WHAT CAN WE LEARN FROM PUBLISHED JURY RESEARCH?: FINDINGS FOR THE CRIMINAL COURTS REVIEW 2001

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Summary: *Contrary to popular myth that "there is no jury research", there is a mass of work published throughout the world and the English legal system could learn a lot from it, in reshaping the jury system. Here I summarise findings made by a Kingston team, commissioned by the Criminal Courts Review, to analyse empirical research and personal accounts of jury service and extrapolate lessons for the English legal system.*

I. INTRODUCTION

On commencing the Criminal Courts Review, Lord Justice Auld asked whether s. 8 of the Contempt Act, 1981 should be repealed so as to permit research into the jury and asked what we were likely to find if such research were carried out. His call follows the clamour for the repeal of the section to enable interviews to be carried out on "real" English and Welsh jurors. Many legal commentators here wrongly believe that s. 8 put a stop to all useful jury research. When new work is published, such as that conducted for the New Zealand Law Commission from 1998, it is received as a revelation, as if it were the *only* such work, oblivious of the fact that a search in sophisticated legal and or criminal justice English language databases will reveal 3-5,000 pieces of jury research or commentaries thereon. I studied the American jury in great depth, while teaching at the University of

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California at Berkeley, in 1992-3 and became aware of this mass of work, mostly by social scientists and experimental psychologists, from the U.K., the U.S.A., Canada, New Zealand, Australia, Spain and Russia. Consequently my response to Auld L.J.'s questions was to suggest that before we expend British taxpayers' money in re-inventing the wheel, we should attempt to summarise and examine this mass of existing empirical data to see if there were lessons we could learn for the restructuring of English jury composition and the trial process.

The task almost overwhelmed us. We concentrated on what seemed, from the literature, to be the most cited and academically respected pieces. We excluded work of no relevance, such as that applicable peculiarly to civil juries. We omitted the mass of work produced by the multi-million dollar American "trial support" industry, which feeds information to trial lawyers selecting jurors in the elaborate American "voir dire" system and devising trial tactics, because much of this is not academically respected. We completed the task in one month in autumn 2000, for its delivery to Auld L.J. Some significant items from 2001 have been added but we do not pretend to present an exhaustive survey. Sources are not footnoted here, nor is our extensive bibliography attached.[1]

We examined research on jury composition and the representativeness of jury panels; how juror's characteristics affect deliberation and the verdict; the mental process of the individual juror; the dynamics of deliberation; the timing and effectiveness of instructions, verbal and written; tactics to make jurors less passive, such as asking questions and

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[1] These can be obtained from the full report, "What Can the English Legal System Learn from Jury Research Published up to 2000?", accessible online via the Criminal Courts Review website: www.criminal-courts-review.org.uk or as the hard copy document, published by Kingston University and available from p.darbyshire@kingston.ac.uk.

permitting deliberation during the trial; jury size; the "competence" of juries and jury equity; the pains of being a juror and experiments in responding to the shortcomings in jury representativeness and functioning identified in the research. Most of the work reviewed here was conducted on experimental juries in laboratory conditions or on shadow juries. Some work results from the questioning of real jurors. The shortcomings of experimental juries have been well rehearsed years ago and are examined by us in our full paper. Further, an obvious objection to our review is that much of this work comes from other common law jurisdictions, operating in a different cultural context so we measured the research findings against published personal accounts of their service by real English and Welsh jurors, to see whether cultural and legal differences rendered different results. This is a short summary of a lengthy paper.

II. Jury Composition

A. Do Juries Represent the Population at Large?

The most recent work on this in England and Wales, the 1993 *Crown Court Survey* for the Royal Commission on Criminal Justice, confirmed older findings that women and non-whites are underrepresented. Detailed analysis in New Zealand in 1993 found certain occupational groups to be underrepresented. This is highly likely to be the case here for the same reasons: excessive statutory exclusion, excusals and non-appearances. 1999 research for the Home Office showed showed 38 per cent. of those summoned were excused. Excuses and exemptions are not randomly distributed across different populations so this distorts the representativeness of juries.

