

Jury Reform in England & Wales – Unfinished Business

Penny Darbyshire, Professor, Kingston Law School (London); Adjunct Professor, University of Notre Dame, Indiana, 2014

I am honoured to be invited to present this paper to an audience of *real* experts on juries and the use of lay people in legal systems. I am always excited about what we can learn from one another, internationally. In 2014, I was privileged to lecture the California Judges Association, in Cambridge. I was keen to learn about the procedures for a defendant opting for a bench trial and the use of alternate jurors. They were keen to learn how England and Wales had eliminated peremptory challenges and almost all challenges for cause!

This paper revisits some of the arguments I have previously made, including those in a meta-analysis of jury research for Lord Justice Auld’s 2001 Criminal Courts Review.¹ Our paper’s recommendations were explored and adopted by Auld LJ. Some were followed by the Labour Government in their 2002 White Paper, *Justice for All*.² The main achievement, from a point I made in 1991 and reiterated in 2001, was the abolition of the long lists of people who were statutorily “ineligible” for jury service and “excusable as of right”, by the Criminal Justice Act 2003. As the press release said

“Judges, politicians, vicars, bishops, doctors and Lords will, from today, be able to sit on a jury...the legislative changes significantly increase the number of people who can now do jury service... Around 480,000 people are summoned for jury service annually. Previously, less than half (about 200,000) were eligible.”³

This paper reignites the 2001 recommendations that have not, thus far, been fruitful. Since 2002, I have had the benefit of sitting on the bench observing the working lives of all types of judge.⁴ In the Crown Court, I was naturally watching the judge and jury at work.

1. Giving the Crown Court defendant the right to trial by judge alone, “jury waiver”

As a matter of principle, I believe the defendant should have a moral and a legal right to choose judge-alone trial (“bench trial”, in American legal English) in the Crown Court, as he can in many of England’s common law daughter jurisdictions. In 1991, I argued that we could not be said to have a “right” to jury trial, in constitutional or jurisprudential terms, other

¹ The Rt. Hon. Lord Justice Auld, *Review of the Criminal Courts of England and Wales – Report* (The Stationery Office 2001). <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/> The paper commissioned by him was P. Darbyshire, A. Maughan and A. Stewart, “What can the English Legal System Learn from Jury Research Published up to 2001?” (Kingston University 2002); <http://eprints.kingston.ac.uk/23/> summarised at [2001] Crim. L.R. 970. In preparing this paper, I am grateful for the research assistance of Holly Howell and Alison Davenport.

² Cm 5563 <http://www.cps.gov.uk/publications/docs/jfawwhitepaper.pdf>

³ Dept. for Constitutional Affairs News Release 152/04, 2 April 2004.

⁴ P. Darbyshire, *Sitting in Judgment – the working lives of judges*, (Hart 2011), chapters 9 and 10.

than in “either way” offences, where the defendant can choose Crown Court judge and jury trial, or trial in the magistrates’ court by three lay justices. Depending on location, he may be tried, exceptionally, by a district judge (magistrates’ court) but he has no choice

“What of indictable offences? Here, I must appear before the Crown Court, where my only choice is as to plea. My only right is as to trial. I cannot choose to be tried by judge alone, as I could in the United States”.⁵

Two years later, Zander found that 30 per cent of 499 Crown Court defendants surveyed said that they would have chosen trial by judge alone, had the law permitted this.⁶ My argument was cited by Jackson and Doran in their thoroughly researched and very persuasive 1997 article, “The Case for Jury Waiver”.⁷ That year, I also reiterated this argument.⁸ I drew attention to Schulhofer’s famous article on the Philadelphia bench trials⁹ that I had observed a decade after him.

In 2000, I sent those articles to Auld LJ and asked him to observe bench trials in the USA. He did so and also visited Canada, where he found that in some provinces, there was a very high uptake of bench trials. In his *Review*, having examined the law in the USA, Canada and New Zealand, he recommended that:

“defendants, with the consent of the court after hearing representations from both sides, should be able to opt for trial by judge alone in all cases now tried on indictment...” (p. 181).

This was adopted in *Justice for All*¹⁰ and accordingly, the Government included such a clause in the Criminal Justice Bill 2003. Disappointingly, it was removed at the eleventh hour¹¹ after weak and ill-informed debate. Parliamentarians, like some lawyers and probably members of the public, simply cannot imagine why a defendant would opt for a non-jury trial and they have no idea that this right is taken for granted in other English speaking countries, yet Auld LJ had carefully set out six common reasons why defendants make this choice.

- Factually or legally complex cases, where the defendant wants a tribunal who understands the case;
- defendants with technical defences;
- defendants who have attracted public opprobrium for repugnant offences (sex or violence), who expect a judge to be objective;
- defendants who have suffered adverse publicity;

⁵ “The lamp that shows that freedom lives – is it worth the candle?” [1991] Crim. L.R. 740, at p. 742.

⁶ The Royal Commission on Criminal Justice Crown Court Study, Research Study No 19 (HMSO 1993), at p. 172.

