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Introduction

There have been recent calls for major changes to our jury system in a number of states. Such calls for reform are not new, and tend to occur whenever there has been a high-profile controversial jury decision. One recent example was the trial of Pauline Hanson and David Ettridge in Queensland on charges of electoral fraud. The jury in that case handed down a guilty verdict and the pair was sentenced to three years imprisonment. However, within two months the Queensland Court of Appeal overturned that verdict, quashed the original convictions and the pair were set free.

The appellate judges, while not directly critical of the jury's decision, did note that it was a complex case with much complicated evidence presented. As a result, politicians and some legal experts have been calling for changes to the jury system in trials where there is this kind of complex evidence presented. It is thought that such evidence may be beyond the abilities of ordinary men and women to decipher and that the jury's role would be better performed by a panel of judges in such cases. This challenges the role that juries have held in the justice system for centuries.

Background of Juries

The "common law" system was introduced to the Royal Courts of England in the 11th century. Thus, trial by jury, which introduced human judgement into the process of determining guilt operated alongside, and eventually replaced, the practice of trial by ordeal that relied upon divine intervention. The first jury trials were conducted before "a body of men, drawn from a particular locality, sworn to give a true answer (verdictum, verdict) to some question of interest to the Crown". Jurors were selected for their prior knowledge of the facts of the case and their role was to provide the facts and to inform judges of criminal activity, thereby serving the role now reserved for witnesses. Suspects were then tried by one of several ordeals, for example, individuals may be required to immerse their arms into boiling water, and their guilt determined by the healing of their subsequent wounds. By the end of the 17th century, the role of jurors focused solely on determining guilt (adjudication) through passive observation. Those with knowledge of the case were relegated to the role of witness and to providing evidence under oath. A trial before a competent, independent and impartial jury became recognised as a fundamental human right.[1]

Following colonisation in Australia the first "juries" comprised six governor-elected military officers and a military judicial officer. This system was deemed unjust and open to manipulation and prejudice, yet not abolished until 1833. In the name of fairness and feasibility, it was decided that emancipated convicts should be able to serve as jurors, an option previously unavailable due to legal exclusion based on felony convictions. This change introduced the notion of a trial before "your peers" into our criminal justice system. Free settlers argued against this movement, citing an over willingness to acquit by the former convicts and the indignity of free settlers being tried before ex-criminals. Nevertheless by 1900, trial by jury for criminal cases was legislated in each of the federating colonies. At this time juries comprised predominantly middle-aged, middle-class men as it wasn't until the late 1960s that women were afforded the same privilege of jury service as males.[2]

While most common law disputes, including divorce, were litigated before a jury prior to World War II, there has been a decline in this practice. Most civil and family law cases are now litigated before a judge alone (a jury of four is optional in civil litigation), while the majority of criminal cases involving minor crimes are decided in the lower courts by a lone magistrate. A jury trial is not required in an overwhelming majority of Australian cases (about 70%), as they are resolved via guilty pleas, so it is only a minority of cases that actually go to trial before a jury. Despite the fact that jury .trials are generally reserved for the most serious offences, the jury remains the cornerstone of the adversarial system.[3]

Contemporary Australian juries comprise individuals randomly selected from electoral rolls, much like the running of a giant lottery. Those with a recent criminal record are automatically excluded, MPs, police and legal practitioners are also ineligible, and professionals such as doctors and dentists may be exempted. Once assembled, it is the jurors responsibility to determine the ultimate factual question % whether the prosecution has proven guilt of the accused beyond reasonable doubt – based upon the evidence presented and directions from the judge regarding the relevant points of law. Thus, any verdict may be affected by the jurors comprehension of three potentially complex factors % the evidence, the law and the application of law to fact. Much discussion has centred on improving juror comprehension by changing procedure in respect to these factors.[4]