Selection from the electoral roll is a flawed system. Research as long ago as the 1960s, in the USA, showed electoral lists are not representative of communities and this has since been confirmed in Australia and New Zealand. This is caused by factors such as population mobility and

residential status, which are linked to class and income levels. Census data in England and Wales show non-registration to be high among ethnic minorities, the 20-24 age group and renters. Also, it is well known that non-registration may be an attempt to evade council tax. As long ago as 1968, Federal U.S. legislation required supplementary source lists, such as drivers' licence and public utility lists to be used to correct this unrepresentativeness. Most research shows that merging electoral rolls with other lists increases the proportion of young people and non-whites in jury pools.

We found that the new central summoning system for jurors has not solved the problem of a high avoidance and excusal rate. In London in 2000, the Bureau found they had to summon six times as many jurors as needed and four times as many elsewhere in England and Wales. We found if jurors ignore their summons and reminder letter, many Crown Court centres will take no steps to pursue a non-respondent.

Research in England and Wales, California and New Zealand found that the causes for high excusal and avoidance rates are problems with childcare, family commitments, employment problems and potential lost income. The one-day, one-trial system has been introduced in some states of the U.S.A. in response to these problems but we would not recommend cutting down the length of jury service here because of empirical evidence that more inexperienced jurors are more likely to acquit.

B. Do Jurors' Characteristics Affect their Vote in the Verdict?

Many researchers agree that the main factor affecting verdict is the evidence. Beyond that, there is a lack of consensus over what characteristics affect the verdict. Males participate in the deliberation process more than females. The effect of gender on jury decision making is a complex one, linked to other factors in the trial. Again, studies on the relationship between age and verdict produced inconsistent results but it seems that most work has not found a significant association between age and verdict. Nevertheless, one study

showed a clear relationship between youth and fuller recall of facts in the jury room. There is clear evidence that higher occupational status and educational levels are linked to higher recall of evidence in the jury room.

Much mock jury research confirms the findings of a study of over 35,000 trials in New York State 1986-95, that there is a clear relationship between racial composition and verdict, confirming public belief. Acquittal rates were higher in places with high black and Hispanic populations.

II. Jury Decision-Making and Deliberation

A. The Individual Juror

Of all models developed by behavioural scientists to reflect the thought processing of the individual juror, the cognitive story model developed by Hastie, Penrod and Pennington is the one which has received most academic acclaim here and in the U.S.A. and New Zealand and appears to us to accord closely to the accounts of their jury service given by real English and Welsh jurors. This is also why it is often said that the best advocates are the best story tellers. The juror attempts to organise information into a narrative story, using trial evidence, personal knowledge and personal opinion of what makes a complete story. Unfortunately, evidence is not presented in a form that best aids the development of a story. For instance, lengthy cross-examination of experts may disrupt the formation of a story.

On witnesses, any questioning of an expert witness's reputation instantly damages their credibility, whether founded or not. Unlike in several other jurisdictions, English and Welsh jurors may not be given expert evidence on the reliability of eyewitness or earwitness evidence, despite a mass of empirical evidence throughout the twentieth century of the unreliability of both.

Jurors are persuaded by simple, direct language. English and Welsh research in the 1970s and 1990s shows

that evidence of a recent conviction has a significantly damaging effect of the perception of the defendant but a conviction for a dissimilar offence is more favourable to the defendant than being of good character.

There is widespread evidence from several jurisdictions that joinder of defendants or a trial on multiple charges confuses juries. Evidence accumulates in the mind of the juror and judicial instructions to consider charges and defendants separately has little effect.

B. Instruction

There is much sophisticated research on jury instruction in the United States. Virtually every involved researcher agrees that juries have a great deal of difficulty in understanding instructions, even though research shows that most juries conscientiously try to follow them (as for instance, in the Oxford jury research project). Improvements in comprehension have been achieved experimentally in the United States, by reorganising instructions, reducing sentence length and complexity, avoiding jargon and uncommon words and using concrete rather than abstract concepts. Psycholinguistic experts could help in rewriting instructions. A useful guide to rewriting instructions has been developed in Michigan.

