Trial by jury: has the lamp lost its glow?

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Of course trial by Jury is one of our sacred cows. But, you know, if we’d long had trial by Judge in criminal cases and I were now to suggest that his reasoned and professional judgment as to facts and inferences should be replaced by the blanket verdict of pretty well any twelve men and women placed in a cramped box and hold up there for days or even weeks at a time you would rightly think that I had taken leave of my senses. (Professor Hogan, letter to The Times, 3 May 1982)

Introduction

Trial by jury has been in existence, in England, since the 12th century, when Henry II (1133-1189) favoured it over trial by ordeal. During early medieval times a person accused of having committed a crime was injured in some way (the ordeal). Most commonly this was (a) by fire: walking barefoot on a bed of hot coals, branded with a heated iron bar, if no blisters/the injury healed within a certain period of time-usually three days-this determined innocence: failure to heal signified guilt, or (b) by cold water: if the defendant sank to the bottom of the pool he/she was accepted as pure by the water and deemed innocent, if he/she floated, then guilty. It was believed that God would intervene to condemn the guilty and acquit the innocent, reliance being placed not on reasoning but on faith (Bingham 1999, 208), the verdict of the ordeal being accepted as the judgment of God. Jury trial became enshrined as a principle of civil liberty upon the signing of the Magna Carta by King John in 1215 (Article 39). Throughout the ages, its statutory provisions have been amended and consolidated many times within the last two centuries alone, by virtue of the Juries Acts of 1825, 1870, 1922, 1949, 1954, 1974 and, most recently, the Juries (Disqualification) Act 1984. Its concept must also be viewed in conjunction with the Criminal Law Act 1977 and the Criminal Justice Acts 1972, 1988, 1994 and 2003. Over the years, it has been the target of much scrutiny by judiciary and academics alike. It was subjected to review by the 1993 (Runciman) Royal Commission (Cm.2263 HMSO, London, 1993) and more boldly by Sir Robin Auld in 2001 (Lord Justice Auld, Review of the Criminal Courts of England and Wales, HMSO, London, 2001). Brief mention will be made of its
changing role in the coroner’s court and civil courts, but the main focus of this paper is the arena of criminal jurisdiction.

The English (England and Wales) criminal justice system is highly regarded world-wide and jury trial has, historically, been perceived by many as one of its strengths. Lord Chief Justice Vaughan, in *Bushell’s Case*, described the jury as ‘the bulwark of liberty’, possibly borrowing the phrase from Abraham Lincoln. Lord Devlin referred to it as the ‘bastion of liberty against excessiveness of the executive and judicial power’ and ‘more than an instrument of justice, more than one wheel of the constitution: it is the lamp that shows that freedom lives’ (Devlin 1956, 164, my emphasis; a reference to the candles that were lit in the windows of houses in London, following the acquittal of seven Bishops in 1688). These positive adulations have continually been repeated in academic circles to perpetuate the use and retention of the jury.

**Fundamental concepts**

The main principle of our legal system is that the law is so formulated that a man is innocent until he is proven guilty beyond reasonable doubt. Our Constitutional framework, incorporating as it now does Article 6 of the European Convention on Human Rights, provides for ‘trial by an independent and impartial court’. Running alongside this is a second powerful fundamental principle coupled with the concept of fairness: the doctrine that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’ (Lord Hewart CJ, *R v Sussex Justices ex parte McCarthy* 1924). As Jaconelli states: ‘it is a fundamental which has long been formally recognized in constitutional and human rights texts throughout the world’ as, for example, the Sixth Amendment to the Constitution of the USA, even though he acknowledges that ‘there is no fundamental constitutional text embodying the right to it’ (Jaconelli 2002, 5-6). The question is: does trial by jury succeed in upholding these principles?

