verdicts and on perverse verdicts. Sir Robin comes out against what he calls 'intrusive' research, which he defines as 'how individual juries reach their decisions' (paras 80,82). He does however approve the research (1999) by interviews of 312 jurors in 48 trials by the New Zealand Law Commission (paras 85-86) which he describes as non-intrusive, though his Recommendation that s.8 should not be amended (p168) would continue to render that modest variety of research (para 85) impossible. However Sir Robin does have a Recommendation for the amendment of s.8 (p173): 'to permit, where appropriate enquiry by the trial judge and/or Court of Appeal..into alleged impropriety by a jury...'. It would be a digression to discuss that here, except to state that there is a tension between these recommendations; similarly with the proposals regarding jury-room interpreters and counselling (paras 45-46). Instead I draw attention to one lapse in the information on which Sir Robin proceeded, that is on 'intrusive' research. In the USA such methods have been used. There was the 'bugging' of juries in civil trials in Kansas City in 1960 with the co-operation of court and counsel, but without the consent of jurors. This method remains prohibited today- and I do not propose otherwise. Since then there have been two sets of recordings of jury deliberations in state trials in which their consent was obtained. Here I simply remark that the criminal justice in both those states continues to operate as it always did – dire predictions of those opposed to such research have not been borne out. It is a pity that Sir Robin was unaware of the two pieces of published research on the jury deliberation in the Wisconsin trial of Leroy Read in 1986. The advantage of such research is that their lay processes in which 'lawyer' topics may surface and interweave in various parts of the collective discussion, can be observed; rather than the atomised recollected accounts of isolated jurors, as in the NZ research.

The Review provides an opportunity to generate discussion as to the principles and methods by which jury deliberations research might be conducted. My starting point is that this is indeed a sensitive area and that untrammelled access to the jury by researchers should not be contemplated. On the other hand, to limit such access to government controlled departmental units would be invidious; as with the fate of the Home Office's research on jury 'challenging': J Vennard and D Riley *Crim L Rev* (1988) 731 T4 and

s118 Criminal Justice Act 1988; and the lack of use of easily available research for the Home Office Consultation Document on Serious Frauds (2/1998). Licensing therefore seems to be an appropriate way forward, I assume by the Lord Chancellor in consultation with the Lord Chief Justice.

Beyond this lie concerns over the types of research that might be licensed. The door that legislation can open is that of direct access to the jury itself. In my opinion there is no substitute for this if we are serious about such issues as moveable goal-posts on the standard of proof for particular offences, or particular types of defendant; and how one might assist - rather than denigrate - juries' methods for coping with or evaluating complex or expert evidence, or credibility; and so on - the list is long.

However a caution must also be entered. Those consensually recorded American deliberations are 'valid' in that such jurors in real trials are responsible for their decisions, unlike those in BBC 2 's otherwise outstanding 'mock' trials in 1998-1999. However because of the 'observer effect', one can worry over their 'existential authenticity', because it is a fact that these few trials were dominated by problems such as 'hung' verdictless deliberations. Over the years I have attempted to square the circle of jury validity and authenticity in proposed research: the Double Shadow jury was impractical (*The Times* 17/1/1989); the Sound-shape jury would produce too little information for policy development (*The Times*: 1/2/1994); the 'Focus jury' for practitioners and trial judges, on which I worked with a Circuit judge, was shot down by the Bar's Professional Standard Committee without consultation!

Here I would like to propose another method. This I call EBP, Ethical Bugging Procedure. I am grateful to Ruth Chadwick, the ethicist and Professor of philosophy at Lancaster University, for her advice when I was developing this idea. The method relies on the advances in recording methods, which enable unobtrusive recording to be made, so that jurors would not know at the time whether they were being recorded in any particular case. The key to the method is a double consent protocol. The first would seek consent limited to recording and confidential research analysis. The second consent stage would be limited to those who served as such jurors; this would be for publication of identifiable deliberation material relating to that juror, for example in LCD jury induction videos, or in a Bar symposium on a particular issue, and so on. This brief article necessarily glosses over practical problems; here I will mention just one: the position of a defendant convicted by such a jury. I suggest here three ways in which one might appeal-proof the verdict of such a jury on this point. One might also obtain the defendant's consent. The court, which in any event could terminate the EBP process at any time during trial, might impound the recording until after the appeal limitation period had expired; or, one might shred all recordings of deliberations resulting in conviction, thus limiting the research to acquittal verdicts.

In preliminary discussion on using this method in the Isle of Man, where there is no equivalent to section 8, the issue of 'intrusiveness' was relevant. The Deemster, HH Michael Kerruish considered extending the voice-activated microphones of the Isle of Man Courts of Justice to the jury room. My view was that these visible objects were

‘intrusive’ (like the American cameras and crews). My preference was for state-of-the-art unobtrusive recording devices; their downside was the additional costs involved.

There have been two purposes in writing this article. The first has been to keep the idea of research open, and to be open about a novel avenue of research. The other is to open the method up to other researchers. Within the UK there is much to be said for a standardised method under the proposed licensing conditions, so that particular offences and research issues could be examined in a variety of Crown Court localities by a variety of academics, who might then share their data. Beyond that, if such research was not to go forward, the method is now in outline available to researchers in other jury jurisdictions.

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