It is well known that audible information is lost soon after receipt. Written instructions do not reduce deliberation time but they result in better comprehension, retention and application. They make jurors more satisfied and efficient and they participate in higher quality deliberations. American researchers have suggested a juror notebook with witness photos, key documentation and a written instruction. Similar conclusions have been reached in recent New Zealand research on real jurors, who found a written summary of the law useful. We encountered English circuit judges who have given word-processed instructions to juries for some years.

The pros and cons of pre-instruction have been analysed. Most writers appear to conclude in favour of

pre-instruction, which confirms accounts of real jurors in England and Wales that it is illogical and confusing to receive a mass of verbal information (the trial evidence) and then be verbally instructed on the decisions the group has to reach on that information. Judges were less surprised by and more satisfied with the verdicts of pre-instruced juries (in American experiments with real juries) and tend to favour their use, finding no difficulty and no extra burden in preparing them.

C. Pre-deliberation Discussion

In the English legal system and its common law daughters, jurors are expected to remain passive and not discuss the case until all the evidence has been presented. Nearly every writer believes, however, that the vast majority have reached a decision before deliberation and a good proportion have discussed the evidence. This is confirmed by the New Zealand Law Commission project (informing their 2001 Report), which found that 12.5 per cent. of real juries engaged in pre-deliberation discussions. The research report concludes this did not lead to prejudgment. The main weight of opinion among American writers is that trial can be improved by pre-deliberation discussions and have analysed the advantages. Since 1995, Arizona has been experimenting with moves to make the jury more active and attentive including pre-instruction, pre-deliberation discussion, encouraging note-taking and written questions through the judge. The majority of real jurors and judges involved in these experiments thought being permitted pre-deliberation discussion helped jurors understand the case.

D. Asking Questions and Taking Notes

Accounts of their jury service by real jurors in England and Wales show a serious inhibition against asking questions. Both everyday observation and the published accounts show the minority of jurors attempt to take notes. Their accounts show that they find this makes it difficult to concentrate on observing the witnesses. This is recognised in

the United States, where note-taking is banned in some jurisdictions. It should be noted however, that taking the occasional note keeps jurors awake and alert.

E. Beyond Reasonable Doubt

This direction is almost universally seen as problematic. Recent English research found that subjects thought the quantum of proof varied with the gravity of the offence. Most subjects instructed with the English instruction, including the word "sure" equated BRD with an impossible 100 per cent. proof and this was confirmed by very recent English research. A survey of American studies showed that the percentage proof at which jurors were prepared to convict varied from 51 to 92 per cent., very close to their interpretation of the balance of probabilities. Some American researchers have suggested that BRD should be explained to jurors in percentage terms because the modern lay person is accustomed to percentages, although where to fix the percentage of proof BRD is problematic because U.S. research shows that even federal judges equate it with 80 to an impossible 100 per cent. proof.

F. Jury Deliberation

Observation of experimental juries shows that once a clear majority appears, then, through discussion and negotiation, other members are persuaded to adopt that verdict until the required majority for conviction is reached or the jury is hung. The larger the number of options available, the more deliberations will focus on negotiation. Many jurors will have a pre-deliberation preference and the eventual verdict will mirror these prefences in the overwhelming majority of cases. The larger the majority, the more likely it will be the eventual outcome. Experimental jurors form alliances with those of similar outlook. If unanimity is required, deliberations involve a more thorough investigation of the evidence and law, called "evidence–driven", because dissenting factions have the ability to hang the jury. Where a majority verdict is sufficient, as in England and Wales, there