Calls for Reform

Calls for reform to the jury system are not new and tend to occur when there is the perception that justice has "gone wrong", for example, when verdicts are overturned on

appeal or when it seems there is a high rate of acquittals or hung verdicts. The jury is often blamed for perceived injustices and is also often seen as an easy target for reform. Previously proposed reforms have included: majority rather than unanimous verdicts; simplifying judge's instructions to jurors; providing written materials to jurors and allowing them to take notes or even to ask questions. In addition, the call to abolish jury trials in complex cases, due to a perceived inability to appreciate technical evidence, has recently re-emerged in Australia, especially following the Hanson/Ettridge decision.[5]

In the wake of the Hanson/Ettridge appeal court decision, Queensland National Party leader Lawrence Springborg proposed that trial by jury become optional for people charged with serious fraud offences and other white-collar crimes; allowing them to opt for trial before a single judge or a panel of judges instead. The rationale behind this proposal being that the appeal court, comprising a panel of judges, was more competent in assessing the complex evidence in such cases than a jury. The essence of using judges or judge panels is an expected increase in comprehensibility and diminished duration of these trials. This reform has also been proposed for managing cases involving extremely prejudicial publicity.[6]

Research has shown that juries do have most difficulty in trying to reach a decision in highly complex cases, and so it might be useful to examine the jury process and to instigate some minor reforms. One New South Wales study found that one in six juries are unable to reach a unanimous decision and thereby the jury is "hung" and the trial has to be aborted. The cases most frequently resulting in a hung jury tend to be complex cases, involving sexual offences or fraud, and those where there are multiple charges against the defendant. The length of the trial also increases the likelihood that a hung verdict will be returned.[7]

Increasingly too, there is complex forensic evidence presented at trials including DNA evidence or fingerprints, or a paper trail of documents in white-collar crimes. Deliberating on these complex sets of evidence may be an unreasonable burden on those lay people randomly chosen for jury service, without reference to their experience or qualifications. It is suggested that juries may have limited understanding of scientific evidence or financial matters due to unfamiliarity with the relevant technical language or its conceptual framework. This is particularly so in our adversarial system where there can be the situation of having both the prosecution and defence lead evidence from forensic experts who disagree about interpreting the material. The conclusion might well be that if these experts are unable to agree then how could 12 ordinary community members reach a decision about such complex evidence. In addition, they are required to remember such information presented to them orally, synthesise information presented in a fragmented and persuasive manner and reach a decision upon case completion without the option of asking questions of witnesses or counsel. One alternative that has been suggested for these situations is to convene a panel of experts who would then report to the jury.[8]

The jury system is not perfect; it has both its strengths and weaknesses. However, the handing over of all trial processes to those with legal backgrounds can be seen as a retrograde step, removing community involvement and returning the process entirely to the responsibility of the State. The jury system increases accountability and is a protection against oppressive conduct by the State either in making laws or in applying them. The jury "is an almost anonymous group of twelve ordinary citizens with no attachment to the particular case and no dependence upon or relationship with the other participants", which has no future after the verdict is reached. While judges may be more easily identified and subjected to allegations of bias, there is also the possibility of alienating the defendant, as all parties involved except for the defence are State employed. In addition, community participation via juries promotes an understanding of, and confidence in the value of our justice system. Thus, ensuring that not only is justice done but that it is also seen to be just. Indeed, judges are generally supportive of jurors' verdicts and advocate for the retention of the jury system.[9]

The judges' main role is to interpret and apply the law in a strict and technical way, whereas jurors are there to represent the community and to bring some commonsense community standards into the justice process (in a way that a single judge does not). Jurors also bring with them a wide diversity of life experience to the deliberation process, far broader than would be expected from any single judge. Furthermore, judges are not necessarily anymore knowledgeable about forensic science than lay people, nor are they entirely immune to persuasion from experts.