⁷ [1997] Crim. L.R. 155 and their footnoted publications, notably *Judge Without Jury – Diplock Trials in the Adversary System* (Oxford 1995).

⁸ “An Essay on the Importance and Neglect of the Magistracy” [1997] Crim. L.R. 627 at 642.

⁹ “Is Plea Bargaining Inevitable?” (1984) 97 Harv. L.R. 1937.

¹⁰ P. 74.

¹¹ R. Bennett, “Sacrifice of trial by jury plans saves justice Bill” *The Times*, November 21, 2003. It was dropped in exchange for the clause permitting judge-alone trials in jury nobbling cases (now s. 44), “Officials said it was never particularly important”.

- cases turning on identification or confession evidence;
- where judges are known to local practitioners and trusted to try cases competently and fairly.¹²

When I explain to lawyers and judges in the UK why a defendant might opt for a bench trial, I often give a practical example, reported in UK news in 1994. A woman in San Francisco whose daughter died of morbid obesity was tried for her homicide. She chose a bench trial, fearing that all potential jurors would be hostile to her. The Bar opposed Auld's recommendation in these terms:

“Judges are likely under these proposals to have a diet of unpopular sexual allegations; unattractive middle or upper class fraudsters; and cases where the defence lawyers hope for a technical victory...such opportunistic excursions...so that defendants can seek to exploit the perceived advantages of the professional judge [risk] bringing the law into disrepute”.¹³

This conjures an image of juries creaming off the “attractive” defendants, such as armed robbers and terrorists. There is no evidence that the judge-alone option has brought the law into disrepute throughout North America, Canada,¹⁴ New Zealand¹⁵ and those Australian states and territories where the bench trial option is permitted.¹⁶ Aside from the cultural arrogance of some English lawyers, one problem in England and Wales is a fear of the unknown, coupled with ignorance of comparative criminal procedure and even how the English legal system works. Many barristers and consequently Crown Court circuit judges simply cannot imagine how a bench trial works, how a criminal judge can be an arbiter of fact and law, as I discovered during the ten years I spent researching judges' working lives. As one circuit judge asked, “What'll happen in the courtroom when a judge retires to bring in his verdict?”¹⁷ Many are oblivious of the work of their counterparts, district judges in the magistrates' courts, let alone lay justices conducting bench trials. Magistrates' bench trials include some serious adult matters in the “either-way” category and, hidden away in the youth court, multi-handed robberies, gang rapes and incidents related to gang-warfare.¹⁸

¹² P. 178. For detail, see Doran and Jackson.

¹³ The General Council of the Bar and The Criminal Bar Association, “Response to the Review By Lord Justice Auld of the Criminal Courts”, undated (2001 or 2002), at p. 30.

¹⁴ A current plain English explanation is on the Department of Justice website “More serious offences are prosecuted by indictment. In most cases the accused may choose to be tried by a provincial court judge, by a superior court judge or by a judge of a superior court with a jury”. <http://www.justice.gc.ca/eng/>

¹⁵ The system is under reform to reduce the jury trial option. See discussion under “new criminal procedure” and see statistics under “court and tribunal statistics” <http://www.justice.govt.nz/>

¹⁶ A current plain English explanation is in the Criminal Courts section of the Australian Bureau of Statistics website. All defendants in the Higher Courts are tried by judge and jury, except that in some states and territories the defendant may elect for a judge-alone trial. <http://www.abs.gov.au/>

¹⁷ Darbyshire (2011) p. 221.

¹⁸ Illustrated in *Sitting in Judgment*, ch. 8.

Auld's recommendation did receive some weighty support, however, notably from The Law Society, then representing eight times as many lawyers as the Bar Council, provided that the defendant's decision was "an informed one, taken after legal advice".¹⁹

As I consider that the defendant should have a moral right to opt for trial by judge alone, I would not allow the judge to veto that choice, unlike Auld LJ. I am aware that most circuit judges are very strongly in favour of jury trial²⁰ not least because they would not want to determine guilt or innocence themselves.²¹ Judges' preferences do not trump my argument that the defendant should have a moral right to a bench trial.

There is no need to research this issue again. Doran and Jackson left no stone unturned in examining the moral and mechanical issues and international comparative criminal procedure. The only need is for critics and especially parliamentarians to be better informed and to understand that this right is *normal* in other common law countries and that we already have bench trials operating in the magistrates' court, including in some very serious cases. There is no need to worry about how bench trials can function, practically and procedurally. Ask the 21,600 English and Welsh lay justices and 142 district judge (magistrates' courts) and their legal advisers. Incidentally, bench trials have the advantage of a reasoned verdict. Although the magistrates' court is not a court of record, magistrates and DJMCs decided to give reasons from 1998, in anticipation of the Human Rights Act coming into force in 2000 and triggering the Convention's Art 6 requirement for reasoned decisions.

2. Alternate or Extra Jurors

In the 2001 paper for Auld L.J., citing Baroness Helena Kennedy Q.C., we recommended that alternate jurors should be sworn in for long trials, to insure against a trial's collapsing because of juror problems.