**Fairness**

The system strictly in England and Wales, unlike the criminal jurisdictions in the United States, is in fact trial by judge and jury as a composite tribunal, the former directing on law and summing up the evidence for the latter, the exclusive decision-maker on the facts.
On the question of fairness, perhaps one of the fundamental issues to examine first is the composition of the jury. Peter Thornton asserts that the modern jury is ‘undoubtedly a different creature from the jury of 1954’ (Thornton 2004, 684). The qualification and eligibility for jury service, set for many years in the early nineteenth century, was modernised in the Criminal Justice Act 1972 by the abolition of the property qualification, and by the reforms of the Juries Act 1974 with, amongst other things, increase of the age range, currently 18 to 70.

Despite these reforms, the common view was that juries still tended to be, in the famous words of Lord Devlin in 1956, ‘male, middle-aged, middle-minded and middle-class’ (Devlin 1956, 20). Zander and Henderson (1993), Runciman (1993) and Thornton (2004) all found that the social classes of jurors reflected the wider population in terms of unskilled manual workers, but that professionals, managers and skilled manual workers were under-represented. Research in 1993 by the New Zealand Department of Justice undertook an even more detailed analysis of occupational groups on jury panels and found likewise under-representation. Had the same study been undertaken here, similar findings would have occurred, so similar were the processes in the two countries in respect of juries. Auld LJ summarised the situation in the following terms:

> juries in England and Wales mostly still do not reflect a broad range of skills and experience … of the communities from which they are drawn. Jury service may be an important incident of citizenship, but many in this country do not qualify for this civic privilege and duty. And many who do qualify do not regard it as a privilege and do their best to avoid it. If the jury is to fulfil its valued role of giving the community a say in the administration of justice, it should reflect the community better than it does. (Auld 2001, ch 5)

There were various reasons for this, in particular the statutory exclusion of large elements of the population by virtue of ineligibility, disqualification or excusability as of right, under the Juries Act 1974, and the summoning and excusal system. Following the recommendations of the Auld Review, the Criminal Justice Act 2003 (which came into force in 2007) swept away most of the categories of ineligibility. Except for the mentally disordered and those disqualified because of certain criminal convictions, or for being on bail in criminal proceedings, anyone on the electoral
roll can now serve. The effect has been to widen significantly the pool of eligible jurors in criminal trials, thereby enhancing their impartiality by strengthening their representative nature. What lies at the heart of these reforms is the perception that twelve people from a diverse cross section of the populous should deliver a range of views, common sense and experience to the jury deliberations, giving the jury as an institution a democratic quality. The most controversial effect of the reforms is that, theoretically, now it is possible for a jury to consist of serving judges, police officers, prosecuting lawyers, prison officers and court staff involved in the administration of justice. This point will be revisited later when examining any negative aspects to which it may lead.

A further element, adding strength to the perception of fairness, is the randomness of the jury selection process, a long established principle. It was reaffirmed by a Practice Direction issued by the Lord Chief Justice on January 12, 1973 and is still current:

A jury consists of 12 individuals chosen at random from the appropriate panel. A juror should be excused if he is personally concerned in the facts of the particular case or closely connected with a party to the proceedings or with a prospective witness. He may also be excused at the discretion of the judge on grounds of personal hardship or conscientious objection to jury service. It is contrary to established practice for jurors to be excused on more general grounds such as race, religion or political beliefs or occupation. (Thornton, 2004, 2 -3)

This encapsulates the old standard ‘twelve good men and true’. Jurors are summoned by the Central Jury Summoning Bureau, having first been selected randomly, by computer, from the electoral roll of the catchment area, local to the particular court, for jury service usually lasting two weeks in length. Once inside the court building, all potential panellists succumb to a further computerized selection process to choose 15 jurors from whom the actual twelve to comprise the jury for a particular trial are balloted. This takes place in Open Court in clear view of the defendant (and quite often witnesses). In addition to demonstrating lack of manipulation of the panel, this has a dual purpose in avoiding later recognition of a party by a juror, or vice versa, two or three days into the trial, rendering the chance of the trial being aborted.
Drawbacks
Paradoxically, the very reforms intended to bring about the fair and representative element to jury composition may inadvertently have contributed to a negativity of the system. Given that there is so little ‘opt out’, the result may be that some jurors who do not wish to be there will be participating unwillingly, or even worse be totally disinterested or obstructive. This does not aid the concept of a defendant having a fair trial. However, there are procedures to deal with these eventualities. The judge will issue a direction to the effect that any problems in the jury room, or attempts at intimidation, should be brought to his/her notice. Unfortunately, the power of the judge to intervene is only possible if anything untoward is reported during the currency of the trial. Section 8 (1) of The Contempt of Court Act 1981 provides that:

it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

In the case of Mirza (2004), the House of Lords decided by a majority of four to one that no-one, not even senior Court of Appeal judges, may enquire after verdict into allegations of jury bias, even where there is a possibility of miscarriage of justice. However, had the question of impartiality been raised by the juror (in the form of a note) during the currency of the trial, the judge could have enquired into the alleged misbehaviour.

Jury bias
This leads on to a commonly cited argument levelled against jurors: that they are biased. The important point here is the perception of bias. In the case of R v Abdroikov (2005), Lord Woolf found that:

the variety of prejudices that jurors can have are almost unlimited … biased due to accused’s class, accent, habits, occupation, physical characteristics … or … prejudice fostered by pre-trial adverse publicity.
Particularly in emotive and sensitive cases, the media attention is so great that it is virtually impossible to find twelve people who have not been influenced by media coverage.

Articles 6 (referred to previously) and 14 of the European Convention of Human Rights require trial before an impartial tribunal without discrimination due to ‘race, colour, language, religion … national or social origin’. The European Court of Human Rights offers protection by having developed a test of impartiality, which has a subjective and objective element. The Juries Act 1974 preserves the common law right to challenge a juror for actual or apparent bias. Auld L J sought to address the argument against, for example, police officers serving as jurors, using the analogy of shopkeepers or householders who may have been burgled trying an offence of burglary. He argues that:

I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have.

Thomas (2008) points out that whilst it has been accepted that in exceptional circumstances a judge has the discretion to achieve a racially mixed jury, in 1989 the Court of Appeal ruled that a trial judge has no power to construct such a jury, nor that a jury needed to be racially balanced, as constructing a multi-racial jury would interfere with the element of randomness which underpins the conception of a fairly structured jury. Any change would have to be granted by Parliament.

Lord Bingham, on dealing with the case of Abdroikov (2005) on appeal in the House of Lords in 2007 ruled that:

The reality therefore is that the jury system operates, not because those who serve are free from prejudice, but despite the fact that many of them will harbour prejudices of various kinds when they enter the jury box. In the United States a voir dire is held to try to select jurors who are free from relevant prejudices. In Britain, with its very different history, such a procedure has not been adopted; indeed, it has been
specifically rejected. If experience had shown that British juries, made up of people
drawn at random from all kinds of backgrounds, could not act impartially, the system
would long since have lost all credibility. But Parliament must consider that it works,
since it has not abolished it or introduced a new procedure for selecting jurors, even
though it has had opportunities to do so. Juries also seem to enjoy the confidence of
the general public. The fair-minded and informed observer will be well aware of this
(34).

Open Justice
It is commonly accepted that the restrictions of section 8 (1) Contempt of Court Act 1981 are
appropriate to protect the confidentiality of the jury and to allow them to carry out their
deliberations with candour. The European Court of Human Rights terms it a ‘crucial and
legitimate feature of English trial law which serves to reinforce the jury’s role as the ultimate
arbiter of fact and to guarantee open and frank deliberations’ (Ferguson 2006, 186). However,
the restrictions of section 8 subsequently limit attempts at research into how juries actually
behave; they are therefore contrary to the essence of transparency and seriously strike at the heart
of the ideal of ‘justice not only being done but being seen to be done’ mentioned earlier. It
impedes a defendant, who believes he has been denied a fair trial, due to some jury
misbehaviour. Previous research into any jury deliberations has been limited: Baldwin and
McConnville (1979) and Zander and Henderson under Runciman (1993). Following the
Lawrence enquiry in 1993 the Department for Constitutional Affairs (DCA) as it then was (now
the Ministry of Justice), took the first steps to remedy the situation. Ferguson (2006) argues that
problems of research could be circumvented, by adopting the policy that the ‘secrecy’ rule only
relates to ‘jury deliberations’ within their retiring room (210). Therefore section 8 (1) would not
be contravened by a court investigating suggestions such as decisions by Ouija boards
(infamously R v Young 1995), as clearly the ‘verdict’ was not arrived at in accordance with the
jury oath to ‘try the defendant … give a true verdict according to the evidence’.