is less consideration of the evidence and more emphasis on the mechanics of reaching agreement. These "verdict-driven" juries tend to start with a verdict category and construct a story to fit. Verdict-driven juries also form after a vote is initially taken in the jury room, prior to deliberation. One author suggests that, where a majority verdict is sufficient, jurors should be instructed to examine the evidence in depth first before taking a vote. Homogeneous groups tend not to consider evidence that conflicts with their view, whereas heterogeneous groups are evidence-led. Most researchers examining the balance of power find that around three jurors may be responsible for 50 per cent. of the discussion. They also agree that the silent minority hold a disproportionate level of power, for reasons we explore in the full paper. For this reason we would not recommend a reduction in jury size. Many States in the U.S.A. have six person juries and American research shows these smaller juries produce more variable decisions (as well as being less representative of the population). More discussion contributions come from those with higher status occupations, more education, male gender and the foreman, who, as real English and Welsh jurors support, is mostly male. Where the jury is evenly divided at the start of deliberations, the likely verdict is acquittal. We have a lot more to say on deliberation and verdict in the full report.

G. Giving Reasons

There is no reason why juries should not be given a series of questions to structure their decision-making. There are models for this in the English civil jury trial and Spanish criminal juries.

H. The Trials of the Juror and Measuring the Research Findings Against Real Jurors' Accounts

Published accounts of real jurors in England and Wales on over 60 juries show elements of jury service which cannot be replicated experimentally. Boredom is the most commonly mentioned reaction, along with inconvenience and

resentment at having failed to avoid service, discomfort, and resentment at being herded around or treated rudely. I observed and describe in the report a shocking example of jurors being dealt with rudely, in 2000, which gives the lie to assurances in *The Courts Charter*. Real jurors are often heavily critical of lawyers' performances and judges' summing up. They give accounts of personality clashes, arguments and confusion over the evidence and prejudice against particular witnesses.

On the dynamics of deliberation and reaching a verdict, the interpretation of instructions, especially quantum of proof and note-taking, real jurors' accounts back the research findings to a remarkable degree. For instance, they give strong support to the story model, the dynamics of discussion and the findings on evidence-driven and verdict-driven juries and the timing of instructions. To the research findings, they add an interesting insight into the difficulty of note-taking; what influences real juries; a substantial inhibition against asking questions, mentioned above; methods of selecting a foreman and deciding how to deliberate and the frustration they feel at not hearing the whole story, where evidence has been excluded.

I. Other Matters

We also examined the findings on jury equity, "the Friday afternoon effect" and hung juries, the different dynamics of juries required to bring in majority or unamimous verdicts, the effects of harrowing evidence on jurors and the question of counselling, the use of alternate jurors and other matters which there is not the space to summarize here.

III. CONCLUSIONS AND RECOMMENDATIONS FOR AULD L.J., DELIVERED NOVEMBER 2000

These are based on our full report and our opinions, not on the summary here. Published accounts by real English and Welsh jurors endorse the research findings to a

remarkable degree and demonstrate that foreign experiments and reforms may be equally useful to us, despite cultural differences.

1. Juries in England and Wales are unrepresentative of certain groups, notably women and minorities and, possibly, some occupational groups.
2. Most of the lengthy list of the statutorily disqualified and ineligible should be eliminated. The category of excusable as of right should be abolished.
3. Selecting jury panels from the electoral roll excludes certain groups, notably those who choose not to register or whose residential status is more transient. This excluded group includes a disproportionate number of non-whites. The Juries Act 1974 should be amended to require that the roll be merged with other lists, such as those compiled by the DVLC, the DSS and Inland Revenue and/or telephone directories, mobile 'phone subscriber lists and mailing lists.
4. Most people try to avoid jury service. The astonishingly poor ratio of jurors to the number summoned (1:4; 1:6 in London, in 2000) is a cause for concern because:
   - Although adults in England and Wales only have a one in six chance of doing jury service during their eligible lifetimes, if most people avoid or evade service, this places an undue burden on those who do serve, who may serving for more than one period.
   - Honest jurors deeply resent the high avoidance/excusal rate.
   - In London, it appears that five sixths of those summoned are avoiding or evading service. This must distort jury representativeness.

- The lack of enforcement of jury summonses may bring the law and the jury system into disrepute.
- The more widely it becomes known that jury service is easy to evade, the more people will evade it.