"Given the expense of some long trials, even swearing in two alternates would be worthwhile. It is common practice to use alternates in the United States...In four Australian jurisdictions, up to six reserve jurors may be sworn in. This is not yet permissible in Canada, Scotland or New Zealand, nor in English law."²²

Our suggestion was discussed by Auld LJ at pp. 142 – 143. He cited a fraud trial that was forced to proceed with nine jurors, as is permissible in England and Wales. Incidentally, although juror problems did not cause the 2005 collapse of the Jubilee Line fraud trial, two jurors had already been discharged – one for an allegation relating to benefit fraud and another had become pregnant – and a third was "reluctant to attend court unless a problem he had with his employer over pensions payments was resolved by the Department for Constitutional Affairs", which was impossible.²³ Auld recommended that judges be

¹⁹ At p. 15 of their response.

²⁰ Zander (1993, p. 172) found that 79 per cent of 419 Crown Court judges surveyed considered the jury system good or very good, confirmed by my own conversations with judges (2011, p. 221).

²¹ Darbyshire (2011) p.221.

²² P. 37 in the hard copy; p. 40 in the electronic version.

²³ HM Chief Inspector Mr S. Wooler CB, *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case* (HMCPs Inspectorate 2006), p. 2.

empowered to swear in alternate or reserve jurors in long cases, where they consider it appropriate. This was not, however, followed in the *Justice for All* legislative plans.

The safest procedure for using alternates is to swear in, say, 14 jurors then use a ballot to select the final 12 at the pre-retirement stage. This, however, raises the problem that the discharged jurors have contributed to discussions throughout the trial in a decision for which they do not have final responsibility. This is obviated if the extra two simply remain in the jury so that on the very rare occasions where a judge sees fit to swear extra jurors and the jury remains intact, the verdict emanates from a jury of 14, enhancing its legitimacy. There is a large body of research on optimum group size for decision making and a group of 14 has benefits and drawbacks, as does a group of 12. The pros and cons of all “alternate juror” procedures have been thorough canvassed recently in Canada and New Zealand.²⁴

Jury boxes only have space for 12 jurors. To reject this proposal on such a ground would be a case of the tail wagging the dog. There is no reason to make bigger jury boxes throughout the court estate. A few courtrooms could be equipped with an extra box for two, complete with IT and a monitor and the jurors could take turns in sitting in the extra box. Simply as a cost comparator, the Jubilee Line trial collapse wasted £25 million and 21 month of the jurors’ lives.

3. Pre-trial case summaries

In 2001, we recommended to Auld LJ that, where possible, juries should be given a simple pre-trial summary of the issues, because of the illogicality that I had remarked on, as a 1990 juror, of receiving all the trial information (evidence) before being told what to do with it.²⁵ If a group of people is expected to take a decision, it is abnormal and unhelpful to provide them with all of the information first, and then to tell them afterwards what decisions are expected of them, especially when the delivery of the information takes days or weeks. We quoted Grove, citing an American judge that it was like:

“telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game”.²⁶

Auld LJ adopted our recommendation in his *Review*.²⁷ Sixteen of the 27 circuit judges interviewed on this topic for *Sitting in Judgment* were either opposed, or considered that it would only be of limited use in, say, complex trials. Almost all gave the same reason, “Issues shift during the course of the trial”. Nevertheless, Lord Justice Auld had contemplated this: the agreed statement could be amended and approved. Several judges considered the pre-trial

²⁴ The pros and cons of all options are outlined in a New Zealand Ministry of Justice consultation paper, *Options for Avoiding Retrials Following the Discharge of Jurors Following Trial Commencement* (2008), p. 12-14 and a Canadian report, cited therein, *Final Report on Mega Trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System for the Federal/Provincial and Territory Deputy Ministers Responsible for Justice* (2004). New Zealand has chosen to follow the English example of allowing the trial to proceed with fewer jurors.

²⁵ “Notes of the Lawyer Juror” [1990] N.L.J. 1264.

²⁶ T. Grove, *The Juryman’s Tale* (Bloomsbury 1998).

²⁷ He examined this in some depth: pp 518-523.

summary ought to be done in the prosecutor's opening speech. Of those judges in favour, however, some had already done it:

“I see no problem in giving sort of mini-directions before the trial starts or before the speeches—‘Members of the jury, you will be invited to consider this’...I may say to the jury ‘The only issue that I anticipate that you may have to decide is whether he had these drugs with him and he intended to supply them to someone else’.”

