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Chapter 1

Challenges facing contemporary jury trial

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Abstract

This Chapter explains the aims of the edited collection and provides an overview of the chapters within it. The book draws together papers delivered at the Jury Trial Conference held at the University of Worcester in December 2022. The papers presented at the conference addressed issues affecting our domestic jury system and jury systems from around the world, and explored a variety of contemporary issues facing the jury. The chapters in this collection offer innovative research and inform the debate about the modern jury in England and Wales, and in other jurisdictions, and offer an interdisciplinary approach, drawing on legal, psychological and criminological perspectives.

1.1 Introduction

In December 2022, the University of Worcester hosted the Jury Trial Conference which drew together innovative research from different disciplines and jurisdictions on the challenges faced by the contemporary jury. Papers delivered addressed issues affecting our domestic jury system and jury systems from around the world and explored a variety of contemporary issues facing the jury. The Conference and book stem from a real concern that criticism of the jury may lead to a loss of public confidence in the institution, and that this may renew Government efforts to further restrict the role of the jury in criminal proceedings in England and Wales. The book informs the debate about the modern jury in England and Wales through some interesting and innovative chapters.

This edited collection represents the papers delivered at the conference and offers an interdisciplinary approach which predominantly focuses on England and Wales from legal, psychological and criminological perspectives. This approach allows the collection to bypass traditional borders and offer a cohesive approach to the topic. In order to facilitate an awareness and engagement with comparative practice in terms of challenges and opportunities, the collection includes a comparative perspective, drawing on experiences and research in a select few other jurisdictions. These jurisdictions have been chosen for a number of reasons including that they face similar problems to that of England and Wales, such as the realities of the modern world we live in with instant access to the internet, the rapid advances in technology, and the changing dynamics and behaviours in society.

Academic interest and research in trial by jury has remained constant. It is unsurprising given the importance of the jury in the legal and popular psyche. In England and Wales, attempts to restrict trial by jury have been met with resistance, as the Mode of Trial Bills were abandoned by the Labour Government in 2000 in the face of hostility in the House of Lords. It is almost not surprising that the provision relating to judge only trials in cases of complex fraud that was within the Criminal Justice Act 2003 was never introduced, despite ample research warning about the dangers of using jurors in such cases. Recent literature has questioned the role of the jury in the 21st century. Sir Louis Blom-Cooper clearly opposed the current use of the jury in his 2019 monograph *Unreasoned Verdict: The Jury's Out* (Hart Publishing), whilst other authors seek to defend the jury by acknowledging the problems but by offering solution to these. Sherrod's *The Jury Crisis: What's Wrong with Jury Trials and How We Can Save Them* (Rowman & Littlefield Publishers 2019) is concerned with trial by jury in the United States, whilst Horan's *Juries in the 21st Century* (Federation Press 2012) considers the jury in Australia. In terms of a comprehensive review of the jury system in

England and Wales and the obstacles faced, it is Findlay and Duff's *The Jury Under Attack* (Butterworths 1988) that last offered a multi-contributory legal perspective. My intention is that this book offers readers a chance to explore the use of trial by jury from both legal and psychological perspectives, and benefit from accounts covering not just England and Wales, but also Scotland, Ireland, Japan and the United States of America.

1.2 Overview of chapters

This next section offers an overview of the substantive chapters within this book. Chapter Two explores ways in which we might help the jury to do their job. Peter Hungerford-Welch identifies amendments to the Criminal Procedure Rules, the Criminal Practice Direction, and the *Crown Court Compendium*, which seek to help the jury to carry out their task. The chapter begins with consideration of case management strategies to reduce the number of issues in a Crown Court trial in order to minimise the number of issues that jurors have to consider when considering their verdicts, which might include severing the indictment or the use of formal admissions, as well as directing the jury at the start of the trial on what they should not do (such as carry out their own research). The chapter covers the guidance given to jurors at the start of the trial; the provision of early directions to aid juror understanding on how they should approach the evidence before – rather than after – they hear it; the use of written directions, including a route to verdict, to help jurors employ a structured decision-making process; and guidance on how to conduct deliberations. Finally, the chapter draws upon research carried out with real jurors and evaluates the effectiveness of these measures in assisting the jury, concluding that ‘there is scope for a larger scale research project to enable a much wider pool of jurors to give feedback (without revealing details of their deliberations) on what they think would have made their task easier’.