5. The Central Summoning Bureau team is currently developing a database of why people seek to be excused. This is likely to confirm existing Home Office research findings that common reasons are child care and work commitments.
6. Employees already enjoy protection, although the loss of earnings allowance is insufficient to compensate some and jury service may be especially disruptive to the self-employed. If jury service is spread fairly, however, most people will only need to serve for two weeks in their adult lifetimes. This is not an unfair burden on a citizenry who appear to "believe" in the jury system.
7. The burden would, if it were fairly spread, be no more on an employer or a self-employed juror than taking an extra fortnight's holiday, once in a lifetime. The deferral system partly offers flexibility but Lord Justice Auld might consider offering the juror a choice of dates within a certain period of, say, a year or six months.
8. Reducing jury service to a week would be likely to increase the acquittal rate. Accordingly, we do not recommend it.
9. Where childcare or care for the elderly or infirm are a problem, a loss of earnings allowance and employment protection could be offered to another person to take over the role of carer for the period of service.
10. Lack of representativeness is a cause for concern because some personal characteristics, such as those listed below, appear to be related to verdict

preferences and contribution to deliberation. Making the jury pool more representative cannot guarantee that any individual jury is representative because these are selected at random from the pool and may, therefore, be all white or all female. Nevertheless, juries as a whole will tend to be more representative. The following findings should be taken into account:

- Men participate more in jury room discussion, are more likely to be foremen and may be more likely to acquit than women, in certain circumstances. Jurors are more likely to empathise with defendants of their own sex. (Incidentally, in this context, it should be borne in mind that defendants are overwhelmingly male and men are more likely than women to have a criminal record.)
- Age may affect the deliberation process, since younger people can recall more instructions and more of the evidence.
- Occupation and education have an effect on the juror's ability to recall the case, in the jury room.
- There is a relationship between race and verdict and this is strongly perceived to be the case by the public. The racial structure of juries is and will continue to be a provocative issue. Lord Justice Auld may wish to reiterate the RCCJ's recommendation that the trial judge should be able to order that the jury should include at least three black or Asian jurors, as appropriate, in a racially sensitive case. This does not, however, solve the problem of potential bias against Irish defendants by an all-English jury. Irish jurors should not be routinely excused service in cases involving Irish alleged terrorists.

11. The most popular theory on how jurors individually consider the trial and verdict is the

cognitive story model. Accounts of real English and Welsh jurors strongly support the story model and the research finding that the adversarial trial process presents evidence in a way which hampers the juror's construction of a story.

12. It is questionable how effective the average juror is at judging the truthfulness of a witness based on demeanour but real jurors' accounts show that many of them are influenced by whether they approve or disapprove of witnesses.

13. Although *Turnbull* allows a warning that even truthful and impressive witnesses can be in error, some jurisdictions allow a much greater input from experts on the reliability of eyewitness evidence and other expert evaluation of different types of evidence. Since we are already concerned at the increased length of trial times in the Crown Court, we would be reluctant to suggest a new opportunity for a bonanza for expert witnesses. There is another solution to this. The LCD or Judicial Studies Board or a small committee of circuit judges could assess the state of expert knowledge on the reliability of certain types of evidence, with help from research sponsored by the LCD, and juries could be informed accordingly. Again, there is no reason why a simple list of such findings should not be added to the juror's introductory pamphlet and the relevant warning explained again, orally, in the appropriate context. The same points apply to earwitness evidence.

14. The accounts of real jurors show they are frustrated by the fact that pieces of evidence have been excluded from the story and they speculate on what this evidence might be. They sometimes refer to jury trial as a game.