If the Criminal Justice Act 2003 was working as intended, resulting in fuller defence statements, then surely the provision of a pre-trial summary of the issues would be even more feasible now, than when we made this observation in 2001. Lord Chief Justice Phillips repeated this point in 2007, in a speech, “Trusting the Jury”:

“Sir Robin Auld in his report recommended some more radical changes to the nature of jury trial. Issues should be identified before trial, with better use being made of the defence statement. At the start of the trial the judge should give the jury a summary of the case and the questions that they will have to decide, supported by a written aide memoire, agreed with counsel before-hand. The jury should be told the nature of the charges, a short narrative of the agreed facts and a summary of the facts in issue and a list of the likely questions for their decision”.²⁸

The 2010 Bench Book, *Directing the Jury*, which was supposed to be a response to his concerns, is silent on this precise point, as is a 2009 training guide written by His Honour Judge Inigo Bing, then a Crown Court judge.²⁹ In 2010, Moses L.J. reiterated the suggestions of Auld and Phillips:

“...defence counsel should be required to tell the jury what the defence is at the outset...there is some superstition...that to require the defence to explain its defence somehow infringes the right to silence. For an inexplicable reason, the statutory obligation to update the statement has not yet been brought into force. The statute limits the power of the judge to show the jury this statement to those cases where it *would help the jury to understand the case or to resolve any issue in the case.* (S. 6E(5)(b)). It is not possible to envisage any properly drafted defence statement which would not be of assistance to the jury.”

One problem here though is that my recent work on case management in ten of the 71 Crown Courts showed that by the time of the plea and case management hearing, in some courts, defence statements were missing in most cases, because of prosecution disclosure failures, or, in any court, they sometimes amounted to a solicitor's template asking questions rather than giving much information.³⁰ Nevertheless, in an eleventh court in 2007, which specialised in serious fraud and other complex cases, the resident judge said that he had demanded full

²⁸ Judiciary website.

²⁹ Not a public document. I am grateful to have been given a copy.

³⁰ “Judicial Case Management in Ten Crown Courts” [2014] Crim. L.R. 30.

statements for years and showed me a 45 page statement. I observed him in a case management hearing as he kept rejecting a statement that was not explicit enough. Strict trial management in cases like this, from 2005, and demands for thorough preparation, appeared to have generated a culture change, according to nine fraud judges.³¹ There is no reason why, regardless of the defence statement, strict case managing judges cannot insist on a pre-trial outline, agreed by both sides, which would be helpful to the jury. Jurors, like everyone else, build up a story in their heads of what went on in the case.³² They need an outline of the prosecution's story, and outline of the defence story and they need to know what facts are agreed. This third point, coupled with robust judicial case management, might also serve to focus lawyers' minds on what evidence they do *not* need to bore the jury with relentlessly in the trial, such as a simple trial described in *Sitting in Judgment* where the defendant admitted shooting his wife at point blank range. The only contest was whether it was accidental but the jury suffered slow video footage of the entire house *twice*, with the deceased sitting up in bed, plus still photographs, then the post mortem report, in grisly detail, then the re-enactment of the entire unedited transcripts of the police interrogations.³³ The 1999-2001 New Zealand Law Commission jury research project identified complaints by jurors about the absence of guidance at the start of the trial about what were the real issues. Young, one of the researchers, supported our argument that jurors create "an evolving story which makes sense to them" so "the initial frame which jurors adopt in order to construct their "story" is important". Young said research had perhaps contributed to judges' increasing use of written material and certainly encouraged them to "give reasonably elaborate directions and advice at the commencement of trials":

"It is this frame which enables jurors to select from and interpret the evidence as it begins to emerge... The New Zealand research identifies many complaints by jurors about the absence of clear guidance at the start of the trial as to the real issues in the case. In the absence of such guidance, jurors are likely to focus on what, in the end, turns out not to be in dispute and not to realise in a timely way the importance of what may be the critical evidence".³⁴

They supported Auld L.J.'s recommendation for a written pre-trial instruction identifying the issues.

4. Encouraging jurors to ask questions

In 2001, we reported that jurors who had published stories of their jury service in England and Wales frequently mentioned a strong inhibition against asking questions. This confirmed

³¹ R.F. Julian, "Judicial Perspectives in Serious Fraud Cases – The Present Status of and Problems Posed by Case Management Practices, Jury Selection Rules, Juror Expertise, Plea Bargaining and Choice of Mode of Trial" [2008] Crim. L.R. 764.

³² Darbyshire, Maughan and Stewart (2001), pp22-23.

³³ P. 199.

³⁴ W. Young (Judge of the HC of NZ), "Summing-up to Juries in Criminal Cases – What Jury Research says about Current Rules and Practice" [2003] Crim. L.R. 665, citing W. Young, N. Cameron and Y. Tinsley, N.Z. Law Commission preliminary paper 37, vol. 2, *Juries in Criminal Trials, Part II A Summary of the research findings* (1999).

Zander and Henderson's *Crown Court Study*.³⁵ 44 per cent of 8,194 jurors had wanted to ask questions but under a fifth had done so. Matthews, Hancock and Briggs made the same point.³⁶ 67 per cent of their sample had wanted to ask questions. Many felt uncomfortable about holding up the trial. Some felt they were actively discouraged. Some felt it would be embarrassing. In the observational research with judges reported in *Sitting in Judgment*, no judge suggested to a jury that they might ask questions. Judges neither encouraged nor discouraged it. In some American jurisdictions, it is recognised that jurors experience this inhibition so they are actively encouraged. Although English and Welsh jurors are told that they may ask questions, in 2001 we recommended that it may be helpful to alert judges to this inhibition and to encourage them to ask the jury at certain points in the trial whether they needed to ask questions. Matthews et al recommended that 15 minutes per day be set aside for this. Many jury reforms have been pioneered in Arizona, as a result of research. Jurors are told in their orientation video that they may ask questions of witnesses, provided that these are in writing and submitted to the judge.³⁷ Similarly, English jurors are told in the YouTube video "Your Role as a Juror" that "if at any point you need further explanation or want to ask a question you can do so by passing a note to the judge, via an usher", but it is not clear whether this means "at any point in the judge's summing up". Clearly it does not but it could be so interpreted by a lay person, as it stands. Ample prior research has demonstrated that asking questions and taking notes encourages jurors to be active and alert, avoiding the "passive sponge" effect that we discussed in 2001.