The jury also benefits from collective recall of evidence, and each fact is subjected to group scrutiny. One New Zealand study found that jurors experiencing difficulty understanding evidence were a minority and were generally helped by other jurors who did understand. It was also found that jurors were capable of assessing expert evidence and rejecting it where necessary. However, it was suggested that jurors would benefit from the removal of unnecessarily technical language and the use of visual aides in expert testimony.[10]

Another reform that has been the focus of much debate, is changing the requirement that a jury reach a unanimous verdict to requiring a majority decision. Majority verdicts (10:2; 11:1 in Victoria) are currently an option in all States and Territories in Australia, except Queensland, New South Wales and the ACT; exceptions include cases of murder or treason. If after a specified period of deliberation (often at least six hours) it is clear that the jury will not reach a unanimous decision, a majority verdict may be employed. This reform has been suggested to reduce the amount of court time wasted by hung verdicts and subsequent retrials (where the majority of hung trials are listed for retrial), as well as reducing the trauma experienced by witnesses having to repeatedly testify and be cross-examined. However, in New South Wales it is estimated that the introduction of majority verdicts would only result in modest benefit.[11]

Current Knowledge About Juries

It is important to note that our knowledge regarding juries and their members and subsequently the deliberation process is limited. This is because the identity of jurors is protected in Australia and the United Kingdom. Unlike the USA, where jurors may appear on popular talk-shows, give media interviews or indeed publish books about their experiences, jurors and the jury process remains a relatively secret process in Australia. This is not necessarily a negative situation as jurors should have their privacy and identities protected. However, it does mean that there is only scant

research on who comprise juries, how they arrive at their decisions and indeed how they feel about being on a jury. There is nevertheless some research available.

The two main concerns voiced with regularity about juries are:[12]

1. Representativeness

A frequent comment is that the members of a jury are not truly representative of the community they are meant to be representing, as many people are able to provide excuses for not appearing, and therefore escaping their civic duty of jury service. The evidence that is available shows this not to be the case, especially for juries in the metropolitan centres. They are representative in terms of age, sex, education, and other social and economic backgrounds.

2. Bias

Another common belief is that jurors come to their deliberations with many preconceived notions and biases. However, it is suggested that with 12 people, collectively their values will be representative and that particular prejudices are likely to be negated by others in the group. Furthermore, the research does not support this belief about bias. First, some extensive research has found "cautious support" for the fact that jurors are able to discard any information they have heard about a case in the media. That is, they focus on the evidence presented at the trial and what the judge has instructed them and tend not to be swayed in the main by prejudicial publicity. Secondly, the consensus of opinion from those who have been at trials is that most often juries tend to "get it right". Interviews with jurors show that they take their job seriously, they do weigh up the evidence and they are conscientious in reaching their ultimate decision.

Conclusion

It is true that trials involving complex evidence can present difficulties for jurors. However, the jury is the cornerstone of the criminal justice system and should not be blamed when trial outcomes are viewed as wrong. Nevertheless, there is scope for some minor reforms to the jury system.

It is recommended that in those trials where complex forensic evidence is presented there could well be the case for a trial within a trial (voir dire) at which a panel of court-appointed experts in the field are given the task of weighing up complex or contradictory evidence. Once they have reached a decision then this could be presented to the jury, giving all the relevant information and the final decision by this panel of arbitrators. This would then not usurp the fundamental role of the jury as being representatives of the community.

Questions for Discussion

Debate the view that juries are the "cornerstone" of our justice system?
If panels were to be introduced in trials where there is complex evidence, should it be panels of judges or forensic experts?
Would you like to be a member of a jury? Why or why not?

Notes

1. Bronitt & Hogg 2003; McHugh 1988, p. 56; NSWLRC 1987
2. Chesterman 1999; Hunter & Cronin 1995; NSWLRC 1987
3. Findlay et al 1999; McHugh 1988
4. Findlay 2001; Findlay et al 1999
5. Hogg & Brown 1998
6. Harding 1988; Media Release National Party Queensland, 11 November 2003; NSWLRC 1987
7. Baker et al 2002; Salmelainen et al 1997
8. Brown & Wilson 1992; NSWLRC 1987
9. Chesterman et al 2001; NSWLRC 1987
10. NZLRC 2001
11. Salmelainen et al 1997
12. Chesterman et al 2001; Findlay 2001

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