In Chapter Three, Kay Crosby considers the phenomenon of jury nullification. Crosby draws upon first-hand experience of being asked to provide expert evidence on the common law position regarding lawyers who advised their clients to acquit against the law. The chapter considers the need to educate jurors about their power to nullify. The example of the nullification by the jury in the trial of those accused of criminal conduct relating to the damage to the statue of Edward Colston in Bristol is considered, with Crosby observing that ‘[I]n January 2022, English law briefly appeared to have formalised the practice of nullification, when the jury in the trial of a group of protesters who had thrown a statue of a slave trader into a river were advised among other things that they should not convict if they considered that to do so would breach the protesters’ human rights to freedom of thought, conscience and expression.’ Crosby rejects the view that there is a common law position relating to jury nullification and proffers that in the absence of a common law position. She questions ‘what might [such a position] be’ based on legal traditions.

Chapter Four explores the position relating to jurors who happen to have specialist knowledge or expertise in relation to an issue to be determined at trial. The law draws a distinction between the juror applying their own common sense and personal knowledge to the evidence and importing their own specialist knowledge to other jurors. While the former is permitted, the latter is prohibited on the basis that this would introduce extraneous, untested evidence into the deliberations. This distinction places jurors with specialist knowledge or expertise in a difficult position and puts even the most responsible and diligent juror at risk of unconscious jury bias. This chapter explores the jurisprudence on jurors with specialist knowledge or expertise and considers the practicability of this narrow distinction.

In Chapter Five, Dan Jasinski explores the problems relating to the use of remote jurors, a practice that developed as a consequence of the Covid-19 pandemic, during which the use of remote juries enabled the criminal justice system to continue to function. Jasinski warns that ‘[t]his notion of ‘trial by remote jury’ gives rise to significant concerns and presents an increased risk of miscarriages of justice...’ Post-Covid-19

Jasinski argues that jurors must be in the courtroom and not online. As he notes, whilst the jury may just appear to sit there throughout the trial and undertake for the most part a seemingly passive role, 'this fundamentally underplays the extent of the importance of jurors in court-room communication, a point made clear by Lord Pannick when commenting on the concept of counsel and jury being located in separate physical spaces.' Jasinski clearly advocates for a repudiation of remote juries and makes a case based on factors such as trial advocacy and the comprehension of evidence.

Chapter Six is the first of four chapters that considers trial by jury beyond the jurisdiction of England and Wales. In Chapter Six, Mark Coen offers a perspective on the use of jury trial in Ireland. Unlike England and Wales where jury trial is permitted by ordinary legislation and thus can be restricted by Parliament, in Ireland it is a constitutional requirement (in Article 32 of the Constitution) that serious offences are tried by the jury. Coen outlines how Ireland's jury system is one of exceptionalism, with a core feature being 'the phenomenon whereby developments elsewhere [in the common law world] are not mirrored in Ireland', which means that the 'Irish jury system has remained impervious to changes in the jury systems of many other common law countries.' In his chapter, Coen is clear about the perceived importance of jury trial in Ireland and how, despite its English roots (which had attracted hostility in the past), the 'jury trial has "gone native."' The judges who preside over jury trials speak very highly of the institution and the people who serve on it. The public do not question its place in the legal landscape.'

In Chapter Seven, Pamela Ferguson offers an account of the Scottish jury system. As Ferguson notes the use of jury trials is rare in Scotland, with just 1,632 such trials between 2019 to 2020. At present the Scottish jury has 15 members and this is larger than its English and Welsh equivalent, although just 8 jurors are able to deliver a bare majority verdict. Ferguson outlines why in Scotland there is no right to trial by jury, and how this has led to plans to remove juries where a defendant has been accused of rape. Chapter Seven considers the problems facing trial by jury in Scotland and the possible utility of further reforms such as the use of a facilitator to assist jurors during their deliberations.

Valerie Hans offers an account of trial by jury in the United States of America in Chapter Eight. Her chapter examines why trial by jury has survived in the United States, when its use in both criminal and civil trials has declined. Hans is clear that '[t]he endurance of the institution of the jury trial is remarkable, even surprising. The lay jury emerged at a time when there were few or no law-trained judges; thus trial by citizen juries could be justified as an efficient and economical approach to the resolution of legal disputes.' This endurance in light of the modern professionalism and training of judges is significant. Hans is clear that any decline in the use of trial by jury could harm community engagement and participation in the criminal justice system. As Hans notes 'although the numbers of jury trials are low, they are often chosen for high profile trials', such as Harvey Weinstein and Donald Trump. There is a clear benefit for the continued use of jury trials (as evidenced by their use on the previous two examples), as Hans is of the opinion that '[w]ith jury trials, we continue to benefit from transparent and public hearings, a definitive outcome that often reflects the community's considered views, and a bonus feature of greater civic engagement.'