15. Jurors may be disproportionately influenced by evidence they are told to ignore and are influenced by previous convictions.
16. Joining defendants and multiple charges can confuse juries.
17. Juries are much better at remembering evidence than individual jurors but real juries sometimes argue in the jury room over the contents of the evidence.
18. Jurors seldom take notes but cannot be expected to take a useful note of the evidence and note-taking could distract them from witness evidence. If jurors are to be required to give reasoned decisions in the future, it may be necessary for them to have access to the transcript. The *Modernising The Crown Court* project, introducing new technology for some trials in England and Wales has not made a difference to this problem. Only 50 courtrooms are projected to have such recording equipment installed and jurors are still required to request a playback of the tape, which is played back to them in open court.
19. If English judges are to continue to sum up the evidence, they should be told not to recite their notes but to draw attention to the main points, to areas of conflict and to how the law applies to the issues of evidence.
20. Juries have a great deal of difficulty in understanding and applying judicial instructions. The Judicial Studies Board's model instructions should be subjected to rewriting by English and Welsh psycholinguists, possibly in accordance with guidelines developed in the United States.
21. Juries should be given written as well as verbal instructions on the law after the trial. These should be drafted by the judge and agreed by counsel and

explained verbally by the judge. Where possible, juries should be given a pre-trial summary of the issues. Certain basic instructions, such as on burden and quantum of proof could be written into the juror's introductory pamphlet and pinned, as reminders, onto the walls of the jury room.

22. Juries have immense difficulty in understanding "beyond reasonable doubt". Depending on how it is interpreted by the judge, they may equate it with 51-100 per cent proof. Modern lay persons are used to evaluating probability in terms of percentages. English research findings confirm real jurors' accounts that when judges use the word "sure", some or even the majority of jurors will equate BRD with absolute proof. On the other hand, with different instructions, jurors may equate BRD with the balance of probabilities. It may be thought desirable to describe BRD in percentage proof terms. In any event, the word "sure" should be eliminated from the BRD direction.

23. Real jurors in England and Wales experience a great inhibition against asking questions, often to the detriment of their deliberation. Encouraging jurors to ask questions, take notes occasionally and discuss the evidence at an interim stage may all help to keep them awake and alert and to make sense of the trial, to help them remember the evidence more accurately, to understand the case and make their deliberation more focussed.

24. Since juries consider the evidence more thoroughly when they are not "verdict driven", it may be thought desirable to encourage them to discuss the evidence thoroughly before taking a vote on verdict.

25. We agree with the suggestion being made by many that the ECHR may require jurors to give reasoned decisions. They could be given a series of

questions, agreed between counsel and judge, as they are in civil trials. Lord Justice Auld might find it helpful to study research on how the procedure works in Spain. If jurors are to be asked for reasons, then they must surely be told of their power to acquit in the face of condemnatory evidence, as an exercise of jury equity.

26. We would recommend against reducing jury size because juries will be less representative of the population and their verdicts may be more erratic.

27. Many jurors resent giving up their time for jury service. The universally abiding memory of almost all jurors is boredom, waiting to be used at a trial, or waiting while legal argument takes place in a trial, or in court. The activities of the Central Summoning Bureau, contrary to some of the assurances given in the press release at its launch and in *Modernising the Crown Court* will not prevent jurors waiting around, only to be sent home, because no-one can pre-empt a trial collapsing into a guilty plea. In long trials, where boredom and resentment may warp the jurors' sense of judgement, it would be wise to use the afternoons for legal argument and conduct the jury trial in the mornings when the jurors are more alert, as was done in the Maxwell trial.

28. Real jurors' accounts from England and Wales show jurors suffer a lot of discomforts, in addition to boredom and inconvenience, which may affect their performance. Heat and cold, boredom and their passive role may reduce their arousal levels and ability to concentrate on the evidence. Court managers should regularly check courtroom temperatures and it may be wise to give jurors frequent breaks and encourage them to be more active, as described above.

29. Small discomforts all irritate jurors. Jury managers should encourage feedback on these minor irritations and try to respond. All court personnel should be taught to be polite to jurors and respect the fact that jurors are making a personal sacrifice for the public good.
30. Jury service can be very stressful, emotionally and physically. In extreme cases, jurors may become depressed after a particularly harrowing trial.
31. In long trials, one or two alternate jurors should observe alongside the jury, in case of illness or other indisposition.
32. We have made no attempt to examine research into complex and lengthy serious fraud trials, or to suggest how they could be improved. Fraud trials are not all complex and complex and/or lengthy trials may be of crimes other than fraud.