5. Written Directions and Simplifying Directions

There is something unreal about having to reiterate a call for written directions when the intended audience, the jury, has progressed beyond the era of reading hard-copy material. According to 2014 research, "Britons spend more time using tech than sleeping".³⁸ The principle of orality in English and Welsh criminal jury trial runs deep. In 2001, relying on previous international research, we recommended that judges be encouraged to give written directions to jurors and a series of written questions. The suggestion on written directions goes back at least to the 1970s LSE jury project.³⁹ Auld LJ contemplated ideal directions at some length and adopted this recommendation. He cited Professor E. Griew, who suggested a series of written questions, with minimal reference to the law.⁴⁰ Auld said the jury should not direct the jury on the law, save as implied in the questions of fact he puts to them.⁴¹ In 2001, we did not ascertain how many judges did this. In researching *Sitting in Judgment* (2011), it transpired that the practice of giving written directions was much more common than the 2001 paper anticipated. 23 of the 27 circuit judges questioned on this point said they had given agreed written directions. (Two were newly appointed and had not yet had the

³⁵ *Crown Court Study* for the Royal Commission on Criminal Justice Research Study No 19. (London, HMSO, 1993) p. 213.

³⁶ R Matthews, L Hancock and D Briggs, 'Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts', Home Office Online Report 05/04.

³⁷ Jury Service Information <http://www.azcourts.gov/juryduty/JuryServiceInformation.aspx>

³⁸ Research by Ofcom, BBC News, 7 August 2014.

³⁹ W.R. Cornish, *The Jury* (Allen Lane 1970).

⁴⁰ "Summing up the law" [1989] Crim. L.R. 768.

⁴¹ Pp. 532-538.

chance).⁴² Most supplied copies of examples and it was clear that the directions usually took the form of a sequence of questions, or sequences following alternative routes, rather like a flow-chart. Judges did not give written directions in routine cases where the issues were simple but they generally gave them in murder, reckless arson, rape, joint enterprises and dangerous driving. Judges showed me how they prepared written directions in murder cases. Nevertheless, written directions were the exception. Frequency varied from one Crown Court resident (managing judge) who had given them twice in his career to another resident who said “I do it all the time” and certainly in every murder case. Both conducted many murder trials. One judge said that he was becoming increasingly willing to give them. Two judges outside the research sample said, in 2007, that they gave written directions in *every* case. One had been influenced by a 2006 article on the subject by Judge Madge,⁴³ who had tried written directions in all cases and reported the results: quicker verdicts, fewer questions and more convictions.

Why do jurors need written directions? In a 2010 case simulation study with 797 real jurors, Cheryl Thomas found that only 31 per cent accurately identified two questions the judge had set them to determine self-defence but 48 per cent of a sub-sample of 72 jurors who received an additional one-page aide-memoire were able to correctly identify the questions.⁴⁴ In the first stage of her current UCL jury project, she found that 70 per cent of 239 real jurors said they had received written directions and 100 per cent of that group had found them helpful. Of the 30 per cent who did not receive them, 85 per cent said they would have found written directions helpful.⁴⁵ Continuing his 2007 endorsement of the Auld Review, Lord Phillips went on:

“At the end of the evidence the judge should no longer direct the jury on the law, nor sum up the evidence in detail. He should remind the jury of the issues and of the evidence relevant to them and, of course, of the defence. He should put to the jury a series of written factual questions, the answers to which would lead to a verdict of guilty or not guilty. These proposals were made seven years ago. They have not been taken up. The time may come when they receive further consideration.”

In the Judicial Communications Office response to Cheryl Thomas’s 2010 research report and recommendation that jury directions should be simplified, they said “The Judicial Studies Board now recommends that written directions be given to juries in all but the most simple of cases”. I would expect that if I were to re-interview my sample of judges, they would have increased their use of written directions. I would also expect that all new judges and recorders (part-timers) would give written directions in some, if not most, cases. All judges in the *Sitting in Judgment* research asked advocates to approve written directions before offering them to the jury. By doing so, they protected themselves from disapproval by the Court of Appeal and the consequent quashing of a conviction. One novice told me of an instance

⁴² I also interviewed High Court, Court of Appeal and UKSC judges with criminal trial experience on this point.

⁴³ HH Judge N. Madge, “Summing up – A Judge’s Perspective” [2006] Crim. L.R. 817.

⁴⁴ *Are Juries Fair?* Ministry of Justice Research Series 1/10, p. 38.