In Chapter Nine, Meryll Dean considers the use of the jury trial in Japan. Dean provides a detailed account of how jury trial had been twice introduced into Japan (1923-1943, and 1963-1972) and on both occasions was abolished. Her chapter explores the current use of jury trial in Japan, and Dean questions whether on the third introduction of trial by jury in 2009 it has been a success. The use of jury trials (and their abolition) reflect the changing attitudes of politics and the constitution in Japan, as Dean notes that the first introduction in 1923 was as a consequence of '[a] more liberal and democratic approach to policy change and legal reform.' The rationale for the third (and current) introduction of trial of jury in 2009 was 'the idea that the trial of the defendant was a joint endeavour between the professional judges and the lay participants

sitting together on the bench.’ The overall experience of the public and jurors has been positive since 2009, as Dean observes that approximately 95% of jurors believed that it had been a good experience.

The final three chapters explore the challenges facing the jury from psychological and criminological perspectives. The impact of rape myths is considered by Rosie Cowan in Chapter Ten. Cowan considers the impact of these rape myths on how mock jurors in Northern Ireland reached their decision. Importantly, it is clear that the use of mock jurors and the research from this could help to lessen potential bias in actual trials. Cowan considers the damage played by rape myths and the under-reporting of sexual offences. As Cowan notes, ‘[t]here are many factors behind these chronically low reporting rates and high attrition, however, rape myths undoubtedly play a critical role.’ Her chapter provides an account of the mock jury study in Northern Ireland and how mock jurors were ‘two short written trial scenario narratives’, but ‘crucially, they were not informed the study was testing rape myth belief while the myths were naturalistically interwoven into plausible trial scenarios as opposed to decontextualised and isolated in an abstract questionnaire.’ Cowan explores the outcome of the study and the impact of the participant’s gender on their approach to rape myths. As Cowan concludes, the starting point in challenging rape myths and preventing their prevalence is education in schools, but as Cowan notes ‘this is fraught with difficulty in Northern Ireland due to strong religious and cultural opposition to unbiased, informed discussion regarding sexual issues and resistance to a standardised curriculum in this area.’

Dominic Willmott and Lara Hudspith explore the research evidence about rape myth bias in Chapter Eleven. They state that ‘rape myths have been well documented in their wider impact upon jury and juror decision-making.’ They reflect upon research studies involving trial simulations with mock jurors which evidence a link between rape myth beliefs and juror decisions. They offer a critique of a leading study involving genuine jurors which did not indicate evidence of rape myth endorsement, arguing that there were shortcomings in the methodology and contrasting this with ‘40 years of research that made use of a wide range of sophisticated study designs, [which] have consistently evidenced the negative influence of rape myths.’ The chapter considers stakeholder perceptions on the role of rape myths among jurors and possible solutions to reduce rape myths, such as jury screening, the introduction of a gradation scheme, and the curtailment of lawyers’ use of rape myths during trial. Willmott and Hudspith advocate that the preferred and most sensible option is greater education and training for jurors. The chapter also considers interventions that aim to address rape myth beliefs, drawing upon the research of Hudspith and colleagues. The first study examined rape myth interventions implemented within university and military settings and concluded that ‘most of the interventions that proved effective included specific rape myth debunking information, involved some element of bystander training programmes and contained some victim-empathy training component.’ The second study consisted of a systematic review assessing the effectiveness of experimental interventions and solutions in non-naturalistic settings, specifically in a mock juror setting. Hudspith and colleagues concluded that while ‘there exists some evidence to suggest that the provision of rape myth information to jurors via judicial directions, expert witness testimony, and complainant statements can have an impact upon jury decision-making’, further empirical research is required as there were mixed results across and within the studies.

In Chapter Twelve, Lee John Curley and Nicola Peddie offer a critique of the experimental study of juror decision-making and outline the challenges. They also offer recommendations. Curley and Peddie observe that ‘mock juror and jury research touches on several pertinent issues such as rape myths, racial biases, and jurisdictional differences. These issues rarely occur in a vacuum, juror/jury research is often associated with progressive political movements such as MeToo and the Black Lives Matter movements.’ Therefore, given the impact of bias, they argue that researchers need to be careful when conducting research in this area, given the consequence of policy makers adopting their recommendations. Curley and Peddie offer a critique of jury research and the problems of trying to create a mock jury in a controlled setting. They are clear that

there are many problems, such as who sits on a mock jury. Unsurprisingly, '[s]tudents have often been recruited as participants in mock juror/jury studies. This is often because students are widely accessible to academics within universities.' This has a consequence of not reflecting society and 'may cause generalisability issues'. Their chapter offers six key recommendations for jury researchers to adopt in order to improve the reliability and value of their findings.