Latest Research
With this principle in mind, research by Professor Cheryl Thomas, published in February 2010,
using data obtained from the Ministry of Justice Crown Court records (2006-2008) in
Nottingham, Winchester and London Blackfriars, has demonstrated the large scope for comprehensive research on jury verdicts in this country within the confines of section 8. She sought to address many of the issues regarded as faults of the present system, examining ethnicity, offence type, composition of jury panel, fairness, impropriety, consistency and juror comprehension. Her findings are well founded because, rather than relying on existing data from other jurisdictions, which may be misleading in their relevance to British juries, she conducted her study under controlled conditions with real jurors. Thomas’ findings are summarised in the conclusion.

**Miscarriage of Justice**
Juries are often blamed for miscarriages of justice. It is true that juries are in a sense responsible for miscarriages of justice when they come to a bad decision. However, as several newsworthy cases have shown (e.g. *R v Clark* 2000; *R v Cannings* 2004) a jury is only as good as the material put before it. Judges would have been just as reliant on seemingly impressive expert evidence as the juries; Clark and Cannings were not the victims of poor decision-making by juries.

**Precedents for erosion of jury trial**
Notwithstanding all the above, precedents have already been set for jury trial to be eroded in certain circumstances. Since 1927, a coroner’s jury has only been necessary in a minority of inquests. The Counter-Terrorism Bill of January 2008 permits the Home Secretary to create special inquests, without juries, for ‘reasons of national security’ or ‘otherwise in the public interest’ (clause 65). As Samiloff pointedly observes: these changes are ‘corrosive to the rule of law and the separation of powers’ in effectively allowing an important part of the justice system to be ‘politically managed … the minister accountable only to a Parliament substantially controlled by government’ (2008, 345). In the civil jurisdiction, jury trial has been abolished in all but cases of libel and false imprisonment. The Domestic Violence Crime and Victims Act 2004 section 23 (2) removed the need for a jury, leaving the judge alone to determine the question of fitness to plead. Blom-Cooper cites the experience of the Diplock courts in Northern Ireland as an indication that the quality of criminal justice need not be adversely affected by the abolition of the jury, whilst acknowledging that there were very compelling reasons of witness and jury protection which brought about this position (Blom-Cooper 2001, 1). Parry refers to the
move away from lay magistrates to professional status and change of title to District Judge, one foot on the judicial ladder (2006, 2). Auld L J rekindled the recommendations of The Roskill Committee (1986) proposal for a fraud trial tribunal. Part 7 of The Criminal Justice Act 2003 denies a citizen of England and Wales the right to trial by jury in two classes of serious cases. It provides for trials on indictment without a jury ‘or certain fraud cases’ (s.43 not yet in force) and where there is evidence that there exists ‘real and present danger that jury tampering would take place’ (s.44).