⁴⁵ C. Thomas, “Avoiding the Perfect Storm of Juror Contempt” [2013] Crim. L.R. 483, at p. 498.

where the advocates had disagreed with her proposals and she had redrafted the directions and then checked them with the resident (managing) judge.

In 2001, incidentally, I also suggested that certain basic instructions, such as on the burden and standard of proof could be placed on jury room walls. Why *not* do this?

Not before time, serious large-scale research into jury directions is being undertaken by Professor Cheryl Thomas, in the UCL jury project. She is looking at the form and frequency of written directions, “as well as looking at which form(s) of written directions is clearer and easier for jurors to understand - routes to verdict, bullet point summaries, full transcripts, etc. The findings should be available early in the new year” (email August 2014). This is extremely welcome. Crucially, it is perfectly clear since 2011 that the sort of “route to verdict” directions and questions now given by many judges and which we recommended in 2001 are necessary to satisfy the defendant’s fair trial rights under Article 6 of the European Convention on Human Rights, as defined in Strasbourg jurisprudence, in *Taxquet v. Belgium*,⁴⁶ as explained by Spencer:

“Whilst stating that the need for reasoned decisions applies even with lay juries, the Grand Chamber accepted that it could be met in other ways than by requiring the jury to provide a reasoned judgment in the same way as a professional judge. One possible way, it said, was by giving the jury a set of “precise, unequivocal questions” to answer, so providing “a framework on which the verdict is based”. In France this already happens, at least in some cases, but this had not been done in Belgium in the case in hand. Another way, it said, was by “directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced”, which is of course what happens in the UK and in Ireland.”⁴⁷

Auld LJ went further than this and would have required jurors to publicly state their reasons. He also sought an end to jury equity (the power to nullify). Sadly this caused such outrage and antipathy that it sounded the death knell to a good part of his report and it lost all credibility to some commentators.

I am preparing a separate paper on jury directions on the standard of proof. In our meta-analysis of jury research we concluded that juries have difficulty in understanding the direction on the standard of proof and we said the word “sure” should be eliminated from the direction, because research indicated that it inevitably sends some people looking for absolute proof. To my alarm, since 2011, the word “sure” is the *only* requirement in the direction on the standard of proof. The standard of proof throughout the common law world is “beyond reasonable doubt” (BRD), yet in England, the mother of all common law systems, worldwide, we appear to have eliminated BRD from the instruction. To require jurors to be “sure” is a nonsense. They cannot be sure. They were not witnesses. Even some defendants cannot be sure of whether they committed the actus reus or had the required mens rea as they were intoxicated at the time of the alleged offence.

⁴⁶ Case 926/05, 13 January 2009.

⁴⁷ Professor John Spencer, “Strasbourg and Defendants’ Rights in Criminal Procedure” [2011] C.L.J. 14.

As for simplifying directions, In our 2001 paper, we had recommended that specimen jury directions be simplified with expert help of linguists and psycholinguists, as in some states in the US, and we expressed concern that current specimen directions responded to the Court of Appeal's requirements and had not been "road tested" on real people. The 2010 Crown Court Bench Book *Directing the Jury* (Judiciary website) tries to change the judicial approach and to stop some judges slavishly following the specimens. It explains the law's requirements, then presents examples. These have still not been tested on non-lawyers (they were drafted by judges again) but simplifying some instructions seems an impossible task when the law is so complex. For example, the section on a defendant's failure to mention facts he later relies on (exercising the right of silence) amounts to 9.5 pages, including a two-page suggested direction. There is another large section on how to instruct the jury on a defendant's failure to account for evidence. The 2010 Bench Book may result in directions being more varied but it in no way guarantees that they will be more comprehensible to juries. By 2011, it was thought necessary to produce a Crown Court Bench Book Companion, also drafted by judges.⁴⁸ This is said not to replace the Specimen Directions, in the sense that forms of words are not provided. It encourages individually crafted directions. So the specimen directions are done away with and instead we rely on the skills of individual judges to explain the lists of everything necessary to the jury in plain language, meaning, I suggest, "plain language understandable by the least articulate juror". Daphne Perry, barrister turned plain English consultant, pointed out that while encouraging "plain English", the 2010 Bench Book suggests judges should direct jurors in such terms as "oral evidence", "he gave an account", "you will appreciate that".⁴⁹ As Moses LJ said "It should not be forgotten that however clear the new directions are to a lawyer, they are in a foreign tongue to a member of the jury".

6. Summing up on the Evidence

One question raised regularly is whether judges in England and Wales should continue to sum up on the evidence, for the jury. The issue is under scrutiny by Leveson LJ in his current review of efficiency in criminal proceedings, perhaps prompted by the famous speech by his Court of Appeal brother, Moses LJ, "Summing Down the Summing Up"⁵⁰ In neighbouring Scotland, judges rarely sum up. In the USA, the curb on judges commenting on the evidence goes to the very root of the Constitution and the history of America. It is seldom remembered now but repugnance at colonial judges' power over juries was just as much a spark to the American revolutionary war of independence as taxation without representation. Modern American judges and lawyers are deeply suspicious when they observe English judges summing up. Their suspicion has a historic basis. The very purpose of the summing-up was not to remind the jury of the evidence, but, from 1836, when counsel were permitted to address the jury, to comment.⁵¹ Modern trial judges almost certainly do not know that. They sit in court with the Court of Appeal metaphorically "sitting on their shoulders".⁵² The Court of Appeal in London is hyperactive and has become increasingly prescriptive about judicial

⁴⁸ See March 2012 version, Judiciary website.

⁴⁹ "Direction" *Counsel*, March 2011, p. 35.

⁵⁰ 2010, Judiciary website.

⁵¹ Moses LJ, 2010.

⁵² A repeating theme for civil and criminal trial judges in *Sitting in Judgment* (2011).

utterances and what constitutes a fair trial. Judge Madge examined the appellate case law in 2006 and observed that it was customary for judges to start with the “mantra”, “If I appear to express any views or comments about the evidence, do not accept them, unless you agree with them”.⁵³

Regardless of the arguments above, in our paper for Auld LJ we were simply concerned with how juries could be helped in performing their function. It is conceivable that a summing up helps the jury, especially as some jurors do not take notes and those who do are not necessarily experienced note-takers. In 1993, Zander found that 19 per cent of 6,728 jurors thought their task would have been “much harder” without the summing up and this rose to 34 per cent in trials over a week long. A further 33 per cent thought their task would have been “a little harder”.⁵⁴ In New Zealand, where judges traditionally sum-up on the evidence, research on real jurors demonstrated that some still suffered difficulties with recall and comprehension.⁵⁵ In work-shadowing judges in my research from 2002, I asked judges to show me how they drafted their summings-up and to comment on this in their interview. They demonstrated how they prepared the summary of the evidence day-by-day as the trial progressed, from their longhand notes. Some explained that it was time consuming to sum-up in a relevant and concise manner. Merely reciting everything in one’s notes was regarded as a bad technique of judges of yesteryear.

“Someone said ... the ideal is to have no more than one hour [for every] week of evidence ... most summing-ups are too long because people haven’t taken the time to make them shorter.”

“You have got to be able to analyse and organise material. If you are going to help a jury... it is no good just reading through your notebook. I saw this 20 years ago ... horrendous.”

“I often work at home in the evening ... as the trial is progressing. It is only at the end that the issues... and the pattern become clear and you can pick out what is important, so you are left with a massive workload at the end.”

“I was summing-up for most of the weekend on this big contract killing. All of that work is now down the drain as I had to abort the trial. The most boring part is reading through the evidence and highlighting the parts of interest ... You can’t just read it from your notebook because it has to be tailored to what the issues are in the end, and that is very time consuming.”

“I really enjoy...say, at the end of a case that lasts a fortnight...to sum it up in less than an hour and a half, to have distilled it into a series of issues and to present it to a jury in a digested and balanced way which I hope helps them ... I enjoy creating a balanced résumé and telling the story to the jury in a way that brings it to life yet helps them with their decisions.”

⁵³ As above and for case law on the CA criticising judgmental judges, see the criminal procedure and jury chapters of *Darbyshire on the English Legal System* (11th edition, Sweet & Maxwell 2014).

⁵⁴ 1993, p. 214.

⁵⁵ Young, 2003, cited above, p. 684.

In 2001, we recommended that in summing-up, judges “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”. The research judges that I work-shadowed after this date clearly endeavoured to do this and judges’ interviews acknowledged the time and care that must be taken in preparing a summing-up that is sufficiently brief and focussed to help the jury. In the last quotation, the judge was unwittingly confirming what we found to be the psychologists’ consensus that jurors operate an internal “cognitive story model” in which they try to make sense of the evidence by constructing a feasible story, in their minds. Zander and Henderson, in 1993 and Jackson,⁵⁶ in 1996 referred to judges summing-up for the prosecutor or the defence⁵⁷ but the judges I observed would have been horrified at this suggestion. They tended to see it as an archaic practice. Typically, in 2006, one judge explained this to a group of curious American law students, who asked him if he tried to get the jury to acquit or convict.

“If you try and tell a London jury what to do they may well rebel ... Nowadays judges don’t try and sway a jury. There used to be some judges who were masters at telling the jury the verdict they wanted them to bring in.”

I would be astonished to witness this nowadays. While judges may, in law, express an opinion, modern circuit judges seem to strive to be neutral, out of a sense of real neutrality and fairness, a distaste for the role of fact-arbiter and a realistic fear of being appealed. Although I did not question judges on this, I would expect that many would not even realise it was *legal* for them to comment on the evidence.

Young said that as a result of their research, a number of New Zealand judges gave transcripts of evidence to juries.⁵⁸ On being asked whether they considered that juries should be given access to a trial transcript, 19 of 25 Crown Court judges interviewed on this point in *Sitting in Judgment* thought this a bad idea. They felt jurors would become ‘bogged down’ in a “mountain” of paper. Many had experience of reading *Livenote* instantaneous trial transcripts and pointed to the fact that these could generate about 70 pages of transcribed text per trial day, which was difficult enough for a judge to cope with, let alone a jury. They warned that concentrating on a fragment of the dialogue could give a biased impression of the evidence. They felt that judges were there to take notes and juries could ask them to clarify testimony if necessary. The job of the juror was, as they saw it, to note the demeanour of witnesses. This answer was typical.