**History in the making**

In the recent high profile case (March 31, 2010) of *John Twomey and others* (Peter Blake, Barry Hibberd and Glenn Cameron), Mr Justice Treacy will go down in history as the judge who presided over and delivered verdicts in the first ever such trial without jury (in respect of an indictable-only offence) for over 350 years. Starting life in the Royal Courts of Justice, but later transferring to The Old Bailey, and ordered by the Court of Appeal under section 44, after three abortive trials, it concerned a £1.75 million armed robbery at a warehouse in Heathrow in 2004. Adam Fresco, Crime Correspondent, writing in *The Times* on the 1 April 2010, expressed the fear of lawyers that it is ‘the thin end of the wedge’ and precursor to further erosion of ‘the right’ to trial by jury in an attempt to reduce costs. In the same article he quotes Paul Mendelle QC, chairman of Criminal Bar association:

> some values of a democratic society are beyond price. We would not countenance restriction of right to vote because elections were too costly. Nor should we remove right for jury trial simply on grounds of cost when cost cannot be capable of scrutiny (Fresco, *The Times*, 1 April 2010, 8).

There is an inherent danger which brings to mind Lord Devlin’s oft-quoted words:

> Each jury is a little Parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to
overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen (Devlin 1956, 164).

Levine explores the practical consequences leading to ‘uncharted territory’ which ‘push the notion of judicial compartmentalism to breaking point’ (2010, 2). This would be tantamount to a retrograde step, compromising the Rule of Law in the same way as the Counter-Terrorism Bill referred to earlier. Power corrupts and absolute power, given time, corrupts absolutely (Baron Acton 1834–1902). The idea that, as a matter of routine, one sole judge would be constrained to assume the role of decision maker for all aspects of case management, bail / custody status, Public Interest Immunity, bad character, admissibility of evidence (all of which for obvious reasons are not discussed in the presence of the jury), whilst being expected not to allow one’s role of tribunal of fact to be affected, is detrimental to all that has been achieved so far in the democratic institution which is jury trial.

Conclusion
No system is perfect. Zander confirms that he is ‘a strong believer in trial by jury … always regarded it as greatly preferable to any other system …’ (Zander 2005, 2). Trial by jury retains the confidence of the general public (Roberts and Gough 2009, 25) and it would be hard to devise a better or fairer process. Now that juries are representative of society, they genuinely provide trial by defendants’ peers. Trial by jury avoids decisions on the facts by case-hardened judges who have ‘heard it all before’, and, arguably, 12 (or 13) heads are better than one. Dividing decisions on fact and law between lay jurors, who can use their collective common sense and experience of ordinary life, and judges with specialist legal knowledge is a remarkably sophisticated approach.

The view reached by Cheryl Thomas in her ‘large-scale analysis of jury verdicts (CREST) suggests that juries are overall efficient and effective’ (Thomas 2008, 28). Her findings reveal that once sworn, juries are rarely discharged (less than 1%) and once they begin to deliberate they reach a verdict on virtually all charges, hung juries occurring on only 0.6% of charges. Her study concluded that, contrary to popular belief, there were no significant differences in jury verdicts for White, Black or Asian defendants; all-White juries did not discriminate in acquitting
White defendants charged with racial offences more often than racially mixed juries; there were no courts with a higher acquittal than conviction rate dispelling the myth that there are courts where juries rarely convict, and juries are not primarily responsible for low conviction rate on rape allegations (Thomas 2008, 32,46,47,53).

As stated at the beginning of this article, the common law trial by jury system has been in existence for centuries. There is no older or greater civic duty than public participation in the law. Given the newest research, there is still not a single statistic study, or informed body of opinion, which proves that judges would be any more reliable in their verdicts. Therefore there is no legitimate basis for change. I note with interest a radical alternative proposal suggested by Fitzpatrick, to follow the French system of the trial judge retiring with the jury (2010, 15). It is my view that this would inhibit free discussion, undermine the principle of impartiality and merely lead to the twelve jurors looking to one (expert) voice for leadership. This novel reform should not be encouraged. I agree with Shami Chakrabarti, director of the campaign group Liberty, that ‘… (without jury trial ) the professional classes appear to sit in permanent judgment of ordinary people’ (The Times, 1 April 2010). Abolition of jury trial in favour of trial by judge alone would result in public confidence in the criminal justice system being irrevocably eroded. The verdict should be that by preserving jury trial people’s justice is here to stay, hopefully for a few hundred years more.

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