“juries are there to sit and watch and listen. Judges miss such a great deal when they are... trying to make a note. The great value of the jury is they hardly ever miss a trick ... I am not happy when I see jurors writing too much down ... if they were given a transcript ... they would be tempted to answer those little questions that sometimes have to remain unanswered ... combing through it in almost an attempt to review the entire case.”

⁵⁶ J Jackson, ‘Judicial Responsibility in Criminal Proceedings’ (1996) 49 *Current Legal Problems* 59.

⁵⁷ D Wolchover, ‘Should Judges Sum up on the Facts?’ [1989] *Crim LR* 781 said ‘judicial habits vary’.

⁵⁸ Young, above, 2003, p. 685.

Several judges said the jurors' job was to watch the witnesses. Of the six judges who were prepared to allow jurors access to a transcript, one gave the following reason.

“I think otherwise they are very often saying ‘a witness said this or the other’ when what they really have in their mind are counsel’s questions and I think that to be a good defence advocate you are getting a view of the events across to the jury by way of your questions which actually isn’t reflected in the evidence at all.”⁵⁹

7. Helping juries with their deliberations

In our 2001 meta-analysis, we examined the major pieces of research on jury deliberation, including the dynamics of negotiation and the difference between evidence-driven and verdict-driven juries. The only point we made was that, since the research indicated that juries considered the evidence more thoroughly when they were not verdict-driven, it might be thought desirable to encourage them to discuss the evidence thoroughly before taking a vote. In her 2010 study, Thomas found that 67 per cent of jurors surveyed said they would have liked more information on conducting deliberations. In her current UCL jury project, 82 per cent of 239 jurors said they would like more guidance. The most popular aspects were on what do if they were confused about a legal issue, or if something went wrong in deliberations, how to ensure that jurors were not unduly pressured into reaching a verdict and how to start deliberations.⁶⁰ In the second stage, these findings will help the trialling of deliberation guidance.

8. Jurors’ engagement, comfort and well-being

In our 2001 paper, we remarked on the abiding memory of most jurors who had published written accounts of the jury service as boredom and waiting around. There is much less of this nowadays. Thanks to cutbacks in public spending, jury managers may now only request the number of jurors they think they will need so the number summoned has gone down. In 2011-12, when I was researching case management, I noticed that the position was often reversed. Judges were often kept waiting, with other trial participants on standby, for a jury to become free.

We also remarked that small discomforts can irritate jurors. For instance we suggested that court managers should check courtroom temperatures. Disappointingly, I found in my research on judges at least one judge who kept his courtroom temperatures very low, thinking that this would keep jurors alert, seemingly oblivious of the fact that cold reduces arousal levels. Worse, I discovered on the western circuit that “All courtroom temperatures are controlled from Bristol”.

We remarked on the experiences of one of us, observing a new jury panel being “welcomed” in a London Crown Court and how they were addressed and shepherded around in a disrespectful manner. I recommended that all court personnel be taught to be polite to jurors and respect the fact that they are making a personal sacrifice for the public good. Auld LJ addressed these points and the need to keep jurors informed at all times. Juror satisfaction surveys show high levels of satisfaction and routine information is now provided to individual jurors, when they are summoned and is publicly available online. The Court Service had assured Auld LJ that jurors were kept well-informed, for instance, about when they would be needed in court. In the context of all of this, the report on the

⁵⁹ 2011, p. 218-19.

⁶⁰ 2014 at. p. 496-97.

interviews with the jurors in the collapsed 21 month Jubilee Line fraud trial make depressing reading. Sally Lloyd-Bostock found that they felt they were treated as “jury fodder”, borrowing our 2001 phrase – kept on tap but not informed. They were not told why there were very frequent breaks in the trial so they could not make use of the time off. They complained of having been spoken to like children. They wasted long hours travelling to the courthouse needlessly. Most of them suffered financially as a result of the trial and it had serious long-term consequences on their employment. They were not thanked for their service and, unbelievably, five months after the trial collapse, none had been given any explanation.⁶¹

Conclusion

Like any element of procedure, the jury system is still a work in progress. I could have said more in this paper. I could have mentioned the problems caused by widening jury participation to include police officers and prosecutors. I could have examined the still-too-high excusal rate and excusal by judges, a phenomenon I discovered in my judge-research. I could have said a lot more about jury directions and I am writing a lot more about “beyond reasonable doubt”. All of this will have to wait, as this paper is already very long.

In attending the Taiwan conference one thing is certain. I will learn an enormous amount from the other participants so thank you so much for including me!

⁶¹ “The Jubilee Line Jurors: Does their Experience Strengthen the Argument for Judge-only Trial in Long and Complex fraud Cases? [2007] Crim.L.R. 255.